

Alternative Dispute Resolution Georgia



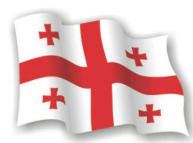
**A Textbook of
Essential Concepts**

**Steven M. Austermiller
Delaine R. Swenson**

July 2014



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*The Judicial Independence and
Legal Empowerment Project (JILEP)*

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**Steven M. Austermiller
and
Delaine R. Swenson**

The Georgian adaptation of this book and the printing for its use in USAID/JILEP, is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID, or the United States Government or East West Management Institute.

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ISBN 978-9941-10-867-9

**Meridiani publishers
Tbilisi 2014**



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Acknowledgements

This book is part of a larger program to help promote ADR in the Republic of Georgia. The United States Agency for International Development (USAID), which receives its money from American taxpayers, was the funder of the program that supported this book. The East West Management Institute (EWMI) is the implementing organization for this USAID program. EWMI has worked to promote ADR in Georgia through the establishment of a National Center for Alternative Dispute Resolution (NCADR), located at Tbilisi State University Law School. This center has developed and implemented a variety of programs including training for law professors and lawyers, the establishment of an ADR journal, ADR legal clinics and holding law student competitions in mediation. It is hoped that this book will further encourage ADR studies and classes in Georgian law schools.

I would like to give thanks to my co-author Delaine Swenson for all his hard work. I would also like to thank Giorgi Vashakidze, Mariam Vardosanidze and Lana Chkhartishvili for their hard work editing the Georgian and English versions and providing helpful advice on Georgian law. Thanks also to Lali Gagnidze for her work on the initial translation. The translation from English to Georgian was not an easy or straightforward task. I would also like to acknowledge Nikoloz Alavidze, who helped with formatting and many computer-related issues, and Sophie Tkemaladze, who helped with updates and translations of important laws.

Appreciation goes out to my colleagues at East West Management Institute (EWMI), Herb Bowman and Mark Dietrich, who provided the scheduling freedom necessary for this project. Appreciation also goes to the International Bar Association (IBA) for allowing the reprint of its Rules on the Taking of Evidence in International Arbitration and Guidelines on Conflict of Interest in International Arbitration. Finally, I thank the American Bar Association-Rule of Law Initiative (ABA-ROLI), for agreeing to allow the original version of this book, developed for Cambodia, to be translated and reworked for Georgia.

While all these individuals and organizations helped me with this project, I would like to make clear that the opinions expressed and any errors herein remain those of the authors.

Steven Austermiller

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The Purpose of the Textbook

The primary purpose of this textbook is to introduce Georgian students and professionals to modern concepts of Alternative Dispute Resolution, or “ADR.” Although most Georgians are aware that disputes can be resolved in alternative ways, without traditional court adjudication, there is little material currently available to explain these alternative means of dispute resolution. As a result, Georgian law students, practitioners and other legal and judicial professionals have not been sufficiently exposed to modern ADR practices and their role in the Georgian justice system. Because ADR is an integral part of Georgia’s past, current, and future legal landscape, this book aims to provide readers with a basic understanding of these contemporary ADR principles.

The concepts underlying Alternative Dispute Resolution are a recognizable part of Georgian day to day practices. For example, negotiation is an integral part of most Georgian efforts to resolve disputes. It is the natural first step in resolving most disputes, from a simple one over the price of vegetables at the market to a larger dispute relating to a large construction project. Similarly, mediation is also part of the Georgian tradition. For example, couples often use mediation of their marital disputes from respected neutrals. Arbitration also played an important part in Georgia’s commercial past and is now becoming more important in modern dispute resolution. Now that the government has passed the Law on Arbitration, the role of arbitration, domestic and international, may flourish.

Each section of this book describes an ADR process and the surrounding legal framework, provides examples of how the process is used, and includes case-based hypothetical study problems and exercises to allow readers an opportunity to become familiar with each method. The textbook can be used as part of an interactive class where students learn through participation in these exercises.

Organization of the Textbook

The text begins with an introduction to ADR. Before delving into the details of any particular ADR process, the reader should understand what ADR is, why it is used, and how it is relevant to a Georgian legal practitioner. Accordingly, Chapter 1 focuses on what ADR is and how and why it is used. Chapter 2 focuses on negotiation, the most common form of ADR. Chapter 3 focuses on mediation, which builds on many of the concepts developed in the preceding chapter. Chapter 4 focuses on arbitration. This chapter explains how arbitration is similar to and differs from traditional litigation. Chapter 5 compares the three methods to help readers determine which method is best in different circumstances. It also offers a brief survey of additional ADR methods that have developed in recent years.

Chapter 1 – Introduction to ADR

A. What is ADR?

ADR stands for Alternative Dispute Resolution. It refers to the various ways parties can settle disputes outside of the traditional, court-centered adjudication system. ADR encompasses many forms of dispute resolution, some of which are common and some of which are quite new. Arbitration, negotiation and mediation are the most common forms of ADR. Lawyers call these ADR forms an *alternative* because many people today consider courts to be the main form of dispute resolution, whereas anything else is an alternative.

Why do we study ADR? Why not resolve all disputes by traditional adjudication? To understand the appeal of alternative dispute resolution, one must first step back and understand the nature of disputes.

B. Solving Problems

We all experience times or moments in life when we want something that we do not have. This could be called a problem. We can choose to ignore the problem or we can act. If we decide to act, we can generally choose how we go about getting what we want. If we try and fail, the problem might become a dispute. For example, imagine the following story:

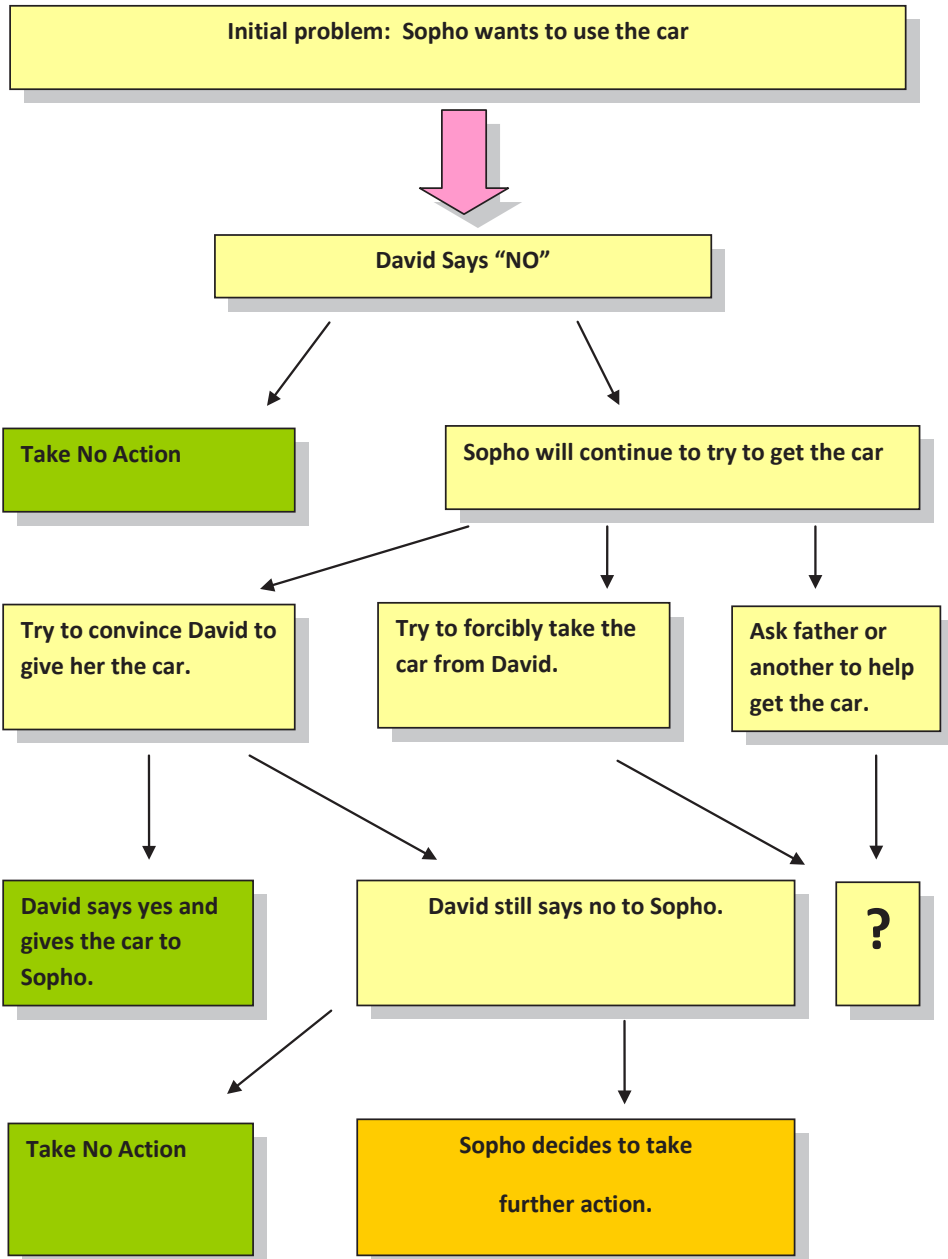
Sopho is a twenty-two year old girl. She has an older brother named David. One day, David decides that he will take the family's car for an all-day ride into the city to be with his girlfriend. Sopho is very upset because she needs the car on that same day to go to her cousin's house. She can choose to do nothing about it or she can try to get the car. She decides that she really wants it, so she asks David to use the car instead of him.

If she asks David for the car and he gives it to her, then she has achieved her goal—obtaining possession of the car for the day. For her, the problem is solved. If David says, “No, you cannot have the car today, I am using it,” then Sopho has a choice. She can ignore the problem and perhaps tell

herself that she can visit her cousin tomorrow. Or, she can continue with her efforts to obtain the car. If she chooses the first option, she is choosing to do nothing, sometimes called, “taking no action.” If she chooses the second option, then she is turning the situation into a dispute.

This simple story can be analyzed in more detail through the flow chart on the following page.

Origins of a Dispute



The flow chart shows the complex calculations that might go on in Sopho's brain as she ponders the situation and decides how to act. She might weigh the consequences of her actions in this logical fashion but do it at a very fast, subconscious level. She might not even be aware that her brain is engaging in this exercise.

As the chart shows, Sopho has several opportunities to end the matter without turning it into a dispute.

Study Questions

- Why might Sopho choose to take no action even though she wants the car?
- What are some of the consequences for Sopho if she turns this into a dispute?
- In your personal life, have you ever chosen to take no action on a problem that you had? If so, why?

Life is full of these simple problems and we usually resolve them one way or another, easily, quickly, and without great cost. Sometimes, ignoring a problem is the best strategy. In the example above, Sopho might be able to visit her cousin on the following day. Or, she might learn that her parents plan to buy another car so that she can have access to one more often. Her selfless actions might earn her more rights or favors from the family in the future.

Turning a problem into a dispute also has the potential to damage the relationship between the individuals involved. Disputes can affect relationships by creating bad feelings between the parties, especially if one side must lose. If Sopho values her relationship with David highly, she may decide that causing a dispute over a car might not be worth it.

Problems are a normal part of life and learning to resolve them is an important part of our social and material success.

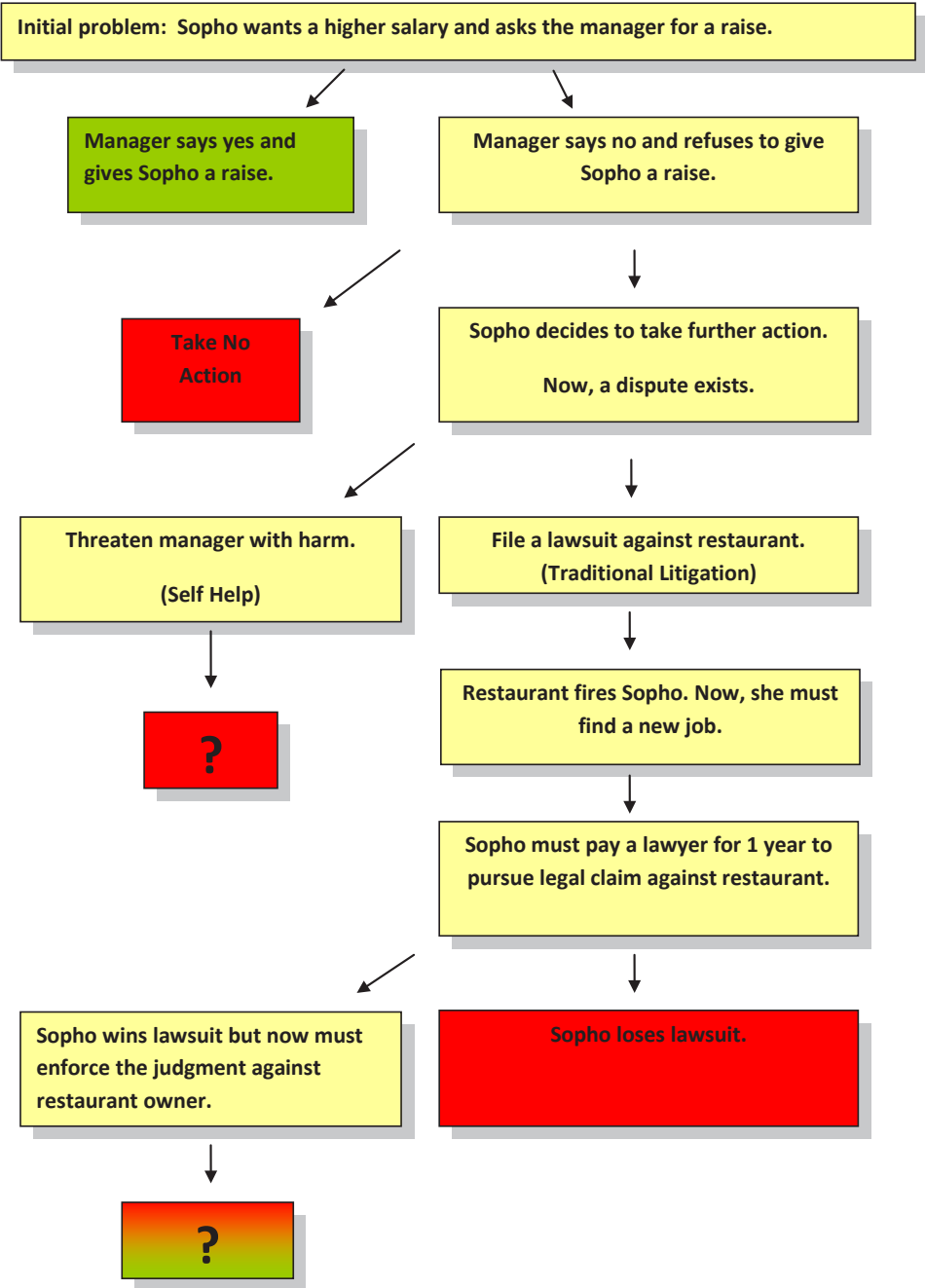
C. A Problem Becomes a Dispute

To see how relationships are affected by disputes, consider the following problem.

Now Sopho works in a restaurant in Mtskheta. She is paid 300GEL per month but learns that the male workers are paid more to do the same job. She feels bad about this since she works harder than anybody at the restaurant and has been working there longer than the others. What can she do?

She can ignore the problem and try not to worry about it. Or, she can decide to take action. One action she could take is to confront the restaurant manager informally and explain to him that she is not being paid enough money. If the manager agrees and raises her salary, then the problem is resolved. If the manager disagrees, then there is a dispute, and Sopho must choose to take action or not. If she decides to take action, she might threaten the manager with some kind of consequence. Or, she might file a lawsuit against him. The chart below illustrates the options.

Traditional Dispute Resolution Options



In the flow chart, the good outcomes are represented by green color boxes and the bad outcomes are represented by red boxes. The yellow boxes represent Sopho's actions. As the flow chart demonstrates, the only good outcome is if the manager initially gives her a raise.

1. Option One: Self-Help

If she threatens the manager with some kind of harm (perhaps physical or financial), the outcome is unclear. The manager might threaten to have her harmed, or may actually have her harmed in some way. He would likely fire her from her job. He might contact the police and have her arrested. Regardless of what his response is, it is unlikely that he will agree to give her a raise. Threatening harm is one example of "self help."

In many cases, we look to self help solutions to deal with our problems. However, it can often backfire and does not solve our problem but instead creates bigger ones. Additionally, self-help remedies are often illegal. This option is not the best one for Sopho.

Study Questions

- Can you think of a situation where you or somebody you know chose a "self-help" remedy in a dispute?
- What was the result?
- Was there a better option?

2. Option Two: Traditional Litigation

Sopho could choose the traditional litigation option and file a lawsuit against the restaurant. As the flow chart demonstrates, the results may not be satisfactory. She will likely lose her job. She will likely have to pay expensive legal fees for over one year. She will have to answer questions from the judge and the restaurant's lawyers.

The restaurant, in its defense, might claim that Sopho was not a good worker and might bring up past instances where she made mistakes. The restaurant might ask customers and other workers to testify against Sopho and claim that she was not a good worker. These other workers might not want to do this but might feel that they must do so to keep their jobs at the restaurant. This might be very disturbing and stressful for Sopho. In the end, Sopho

might lose the case. Even if she wins, she has likely lost her job, paid a large amount of legal fees, gone through a long, painful experience and she might not be able to collect her judgment if the restaurant owner hides his assets or goes out of business.

Therefore, both courses of action, self-help and litigation, seem to destroy Sopho's relationship with her manager and the restaurant. Both courses of action will likely result in Sopho losing her job.

Study Questions

- Have you or somebody you know ever filed a lawsuit?
- How long did it take to complete?
- How much money was paid in legal and other fees?
- What was the result?

3. Option three: Ignoring the Problem

So, for Sopho, the self-help and traditional litigation remedies are not very attractive. However, in this case, ignoring the problem may not be the ideal solution either. Ignoring the pay issue might make Sopho work less hard. She might subconsciously say to her herself, "if I am not being paid properly, then why should I be motivated to work hard?" But, if the manager notices that she is not working hard, the manager might fire her. Even if she is not fired, she might feel stressed about the problem and this might affect her physically and psychologically. Perhaps the next time that she has a grievance at the restaurant, she may overreact since she is still upset about the pay. Sometimes, these small problems, if kept inside and not addressed, can build up and eventually explode into violence or other forms of anti-social and unproductive behavior. For these reasons, the result from Sopho choosing to take no action—ignoring the problem—is represented as a red box to show that it is also probably not a good idea.

If the three solutions presented—self-help, litigation, and ignoring the problem—do not result in a good outcome for Sopho, what other alternatives exist?

D. Alternative Dispute Resolution

ADR offers alternatives to these problem-solving options. Today, ADR has become an important part of the legal landscape in Georgia and elsewhere because of the perceived problems with the traditional court system. Those problems include:

- cases often take years to adjudicate;
- parties are in a difficult position where their dispute is left “open”;
- if the parties have hired lawyers to represent them, they often have to pay high legal fees and costs to continue the dispute;
- parties to litigation often feel that they have no control over the process;
- sometimes parties worry about corruption or competence in the judicial system;
- judges are constrained in their decision-making abilities—they can usually only order money damages for one side or the other; and
- often, the judgment results in a complete loss for one side and this can have negative effects on the parties’ relationship.

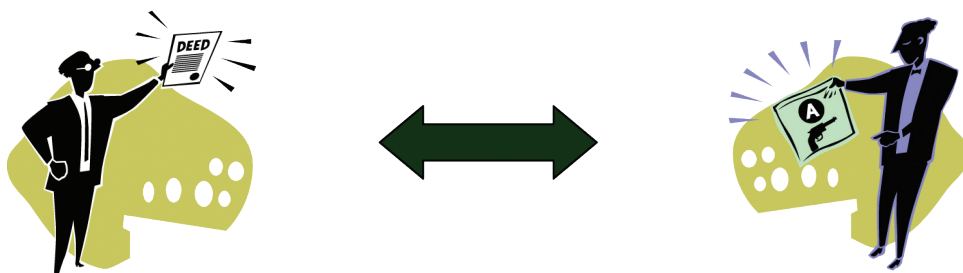
In recent years, many people have looked to ADR to find dispute resolution solutions that mitigate or avoid these perceived limitations in the traditional court system. Arbitration, for instance, tends to be a faster and cheaper method of resolving disputes when compared with the courts. Arbitration was the first ADR solution to receive widespread formal support and it remains the most popular formal ADR mechanism in most developed legal systems.

However, mediation has also become popular lately as a dispute resolution mechanism. Mediation offers parties faster and cheaper dispute resolution with the opportunity of more flexible solutions that can preserve the parties’ ongoing relationship. Mediation is also voluntary so parties only resolve the dispute if they all agree on a settlement. Negotiation, which is a simplified form of mediation, is also a quick, practical means of resolving issues.

In addition, mediation and some other forms of ADR have been used as a tool to improve access to justice. In many countries, including Georgia, the formal court system is too expensive for the poorest members of society. They cannot afford to pay the court costs and the attorney's fees that are necessary in order to have their disputes decided by the courts. Since most forms of ADR allow parties to resolve their disputes in a more informal and inexpensive setting, they can be an important tool to help poor people resolve their disputes.

For these and other reasons to be discussed in this book, modern ADR methods are becoming an important and integral part of Georgia's legal system. This book will help the reader learn more about ADR and how to use it effectively.

Chapter 2 – Negotiation



“ზოგჯერ თქმა სჯობს არათქმასა, ზოგჯერ თქმითაც დასშავდების“
“If you can't say anything nice, don't say anything at all.”

(Georgian proverb)

A. Introduction

This Chapter focuses on negotiation. It is intended to assist people involved in negotiation, whether they are negotiating for themselves or on behalf of another. At its most simple form negotiation is a process we undertake whenever we want to get something from someone else. It is the process of back and forth communication, whereby parties submit and consider offers until an offer is made and accepted.¹ Negotiation is the most common form of dispute resolution process in the world, found both in civil law and common law jurisdictions. Negotiation can resolve large and small disputes, and can be a very complex process or a simple one.

People negotiate all the time. It is one of the most basic forms of human interaction. People negotiate even when there is no dispute. For instance, people negotiate over the price of something on sale or what they will do with friends on Saturday night. Sometimes, people do not even realize that they are negotiating. For instance, when an individual tries to convince a group of family members to take a trip, there may be negotiations over where to go or when to leave.

Negotiation can take place in many ways. It can be oral or written. It can be directly between two parties or through the parties' representatives. It can be casual or formal. It can be done via letters or emails. Negotiation

¹ *Gainey v. Brotherhood of Railway and S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 275 F. Supp. 292, 300 (E.D. Pa. 1967).

commonly occurs in person, but it can also be done over the telephone. When the negotiation involves a legal dispute, the negotiation likely involves a combination of these methods of communication.

Georgian law supports negotiation. The Georgian Code of Civil Procedure encourages negotiated settlements between two parties.² In the U.S., and other jurisdictions, negotiation is also encouraged through a variety of procedural rules.³

Many jurisdictions favor negotiated settlement for good reason. Because most jurisdictions have significant case backlogs, one way to resolve disputes in a timely manner is to encourage the parties to discuss the issue between them and try to reach an agreement. In the U.S., for instance, 90% of all cases are resolved by ADR,⁴ and negotiation is the most popular form of ADR.

² CODE OF CIVIL PROCEDURE OF GEORGIA, art. 3, (2007), [hereinafter CCPG]. *See also*, art. 217 (“In starting the hearing on merits, the judge shall first ask the parties whether they wish to reach settlement/reconciliation...”); art. 218 (“The judge shall make his best efforts and take all statutory measures in order for the parties to end the case by settlement/reconciliation.”); and art. 49 (fees reduced or substantially waived in the event of settlement).

³ In the U.S., the Federal Rules of Civil Procedure require, in most cases, pre-trial settlement conferences where the parties are encouraged to negotiate a settlement. Fed. R. Civ. P. 169(a)(5); 16(c)(7). The Federal Rules also provide that a party’s failure to accept a reasonable settlement offer can result in that party having to pay the other party’s trial costs. Fed. R. Civ. P. 68. Finally, the Federal Rules of Evidence promote settlement by disallowing into evidence any offers to settle a case. Fed. R. Evid. 408.

⁴ SUSAN PATTERSON AND GRANT SEABOLT, *ESSENTIALS OF ALTERNATIVE DISPUTE RESOLUTION*, 5 (2nd ed., 2001).

B. Advantages of Negotiation

Compared with the other common methods of dispute resolution, negotiation has some important advantages:

- **Cost savings**

The cost of negotiation is lower than for any other dispute resolution method. This is partly why negotiation is so popular. There are no court fees or other expenses.

- **Privacy**

Negotiation can be a completely private process. It is just between the parties or their representatives. There is no court involvement. There is no press. There are no outsiders. The parties do not even have to involve lawyers, although as this chapter makes clear, lawyers have a very important role to play in most legal disputes. But, even with lawyers, the details of the dispute will remain private,⁵ which can be very important to individuals and businesses.

- **Flexibility**

Negotiation is flexible in both its process and its results. First, the *process* of negotiation can be very flexible because, as mentioned above, it can be informal or formal. Negotiation can be informal, occurring between two people on the street, or it can be very formal, with parties and their lawyers sending written letters back and forth.

Second, the *results* of negotiation can be very flexible. Since it is the parties themselves who are reaching a settlement, they can agree to many different solutions that would otherwise be impossible in arbitration or litigation. For instance, a person might agree to pay a higher settlement amount if it is paid over a period of years, instead of one lump sum payment. While perfectly permissible in negotiation, this kind of award is not generally allowed in litigation.

- **Speed**

Negotiations can potentially resolve matters very quickly and

⁵ The rule in the U.S. is known as the “Attorney-Client Privilege” or the “Rule of Confidentiality” (See *e.g.*, ABA Model Rules of Professional Conduct, R. 1.6); in Europe, it is known as “Legal Privilege” or “Secret Professionnel” (Council of Bars and Law Societies of Europe, Code of Conduct, art. 2.3); and in England, it is known as “Legal Professional Privilege” or the broader “Duty of Confidentiality” (England and Wales Solicitors’ Code of Conduct, R. 4.01). See also, INTERNATIONAL CODE OF ETHICS, International Bar Association, R. 14.

efficiently. The parties do not have to wait for the judge, arbitrator or mediator to hear and make a decision on the case. Matters can be settled as soon as the parties reach agreement.

- **Party Control**

Negotiation offers the parties complete control over the process and the conclusion. The parties determine how the negotiation takes place and whether there is a settlement. In negotiation, a party cannot be forced into the negotiation process or into a settlement to which the party does not agree.⁶

- **Preservation of Ongoing Relationship**

Negotiation allows for the possibility that the parties can craft a settlement that will preserve their ongoing relationship. For example, if an employer and an employee have a dispute over vacation time and they negotiate an agreement, they will be able to preserve their relationship so that the employee keeps her job. In litigation or arbitration where a third party decides the matter, the solution may not keep both sides happy enough to allow them to continue to work together. Through negotiation, however, the parties are able to work together to find a solution that is acceptable to both sides.

- **Settlement Enforcement**

A negotiated settlement of a lawsuit can sometimes be recorded in a court proceeding in front of a judge and it becomes enforceable as a judgment.⁷

⁶ Such a settlement would not be enforceable in Georgia. *See, e.g.*, Civil Code of Georgia, Article 85.

⁷ In Georgia, if the settlement is the result of mediation, it can be recorded as a court judgment. CCPG, *supra* note 2, at art. 187.

C. Disadvantages of Negotiation

Despite its many advantages, there are some reasons why a party might not choose negotiation:

- **Delay**
One disadvantage with negotiation is that a party can delay the process if it wishes. In a pure negotiation situation, there is no way to force a party to speed things up. It is possible that the offending party is not even serious about settlement and is using negotiation as a way to delay matters or avoid litigation.
- **Unreasonable Party**
On a related note, parties also face the possibility that the other party may take an unreasonable position in the negotiation. As discussed above, this could be because they are not serious about negotiation and are engaging in this tactic to waste time or avoid litigation.
- **Settlement Enforcement**
After negotiations, the parties may agree to a settlement that is written and signed. But some time later, one of the parties may fail to abide by the settlement's terms. For instance, a party may fail to deliver a certain quantity of goods that she agreed to deliver in the settlement. Because the settlement was only a negotiated agreement, the other party has no direct means of judicial enforcement. As a result, that party may have to file a lawsuit and wait a long time to enforce the original settlement agreement.⁸
- **One Party is Too Powerful**
There are some circumstances where the parties have disproportionate bargaining power and thus, one party has too much control. For instance, a very rich and powerful businessman may fail to pay an auto repairman. The repairman might be subject to pressure or threats from the businessman during a private negotiation. It is possible that the repairman would give in to the threats and agree to a bad settlement. With private negotiation, there is no third party who can prevent this unjust result.

These disadvantages, while worth considering, are relatively rare. Usually, negotiation is the best initial option. Before filing a lawsuit or invoking an

⁸ A settlement agreement is a contract and is generally governed by the Georgian Civil Code.

arbitration clause, many lawyers explore negotiation because it is quicker and cheaper than other dispute resolution methods. There is usually no downside to attempting to negotiate a dispute.

D. Two Basic Approaches to Negotiation

Parties can approach negotiation in two basic manners. First, there is the *distributive* or win-lose style of negotiation.⁹ Second, there is the *interest-based*, win-win style of negotiation.¹⁰

1. Distributive Negotiation (win-lose)

In the distributive negotiation, the parties assume that there is a fixed amount of resources that they must divide and distribute between them. It is sometimes referred to as a zero-sum game. The more one side is allocated, the less there is available for the other side. Usually, resources are expressed in terms of money.

During the negotiations, the parties stake out positions. The accused party knows the maximum she is willing to pay and the injured party knows the minimum that she is willing to accept. The negotiation discussion and possible outcomes are limited to the positions that each party holds. Each party's goal is to maximize the amount of resources gained within this bargaining range.

As an example, one party may claim to have been injured by a car driven by the other party. The injured party may have sustained \$1,000 worth of injuries. When the two negotiate in a distributive manner, they take positions on the amount of the payment. The injured party will try to persuade the accused to pay her \$1,000 or as close to that as possible. The accused will try to persuade the injured to accept as little payment as possible.



The distributive negotiation process usually looks and feels very competitive.

2. Interest-based Negotiation (win-win)

The interest-based negotiation is more collaborative than distributive negotiation. It assumes that there are other important interests that need to

⁹ This is also sometimes referred to as “positional bargaining” or a “zero-sum” negotiation.

¹⁰ This is also sometimes referred to as the “collaborative” approach to negotiation or a “non zero-sum” negotiation.

be identified and satisfied. The parties may have some interests in common or at least some that are complimentary.

To illustrate the different approaches, take the classic case of the Orange Dispute:

In distributive bargaining, George claims ownership of an orange, citing favorable arguments and facts (e.g., that George paid for the orange or perhaps suggested buying the orange). Mariam cites contrary arguments and facts (e.g., she selected the orange or maybe she stored the orange). Each party will try to discredit the other party's arguments, and possibly the other party's credibility. The resolution through distributive bargaining is limited to the following solutions:

- 1) One party gets the entire orange.
- 2) The orange is divided between the parties, perhaps 50-50 or some other proportion.
- 3) If they cannot reach an agreement, the parties go to a judge or arbitrator, and the parties present their arguments and attempt to discredit the other party even more vigorously than before. The judge/arbitrator decides on either alternative (1) or alternative (2), above.

Consequently, one party and maybe both parties are dissatisfied, and their ongoing relationship has been damaged by the pressure tactics employed during the negotiation process.¹¹

In contrast, with interest-based bargaining, George and Mariam sit together and list the components of the orange, and then try to come up with ideas. Maybe it turns out that George's primary interest is in the orange rind, to make a cake, while Mariam's primary interest is in the juice of the orange for a drink. The seeds may be useful to one or both and therefore may be divided. By proceeding in this way, an

¹¹ See B. Daniel Lynch, *Peeling the Orange - Negotiations for an Amicable Divorce in Mediation*, Divorce Mediation in Pasadena, Los Angeles County, California, available at <http://www.mediationdivorce.net/id8.html> (last visited April 1, 2014).

agreement can be reached by which both parties get most of what they want, and their relationship remains intact.

It is important to remember, however, that interest-based negotiation is not always successful. Some negotiations are very simple and based solely on money. Many purchases at the market are simple, money-based negotiations. In those cases, a distributive negotiation is likely the most appropriate. However, in most dispute resolution negotiations, it is worth at least considering an interest-based approach first because it can usually lead to better results for both parties. The next sub-section will focus on the details of the distributive approach.



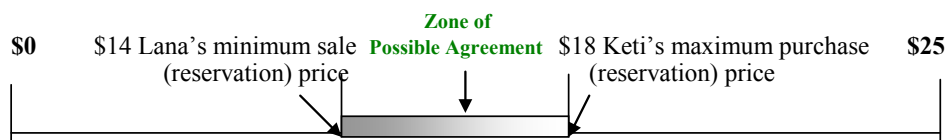
The interest-based approach to negotiation usually looks and feels more cooperative than competitive.

E. Details of the Distributive Approach

1. General Principles of the Distributive Approach

The distributive approach is sometimes referred to as “haggling.”¹² In essence, each party goes back and forth with a suggested number. Sometimes the parties reach an agreement and sometimes they don’t. As an example, Keti goes to the market and wants to buy a table from Lana. Lana states that the table is for sale for \$25. Keti says, “Oh, that is a nice table, but you are asking too much money. I would gladly pay \$10, but no more.” Lana then replies, “Yes, it is a nice table with nice wood. It took five days to make it and I cannot sell it for a loss. I can give you a special discount--\$20, but no less, I must make a small profit.” Then Keti says, “How about \$12?” And the negotiation goes on.

The two might come to agreement, but only if Keti’s maximum purchase price is equal to or greater than Lana’s minimum sale price. Keti’s secret maximum price that she is willing to pay is called her *reservation price*.¹³ Lana’s secret minimum sale price is her *reservation price*. If they overlap, they can complete a sale. The following graph can illustrate the parties’ respective reservation prices:



The illustration shows that Lana’s minimum sale price, her reservation price, is \$14, while the maximum price that Keti will pay for the table is \$18, her reservation price. The area where the two parties’ reservation prices overlap is called the *zone of possible agreement (ZOPA)*. As the illustration shows, the zone of possible agreement for this transaction is between \$14 and \$18, the grey area above. The sale agreement could be made anywhere in that bargaining zone.

¹² Bruce Patton, *Negotiation*, HANDBOOK OF DISPUTE RESOLUTION 279, 288 (Michael L. Moffitt, Robert C. Bordone ed., 2005).

¹³ A party’s reservation price is sometimes referred to as the “resistance price.”

In this kind of negotiation, it is important to try to determine the other side's reservation price as accurately as possible. If Keti knows that Lana's reservation price is \$14, Keti will try to pay no more than \$14. On the other hand, if Lana is a smart seller, she will try to determine how much Keti is willing to pay—Keti's reservation price—and she will try to sell the table for as close as possible to Keti's reservation price of \$18. Thus, information gathering is an important aspect of successful negotiation.

Therefore, in a distributive negotiation, each party aims to try to keep his own reservation price secret or to make the other side believe it is something different. Lana would like for Keti to believe that her reservation price is higher than \$14. She makes more money if Keti buys the table for \$15 or \$16. So, she might try to make Keti believe that \$15 or \$16 is her reservation price. However, this is a dangerous game. If Keti believes that Lana's reservation price is too high, Keti will likely give up and walk away without a purchase.

In addition, in a negotiation, it is sometimes useful to try to persuade the other party that their reservation price *should* be higher or lower. Keti might say to Lana that the table can be purchased elsewhere for \$12 instead of \$14. Of course, Lana could do the opposite, perhaps telling Keti that she sold a similar table yesterday for \$20, so Keti must raise her reservation price to \$20. However, this may be risky since a party may lose credibility if her assertions are false or unreasonable.

Study Questions

- What could Lana say that might convince Keti that Keti's reservation price is too low and should be raised?
- What could Keti say that might convince Lana that Lana's reservation price is too high and should be lowered?

2. Distributive Approach to Dispute Resolution

Dispute resolution under the distributive approach has the same basic analysis as outlined above for the sale of Lana's table with a few additional variables. To determine a party's reservation price in a dispute, one must first calculate the EMV (the expected monetary value of the case) and then the BATNA (the best available alternative to a negotiated settlement). After

that, one can easily determine the most appropriate reservation price for a distributive negotiation in a dispute.

a) Expected Monetary Value

1) Calculating EMV

Every case has an expected monetary value (EMV). This is the “value” of the case after considering all possible scenarios. It is an important calculation that a lawyer should do for every case. For instance, take the earlier example of a car accident where Levan was driving his car and hit Nino who was walking down the street. In this example, the lawyers representing each person would first need to calculate the EMV for the case.

The first step in calculating the EMV is to determine Nino’s total sustained damages. Let’s assume that she broke her leg in the accident and she had to pay \$500 in medical bills and medicine. Let’s also say that she was carrying her new \$100 mobile phone and it was broken in the accident. Finally, let’s say that she was walking to a job interview but she was unable to attend the interview because of the accident. The company hired another person and Nino claims that she would have made \$400 per month if she had been able to take the job. But, because of her accident, she missed the interview and could not work for three months afterwards.

Here is a list of the potential damages for Nino :

Medical costs	\$500
Mobile phone	\$100
Lost income	<u>\$1,200</u>
Total damages	\$1,800

The next step is to determine the odds that a court would award each of these damages to Nino.

Perhaps a Georgian judge would find that Levan was driving too fast and was not looking carefully at the street. Although Nino was not crossing at a corner, she was walking slowly and carefully. In this case, the judge might be inclined to find Levan liable and award the medical costs and mobile phone to Nino. But, perhaps the lost income is too speculative. Nino might not have received the job even if she had been able to attend the interview. Yet, there might be a small chance that the judge will find that Levan acted

very carelessly and may award lost income to Nino.

Here is a list of the odds of Nino's success on each of the three damage items as might be calculated by Nino's lawyer:

Medical costs	90%
Mobile phone	90%
Lost income	10%

The next step is to combine the odds of success for each damage item with the amount of those damages:

Medical costs	$\$500 \times .9 = \450
Mobile phone	$\$100 \times .9 = \90
Lost income	$\underline{\$1,200 \times .1 = \$120}$
Total EMV	\$660

Based on this analysis, the expected monetary value of the case is \$660. This does not mean that Nino will receive \$660 if her case against Levan goes to trial. She might receive nothing if the judge decides that she was completely at fault. Or, she might receive the full \$1,800 in damages if the judge decides the opposite way. Rather, the EMV reflects an average recovery amount that she would receive if the case were tried many times. It helps a party understand the "value" of the case if the party wants to consider negotiating a settlement.

Exercise -- Calculating the EMV

Calculate Etia's EMV for the following case:

Etia ordered 1,000 bottles of wine at a cost of \$9 per bottle. She had a contract to re-sell the wine to a Chinese export company for \$12 per bottle. The supplier, Good Grape Wine Company, failed to deliver the wine on time to Etia and the Chinese company was threatening to sue her for her failure to deliver. After repeated demands to Good Grape, Etia was forced to purchase 500 bottles from the Sour Grape Company at \$12 per bottle and then re-sell to the Chinese at the same price--\$12 per bottle.

Finally, after two weeks' delay, Good Grape delivered the original 1,000 bottles to Etia. Etia accepted 500 bottles and re-sold them to the Chinese at \$12/bottle, making her a profit of \$3 per bottle. The Chinese were very unhappy about the delay and told Etia that they would not buy from her again. Etia didn't have a buyer for the other 500 bottles so she sent them back to Good Grape at a cost of \$500.

Etia believes she has damages for a) loss of profit, b) cost of sending the wine back to Good Grape, and c) loss of future profits from contracts with the Chinese company due to the harm to her reputation.

2) Attitudes About Risk

It is important to note that the EMV does not take into account the parties' attitudes toward risk. Some people are very afraid to lose money, while some people are not. Consider two cases, each with an EMV of \$5,000.¹⁴ In the first case, one party has a 50% chance of winning \$10,000 and a 50% chance of winning nothing, but paying nothing. In the second case, that party has a 60% chance of winning \$10,000 and a 20% chance of winning nothing and paying nothing, but also a 20% chance of having to pay \$5,000 to the other party. Both cases will have a final EMV calculation of \$5,000, but may result in very different settlements depending on the parties' attitudes toward risk.

The two cases' EMV calculations can be expressed below:

¹⁴ Adapted from Marjorie Corman Aaron, *Finding Settlement With Numbers, Maps, and Trees*, HANDBOOK OF DISPUTE RESOLUTION 202, 206 (Moffitt and Bordone, ed., 2005).

Case #1	Case #2
\$10,000 (amount of award) x .5 (odds of winning) = \$5,000 +	\$10,000 (amount of award) x .6 (odds of winning) = \$6,000 +
\$0 (amount of award) x .5 (odds of winning) = <u>\$0000</u>	\$0 (amount of award) x .2 (odds of winning) = \$0000 +
-\$5,000 (amount of award) x .2 (odds of winning) = <u>-\$1,000</u>	
Total EMV \$5,000	Total EMV \$5,000

Study Questions

- Would you be willing to settle for the same amount of money in Case #2 as compared with Case #1? Explain.
- Would you be worried about the 20% chance that you might actually lose \$5,000 in Case #2?

3) Different EMV Calculations

It is also important to remember that both parties in the example above will be calculating the EMV separately. As a result, they may come up with very different EMV figures for the same case. For example, perhaps Levan thinks he did nothing wrong and that Nino recklessly ran out in front of Levan's car. In that case, he might believe that the judge is less likely to award the damages than Nino believes. Or, perhaps Levan believes that Nino's medical costs are unjustified because they relate to a problem that she had prior to the accident. In that case, Levan's EMV calculation might be much lower than Nino's calculation.



Parties with similar EMV calculations are more likely to reach a negotiated settlement than parties with vastly different EMV calculations.

b) BATNA

After the parties have calculated the EMV, they will use that number to calculate another item—the BATNA. The acronym BATNA stands for the Best Alternative To a Negotiated Agreement. The BATNA is a very important item in ADR. The BATNA tells a party what will likely happen if it does not reach a settlement. Usually, the BATNA involves taking the EMV and adding a few additional items.

In the example above, Nino must consider how much she would have to pay her lawyer to file the lawsuit against Levan. If the cost is \$150, then she must subtract \$150 from her EMV. If she does not reach a negotiated settlement with Levan, she will likely receive an average net payment of about \$510 by suing Levan in court ($\$660 \text{ (EMV)} - \$150 \text{ (lawyer fees/costs)} = \510).

However, she should also consider that the payment might not be made for a year or more because the court system works slowly.¹⁵ She would also have to worry about the stress of testifying in court. Finally, she is taking a risk that the court may decide in favor of Levan leaving Nino with little or no payout. If she needs the money immediately or if she is very nervous about testifying in court then she might consider subtracting an amount of money from her original BATNA to take these subjective factors into account. However, it is difficult to place a monetary value on stress or on the need to receive money immediately. But, she might believe that these issues—stress and immediate need for money—would be worth \$100 in the calculation.¹⁶ If so, she is in essence, saying to herself:

I really need money now and I am afraid to go to court. I am willing to settle for less money to ensure that I receive money soon and avoid a long and stressful court process.

¹⁵ Usually, the time value of money (interest rate) is also part of the BATNA calculation. For simplicity, that has been left out of this equation.

¹⁶ It is possible, but less likely, that Nino will have the opposite feeling about going to trial in the case. She may be from a rich family and not really need the payment. And, she may be very angry with Levan and actually prefer to take him to court so that she can prove him guilty in public. In that scenario, she would want to add, not subtract, some money to her BATNA to take account of her desire to not settle and instead go to court.

In that case, Nino’s final BATNA is calculated as follows:

Nino’s original EMV	\$660
Nino’s Attorney fees and Court Costs	-\$150
Nino’s subjective concerns about going to court	<u>-\$100</u>
Nino’s BATNA	\$410

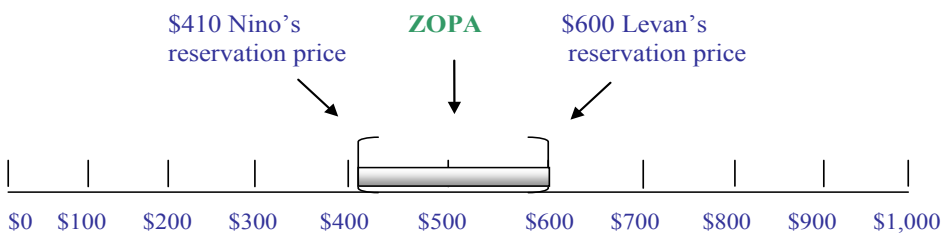
So, this is Nino’s BATNA, her best alternative to a negotiated agreement — \$410.

c) The Reservation Price

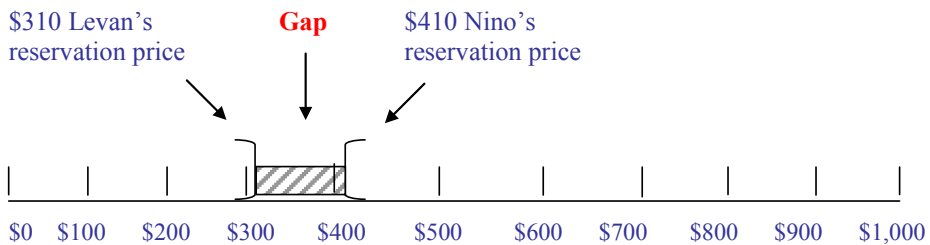
Every party in a dispute negotiation needs to have a reservation price (recall the example of Lana and Ketu haggling over the price of the table). This is near the “bottom line” for that party, i.e., the least one party is willing to accept and the most the other party is willing to pay. At each party’s reservation point, she is indifferent to settlement, meaning that her expected result from settlement and litigation are the same, thereby making her indifferent to which process to select. In these situations, the party’s reservation price is usually the party’s BATNA.

Thus, in the Nino-Levan example, Nino’s BATNA and her reservation price, as discussed above, is \$410. If she settles at \$410, she is no better off or worse off than if she pursued litigation. In other words, she should be willing to settle the case for a payment of \$410 or more. But, she would reject any offer for less than \$410 because it would be lower than her best alternative to a negotiated agreement—going to court. If Levan’s reservation price is higher than Nino’s (*i.e.*, he would be willing to pay more than \$410), then the parties should be able to settle the case. This means that they are both better off reaching a negotiated settlement than going to court.

The graph below shows the possible solutions available if Nino’s reservation price is \$410 and Levan’s is \$600:



Somewhere in that bargaining zone (ZOPA), a settlement is possible. On the other hand, if Levan calculates his reservation price to be only \$310, which is \$100 lower than Nino's reservation price, there will not be a settlement. This would mean that the parties' reservation price calculations show that they are better off going to court than settling the case. The following graph shows that scenario and the gap between the two reservation prices:



The same rules about using outside relevant facts to come up with a reservation price at the market also apply in a dispute negotiation. During negotiation, Nino would likely try to persuade Levan that Levan's reservation price should be very high, perhaps because of the bad injuries she has sustained. Levan would try to persuade Nino that her reservation price should be low—the courts are uncertain, lawyers cost a lot of money, she will have to wait a long time, and it was her fault, not his, etc.

Exercises – BATNA and Reservation Price

EXERCISE # 1:

Sopho owns a store in Kutasi that sells mobile phones. She purchases many of her phones from Tamar's import business. In July, Sopho ordered 100 new Motorola phones from Tamar. Tamar charged Sopho \$100 per phone. Sopho was very excited to receive these phones because they were new to the Georgian market. Motorola had just begun making these phones and they had a new look, were very thin and had proved to be very popular in the U.S. and Japan. Sopho was planning to sell the phones for \$200 retail. Sopho spent \$500 advertising these new phones and stated that they would be available starting Saturday, August 8. Sopho's store was the first to offer these phones in Georgia.

In July, Sopho paid Tamar one-half the purchase price (\$5,000) and agreed to pay the other half upon delivery on August 7. But, on August 7, the phones did not arrive. On August 8, many customers visited Sopho's store to purchase the new phones but she did not have them. The customers were upset that she did not have the new phones on Saturday, as promised in her advertisements. Tamar promised delivery in a few more days, citing problems with customs.

Finally, on August 15, Tamar delivered the Motorola phones, but many of Sopho's customers had already bought the new Nokia phone at a competing store. Sopho also learned that the phones were defective and did not work properly. She did not pay Tamar the second payment and she has demanded that Tamar return the first \$5,000 she paid in July. Tamar has refused and has promised to send another 100 Motorola phones in two weeks' time if Sopho would return the defective phones.

Sopho has come to you to ask about negotiating a settlement or possibly filing a lawsuit against Tamar. Sopho is worried that a lawsuit would take too much time away from her business. She is also nervous about testifying in court against Tamar. She has heard that Tamar is very powerful.

Please calculate the EMV, BATNA and reservation price for Sopho.

Then, try to estimate Tamar's reservation price. What additional information would you need to estimate Tamar's reservation price?

EXERCISE #2:

Giorgi Q. works as a consultant helping train employees of various companies on leadership skills. He is currently trying to put together his work for the month of August and tomorrow he is entering into negotiation with Big Corporation (BC) about leading a training program for some of its employees.

Big Corporation is looking for a consultant to work for 20 business days during the month of August. If the training is successful Giorgi knows that there is a potential for a lot of additional business from BC in the future. Giorgi has heard that the last trainer used by BC received \$400 a day for his services, which the previous trainer provided at a discount since he wanted to impress BC with his services in order to get more business in the future. Unfortunately for him, BC did not like his trainings and they have decided they would like to find a new trainer, which is why they are speaking with Giorgi.

Giorgi has an offer from Medium Sized Enterprises (MSE) to train some of their employees for 7 business days during the month of August. MSE will pay Giorgi \$300.00 a day for the 7 days. MSE is an old, long-term client of Giorgi's and he values their relationship but he has not yet made a commitment to them for these 7 days. In addition, Small Business (SB) has asked for Giorgi's services for 3 business days in August and they have offered him \$250 a day for his services. They have also indicated that they would have a similar contract for Giorgi each month for the next 12 months if he is available.

Giorgi can work no more than 22 business days in August. He was planning to take a one-week vacation with his girlfriend during August but is reconsidering his vacation after hearing about the BC job possibility. He has promised a trip to the beach to his girlfriend, so he will have to explain it to her if he decides to take the BC job. In addition, he was going to use the vacation as a time to propose marriage to his girlfriend, which he is sure she is expecting.

What are Giorgi's BATNA, Reservation Price and the Zone of Possible Agreement between Giorgi and BC?

3. Tactics in a Distributive Negotiation

One might achieve improved results from distributive negotiations by employing a few well-known tactics. The following are some tactics that have been used by negotiators. These tactics are offered as possible tools to be used in distributive negotiations, but not necessarily in interest-based negotiations.

- **Your Reservation Price.** The first tactic is to carefully and objectively develop a good EMV, BATNA, and resulting reservation price. As mentioned above, this is crucial to determining how to proceed in a dispute.
- **Other Party's Reservation Price.** The second tactic is to try to accurately determine the other party's reservation price. This can be difficult. One way to do this is to try to gather as much information as possible about the other party and the subject of the dispute. In addition, it is important to listen carefully to everything the other party says or writes during the negotiation. Consider the figures she suggests and how flexible she is during negotiation. This might provide some insight as to her reservation price. Conversely, it is important to not give away your own reservation price.
- **"Bluff."** To bluff is to show intention to do something that is not really intended, such as to pay only a certain amount or stop all cooperation with the other party or walk away from the negotiations. With a bluff, the party might be able to create additional bargaining power. It may cause the other party to alter her own reservation price or alter her assessment of your reservation price. Either way, it may improve the results for the person making the bluff.

However, this is risky since a bluff can sometimes be "called." This means that the other person may force you to do what you threatened to do. If you don't follow through, then you will have lost credibility in the eyes of the other party. And, in the future, the other party may not trust anything you say. If a bluff is called, the likely end result is much worse than before.

Moreover, a bluff can sometimes hurt the long-term relationship between the two parties because of lack of trust. Bluffing is best used in negotiations that involve two parties that do not intend to have a future relationship, such as a purchase at a market on holiday.

- **Anchoring.** Anchoring is the use of a number, whether high or low, to influence the other party's perception of value. Research has shown that people will change their evaluation and counter-proposals based on an initial anchor offer.¹⁷ For example, a Swedish study found that purchasers of an apartment offered a higher initial amount if the initial listed price was higher. Purchasers offered a lower amount if the initial listed price was lower for the same property. In other words, purchasers' perceptions of the market value of the property were affected by the amount of the sellers' initial offer.¹⁸ Anchoring even influences experts. In a German study, researchers found that professional automobile mechanics' estimated value of cars were heavily influenced by an initial anchor question made by a customer.¹⁹

Anchors work because they tend to make people focus on certain aspects of a subject. A high anchor price related to a product will tend to make people focus on the product's positive aspects, while a low anchor will cause the opposite effect. Negotiators can take advantage of this by presenting a high initial demand from the other party (as with the Swedish property sellers) or a low initial offer if the party is the one paying. It should be noted that absurdly high or low initial anchors work less effectively and run the risk of causing the other party to walk away.²⁰

Anchors are also effective as initial offers since they set the range of the negotiation and force the other party to move the amount in their direction. If one party wants a high price and makes an initial high offer, the other party then has the burden in the negotiation to move the offer lower. This burden of movement in the negotiation is often better given to the other side.

17 Henrik Kristensen and Tommy Gärling, *Anchor Points, Reference Points, and Counteroffers in Negotiations*, 7 Goteborg Psychological Reports 27 (1997).

18 *Id.*

19 Adam D. Galinsky, *Should You Make the First Offer?*, NEGOTIATION (Harvard Bus. School 2004). "In the study, researchers had customers approach German mechanics—individuals expected to be knowledgeable about the true value of cars—with a used car that needed numerous repairs. After offering their own opinion of the car's value, the customers asked the mechanics for an estimated value. Half the mechanics were given a low anchor; the customer stated, 'I think that the car should sell for about DM 2,800.' The other half were given a high anchor: 'I think that the car should sell for about DM 5,000.' The mechanics estimated the car to be worth DM 1,000 more when they were given the high-anchor value!" *Id.*

20 *Id.*

- **The Irrevocable “Bottom Line.”** Sometimes a party may claim that he is offering the absolute, bottom line position. It is his best offer and he cannot bargain any further. Declaring an irrevocable bottom line is sometimes similar to bluffing, except that the bottom line is the legitimate position of the party and not merely a bluff. The bottom line is usually the reservation price. If, for example, after trying to negotiate a settlement, a party is only willing pay \$1,000, that party might declare this to the other party. In the U.S., a party may say that his “hands are tied.” This means she does not have the ability to adjust her position any further.

This should only be done after negotiations have reached a point where the party knows that he will not get any better deal than his reservation price. Declaring a bottom line too early may result in a less advantageous outcome. If, for example, a party declares too early in the negotiation that he will pay no more than \$1,000, he has lost the opportunity to pay less, say, \$900. The party should be absolutely convinced that nothing less than \$1,000 is possible. Then and only then should a bottom line be declared to the other party.

Declaring a bottom line will likely end the negotiations, either with an agreement or with failure. As a result, this is a time efficient tactic but potentially risky if employed too early in the process. New information later revealed in the negotiation may change the bottom line.

- **Reservation Price Change.** One party can advocate that the other party change her reservation price based on facts or opinions presented during the negotiations and important information that the other side might not possess. This is part of the attorney’s job as an advocate for her client. For example, one party might provide evidence of significant damage to a business as a result of the other party’s defective product.

However, a lawyer should not too vigorously advocate for her client’s position and commit a fraudulent misrepresentation. Most jurisdictions provide remedies to victims of fraudulent statements that induced a settlement agreement. Such remedies can include suing for damages resulting from the fraud or rescission of the

agreement followed by reinstatement of litigation.²¹ In Georgia, acts of deception, dishonesty, or misrepresentation can void a transaction such as a settlement agreement.²² There is a fine line between an act of deception and a sharp negotiating tactic designed to move the other party's reservation price. Legal practitioners should be careful not to cross that line or risk creating a voidable agreement and violating the Georgian lawyer ethics rules.²³

Study Questions

- Have you ever used any of these tactics in a negotiation?
- If so, which ones were the most successful and why?
- Lawyer Maia claims to Lawyer Karlo that her client is “very motivated” to go to trial and to have a judge determine who was right. But secretly, Maia knows that her client is very afraid to go to court. If the parties successfully settle the dispute, would Maia's representation constitute a fraudulent act, making the settlement agreement voidable?
- Would you want to know more facts to answer this question? If so, what facts would be helpful?

21 Settlement agreements, like other contracts, are voidable in case of fraud or misrepresentation. In the U.S., see, e.g., UCC 2-721; *Phipps v. Winneshiek County*, 593 N.W.2d 143 (Iowa 1999). In England, see, e.g., *A Fulton Co. Ltd. v. Totes Isotoner (UK) Ltd.*, 2002 WL 32068011 (PCC), R.P.C. 27 (2003). For contracts, in the EU, see, e.g., THE PRINCIPLES OF EUROPEAN CONTRACT LAW, Art. 4.107, Commission on European Contract law (1998).

22 See Civil Code of Georgia, Title 2, Chapter 4.

23 Georgia Code of Professional Ethics for Lawyers, Arts. 7 and 10(1) (2013).

Exercise – Distributive Negotiation

The Batumi Construction Company is building a large hotel in Batumi called the “Black Sea Tower.” The ABC Cement Company has just signed a contract to supply Batumi with cement for the project. The contract requires ABC to deliver 10,000 kilos of mixed cement to Batumi on January 15. Then, ABC is to deliver another 5,000 kilos of cement on the 15th day of each month thereafter until December 15. The total contract price is \$65,000 (\$1/kilo of cement x 65,000 kilos).

ABC made the first two deliveries on time and Batumi made the first two payments on time. Then in March, Batumi refused to pay for the third delivery because it claimed that the cement was of poor quality. ABC replied that it had inspected the cement and that it was fine when delivered but that Batumi’s workers had not properly installed it at the building site, based on its observations and inspections. ABC further stated that if Batumi refused to pay, it would refuse to deliver any additional cement.

Batumi then decided to make an emergency contract with another cement supplier at twice the ABC price. Batumi contacted its lawyers and claimed that it received 5,000 kilos of bad cement from ABC. It had spent \$5,000 in labor and other costs associated with installing and then removing the bad cement. Since it would suffer further damages if it were late in finishing the construction, Batumi contracted with the only other supplier available and had to pay twice the contract rate it had with ABC. In other words, Batumi will have to pay \$100,000 for its future cement needs (\$2/Kilo x 50,000 kilos), \$50,000 more than the price it contracted to pay ABC. After investigating the site, however, Batumi privately thinks that it might be partly at fault for the cement problem.

ABC contacted its lawyers and claimed that Batumi hired unskilled workers who did not know how to properly install the cement. They claim it is Batumi’s fault that there was a problem at the site. ABC believes it can prove this, but privately thinks that it might be partially at fault. ABC has not been paid for its third delivery of 5,000 kilos of cement. Furthermore, Batumi has breached the contract by refusing to accept the other nine deliveries. ABC would have made a profit of \$25,000 on the remaining cement deliveries. Also, ABC had already transported most of the cement materials and equipment to Batumi for the job. Now, it has lost not only the profit from the contract, but also must pay \$5,000 to move the materials and equipment to another location.

If the dispute goes to court, each side will have to pay about \$10,000 in lawyer fees and costs. Also, both companies are afraid that a public trial might make them look incompetent and hurt their businesses.

Students should divide into teams of lawyers representing Batumi and ABC. They should privately calculate the two sides' reservation prices and engage in a short distributive negotiation to see if an agreement can be reached.

4. Advantages and Disadvantages of the Distributive Approach

The distributive approach to negotiation is common throughout the world. This is because it has some important advantages. First, distributive negotiation is simple. Anybody can engage in this style of negotiation. There are usually just the two numbers that the two parties are advocating. Second, distributive negotiation is universally understood. People from different cultures can negotiate over the price of a chicken at the market quite easily. Third, distributive negotiation is concrete. One party offers something and the other party either accepts or counteroffers. If they agree, a deal is made. Fourth, distributive negotiation is usually efficient. A distributive negotiation can often take place in a few seconds. Even with a larger subject, the parties do not need to waste a great deal of time if they are merely trading numbers. And finally, distributive negotiation's focus on numbers allows parties to avoid giving up a great deal of information about their interests.



Distributive negotiations tend to work best where the issue is simple, the stakes are relatively low and bargaining is well-established and expected.

However, the distributive negotiation approach has some significant drawbacks. By focusing on positions and concrete commitments, it discourages the search for creative, value-maximizing options. It assumes

that there is no chance for the parties to find joint gains.²⁴ It also encourages arbitrary “split-the-difference” outcomes that may have no logical basis and may be difficult to explain or justify to third parties or superiors.

Furthermore, it can lead to bad decisions by the participants. When parties engage in distributive negotiation, they tend to lock themselves into positions. They defend and justify them, making it harder to move off of them. They begin to have an interest in “saving face” and keeping to their own position.²⁵

Most importantly, distributive negotiations tend to promote an adversarial relationship between the parties.²⁶ It causes the parties to go “head-to-head” against each other. Each party will try to gain an advantage at the expense of the other. This can sometimes lead to a self-fulfilling cycle of hostility as each side begins to view the other party’s motives with suspicion and negative feelings.²⁷ At this point, the parties’ relationship will be adversely affected. Even if they reach an agreement, the parties may wonder if they were “taken advantage of.” They may resent how the negotiations occurred and may even choose to end the relationship.

F. The Prisoner’s Dilemma

A famous game, the *Prisoner’s Dilemma*, illustrates the importance of cooperation and thinking in terms of win-win instead of the traditional distributive negotiation’s win-lose mentality. The Prisoner’s Dilemma was developed by Merrill Flood and Melvin Dresher in the U.S in 1950 as part of the emerging field of science known as “game theory.”²⁸ Albert Tucker, a mathematician, was the first to adopt the concept of game theory to prison sentences and to give the game its famous name, Prisoner’s Dilemma.²⁹

The Prisoner’s Dilemma is a story about two prisoners who have been arrested by the police. They are held in pre-trial detention and agree not to betray one another and not to confess to the crime. But then, the two are separated and cannot communicate with each other. The police have only limited evidence for a conviction. They visit each prisoner and offer

²⁴ Patton, *supra* note 12, at 288.

²⁵ ROGER FISHER, WILLIAM URY AND BRUCE PATTON, *GETTING TO YES*, at 4-5 (2nd ed. 1991).

²⁶ *Id.*

²⁷ *Id.*

²⁸ WILLIAM POUNDSTONE, *Prisoner’s Dilemma* (Doubleday ed., 1992).

²⁹ *Id.*

the same deal: if one confesses and testifies for the prosecution against the other and the other remains silent, the “betraying” prisoner goes free after only ten days in prison while the silent accomplice will be convicted and receive a ten-year sentence based on the testimony of the other prisoner. If both prisoners stay silent and refuse to betray each other, they will both be sentenced to only six months in jail because the police have only limited evidence. If both prisoners confess and betray each other, each prisoner receives a five-year sentence. Each prisoner must make the choice to cooperate with each other and remain silent or to betray the other prisoner and confess. However, neither prisoner knows what choice the other prisoner will make and they cannot talk about it.

The Prisoner’s Dilemma asks the question, how should each prisoner act? The following graph explains the choices and consequences:

Choices For Prisoner B

		Choices For Prisoner B	
		Prisoner B Stays Silent/Cooperates	Prisoner B Betrays
Choices For Prisoner A	Prisoner A Stays Silent/Cooperates	Each prisoner serves six months in jail	Prisoner A serves 10 years in jail Prisoner B serves 10 days in jail
	Prisoner A Betrays	Prisoner A serves 10 days in jail Prisoner B serves 10 years in jail	Each prisoner serves five years in jail

The dilemma exists because both prisoners likely care most about minimizing their own jail terms. Each prisoner has two choices, to remain silent or to betray the other prisoner for a lighter sentence. Each prisoner must choose without knowing what the other will choose.

Study Questions

- According to the chart, if Prisoner A chooses to stay silent and cooperate, which decision gives Prisoner B the best result: betray or stay silent/cooperate?
- According to the chart, if Prisoner A is going to betray, which decision gives Prisoner B the best result: betray or stay silent/cooperate?
- What if Prisoner B does not know what Prisoner A is going to do? In that case, which decision gives Prisoner B the best result?

Exercise – The Prisoner’s Dilemma

The class should be separated into groups of two people each. Each group should play the Prisoner’s Dilemma in two rounds. In both rounds, the players are prisoners in the Prisoner’s Dilemma game.

In the first round, the players should make a fist with one hand behind their back. Each player should secretly hold either one or two fingers out behind his back. If the player holds one finger out, the player had decided to stay silent and cooperate with the other prisoner. If the player holds two fingers out, that player has decided to betray the other prisoner.

At the count of three, both players should simultaneously bring their hands in front of them to show the other player how many fingers he has held out. The objective of the game is to get the best result for yourself—the least amount of jail time. In this first round, neither player can reveal his choice before the fists are simultaneously revealed and they cannot discuss their decision with the other player or make any agreements. Before choosing, it is helpful to review the Prisoner’s Dilemma chart.

After the players reveal their choices, they should record them below. Circle the number of fingers that each player chooses. Then consult the chart and fill in the result to determine how many years in prison each person received.

In the second round, the players will play the game exactly the same as in the first round except there is one important difference. In the second round, the players can talk to each other about their decision. They have the opportunity if they want, to cooperate or make an agreement prior to showing their fingers. After revealing their decision, the players record the results in the table.

	Player A	Player B	Result (Years in Prison)
Round 1 (No communication)	One finger/stay silent Two fingers/betray	One finger/stay silent Two fingers/betray	Player A _____ Player B _____
Round 2 (Communication possible)	One finger/stay silent Two fingers/betray	One finger/stay silent Two fingers/betray	Player A _____ Player B _____

- What were some of the differences in behavior between the two rounds?
- Did you make a deal with the other player in the second round? If so, what was the deal?
- If you were a prisoner in this situation, which format would you prefer, the format in round 1 without communication or the format in round 2 with communication?
- If you add up the total prison terms for the two prisoners in round 1 and compare to the total in round 2, which format resulted in less total prison time?

G. Details of the Interest-based Approach to Negotiation

1. General Focus of the Interest-based Approach

The prisoner's dilemma is a bargaining model that allows for a win-win result. It demonstrates that there are more total benefits to be divided among the negotiators in a setting of joint cooperation than in a setting of mutual betrayal. In other words, if the players cooperate, they can achieve better results than if they are separated and have to make their decision independently. If they cooperate, they can enlarge the benefits, or the "pie," as it is sometimes referred to in the U.S.

Interest-based negotiation resembles the prisoner's dilemma.³⁰ Interest-based negotiation attempts to overcome the disadvantages of distributive negotiations by enlarging the total benefits for both parties through cooperation. In the same way that the two prisoners could have cooperated and received light sentences (against the apparent logic in favor of betrayal), the two sides in an interest-based negotiation look for creative ways to find the best solution for everybody. Interest-based negotiation can overcome the disadvantages of distributive negotiations in the following ways:

- Instead of focusing on positions, interest-based negotiations focus on fulfilling the parties' underlying interests.
- Instead of requiring commitments and concessions, the interest-based approach postpones all formal commitments to the end of negotiation.
- Instead of demands and offers, parties work together to fulfill each other's interests. Only at the end of the negotiation do they settle on commitments.

³⁰ The Prisoner's Dilemma is not a perfect analogy for interest-based negotiations. The Prisoner's Dilemma assumes that there are only two choices: cooperate or defect. In reality, negotiators usually have a wide range of options, and some may not neatly fit into either category. However, it does capture the importance of cooperation with an adversary, even when each party's best interests seem to be served by taking an adversarial, win-lose approach. See Michael L. Moffitt, *Disputes As Opportunities to Create Value*, HANDBOOK OF DISPUTE RESOLUTION, 173, 181-183 (Michael L. Moffitt, Robert C. Bordone ed. 2005).

- Instead of arbitrary results, interest-based negotiations help produce fair, justifiable and understandable results.
- Instead of jeopardizing the parties' relationship, interest-based negotiations allow parties to maintain and sometimes even strengthen their relationships.³¹

The original proponents of the interest-based approach to negotiations were Roger Fisher and William Ury of the Harvard Negotiation Project at Harvard Law School. In their famous book, *Getting to Yes*³², they identify four main principles of the interest-based approach:

- Separate the People from the Problem
- Focus on Interests, not Positions
- Invent Options for Mutual Gain
- Insist on Using Objective Criteria

The next sections of this book provide further detail on these four main principles.

2. Separate the People from the Problem³³

Because negotiations are between people, sometimes participants mistakenly view negotiations as a competition and a battle of wills, rather than as a discussion over terms of an agreement. Also, people have emotions. They can misinterpret what is said. During negotiations, parties can become angry, hostile, offended or frustrated, complicating what could otherwise be a simple negotiation. When this happens, the parties may not be able to reach agreement. The way to diffuse this situation is to try to separate the people from the problem.

In a negotiation, each party has two separate interests: (1) the substance of the negotiation and (2) the relationship with the other party. An example of the substance of the negotiation would be who should pay for an item or how much to reimburse one party for a loss caused by the other. Examples of the parties' relationship would be two long-term business partners or perhaps a husband and wife or even two neighboring countries. In many

³¹ Patton, *supra* note 12, at 292-293.

³² Fisher et al., *supra* note 25, at 4-5.

³³ *Id.* at 17-39.

cases, the relationship may be far more important than the substance of the negotiation. Yet, the relationship can suffer when people negotiate. They might become angry because of a perceived slight, or lack of respect, or a strongly-held position.

There are three areas where a smart negotiator can focus on the person and preserving the relationship (as opposed to the substance of the dispute). They are perception, emotion and communication.³⁴

a) Perception

In 1787, a man in the U.S. discovered a very large dinosaur bone in a creek. This was possibly the first time in modern history anybody had made such a discovery. He showed the bone to a Dr. Casper Wistar, an expert in human anatomy. After analysis, he determined that it was not important. Dr. Wistar had no idea what it was and the bone was eventually lost. About fifty years later, somebody else discovered different dinosaur bones and made history by publicly proposing that they represented evidence of huge creatures that walked the earth long before mankind. He called them *dinosaurs* and it was considered a famous discovery.³⁵

Today, we might look upon Dr. Wistar as a fool who did not know what he had found but, we must remember his perspective. At that time, no one had ever heard of dinosaurs. With our education, we see the bones as obvious evidence of giant creatures from the past. But Dr. Wistar could not see this given his perception and the available scientific knowledge at that time. This is an example of how people combine perception with available knowledge to determine “reality” as they see it. If Dr. Wistar had lived fifty years later and had access to theories about evolution and other discoveries, he might have been able to “see” the dinosaur in the bone much easier.

This is also true in negotiations. People tend to see matters differently. Even the same set of facts can be subject to very different interpretations. Sometimes they may not seem rational or logical, but they still have to be dealt with if the parties are going to reach an agreement.



An important skill for every negotiator is to try to see the issues from the other party's standpoint.

³⁴ *Id.* at 18.

³⁵ See BILL BRYSON, A SHORT HISTORY OF NEARLY EVERYTHING, 109 – 129 (Black Swan ed., 2004).

The following sub-sections discuss three important perception problems for everybody.

1) Egocentrism

People generally perceive the world from their own perspective, and focus on their own needs, views, and interests. People typically do not take the time to perceive the world from another perspective. This is called “egocentrism.”

A childhood example:

Ana is a four year old child who is talking to her mother, Irina, on the telephone. Ana is at home, while Irina is at the office working. Irina asks Ana “where is your dad?” Instead of saying something to Irina, Ana instead points with her hand at her father who is sitting nearby. Irina doesn’t realize that her mother cannot see her pointing. She has not yet developed the ability to view the world from other peoples’ perspectives.

Adults have the ability to understand others’ perspectives, but often forget to use this skill. People want to have a positive view of themselves, so they often interpret facts in the light most favorable to themselves. An adult example would be a couple in a divorce negotiation over assets. Vako believes that he should be entitled to 70% of the assets, but Mariam believes that she should be entitled to 60% of the assets. But, they cannot both be right since their total claims are 130%. Another example would be situations where two partners each claim that they performed 80% of the work on a project.

Study Questions

Most people are egocentric to some extent:

- Ask one of two business partners what percentage of the team’s work she performs every week. Then, ask the other partner. Add the two percentages together. Do they total 100% or more?
- Can you think of a personal example of egocentrism in a friend or work colleague?

2) Overconfidence

Self-serving, egocentric interpretations can also lead to overconfidence. In one study, business students who failed to reach an agreement in a simulated, two-person labor-management dispute were asked to submit their final offers to an arbitrator who would choose one of the two offers. Then, the students were asked to estimate the odds that the arbitrator would choose *their* offer over that of their counterpart. The average student felt that she had a 68% chance of her offer being chosen, even though everybody knew that only 50% of all the offers could be chosen.³⁶ This shows that the students were overconfident.



When a party is overconfident of her position, she will fail to make appropriate compromises and may jeopardize her ability to reach an agreement.

3) Confirmation Bias

A related issue is confirmation bias, where a person interprets information in a way that confirms a pre-existing belief or position. This causes parties to ignore or downplay information that contradicts their viewpoint and to overemphasize information that confirms their own viewpoint.³⁷

The chart below provides examples of differing perceptions of an owner and a tenant in an apartment.³⁸

Tenant's perceptions		Owner's perceptions
The rent is too much money.		The rent has not been increased for two years.
With food and other costs going up, I cannot afford to pay any more for this apartment		With food and other costs going up, I need more income from this apartment.

³⁶ Max H. Bazerman, Katie Shonk, *The Decision Perspective to Negotiation*, HANDBOOK OF DISPUTE RESOLUTION, 52, 55-56, (Michael L. Moffitt, Robert C. Bordone ed., 2005).

³⁷ See, e.g., Keith G. Allred, *Relationship Dynamics in Disputes*, HANDBOOK OF DISPUTE RESOLUTION, at 83, 84 (Michael L. Moffitt, Robert C. Bordone ed., 2005)

³⁸ Fisher et al., *supra* note 25, at 24.

The apartment needs some painting and other improvements.		The tenant has caused a lot of damage to the apartment.
I know people who pay much less money for a similar apartment.		I know owners who charge more money for a similar apartment.
Young people like me cannot afford to pay such high amounts of money.		Young people like him sometimes cause problems and can be destructive to the apartment.
The rent should be lower because the neighborhood is unsafe.		We owners have to raise rents to improve the quality of the tenants in this area.
When the owner asks for the rent, I always pay him promptly.		He never pays me the rent until after I ask him for it.
The owner is not very nice, she never asks me how I am doing or shows any interest in me.		I am a considerate person who respects the tenant's privacy.

4) Avoiding Perception Problems

There are five ways to avoid these perception problems when negotiating:

- Be objective
- Consider the other side's perspective
- Discuss perspectives
- Involve the other side in your reasoning
- Save face for the other side³⁹

One way to avoid egocentrism and overconfidence is to try to look at the dispute as objectively as possible; look at the dispute as if you have no interest in it, as a judge perhaps.⁴⁰ Another simple solution is to think very seriously about the other party's perspective—it will help you have a clearer view of your own. For example, in a study of academic co-authors, two

³⁹ *Id* at 23 - 29.

⁴⁰ The famous philosopher John Rawls recommends trying to make decisions under "a veil of ignorance." JOHN RAWLS, A THEORY OF JUSTICE (Harvard U. Press 1971).

groups of authors were asked to rate what percentage of the credit they individually deserved on their works. The authors who were asked to think about their co-author's contributions tended to rate their own credit lower than those authors who were merely asked to rate their own contribution without thinking about their co-author.⁴¹ Thus, the mere act of thinking about somebody else's work caused the authors to downgrade their own egocentric bias.

Aside from altering your own behavior and thinking, it is important to try to influence your counterpart's behavior and thought. First, one must understand how the other party feels and how the other party might believe what they are saying, even if it seems patently false. One way to achieve this understanding is to explicitly discuss perceptions. Even if it seems unimportant or unrelated to the "real substance" of the dispute, an explicit discussion of perceptions can make parties feel more comfortable and trusting. For example, one party might say "Am I correct in saying that you perceive this dispute as a threat to your authority?"

Another way to understand and possibly influence perceptions is to make sure you involve the other party in your reasoning process.⁴² Do not merely assert a conclusion but work with the other party to help you reach it. A conclusion that is reached together is more likely to be accepted by the other side.

In trying to understand the other party's perceptions, do not assume that the other party has bad intentions. Do not blame the other party for your problems or difficulties. Blaming the other party will likely force a defensive reply.



It is better to try to avoid blame during negotiations.

Finally, do not ignore the importance of saving face.⁴³ Try to make proposals that appear consistent with the other party's principles or stated needs. This may simply mean carefully framing the proposal.

41 Bazerman et. al., *supra* note 36, at 56.

42 Fisher et. al., *supra* note 25, at 27 – 28.

43 In the US, saving face is sometimes looked down upon as an insignificant concern. However, if it is important to that person, it needs to be addressed.

Exercise – Perception Problems

How would you avoid the perception problem in this case?

Karlo wants you to represent him. He has just fired a Turkish Muslim employee at his factory because the employee was stopping the production line and praying three times each day. This lowered production levels and when Karlo asked the employee to stop praying, the employee had refused.

The employee is very angry and is threatening to file a lawsuit against Karlo. He feels that Karlo has discriminated against him because of his Muslim religion. He is also considering asking all the Turkish people working at the factory to go on strike.

What suggestions can you give Karlo in his upcoming negotiation with the Turkish employee he fired?

b) Emotion

Beginning Study Questions

Etia is working in an office with Levan. One day, Etia comes in to Levan's office and looks very nervous.

“What is wrong?” asks Levan.

“I have an important negotiation with our client tomorrow. I have prepared for a week but I am still nervous. I know that our client might be very emotional about this negotiation and I might become emotional too.”

What advice should Levan give Etia?⁴⁴

- A. Use your emotions to show your authority and seriousness.
- B. Forget about this concern and focus on the specific issues.
- C. Hide all emotions and work to stay in total control.

⁴⁴ See Daniel L. Shapiro, Enemies, Allies, and Emotions, HANDBOOK OF DISPUTE RESOLUTION, at 66, 68 (Michael L. Moffitt, Robert C. Bordone ed., 2005).

1) Negative Emotions

As the study question above illustrates, emotions can become problematic during an intense negotiation. During heightened states of emotion, memories become much simpler and less specific even though they may be particularly vivid.⁴⁵ And when those emotions are negative, they can significantly reduce the chances of settlement.⁴⁶ Anger and other strong negative emotions can cause poor judgment and reduced concern for other people.⁴⁷ Emotions are also contagious so a strong negative emotion in one party is likely to cause a strong negative emotion in the other.⁴⁸ Everybody has seen the dynamics of something like this:

Lela is upset that she did not receive a pay raise at the restaurant where she works. She confronts her boss, Lasha, and becomes emotional.

“I have worked very hard here for over fifteen months and I do all the extra work you ask. How can you give Mariam a raise after just three months? It’s obvious that you don’t like me, but I have earned a raise!”

Lasha, who was not emotional until now, says, “How dare you accuse me of favoring one employee over another. I treat everybody equally. You are not as good as Mariam. You never stay late. You never offer to help clean up...”

Each statement makes the other side angrier in a vicious cycle. This could continue for a long time.

It follows then, that it is important to try to avoid behavior that might create or increase negative emotions during a negotiation. In his popular book, *Blink*, Malcom Gladwell describes a Dr. John Gottman who is able

⁴⁵ *Id.* at 154. This helps explain how parties can have very different recollections of the same event.

⁴⁶ While this is the near universal view, there might be an exception for some distributive negotiations. Some experts posit that in one-time, distributive negotiations, such as at the market, where the parties do not care about a future relationship, negative emotions can produce improved results. Showing anger at an insultingly high price for a product at the market can effectively communicate the gravity of feelings about that price. This may lead to a better result than with a non-emotional or positive emotional reaction. *Id.* at 73-74.

⁴⁷ Keith G. Allred, John S. Mallozzi, Fusako Matsui, and Chistopher P. Raia, *The Influence of Anger and Compassion on Negotiation Performance*, ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES, 70, 175-187 (1997).

⁴⁸ Shapiro, *supra* note 44, at 76.

to analyze short video tapes of couples discussing difficult issues.⁴⁹ Based on these short videos, Gottman can determine whether the couple will get divorced with an amazing 95% accuracy.⁵⁰ He does this by looking for four negative behaviors that cause negative emotions and ultimately, divorce. Those four important negative behaviors are:

- 1) Criticism of the other's character (e.g., "you didn't clean the kitchen, you are so selfish")
- 2) Expressions of contempt (e.g., rolling one's eyes when the other person speaks)
- 3) Defensiveness ("I might have been late this morning, but you are always late in the morning")
- 4) Stonewalling (refusing to discuss matters when the other wishes to discuss)⁵¹

It is clear that one should try to avoid these four negative behaviors in negotiation. But, what should be done if the other side is exhibiting these behaviors? One way to mitigate the effects of these powerful emotions is to allow the other party ample time to give her emotional speech. She may feel better after doing so.⁵² The party may also be performing for the benefit of her client or colleagues. An example might be a young lawyer who acts tough in front of her clients so that they feel more comfortable that their interests are being vigorously protected. It is important to not overreact to that emotional attack.

Another tactic is to explicitly acknowledge the other side's emotion and to validate it. For instance, one might say, "I understand that you are upset about your business. I would be upset too if I had lost my biggest contract." This does not mean that you agree with the other party's conclusions. But, by validating their emotions, the party will feel like you understand their situation and may have more positive feelings towards you.

49 MALCOM GLADWELL, *BLINK*, 18 (Little, Brown ed., 2005).

50 *Id.* at 21.

51 *Id.* at 32. Gottman considers contempt to be the most important one in predicting divorce. It follows then that in negotiations, expressions of contempt are probably the most counterproductive of all emotions.

52 Expressing negative emotions may be a coping mechanism to help people deal with distress. Shapiro, *supra* note 44, at 72, *citing*, Eileen Kennedy-Moore and Jeanne C. Watson, *EXPRESSING EMOTION* (Guilford Press, 1999).

Study Questions

- Have you ever become emotional during an important negotiation?
- Did your emotions help you or hurt you?
- How did the other party react to your emotions?
- How did you react to the other party's emotions?

2) Positive Emotions

Positive emotions, on the other hand, can be conducive to creative thinking, which is important for reaching an agreement.⁵³ They can also help the parties maintain a good working relationship. And, of course, they can help avoid the pitfalls of negative emotions.

Notwithstanding conventional wisdom, positive emotions can be generated voluntarily. Emotions do not just “happen” to people. They can be created as well. Negative thoughts can create negative emotions. As an example, Lela might think a lot about how she lost a table tennis game to her older sister, Lana. This negative thinking can cause negative emotions. But, if she could think more about how much her sister liked the dinner Lana prepared after the game, she will begin to feel positive emotions. In Dr. Gottman's research, he has found that married couples need to maintain at least a five to one ratio of positive to negative interactions to avoid divorce.⁵⁴

In negotiations, an effective negotiator can try to create positive emotions by simple actions. For example, smiling can cause the other party to smile back, thereby creating a positive emotion. Asking a few personal questions can sometimes help create a more positive emotion. As an example:

Ana would like to sell her car to Vako. They have reached an impasse since Vako wants to pay \$2,000 but Ana wants to sell for \$2,500. During the negotiations, Ana asks Vako if he has children. Vako replies with a smile, “Yes, I have three children—2, 4, and 5 years old.” Ana replies, “Oh, that is wonderful. I have a 2 year old also. Isn't that a nice age? They are so cute at that age.” Now, Vako and Ana are thinking about their children and have positive emotions. They may also feel closer to each other now that they have

⁵³ *Id.* at 75.

⁵⁴ Gladwell, *supra* note 49, at 26.

something in common. As a result, they might find it easier to negotiate or work harder to reach an agreement.

The discussion can be about anything, but it helps if it relates to something that is happy or positive and is something that the two people might have in common. Of course, it is important not to overdo this tactic and appear insincere or manipulative.

Finally, symbolic gestures like apologies or statements of regret, while not containing admissions, can go a long way towards creating a positive atmosphere.⁵⁵ They make the other side feel better and can generate some positive emotions.



The best part is that symbolic gestures usually cost nothing.

Think about the question at the beginning of this chapter: what advice should Levan give Etia about emotions in his important upcoming negotiations? He should advise Etia:

- Do not ignore emotions;
- Recognize that you may have negative emotions that could be problematic;
- Remember to handle yours and your client's emotions with great care; and
- Try to generate some positive emotions.

3) Taking a Time Out

As a negotiator it is important that you not allow emotions to control you during the negotiation unless they are used with intention. If during the course the negotiation you find yourself responding in an emotional manner or that emotions start to dominate the discussion or you or the other party, then consider taking a “time out” to allow the emotions to settle.

A time out is simply a pause in the negotiation that allows you and the other negotiator to refocus on the task at hand, a period of time that allows emotions to calm down for a bit. A time out can be as simple as taking a

⁵⁵ Fisher et al., *supra* note 25, at 32.

break for refreshments, a well-timed visit to the restroom, or getting up to open a window. Longer time outs are often justified by needing time to “think things over” or “needing to sleep on it for a night”. As attorneys we can also use the need to consult with our clients or our bosses as a method of taking a time out before continuing negotiation. The important thing is to take the time you need to avoid making an emotional decision that you or your client will later regret.

c) Communication

Communication is, of course, the foundation of all human interaction, including negotiation. How a party communicates an idea, offer or solution is sometimes more important than the substance of the idea itself. The two main difficulties in communication are listening and misunderstanding.⁵⁶

1) Listening

Often, when two parties are engaged in a heated negotiation, they only hear the beginning of the other party’s statements. Their brain completes the thought faster than the other person can say it. Sometimes, their brain’s completed thought is not what the other party actually said, and they miss the complete thought. Sometimes, a party will listen to part of a statement, and then begin to formulate a response without having heard the rest of the statement.

This type of poor listening process is problematic. First, not hearing the full story makes it difficult for the parties to have all the information to reach agreement. Second, and equally important, if one party is obviously not listening fully, the other party may feel disrespected and may respond by not listening fully as well. With neither side fully listening, communication is dysfunctional and no agreement is possible.

The way to avoid this problem is to *actively* listen to what the counterpart is saying. Parties should try not to interrupt. Parties should take notes. It is helpful to periodically, say things like, “I want to make sure I understand what you are saying. Did you say XXXX?”⁵⁷ It is also important to physically

⁵⁶ Fisher et al., identify three communication problems, but the author of this book believes they can be better understood as two main issues. *Id.* at 32 – 34.

⁵⁷ Resist the temptation to phrase the other party’s arguments in a demeaning, simplistic or sarcastic

demonstrate that you are interested by keeping good eye contact and body posture.⁵⁸ By following these rules, two goals are achieved. First, accurate information is obtained. Second, the other party feels that her voice is being heard and understood.

Active listening involves not only the use of your sense of hearing but of all five senses. It is important that you focus your mind on the person you are negotiating with and not allow yourself to become distracted by your surroundings, or other mental distractions.

2) Misunderstanding

The other main communication problem is misunderstanding. As mentioned above, people perceive reality in different ways. They also perceive the spoken word differently. One party might say,

“I gave you two chances to complete the task.”

The party is trying to show how generous, fair and patient he is. But the other party might take offense at the statement and understand it to mean:

You are really incompetent. You had two opportunities to complete this task and you failed both times.

In addition, certain words can have vague or unclear meanings, which give rise to different interpretations or misunderstandings. If the parties speak different languages, these problems become even more pronounced.

One way to avoid misunderstandings is to be careful with the words you choose to use. Another important tactic is to phrase matters in personal terms and not in terms of the other party.⁵⁹ For instance, it would be unwise to say: “You have disrespected my family.” This is an accusation. At best, it invites a denial. At worst, it could cause offense and counter accusations. Instead, even if one feels disrespected, it is best to say something personal

manner. Fisher et al., in *Getting to Yes*, go one step further and suggest that you phrase the statement positively, making the strength of the other side’s case clear. *Id.* at 35. This is probably too difficult for most negotiators, but it is important to try to avoid re-phrasing the other side’s arguments negatively. 58 Spoken words only account for a small percentage of the information being conveyed by the other party. See, International Listening Association, website available at http://www.listen.org/Templates/try_new.htm, citing, *inter alia*, Ray L. Birdwhistell, *KINESICS AND CONTEXT*. (U. of Pennsylvania Press, 1970).

59 Fisher et al., *supra* note 25, at 36.

like, "My family feels very hurt about what was said." Now, the other side is less likely to challenge it or feel angry. Nobody has been accused. Yet, the same information has been conveyed.

Another example is when somebody says, "You shouldn't do that!" Or "You cannot do that!" This is threatening to the other party and again invites a counter assertion from the other party that she indeed CAN do that. Instead, try saying, "I don't feel comfortable when you do that." Now you have phrased your concerns in a personal manner instead of in a manner that accuses the other party.

Study Questions

How could the following assertions be rephrased in a more effective manner?

- "You have caused my company significant damages."
- "Your actions are illegal and breach our contract."
- "You clearly don't care about the community's health and well-being, otherwise you wouldn't have dumped that garbage."
- "You have stolen our land."
- "Your offer is so low that it is an insult to me."

3. Focus on Interests, Not Positions⁶⁰

Consider the following story⁶¹:

Otar and Salome are both at the library reading books. Otar wants the window open and Salome wants the window closed. They argue about where to leave it—halfway, just a crack, etc. But, they cannot agree.

Then, Giorgi, a librarian, walks in and asks about their disagreement. He asks Otar why he wants the window open. Otar replies “I want some fresh air.” He then asks Salome why she wants it closed and Salome replies, “I want to avoid the draft. It’s not healthy and I feel sick.” Giorgi then thinks for a minute and easily resolves the problem. He goes and opens another window farther away. He has brought in fresh air for Otar but without the draft to bother Salome.

This illustrates the importance of focusing on *interests*, rather than positions. Otar’s position was he wanted the window fully open. Salome’s position was she wanted the window fully closed. Their underlying interests, though, were different. Otar’s real interest was having fresh air in the room. Salome’s real interest was to avoid the draft, which might make her feel sicker. Their interests and positions are shown in the table below:

	Positions	Interests
Otar	Window should be fully open.	Wants fresh air; the room feels musty.
Salome	Window should be fully closed.	Feels sick and is worried that the draft of cool air might make her feel worse.

When Giorgi learned about the two parties’ interests, he was able to find a solution that satisfied both of them. By contrast, in a distributive negotiation, the parties would have likely resolved the matter by leaving the window partly open. This might have left Salome feeling sick and Otar still

⁶⁰ *Id.* at 40 – 55.

⁶¹ *Id.* at 40.

feeling uncomfortable and hot. Thus, when interest-based negotiations are possible, they are usually more satisfying and successful than distributive negotiations that merely focus on positions.

The interests are the parties' hopes, fears, desires, needs, wants, etc. The positions are the parties' specific demands, requests, offers, etc. Positions are easy to determine. Parties declare their positions quite readily. They often think in explicit positions such as, "I really want 10 of these as compensation." But, interests are more difficult to determine. Sometimes, parties do not want to reveal them. More often, parties have not even considered their own underlying interests.

Fisher and Ury state that the most powerful interests are the basic human needs:

- ***Security***
- ***Economic well-being***
- ***A sense of belonging***
- ***Recognition***
- ***Control over one's life***⁶²

Even in cases where it appears that money is the only issue, there may be more at stake. For instance, Viktor, an artist, has a painting for sale, and insists on a high price for his work. Moris is a young man with some friends who are journalists and cannot afford to pay this amount but likes the painting very much. Perhaps, Viktor is interested in being recognized as a serious artist, as much as ensuring his economic well-being. Perhaps Moris could help satisfy this interest by agreeing to help him publish an article about his work in a magazine, in exchange for a lower price.

Another issue to remember is that most people have more than one interest. Think of the manager of a company who has the interests of his company's finances (the company needs to save money), the interests of his personal career (he needs to look like he is meeting production quotas), the interests of his employees (they need to stay healthy and safe) and the interests of his family (they want him to take a vacation from work). The more a negotiator can understand the complexity of interests, the more likely she can find an effective solution.

In a negotiation it is important to ask who is your opponent's "key client", in

⁶² *Id.* at 48.

other words who is the person they are most determined to please. In many cases it is their client, but in others it may be their boss who is considering them for advancement, or a partner they are trying to impress. Understanding who is the key client will allow you to make an offer that addresses those interests.

One way to determine a party's interests is to ask. As mentioned, it is possible that the party has not explicitly considered her interests. By just asking the question, it makes the questioner appear to care about the other side's welfare. Another way to determine a party's interests is to listen very carefully to what they say in the negotiations. They might give a hint as to their main concern by how they communicate or phrase their positions. Conversely, it is sometimes important to clearly indicate your own interests to the other side. This allows them to think about how to fulfill your needs too.

In addition, it is sometimes helpful to present the problem and the solution. When communicating in a negotiation, it is better to state the problem *first* and then the proposed solution.⁶³ If a person calls up a neighbor and states:

“You must stop playing that music at night! It is too loud ...”

The person has not presented the problem, only a solution—stop the music. Before the person can explain her problem or interests, the neighbor will probably become angry and stop listening. She is likely to be formulating a reply that sounds something like:

“I have every right to play music in my own house. Besides, it is not too loud. . .”

A better approach is to present the neighbor with the problem and interests first, then the solution:

Dear neighbor, we are having difficulties with our children. They are not sleeping at night and keep waking us up. Their lack of sleep is causing them to do poorly in school. It is really bothering us. We want our children to become good students and go to the university like your son. But, at the moment, we are concerned. I think if it were quieter at night, they might sleep better. . .

⁶³ *Id.* at 52.

Now, the neighbor understands (and possibly relates to) your problems and interests. She may listen to and consider your solution when presented this way. The neighbor might propose something that is consistent with her interests (that she has the right to play music) but also satisfies your concerns. She might propose to play the loud music at a different time of day instead of at night when the children are trying to sleep.

Back in the previous section, we discussed the different perceptions of an apartment owner and tenant. They show how their interests might be similar:

1. Both want stability. The owner wants a long-term tenant; the tenant wants a long-term home.
2. Both want to see the apartment maintained well. The owner sees a well-maintained apartment important for his property value; the tenant wants it well-maintained since he lives there.
3. Both want a good relationship with each other. The owner wants consistent rent payments without problems; the tenant wants the owner to repair things without problems.⁶⁴

So despite the many different perceptions between an owner and tenant, there are still some similar interests. In most negotiations, there are at least one or two similar interests that can be used to find an agreement.



A smart negotiator should focus on those similar interests as a starting point for finding a solution.

⁶⁴ *Id.* at 42 – 43.

Study Questions

What interests might be similar in the following examples?

- An employer and an employee are negotiating over salary.
- A businessman has found a defect in the latest delivery of fabric from his long-time, regular supplier.
- A couple is arguing over what to do for the New Year holiday. He wants to go to the city to visit friends and she wants to go to the beach.
- A developer wants to build a large hotel on his land but the government is worried about issuing the approvals because there is already too much traffic and noise in the community.

4. Invent Options for Mutual Gain⁶⁵

If parties are going to successfully settle a dispute, they need to invent options for mutual gain. However, this often seems difficult. There are four main reasons why this is difficult for parties:

- Parties sometimes make premature judgments about the option. Before it is even discussed or proposed, a party might reject it as a bad idea. Or a party might be embarrassed to suggest the option. Or, perhaps by making the suggestion, the party may reveal private information.
- Parties sometimes tend to focus on finding that single, perfect answer instead of looking for many possible answers.
- Parties too often believe that the dispute is about a certain sum of money or that it is a win-lose, zero-sum game. If one party pays the other party \$100 more, then it is a gain for the receiving party and a loss for the paying party.

⁶⁵ *Id.* at 56 – 80.

- Each party is only concerned with its own interests. A smart negotiator though, should think about satisfying the other party's interests too, since that will be the only way to reach agreement.⁶⁶

There are four important answers to these problems that help negotiators create options:

- separate the act of inventing options from the act of judging options;
- try to broaden the options being considered rather than looking for a single answer;
- look for mutual gains; and
- think of ways to make the other side's decision easy.⁶⁷

a) Separate Inventing From Judging⁶⁸

The first answer is to separate the inventing of options from the judging of options. One way is to use the technique known as "brainstorming." Brainstorming sessions are used throughout the business, NGO and governmental world to help people develop ideas in a quick, easy and fun manner. The process is simple: it starts by people getting together in a room with a white board, paper or other place to write. One person serves as the facilitator and asks the group to shout out ideas or solutions about a particular problem, which the facilitator writes down on the board for all to see. People are encouraged to shout out any ideas that come to mind, even if problematic. Sessions need to have at least three people present and ideally as many as ten. They also require an informal and positive environment where nobody says anything negative about any of the ideas. Nobody has any rank or authority over anybody else in a brainstorming session.

Ideally, participants sit side by side, everybody facing the white board, to emphasize that they are working together to find answers. Usually, people begin to think of new ideas after hearing somebody else's. At the end of the session, the ideas are recorded and only later are they analyzed.

Brainstorming can even be completed jointly with the other side. This may seem like an unrealistic idea, but joint brainstorming has some significant

⁶⁶ *Id.*

⁶⁷ *Id.* at 60.

⁶⁸ *Id.* at 60 – 65.

benefits. First, the parties will come to trust each other more if they work together to brainstorm solutions. Second, they will likely come up with more options for resolution. And finally, the parties will learn to understand each other's interests better. However, it is important that all participants understand that the brainstorming session is not a negotiation. It does not commit any party to a particular concession or position. Its explicit purpose is to generate options that might be useful for settlement later.

Exercise – Brainstorming

Generate settlement options using a Brainstorming Session for this case:

Tariel is a very valued employee at GG Mobile, a telephone and internet company. She is an expert computer programmer. She has just had her first baby. She wishes to work fewer hours so she can spend more time with her baby. But, she also needs the income so she does not want to quit her job. GG Mobile is concerned because they need her expert skills almost full time, but they cannot afford to give her a big raise to try to keep her working at the job.

What solutions would meet both parties' interests?

b) Broaden the Options⁶⁹

This tactic is useful after the party or parties have developed some interesting options. The process begins by taking the interesting options and *broadening* them—that is, to think of other more general ideas that are related to each option. One way to do this is to look at the problem through the eyes of different experts. If the dispute relates to a business contract, look at the problem from the viewpoint of an accountant or business manager or lawyer or government official, etc. Think of solutions that might occur to this kind of expert. It does not matter if you *are* that kind of expert, just that you try to think like one.

Another idea is to break the problem up into smaller segments and look for solutions there. For instance, if a shopkeeper has a dispute with a supplier over poor product quality, she might agree to try one future delivery of a different product and to test its quality. Only after that would they consider a permanent solution.

⁶⁹ *Id.* at 65 – 70.

c) Look for Mutual Gain⁷⁰

1) Shared Interests

Instead of assuming a gain for you is a loss for the other side, consider opportunities for mutual gain. As mentioned above, parties nearly always have a few shared interests that can be exploited in a settlement. Look at the following hypothetical example of a business dispute in the future:

Geo-China is an oil company that has been pumping crude oil off the coast of Batumi and sending it to the Batumi port for loading onto oil tanker ships that deliver the oil to Istanbul, where it is refined into gasoline. The governor of Batumi has informed Geo-China that he wants to raise the annual tax from one million dollars per year to two million dollars per year. Geo-China believes that it pays more than enough in annual taxes already and wants to leave the taxes at one million. If you are the lawyer for Geo-China, what can you do?

Look for shared interests. The governor wants money. This money would help pay for a new government office building, a new fire station, and new roads. But, the governor cannot pay for all of these things from taxes on Geo-China alone. Geo-China is interested in having Geo-Turk, an oil refinery company, build a new oil refinery at the Batumi port. If there were an oil refinery in Batumi, Geo-China would be able to conveniently sell its crude oil locally without paying to deliver it to Istanbul. The governor would also like to see Geo-Turk locate in Batumi since it would provide thousands of new jobs and improve the local economy. It would also provide a larger tax base.

So, the Geo-China lawyer could make some suggestions that utilize the parties' shared interests. Perhaps Geo-China and the governor could work together to bring Geo-Turk to Batumi. Perhaps, the governor could offer a special tax break for new investment in the port (like Geo-Turk's oil refinery) and perhaps keep the Geo-China tax rate at one million, IF the parties are successful in convincing Geo-Turk to build

⁷⁰ *Id.* at 70 – 76.

its refinery there. This would allow for a lower tax for Geo-China, a low tax for Geo-Turk, but still enough total taxes for the governor's plans.

Even in the most difficult situations, parties may have some mutual interests. Disputes are almost always costly and time consuming. There is the possibility of expensive lawyer fees. Even if the dispute is small, it can still be costly. For example, if an owner and a tenant dispute for too long over who is to fix a leaking faucet, the water may eventually cause permanent damage. Two neighbors who were angry over a noise issue may lose sleep and the opportunity for their children to play together. So, even in these cases, the parties have a mutual interest in ending the dispute.

2) Different Interests

Different interests sometimes present different opportunities for mutual gain. Think of the example of George and Mariam arguing over the orange. George's interests were in finding ingredients to bake his cake, while Mariam's interests were in using the juice for a drink. Their interests were different but they presented an opportunity for settlement. If they both had the same interest in, say, baking a cake, then they might have had a *more* difficult time settling their dispute. But, since they had these different interests, settlement was easier. Therefore, even if the parties have differing interests, settlement can still be reached.

Here are two additional examples of different interests that might be used for settlement:

- *Teona needs to buy a scooter immediately to go to and from work. But she doesn't have the \$500 for the scooter that Tamuna is selling. Tamuna wants to earn as much money as possible from the sale of her scooter.*

Teona's interest:	Immediate use of a scooter.
Tamuna's interest:	Maximize total money received from the scooter sale.
Resolution:	The two agree that Teona will buy and possess the scooter immediately and pay Tamuna \$600 over the next twelve months (\$50 per month), instead of the \$500 sales price.

- *Zviad needs to cut costs because his business has expanded too fast. He occasionally orders silk cloth from Natia. Zviad is worried that he is not selling enough product for his business to survive in the future.*

Zviad's interest:	Cutting costs and saving money.
Natia's interest:	Long term security for her business.
Resolution:	Zviad agrees to increase his purchases from Natia and make regular future purchases. Natia agrees to give Zviad a 20% discount on her product in exchange for a regular, long-term order.

3) Other Obstacles

Besides the challenges of shared or different interests, parties may have different assessments of the facts. Differing factual assessments may be an obstacle but also an opportunity. For example, in a dispute involving union leaders as to which wage proposal is most beneficial for the workers at a factory, the two leaders could settle it by submitting it to a vote among the membership.

Parties may have different levels of risk tolerance. In a dispute over a football player's salary, the team may be worried about risking too much money for a player who does not deliver positive results. The player may be willing to risk a lower payment in exchange for some incentives. Therefore the team might propose to pay the player \$1,000 per month instead of the \$2,000 he is demanding. In exchange, the team agrees to pay the player an extra \$2,000 in each month that the player scores two goals. In this way, the player assumes the financial risk that he may not deliver positive results for the team.

d) Make Their Decision Easy⁷¹

Settling a dispute involves both sides eventually agreeing to something. Your job as a negotiator is to try to persuade the other side to agree. It is much easier to do that if you can consider the dispute from the other party's position and try to propose a settlement that will be attractive to the other side.

⁷¹ *Id.* at 76 – 80.

Sometimes, it is just a question of how to package an option. Usually it is easier to stop something from starting than stopping something that is already occurring. Also, it is easier to stop something that is occurring than it is to start up something new. So, for example, if garment factory workers want a morning tai-chi exercise, it is probably easier for the company to agree to not interfere with an experimental union or worker-run exercise program than it is for the company to agree to start up a tai-chi program on its own.

In addition, precedence can be helpful in gaining acceptance for your proposal. If there is precedent for your proposal, it will appear more legitimate to the other side. So, try to present the solution in a way that appears consistent with what the other side said or did. For instance, in the example above, the workers might cite company handbooks that extol the virtues of a healthy workforce. Or perhaps, the factory health clinic has materials that recommend tai-chi as an important preventative measure.

One related psychological phenomena is called “extremeness aversion.”⁷² Research suggests that people evaluate an option more favorably if there are “extreme” choices presented alongside it. This was demonstrated in a study involving the hypothetical purchase of a camera.⁷³ Participants were asked to evaluate which camera they would purchase. They were divided into two groups. The first group was given two options: a lower-quality, lower-priced camera or a medium-quality, medium-priced camera. The second group was given the same two options and a third option: a high-quality, high-priced camera.

In the first group, half of the participants choose the low-quality camera and half choose the medium-quality camera. But, in the second group, where the medium-quality camera was offered alongside the lower and higher-priced options, about three-fourths of the group chose the medium-quality camera.⁷⁴



The lesson here is that people prefer what appears to be the intermediate option, and are averse to the “extreme” options.

⁷² Itamar Simonson and Amos Tversky, “Choice in Context: Tradeoff Contrast and Extremeness Aversion,” 29 *Journal of Marketing Research* 281, 292 (1992).

⁷³ *Id.*

⁷⁴ *Id.*

When presenting options for dispute resolution, it is a smart tactic to consider adding a few extreme options so that the other side views your intermediate option more favorably. Therefore, in the tai-chi example above, the workers might suggest a) the *company* itself (as opposed to the union) organize tai-chi sessions, or b) the company pay for employees to attend private tai-chi sessions at a community center. When compared with these two more extreme options, the idea of the company not interfering with a worker or union-organized tai-chi program might appear more acceptable.

On the other hand, there is also research indicating that presenting a person with *too many options* can be problematic. These phenomena, known as “Decision Aversion” and “Option Devaluation,” are discussed in the Mediation Chapter of this book.⁷⁵

5. Insist on Using Objective Criteria⁷⁶

Sometimes, when the negotiation becomes tense, the parties resort to a battle of wills, such as, “my best offer is \$500.” This is not an ideal way to resolve disputes because a resolution on that basis means that one party must back down and lose face to reach a resolution. This might endanger the long-term relationship of the parties. The party backing down may feel injured and will hold that against the other party. Perhaps she will take a tougher position the next time. Or perhaps she will repudiate the agreement and fail to abide by the terms of the agreement.

Using objective criteria to resolve issues makes people feel that their resolution was fair. If Ekaterine and her building contractor are in a dispute about how deep a foundation the contractor should dig for her house, the parties should find an objective criterion around which to structure their solution. Perhaps they could see if there is a government safety standard for that type of soil. Alternatively, they could find what the industry standard is in her neighborhood. Or perhaps they could find an expert to give an opinion. Whatever standard they use, if it is based on objective criteria, it will likely be viewed as fair by the parties. If it is viewed as fair, it is more likely to maintain the relationship. Also, the parties are more likely to agree if it seems fair.

⁷⁵ See Chapter 3, Mediation, *infra*.

⁷⁶ Fisher et al., *supra* note 25, at 81 – 94.



It is easier to compromise and back down in the face of a fair, objective standard than in the face of another person's willpower.

Fairness is an important part of successful negotiations. Studies show that people will turn down agreements, even if in their best interests, because they feel that it is not fair to them. As an example, people were given \$10 in a study and told that they had to split that money with an unknown second person. The first person could choose any split she wanted and both people would be allowed to keep the money, but only if the second person agreed to the first person's split. There could be no negotiation or additional splits—the second person could only accept or reject the proposed split. If the second person rejected the split, both people got nothing. Logically, that second person should be willing to accept any split at all (even less than \$1) because she gets more money accepting any split than if she rejects (in which case she would get nothing). But, most people rejected splits of less than \$5 because they did not believe it was fair.⁷⁷

a) Fair Standards

There are two kinds of objective criteria, fair standards and fair procedures. An example of fair standards would be the following:

Rusudan's car hit Nodar's car and caused a great amount of damage to David's car. David and Nodar decide to negotiate how much Rusudan should pay David. David could suggest a number of objective, fair standards to determine the amount of compensation:

1. Repair cost: How much it would cost to have David's car repaired?
2. Replacement cost: How much it would cost David to buy a similar car?
3. Lost Value: How much of a decline in value David's car suffered from the accident?

⁷⁷ See RICHARD THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (Free Press ed, 1991).

b) Fair Procedures

Fair procedures are another kind of objective criteria. For instance, if two children are fighting over a piece of cake, they could agree on a fair procedure: Nana can cut the cake and Tamuna can choose which of the two pieces she wants. Another example is for two people to take turns getting the item at issue. For instance, if two founding members of a club both want to be spokesperson, they could decide that one person gets the position first, and then one year later, the other gets the position. Another idea is to have the parties choose the end result first and then decide where each one fits. For instance, if two neighbors are disputing ownership over the land in between their houses, they could agree that one party will have ownership, but the other party will hold a perpetual easement right to use the property for transportation. Once this is determined, deciding the ownership issue is not as difficult. In theory, this makes each side more reasonable.

As a matter of presentation, it is important to try to frame the negotiations as a joint search for fair or objective criteria. As mentioned above, if you and the other side can work together on finding appropriate criteria, you are more likely to reach agreement. It is good to try to have the other side agree to criteria early on in the negotiations. For instance, if the negotiation is over the purchase of a house, the seller might claim a price based upon a comparable house on the same street. This is called valuation based on “comps”. If that is the objective criteria, then the buyer might want to find some other comps on other nearby streets that point to a lower price. The seller cannot claim that this is unfair or irrelevant since she has already asserted that valuation based on comps is a fair, objective way to determine the value of her house.

H. The Stages of the Negotiation Process

Other than the proscriptions on misrepresentation or duress, the negotiation process has no formal rules. There are no laws or statutes guiding the negotiation process. However, the process can be better understood in five stages:

- Preparation Stage
- Preliminary Stage
- Information Stage
- Distributive/Interest-based Stage
- Closing Stage

Every negotiation is different. In a transaction at the market, most of these stages will be passed through in a matter of seconds. In a complex legal negotiation, the stages may take many days or weeks to complete.

1. The Preparation Stage

- Obtain the facts
- Understand the Marketplace
- Analyze the law
- Learn the client's interests and goals
- Determine BATNA
- Consider the other party's case
- Develop Strategy

The first stage of the negotiation is the Preparation Stage. In this stage, the parties and their attorneys look carefully at the case and try to make some basic conclusions before proceeding. The first step for the attorney is to research and obtain all the relevant facts of the case. This usually means conducting one or more in-person interviews. It may also involve reviewing documentary evidence such as contracts or receipts.

Once the attorney understands the facts, the next step is to analyze the law, based on those facts. The law might not give a clear answer. Alternatively, the legal standard may be clear but the facts may be in dispute. At this point, it is important for the attorney to try to develop as many legal arguments as possible and objectively assess the strength of these arguments.

The next step is to learn the client's interests and goals. This requires the attorney to ask more basic questions about things like the client's business, relationships, fears, desires, goals, etc. The following is a list of some of the many possible interests a client might have other than money:

- Confidentiality
- Physical safety
- Preserving reputation
- Maintaining good relationship with the other party
- Continuing employment
- Recognition of the client's efforts
- Receiving expressions of regret, sympathy or apology
- Having the client's "day in court"
- Having the other party listen to and understand the client
- Saving face
- Publicly humiliating or shaming other party
- Wanting to belong to a culture, family or organization
- Proving the client was right

In some cases, these interests and goals may be much more important than money to a party. For example, the client may have a strong case from a legal standpoint, but the client's interests may be in avoiding a public confrontation. Or, the client may need a quick resolution due to financial hardship or business deadlines, thereby making a speedy resolution more important than getting the maximum amount in settlement.

Another key step to preparation for a negotiation is to make sure you understand the marketplace, that is the context that the negotiation takes place in. How much have similar cases been settled or decided by courts for in the past. Is there a normal recovery, or at least a range in similar cases? Having an understanding of what the market will bear will help you to be realistic in your goal setting.

As discussed earlier in this chapter, once the facts, legal analysis, interests, and marketplace have been learned, the attorney can compute the BATNA—the client's best alternative to a negotiated agreement.

After the client's BATNA is computed, the attorney should review the case from the perspective of the other party or parties. Perhaps the other party disputes the facts and believes that your party or another party is at fault.

Perhaps the other party has important interests that make him more likely to want to settle the case. Note that this BATNA computation for the other party is naturally more speculative than the BATNA computation for your own party. The attorney has a client who can speak honestly and confidentially about her interests whereas the attorney cannot learn as much from the other party. So, the attorney should speak with the client and possibly others to learn what important interests might be motivating the other party. It is also very important for the attorney to exercise independent judgment about the strength of both parties' cases. The attorney's BATNA computations should be independent of the client's likely bias regarding the strength of her own case and "correctness" of her own position.



Remember that the client and the attorney may be subject to egocentrism and overconfidence bias discussed earlier in this chapter.

Once these foregoing steps are completed, the attorney should develop a negotiation strategy. The strategy should focus on how to present the case to the other side; what concessions your client can eventually make; what the important interests are; possible solutions; and the BATNA/reservation price. The strategy can be determined by answering the questions in the negotiation journal page entitled, *Planning for Negotiation*, located at the end of this chapter. The strategy should be reviewed with the client to make sure that she is comfortable with it and the client should provide the attorney with full authority to negotiate consistent with the strategy.

2. The Preliminary Stage

The Preliminary Stage of the negotiations is often ignored as unimportant. However, this stage can be crucial to later success. In this stage, the attorneys contact each other to discuss negotiation formalities, such as IF there should be settlement negotiations and WHEN, WHERE and HOW those negotiations should take place.

- IF there should be negotiations
- WHEN should they take place
- WHERE should they take place
- HOW should they take place

IF

The “if” question—should there be any negotiations?—is very important. In some cases, the first party to ask for negotiations might be perceived as showing weakness. If that is the case, the attorney needs to think carefully about how to present that request. As a general rule, the less interested a party is in negotiation, the stronger that party’s position appears. Therefore, it is sometimes helpful to try to *appear* disinterested in negotiations, but still agree to engage in them.

WHEN

These other questions are sometimes viewed as a mere formality. However, they can also be important. Regarding the “WHEN” question, a party’s strong interest in immediate negotiations might indicate a level of need or desperation. If a party feels that negotiations must take place immediately, that party might be facing a need for money. Or, it might be facing an important business deadline. Or, it might fear that the dispute would become public, thus causing it great harm. Whatever the reasons, it is helpful to remember this and make sure that your client does not appear overly eager to have immediate negotiations.

WHERE

The WHERE and HOW questions are more subtle in their importance. If the negotiations take place at your attorney offices, you have the “home field” advantage. You may feel more comfortable, while the other side might feel uncomfortable in an unfamiliar setting. Furthermore, in some cultures it might appear that the visiting side is more eager for a settlement agreement since they agreed to travel. For these reasons, negotiations sometimes take place at neutral locations such as a bar association office, a court center or a private mediation center. There can be some advantages to traveling to the other party’s offices, such as giving you a better idea of the resources they have available or the level of seriousness they are taking with the negotiation. Sometimes useful intelligence can be gained from the other side by taking the negotiation to them.

HOW

The HOW question relates to the negotiation process itself. Should the two parties exchange emails? Should they negotiate over the phone? Should they negotiate face to face, in person? If in person, should the clients be present at the negotiation? If your client is much stronger financially or is a naturally confident person, then having a face to face negotiation with both

clients present might be helpful. Or, your client might be able to provide important factual information to you during the negotiations. Or, the client may initially have unrealistic settlement expectations and having her listen to the other side's story may help moderate her expectations.

Conversely, if your client is intimidated by the other side or very emotional, then client participation in an in-person negotiation should be avoided. If your client is likely to give away important information or provide nonverbal clues (such as showing fear), then you might consider avoiding in-person client participation in the negotiations.

3. Information Stage

The Information Stage starts when the two parties begin actively negotiating, either directly or through their attorneys. At this stage both parties begin providing each other with information. One party may start with a recitation of the facts as his client understands them, following by a brief review of the law, and an offer of settlement. As mentioned above, this could be written in an email or letter, or could be conveyed in a telephone conversation. But, to keep matters simple, we will assume that this is taking place in a direct, face-to-face discussion. After the first party provides this information, the other party will do the same—discuss the facts, the law and then convey a settlement offer.

When discussing the facts and the law, the parties should provide an objective reason for their settlement positions. They should show logically why they can win the case, why they are entitled to damages or alternatively, not obligated to pay damages and why the opposition's case is weak. At this stage, the attorneys must play a balancing act between trying to learn as much information as possible about the other party's interests and BATNA while trying to reveal as little as possible about their own BATNA. But, they must still provide enough information so that the negotiations continue.

It is helpful for the parties to agree to have frequent breaks to pause and consider all the information they have learned. For example, perhaps the other side has presented some important evidence that was not considered by your client. Perhaps that evidence alters your assessment of the likelihood of success in court and thus alters your client's BATNA and reservation price. If that is the case, then you should re-assess your negotiation strategy. Or alternatively, perhaps the other side has revealed that their business is

suffering significant damage from other sources and needs a fast settlement. Then, your client is in a better position than you thought and you might want to adjust your settlement strategy accordingly.

Throughout the process, it is important to ask the other side questions. Challenge them to explain their positions on everything from liability to damages. It is important to try to stay positive even if matters initially appear unfavorable for your client. Try to use positive phrases instead of threats or negative statements.

Negative statement: *“If you don’t continue buying product from my client, she will go to court and collect thousands from you in damages.”*

Positive statement: *“I might be able to compromise on our demand for compensation if you can consider continuing their business relationship.”*

It is helpful to try to keep the other party talking during the negotiations. The more that the other party speaks, the more information she may reveal. A good negotiator will always try to listen as actively as possible in this stage. However, there is also a great deal of non-verbal information available to the negotiator. Here is a list of some of the non-verbal communications in Western culture that the other party may be providing without even knowing it:

- Sometimes people clear their throat just before they make a false statement.
- Words that are spoken slowly and carefully may be false.
- If the speaker’s voice becomes high-pitched or fast-paced, it may indicate anxiety or distress.
- When somebody rubs their eyes or rubs their hands over their face, it may indicate that the person cannot accept what is being said.
- Crossed arms and legs are indications that the person is feeling defensive or cautious.
- Drumming fingers on the table is often a sign of impatience.
- Sweating and frequent eye blinking is a sign of nervousness or tension.
- If the person leans back in her chair it can be a sign that the person is feeling confident.
- If the speaker uses uplifted hands, it means the speaker wants to appear sincere and honest.⁷⁸

⁷⁸ Patterson et al., *supra* note 4, at 35.

These signs may or may not be accurate for Georgian culture. The main point here is that the negotiator should look for non-verbal communication signs that are relevant to the other party's culture.

4. Distributive/Interest-based Stage

After the parties have had the chance to explain their understanding of the facts, their analysis of the law, and their positions and interests, the Distributive/Interest-based stage begins. This is the stage where the parties explore possible interest-based solutions first and if none are possible, then pursue distributive-based solutions. As the section above on interest-based negotiations explains in detail, there are many different things to remember.



Remember to: Separate the people from the problem; Focus on interests, not positions; Invent options for mutual gain; and Insist on using objective criteria.

Unless the negotiation at hand is of a type that requires a distributive approach, such as purchasing food at the market, the interest-based approach should be attempted initially. If all possible interest-based approaches to settlement have been exhausted then the parties may want to make a final effort with a distributive negotiation.

5. Closing Stage

Once agreement has been reached during the negotiation, make sure that the terms are reduced to writing *immediately*. People's memories fade, and if the parties wait to memorialize the terms of the agreement, they might disagree on the specific terms later when they try to write them down. Furthermore, if parties have too much time, they might reconsider their concessions and try to re-negotiate for better terms. To avoid this, the parties should always be prepared to write down the basic terms of the agreement and sign it, and then perhaps write the final terms soon after, when the lawyers have the chance to use the appropriate legal format.

In addition, it is important not to gloat or say things like "that turned out better for me than I thought it would." This could create ill will between the parties and potentially unwind the agreement.

I. Negotiation in Practice

Now that the many theories and details of negotiation have been reviewed, this section provides additional negotiation exercises to consider.

Exercise – Negotiation Case 1: Kvarelli Timber

You are a lawyer representing the Kvarelli Timber Company (KTC). KTC is seeking permits to log an area in the Caucasus Mountains not protected as a national park. There is a dispute as to how much timber the government will allow KTC to extract each year. You want to obtain a profitable deal for your client, but you also realize that you may have to make some compromises to achieve it. KTC has given you wide discretion and the power to complete an agreement without consulting it first.

Your goals are to ensure that 1) KTC can cut down at least 13,000 cubic meters of timber per year, 2) KTC has exclusive rights to log in the area for at least five years, 3) the government will not hold KTC liable for any damage caused by the logging.

You have heard that the government is willing to grant some of your goals, but also wants the following concessions: KTC must 1) replace any trees it cuts down by planting new ones, 2) donate \$10,000 to forest conservation programs in the region, 3) allow other companies to log in the area after three years, and 4) be liable for limited damages should it fail to replant the trees according to the agreement or any other damages in breach of their final agreement.

You find none of these claims outrageous, although KTC wishes to avoid the third one the most. You are also aware that other logging companies are talking to the government. If you do not reach an agreement soon, another company may conclude an agreement with the government, granting exclusive rights to log in the area.

- How should you proceed with the negotiation? Should you make the first offer? Should your offer include some of the concessions that you think (but cannot confirm) the government wants?
- Are there common interests between you and the government? If so, what are they?

- Are there different interests between you and the government? If so, what are they?
- Are some interests more important than others?
- How would you fulfill both sides' interests? How would you present this idea to the other side?

Exercise – Negotiation Case 2: Bono Water

In this case, students will divide into small teams representing either Bono Water Corporation (BWC) or Salome G., Chairman of the BWC Employees' Union.

Bono Water Corporation (BWC), a multinational corporation headquartered in Paris, is one of the world's biggest producers and sellers of bottled water. BWC-Georgia is a wholly-owned subsidiary of BWC having almost 200 employees in Georgia. Recently, BWC has noticed that the productivity of its BWC-Georgia division has dropped. BWC sent Mr. Loup from Paris to Tbilisi to look into ways to save money. Mr. Loup decided to reduce costs at BWC-Georgia by terminating six key employees in the Water Research Department. On Friday afternoon (two weeks ago) he sent each of the six employees a letter notifying them of their immediate dismissal from the company effective the following Monday morning and advising them of the amount of their severance pay. Mr. Loup's letters explained that the dismissal was necessary because of their low productivity and the budget cutting measures issued by the head office in Paris. In addition to the accrued retirement and other payments required by the BWC work rules, a generous severance payment was promised in the letters.

On the following Monday, a general strike was called against BWC-Georgia by the Federation of Georgian Workers (FGW). Although BWC-Georgia employees have their own small union, BWC Employees' Union (BWC-EU) and it is not a member of FGW, most of the BWC-Georgia workers were afraid to cross the picket line and go to work. The head of the BWC-EU is Salome G., a 15 year employee who is being considered for an important management position in the company after she completes her term as head of the company's union. She has been acting as the spokesperson for the dismissed employees and the union during this dispute.

BWC-Georgia is beginning to suffer from the strike and the bad publicity. Many employees are staying away from the office so work cannot get completed. In addition, some of BWC-Georgia's local customers are afraid to do business with them due to the bad publicity. A recent article in a local newspaper claimed that BWC was not treating its Georgian employees fairly.

BWC has decided to send its best negotiation team to meet with Salome G. and her colleagues and try to quickly resolve the dispute. Both sides understand that it is not in their interests to continue the strike for a long time.

Each negotiation team may be given secret information, depending on which side it represents. After reviewing the secret information, the teams will be asked to engage in a negotiation with counterparts to see if an agreement can be reached.

Exercise – Negotiation Case 3: Cambodia And The United Nations

Cambodia is a country in southeast Asia. In the 1970's a communist guerilla group, the Red Khmer, fought a successful war against a right wing government and took control of the country for almost four years. During the time the Red Khmer was in power they are alleged to have committed several war crimes and crimes against humanity including genocide, and mass murder of women and children. The Red Khmer was eventually defeated by a coalition of international forces and a faction of the Red Khmer, called the Cambodia People's Party, who are now in power. The President of the Country is Hun Sen, who was a regional commander of the Red Khmer but broke away from them and formed the Cambodia People's Party. The international community has refused to recognize the new government of Hun Sen and to provide international assistance unless trials are held that will bring those responsible for the war crimes to trial in Cambodia.

This negotiation is between the government of Cambodia and the United Nations and concerns what form the trial of alleged war criminals will take. Time is important since an agreement is necessary for both sides. The UN realizes that the worst offenders, the former leaders of the Red Legion are aging quickly and could all die of old age before justice is served. The government of Cambodia wants an agreement quickly as they need foreign assistance to develop their country which faces a serious financial and humanitarian crisis.

The items that have to be settled in this negotiation are:

Composition of the Trial Court: The Parties have agreed that there will be 12 Judges. The negotiation has to determine where the Judges will come from, Cambodia or from other states, or a combination of the two. The other states that have agreed to provide judges if asked to do so are: China, Russia, North Korea, Poland, Georgia and the United States.

Prosecution: The parties have to agree who will serve as prosecutors, lawyers from Cambodia or from other states. Four prosecutors have to be chosen from Cambodia or the states listed above or some combination. Of the four, one should be chosen as the lead prosecutor.

Procedures: You have to negotiate the procedures in certain key areas of the proposed trials:

1) Will the tribunal have the power to subpoena all witnesses and bring charges against all defendants it wants to?

2) What maximum punishment will be available to the court against the defendants:

- No More than 5 Years of Imprisonment
- No More than 10 Years of Imprisonment
- No More than 20 Years of Imprisonment
- Life in Prison
- Death

1. Worksheet: Planning for Negotiation

The following is a basic negotiation journal for any negotiation:

- Briefly state the issues.
- What additional information is needed to clarify or further understand the facts/issues?
- What is your goal (what do I want to achieve)?
- What are your interests (rank them in order of priority)?
- What is your BATNA and resistance point?
- What is the other side's goal?
- What are the other side's interests (rank them in order of likely priority)?
- What strategy will you use in the negotiations?

2. Worksheet: Engaging in Negotiation (General Issues)

Issue	What my side wants	What my side is willing to accept
Issue	What the other side wants	What the other side is willing to accept

3. Worksheet: Engaging in Negotiation (Advocacy of Issues)

My side's issues	Supporting Arguments	Counter Arguments
Other side's issues	Supporting Arguments	Counter Arguments

4. Worksheet: Engaging in Negotiation (Interest-based Strategies)

- Have you considered the other side's perspective? Have you let the other side know that you are considering their perspective?
- Have you involved the other side in your reasoning process?
- Have you given the other side a chance to save face?
- Have you acknowledged the emotions involved on both sides?
- Have you listened carefully to everything the other side is saying (verbally and non-verbally)?
- Do the two sides have any similar interests? What are they?
- Do the different interests lend themselves to possible agreements? If so, how?
- Have you tried to invent options together with the other side?
- Have you considered presenting your best options with other more extreme options alongside?
- Are you using acceptable and objective criteria?

5. Worksheet: Engaging in Negotiation (Resolution Worksheet)

Issue	Our position or proposal	Their position or proposal

6. Worksheet: Engaging in Negotiation (the Agreement)

Issue	Resolution Terms

7. Worksheet: Observations of Negotiation

- Were you fully prepared? Was there any preparation you would have done differently?
- Did you change your BATNA or reservation point at any time during the negotiation?
- How effective were you as an advocate?
- How effective was the other side as an advocate?
- Did you achieve your goals?
- Did the other side achieve its goals?
- What would you do differently if you could do it over again?
- What strategies worked well for you?
- What strategies did not work well?
- Were there any strategies that the other side used that were particularly effective?

Chapter 3 – Mediation



“გველსა ხვრელით გამოიყვანს ენა ტკვილად მოუზარი“
“You attract more bees with sugar than with vinegar.”
(Georgian Proverb)

A. What is Mediation

1. Introduction

Mediation can be broadly defined as assisted or facilitated negotiation.⁷⁹ Mediation usually involves two or more disputing parties attempting to negotiate a settlement with the assistance of a third party, the mediator, who is neutral towards the parties and the outcome. The mediator does not have authority to impose a settlement. Rather, the parties retain the authority to decide whether or not to settle. If the parties do not want to settle or are not in agreement, then there will be no settlement, despite the mediator’s best efforts. Unlike arbitration or court litigation, the mediator can only suggest solutions to the parties.

In a mediation session, the mediator typically 1) listens to each party, 2) encourages each party to listen and consider compromise, 3) assists in the exploration of creative solutions, 4) helps the parties understand the facts and law as viewed by a neutral, and when appropriate, 5) helps develop the specific items in a settlement agreement.

⁷⁹ Patterson et al., *supra* note 4, at 53. Mediation has also been defined as a “process in which an impartial intervener assists two or more negotiating parties to identify matters of concern and then develop mutually acceptable proposals to deal with the concerns.” ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (1st ed. Matthew Bender 2001), *cited in* Steven Auster Miller, *Mediation in Bosnia and Herzegovina: A Second Application*, 9 *YALE HUMAN RIGHTS & DEVELOPMENT LAW JOURNAL* 132, 141 (2006).

The term *mediation* and the term *conciliation* have been confused over the years, even by legal and judicial professionals and academics. Today, *mediation* and *conciliation* are often used interchangeably to refer to the same process. Although some have tried to draw a distinction, there is no common international legal authority defining how the terms might differ.⁸⁰ Although the term *mediation* is found internationally, *conciliation* is the term most commonly used in international documents. For example, the UNCITRAL Model Law on International Commercial Conciliation (the “UNCITRAL Conciliation Law”)⁸¹ uses the term “conciliation” to refer to all types of proceedings where a neutral person or persons assists parties to reach an amicable settlement, including mediation proceedings.⁸² In contrast, mediation is the term most commonly used in the American legal system, with the term conciliation falling out of use. An example would be the American Uniform Mediation Act.⁸³

80 In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) states that there is considerable confusion in both Australia and elsewhere regarding these terms. See generally NADRAC Terminology Discussion Paper, available at <http://www.nadrac.gov.au/agd/www/Disputeresolutionhome.nsf/Page/RWP7E251CA71B8E7700CA256BD100135550?OpenDocument> (last visited April 1, 2014).

81 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, U.N. GAOR, 57th Sess., Supp. No. 17, U.N. Doc. A/57/17, Annex I, art.9 (2002) available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf> (last visited April 1, 2014) [hereinafter UNCITRAL Conciliation Law]. The UNCITRAL Model is the UN’s effort at recognizing the growing interest in mediation and in promoting non-contentious methods of dealing with disputes. Luis M. Diaz & Nancy A. Oretskin, *The U.S. Uniform Mediation Act and the Draft UNCITRAL Model Law on International Commercial Conciliation*, in INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 2002, at 791, 797 (PLI Litig. & Admin. Practice Course, Handbook Series, Order No. H0-00GP, 2002). It also represents an effort to provide uniform mediation rules across various countries, especially in emerging commercial fields like Internet disputes. GUIDE TO ENACTMENT AND USE OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, ¶ 17 (UNCITRAL 2002) [hereinafter UNCITRAL Conciliation Guide]. In this author’s experience, the UNCITRAL Conciliation Law has gained widespread acceptance and many transitional countries have looked to it as an appropriate model. This may be due to the fact that the UNCITRAL Working Group was composed of representatives from a wide range of countries and legal traditions.

82 UNCITRAL Conciliation Guide, *supra* note 81, at ¶ 7; Diaz & Oretskin, *supra* note 81, at 797.

83 UNIFORM MEDIATION ACT (amended 2003), available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.pdf> (last visited April 1, 2014) [hereinafter UMA]. This was the result of collaboration between the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and a drafting committee of the American Bar Association. See Diaz & Oretskin, *supra* note 81, at 793. It was completed and approved in 2001. The purpose of the UMA is to provide uniformity in mediation laws throughout the United States. The UMA Prefatory Note indicates that legal rules affecting mediation in the United States can be found in more than 2,500 statutes, many of which could be replaced by this Act. UMA, at Prefatory Note, § 3. Nine American states (Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington) and the District of Columbia have already adopted the UMA and the UMA has been introduced as legislation in two others. See NCCUSL website at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited April 1, 2014). In 2003, the UMA was amended to incorporate by reference the UNCITRAL Conciliation Law for international proceedings. See 2003 AMENDMENT TO THE UNIFORM MEDIATION ACT, § 11.

Both terms refer to a negotiation process facilitated by a neutral third party. In different countries and different traditions, there is wide variation in the process or in the level of involvement by the neutral.⁸⁴ In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (called caucuses) and through suggesting specific solutions.⁸⁵ In other traditions, the mediator or conciliator takes a more passive approach and allows the parties to control the process. Both approaches are valid and for the purposes of this textbook, the term mediation will be used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term will be used.

84 *Id.*; M. Jagannadha Rao, *Concepts of Conciliation and Mediation and Their Differences* (2002) (compares the terms conciliation and mediation as used in India), available at http://1.1.1.1/472008168/472002888T080531111635.txt.binXMysM0dapplication/pdfXsysM0dhttp://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf

85 There is authority in some countries to define conciliation as the process where the neutral takes a more active, solution-proposing role, while mediation is defined as the process where the neutral engages in a more passive, facilitative role. *See, e.g., Dispute Resolution Terms*, National Alternative Dispute Resolution Advisory Council (Australia) at 3 (2003), available at [http://1.1.1.1/467929504/472002888T080531121212.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~1Report8_6Dec.pdf/\\$file/1Report8_6Dec.pdf](http://1.1.1.1/467929504/472002888T080531121212.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~1Report8_6Dec.pdf/$file/1Report8_6Dec.pdf) (last visited April 1, 2014).

2. History of Mediation

Mediation has existed almost as long as organized human society. It is not difficult to imagine a family or tribal member helping two individuals resolve a dispute by taking a neutral role and helping facilitate a resolution. Mediation is likely older than the first formal court system and may have served as a model for the development of the law courts.⁸⁶ Moreover, this informal dispute resolution model developed all over the world. Mediation has been practiced throughout pre-modern history in places as diverse as: Confucian China, rural Albania, 12th Century England, colonial and indigenous North America, and pre-colonial Africa.⁸⁷ In Confucian China, for example, people considered the use of an intermediary to be the socially acceptable way to resolve disputes.⁸⁸ In Anglo-Saxon England, the parties could even mediate their dispute *after* a law court had rendered judgment.⁸⁹

In the Middle Ages, the rise of the nation-state led to the rise of government court systems. As a result, mediation fell in popularity. However, in the twentieth century, mediation returned as an important and popular method of resolving disputes. This recent popularity is partly due to the perception that formal court systems are slow and expensive. It is also because parties to mediation, unlike in formal court adjudication, can craft their own resolution, which may better serve both parties' interests.

⁸⁶ Patterson et al., *supra* note 4, at 55.

⁸⁷ Betty Southard Murphy, *ADR's Impact on International Commerce*, 48 DISP. RESOL. J. 68, 73 (1993); Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, J. DISP. RES. 327, 341 (2002); Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 57 DISP. RESOL. J., July 2002, at 44; Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235, 247-51 (2001), cited by Austermilller, *supra* note 79, at 147, n.114.

⁸⁸ Patterson et al., *supra* note 4, at 55. Unlike modern mediation where the parties usually meet and hold the sessions in one location, the Chinese intermediary would travel between the two sides conveying information about the dispute and its resolution.

⁸⁹ *Id.*

3. Mediation in Georgia

The Civil Procedure Code of Georgia was recently amended to introduce the notion of *Judicial Mediation* in Georgian legislation.⁹⁰ The proposed mechanism of Judicial Mediation allows for referring a case to a mediator to end the dispute by mutual agreement between the parties. A case may be referred to a mediator either if it is one of the cases listed in the law or any case if the parties agree on its referral to a mediator.⁹¹ Specific types of cases mentioned in the law where Judicial Mediation may occur include family law (except adoption and parental rights matters), inheritance disputes, and disputes involving the law of neighbors.⁹² Having due regard for the interests of the parties, the law envisages that the mediation process is confidential; also, the law lists grounds for recusal of a mediator and states that a mediator cannot be summoned to testify as a witness on circumstances that have become known to the mediator in connection with him or her discharging his/her official functions as a mediator.⁹³

Conditions of mutual agreement reached between the parties concerning the resolution of the dispute within the framework of a mediation process will become part of a court order thus being an additional guarantee for their enforcement.⁹⁴

Study Questions

- Have you ever been involved in mediation? Perhaps an informal one involving family or friends? If so, what were the results?
- Have you ever tried to solve a problem between two friends? If so, you were a mediator.
- Have you ever witnessed or heard about a more formal mediation involving a legal dispute in Georgia? If so, what were the results?

Mediation may help address some of the problems with the justice system in Georgia. Studies show that mediation can improve access to justice in a variety of ways. Mediation can help poorer segments of society participate

90 CCPG, *supra* note 2, at Chapter XXI, Judicial Mediation.

91 *Id.*, art. 187.

92 *Id.*

93 *Id.*

94 *Id.*

in conflict resolution in cases where they could not afford an attorney for traditional litigation.⁹⁵ Mediation can take place in rural areas or areas not served by a courthouse.⁹⁶ It can occur on weekends or evenings so that participants do not have to take time off of work. The informal nature of mediation may also appear less intimidating to people who view the government or judicial system with suspicion or fear.⁹⁷

Mediation may also improve citizens' attitudes towards the judicial system. Mediation's emphasis on party-centered decision-making allows parties to resolve cases in a manner consistent with their interests. Since resolutions are voluntary, mediation eliminates the inherent coercion that a court judgment entails. Studies show that mediation tends to have a very high user satisfaction rate.⁹⁸ As a result, mediation parties may begin to view the general judicial system more positively, which should improve the rule of law.

Mediation might eventually help strengthen Georgian democracy. In many countries, mediation has played a role in preparing community leaders, increasing civic engagement, and developing public processes that facilitate beneficial restructuring and positive social change.⁹⁹ For example, a leading South African politician indicated that "the success of the [various mediation services] helped redirect the country from a culture of violence to a culture of negotiation."¹⁰⁰

Furthermore, the increased use of mediation (with appropriate training) might help build a culture of compromise in Georgia. With time, parties and representatives may increasingly use non-confrontational ways to address

95 SCOTT BROWN ET AL., ALTERNATIVE DISPUTE RESOLUTION PRACTITIONER'S GUIDE (Ctr. for Democracy and Governance, USAID 1998), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf [hereinafter ADR Guide], at app. B *Sri Lanka Case Study; Bangladesh Case Study*.

96 FRED E. JANDT & PAUL B. PEDERSEN, CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA PACIFIC CASES (Thousand Oaks, 1996), noting the interesting example of the over one million voluntary, village-based People's Mediation Committees in China, which were created by the 1982 constitution.

97 Alkon, *supra* note 87, at 354.

98 In a mediation program initiated by the World Bank/IFC in Bosnia and Herzegovina, 96% of the participants indicated that they would use mediation again. VESNA DASOVIC-MARKOVIC & KENDEL RUST, WORLD BANK/IFC SEED PROJECT & CANADIAN INST. FOR CONFLICT RESOL., INTRODUCTION OF MEDIATION IN BANJA LUKA'S 1ST INSTANCE COURT § 7 (Sept. 2004), *available at*

http://www2.ifc.org/seed/PDFs/ADR_BiH_Final_Report.PDF (last visited April 1, 2014) [hereinafter "World Bank BiH Evaluation Report"], *cited in* Austermler, *supra* note 79, at 158, n. 186. *See also*, ADR Guide, *supra* note 95, at app. B, *Sri Lanka Case Study; Bangladesh Case Study*.

99 Austermler, *supra* note 79, at 143 (citing mediation examples in South Africa, Philippines and Ukraine).

100 *Id.* at 143, citing the South Africa Case Study in the ADR Guide, *supra* note 95.

conflicts and begin to take personal responsibility for resolving them. This is crucial for Georgia's on-going development.

Study Questions

- What are some long-running disputes in Georgia? Can they be solved through mediation?

4. Mediation Compared to Negotiation

Mediation can sometimes look like a special kind of negotiation. The two methods both allow the parties to reach a settlement between themselves. In both mediation and negotiation, there will be no resolution unless all parties are in agreement. In addition, both methods usually involve using interest-based analysis to reach a resolution. Finally, they are both non-legal processes that allow for but do not require lawyers. However, mediation and negotiation should not be confused. There are a number of important differences, which are listed below:

- In mediation, the parties to the dispute will almost always participate directly in the mediation proceedings. With negotiation, the parties generally participate indirectly, through their lawyers or other representatives, and appear in person only at the very end to sign a settlement agreement. Indirect participation in negotiation is especially applicable when the dispute involves large companies or international parties.
- In mediation, a neutral third party is always presiding over the sessions. With negotiation, there is no third party involvement. It is strictly a private process involving the parties at issue.
- Mediation is usually a single, formal event that lasts one or more days. There is a clear beginning, middle and end to the process. The parties must agree to engage in mediation and usually plan for it by selecting, among other things, a mediator, a mediation process, a schedule and a fee (if applicable). On the other hand, negotiation can take place over many months or years. It can start and stop without any warning or preparation. It can take place via telephone, fax, mail, email or in direct face-to-face discussions.
- Mediation usually occurs at the start of the dispute or at some time prior to the main hearing (trial) in a lawsuit. Negotiation, on the other hand, can take place at any time, even after a dispute has been adjudicated.
- Mediation is usually designed with an interest-based approach in mind. Negotiation, as discussed in the previous chapter, can proceed with either a positional or interest-based approach.

5. Which Disputes Are Best Suited for Mediation?

Mediation is most appropriate where the parties wish to maintain an ongoing relationship. For example, if Keti works for Georgi's restaurant and they have a dispute over working hours, the two parties may want to resolve it with a neutral third party who can explore their respective interests and help them reach a mutually satisfactory resolution. Another example is a married couple who have an argument over money. Because both parties love each other and wish to remain married, it is in their best interests to try to resolve matters peacefully. Sometimes a third party can mediate between the two and save the relationship, which may be more important than the actual subject of dispute.

Mediation is also useful if the parties have both expressed an interest in a quick and/or private resolution. For example, two companies may not care about their future relationship, but may have strong motivations to resolve the dispute privately and quickly, to avoid a public trial in the courts.

Mediation is also appropriate if the parties are interested in settlement but do not trust each other. A skillful mediator can help each party present its proposal to the other in an acceptable manner. This is important because the parties' mutual suspicion may prevent them from taking each other's proposals seriously.

Mediation is also appropriate if the case is very important and neither side can afford to lose. Arbitration and litigation tend to provide a legal decision that often results in a winner and a loser. If neither side wants to risk losing, then mediation allows the parties to resolve the case so that both sides win.

Also, if the parties wish to retain control over how the dispute is resolved, then mediation is one of the best options. For example, two brothers might fight over control of a family business and may want to resolve the issue based on certain private guidelines. Mediation allows for special arrangements and agreements that might not be possible in court litigation.

Even though mediation is a more formal process than negotiation, some small cases can still be efficiently resolved through mediation. For instance, if David and Mariam have an argument about who should clean the dishes after dinner, their older sister, Lana, might intervene and help them work out an agreement. Lana's mediation efforts might last no more than a few minutes but this might resolve matters where negotiation failed.

Study Questions

For the following disputes, which ADR method is better: negotiation or mediation? Explain why.

1. Levan lives in a Tbilisi apartment building. The building supervisors hired some workers from a small company to clean the outside of the building with an acid solution. Because the acid can burn, they tried to seal off all of the building's windows. However, they mistakenly did not seal off a window in Levan's apartment. While he was out, some acid leaked in and covered some ornaments he had placed by the window. When he returned home, he tried to grab one of the ornaments and burned his hand.

Levan attempted to get the cleaning company to pay for the damage to his hand, but they refused. He also asked for damages from the building owner who hired the cleaners, but he refused too. The operation to repair his hand would cost \$250. While he wanted to pursue his claim against the cleaners and the owner, he is worried that the costs of litigation might be higher than the actual claim. In addition, he is worried that the owner might retaliate and raise the rent or terminate his lease.

2. Oto is an old farmer. He owns 40 ha of farmland in Khakheti. He has four children, two boys and two girls. When Oto died, he left his farmland to his children, each one getting 10 ha of land. However, only the oldest brother, Giorgi, knows how to run a farm. The other brother and sisters, who work elsewhere in the village and are not involved with the farm, allow him to run their share of the farm as well. They each receive some income from their share of the farm, although Giorgi receives a large salary for his management.

After several years, the income from the farmland fell dramatically. Meanwhile, Giorgi's salary was increasing. In fact, he even bought a new car for his wife. The younger brother and sisters are worried that Giorgi is mismanaging the farm. However, they are nervous about confronting their older brother, particularly since he may quit if they criticize his management. If that happens, they might have to sell their land.

3. Alexandar and Maia live in Kutaisi. They have been married for ten years and have two children. They both love their children very much. However, Alexandar and Maia have had problems with their relationship. Maia complains that Alexandar works too much and never spends time with her, but Alexandar loves his job and does not want to leave his job. When he is promoted and sent to an office in Tbilisi, Maia refuses to move. They agree to get a divorce. There are a few financial issues between them, but the largest issue is over custody of the children and visitation rights. Both Alexandar and Maia would like to see their children, but also want a resolution in their children's best interest. They are both a little suspicious of outsiders getting involved in their personal problems.

6. When Should Mediation Occur?

As mentioned above, mediation can occur at almost any time during a dispute. Usually, the parties will try informal negotiations first. If those negotiations fail, then the parties will sometimes attempt mediation. Many dispute resolution clauses in contracts will specify that if there is a dispute, the parties agree to engage in mediation prior to filing a lawsuit. A special process called *Med-Arb* is sometimes specified as the dispute resolution process in commercial contracts. Under Med-Arb, the parties commit to mediation first, and if that fails to resolve the issues, the parties engage in arbitration. So, the general order is:

Negotiation → Mediation → Arbitration or Litigation

This order is logical, since the first method employed is inexpensive, fast and informal. After that, the methods become more formal and expensive as the parties move forward on that list.

Mediation can also occur after a lawsuit has been filed. Some court systems provide for court-sponsored mediation to occur after an initial complaint has been filed. These systems provide that judges shall engage in mediation efforts to help parties resolve their disputes.¹⁰¹ And, in another provision, judges are given the power to hold mediation sessions at any point in the litigation process.¹⁰²

Generally the earlier mediation is attempted; the more successful it is likely to be. This is for two reasons. First, early in litigation, the parties may not have spent as much money on lawyers and other costs. Early settlement through mediation results in a large savings in lawyers' fees and other costs, assuming the parties are paying their lawyers based on the amount of time the lawyers work on the case. A mediated settlement later in the litigation process may still be possible but it does not hold the promise of a large savings in lawyers' fees since they would already have been incurred. Earlier mediation is also more likely to succeed because as the adversarial process moves forward, parties become more entrenched in their positions and feelings.

¹⁰¹ CCPG, *supra* note 2, at Ch. XXI.

¹⁰² *Id.*



Since every dispute is different, it is important to try to determine whether the dispute is ready for mediation before making the proposal.

Mediation may be too early and inappropriate prior to certain events. At the beginning of the litigation process, the parties may not be prepared to engage productively. They may not have fully investigated the applicable law and facts. They may not have considered their interests. And they may not have engaged in the exchange of documents (called “discovery” in the U.S.) and pleadings and therefore do not fully understand the other side’s arguments. If mediation is attempted before these basic matters, it may be a waste of time and money. Even worse, it could polarize the parties by making them angry about each other’s perceived misunderstandings and stubbornness.

B. Private Mediation and Court-Annexed Mediation

Mediation can take place in one of two different settings: private mediation and court-annexed mediation. In private mediation, the parties agree among themselves to engage in mediation. That agreement might be made at the time of contracting, long before there is a dispute. Or, where the contract contains no such provision, the parties may agree to engage in mediation after a dispute arises.

Private mediation, as the name implies, is called such because it is a private agreement to mediate a dispute. There is usually no court involvement in the mediation process. The exception is where a court is asked to enforce a prior agreement between the parties to mediate.¹⁰³ Otherwise, it is completely private. The mediator is private and the mediation forum is private. Private mediation can take place in the absence of litigation or it can take place during litigation (in which case the lawsuit is usually placed on hold until the result of the mediation is known). If the mediation results in a settlement, then the lawsuit is dismissed. If the mediation does not result in a settlement,

¹⁰³ A court may also be called upon to rule on aspects of the mediation process or the enforcement of its outcome.

then the lawsuit proceeds in the court system with no prejudice to any party.

In court-annexed mediation,¹⁰⁴ the court runs the mediation program in part or in full. It occurs during a lawsuit. There are many different kinds of court-annexed programs found around the world. Sometimes, the court-annexed mediation program is voluntary, where the judge or administrator analyzes the case and, if appropriate, suggests that the parties consider engaging in mediation. In this kind of program, mediation occurs only if all parties agree to engage in mediation. If not, they proceed with the litigation. In other programs, the mediation is mandatory, requiring parties to engage in mediation as part of the litigation process. Although the parties are required to engage in mediation if the program is mandatory, they still retain complete control over whether they reach a settlement agreement.

In some court systems, a mediation offer is a prerequisite to the filing of a lawsuit.¹⁰⁵ This means that the plaintiff is required to offer mediation to the defendant prior to filing a complaint with the court. If the defendant agrees, then mediation occurs. If the defendant rejects, then there is no mediation and the plaintiff has fulfilled her requirement and can proceed with court litigation.

Depending on the way it is organized, the mediator in a court-annexed program may be a judge,¹⁰⁶ a lawyer, or a private industry expert that is contracted by the court system. Sometimes the mediator is not contracted by the court at all but rather hired by a private mediation company that provides mediation services on behalf of the court.

One important difference between court-annexed and private mediation is enforcement. When court-annexed mediation results in a settlement, it is usually recorded with the court and automatically enforceable like a judgment. However, private mediation is not always enforceable in that manner.

Private mediation enforcement rules vary widely throughout the world. In most Australian states, agreements reached through mediation outside the sphere of court-annexed mediation schemes cannot be registered with the court unless court proceedings are underway.¹⁰⁷ The rules are similar in the

104 Sometimes called *court-sponsored* mediation or *judicial* mediation.

105 Usually, this is a prerequisite for only certain types of cases, such as small claims or family law disputes.

106 In the U.S., judges often mediate in informal pre-trial “settlement conferences.”

107 UNCITRAL Conciliation Guide, *supra* note 81, at ¶ 90.

U.S. However, if there is a U.S. court proceeding underway, the court can usually decide to enter an order that incorporates the parties' settlement agreement into the judgment and this will be enforceable like a court order.¹⁰⁸ If the court does not incorporate the agreement into the order, the mediated agreement is merely a contract, enforceable through a breach of contract lawsuit. One exception is family law cases (divorce, child custody, visitation and support), where mediated agreements are almost always considered court judgments.¹⁰⁹ In Bosnia and Herzegovina, the new Law on Mediation appears to make all mediated settlements, whether private or court-annexed, enforceable like court orders.¹¹⁰

In some jurisdictions, like in Germany, India, Bermuda, Hong Kong and China, a private, mediated settlement can be converted into an arbitral award, thereby enjoying the same enforceability as a court judgment.¹¹¹

108 *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a)(b) (West. Supp. 1997).

109 Patterson et al., *supra* note 4, at 108.

110 ZAKON O POSTUPKU MEDIJACIJE BOSNE I HERCEGOVINE [BiH LAW ON MEDIATION PROCEDURE], art. 25 (2004).

111 *See, e.g.*, ARBITRATION ACT (1986) (Bermuda); ARBITRATION AND CONCILIATION ORDINANCE, arts. 73 – 74 (1996) (India); ZIVILPROZESSORDNUNG [GERMAN CODE OF CIVIL PROCEDURE], Tenth Book, § 1053 (Germany); ARBITRATION ORDINANCE, § 2C, Cap. 341 (1997) (Hong Kong); ARBITRATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 51 (1995) (China).

C. Advantages and Disadvantages of Mediation

1. Advantages

- **Speed**

Mediation allows parties to resolve difficult disputes within a short period of time, usually in one day or less.¹¹² Litigation or arbitration can take months or even years. Negotiation also has the potential to resolve matters quickly, but since it often occurs with no deadline or urgency, it can drag on for a long time. Mediation, in contrast, is usually a single event that takes place over a short period of time, thus resolving matters quickly.¹¹³

- **Cost**

While private negotiation is usually the most inexpensive dispute resolution technique, mediation costs are generally lower than other options like litigation and arbitration.¹¹⁴ Mediation generally lasts one to two days so the lawyer costs and the mediation center's fees are low. For simple disputes, mediation with a friend or relative can be cost-free, just like negotiation.

- **Party Control Over Outcome**

With mediation, the parties remain in control of the result. The parties decide if there is going to be a resolution and on what terms. The parties also decide if the process is a waste of time and should be ended. Nobody can force the parties in mediation to commit to anything.

- **Preservation of Ongoing Relationship**

As with negotiation, mediation allows the parties to craft a settlement that will preserve their ongoing relationship.¹¹⁵ This is important for society since personal relationships are crucial for business, politics and other areas of activity. For example, if business partners have a dispute over property and are able to negotiate an agreement, they can preserve their relationship and continue to engage in a profitable business relationship. In litigation or arbitration where a third party decides the matter, the solution may not keep both sides happy enough to allow them to continue to work together.

112 Patterson et al., *supra* note 4, at 57.

113 *E.g.*, ADR Guide, *supra* note 105, at 7-8.

114 *Id.* at 16-17.

115 *Id.* at 12.

- **Privacy**

The mediation process is meant to be confidential. Most jurisdictions protect any information relating to negotiations or mediations, even if they do not result in a settlement and the dispute must be litigated. As an example, the UNCITRAL Conciliation Law provides the following:¹¹⁶

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

This is a common provision found in many jurisdictions. Mediation works partially because the parties can be confident that their discussions and offers to settle are not going to be repeated or used against them in the future. Litigation proceedings, by contrast, are usually open to the public.

- **Flexibility**

The parties have a great deal of flexibility to design the mediation process. The mediator can play a simple facilitative role, listening to each side and encouraging the parties. Or, the mediator can play a more active role, meeting with each party separately to learn more about their interests and positions and ultimately even suggesting possible solutions.

As with negotiation, the *results* of mediation can also be very flexible. Since it is the parties themselves who are reaching a settlement, they can agree to solutions that would otherwise be impossible in arbitration or litigation. For instance, in a dispute with a terminated employee, a company might agree to give its terminated employee a consulting agreement in exchange for his promise not to compete with his former employer. While it is perfectly permissible for parties to agree to this, courts do not generally have the power to include this in a judgment.

- **Settlement Enforcement**

As mentioned above, mediated agreements from a court-annexed

¹¹⁶ UNCITRAL Conciliation Law, *supra* note 81, art. 9. *See also*, CCPG, *supra* note 2, at art.187⁸.

process are generally enforceable like court judgments, which means that they have an expedited enforcement process. Depending on the jurisdiction, even privately mediated agreements can be enforceable like court judgments. This is a big advantage over negotiated settlements, which do not enjoy any expedited enforcement rights.

- **Compliance With Mediated Settlement**

Mediation tends to result in high rates of compliance with the settlement agreement.¹¹⁷ In other words, the parties to a mediated agreement tend to adhere to their settlement agreement. This is partly due to the fact that the mediation process is usually considered by the participants to be a fair and satisfying way to resolve disputes.¹¹⁸ It is also due to the fact that mediation allows the parties to design their own resolution instead of a judge or arbitrator.

- **Higher Chances of Settlement**

Most mediation programs report high settlement rates.¹¹⁹ Based on these figures, mediation is probably more successful in achieving settlement than negotiation. Mediation is more successful than negotiation for a number of reasons. First, in mediation, the parties have the unique opportunity to meet and hear the other side's story in an informal setting. Second, negotiation through attorneys has the risk that information will be distorted or misunderstood when passed from Party A to Party A's lawyer then to Party B's lawyer and on to Party B. With mediation, the communication can be direct and clear. Third, negotiation usually exacerbates the personality conflicts between two negotiating attorneys whereas mediation allows for a neutral to resolve those issues. And fourth, in cases of mutual suspicion, settlement proposals presented through a mediator may be taken more seriously and with less suspicion than if presented

117 See, e.g., Betty Southard Murphy, *ADR's Impact on International Commerce*, 48 DISP. RESOL. J. 68, 73 (1993) (referencing ninety percent compliance rates); ADR Guide, *supra* note 105, at app. B, *Sri Lanka Case Study*; *South Africa Case Study*.

118 See, e.g., World Bank BiH Evaluation Report, *supra* note 98, at 158, n. 186 (citing a 96% user satisfaction rate). See also, ADR Guide, *supra* note 105, at app. B, *Sri Lanka Case Study*; *Bangladesh Case Study*.

119 Mediation programs have been successful all over the world: 67% settlement rate in Bosnia and Herzegovina (*Presentations on Mediation in Banja Luka and Sarajevo*, MEDIATOR, NOV.-DEC. 2005, at 3); 50-60% settlement rate in Germany (C. Buhring-Uhle, *Arbitration and Mediation in International Business: Designing Procedures for Effective Conflict Management*, at 278 n.57 (1996), quoting Klaus Rohl); 62% settlement rate in Illinois, U.S.A. (Lynn P. Cohn, *Mediation: A fair and Efficient Alternative to Trial*, DuPage County Bar Association Brief, (Oct. 1996)); 80-85% in Texas, U.S.A. (David S. Winston, *Participation Standards in Mandatory Mediation Statutes, You Can Lead a Horse to Water . . .*, 11 OHIO ST. J. DISP. RESOL. 187, 190 (1996).

from the opposing party's attorney.

- **The Party's "Day in Court"**

Sometimes it is important for a party to have had the opportunity to tell her side of the story, and to feel as though she has been heard. This can make the party feel a little better, regardless of settlement terms. In some countries, this is called having her "day in court." Negotiation does not usually provide a structured opportunity for this to happen.

- **Avoid Corruption**

The voluntary nature of mediated settlement makes participants less vulnerable to corruption.¹²⁰ The mediator cannot extract an unofficial payment since she has no control or power over the parties.

- **Choice of Neutral**

In a mediation session, the parties usually choose their neutral, unlike litigation where they are assigned a judge. This choice can help the parties feel confident that the mediator is not biased.

¹²⁰ Austermilller, *supra* note 79, at 142, n. 80. A corrupt mediator, however, might still try to coerce a party into settling through subterfuge or duress.

2. Disadvantages

- **Unreasonable Party**

No party in mediation can be forced to agree to anything. This is both an advantage and a disadvantage. If one party is unreasonable and does not want to settle, then there is nothing that the mediator can do. Mediation can turn out to be a waste of time and money if one or both of the parties are unreasonable or unwilling to settle. In some cases, this can lead to an increase in the levels of suspicion and animosity between the parties.

- **Unequal Bargaining Power**

If the parties have very unequal bargaining power, mediation may be dangerous for the weaker party. For instance, a large company might have far greater bargaining power compared to a small family-run shop. If the two sides engage in mediation, the large company can threaten or intimidate the weaker party into an unfair settlement. In such a case, the weaker party might be better protected with the presence of a judge or an arbitrator.

- **Settlement Enforcement**

Depending on the jurisdiction, privately-mediated settlements may or may not have expedited enforcement rules. Therefore, the parties should consider the jurisdiction where they are contracting to make sure that they understand the applicable enforcement rules. If they are in a jurisdiction that does not provide expedited enforcement rules for privately-mediated settlements, such as Australia, mediation may be less attractive.

- **Cost**

Mediation can be free if the mediator is a family member or a friend of both parties. But, if the dispute is among two unrelated people or companies, the mediator is usually a paid neutral. The parties might not want to spend the money for mediation, but may prefer to attempt negotiation first to see if a resolution can be found without paying an outsider.¹²¹

- **Privacy**

While the parties' communication in connection with mediation should be protected as confidential under the law, some jurisdictions

¹²¹ Although, negotiations can last a long time, which may cost a large amount of lawyer's fees.

do not have a mediation law that specifically protects mediation-related communications. Thus, parties cannot be 100% sure of privacy. Even in jurisdictions where there are confidentiality protections, they still have to trust that the mediator will not disclose private information. With negotiation, there is no third party to worry about.

D. Drafting a Mediation Provision

Most business relationships involve written contracts that incorporate a dispute resolution clause. The clause is included in the contract so that the parties know exactly how they will resolve any future disputes. This protects both sides. A dispute resolution clause can select any method, for instance, litigation or mediation.



A wise attorney will consider her clients' interests to ensure that the dispute resolution clause provides for a method best suited for that client.

If the client wants to ensure that disputes are resolved through mediation, the dispute resolution clause must specify mediation. The provision could state merely that the parties will resolve disputes through mediation. Or, in addition, the provision could also specify where the mediation would take place. It could even provide a time period within which mediation must be completed, prior to arbitration or litigation.

The following are four sample mediation clauses that can be used in a contract:

1. If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association before resorting to arbitration, litigation, or some other dispute resolution procedure.

OR

2. In the event a dispute shall arise between the parties to this [contract, lease, etc.], the parties agree to participate in at least four hours of mediation in accordance with the mediation procedures of the National Mediation Center of Georgia. The parties agree to share equally in the costs of the mediation. The mediation shall be administered by [one of the following choices: (1) designate a specific office, including address and phone number; (2) provide a method of identifying the correct

office such as “where manufacturing plant is located”; or (3) insert “a local office to be designated by National Mediation Center of Georgia Headquarters”].

Mediation involves each side of a dispute sitting down with an impartial person, the mediator, to attempt to reach a voluntary settlement. Mediation involves no formal court procedures or rules of evidence, and the mediator does not have the power to render a binding decision or force an agreement on the parties.

OR

3. If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties’ mediation may be asked to serve as the arbitrator.

OR

4. Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.¹²²

¹²² UNCITRAL Conciliation Rules, U.N. GAOR, 35th Sess., supp. 17, U.N. Doc. A/35/52, ¶ 105-106 (1980) available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html (last visited April 1, 2014) [hereinafter UNCITRAL Conciliation Rules]. These are model rules as opposed to the model law set forth in the UNCITRAL Conciliation Law, *supra* note 81. At the above-cited link, the U.N. describes these rules as follows: “Adopted by UNCITRAL on 23 July 1980, the UNCITRAL Conciliation Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing

As mentioned above, in most jurisdictions, confidentiality rules will protect parties from disclosure of communications made during a mediation session. However, to be safe, the parties could add a confidentiality clause as follows:

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

This clause follows the UNCITRAL Conciliation Law¹²³ and appears to give the broadest possible degree of confidentiality.

Study Questions

The Kvareli Wine Company wants to enter into a contract with an Australian company to sell a large portion of its wine. The owner of the Australian company has a reputation for being a hard bargainer and seems to get angry very easily. The price is so high that Kvareli Wine is worried that the Australian company might fail to take delivery or might not make all its payments in the future.

You are the lawyer for Kvareli and must draft a dispute resolution provision for this contract.

procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.” *Id.* The UNCITRAL Conciliation Rules are reprinted in full in Appendix C.

123 UNCITRAL Conciliation Law, *supra* note 81, art. 9.

E. The Mediation Process

The typical mediation process has seven phases:

1. Initiating mediation
2. Selecting a mediator
3. Briefing the mediator
4. Opening session
5. General problem solving sessions
6. Private caucuses
7. Closure

Studies show that the mediation procedure is a critical factor in the success of the mediation. If the parties perceive the process to be fair, they are more likely to settle. Where the parties developed the procedural rules themselves, there was an even higher rate of settlement.¹²⁴ With this in mind, the following phases will be reviewed in more detail.

1. Initiating Mediation

The first phase in every mediation is the initiation of mediation. As with most ADR processes, mediation will usually occur if one of the following three circumstances exist:

1. The parties have a dispute resolution clause in their pre-existing contract that chooses mediation;
2. The parties decide to engage in mediation after a dispute has arisen;
or
3. A court has ordered or advised the parties to engage in mediation.

In #1 and #2, the party initiating mediation sends a written invitation to mediate the dispute. The invitation can include a suggestion about the location and rules for mediation. The other side can either accept the invitation or reject it. If the other side accepts, then the two parties would proceed to set up the rules and search for a mediator. If the other side rejects, there is no mediation and the parties may proceed in a different direction. If the parties have a mediation clause in their pre-existing contract and one

¹²⁴ Douglas Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105 (1996). See also, Keith G. Allred, *Relationship Dynamics in Disputes*, HANDBOOK OF DISPUTE RESOLUTION, 83, 91 (Michael L. Moffitt, Robert C. Bordone ed., 2005).

party refuses to engage in mediation, the other party might seek a court order requiring mediation. Such a court order will require a party to *engage* in mediation but cannot order that party to agree to any settlement in that mediation.

Under the model UNCITRAL Conciliation Rules (reprinted in full in Appendix A),¹²⁵ if the party initiating conciliation does not receive a reply within thirty days from the date he sent the invitation, or within the period of time specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he should inform the other party.

If a court has ordered mediation in connection with a court-annexed mediation program, the court will likely provide the parties with a mediator and a set of rules.

2. Selecting a Mediator

After mediation has been established as the dispute resolution mechanism, the parties must choose a mediator. If the parties have not designated a particular mediation center, they can choose anybody they like in any manner they like. If they have agreed to use a particular mediation center, such as the Tbilisi Mediation Center, that center's rules will determine which mediators are available and how they are chosen.

Most mediations involve one mediator. However, it is possible to proceed with two or even three mediators. Unless there is a very clear reason to do so, the usual advice is to proceed with one mediator. The mediation center will likely provide a list of potential mediators to the parties or, if they cannot agree or do not want to decide, the center can also appoint a mediator for the case.

The following is a list of issues to consider when choosing a mediator. Is the mediator:

- Completely neutral, having no relationship with either party?
- Knowledgeable about the subject matter of the dispute (for example, building construction industry standards and rules)?
- Experienced in mediations?
- A lawyer, judge or is somebody without a legal background?

¹²⁵ UNCITRAL Conciliation Rules, *supra* note 122, art. 2 (4).

- A government official?
- Biased in any way, such as pro-employee or anti-foreigner?
- Recommended by other parties?
- Expensive?
- A good listener?
- Persuasive?

Study Questions

Maxim and Anna live in Samtredia and have been married for ten years. Anna feels that Maxim spends too much money on gambling. Maxim complains that Anna is cold to him and does not take care of the house and children properly. Maxim is a big, intimidating man and Anna never challenges him for fear that he might beat her. They are unhappy and are considering divorce but want to talk to a mediator to see if their problems can be worked out.

The local bar association has provided the couple with a list of mediators who could handle their dispute. One of the mediators is Nino. Nino is the most famous mediator in the city who is known for her professionalism and intellect. However, Nino has never been married. In fact, she has told all her friends that she does not want to get married because she believes that most men are lazy and is worried about financially supporting a husband.

Would Nino be a good mediator here? Could she remove her own views from the mediation?

3. Briefing the Mediator

Once the parties have chosen a mediator, they need to prepare for the upcoming mediation session(s). Usually, the first task is to provide the mediator with information about the dispute. The mediator may designate this information as confidential and not share it with the other party. If this information is not designated as confidential, the parties should take care in the information they provide. In simple cases, the mediator might need very little information prior to the actual sessions. But, in more complex cases, the mediator might ask the parties to submit written briefs explaining the

facts (facts that are in agreement and those in dispute), the applicable law and any documentary evidence that supports each side. The mediator might want to see any court pleadings that have been filed. The mediator might also want to know about the witnesses that are prepared to testify for each side.¹²⁶ The mediator may also ask each party to identify the strengths and weaknesses of their side, and of any prior attempts to resolve the dispute.

All this pre-mediation information helps the mediator more efficiently handle the mediation session. For instance, the mediator will not need to ask as many questions about the facts or the laws if she has read about them in the pre-mediation submissions. This preparation is also helpful for the parties and their attorneys as they begin to explore the possibility of settlement.

The mediator will also need to choose a neutral location for the mediation sessions. If the mediation is taking place under the auspices of a mediation center, the center will likely be the location. If not, the mediation can take place at the mediator's law office, bar association office, private home, or community or government center. Any place will do, as long as it is convenient and comfortable for the parties and it provides the participants with privacy.

Study Questions

What information, if any, should the parties submit to the mediator before the first session in the following cases?

- A divorce case;
- A dispute between two neighbors about the property line;
- A dispute over the purchase of land by a rich politician from a local community of farmers;
- A dispute over rent payments between a landlord and a tenant;
- A dispute over pay between a secretary and her employer; and
- A dispute between two brothers over the ownership of a car that was purchased by their father who has since died.

¹²⁶ See also, *Id.* art. 5.

4. Opening Session

Once the parties have provided the mediator with their pre-mediation submissions and the mediation has been scheduled, the next phase is the opening session. At the opening session, the parties meet the mediator in person. In simple or smaller cases, the parties might be participating without lawyers and the process is more informal. In more complex cases, the parties participate with their lawyers.



If the parties are represented by lawyers in the dispute, it is essential that the lawyers and the parties themselves be present for the entire mediation process.

Mediators usually prefer to meet with both parties together to save time and to reduce any feelings of suspicion or bias at the beginning.¹²⁷ There is no record of the session kept and no outsiders are allowed in. The opening session has the following purposes:

- To introduce the participants;
- To discuss and review the process;
- To set forth the rules to be followed;
- To allow each side time to describe the dispute and their legal and factual positions;
- To exchange important information between the parties;
- To provide the parties an opportunity to express their feelings and interests; and
- To identify initial areas of agreement and disagreement.¹²⁸

The mediator usually begins by introducing the participants to each other. The mediator will then review the process and the rules of the session. At some point, the mediator will try to explain her role in the process so that everybody has the same expectations. When explaining the rules of the session, the mediator should explain details such as the need for everybody to stay until the end of the session or the need to listen and never interrupt. If the parties are in agreement, the mediator will explain that she might need to hold a private caucus with each side to help facilitate settlement. She should stress that there will be no imposed agreement, that everything said will

¹²⁷ Patterson et al., *supra* note 4, at 59.

¹²⁸ *Id.*

be completely confidential, and confirm that each party is represented by somebody with full authority to settle. Finally, the mediator will answer any questions the parties have about the rules and the process. If the mediation is taking place at an established mediation center, the rules will likely be available to the parties in writing beforehand. Usually, a mediator will allow for some variation in the rules if all parties are in agreement.

After these initial, standard comments, the mediator will invite each party to present an opening statement. In the opening statement, the party will present the case as she sees it, specifying evidence and law. This is a chance for each party to show emotion and have the healthy experience of informing the other side of all their positions. This is sometimes called “venting.”

Ideally, each presenting party will also explain its interests. It is best not to make demands on the other party during opening statements. The listening party also benefits from hearing, usually for the first time, the entire case from the other side’s point of view. The party’s lawyers should provide the opening statement to ensure that it is communicated in a clear, effective and non-accusatory fashion.

Once the first party has completed its presentation, the mediator might ask some questions to clarify some of the issues. If the mediator has received and reviewed pre-mediation submissions from the parties, she will likely not need to ask too many initial questions. After the questions are answered the other party will make its opening statement under the same circumstances as the first. The mediator will usually take extensive notes during this period to make sure that she fully understands the dispute, the emotions and the interests at stake. When all parties have had the opportunity to present their case, the mediator usually calls for a short break.¹²⁹

129 In a survey of commercial lawyers who used mediation in 2007, a substantial number felt that the opening statements were a waste of time, and in some cases, could be counterproductive because of their inflammatory nature. The survey did not indicate whether this was the majority view among respondents. John Lande and Rachel Wohl, *Listening to Experienced Users: Improving Quality and Use of Commercial Mediation*, DISPUTE RESOLUTION MAGAZINE, 18 (Spring 2007).

Study Questions

- What should the mediator say if both parties want to skip the introduction and go straight to the dispute issues?
- What if one party wishes to give the opening statement herself instead of the lawyer?
- Should the mediator take any special precautions or say anything different if one party is represented by a lawyer and the other party is not?

5. General Problem Solving Sessions

When the parties return, the mediator begins the general problem solving session(s). This is where the mediator and the parties try to explore resolution opportunities. At this point, the mediator usually tries to clarify areas of agreement and disagreement. At some point early on, the mediator will usually enlist the help of the parties' lawyers to try to determine what will happen if the dispute is not settled. She will try to calculate the likely costs to the parties to litigate the case to resolution.¹³⁰ This will help the parties focus on the consequences of failing to reach an agreement.

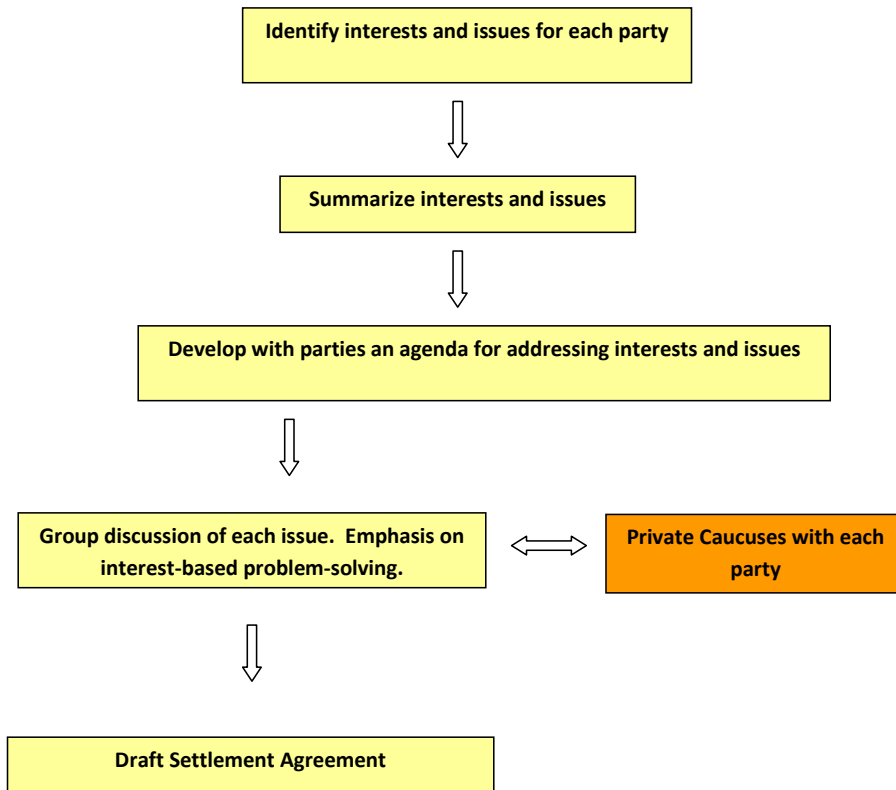
The mediator will also facilitate a discussion about creative solutions for how the parties might resolve matters. This is best done in a collaborative, non-adversarial manner that focuses on the parties' interests and problems, not the parties themselves. Usually, the mediator tries to learn the parties' priorities and looks for areas of agreement or common interests (such as avoiding long, expensive litigation).



The mediator usually avoids talk about positions or demands, which are difficult to change. Instead, the mediator asks about goals, fears, desires, and interests.

There is no set pattern that can be applied to all mediation sessions. However, the flow chart below provides a general idea of how a mediation session might proceed:

¹³⁰ This is a way to get the parties to focus on their "BATNAs" (Best Alternative to a Negotiated Agreement).



The steps taken by the mediator are similar to the steps one might take in the middle of an interest-based negotiation. The mediator will probably try to determine the key issues in the case first. Then, she might ask the parties about their underlying interests. For instance, the parties might be two feuding neighbors, Gogo and Salome. The issues might be the property line between them and the perception that one or both of them are trespassing on the other's property. The interests for Gogo might be in establishing peace, quiet, and privacy. He may have plenty of land. The interests for Salome might be to maximize her land holdings since she is hoping to sell in the next two years and move to the city with her daughter.

The mediator will, at this point, develop a simple agenda to discuss the items one at a time. The first item may be how to ensure Gogo's peace, quiet, and privacy. The parties might discuss creative options to prevent the disturbance that Salome feels is making her life so difficult. This does not mean that Salome will make any promises or commitments. Rather, it is an exploration to see what options are available. Perhaps Salome can move her outside furniture so that her parties are not near Gogo's property. Or perhaps Salome can plant some large bushes on her own property so that Gogo does not have to see or hear Salome's guests. Once these possible solutions are

generally deemed agreeable to both sides, the mediator moves on to the next item; perhaps Salome's concerns about maximizing her sale proceeds when she sells. Once again, the mediator will explore creative solutions.

The mediator is sometimes no more active than a referee in a football game, simply watching and letting the parties work out their problems. She is there to encourage a constructive environment. She will discourage personal attacks and try to limit the damage that negative emotions can do to a negotiation. She will try to enforce any ground rules, such as no interrupting the other side, but otherwise play as limited a role as needed. Every mediator has a different style and personality and every dispute has different parties, issues and emotions. One set approach will not work for every case.

a) Listening

Generally, the most important skill for the mediator during this and the previous phase is listening. The mediator should actively listen to what the parties are saying and look for important interests that might be fulfilled in a settlement. The listening should not be limited to words. The mediator should also observe the body language of participants. The negotiation chapter in this book covered some of the important body language that a negotiator or mediator should consider.

Exercise – Understanding Non-Verbal Communication

Pair up with someone in the class that you don't know or do not know well.

- 1) Spend two minutes telling the partner about yourself without talking. Act out interests, events, family, friends, sports, etc. Listeners must also remain silent.
- 2) Spend two minutes discussing what was communicated.
- 3) Then switch roles and repeat the exercise for two minutes.
- 4) Spend two minutes discussing what was communicated.

What kind of information was communicated without words and how was it communicated?

b) Re-framing

Another very important skill that mediators use during this phase is called re-framing. This is often used in both private caucuses and in group sessions. Re-framing is a technique used by a mediator to re-word an unproductive statement made by one party to move the discussion in a more neutral or positive direction. Instead of inviting a counter-attack or defensive statement from the other side, re-framing encourages the two parties to reconsider their situation and move in the direction of resolution.

To understand re-framing, one needs to understand framing. Framing is a description of how people see or perceive a situation or event. The word “frame” is used because it describes the image of someone looking out through the frame of a picture to the outside world.

We can alter people’s frames and thus change how they perceive something. This can ultimately change their behavior. For example, participants in a psychology experiment were playing a game where they had to choose whether to cooperate or to defect. The participants were divided into two groups. The rules were the same for both groups, only the label was different. The first group was told that the game was called “The Wall Street Game.”¹³¹ The second group was told that the game was called “The Community Game.” Participants in the first group cooperated only one-third of the time, while participants in the second group cooperated two-thirds of the time.¹³² The label itself was so powerful that it impacted participants’ behavior. In other words, it provided a certain frame for participants and illustrates the power of words.



The idea behind re-framing is to force the parties to look at the situation or the facts in a different way and perhaps behave in a different way—just like the label in the psychology experiment.

131 Wall Street is a famous street in New York where the stock market is located. The term “Wall Street” tends to connote money, competition and wealth.

132 See Lee Ross and Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, VALUES AND KNOWLEDGE, (E.S. Reed, E. Turiel and T. Brown, 1996).

There are three main goals to re-framing in dispute resolution:

1. Calming or decreasing hostility;
2. Changing the focus from positions to interests; and
3. Changing a concern or complaint into a solvable problem.

Re-framing a party’s statement can address one or more of these aspects. Mediators should re-frame in a careful, questioning manner so as not to offend the original speaker.

Below are a few re-framing examples:

Original Statement	Re-framed Statement or Response by Mediator
“Don’t you know any better than to submit a proposal that will never be accepted?”	“Tornike, you may have a good point there. How would you improve the proposal to make it more acceptable?”
“Sasha lied to us and he is not to be trusted.”	“In the past, Sasha provided them with information that turned out to be incorrect so they are perhaps hesitant to rely on his current statements.”
“You destroyed our vacation.”	“Etia is having trouble enjoying her holiday because of what happened.”
“You breached the agreement.”	“Money was not paid on time and Levan believes this caused him difficulties in making his payment obligations to others.”
“Lado is a messy person.”	“It bothers Mariam when she finds your clothes all over the house.”

Re-framing does not solve disputes but does provide the opportunity to move away from negative or unproductive viewpoints and statements to a more productive setting where the participants can explore possible settlement options. It is a subtle but powerful tool that can alter people’s perceptions and possibly their behavior.

Exercise – Re-framing

Try to re-frame the following statements:

- In a history class, Anna and Viktor must work together to give a joint presentation. Anna complains to a friend, “I do all the work. Viktor does nothing, even though I have asked him a hundred times.”
- In a family where two brothers share a car, Koba says, “Zviad takes the car every Monday night to visit his friends even though I need it to get to my school.”
- Two office workers are fighting over the use of a computer. Tamuna says, “He takes the computer without even telling me. He is violating company policy.”
- Two sisters are fighting about noise from each other’s bedroom. Rusudan says “Every time I ask her to be quiet, she just yells at me and slams her door!”

The goal of re-framing and other techniques, of course, is to reach acceptable solutions. If solutions are found that meet both parties’ interests, then they are likely to propose a settlement. The mediator can help facilitate this by assisting in the process of developing settlement options. It is usually advisable that the parties both develop and propose the solutions, if possible. That way, they are more likely to be acceptable and durable. If the mediator finds that the parties are unable or unwilling to propose solutions, she may play a more active role, and may even propose solutions herself. There are some circumstances where the parties do not trust each other and a solution proposed by one side will be viewed with suspicion by the other. In that case, the mediator might want to make the proposal her own so as to decrease the suspicion.

c) Generate Options

As with negotiations, a key to success is generating options for mutual gain. The same main points are relevant here. The mediator should help the parties:

- separate the act of inventing options from the act of judging options;
- try to broaden the options being considered rather than looking for a single answer;
- look for mutual gains; and
- think of ways to make the other side's decision easy.¹³³

The reader should review the negotiation chapter of this book for further details about these four important tasks, which includes techniques like brainstorming. However, there is one specific caution for mediators. Mediators sometimes develop too many options in their search for solutions. While this may seem like a good idea, the mediator should be aware of an important phenomenon known as *decision avoidance*.

With decision avoidance, parties with too many options are actually less likely to choose any settlement option, when compared with parties who are presented with fewer options. In an interesting study, researchers set up displays with jars of jelly in a supermarket to see how consumers would react. Customers who approached a display would be invited to sample the jelly and be given a coupon for a \$1 discount on any jars that the consumer bought. One display had six different jars of jelly, while the second one had twenty-four different jars. Consumers were more attracted to the larger display but less likely to buy anything. About 30% of the 104 customers who stopped at the smaller display bought a jar of jelly, while only 4% of the 145 customers who stopped at the larger display bought jelly.¹³⁴ In other words, 96% of the customers who stopped at the larger display opted not to decide because they were presented with too many options.

The mediator who offers too many options, like the 24 jars of jelly in the study, runs the risk of causing the parties to avoid choosing altogether and possibly missing a settlement.



While generating options is usually an essential exercise, care should be taken so as to not overwhelm the parties, particularly if they are showing signs that they are afraid to make difficult choices.

¹³³ Fisher, et al., *supra* note 25, at 4-5.

¹³⁴ S. Iyengar and M. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 76, 995 – 1006 (2000).

6. Private Caucuses

If the mediation is at a standstill (because of decision avoidance or any other reason), one common procedural tool that the mediator will likely employ is the private caucus. As can be seen in the flow chart, the private caucus usually takes place during the periods when the parties are discussing possible solutions to the issues. It is not uncommon for a mediator to hold five or even ten private caucuses during the course of a difficult mediation. Usually, if the mediator meets privately with one side, she will then meet privately with the other side. The mediator, after these two private meetings, could call a group session or continue to go back and forth in private meetings.

Private caucuses allow parties to share private information with the mediator that they might not be comfortable sharing in front of the other side. For example, the party might not want to reveal a particular interest (like the company is short on cash and might have to declare bankruptcy/insolvency). Or, the party might want to further explore a settlement option that it was uncomfortable taking seriously in front of the other side, for fear of showing weakness.



The private caucus allows the parties to drop the “face” that they sometimes need to show to the other side.

From the mediator’s perspective, the private caucus allows her to gain greater trust from the participants. The mediator can show more empathy to the party during a private caucus, which perhaps, she could not do in the group session for fear of appearing biased. The private setting also allows the mediator to more aggressively challenge a party’s positions and force them to seriously consider what the other side is proposing. A mediator could even propose possible solutions in this private setting that might appear biased or inappropriate if proposed in the group meeting. The private setting also encourages greater participation from the parties themselves, since the lawyers are often the ones who speak in the group settings (lawyers sometimes tell their clients to not speak at all unless they say so).

Private caucuses are not always necessary but are often helpful to bring the parties together, especially if they appear to have reached a stalemate. The most appropriate settings where private caucuses are needed are the following:

- Where there are more than two parties to a case, such as in a property

damage case where there is the plaintiff who suffered damages, the defendant who allegedly caused the damage and the insurance company.

- Where the case is very complex. For instance, when a property developer has been sued by investors for a delay in the project's completion due to problems caused by the developer's sub-contractors, who blame the materials suppliers and the architect.
- Where there is a significant disparity in the balance of power. For example, in the case of a large multinational employer that has terminated a poor secretary. The secretary might suffer terrible consequences if she does not get her job back. The company does not have any concern and could easily hire somebody else. In a private caucus, the mediator might be able to provide encouragement and support that would not be available in the group setting.
- When the parties are abusive to or threatening each other. This is the most common reason for private caucuses. For instance, with family disputes, the parties may have strong emotions that have become counter-productive to settlement. Or perhaps, the husband intimidates the wife in a divorce mediation and the pressure of confronting him face to face is causing her to give in to every demand. Private caucuses may help restore the balance that is ultimately in the family's best interests.

7. Closure

The mediation will end with one of three possible results:

1. The parties have reached complete agreement;
2. The parties have not reached complete agreement but will continue mediating at a later time; or
3. The parties have reached a stalemate¹³⁵ and the mediation is over.

In the first case, the mediator will encourage the parties to draft and sign a settlement agreement. Waiting to draft and sign an agreement until a future date is risky, since the parties may reconsider their compromises. They

¹³⁵ This is sometimes called an "impasse."

might be pressured by family, friends or colleagues to keep fighting for a better deal. As a result, they might try to ask for a final concession from the other side and risk destroying the agreement.

The parties themselves should draft the agreement. If the mediator drafts the agreement, she risks helping one side or the other in the words she chooses. It is better for her to write down the basic points of agreement at the end of the session, have the parties sign them, and then give the parties some time to draft the full agreement themselves. The mediator can review the agreement, but even then, she needs to be careful about helping one side over the other. It is a very delicate situation when two feuding parties compromise and try to memorialize their agreement. Therefore, the mediator must be extra careful to make sure that she does nothing to upset the balance.

If the second result happens (mediate more later), the mediator should stress the progress made and provide some suggestions for consideration for the next session. The next session should be scheduled relatively soon to help retain any of the momentum gained in the last session.

The third result can happen at any time. One of the parties may end the mediation session early if they are angry or unwilling to continue discussions. There is nothing the mediator can do if one party absolutely refuses to discuss settlement further. The mediator may also choose to end the session if it appears that no settlement can be reached. While mediation is an excellent tool for settlement, it is ultimately up to the parties and some disputes cannot be successfully mediated. When the mediation ends in this way, the parties are free to continue their dispute in other forums such as arbitration, private negotiations, or even litigation.

F. The Role of the Mediator

In general, the mediator needs to be comfortable with all kinds of people. The mediator has to be a good listener. She must be willing to understand the strengths and weakness of each side's case and be able to help the participants fully understand them. She has to encourage the parties even if the situation looks bad. Finally, she has to be creative in her thinking to allow the parties to consider a variety of options for settlement. These are the general requirements of a successful mediator. The following is a list of some of the more specific attributes common to successful mediators.¹³⁶ The mediator:

- must remain neutral, no matter what happens;
- should ultimately be an advocate for the mediation process (not for any of the parties or any particular position or solution);
- is generally sympathetic and empathetic with the parties;
- focuses the discussion on parties' interests instead of positions;
- tries to keep the process moving forward (by focusing on options and issues, not the parties);
- remains positive and encouraging even in the face of difficult situations;
- is persistent;
- is willing to try different approaches based on the nature of the dispute and the personalities; and
- always searches for possible resolution options.

One last issue relates to whether a mediator should play a role beyond mere facilitation. Should the mediator offer opinions on options, legal points or other matters? Should the mediator provide suggestions for solutions? These are sometimes called "evaluative" roles. ADR professionals have differing opinions on these matters. It depends on many factors, including

¹³⁶ Partially found in Patterson, *et al*, *supra* note 4, at 67-69.

the legal and wider cultural norms, the parties' expectations, the mediator's personality and even the local legal rules. Some jurisdictions might consider a non-attorney mediator to be engaging in the unauthorized practice of law if she were to provide legal opinions to parties in mediation. The best practice is for the mediator to raise this issue in the opening discussion and determine whether the parties are comfortable with the mediator playing an active, evaluative role. If both parties are uncomfortable with this, the mediator should remain in a more passive, facilitative role.

Study Questions

In your opinion, which of the two mediator roles (*facilitator* or *evaluator*) is generally more effective for the following disputes:

- A dispute between a dominating husband and submissive wife over money.
- A dispute between two sophisticated business partners.
- A dispute between a Georgian national and a German national.
- A dispute between an employer and employee.
- A dispute between a community of local farmers and a government official over the granting of land concessions.
- A dispute between two neighbors.
- A dispute between a driver of a car and the pedestrian that he has hit.

G. The Role of the Lawyer

As mentioned above, some mediations proceed without attorneys. An example of such a mediation is a small dispute between husband and wife. Often, community mediation services, such as those at the local government are free of charge and very informal. However, if the party is represented by an attorney, then the attorney should participate in the mediation. If one party is represented by an attorney, it is advisable that the other party be represented by an attorney as well.



Whether with or without an attorney, the parties to a mediation session must have full authority to settle the dispute.

This does not mean that the attorneys must run the process. In fact, the parties have more control in mediation than during negotiation. Unlike negotiation, the parties themselves are always present at the mediation session and parties must agree to any settlement or compromise. They can speak in the group or private sessions and will often be encouraged by the mediator to do so. So, what should the lawyer do?

Initially, the lawyer should decide whether to insist on a mediation clause in the parties' contract. In some cases, mediation might help save time and money. If the lawyer is involved in the dispute *after* the relevant contract has already been signed and there is no dispute resolution clause, the lawyer might consider mediation if basic negotiations do not resolve the problem.



Mediation is usually more costly than negotiation and, as mentioned above, can only work if both sides are willing to sincerely try to resolve the dispute.

Other initial roles include helping the client find a competent and neutral mediator, choosing a mediation center, if appropriate, and providing the mediator with the pre-mediation submission of documents. One of the most important roles a lawyer plays prior to mediation is preparing the client. The lawyer must prepare the client to think about settlement strategies *before* the mediation sessions begin. This means reviewing the BATNA, reservation price, facts, laws, interests, possible compromises and the

“bottom line” with the client. The client may not have thought explicitly about her interests, since she has likely only considered how the other side has harmed her. The lawyer should encourage the client to think objectively about the weaknesses of her case and set forth the consequences of a failure to settle.

Finally, there are considerations for the mediation session. Who will give the opening statement? Usually, that is the lawyer’s job. Who will speak during the group discussions? Perhaps both the lawyer and the client will speak, but they should decide which issues they will each address so that there is no confusion. The client also needs to understand that the mediator is not a judge and cannot force the client to do anything. Everything is voluntary. The client should also be encouraged to listen to everything that the mediator and the other side say.

Finally, the lawyer should discuss his behavior during the mediation session. The client might become confused or worried if the lawyer acts tough and adversarial in group sessions but then seems to side with the mediator and against his client in private sessions. The lawyer should explain that the mediator might try to help the client understand her weaknesses in the private session. He might even strongly suggest a particular settlement, but he is always acting in the client’s best interests.

At the opening and group sessions, the lawyer should be careful to strike a balance between appearing as a strong advocate while also appearing open to compromise. This is not a court, and while the lawyer’s job is to advocate for the client, he also wants the mediation session to be productive. If he offers a compromise, perhaps the other side will offer an even bigger compromise on something else.

During the breaks and during the periods when the mediator is in private caucus with the other side, the lawyer can help the client assess the progress and consider the options. They might need to reassess their strategy based upon the statements made by the other side. The lawyer should not merely sit back and let the client figure out how to resolve matters.



The lawyer should play an active role in searching for and analyzing solutions with the client.

At the end of the process, the lawyer must take the lead in drafting the settlement agreement with the other side. One way to do this is to allow one party's lawyer to draw up the first draft and then submit to the other side. Another way to do it is for the two lawyers to sit down together and write the agreement. In both cases, the lawyers will need to explain each provision to their clients, making sure that they understand and agree with the provision. If there is a dispute about the terms of the settlement, the lawyers can ask the mediator to help, although the mediator should be careful to not appear biased in favor of one party.

H. Mediation Ethics

Mediation raises important ethical questions that are important for the mediator, the parties, and the judicial system. Mediators, like judges or arbitrators, potentially hold a great amount of power over people. That power can be used for good or bad purposes. While judges and arbitrators tend to stand aloof from parties, meeting them only in limited, formal settings, mediators have much richer, more intense interactions with parties. Unlike judges and arbitrators, mediators can have numerous private meetings with parties to discuss their feelings, their interests, their concerns and their fears. They can sometimes try to persuade parties. While this is often for everybody's best interests, there are many important ethical concerns that can arise.

The easiest way to summarize the main ethical concerns is to list the nine standards identified in the American Bar Association's Model Standards of Conduct for Mediators.¹³⁷ In the Annex, the European Code of Conduct for Mediators has been reprinted as reference.

STANDARD I. SELF-DETERMINATION

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

STANDARD II. IMPARTIALITY

A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from

¹³⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, American Bar Association, American Arbitration Association and Association for Conflict Resolution (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf> (last visited April 1, 2014). This is the most influential ethics code for mediators.

involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

STANDARD IV. COMPETENCE

A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

STANDARD V. CONFIDENTIALITY

A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

STANDARD VI. QUALITY OF THE PROCESS

A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

STANDARD VII. ADVERTISING AND SOLICITATION

A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

STANDARD VIII. FEES AND OTHER CHARGES

A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A mediator should act in a manner that advances the practice of mediation. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

Exercise – Mediator Ethics

While these mediation standards may appear simple and logical, it can sometimes be difficult to apply them to real world situations. For each of the hypothetical scenarios on the following pages, review the Model Standards of Conduct for Mediators or the European Code of Conduct for Mediators and circle the best course of action among the three choices provided, A, B or C. Assume that you are an independent mediator and are presented with the facts in each box:¹³⁸

¹³⁸ Adapted from Patterson *et al.*, *supra* note 4, at 53.

Exercise – Mediator Ethics: Before the Mediation

	Question or problem	Ethical Response
1	You have heard that a relative of yours will possibly be named as an expert witness in a case that you have been asked to serve as mediator.	<ul style="list-style-type: none"> A. Inform the parties and proceed with mediation if they consent. B. Withdraw from mediation. C. Ask relative to withdraw and if she refuses, then withdraw from mediation.
2	The parties tell you that they cannot afford to pay your standard mediation fee but they really want you as mediator.	<ul style="list-style-type: none"> A. Withdraw from mediation. B. Negotiate a lower fee, so long as it does not prejudice you against the parties. C. Tell parties not to worry about fee until result. Then, depending on outcome attempt to work out a fair fee.
3	The parties really need to settle their case. They offer you double your fee if there is a settlement, but only your normal rate if there is no settlement.	<ul style="list-style-type: none"> A. Withdraw from the mediation. B. Insist on only your normal rate regardless of the outcome. C. Agree to the offer and then at the conclusion, refuse to accept more than your normal rate if the result is a settlement.
4	One of the parties is concerned that you are a friend of the judge that is assigned to the case.	<ul style="list-style-type: none"> A. Explain to the party that you are still neutral in the mediation (just like the judge). Proceed with mediation if they consent. B. Disclose the friendship to all parties and proceed with mediation if they consent. C. Withdraw from the mediation.

5	<p>One of the parties has learned that you have never mediated a dispute relating to the garment industry and questions whether you are qualified to mediate his garment business dispute.</p>	<ul style="list-style-type: none"> A. Withdraw from the mediation. B. Explain to the parties why you feel that you are qualified and if one still questions your abilities, then withdraw. C. Explain to the parties why you feel that you are qualified and proceed with mediation.
6	<p>One of the parties says that both participants are sophisticated and asks you to skip most of the opening session to save time.</p>	<ul style="list-style-type: none"> A. Probe to find out how sophisticated they really are and then consider skipping a portion of the opening session. B. Decline the suggestion, the opening session is too important and the mediation process must be protected. C. Accept the suggestion to build trust, so long as both parties consent.
7	<p>Before the session begins, you learn that one of the parties does not have full authority to settle. But, she claims that her boss is waiting by the phone if she needs to call him.</p>	<ul style="list-style-type: none"> A. Call the boss and insist that he be available for frequent calls from his representative. If he is willing and all parties consent, then proceed with mediation. B. Proceed with the mediation if all other parties consent to this arrangement. C. Do not convene the mediation until all parties present have settlement authority.

Exercise – Mediator Ethics: During the Mediation

	Question or Problem	Ethical Response
1	In a private caucus, the attorney for one side insists that the client not speak a word and that he do all the talking.	<p>A. Terminate the mediation.</p> <p>B. Try to convince the attorney that the mediation process requires all parties to participate and if he still doesn't agree, then terminate the mediation.</p> <p>C. Try to convince the attorney that the mediation process requires all parties to participate and if he still doesn't agree, then continue with the mediation if all parties consent.</p>
2	During your private caucus with one party, she admits to stealing the property of the other party.	<p>A. Tell the parties that you must inform the court or police authorities that one of the parties has committed a crime. Terminate the mediation.</p> <p>B. Tell <i>only</i> the admitting party that you must inform the court or police authorities that he has committed a crime. Terminate the mediation.</p> <p>C. Continue with the mediation, you don't need to inform anybody about past crimes.</p>

3	<p>You are near the end of a long mediation and you learn that your law partner represented one of the parties in the past during the time of your partnership.</p>	<ul style="list-style-type: none"> A. Inform the parties and continue the mediation only if they all consent. B. Inform the parties and terminate the mediation. C. Terminate the mediation and do not reveal the reasons, just indicate that you recently learned about a conflict. D. Continue the mediation and do not inform the parties. There is no conflict since the representation ended prior to the mediation.
4	<p>During a private caucus, one of the parties, who does not have an attorney, asks you whether she should accept the other side's offer.</p>	<ul style="list-style-type: none"> A. Provide an answer but state that it is only what you would personally do in that situation. It is her decision to make. B. Decline to provide an answer, you must stay neutral. C. Provide information such as the pros and cons of the offer but do not advise what to do.
5	<p>Both parties are represented by lawyers. During a private caucus, you learn that one side has seriously misrepresented a fact on which the other side is relying in its consideration to settle.</p>	<ul style="list-style-type: none"> A. Continue with the mediation, say nothing, stay neutral. B. Terminate the mediation. C. Try hard to convince the offending side that it must reveal the misrepresentation. If it refuses, continue the mediation.

6	During the mediation, you learn that one of the parties has substituted improper building materials at a construction project. You believe that this will make the building unsafe but the other side does not know about this substitution.	<ul style="list-style-type: none">A. Inform both parties of what you have learned, that you intend to contact the authorities and terminate the mediation.B. Inform both parties of what you have learned and try to mediate a solution that includes a resolution to the safety problem. If unsuccessful, inform the authorities.C. Inform the parties that you must terminate the mediation, but do not say why. Inform the authorities immediately.
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Exercise – Mediator Ethics: After the Mediation

	Question or problem	Ethical Response
1	When you report to the judge or arbitration panel that the case did not settle, the judge (or panel) asks why.	<ul style="list-style-type: none"> A. Decline to give details. B. Provide details only if all parties consent. C. Provide details so long as the court or panel agrees to keep the information confidential.
2	The parties are not able to reach a resolution so they ask you to arbitrate the case with a binding decision.	<ul style="list-style-type: none"> A. Refuse the request since you have been made privy to confidential information. B. Inform the parties about the potential dangers and agree to the request if all parties consent.
3	You have successfully mediated a domestic relations case between a husband and wife. The husband drafts the settlement and you realize that the agreement is not exactly the same as was agreed to in the final session. They are both without attorneys.	<ul style="list-style-type: none"> A. Let the written agreement stand if the wife reads it and agrees. B. Raise the issue immediately to both parties (so that the wife notices the difference) and let them decide what to do. C. Raise the issue immediately to both parties (so that the wife notices the difference) and insist that the written settlement reflect the agreement that everybody made at the end of the session.

4	Two months after you have successfully mediated a land dispute case, one of the parties contacts you and asks if you are interested in investing in his next land development project.	<ul style="list-style-type: none">A. Refuse to invest since you must maintain the appearance of propriety.B. Agree to invest, but only if the other parties consent in writing that this is unrelated to their dispute.C. Agree to invest if you want to. There is no conflict of interest with the old case since it is unrelated to this project.
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I. Licensing and Qualification

As mentioned earlier, mediation does not require a law degree. Many kinds of community-based mediations can take place with non-legally educated mediators. Some countries do have mediation licensing requirements. In the U.S., there is no general license but some local mediation programs require licenses. Many private mediation companies and court-annexed programs have minimum standards and continuing education requirements. The International Mediation Institute¹³⁹ is developing the first international mediation license.¹⁴⁰ The goal is to provide quality assurances in domestic and international mediations, particularly in areas of the world where mediation is not as common.¹⁴¹

While there is no licensing regime in Georgia, the Civil Procedure Code of Georgia sets some limits. For instance, someone who served as a mediator cannot subsequently sit as a judge or lawyer in that case. The law further provides minimum ethical standards for those involved in mediation.¹⁴²

139 The International Mediation Institute (IMI), based in The Hague, Netherlands, was formed by the American Arbitration Association, the Singapore International Arbitration Centre and the Netherlands Mediation Institute. See IMI website, available at <http://www.imimediation.org/> (last visited April 1, 2014).

140 *Coming Soon: International Mediator Certification*, American Bar Association Journal, 11 (October 2007).

141 *Id.*

142 See CCPG, art. 31(1)(e) (mediators cannot serve as judges) and art. 94 (mediators cannot serve as counsel) in the same case.

J. Sample Mediation Exercises

The participants can be grouped into teams of three. Each team will have one person play the mediator and the other two people will play the actors in the dispute.

1. The mediator's first task is to introduce the process and rules. The mediator should make sure the participants understand:
 - The process is confidential
 - The process is voluntary
 - Nobody can interrupt
 - The mediator might hold group sessions and private caucuses
 - The parties are here to resolve their conflict
2. Next, the mediator should invite the parties to briefly tell their sides of the story. The mediator should listen carefully and try to learn the parties' issues as well as their interests in the dispute. She should generate a list of interests and issues, using the interests and issues worksheet on the next page. The parties should help the mediator in this process and explain if the mediator has made a mistake or missed or misstated anything.
3. Once she has a list of issues, the mediator should direct a series of discussions on each specific issue with the parties. The mediator introduces each issue and tries to frame it in a positive manner. The parties will engage in the discussion, directed towards each other, while the mediator facilitates the process, making sure emotions are handled and matters are framed in a positive light. The purpose of the issues discussion is to make sure that all issues are understood by both parties.
4. Next, when the parties have had a chance to explain their views on all the issues, the mediator directs collaborative, problem-solving sessions. They can be in the form of brainstorming or other option-generation techniques. The goal is to develop options that satisfy the parties' interests. The mediator should work to resolve the issues by playing an encouraging role and re-framing any non-productive statements when appropriate.
5. If the dispute is resolved, the parties should write down the basic terms of the agreement, using the settlement sheet provided.

Exercise – Mediation Case 1: Fallen Fence

One week ago, Vako and some of his friends were walking back to his house after a night at the local disco and they walked through Irakli's yard. They jumped over Irakli's wooden fence. Vako accidentally broke about three meters of the fence when he stepped on the top. Irakli was sitting on his porch and saw what happened. He ran over and grabbed Vako, but the others ran off. Irakli insisted that Vako pay for the repairs. Vako said he would. They exchanged phone numbers.

The next day, when Irakli called Vako with an estimate of \$300, Vako said he did not have the money and thought it was an "outrageous" amount. Irakli says he will take Vako to court if he does not pay, but agreed to try mediation first.

Vako is worried because he has already gotten in trouble for his drinking in the past. He would like this problem to go away but he does not have \$300. He also wonders if Irakli has inflated his price to punish him. Irakli is very frustrated because the boys seem to run through his yard all the time, which kills his plants and flowers. Irakli feels that Vako is lucky since he did not call the police and have him arrested.

Exercise – Mediation Case 2: Administration Argument

The Rector of the East Georgian Law School (EGLS) has been called in to mediate a dispute between two of his employees, the Director of Administration and one of her newer employees. The Director of Administration, Tamar, has been working at EGLS for over ten years and is responsible for supervising a staff of ten people. Oto works for Tamar and has been at EGLS for six months. Recently, Oto requested a change to his work schedule to work late on Mondays and Tuesdays and to come in to work late on Thursday mornings. Tamar rejected this request. Oto seeks mediation by the Rector.

In Oto's last job, he had a lot of input into decision making and had flexible hours. However, he feels that in this job, Tamar does not even listen to his ideas. Oto proposed the schedule change because:

1. He wanted to take a special English language class on Thursday mornings;
2. Monday and Tuesday are the busiest days; and
3. Students might appreciate having extended appointment hours at the office.

However, he feels that he didn't even have the chance to give his reasons for the schedule change. Tamar seemed very short with him, immediately saying that it wouldn't be possible, and as a result, Oto has been reluctant to bring it up again.

Tamar is regarded as a serious and respected director. She feels that staff can make suggestions but once a decision is made, it needs to be respected. Tamar thinks Oto is a little strange and believes that Oto's suggestions are sometimes a little crazy. She is not opposed to change, as long as it is well thought out and well-reasoned. She has been under a lot of stress lately because work has been very busy and she has not had enough time with her family. She knows that sometimes she is short-tempered with people. She is skeptical about mediation and afraid it could undermine her power as the director. What if people reacted to all of her decisions this way and everything had to be mediated? She wouldn't be able to run her department. And besides, English class is not more important than Oto's job at the school.

Exercise – Mediation Case 3: Joint Project Argument

Two graduate student employees at the Georgian University of Science are now avoiding each other after a heated interchange about one week ago. Their responsibilities in the department require them to work together on projects and until recently, they worked well together. The dispute involves who gets credit for work that was done as a team. Mary feels that Eka, her coworker, has been taking too much credit for work she performed. Eka feels that Mary's position was an unfair attack on her, and she has been avoiding contact with Mary ever since.

Mary is concerned about her working relationship with Eka. On the last four joint projects, she feels that Eka took credit for ideas that were hers. During reports to the faculty committee, Mary has heard that Eka often presents the results of their projects without mentioning her involvement. She believes that she also says "I" rather than "we." For some reason, Eka was always the one the director asked to report the results to the faculty committee.

Mary was upset the last time she heard about Eka's presentation. She confronted Eka in the laboratory, but she yelled at her and has avoided her ever since. Mary and Eka are old friends from Batumi, and both would like to remain friends. Mary is worried about her own advancement at the University, and feels that she cannot trust Eka. She has worked hard in the department and she is not getting the recognition that she deserves. Eka does not seem to care.

Eka is very upset that Mary complained to their director that she was misrepresenting their joint work. She knows that her name was on all the reports. She also feels that during joint projects, ideas merge and become shared. The responsibility of presenting completed projects has always fallen on her. Giving these presentations is difficult and takes extra work. Why should she be surprised if other people give her the credit?

He feels that Mary was too tough on him and since Eka hates conflict, she decided to avoid her after that. However, she knows that Mary is very smart and they make a good team at the office. She is worried that this dispute makes her look bad to the University and feels that she should apologize for making this such a big issue.

Exercise – Mediation Case 4: Movie Star

Teo is a beautiful young actress. A few years ago, she graduated from acting school and started to perform in Tbilisi. She played minor roles in a few small movies and then got a big break when she met Nodari at a party. Nodari is a famous movie producer and director in Georgia. He agreed to let her read for a supporting role in a Georgian movie called “My Crazy Family.” The director gave her the part. The movie was a hit and people loved her.

Last month, Nodari announced that he would produce the biggest movie in the history of Georgian cinema. This movie was called “David, the Great King.” He was going to spend over \$10 million producing this and already had offers to show the film at the famous Cannes Film Festival in France later this year. An American film distribution company also expressed interest in the film.

A few days after the announcement, Nodari called Teo and asked her to come to his office. He told her that he wanted her to co-star as the great king’s wife. This would make her the most famous actress in Georgia. She might even become famous in Europe and America. He asked Teo if there was anything embarrassing or controversial in her past. She said no. He offered her one million dollars for this part. This would include promotional obligations and possibly a world tour. She agreed and signed a contract that day. This news was announced to the public the following day.

A few weeks later, the casting director, Dito, visited Teo and showed her a letter he had received from an anonymous source claiming that Teo was not ethnically Georgian, but rather Russian. She confirmed this but didn’t understand why this mattered. Dito explained that Nodari was very unhappy about this. They could not allow a Russian actor to play the role of King David’s wife. He said this could be controversial in Georgia. Nodari is also upset that Teo did not say anything about this when he asked her if there was anything controversial or embarrassing about her. Nodari instructed Dito to terminate Teo’s contract.

Teo is very upset. Her entire career is now in jeopardy. She feels that it shouldn’t matter whether she is ethnically Georgian or Russian. She would be acting a part and would do it well. She wants to play the role, but at the very least wants to be famous and feels that she deserves better than this.

However, she does not want to get a reputation for being difficult. As such, she asked to privately mediate this matter.

Nodari cannot afford to cast somebody controversial who might ruin the entire project. When he cast her for the role, he did not know she was Russian. He feels that she should have told him. Nodari would like to avoid public controversy and needs to resolve this quickly so he can begin producing his movie. The producer has not named a new lead role and Teo's termination has not yet been made public.

Exercise – Mediation Case 5: BMW

Nearly a year ago, Dr. Beridze bought a new BMW 535i automobile from Motion Auto BMW, a Tbilisi shop, for \$56,800. This was Dr. Beridze's first purchase of a new car. Dr. Beridze was quite excited about this new luxury automobile. Motion Auto receives its cars from Deutsch Ost, the only distributor currently authorized to import new BMWs into Georgia.

At the time of the sale, Dr. Beridze signed a "Retail Buyer's Order" and an "Acknowledgement of Disclosure" form. The disclosure form required Dr. Beridze to acknowledge that the automobile might have sustained minimal damage at some point and that he had inspected it and had agreed to accept it. However, no reference to any specific repair or known damage was listed on the form. He does not recall any discussion about damage at the time of sale and may not have read the entire form.

He was quite satisfied with the purchase and drove the car for six months before taking it to "G Finish", an independent car detailing shop. He wanted to make the car look "snazzier than it would normally appear" even though the car's current appearance was acceptable. He had not noticed any flaws or other problems in the finish. After inspecting the car, the detailer, Omar Kaladze, informed Dr. Beridze that the car had been partially refinished already. Dr. Beridze then took the car to another dealership. The manager there was hesitant at first, but did agree with the detailer that it was likely that the car had been refinished.

After confronting Motion Auto, Dr. Beridze eventually was able to determine that the car's paint had been refinished because of acid rain damage sustained during transit from BMW's manufacturing plant in Germany to Georgia. It was also learned that both companies had adopted a policy that they would not disclose any damage to the customer if the cost of repairing such damage was less than 3% of the manufacturer's suggested retail price (MSRP). In this case, the MSRP was \$58,000. The cost for refinishing Dr. Beridze's car was \$1550.00. So, no disclosures were made when the car was sold to Dr. Beridze. The manager of Motion Auto, Levan Rosisvili was quite rude about the matter, which made Dr. Beridze furious.

Dr. Beridze has now brought a claim against Motion Auto alleging that failure to disclose the refinishing constituted numerous causes of action including fraud and breach of contract, as well as a violation of good faith.

He also is threatening to tell everybody in his community, including other doctors (who might want to buy a BMW), that he was cheated by Motion and BMW.

Dr. Beridze hasn't suffered much in monetary damages, although the car is worth a little less, but he feels cheated. He would like to be treated better from Motion. Part of his reason for purchasing the car is to command great respect in his community. Motion feels that this is not its fault, although it admits it didn't check into it until Dr. Beridze informed them. It sees Dr. Beridze as a rich complainer with no real damages. Motion would like to have BMW Ost pay for any damages but also wants to establish itself in the community as a trustworthy seller of cars—a lawsuit is bad publicity. Motion is not sure whether BMW Ost will agree to pay.¹⁴³

143 Adapted from Kimberlee K. Kovach training materials © 2012.

Exercise – Mediation Case 6: Lysteria Hysteria

From Adjara With Love (“FAWL”) is a Georgian company that exports fruits and vegetables to countries in Europe. Over half of the company’s business and revenue is currently generated within Georgia. The owners (Mamuka and Archil) began the export division of the business a little over two years ago and it has grown fast. One of FAWL’s first export customers was Warsaw Pact based in Poland. Currently Warsaw Pact is responsible for nearly one-half of FAWL’s export business; the export business gross revenue was nearly €350,000 last year. Once the produce is received by Warsaw Pact, it is distributed among several restaurants in the Warsaw area. FAWL exports tomatoes, onions and eggplant to Warsaw Pact which it then sells to the Warsaw restaurants. This matter concerns tomatoes, which were sold at about €0.95 per kg. The last shipment that Warsaw Pact ordered (and the one in question) was for approximately 2500 kg of tomatoes, along with other produce.

About six months ago, a few days after the order was received, three restaurants complained to Warsaw Pact that several of their customers got sick after eating the Caprese Salad with the tomatoes. In fact, numerous people became sick after eating at several restaurants. While the restaurant owners thought at first it may be some type of food poisoning, after the particular symptoms were discussed in detail, it was preliminarily determined that it was actually more likely due to listeria.

One of the customers was a physician who then had asked for a sample of the tomatoes from the upscale restaurant, Napoli. The test confirmed that the listeria bacteria were present in some of the tomatoes. Once Warsaw Pact learned this information, it contacted FAWL and suspended all orders. Warsaw Pact also refused to pay for the produce shipment in the amount of approximately €9,500. In response, FAWL has assured Warsaw Pact that it could not have been their tomatoes and that all sanitary regulations were complied with. Mamuka, on behalf of FAWL, has insisted that there must have been some other intervening cause for the illnesses.

The contract for shipping between the two companies provided for matters such as delivery dates and payments, but included no provision regarding potential liability in instances such as this. A few weeks ago, Warsaw Pact received formal and legal complaints from the restaurants they provide produce to, and have been requested to pay potential damages for the illness in the amount of €150,000. (This sum consists of approximately €40,000 per each of three restaurants, plus claims for attorney's fees). Then, Warsaw Pact made a claim against FAWL in the amount of €200,000.

The contract included a dispute resolution clause, which essentially stated that the parties would attempt to resolve any dispute through negotiation and mediation before proceeding with formal legal action.

Adam has owned and operated Warsaw Pact for nearly 20 years. He is assisted in the business by his daughter, Maria, who is about to take over the business. He is embarrassed and fears that he will lose all of his business. He had hoped Maria would be running the company by next year. She is quite upset and may reconsider the business in light of this problem. The restaurants did tell Adam that they had no choice but to file claims against Warsaw Pact, even though they realized that it had little control over the situation and this is the first major problem.

Warsaw Pact hopes that FAWL can assist them, both monetarily and with the reputational issues. They feel it is clearly FAWL's responsibility – they have a duty to sell products that are not contaminated. Warsaw Pact is looking to FAWL for help in paying the damages. An important point is finding a way to re-establish their reputation so that sales can increase. While no orders have been placed with FAWL since this incident, the company has not yet decided whether to continue business with them.

FAWL realizes that the problem may be with the growers but could also be due to storage in Poland—it is not proven either way. FAWL also knows that its local Georgian growers cannot easily contribute to the damages and in any event, it would be impossible to identify which growers are at fault. FAWL did everything legally required of it in Georgia to ensure safety. FAWL is willing to contribute some amount toward the damages, but would like to preserve its reputation and insists on some future export business guarantees, which is essential to its survival.¹⁴⁴

144 Adapted from Kimberlee K. Kovach training materials © 2012

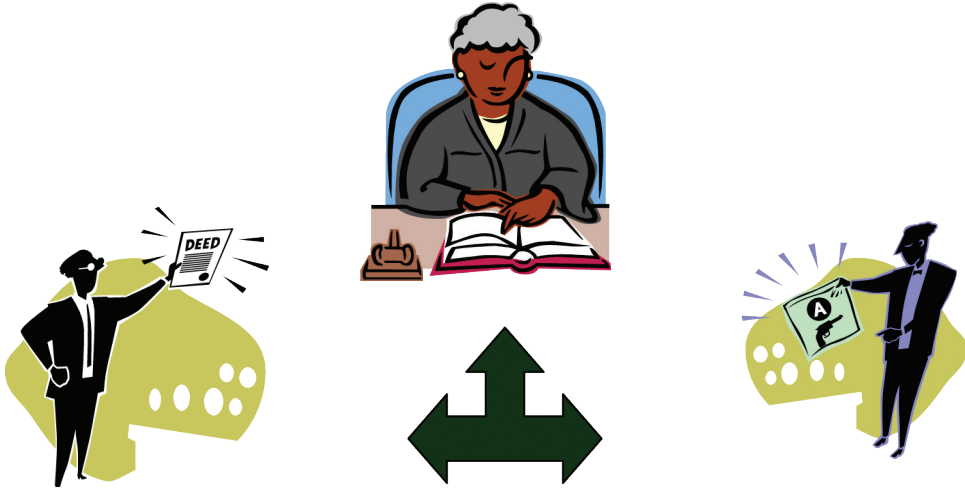
Worksheet: Interests and Issues

	Party A	Party B
Interests		
Issues		

Worksheet: Mediation Settlement

Issue	Resolution Terms

Chapter 4 – Arbitration



“მჯობნის მჯობნს რა დალევს”
“Nobody is undefeatable”
(Georgian Proverb)

A. What is Arbitration?

Arbitration is the third major ADR (alternative dispute resolution) method. In arbitration, the parties submit their dispute to a neutral third party (usually called the “arbitrator” or if more than one, then called the “arbitration panel” or “tribunal”). This third party considers the evidence the disputing parties have submitted and renders a decision called an “award.” As will be discussed later in the text, the award is usually binding on the parties, however, in some cases, the award can be non-binding.

1. History of Arbitration

Arbitration has a long history. It is mentioned in ancient Greek writings as well as in the Christian Bible.¹⁴⁵ Modern commercial arbitration originally developed in Europe during the Middle Ages.¹⁴⁶ Merchants would often travel long distances to markets where they would buy and sell goods and services. Since travel was dangerous and expensive, disputes needed to be resolved quickly and near the location of the markets. However, the standing courts at that time were unable to resolve those disputes quickly and had no knowledge of the merchants' industry standards. This was important since these industry standards were developed to facilitate trading relationships among parties from different countries and cultures. As a result of the courts' limitations, merchants developed private arbitration tribunals that were able to resolve disputes efficiently, often involving industry experts and industry standards.¹⁴⁷

When English settlers moved to America in the seventeenth and eighteenth centuries, they brought these arbitration models with them. As a result, arbitration played an important role in resolving commercial disputes in the English colonies of America.¹⁴⁸ In 1768, the first permanent arbitration organization was established by the New York Chamber of Commerce.¹⁴⁹ It is even reported that America's first President, George Washington, inserted an arbitration clause in his will to govern any disputes among the beneficiaries.¹⁵⁰ However, at that time, courts in the US, as in most countries, could not enforce arbitration awards, thereby keeping arbitration outside the formal judicial system.

For many centuries, Russian and Georgian traders engaged in *ad hoc* forms of arbitration. While arbitration statutes were drafted on several occasions, they were never enacted into law until the Soviet period.¹⁵¹ Soviet arbitration commissions were formed as early as 1922 to handle commercial disputes and the Foreign Trade Arbitration Commission was established in 1932

145 STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS*, 9 (ALM ed., 2002).

146 Sarah Rudolph Cole and Kristen M. Blankley, *Arbitration*, *HANDBOOK OF DISPUTE RESOLUTION*, 318, 320 (Moffitt and Bordone ed., 2005).

147 *Id.*

148 Boston, like many colonial American communities, passed laws encouraging arbitration. Patterson et al., *supra* note 4, at 118.

149 Bennett, *supra* note 145, at 9.

150 Patterson et al., *supra* note 4, at 118.

151 *Commercial Arbitration in Russia (Historical)*, The Chamber of Commerce and Industry of the Russian Federation, available at <http://www.tpprf-mkac.ru/en/-whatis-/history> (last visited April 1, 2014).

to handle foreign trade disputes.¹⁵² The FTAC continued in this capacity throughout the life of the U.S.S.R.

In 1997, the Law of Georgia on Private Arbitration was passed.¹⁵³ Arbitration began to play an important role after that but unfortunately, became associated with corruption and industry bias. The new Georgian Law on Arbitration was passed in 2010 to better equip Georgia for domestic and international arbitration and provide limited court involvement in areas like enforcement and recognition.¹⁵⁴

In the twentieth century, as case backlogs began to grow in the West, the courts of many nations began to accept arbitration as a legitimate method of resolving disputes. In the U.S., the 1925 Federal Arbitration Act (FAA) made arbitration clauses in commercial contracts valid and enforceable.¹⁵⁵ Other countries soon followed, leading to the rise of arbitration forums all over the world.¹⁵⁶ In 1923, the International Chamber of Commerce in Paris founded the International Court of Arbitration, which has become one of the best-known arbitration forums in the world.¹⁵⁷ Other important arbitration forums include the American Arbitration Association in New York City¹⁵⁸ and the London Court of International Arbitration.¹⁵⁹ In the past decade, Asia's economic rise has led to the impressive growth of Asian arbitration forums. The three largest Asian forums today are the China International Economic and Trade Arbitration Commission (CIETAC),¹⁶⁰ the Hong Kong International Arbitration Centre (HKIAC),¹⁶¹ and the Singapore International Arbitration Centre (SIAC).¹⁶² In this region, Turkey is currently pressing

152 *Id.*

153 Signed into law April 19, 1997.

154 See Sub-section D, *infra*, for more discussion of this law.

155 See FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 – 307 (1970).

156 Today, international corporations prefer international arbitration over all other forms of dispute resolution. See, e.g., Dr. Loukas Mistelis, *International Arbitration—Corporate Attitudes and Practices—12 Perceptions Tested: Myths, Data and Analysis Research Report*, THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 525, 538 (2004).

157 See International Chamber of Commerce website, available at <http://www.iccwbo.org/policy/arbitration/id2882/index.html> (last visited April 1, 2014).

158 See American Arbitration Association website, available at <http://www.adr.org/> (last visited April 1, 2014).

159 See London Court of International Arbitration website, available at <http://www.lcia-arbitration.com/> (last visited April 1, 2014).

160 See China International Economic and Trade Arbitration Commission website, available at http://www.cietac.org.cn/index_english.asp (last visited April 1, 2014).

161 See Hong Kong International Arbitration Centre website, available at http://www.hkiac.org/HKIAC/HKIAC_English/main.html (last visited April 1, 2014).

162 See Singapore International Arbitration Centre website, available at <http://www.siac.org.sg/> (last visited April 1, 2014).

forward with legislation to create the Istanbul Arbitration Center¹⁶³, while Georgia has also joined the rush, creating many private arbitration centers.

2. Arbitration for Many Kinds of Disputes

While most of the forums mentioned above focus on handling commercial disputes, it is important to understand that arbitration can and is applied to other areas of the law. In many countries, labor disputes are now handled by arbitration. Collective bargaining agreements often have arbitration clauses that require parties to send disputes to arbitration. Many professional sports use arbitration to resolve salary issues. Even the Olympics uses arbitration to resolve disputes.¹⁶⁴ Construction contracts between builders and owners often have arbitration clauses. In addition, arbitration clauses have become standard in securities contracts, intellectual property agreements, and many types of consumer sales contracts.

3. How Arbitration is Different from Litigation and Mediation

Litigation: Arbitration looks and feels similar to traditional court-sponsored litigation. Both methods involve parties submitting evidence to a neutral party that then renders a decision. Both methods usually involve the assistance of lawyers or legal representatives and both usually involve a binding decision (which is enforceable by the courts), by which the parties must abide. However, there are a number of important differences between arbitration and litigation:

- In arbitration, the parties decide the conditions of the arbitration proceedings. Among other things, the parties decide where and when the arbitration will take place, what procedural and substantive legal rules apply, who will serve as the arbitrator, what issues are subject to arbitration, and what remedies are available. In litigation, the parties have virtually no choice in these matters.

¹⁶³ See, Mehmet Gün, *Can Turkey Become a Major Financial, Commercial Centre - Again*, Business New Europe, April 26, 2013 available at http://www.bne.eu/story4856/THE_INSIDERS_Can_Turkey_become_a_major_financial_commercial_centre_again.

¹⁶⁴ See Tribunal Arbitral du Sport (Court of Arbitration for Sport) website, available at <http://www.tas-cas.org/> (last visited April 1, 2014).

- Arbitration tends to be faster than litigation. In many countries, litigation can drag on for years. This is usually because of case backlogs and heavy caseloads in the courts. However, with arbitration, the parties can choose a forum that is ready to hear their dispute quickly.
- Arbitration tends to be less expensive than litigation. This is partly a result of arbitration being a more streamlined process. Compared to litigation, parties involved in arbitration devote less time presenting evidence and witnesses. Therefore, the parties can avoid court-mandated formalities and rules and are able to reach a resolution of the dispute much easier.
- Arbitration is usually closed to the public while court litigation is usually open to the public.
- Unlike litigation, arbitration decisions cannot generally be appealed.
- Finally, arbitration remedies are more flexible than court remedies.

Mediation: Arbitration does have some similarities with mediation. Both are private alternatives to public litigation. Both can take place in private conference rooms or other locations outside of the courts. Both tend to be cheaper and faster than litigation. But, arbitration is also quite different from mediation:

- The arbitrator, after considering the evidence, makes a decision and has the power to award damages to a party. The mediator has no such power and can merely suggest possible resolutions. In other words, with arbitration, the decision making power is in the hands of the arbitrator, with mediation, the decision making power is in the hands of the parties.
- In arbitration, the arbitrator must review the facts and the law like a judge and must employ logic and legal reasoning in order to reach a decision. As such, the focus is on finding a legally sound result. However, in mediation, the mediator may have to employ social skills and subjective analysis to reach a resolution. With mediation, therefore, the focus is on finding the result that best meets both parties' interests.

- In arbitration, the center of attention is on the arbitrator(s). The parties seek to convince the arbitrator that they should prevail. In mediation, the center of attention is on the parties. The mediator listens to the parties and tries to explore ways in which their interests can be met.

4. Different Kinds of Arbitration

Arbitration is generally considered a binding method of dispute resolution. The parties present their evidence and the arbitrator provides a binding decision. The parties must abide by this decision. They have very limited rights to appeal. The decision can be enforced by the public court system. This is the traditional and most common form of arbitration and it is given the technical term, “*binding arbitration*”.

However, more recently, *non-binding arbitration* has also become an option. *Non-binding arbitration* is similar to *binding arbitration* except that either party can reject the arbitrator’s decision within a short period of time following the decision. *Non-binding arbitration* is sometimes used to help maintain party relations. Instead of forcing a decision on the parties, the arbitrator(s) provide an optional decision. The parties use it as a bargaining tool in their negotiations. They can accept it if it meets both parties’ interests. However, the disadvantage is that it can be a waste of time and resources if the parties reject the decision and decide to continue their fight in court or elsewhere.

Non-binding arbitration resembles mediation more than litigation since it tends to be part of a negotiation process, the outcome of which the parties ultimately control. In contrast, *binding arbitration* tends to resemble litigation more than mediation since it involves a final decision made by the neutral party. For purposes of this chapter, when arbitration is discussed, it refers to the traditional model of *binding arbitration*, unless otherwise noted.

It should be noted that parties generally decide at the time of contracting whether the arbitration they agree to use will be binding or non-binding. This detail is specified in the arbitration clause in the parties’ contract. This arbitration clause will be explored further in this chapter.

Arbitrations can also be classified as either *administered* arbitrations or *ad hoc* arbitrations. *Administered arbitration* refers to arbitration that is conducted at an arbitration center such as the ICC in Paris or Georgia's Chamber of Commerce and Industry. These arbitration centers provide a room for the hearings, a list of arbitrators, a set of procedural rules and various other services, usually for a fee. *Ad hoc* arbitration refers to the parties' choosing to develop their own forum and rules for the specific purpose of resolving their dispute. Usually, the decision between *administered* and *ad hoc* arbitration is made at the time of contract formation.



When negotiating a contract, if the parties want to resolve their dispute through arbitration, they should agree to one form or the other and state it in an arbitration clause in the contract.

The obvious advantage of *administered* arbitration is that most of the details of the process are already determined; the parties merely have to follow the chosen forum's procedures to begin arbitration. This is why the vast majority of parties choose *administered* arbitrations.¹⁶⁵ In the case of *ad hoc* arbitration, the parties must decide the details (procedural rules, fees, arbitrators, etc.) either at the time of contracting or after a dispute has arisen, and will likely need a lawyer to draft these rules. However, *ad hoc* arbitration does allow the parties to have greater flexibility on the details since they do not have to follow a particular arbitration center's rules, including fees.

Administered and *ad hoc* arbitrations can be either binding or non-binding.

¹⁶⁵ 76% of corporations prefer *administered* arbitration over *ad hoc* arbitration. See Mistelis, *supra* note 156, at 561.

Study Questions

In the following disputes, choose which kind of arbitration is most appropriate and why:

Option 1. Binding *Administered* Arbitration

Option 2. Non-binding *Administered* Arbitration

Option 3. Binding *Ad Hoc* Arbitration

Option 4. Non-binding *Ad Hoc* Arbitration

- A. Tsisi sells photocopy services and Achiko wants to sign a contract to purchase 1,000 GEL of photocopy services each month for a one-year term, renewable at the end of the year.
- B. Salome is an architect and is offering her services to a Turkish builder that will need her to help to design a shopping mall to be constructed in Batumi.
- C. Temo wants to purchase a special car from David.
- D. Ozurgeti Oil Company is interested in engaging a Chinese drilling company to perform services off the coast of Guria.
- E. The new Georgia Professional Football League is asking you to design a standard contract that it will offer to all football players in this new league.

B. Advantages and Disadvantages of Arbitration

1. Advantages

There are many advantages to using arbitration as a dispute resolution tool. The U.S. State Department advises in its 2013 Investment Climate Statement for Georgia that arbitration should be the dispute resolution method of choice in Georgia.

It is recommended that contracts between private parties include a provision for international arbitration of disputes because of weaknesses in the Georgian court system. Litigation can take excessively long periods of time. Disputes over property rights have at times undermined confidence in the impartiality of the Georgian judicial system and rule of law, and, by extension, Georgia's investment climate. The new government has identified judicial reform as one of its top priorities, although it is too early to assess progress toward that goal.¹⁶⁶

The following is a list of the most important advantages of arbitration:

- **Cost.** Arbitration is less expensive than litigation. This is partly because the process is usually streamlined compared to court rules. It is also because arbitration usually has no appeals process.
- **Speed.** Arbitration tends to be much faster than litigation. As mentioned above, arbitration, unlike litigation, generally does not allow for appeals. With litigation, however, parties can appeal at least once and sometimes several more times. In addition, many court systems have very large case backlogs, forcing parties to wait a long time for hearings.
- **Finality.** Because arbitration has no appeals, the arbitrator's decision is usually final. Often, this is a big advantage to the parties.
- **Domestic Enforcement.** Now that Georgia has passed its Law on Arbitration, Georgian Courts can directly enforce arbitration awards.

¹⁶⁶ 2013 Investment Climate Statement – Georgia, Bureau of Economic and Business Affairs, U.S. Dept. of State, April 2013 Report, available at <http://www.state.gov/e/eb/rls/othr/ics/2013/204646.htm> (last visited April 1, 2014)

Negotiated or mediated settlements are not as easily enforceable.

- **International Enforcement.** Under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), which Georgia has signed, any arbitration award made in a signatory country is automatically enforceable in all the other signatory countries.¹⁶⁷ This is a big advantage for international disputes since there is no similar international enforcement regime for court decisions.¹⁶⁸
- **Preservation of Relationships.** While arbitration does have adversarial aspects, it is generally less adversarial than court litigation. This may help preserve relationships between parties.
- **Privacy.** Unlike court litigation, arbitration is usually a private process. This can be a big advantage if the parties do not want the public to learn the details of their dispute.
- **Flexible Remedies.** Arbitrators often have the flexibility to award creative remedies that the courts cannot, such as awarding attorney’s fees to the prevailing party.
- **Expertise of Arbitrator.** The parties can choose arbitrators that have expertise in their area of business, for instance, in garments or oil extraction. Most court systems, on the other hand, do not have expert judges for specific areas of law and so the parties may have a presiding judge with no specific knowledge of their industry. Thus, in cases where specific knowledge in an area of business or law is important, the arbitration process may yield a more just and well-informed result.
- **Impartiality of Arbitrator.** Parties to international disputes often worry that the judges in the home country of a party might favor that party—sometimes called “home court advantage.” But with

¹⁶⁷ Over 140 countries have signed the New York Convention.

¹⁶⁸ *But see*, THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS, Hague Conference on Private International Law, June 30, 2005, 44 I.L.M. 1294, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited April 1, 2014). This convention allows for recognition and enforcement of choice of forum clauses and resulting judgments in commercial disputes among signatory countries. The Convention is drafted but awaits ratification. At the time of writing, only one country, Mexico, has ratified it. *See, Convention Inches Ahead*, ABA Journal 60 (December, 2007). The US and EU signed in 2009 but have not yet ratified the treaty. http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited April 1, 2014).

arbitration, the parties can choose the arbitrators and thus eliminate potential national bias.

- **Flexible Procedures.** Parties can often choose whether they want a complex procedure that looks like litigation or a more simple procedure. With court litigation, the parties must follow the legal procedures, even if they do not like them. In a 2004 survey, this advantage was cited as the top reason why international corporations chose arbitration.¹⁶⁹

¹⁶⁹ Mistelis, *supra* note 156, at 543.

2. Disadvantages

- **Costs.** Although arbitration is generally less expensive than litigation, it can still become expensive. The parties must pay for the arbitrator's time, the courtroom, the fee of the arbitration forum, as well as all the normal litigation fees like attorney's fees and related costs. This is usually more expensive than negotiation and sometimes more expensive than mediation.
- **Speed.** Although arbitration is generally faster than litigation, it can be slower than negotiation and mediation. The parties usually need more time to prepare their case for arbitration than if they were pursuing mediation or negotiation. International arbitration can sometimes become as lengthy and slow as litigation.
- **Lower Compliance.** Because the arbitrator's award is not the product of negotiation and compromise, there is a greater likelihood of non-compliance with the award. Therefore, the parties may have to spend more on extra lawyer costs required to pursue judicial enforcement.
- **No Public Hearing.** In some situations, a party may prefer a public hearing, for instance, to publicly defend herself against claims or to punish the other side with possible public embarrassment. Since arbitration does not allow this, it is a potential disadvantage to parties in certain situations.
- **Preservation of Relationships.** While arbitration can potentially better preserve the parties' relationship than litigation, the other two forms of dispute resolution, negotiation and mediation, are even more effective at this.
- **Uncertain Results**
If the arbitrators are acting in the role of *amiable compositeur*, they will judge the case based on principles of equity, not necessarily the governing substantive law. This may lead to uncertain results.
- **Trust**
In some jurisdictions, public trust in arbitration may be low, due to past experiences with fraud, conflicts of interest or perceived pro-business bias.¹⁷⁰

¹⁷⁰ See, e.g., Michael D. Blechman, *Assessment of ADR in Georgia*, East West Management Institute, 2011, available at <http://www.ewmi-jilep.org/images/stories/books/assessment-of-adr-in-georgia.pdf>, (last visited April 1, 2014).

Study Questions

As the above demonstrates, many, but not all, disputes can benefit from arbitration. Assume you are the lawyer in the hypothetical cases below. Should you insert an arbitration provision in your client's contract? Explain why or why not? Is there additional information that would help you decide?

- A. You represent the German Lux Car Repair Center, and your client needs a standard contract for customers.
- B. You represent the owner of a natural gas pipeline in Kakheti and are negotiating a long-term contract with a Kazak company for the operation of this pipeline.
- C. You represent your cousin and her friend who are opening a small shop in Tbilisi to sell imported clothes. They need to form a business and figure out how to resolve any disputes that might arise between them.
- D. You represent a factory making batteries in Gori. Your client would like you to draft a contract with a metal supplier from Belarus.

C. Arbitration Agreement

Under Georgia’s Law on Arbitration,¹⁷¹ (“LoA”) reprinted in full in the Appendix of this book, a dispute is subject to arbitration if the parties’ contract has a written arbitration clause or if they agreed to arbitration in a separate agreement.¹⁷² This agreement to submit to arbitration must be in writing, but this requirement can be fulfilled by a written exchange of communications that demonstrates an agreement to arbitrate.¹⁷³ For instance, parties may send emails or letters to each other stating that they agree to arbitrate any disputes between them but fail to actually include such a clause in their agreement. Under LoA Article 8, this might suffice as a written agreement to arbitrate. There are special rules for parties that are natural persons. If one of the parties is a natural person or administrative agency, the arbitration clause must be included in a formal contract between the parties.¹⁷⁴ If both parties are natural persons, the contract must be signed by their attorneys or certified by notary.¹⁷⁵

However, not every matter may be arbitrated. The LoA limits any arbitral tribunal to hearing “property disputes of a private character which are based on an equal treatment of the parties and that parties are able to settle between themselves.”¹⁷⁶ Any matter that does not meet all of these standards would presumably fall outside the scope of this law and not be subject to arbitration, even if the parties had a written arbitration clause in their contract.

Study Questions

The Georgian Law on Arbitration sets forth certain requirements in order for arbitration to lawfully take place. The following questions probe these requirements.

171 LAW OF GEORGIA ON ARBITRATION (2010), [hereinafter LoA].

172 *Id.* art. 8 (2).

173 *Id.* art. 8 (3-6).

174 *Id.* art. 8 (8).

175 *Id.* art. 8 (9). This special requirement may be eliminated in 2014.

176 *Id.* art. 1 (2).

- A. Would a series of SMS text messages between the parties indicating an agreement to arbitrate all disputes constitute a valid written arbitration agreement under the LoA? What if the text messages occurred *before* the parties signed a written contract that had NO reference to arbitration? What if the messages occurred *after* the signed contract? Would it matter if there was a clause stating that the contract constituted the entire agreement between the parties and any modification or amendment must be in writing?
- B. In regards to the requirement that the arbitration agreement be in writing, why does Article 8 set a higher standard for disputes involving parties that are a natural person? What are the unique dangers for a natural person in arbitration? What rights does a natural person lose in arbitration? Does a natural person *gain* any advantages in arbitration?
- C. Article 1 limits the arbitral tribunal to *property disputes of a private character*. Would the following cases fall within this definition?
1. Your client is enrolled at the privately-owned University of Kazbegi. The contract included an arbitration clause, which was signed and notarized by both parties. She is 21 years old and while she was in class, a bookshelf fell on her head and she was injured. Other classmates were injured too.
 2. Your client is the Digomi Hypermarket. Digomi has a contract to purchase 100 bottles of Chacha each month from Likhi Mountain Drinks Company. Likhi sells its drinks all over Georgia. The contract has a standard arbitration clause. Digomi recently learned that Likhi sent it Chacha that was poisoned with chemicals that could cause blindness. Digomi has sold about 50 bottles of this Chacha already. Digomi sued Likhi but Likhi claims that the dispute must go to arbitration.
 3. The Svaneti Clothing Company has a dispute with its landlord in the town of Khaishi. Svaneti makes high-quality, traditional clothes for export. It employs more than one-half of the adults in Khaishi. Svaneti is threatening to close down operations in Khaishi and move if the dispute is not resolved. If Svaneti closes the factory, over one-half of the people in town will lose their jobs. The landlord and Svaneti have a lease agreement with an arbitration clause for all disputes.

1. The Basic Arbitration Clause in a Contract

Usually, parties agree to arbitration at the time of signing their original contract. Below is a standard arbitration clause offered by the American Arbitration Association (AAA). This and other standard clauses are offered only as examples and the parties are free to develop their own arbitration clauses:

AAA Arbitration Clause

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

In this example, the parties have agreed to have their dispute resolved by AAA-administered arbitration.

Where the parties do NOT have an arbitration agreement but a dispute has arisen and they wish to resolve it through arbitration, the AAA offers the following standard clause:

Post-Dispute Arbitration Clause

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

2. Drafting an Arbitration Clause

In order to arbitrate their dispute, the parties should have a valid, enforceable arbitration clause in their contract. For the clause to be valid, it must be in writing. It must also be unambiguous. That means that an arbitration clause must clearly state that the parties wish to engage in arbitration in the event of a dispute. But, beyond these simple requirements, it is up to the parties or their lawyers to add any important details. In some situations, the basic arbitration clauses set forth above will suffice. But, in other situations, more

detail may be necessary. In either case, the arbitration clause is the key to a successful arbitration.

When determining what details should be added to any basic arbitration clause, the parties need to consider a number of key issues. These issues will arise during the arbitration process (to be discussed in more detail below). A good lawyer should anticipate these issues and, during the initial contracting process, pay particular attention to them to help her client gain an advantage if the need for arbitration should arise. These are the key questions to consider:

a) Should the arbitration be binding?

Usually, an important reason that parties choose arbitration is to have a fast, efficient method of dispute resolution. If the arbitration is not binding, then neither party has finality from the award, and the award functions more like a recommendation offered at the conclusion of the mediation process. In that case, the process may not be fast and efficient. On the other hand, a quick, non-binding arbitration award can provide parties with a valuable, objective assessment of the merits, thus enhancing the possibility of settlement.

This is an example of a clause that makes clear that the arbitration is binding:

Binding Arbitration

Any dispute arising from or in connection with this Contract shall be submitted to the Georgian Dispute Resolution Center for arbitration which shall be conducted in accordance with the Center's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

b) Should the arbitration be administered or ad hoc?

Ad hoc arbitrations offer the parties greater flexibility to develop procedures and rules to fit the dispute. However, administered arbitrations are usually chosen because they come with extensive support and offer a range of arbitrators and rules that the parties can quickly choose. At the time of contracting, many parties prefer to save time and effort and thus choose one of the main arbitration centers for administration.

c) Where will the arbitration take place?

The location of the arbitration is important, particularly for international disputes. The location can determine the cost of the dispute resolution process. If parties, witnesses, evidence, documents, etc. are far away, it can become very expensive. The location can also determine whether the local court will intervene in the process. Additionally, parties should consider whether a pool of qualified and unbiased arbitrators is available in the location. Finally, the location may affect enforcement of awards. If the location is in a country that is not a signatory to the New York Convention, then the arbitration award may have enforcement problems. Here is an example of a clause that sets forth the location of the arbitration:

Arbitration Location

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association's Asia/Pacific Center for Resolution of International Business Disputes in San Francisco in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Simple Location Clause

The place of arbitration shall be Tbilisi, Georgia.

d) What is the number and method of selecting arbitrators?

One of the most crucial questions is who will be the arbitrator(s). Typically, the parties agree on either one or three arbitrators. The standard AAA method is to give each party a list of AAA-approved arbitrators and allow each party to strike out those who are unacceptable. The remaining arbitrators are then ranked. The AAA then chooses a tribunal based on the parties' choices. Another common method is to allow each party to choose one arbitrator and have those two arbitrators (or the arbitration center) choose a third. Alternatively, the parties could also identify a specific person in the arbitration clause. This is risky because the person may be unavailable should a dispute arise years later. The parties could also choose to identify the kind of person that the arbitrator must be, for example, a judge or a Georgian citizen.

Here are some examples:

Arbitrator Selection

The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within ten days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

Or

In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.

Or

The arbitrator shall be a certified public accountant.

Or

The arbitrator shall be a citizen [or national] of Georgia.

Or

The arbitrator shall not be a citizen [or national] of either Georgia or Turkey.

e) Should the parties engage in negotiation or mediation first?

Sometimes, parties should attempt negotiation or mediation prior to pursuing arbitration. The parties might benefit from that effort before submitting to a more adversarial process like arbitration. The following is an example of a clause setting forth negotiation first, arbitration second:

Negotiation-Arbitration Clause

In the event of any dispute, claim, question, or disagreement

arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules.

Alternatively, the parties may wish to engage in mediation first, and only if that is unsuccessful, then engage in arbitration. The AAA offers the following standard clause for this strategy, sometimes called “Med-Arb”:

Med-Arb

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties’ mediation may be asked to serve as the arbitrator.

The last sentence (mediator may serve as arbitrator) is controversial in some places. Some experts believe that a mediator should not serve as the arbitrator because she has been given confidential settlement information that might bias her in deciding the arbitral award. Others would say that it should be left to the parties to decide whether problematic information has been given to the mediator that would bias her as an arbitrator. If they are in agreement that they want to save time and money by using the same person, they should be allowed to do so.

f) Will the tribunal have the power to grant interim relief?

Sometimes the parties will want the arbitration tribunal to provide interim or preliminary relief, prior to the full adjudication of the dispute. For instance, a party may want the other party to stop printing documents that are false or misleading. If, in this example, the parties have to wait six months for a full adjudication, that might be too late. So, to prevent ongoing damages, the arbitration tribunal might order the other party to stop printing the documents immediately (sometimes called an “injunction”) until the tribunal can make a full decision on the merits.

Interim Measures

Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal’s determination of the merits of the controversy).

g) Can the parties consolidate their arbitration with others?

In large, complex cases there are often more than two parties. For instance, in a construction case, the parties to a dispute may include the property owner, the bank that lent the money to the owner, the general contractor, the subcontractor hired by the general contractor, the material supplier, and perhaps the company planning to lease the space from the owner upon completion. In these situations, consolidation of the disputes and parties might save time and money.

Consolidation

The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract

that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

h) To what extent will the parties be required to disclose information?

In some court systems, such as in the U.S., extensive pre-trial disclosure of information is required between the parties, including documents and statements from witnesses and parties. In common law systems, this is called “discovery.” However, under the civil law systems, such as in France, this requirement to share information is more limited. Similarly, under most arbitration rules, the pre-trial disclosure requirements are also limited. However, the parties can determine to what extent they want pre-hearing disclosure in their arbitration.

Disclosure

Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration tribunal], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

i) What remedies can the arbitrator grant?

The parties should consider whether there are any specific remedies that

they may want the arbitrator to be able to impose. Alternatively, they should also consider any specific remedies that they do NOT want the arbitrator to be able to impose.

Remedies

The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.

Or

In no event shall an award in an arbitration initiated under this clause exceed \$100,000.

Or

Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.

Or

If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of \$50,000.

j) What rules will govern the proceedings?

The procedural rules are up to the parties. The parties could draft their own rules, but this is rarely done because of the level of effort required and because most arbitration centers have developed a range of procedures from which to choose. Most arbitration centers will also allow parties to use another center's rules. For instance, the AAA will allow parties to choose AAA as the administrator but use the UNCITRAL Model Arbitration Rules. Parties can also modify any of the set procedures to fit their specific needs—for instance the need for greater speed or the need for live witness testimony with direct and cross examination by the parties.

It should be noted that the Georgian LoA states that “the parties shall include

a reference to the rules of arbitration of the permanent arbitration institution to which the parties have referred to resolve the dispute.”¹⁷⁷

Governing Procedural Rules

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

k) What language will be used in the arbitration proceedings?

In contracts involving international parties, it is helpful to include a provision specifying which language will be used during the arbitration proceedings.

Choice of language

The arbitration shall be conducted in the Georgian language. At the request and expense of a party, documents and testimony may be translated to and from the German language.

l) What substantive law will govern the proceedings?

The parties must identify which jurisdiction’s substantive law will govern. This is called a “choice of law provision.” It is important for the parties to know this at the time of contracting. Otherwise if a dispute arises, the court or arbitration’s conflict of laws provisions will be used to determine which jurisdiction’s substantive law applies. This creates uncertainty for the parties. As a result, a choice of law provision is almost always included in an international contract.

Choice of Substantive Law

This agreement shall be governed by and interpreted in accordance with the laws of the Republic of Georgia.

¹⁷⁷ *Id.* art. 2 (2).

The parties might also want to consider empowering the tribunal to act as an *amiable compositeur* (deciding based on what is just) instead of a judge (deciding based on the law).¹⁷⁸

Amiable Compositeur

The parties hereby give their express and unequivocal authorization for the Arbitral Tribunal to act in the role of amiable compositeur (ex aequo et bono).

Or

The Arbitral Tribunal shall act in the role of amiable compositeur (ex aequo et bono) only if all parties provide express and unequivocal written authorization for such a role.

m) Are the proceedings confidential?

Usually, arbitrations proceedings are confidential. Most of the major arbitration centers provide for confidentiality. However, if the parties are very concerned about confidentiality or if they are drafting their own *ad hoc* arbitration, they might want to highlight this point in their agreement.

Confidentiality

Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

In addition, the parties could choose to modify the language to restrict disclosure of certain subjects, such as, restricting the disclosure of trade secrets.

n) Does the arbitrator have to prepare a written explanation?

Most international arbitration centers have rules requiring that the arbitral tribunal prepare a reasoned decision. But, some domestic arbitration centers

¹⁷⁸ The UNCITRAL Arbitration Law, *infra* note 181, includes this as an option, but the Georgia version omits this.

do not have this requirement. One advantage of having a reasoned decision is that the parties will better understand the decision and be less likely to claim bias or unfairness in the result. One disadvantage is that it provides a possible basis for a court review in the event one party wishes to avoid the decision.

Written Decision

The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.

or

The award shall include findings of fact and conclusions of law.

o) Who pays for the fees and expenses?

Typically, the parties pay for their own attorney's fees and costs while they split the arbitration bill. However, if the parties wish to encourage settlement prior to arbitration, they can agree to award the attorney fees and costs and/or the arbitration bill to the "prevailing party" in the arbitration. Including this type of provision in the arbitration agreement makes arbitration more risky for the parties and might encourage settlement.

Fees and Expenses

Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.

or

The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.

Exercise – Drafting an Arbitration Clause

You are the lawyer tasked to draft an arbitration clause in the following cases. Review each of the 15 issues discussed above and determine which ones, if any, need to be included in your arbitration clause. Then, draft an arbitration clause for each case below.

- A. You represent Murtaz. He would like to buy \$20,000 in gold jewelry from a local supplier.
- B. You represent Manana. She would like to sell her apartment in Batumi to a Turkish investor.
- C. You represent the Adjara Fruit Company. Adjara would like to purchase \$10,000 of fruit each month for one year from a local merchant.
- D. You represent the Zugdidi Telephone Company. Zugdidi Telephone would like to sell mobile phone services to Georgian citizens and is drafting a standard contract for each service agreement it sells.
- E. You represent a Chinese company called C-Car. C-Car would like to build a parts factory in Poti. C-Car needs to enter into a construction contract with a local construction company.
- F. You represent Mariam. Mariam is a famous singer and is interested in contracting with a Tbilisi company to record and promote her new CD.
- G. You represent Geo Air, a new airline. Geo Air has asked you to draft an employment contract for each of its new employees.

D. The Arbitration Process

There are six stages to the typical arbitration process. This section will address each stage and briefly discuss their significant aspects. The six stages are:

1. Initiation of Arbitration
2. Selection of Arbitral Tribunal
3. Pre-hearing Procedure
4. Arbitration Hearing
5. Decision Making
6. Appeal and Enforcement

This section will often refer to provisions of Georgia's Law on Arbitration (LoA).¹⁷⁹ On January 1, 2010, Georgia's LoA came into force.¹⁸⁰ The LoA largely follows the UNCITRAL Model Law on International Commercial Arbitration¹⁸¹ ("UNCITRAL Arbitration Law"), with a few interesting departures. As a result, Georgia's arbitration rules are now largely harmonized with almost 70 nations, including important trading partners such as Turkey, Ukraine, Armenia, Azerbaijan, Russia and Germany.¹⁸²

The LoA covers the landscape of arbitration matters including: arbitration agreements, composition and jurisdiction of the tribunal, conduct of the proceedings, and recognition and enforcement of the award. The law governs "property disputes of a private character, which are based on an equal treatment of the parties and that parties are able to settle between themselves." Property disputes of a private character constitute a very wide range of disputes, including most civil or commercial cases.

¹⁷⁹ *Id.* However, other international models will be discussed where there is a significant difference.
¹⁸⁰ *Id.*, art. 48.

¹⁸¹ UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (2006), UNCITRAL website, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited April 1, 2014)[hereinafter UNCITRAL Arbitration Law]. UNCITRAL stands for United Nations Commission on International Trade Law. According to UNCITRAL:

the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration . . . It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

-UNCITRAL website.

¹⁸² UNCITRAL website, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited April 1, 2014).



***Because of this expansive definition, the LoA will likely cover most future arbitration hearings in Georgia.*¹⁸³**

Accordingly, this section will focus on the arbitration process set forth in the LoA.

It is important to note that the LoA is an arbitration law that provides for arbitration standards. The parties can deviate from these standards, especially with regard to the actual arbitration rules governing a particular dispute. For example, if the parties chose AAA or ICC as the arbitration administrator or merely chose the AAA or ICC arbitration rules, it would be allowed under Georgian law. Those rules are slightly different from the LoA standards, but the LoA allows the parties to do this. It is easiest to understand the LoA as relating mostly to default standards and parameters.

The LoA follows the UNCITRAL Arbitration Law in limiting court intervention in arbitration proceedings.¹⁸⁴ Article 9 states that a court *shall* dismiss a claim or terminate proceedings if a party notifies the court about the commencement of arbitration proceedings on the same matter.¹⁸⁵ A Georgian court will only intervene in an arbitration proceeding in the following specific circumstances: (1) disputes over arbitrator appointment¹⁸⁶; (2) disputes over tribunal jurisdiction¹⁸⁷; (3) enforcement of interim measures¹⁸⁸ and awards¹⁸⁹; and (4) assistance in taking evidence.¹⁹⁰ It should also be noted that the LoA allows for parties to be represented at any stage of the arbitral proceedings by an attorney or other representative.¹⁹¹

183 With the exception of disputes not of a “private character”, such as those involving public utilities or other public entities.

184 The LoA states, “[i]n matters governed by this law, no court shall intervene in any matter except in cases expressly provided for in this law.” *Id.* art. 6(2).

185 *Id.* art. 9(1). Unless the court finds that the agreement is null and void, inoperative, or incapable of being performed. *See also*, CCPG, *supra* note 2, art. 186.

186 *Id.* art. 11(3); 13(2)-(3); 14(2). Court decisions under these articles are final and not subject to appeal.

187 *Id.* art. 16(5). Court decisions under these articles are final and not subject to appeal.

188 *Id.* arts. 21-23.

189 *Id.* arts. 42-45.

190 *Id.* art. 35(3).

191 *Id.* art. 28. It can also be inferred from this language that a party may proceed without any representation.

1. Initiation of Arbitration

There are three ways that arbitration can be initiated: 1) request for arbitration under a pre-existing written arbitration agreement; 2) agreeing to arbitrate at the time a dispute arises; and 3) complying with court-ordered arbitration. The first of these, requesting arbitration under an existing arbitration agreement, is the most common.

a) The Claimant's Submission

If the parties have an arbitration agreement, the way to initiate arbitral proceedings is for one party to present the other with a written request or “notice” for arbitration. Under the LoA, that written notice should be delivered to the other party personally or to her legal/home address, or last place of work.¹⁹² The party initiating the arbitration is known as the “claimant” and the party receiving the request is known as the “respondent.” The arbitral proceedings commence on the date on which the respondent receives the request.¹⁹³

If the parties have chosen the UNCITRAL Arbitration Rules,¹⁹⁴ the AAA International Arbitration Rules,¹⁹⁵ or ICC Arbitration Rules¹⁹⁶ in their arbitration agreement, then their request or notice must set forth, among other things:

- 1) The names and details of the parties;
- 2) A description of the dispute;
- 3) A statement of the relief sought; and
- 4) All relevant agreements, including the arbitration agreement.¹⁹⁷

If the parties have chosen a local Georgian forum, then that center's rules

¹⁹² *Id.* art. 27.

¹⁹³ *Id.* art. 26.

¹⁹⁴ UNCITRAL ARBITRATION RULES, art. 2, available at <http://1.1.1.1/468278784/468291592T080320091030.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>, (last visited April 1, 2014) [hereinafter UNCITRAL Arb. Rules].

¹⁹⁵ American Arbitration Association, INTERNATIONAL ARBITRATION RULES, art. 3, available at <http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES>, (last visited April 1, 2014) [hereinafter AAA Arb. Rules].

¹⁹⁶ ICC ARBITRATION RULES, art. 4. (available at <http://www.iccwbo.org/>, last visited April 1, 2014) [hereinafter ICC Arb. Rules].

¹⁹⁷ The three sets of rules also include the number and choice of arbitrators in the Claimant's submission. AAA Arb. Rules, art. 2 (3)(g); UNCITRAL Arb. Rules, art. 4(3)(g) and ICC Arb. Rules, art. 12.

would apply. It is likely that any reputable Georgian arbitration center will have rules similar to the above, or at least similar to the LoA standards. Those LoA standards apply if no such rules have been chosen by the parties in their arbitration agreement, so they are sometimes called “default” provisions. The LoA default provisions state that parties must submit a written statement of claim that contains: 1) names and addresses of the parties; 2) the claim; 3) the circumstances and evidence confirming the claim; and (4) a list of supporting documents.¹⁹⁸

b) The Respondent’s Submission

Once this initial submission is made, the respondent must file a statement. Under the LoA and the UNCITRAL models, the respondent files a “Statement of Defense”, which is a response to the particulars in the claim and includes any documents and counterclaims.¹⁹⁹ There is no time limit unless the arbitrators provide one. In contrast, under the AAA Rules²⁰⁰ and the ICC Rules,²⁰¹ the respondent has 30 days from receipt of the original notice to file a Statement of Defense (the ICC calls this the “Answer”) and any counterclaims. With the LoA, the respondent’s failure to file a Statement of Defense does not constitute an admission and the arbitral tribunal shall continue the proceedings.²⁰²

2. Selection of and Challenges to the Arbitral Tribunal

a) Selecting the Arbitrators

After submitting the initial claim, the parties must select the arbitral tribunal. Under the LoA, the parties are free to determine the number of arbitrators at the time of contracting.²⁰³ In the absence of such a determination, the number will be three.²⁰⁴

198 *Id.* art. 30(1).

199 LoA, *supra* note 171, art 30(2); UNCITRAL Arbitration Law, *supra* note 181, art. 23. *See also*, UNCITRAL Arb. Rules, *supra* note 194, art. 19.

200 AAA Arb. Rules, *supra* note 195, art. 3.

201 ICC Arb. Rules, *supra* note 196, art. 5.

202 LoA, *supra* note 171, art. 30(5).

203 *Id.* art. 10.

204 *Id.* art. 10(4). Interestingly, the default number of arbitrators under the AAA Arb. Rules and ICC Arb. Rules is one, unless the case warrants three. AAA Arb. Rules, *supra* note 195 art. 5; ICC Arb. Rules, *supra* note 196, art. 12(2).

The parties are free to choose any method to select the arbitrators. Usually, they will follow the selection method of the chosen arbitration center, such as the AAA²⁰⁵, ICC²⁰⁶. In the event that they do not choose a method, the LoA follows the UNCITRAL Law and provides that each party shall appoint one arbitrator and the two arbitrators shall appoint the third.²⁰⁷ If the appointment of the third arbitrator is not made within 30 days of the first two appointments, the Georgian courts will, upon request of one of the parties, make the appointment.²⁰⁸

If there is to be only one arbitrator and the parties have not designated an arbitration center as the administrator and they cannot agree on the arbitrator, the Georgian courts will, upon request, make the appointment.²⁰⁹

b) Challenging the Selected Arbitrators

Under the LoA, the appointed arbitrator must disclose to the parties and the tribunal without delay any circumstances that render her impartiality or independence doubtful.²¹⁰ This might include conflicts of interest with one or more of the parties.

An arbitrator may be challenged for two reasons: 1) “*if circumstances exist that give rise to justifiable doubts as to his impartiality or independence,*” or 2) “*if he does not possess qualifications agreed to by the parties.*”²¹¹ During contracting, the parties may agree on their own procedure for challenging an arbitrator, including those found in the ICC Rules²¹² or the AAA Rules.²¹³ In the absence of such an agreement, the LoA provides its own. First, the challenging party must send a written statement providing the reasons for the challenge within 15 days of learning of the problematic circumstances or the problematic appointment.²¹⁴ Then, if the other party does not agree or the arbitrator in question does not resign, the tribunal decides the challenge.²¹⁵ If the tribunal agrees, a new arbitrator is appointed. If it does not agree, the

205 AAA Arb. Rules, *supra* note 195, art. 6.

206 ICC Arb. Rules, *supra* note 196, art. 13.

207 LoA, *supra* note 171, art. 11(3).

208 *Id.*

209 *Id.* art. 11(3)(b).

210 *Id.* art. 12(3).

211 *Id.* art. 12(1).

212 ICC Arb. Rules, art. 14.

213 AAA Arb. Rules, art. 8 – 9.

214 LoA, *supra* note 171, art. 13(2).

215 *Id.*

arbitrator in question remains on the tribunal. The challenging party can then appeal the tribunal's decision within 30 days to the Georgian courts.²¹⁶

c) Challenging the Arbitral Tribunal's Jurisdiction

LoA Article 9 states that the Georgian courts shall dismiss a case if arbitration proceedings have been commenced, pursuant to a valid arbitration agreement.²¹⁷ In such a case, the dispute must be decided by arbitration. The parties can still challenge the arbitral tribunal's jurisdiction to hear part or all of the case. For example, a party may argue that it never agreed to arbitrate a certain dispute and might prefer to take that claim to a court of law. The party can raise the claim with the arbitral tribunal. The arbitral tribunal "*may rule on its own competence, including any objections with respect to the existence or validity of the arbitration agreement.*"²¹⁸ This is similar to the UNCITRAL, AAA and ICC Arbitration Rules.

The challenging party must raise the issue at or before the deadline for the submission of the statement of defense and no later than seven days after the party becomes aware of the relevant circumstances.²¹⁹ The tribunal's decision on jurisdiction can then be appealed to the Georgian Courts within 30 days of the tribunal's decision.²²⁰

3. Pre-Hearing Process

The pre-hearing process forms the next stage. Once the arbitrators have been selected and jurisdiction has been determined, the parties have a number of important issues to resolve and this is usually achieved during a pre-hearing conference where procedures, locations, and evidentiary and other issues

²¹⁶ *Id.*

²¹⁷ *Id.* art. 9(1). The requirement is presumably not limited to *Georgian* arbitrations, but rather arbitration proceedings anywhere. It should be noted that this article is different than the UNCITRAL Law. The UNCITRAL Law requires merely the presence of a valid arbitration agreement to refer a case to arbitration (and presumably dismiss the court action). UNCITRAL Arbitration Law, *supra* note 181, art. 8(1). The UNCITRAL provision is meant to reinforce Article II of the New York Convention. In contrast, the LoA requires a valid agreement *and* the commencement of arbitration proceedings. The authors herein understand that this provision of the LoA may be changed in 2014 in favor of the UNCITRAL provision.

²¹⁸ *Id.* art. 16(1). It should also be noted that a decision by the tribunal that the contract between the parties is null and void does NOT entail *ipso jure* the invalidity of the arbitration clause. *Id.*

²¹⁹ *Id.* art. 16 (3).

²²⁰ *Id.* art. 16 (5). The Georgian Court's decision on jurisdiction is NOT appealable to the next court level.

are decided to the extent that the arbitration clause in the contract was silent or unclear on these issues.

a) Rules of Procedure

As with most other areas, the LoA provides that the parties can determine their own procedural rules. The various arbitration centers have developed many different kinds of rules and the parties generally adopt the rules of the center where they are appearing. However, they can also agree to their own rules if they choose. In the absence of agreed procedural rules, the LoA provides that generally, the arbitral tribunal shall conduct proceedings in such a manner as it considers appropriate.²²¹

b) Place of Arbitration

The parties are free to determine the place of arbitration in their agreement or elsewhere. If they fail to agree, the place of arbitration shall be determined by the tribunal, “*having regard for the circumstances of the case...*”²²² Unless otherwise agreed by the parties, the tribunal can meet:

*at any place it considers appropriate for consultation among arbitrators, hearing witnesses, experts or the parties, or for inspection of the evidence.*²²³

The place of arbitration is important because the arbitration laws of the host country will vary.

c) Language

The parties are free to agree on the language(s) of the proceedings. If they do not agree, then the tribunal will make that determination.²²⁴

d) Settlement

The LoA provides for the possibility of negotiated settlement. LoA Article 38 states:

²²¹ *Id.* art. 32.

²²² *Id.* art. 25 (1).

²²³ *Id.* Art.25 (2)

²²⁴ *Id.* art. 29. Once the language is established, the tribunal can order that documentary evidence be translated into that language.

*If, during the arbitral proceedings, the parties settle their dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties, the arbitral tribunal shall approve the settlement of the parties in accordance with the agreed terms by way of rendering an arbitral award.*²²⁵

This is an interesting article, based on the UNCITRAL Law. It allows for the possibility that the parties may negotiate a settlement even after arbitration has commenced. The law goes further and ensures that the resulting arbitral award *has the same legal force as any other arbitral award rendered as a result of the examination of the merits of the case.*²²⁶ This has the effect of placing a negotiated (or even mediated) settlement on the level of a court judgment, which can be enforced by the Georgian courts.²²⁷ Ordinarily, a negotiated or mediated settlement between two parties constitutes nothing more than a contract, each requires a full-fledged lawsuit to enforce. However, if the settlement occurs during arbitration, it can be treated like an enforceable judgment, if the parties desire.

e) Interim Measures

Interim measures are very important. In some situations, important evidence may be subject to deterioration or destruction unless it is properly secured by a third party. Or perhaps one party may need to have the other party stop certain activities immediately. Or finally, assets may need preserving. Similar to most other arbitration center rules, the LoA grants the arbitral tribunal the power to award these “interim measures,” so long as the requesting party has shown the reasonableness and need for such action.²²⁸ The tribunal may also require a party to provide appropriate security in connection with such measures.²²⁹

Once the tribunal has granted an interim measure, the requesting party may seek enforcement in the Georgian Courts.²³⁰ Article 21 expressly states that the Georgian Courts shall enforce this award, regardless of the country in which the award was issued. The courts shall enforce the award unless it

225 *Id.* art. 38 (1).

226 *Id.* art. 38 (3).

227 An arbitral award can be enforced like a court judgment. *Id.* art. 44 (4). *See also, infra*, Sub-section 6 (b).

228 *Id.* arts. 17 - 23. *See also*, UNCITRAL Arbitration Law, *supra* note 181, arts. 17 – 17(j).

229 *Id.* art. 18 (3).

230 The Georgian Courts of Appeal, according to LoA article 2(1)(a).

violates one of a limited set of conditions.²³¹ The courts are prohibited from reviewing the substance of the interim measure.²³² A party may also seek interim relief directly from the Georgian Courts.²³³ These rules are similar to the UNCITRAL Rules.²³⁴

f) Disclosure of Information or Discovery

As mentioned above, in some court systems, such as the U.S., extensive pre-trial disclosure of information is required between the parties, including documents and statements from witnesses and parties. In common law systems this is called *discovery*. Under civil law systems, this requirement is more limited. Under most arbitration rules, the pre-trial disclosure requirements are also limited. However, the parties can determine their preferred level of pre-hearing disclosure in their arbitration.

Under the LoA, the parties must disclose to each other “*all statements, documents or other information*” supplied to the arbitral tribunal.²³⁵ But, what must be submitted to the arbitral tribunal? Article 30, §1 states that the claimant must submit to the arbitral tribunal, the evidence supporting the claim and a list of “*documents supplementing the claim.*”²³⁶ However, §2 does not appear to require the same from the respondent, only a statement of defense is referenced. Section 6 states that the parties “*may submit with their statements, all documents that are relevant to the case or indicate those documents or other evidence that they will submit subsequently.*” These rules seem to indicate that the claimant has the obligation to submit supporting evidence to the tribunal and respondent, but nothing else. The respondent does not appear to have any explicit, formal disclosure requirement.²³⁷ Article 35 does provide the tribunal with broad powers to compel parties to present any relevant document or evidence, including witness testimony.²³⁸

There is, of course, the freedom to adopt other, more extensive discovery

231 *Id.* art. 22.

232 *Id.* art. 22(3). The article means to prohibit courts from substituting their own legal or equitable analysis in place of the tribunal’s. Only a technical rule violation should prevent court enforcement once the tribunal has ruled.

233 *Id.* art. 23. In this case, the Georgian Code of Civil Procedure (Chapter XXIII) would provide the applicable standards and procedures. There is an exception in the Code for international arbitration.

234 UNCITRAL Arb. Rules, art. 26.

235 *Id.* art. 32 (3).

236 *Id.* art. 30 (1).

237 The UNCITRAL Arbitration Rules clarify matters somewhat: Article 21(2) states, “the statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.”

238 *Id.* art. 35 (2).

rules. This agreement should be in writing in case the parties need to prove to the tribunal what items should have been disclosed but were not. For instance, the parties may choose to apply the IBA Rules on the Taking of Evidence in International Arbitration. In those rules, parties are required to produce all relevant documents to each other and can even submit specific requests to produce documents to each other.²³⁹

More extensive discovery rules will result in the lengthening of the arbitration process and higher attorney fees. On the other hand, inadequate or very limited discovery exchanges could lead to surprise and delays during the hearing when one party will need to ask for additional time to respond to unanticipated issues and evidence. Limited discovery rules could also encourage parties to hide relevant evidence that is damaging to their own case.

g) Experts

The LoA gives arbitrators the power to appoint experts, unless the parties have agreed otherwise.²⁴⁰ The tribunal may also compel the parties to provide the expert with all relevant information.²⁴¹ If a party or the tribunal requests it, the parties will have the right to question the expert at a hearing after the expert's conclusions are submitted to the tribunal.²⁴² They may also submit their own expert's testimony, as well as challenge the appropriateness of any expert.²⁴³

4. Arbitration Hearing

Typically, the arbitration process involves an oral hearing that resembles the trial in a common law court. The oral hearing can take place at any time that the tribunal decides. The parties often present short opening statements (although there is no such requirement in the LoA), setting forth the facts and the law. Then the claimant presents its witnesses and documentary evidence, followed by the respondent's witnesses and evidence. For an example of this, see the IBA Rules on the Taking of Evidence in International Arbitration.²⁴⁴

239 RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, art. 3(2)-(8), International Bar Association (2010), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited April 1, 2014).

240 *Id.* art. 34 (1).

241 *Id.*

242 *Id.* art. 34 (2).

243 *Id.* art. 34 (2)-(3).

244 RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, *supra*, note 239, art. 8(3).

Witnesses sometimes swear under oath. The tribunal will decide if non-party witnesses can stay during the arbitration hearing.

For live witnesses at arbitration hearings, usually the parties and the tribunal each have the right to pose questions, although it is not clear who can do this under the LoA.²⁴⁵ Then, the parties will usually take turns presenting a closing statement, after which the tribunal will discuss and decide the case. The official UNCITRAL Notes on Organizing Arbitral Proceedings indicates that most international arbitration rules do not specify the details of the hearing, such as the witness order and questioning procedures or the availability and order of opening and closing statements.²⁴⁶ The Notes recommend that the tribunal decide these rules in coordination with the parties early in the process.²⁴⁷

The arbitration hearing is generally less formal than a court proceeding. Procedural or evidentiary issues are more flexible than in a court. If the parties agree, they do not even have to have an oral hearing. The parties can choose to present solely documentary evidence and written submissions for the tribunal to consider. However, if one party wishes to have an oral hearing, then there must be an oral hearing.²⁴⁸ The LoA also requires that the parties have sufficient notice of any such hearing.²⁴⁹ As mentioned above, the tribunal, or a party with tribunal agreement, may request assistance from the Georgian Courts in taking evidence or ensuring attendance of a witness. In that situation, the rights and obligations of that witness would be governed by the Civil Procedure Code of Georgia.²⁵⁰

The LoA provides that all arbitral proceedings are closed, and an arbitrator and any other person participating in such proceedings shall keep confidential all information disclosed.²⁵¹ It further provides that, unless otherwise agreed or provided for in law, all documents, evidence and written or oral statements shall not be published or given and used in other judicial or administrative proceedings.²⁵²

245 The LoA follows the UNCITRAL Arbitration Law and is silent on the method of examination. The UNCITRAL Arb. Rules do state, “Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.” UNCITRAL Arb. Rules, art. 28(2).

246 NOTES ON ORGANIZING ARBITRAL PROCEEDINGS, Art. 17(3), ¶ 80, United Nations Commission on International Trade Law (1996), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html, (last visited April 1, 2014)

247 *Id.*

248 *Id.* art. 32 (1).

249 *Id.* art. 32 (2).

250 *Id.* art. 35 (3).

251 *Id.* art. 32.

252 *Id.*

The various arbitration centers such as the AAA and ICC have their own sets of rules which can be modified by agreement between the parties.

5. Decision Making

Once the arbitration hearing has been completed, the tribunal has to turn its attention to the decision. As mentioned above, under the LoA, the parties can choose to apply any jurisdiction's substantive law.²⁵³ This is sometimes called a choice of law provision in the parties' agreement. In the absence of a choice of law provision, the tribunal is free to choose any substantive law it considers appropriate.²⁵⁴

a) Industry or Trade Standards

The LoA also provides that in all cases, "*the arbitral tribunal shall take into account . . . the usages and practices of the trade applicable to the transaction.*"²⁵⁵ This language seems to indicate that this would apply even if the parties' chosen substantive law does not consider industry trade and customs.²⁵⁶

b) Majority Decision

If the tribunal has more than one arbitrator, then a tribunal decision can be made by a majority of members.²⁵⁷

c) Default Rules

The LoA does provide for default in the event that a party fails to abide by the rules. If the claimant has failed to communicate his statement of claim in accordance with the rules, then the tribunal shall terminate the proceedings.²⁵⁸ In contrast, if the respondent fails to communicate his statement of defense, the tribunal shall continue the proceedings and not

253 *Id.* art. 36(1). This is the same as UNCITRAL Arb. Rules, art. 35(3) and AAA Arb. Rules, art. 28(2), but contrary to the ICC Rules.

254 *Id.* art. 36(2).

255 *Id.* art. 36(4).

256 This is a potential area of uncertainty. The arbitrators may have a conflict between the substantive law and this LoA requirement.

257 *Id.* art. 37.

258 *Id.* art. 30 (4). It is unclear whether this would act as a bar to reassertion of the same arbitration claim in the future.

construe that failure as an admission.²⁵⁹

If either party fails to appear at a hearing or fails to produce documentary evidence, then the tribunal *may* continue proceedings and make the award on the available evidence.²⁶⁰ The use of the word *may* in this sentence and not *shall* implies that, in such a situation, the tribunal could choose not to continue the proceedings. In international arbitration, proceeding without a party would be unusual, but not unprecedented.

It should also be noted that arbitration centers have their own set of default rules which can be chosen instead of these LoA default rules.

d) Form of the Award

To be binding and enforceable through the courts, the tribunal's award shall:

- Be made in writing and shall be signed by the majority of arbitrators;²⁶¹
- State the reasons upon which it is based;²⁶²
- State the date and location of the arbitration²⁶³; and
- Be given to each party, signed.²⁶⁴

There is no requirement that the award allocate among the parties the costs of the arbitration, although this is sometimes useful.²⁶⁵ There is also no mention of empowering the tribunal to award reasonable attorneys' fees of the prevailing party, although this can also be a useful tool. Any settlements reached under LoA Article 38 must follow these same requirements to have the force and effect of a judgment.²⁶⁶

²⁵⁹ *Id.* art. 30 (5).

²⁶⁰ *Id.* art. 33.

²⁶¹ *Id.* art. 39 (2) Any dissenting arbitrator (and perhaps the reasons) shall be noted in the arbitral award.

²⁶² *Id.* art. 39 (3). There are two exceptions: unless the parties have agreed that no reasoning is required or unless the award is based upon a settlement under Article 38.

²⁶³ *Id.* art. 39 (2).

²⁶⁴ *Id.* art. 39(5).

²⁶⁵ The UNCITRAL Arb. Law is silent, the UNCITRAL Arb. Rules, art. 40-43, indicate that the tribunal's award should include the arbitration costs and their allocation among the parties.

²⁶⁶ *Id.* art. 38(3).

6. Appeal and Enforcement

a) Recourse Against Arbitral Awards

Under the LoA and most international arbitration laws, the arbitration award is NOT appealable except in very limited circumstances. Allowing a party to easily appeal an arbitration award would take away one of the main advantages of arbitration, i.e., its ability to deliver relatively fast, cost-effective, professional dispute resolution. In other words, parties would find no real incentive to engage in arbitration if decisions could be easily appealed to the courts and then re-tried.

Therefore, the LoA provides only very limited grounds for the *setting aside* (nullification) of an arbitral award. None of these grounds involve a review of the merits of the evidence and decision. The Georgian Courts may set aside an award if:

- A party to the arbitration agreement lacked legal capacity, or
- The agreement is not valid under the governing law; or
- A party was not given proper notice of the appointment of an arbitrator or of the proceedings, or for other good reason, was unable to participate; or
- The award deals with a dispute not falling within the terms or scope of the arbitration agreement; or
- The composition of the tribunal or the procedure was not in accordance with the arbitration agreement or, if no agreement, the LoA; or
- The subject matter of the dispute is not capable of settlement by arbitration under the law of Georgia; or
- The award is contrary to public policy.²⁶⁷

²⁶⁷ *Id.* art. 42(1). With regard to the last circumstance, public policy, UNCITRAL states that this is to be understood as “serious departures from fundamental procedural justice.” Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, ¶ 46 (2006), available at http://1.1.1.1/482468920/477512240T071020172009.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB_explanatory_note.pdf (last visited April 1, 2014) [hereinafter UNCITRAL Explanatory

The first four grounds must be raised and proved by a party. The reviewing court may consider the last two grounds, *sua sponte* (on its own accord), or presumably, it may be raised by a party.²⁶⁸ The party seeking to set aside an award must file an application to the Georgian Courts of Appeal within 90 days of notice of the award.²⁶⁹ In appropriate circumstances, the Georgian Court may suspend court proceedings to allow the arbitration tribunal to resume proceedings or otherwise take such action to eliminate the grounds for setting aside so that it can complete the process in accordance with the law.²⁷⁰

b) Recognition and Enforcement of Awards

After an award is issued, the prevailing party may have to enforce it if the losing party fails to abide by the award. Arbitration tribunals have no enforcement powers of their own. There are no arbitration police. Accordingly, parties must rely on the judiciary to enforce an arbitration award. Under the LoA, an arbitration award is, in effect, like a court judgment for enforcement purposes.

The LoA says:

*An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced . . .*²⁷¹

As a matter of procedure, the party seeking recognition and enforcement must supply the court with an original or certified copy of the award and arbitration agreement, as well as a certified translation, if not originally in Georgian language.²⁷² This is a simple matter and once properly submitted, the court must recognize and enforce the award as if it were a final and enforceable judgment. The claimant must also pay court costs of 3% of the award.

Note].

268 *Id.* art. 42. The language is actually unclear as to whether the party seeking recourse can raise one of these last two grounds. However, as a practical matter, the court is probably duty-bound to consider these questions regardless of any party, especially if it intends to enforce the award.

269 *Id.* art.42(2).

270 *Id.* art. 43.

271 *Id.* art. 44(1).

272 *Id.* art. 44(2). On the other hand, Article 44(3) seems to allow a Court to suspend enforcement for up to 30 days if the responding party provides appropriate security, although this is not entirely clear. If correct, this suspension power is much broader than anticipated under UNCITRAL Arbitration Law.

However, the court may refuse to enforce the award under the following limited circumstances:

- A party to the arbitration agreement lacked legal capacity, or
- The agreement is not valid under the governing law; or
- A party was not given proper notice of the appointment of an arbitrator or of the proceedings, or for other good reason, was unable to participate; or
- The award deals with a dispute not falling within the terms or scope of the arbitration agreement; or
- The composition of the tribunal or the procedure was not in accordance with the arbitration agreement or, if no agreement, the LoA; or
- The award has not entered into force or was set aside or was suspended by the courts of the country where the award was rendered; or
- The subject matter of the dispute is not capable of settlement by arbitration under the law of Georgia; or
- The award is contrary to public policy.²⁷³

The first six grounds must be raised and proved by a party. The last two grounds may be raised by the court, *sua sponte* or presumably, it may be raised by a party.²⁷⁴ Note that these grounds for refusing recognition or enforcement of awards are almost exactly the same as the grounds for setting aside an award mentioned above. The only additional ground for refusing enforcement is that the award is not yet binding on the parties or

273 *Id.* art. 45(1). With regard to the last circumstance, public policy, UNCITRAL states that this is to be understood as “serious departures from fundamental procedural justice.” Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, ¶ 46 (2006), available at http://1.1.1.1/482468920/477512240T071020172009.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB_explanatory_note.pdf (last visited April 1, 2014) [hereinafter UNCITRAL Explanatory Note].

274 As with the rules on setting aside an award, the language is unclear as to whether the party seeking recourse can raise one of these last two grounds. However, as a practical matter, the court is probably duty-bound to consider these questions regardless of any party, especially if it intends to enforce the award.

was set aside or suspended in the country in which the award was made.

A court may suspend enforcement proceedings pending the outcome of an action in a different court under which a party is seeking to set aside the award. A court may also order the party seeking enforcement to provide appropriate security.²⁷⁵

c) Enforcement of International Arbitration Awards

In connection with international arbitration, the passage of the LoA has brought Georgia into full compliance with the requirements of the New York Convention on the Recognition of Foreign Arbitral Awards of 1958 (“New York Convention”). The New York Convention provides the main international framework for the recognition and enforcement of foreign arbitral awards and awards of an international character. It was passed under the auspices of the United Nations, prior to the creation of UNCITRAL. Georgia signed the New York Convention on June 2, 1994 and it entered into force on August 31, 1994.²⁷⁶ Over 140 countries have ratified the agreement, including all of Georgia’s main trading partners.²⁷⁷

Under the New York Convention, Georgia was required to enforce foreign arbitral awards. However, until the new LoA was passed, there was no clear method of enforcement. Now that the LoA is entered into law, there is a clear legal framework for this enforcement process. As Article 44 states, “*an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and . . . shall be enforced . . .*”²⁷⁸ Unless one of the limited grounds for refusal are present, the Georgian Courts must enforce the award. In the case of an arbitration award rendered outside of Georgia, the Supreme Court of Georgia shall serve as the competent court for purposes of recognition and enforcement.²⁷⁹

So, not only does the LoA provide for enforcement of Georgian arbitration awards, but it also provides for the enforcement of international arbitration awards. For example, a dispute between a Russian business and a Turkish

²⁷⁵ *Id.* art. 45(2).

²⁷⁶ See UNCITRAL website, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited April 1, 2014)

²⁷⁷ *Id.*

²⁷⁸ LoA, *supra* note 171, art. 44(1).

²⁷⁹ *Id.*

business can be arbitrated in Paris and enforced against either party in Georgia, if the party has assets here.

This convention and international enforcement regime is one of the reasons why international businesses prefer arbitration. In the event of a dispute, they can be assured that the award will be enforceable almost anywhere in the world. Now that Georgia is clearly part of this enforcement regime, international businesses may be more willing to invest here.

Exercise – Enforcement of Arbitral Awards

Should a Georgian Court enforce the arbitral award in the following cases (if no, why not?):

1. A traveling Russian circus group, “The Putin Punch,” contracted with a local Tbilisi venue to perform six shows in January. The contract has a term requiring arbitration at the International Commercial Arbitration Court in Moscow. The contract has another term requiring that the waiting room provide heat at a temperature of at least 23 degrees, to allow for the muscles of the performers to be properly warmed up prior to performance. In fact, the waiting room was 20 degrees. During the final show of the visit, a performer’s legs cramped up, and he lost control of a woman he was supposed to catch in the air, causing her to fall and sustain serious injuries. Putin Punch won an arbitration award for \$50,000 against the owners of the Tbilisi venue and seeks to enforce the award in Georgia. Assume:

a) Russia has a law on arbitration similar to Georgia’s wherein Article 36 requires the tribunal to take into account of “the terms of the contract and the usages and practices of the trade applicable to the transaction;”

b) the written award makes no mention of trade practice; and

c) it was admitted by Putin Punch that standard trade practice is to provide waiting room heat at 20 degrees and they had performed under similar conditions in Tbilisi for the past three years.

2. Zaza-GEL, a Georgian bank, loaned \$25,000 to the “G Dream,” a Kobuleti nightclub, to refurbish its sound system and interior space. The contract required full repayment after six months and a late payment interest rate of 18% annual, compounded monthly, starting immediately after the loan due date. G Dream failed to pay back the loan on time. Pursuant to an arbitration clause, Zaza-GEL obtained an arbitration award of \$25,000 plus the interest as provided for in the contract. Zaza-GEL then waited about two and a half years after the award, but G Dream never paid. It is now about 36 months after the loan due date, and Zaza-GEL seeks to enforce the award in court, which totals \$42,728 (\$25,000 at 18% annual interest, compounded monthly over three years).

3. A Ukrainian-owned vessel was hired by an American company to transport oil from Libya to the U.S. It was learned, after delivery, that the vessel had converted some of its oil cargo to fuel, using a permanent connection hidden underneath the cargo spaces. The contract provided for maritime arbitration in New York, using New York law. The arbitrator issued an award against the Ukrainian owner for \$25,000 in compensatory damages and \$100,000 in punitive damages for its willfully fraudulent actions. The American company seeks to enforce the award in Georgia against the Ukrainian owner.

4. Enver Pasha, Inc., a Turkish construction company, is building the Blair Tower, a skyscraper in Batumi. The tower is owned by Blair Hedge Funds, a UK-based company. Enver Pasha hired Panther Skin, a Georgia glass company, to supply glass for the façade of the building. Eventually the glass warped after it was installed and Blair sued Enver Pasha in London after installing new glass at great expense.

The contracts have clauses providing for London arbitration and the law of England to apply. After the first meeting between the parties and the London arbitrators, it was agreed that there would be an oral hearing whereby all witnesses would be presented and subject to examination from all parties. About two months before the oral hearing, Enver Pasha filed a third-party claim against Panther Skin, stating that Panther Skin should be liable because they provided the defective glass. Panther Skin’s Georgian lawyer was aware of the upcoming oral hearing but had never engaged in live witness cross examination before. He asked that the oral hearing be cancelled and just have the tribunal decide on the documents. The others objected to this request and the tribunal denied the request. Panther Skin also asked for a delay but the tribunal felt there was enough time to prepare.

At the oral hearing, the Panther Skin witness, Irakli, claimed that Pasha had installed the glass in the wrong fashion and this was why it warped. Under difficult cross examination, Irakli was made to look dishonest. Also, one of Panther Skin's key documents was shown in cross examination to be questionable in its authenticity. The Panther Skin lawyer did not ask any questions at the hearing. The tribunal ruled against Panther Skin.

Blair seeks to enforce the award against Panther Skin in Georgia. Panther Skin asks the court to refuse enforcement because a) its lawyer only had two months to prepare for the oral hearing while the other parties had six months and b) oral hearings with live witness cross examination under English rules are so different from normal commercial dispute resolution procedure in Georgia that Panther Skin did not have a chance to fairly present its case.

5. The Tbilisi-based software company, VeraSoft, develops and sells expensive software for computer assisted design work. To expand out of Georgia, they developed a Russian version and sold their first Russian language DVD package and license to an Armenian architect firm called Yeredesign. The license allowed for the use of up to three architects. Two months later, Yeredesign merged with a competing firm and expanded to six architects. They all used the VeraSoft DVDs but did not inform VeraSoft. They also allowed the local architecture school to copy and use the software as well. After VeraSoft learned of this, it initiated arbitration proceedings against Yeredesign.

The software had a built in licensing agreement that contained an arbitration clause stating all disputes go to arbitration in Tbilisi Georgia. Although the actual software was in Russian language, the licensing agreement appears during the installation procedure in the Georgian language. When installing the software, the user is advised (in Russian) to read the agreement and click the "I agree" box (the box said "I Agree" in Russian) if the user agrees to abide the terms (which are in Georgian language). The user would be unable to install the software without clicking that Yes box.

Yeredesign refused to participate in arbitration in Georgia, citing cost and inconvenience. VeraSoft proceeded to obtain a \$5,000 award and now seeks to enforce the award in the Georgian Courts—Yeredesign has a bank account in Georgia.

E. Ethical Issues

Arbitrators, like judges, have ethical issues from time to time. Poor ethics can be fatal to any arbitration center. Accordingly, there have been several efforts to develop ethics rules for arbitrators. For instance, in 1996, the American Bar Association and the American Arbitration Association developed a Code of Ethics for Arbitrators in Commercial Disputes.²⁸⁰ In 2004, the International Bar Association developed the IBA Guidelines on Conflicts of Interest in International Arbitration.²⁸¹ While these rules look similar to judicial ethics rules, they are different in that they seek to focus on the unique position of the arbitrator.

In addition to arbitrators, attorneys representing clients in international arbitration should always be aware of their own ethical considerations. For instance, if an American business is forced to engage in international arbitration in Georgia, can that American business employ its American lawyers to represent it? Or would this be considered illegal under Georgian law? If that arbitration agreement chooses German substantive law, for instance, but the arbitration takes place in Georgia, which jurisdiction's attorney ethics rules apply to the attorneys in the arbitration: Germany's or Georgia's or the lawyers' home country, America? Which jurisdiction's rules apply in areas such as confidentiality, duty to report unethical behavior, conflicts of interest, non-disclosure of evidence and attempts at influencing arbitrators?

There are sometimes no clear answers to arbitration ethics questions, particularly in the international context. However, it is important to at least consider these when drafting and preparing for arbitration.

²⁸⁰ CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, American Bar Association and American Arbitration Association (2004), *available at* <http://www.adr.org/si.asp?id=4582> (last visited April 1, 2014).

²⁸¹ GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, International Bar Association (2004), *available at* www.ibanet.org (last visited April 1, 2014).

Exercise – Arbitrator Ethics

A. You are the lawyer representing Niko in an employment case where she claims that her employer, Caucus Hotel Company, unjustly terminated her. Her employment agreement requires arbitration. The rules require each side to choose one arbitrator and then the two arbitrators choose a third. The arbitrator chosen by Caucus Hotel, Lasha, is a well-respected international arbitrator. But, you learn through private research that Lasha's niece is employed by an American company that holds a 10% ownership interest in Caucus Hotel.

- Should you seek to disqualify Lasha as an arbitrator? Only Georgian law applies.
- How should the arbitral tribunal rule?
- Does it matter that the party-chosen arbitrators have agreed to be neutral and independent?
- Would it matter if Lasha's niece was a low-paid cleaner?
- Would it matter if Lasha's niece was a high-paid manager who personally owned stock in the company?

B. You are the sole arbitrator in a case filed by a group of citizens against the Gamarjobat Chemical Company. The citizens live near Gamarjobat's factory and claim that the factory is discharging harmful waste into the air causing breathing problems for the nearby citizens. You do not live near the factory so you do not believe that you have any conflict of interest in the case. However, during the final proceedings, you learn from some documents that Gamarjobat could completely eliminate the air pollution by installing a water discharge system that would direct the waste into the nearby river. The result would be cleaner air, but some pollution in the river.

You live about twenty kilometers downstream and right on the river. You like to go fishing on the river on weekends. You are concerned that if you rule against Gamarjobat, they will have to install the water discharge system and pollute the river. Neither party has mentioned the water discharge system in the arbitration and you suspect that the citizens may not even know about this option. You cannot be sure that Gamarjobat will install the water system in the event of losing the arbitration, because they may have other options that you do not know about. You also feel that Gamarjobat has a strong case and even if you weren't concerned about the river, you would probably rule in favor of them and against the citizens anyway.

The arbitration has taken place over six months and the parties have already spent a great deal of money, including the poor citizens who live nearby. You are concerned that if you withdraw now, it will cause a great deal of extra costs to both sides since they will have to start over—costs that the citizens especially cannot afford to pay.

What should you do assuming only Georgian law applies?

- Inform the parties that you are withdrawing due to a possible conflict that you cannot mention?
- Inform the parties that you are withdrawing due to a possible conflict and explain the conflict: there is a river discharge system that Gamarjobat could install but it would harm the river that you live on?
- Inform the parties that you have a possible conflict of interest, explaining the conflict and wait and see if either party seeks your disqualification?
- Say nothing and rule in favor of Gamarjobat. The costs of withdrawal are so high and you believe that you can honestly and correctly rule in favor of Gamarjobat regardless of your concerns about the river. Why force both parties to incur extra costs of starting over again with the arbitration when a new arbitrator would probably rule the same way?

What should you do assuming the IBA Guidelines on Conflicts of Interest apply?

C. Under the IBA Guidelines on Conflicts of Interest, how would you resolve the following issues:

- You are an arbitrator and your brother happens to own about \$10,000 worth of stock in Bank of America, which has a small arbitration claim against Marjanishvili Construction Company. Bank of America has chosen you as an arbitrator. You feel you can still be impartial. Can you serve as arbitrator?
 - Yes, without disclosure.
 - Yes, but with disclosure and no objections by any party.
 - Yes, but with disclosure and waiver from all parties.
 - No.

- You have been nominated as an arbitrator in a case involving the Ponichala Cement Company. You also work at the Pushkin Law Firm, which has 75 lawyers in four countries. Pushkin recently represented Ponichala Cement in an unrelated transaction in Turkey, where you had no personal involvement. That representation has ended and as far as you know, there is no further representation of Ponichala, although that could change in the future—you don't know. You feel you can still be impartial. Can you serve as arbitrator?
 - Yes, without disclosure.
 - Yes, but with disclosure and no objections by any party.
 - Yes, but with disclosure and waiver from all parties.
 - No.

- You have been nominated as an arbitrator in a large case involving the Gldani Cable TV Company. You subscribe to Gldani Cable TV because it is the only company in Georgia that shows NBA basketball games, which you love. You are a little worried that this large case against Gldani could bankrupt them or at least cause them to reduce costs and services, including NBA basketball. But, you still think you can be completely impartial in this unrelated arbitration case. Can you serve as arbitrator?
 - Yes, without disclosure.
 - Yes, but with disclosure and no objections by any party.
 - Yes, but with disclosure and waiver from all parties.
 - No.

- You are an arbitrator in the case of Varzia Salt against Cappadocia Land Survey. Just before the main oral hearing in the case, Varzia Salt hires a second lawyer that you happen to know--Keti. In fact, you served as an arbitrator with Keti in an unrelated case a few years ago and at the time, you shared one night of intimacy with her (nobody knows about this and you were married at the time). You see her from time to time at professional functions although you are not close friends. You feel you can still be impartial. What should you do?
 - Withdraw, citing a conflict.
 - Disclose the relationship and seek waivers.
 - Disclose the relationship and continue unless a party objects.
 - No need to disclose the relationship.

Would your answers change if only Georgian law applied and not the IBA Guidelines? How?

D. You own your own law firm and represent the Vake Bank of Georgia on various legal matters. You also recently established your own dispute resolution center, after receiving arbitration training from some international experts. Vake comes to you and asks if you would serve as arbitrator or at least serve as host arbitral center for a number of disputes that Vake has with its customers over failure to pay back loans. Are there any ethical rules against this?

What if your law partner left your firm and started his own firm and all of Vake's law work went to him and all of Vake's arbitrations went to you? Are there any ethical rules against this?

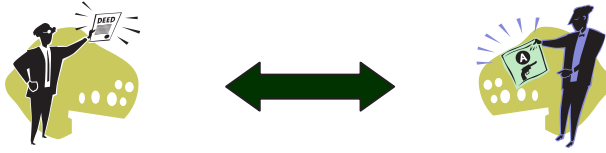
If your law partner and dispute resolution center co-owner, Sopho, happened to also be a partner with Vake Bank in a small, unrelated land deal in Batumi, and she agreed to not serve as arbitrator in any of Vake's cases, could your center accept Vake's arbitration business?

Chapter 5 – Conclusion

„გველსა ხვრელით გამოიყვანს ენა ტკბილად მოუბარი“
“You can get the snake out of the hole if you use nice words.”
(Georgian Proverb)

As evident from the chapters in this book, disputes can be resolved in many different ways. This book focuses on the three main alternatives to court litigation: negotiation, mediation and arbitration. Each process has been explained in detail in individual chapters. This chapter will briefly compare the three processes to allow the reader to decide which process is best suited for a specific dispute. The illustration below provides a basic comparison of the three ADR forms and traditional litigation:

Negotiation



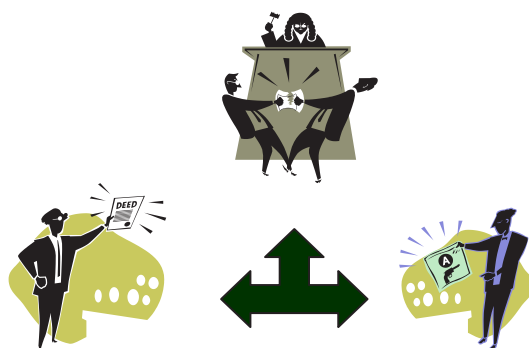
Mediation



Arbitration



Litigation



A. Comparing ADR Using Common Criteria

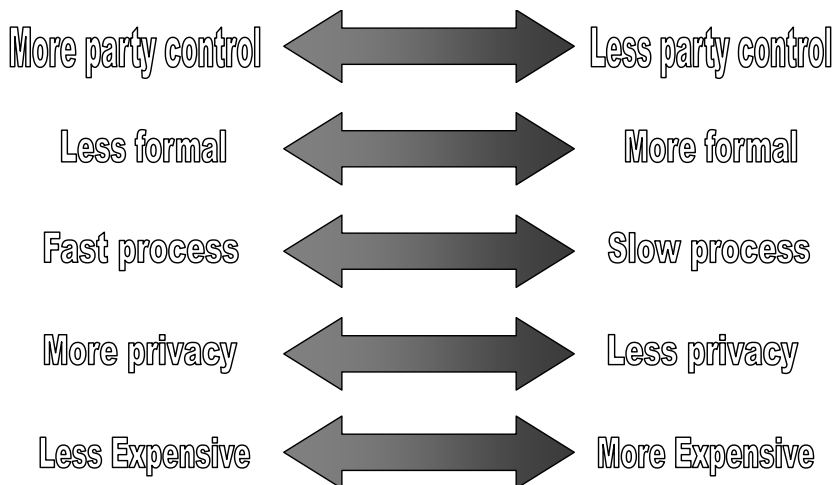
One way to compare the various forms of ADR is to understand how they differ based upon the most commonly used criteria:

- Party control
- Level of Formality
- Speed
- Privacy
- Cost

The following chart compares the various dispute resolution techniques based upon these common criteria:

ADR Methods Compared – Common Criteria

Ignoring the Problem/ Take No Action	Self-Help	Negotiation	Mediation	Arbitration	Litigation
Private decision made by party	Private decision made by party	Private decision made by both parties	Semi-private decision made by both parties	Semi-private decision made by third party	Public decision made by third party



As can be seen, all forms of ADR provide the parties with greater control over the process than traditional litigation. However, some ADR forms, like arbitration, still require parties to relinquish a substantial amount of control over the process. Those on the left provide the greatest level of party control over the process. Those forms on the right tend to be the most formal and the slowest forms of dispute resolution. The two forms farthest on the left, taking no action and self-help, provide the party with the most control and tend to be the quickest and most inexpensive.

B. Comparing ADR on Outcome Flexibility

Some forms of ADR are more flexible than others in their ability to craft a mutually acceptable resolution.

ADR Methods Compared – Outcome Flexibility

Mediation	Negotiation	Self-Help	Arbitration	Litigation	Ignoring the Problem/Take No Action
Third party works with parties to find a mutually acceptable solution	Parties work together to find a mutually acceptable solution	Parties work separately on conflict resolution	Mutually chosen third party resolves dispute based on agreed rules	Judge resolves dispute based on applicable laws	No actual resolution



Mediation is perhaps the most creative and flexible process for finding resolutions. All parties to the process, including the neutral, search for possible settlements. The open discussion helps facilitate maximum creativity. Negotiation is also flexible but without a third party neutral involved, the parties sometimes do not have the opportunity to explore as many creative solutions. Arbitration and litigation are limited in their creativity and flexibility since the court or arbitrator must follow legal principles in resolving the dispute.

C. Comparing ADR on Preservation of Parties’

Relationship

Another area of comparison is the ability of each ADR method to preserve the parties’ relationship. For some disputes, the most important criterion is whether the process and outcome will preserve the parties’ relationship. As evident in the chart below, some methods are better than others:

ADR Methods Compared – Preservation of Parties’ Relationship

Negotiation	Mediation	Ignoring the Problem/ Take No Action	Self-Help	Arbitration	Litigation
Parties work together to find a mutually acceptable solution	Third party helps parties to find a mutually acceptable solution	No actual confrontation	Parties work separately on conflict resolution	Parties compete using rules they agreed to, in front of neutral they chose	Parties compete in an adversarial environment

Strong  Weak

Negotiation is likely the most effective ADR method for preserving the parties’ relationship. When two parties come together privately to resolve their differences, the chances of preserving their relationship are high. Mediation is also strong in this category, but the presence of an outsider helping the parties resolve their dispute makes this form slightly less effective for relationship preservation. Nevertheless, mediation is usually an excellent way to maintain the parties’ relationship. Depending on the

circumstances and the dispute, mediation can sometimes be more successful than negotiation.

Taking no action is in the middle because while it might preserve the relationship in the short term, it may affect the relationship in the long term. For instance, if a wife decides not to complain about her husband's gambling, the relationship may be preserved for the short term, but in the long term, she may grow increasingly discontent and eventually express her frustration in unhelpful or even destructive ways.

Self-help is weak in preserving relationships since it is considered a unilateral action, taken without consulting the other party. Depending on the form that self-help takes (like physical violence), it is potentially the most problematic in terms of relationship preservation. Similarly, arbitration and litigation are highly competitive and result in a winner and a loser, which may make preserving the relationship difficult. Arbitration at least allows for a more informal and flexible procedure that might "soften" the experience.

D. Comparing ADR in Disputes about Principle

Some disputes are not about money, but instead about a principle. They might relate to human rights or defamation. For instance, a party might feel that a newspaper has improperly accused him of some kind of wrongdoing.

ADR Methods Compared – Disputes about Principle

Litigation	Arbitration	Mediation	Negotiation	Self-Help	Ignoring the Problem/Take No Action
Third party decides publicly who is right/wrong	Third party decides privately who is right/wrong	Third party helps parties reach resolution and private vindication	Private vindication and resolution	Private act. No vindication, no decision on who is right/wrong	No vindication, no decision on who is right/wrong

Strong  Weak

When dealing with disputes over a principle, such as who is right and who is wrong on an issue, litigation is the best option because it provides a public decision on the issue. Arbitration provides a private decision, which may be enough for some disputes. Mediation and negotiation do not decide matters of principle but the parties may nevertheless reach an understanding and agreement. Self-help and taking no action usually provide no relief on issues of principle.

E. Comparing ADR in Cases of Power Imbalances

Some disputes have an imbalance of power. One party is much stronger than the other. The strength might be due to the size and wealth of the parties. Or, it might be due to the circumstances. For instance, consider a large company and an individual. There might be an imbalance in favor of the company due its wealth and large team of lawyers. In that case, the individual might want some protection against the powerful company. On the other hand, the imbalance might be in the opposite direction. The company might desperately need this person because he has a great deal of knowledge about the company’s computer system. In a dispute over his salary, the individual has far more power than the company. In that case, the individual does not need any protection.

ADR Methods Compared – Cases of Power Imbalances

Litigation	Arbitration	Mediation	Negotiation	Self-Help	Ignoring the Problem/ Take No Action
Third party decides publicly who wins	Third party maintains procedural and outcome fairness	Third party helps prevent strong side from intimidating weak side	Powerful side can force weak side to capitulate	Powerful side wins	Powerful side wins



As the chart shows, litigation provides the strongest protections for a weak party in a dispute. A judge will make sure that both parties play by the same rules and will resolve the dispute based on the law, with no regard for the parties’ respective powers. Negotiation, by contrast, is just between the two parties. Therefore, the one with the greater power can take advantage of this to force the other into a settlement favorable to the powerful party. For example, in the case mentioned above, the employee with the specialized computer knowledge can force the company to raise his salary because he can leverage his greater power to arrive at a favorable settlement.

Exercise – The King’s Table

This exercise is designed to help demonstrate the difference in outcome and process between mediation and arbitration.

Instructions:

You will be assigned the role of either Zaza, Levan or Arbitrator/Mediator. Meeting in groups of three, you will first have twenty minutes to ARBITRATE the case. (Remember, in an arbitration each party presents his/her best arguments to persuade the arbitrator of the rightness of his/her position. The arbitrator may ask questions, but does not encourage settlement discussions.) Do not announce your decision to the parties.

The Arbitrator then moves to another group where s/he has twenty minutes to MEDIATE the case. (Remember, in a mediation, the neutral’s role is to facilitate discussion between the parties to help them reach a resolution which is mutually acceptable.)

The Facts:

Zaza and Levan are old friends. They have also practiced law together in Tbilisi for almost 15 years. Due to some management differences, they have decided to end their law partnership. They have negotiated a division of all their assets, except for the King’s table. Zaza and Levan had no trouble dividing their clients, the library, the computer equipment, the office lease, or their staff. But neither will compromise on the King’s table.

The King’s Table is an antique table which had been in the palace of the Georgian King in the 1700s. When Zaza and Levan began practicing law together, Zaza’s wife, who goes to many antique stores and auctions, had looked for a long time for the perfect table for the lawyers’ main conference room. She had purchased several old desks, chairs and lamps – which Zaza and Levan had no trouble dividing – but had not been able to easily find the perfect table for the main conference room.

The King’s Table was found in a small old shop near Tbilisi in the early 1990s. It had not been purchased by other buyers because it had been painted over with several coats of very ugly paint and it had cracks and bruises and one side was lower than the other. But Zaza’s wife recognized it immediately as the King’s Table. When Zaza and Levan saw the table, they knew at once that she had done well.

Levan, a woodworker, carefully removed the old paint, healed the table's cuts, balanced the surface by adding some matching, high-quality wood to one leg, refinished the table surface and restored it to its original beauty.

Both Zaza and Levan have proudly used and cared for the table for the past 15 years. Their clients, other lawyers and visitors to their office have always commented on the rarity and beauty of the table. Zaza and Levan believe the table is priceless. As a result, neither is willing to part with the table and neither will sell it to the other, no matter the price.

- What were the results of the arbitrations?
- What were the results of the mediations?
- How was the experience different?
- How did you feel about your partner after each round?

F. Choosing the Best Process

There is no one single method of dispute resolution that is superior to all others. The best approach a lawyer or party can take when choosing among different dispute resolution methods is to consider the various criteria discussed above and try to determine which one is in the parties' best interest. The following is the list of criteria to consider:

- **Party Control**

Does the party want the flexibility to develop his/her own rules? Or are standard rules better?

- **Formality**

Is she better off with formal court rules with which her company is familiar? Or does she need an informal process, given her low level of sophistication?

- **Speed**

Is there an urgent need to resolve the matter? Or would she be better off forcing the other side to fight for several years?

- **Privacy**

Does the dispute involve sensitive information about the party that would be embarrassing to have publicized?

- **Cost**

Is the party a large multi-national company or a poor individual? Is the dispute over one million dollars or does it involve, for instance, a broken mobile phone?

- **Outcome flexibility**

Are the standard court outcomes like money damages sufficient or would the party prefer a larger choice of outcomes?

- **The parties' relationship**

How important is it that the parties' maintain their relationship?

- **Dispute over principle**

Is this a dispute over a principle such that the party wants a decision on who is right and who is wrong?

- **Power balance**

Is there a power imbalance such that the party might need protection?

- **Public interest**²⁸²

Is this a case about the public interest? An example would be a lawsuit to prevent the granting of a logging concession in a protected forest.

- **Durability**²⁸³

Durability is about whether the party needs the resolution to be "durable," that is, to stay in force. For instance, a privately negotiated settlement agreement might resolve matters today, but tomorrow, one of the parties might breach the agreement. The party might need to have a binding decision that is enforceable.

It is important to recognize that the best dispute resolution method for one party to a dispute may not be the best method for another. For example, in a dispute with a large power imbalance, the strong party might prefer private negotiation so as to take advantage of its power. The weaker party however, might prefer litigation so that the judge is there to protect her. However, in many other cases, one ADR method is appropriate for both parties.

282 This criterion was not covered above because it does not fit well into the chart format.

283 This criterion was not covered above because it does not fit well into the chart format.

Study Questions

The following is a list of disputes. For each dispute, identify which of the six ADR methods is most appropriate for each party. In some of these disputes, the parties will both want the same method, while in other disputes, they will want different methods. There may be more than one correct answer. For instance, negotiation and mediation may be equally appropriate for a particular party.

The six ADR methods are: 1) Self Help, 2) Take No Action, 3) Negotiation, 4) Mediation, 5) Arbitration and 6) Litigation

1. Lasha thinks that his father is too strict with him. His father disagrees.

Best ADR method for Lasha: _____

Best ADR method for Lasha's father: _____

2. Turkish-based Giresun Electric Company owes the Ananuri Power Company \$500,000. Ananuri is worried about recovery because Giresun has no assets in Georgia.

Best ADR method for Ananuri: _____

Best ADR method for Giresun: _____

3. Inga does not like the fact that her boss refuses to give her two days off for the New Years holiday on Jan. 1-2, instead he only gives her one day off.

Best ADR method for Inga: _____

Best ADR method for Inga's boss: _____

4. Nodar is the coach of a famous Tbilisi rugby team. Givi is the best player in Georgia. But Nodar and Givi do not like each other and each one refuses to participate if the other is on the team.

Best ADR method for Nodar: _____

Best ADR method for Givi: _____

5. The Happy Hunting Food Company has contracted with the Big Meal Restaurant to supply the restaurant with chicken meat. After Happy Hunting delivered the second truckload of chicken, Big Meal informed Happy Hunting that it could not pay for the chicken because it was having financial problems.

Best ADR method for Happy Hunting: _____

Best ADR method for Big Meal: _____

6. The Megabucks Development Company decided that it wanted to build a large hotel on land that poor people were using for their homes. The poor people did not have formal title to the land but claimed to have been occupying the property for more than five years. Megabucks purchased title to the property but now must consider what to do about the poor people who refuse to leave since they claim rights to the land.

Best ADR method for Megabucks: _____

Best ADR method for the poor people: _____

7. The Isani Sewage Company has received a complaint from some residents of Tbilisi that the sewage is polluting the water in the river that residents use for drinking, washing, fishing and recreation.

Best ADR method for Isani: _____

Best ADR method for the local residents: _____

8. A policeman hit Etuna in the head with a stick when they were arguing about a traffic ticket. The policeman says it was an accident. She was injured and had over 500 GEL in hospital bills.

Best ADR method for Etuna: _____

Best ADR method for the policeman: _____

9. Maia is very angry with Aleko. Aleko borrowed her car and got into an accident, causing 1,000 GEL damage to the car.

Best ADR method for Maia: _____

Best ADR method for Aleko: _____

10. Movie star Lela feels that the “Imedi Gossip” magazine has published a false and misleading story about her personal life.

Best ADR method for Lela: _____

Best ADR method for Imedi: _____

G. New ADR Methods

In addition to the three traditional ADR methods, there are a number of new methods of dispute resolution that have developed in different places. The following is a list of some of these methods:

- **Mini-trial**

In the mini-trial, the parties engage in a short trial before a neutral, presenting key evidence and witnesses and short opening and closing statements. The neutral provides an advisory opinion based on the evidence. The opinion helps the parties predict how a court would rule in the case if the parties' negotiation fails and they must go through the litigation process. The parties take this information back to the negotiation and use it in their negotiation discussions. This is an expensive process that is usually reserved for large, complex disputes.

A variation is called the Summary Jury Trial, which is similar to the mini-trial, but uses a jury instead of judge to render the non-binding decision. This is used for large cases that will go in front of a jury if the parties cannot settle.

- **Early Neutral Evaluation (ENE)**

ENE is similar to the mini-trial but is much shorter and usually part of a court-annexed ADR program. The parties each make a presentation to a neutral that then provides a short, non-binding prediction of the case's outcome if it goes to trial. This helps the parties in negotiation. It can be performed early or late in the litigation process.

- **Settlement Conference**

This was originally found in the U.S. but is gaining in popularity elsewhere. In the settlement conference, a judge or magistrate associated with the court system conducts an informal facilitative style mediation where she tries to determine whether the case can be settled. It is always a court-annexed procedure and usually takes place shortly before a trial. The Georgian Civil Procedure Code provides for something similar in article 217-218.²⁸⁴ In Georgia, it appears that the same judge presiding over the case might engage in the mediation. In the U.S., this is sometimes true, but often the judge or magistrate serving as mediator will be different from the judge or magistrate serving as the judge in the trial.

²⁸⁴ CCPG, *supra* note 2, art. 217-218 (“The judge shall make his best efforts and take all statutory measures in order for the parties to end the case by settlement/reconciliation.”).

- **Med-Arb**

This is short for mediation-arbitration. The concept, as discussed briefly in the arbitration chapter, allows parties to attempt mediation first. If that fails to resolve all matters, then they move on to arbitrate the case, whereby the arbitrator makes binding decisions. There is some disagreement about whether the same person can serve as both mediator and arbitrator. The advantage to having the same person is that he/she can conduct the arbitration in a short time, since she already knows the issues. However, concerns about conflicts and disclosure of confidential information have led many practitioners to recommend a different person to serve as arbitrator.

- **Neutral Fact Finder**

In this procedure, the neutral investigates the dispute and usually considers party submissions *and* evidence he obtains independently. The neutral issues a report (sometimes with recommendations) that the parties then consider in their settlement negotiations. This method is most appropriate when there are significant factual disputes in the case.

- **Baseball Arbitration**

In Baseball Arbitration, the parties present evidence in a manner similar to a standard arbitration, but at the end, each party submits a proposed monetary award to the arbitrator. The arbitrator must choose one of the proposed awards without making any modification. The process forces parties to present reasonable proposals and limits the arbitrator's discretion. The method gets its name from the American sport of baseball, where this procedure was first developed. It is sometimes called "Final-Offer" Arbitration. This method works best when there is a single, discrete point at issue, like salary level or amount of damages.

- **Ombudsman**

The Ombudsman is usually found inside a large institution. She usually serves as a neutral who researches and hears complaints and tries to facilitate solutions like a mediator. The Ombudsman is usually appointed by the institution and tries to prevent conflicts from becoming too serious or large. She usually has no power to decide disputes, but can often publish a report or a finding that the institution may or may not choose to follow.

- **Court-Annexed Non-binding Arbitration and Non-binding Mediation**

In many countries, court-annexed programs allow for the parties to engage in a short, non-binding arbitration or mediation. This is meant to facilitate settlement and reduce case backlogs. The mediation method may be obvious but the arbitration needs explanation.

With the non-binding arbitration programs, the arbitrator usually renders an award that, like ENE, helps the parties in their negotiations. But, the decision is binding unless a party rejects it within a short period of time. Many court-annexed programs create settlement incentives whereby the party that rejects the award must achieve a better result in the future court trial, or else has a monetary penalty imposed against it.

- **Collaborative Law**

Collaborative law is an alternative method of resolving family law disputes. It was developed in the U.S and has become popular in other countries in recent years. In collaborative law, the parties' lawyers all agree to withdraw from representation in the case if they fail to reach a settlement prior to trial. This four-way agreement encourages settlement because the parties will have to start over with new lawyers if they cannot reach agreement. At the moment, collaborative law is largely limited to divorce cases.²⁸⁵

- **Online Dispute Resolution**

Since the rise of e-commerce in the late 1990s, online dispute resolution (ODR) services have become popular in the U.S. and elsewhere. ODR services can be pure online dispute processes, offered by companies like Cybersettle and SquareTrade, where the parties exchange all information and offers online. They can also refer to in-house dispute resolution services for high-volume, low value cases. An example is the ODR system on Ebay, which resolves over 60 million cases each year!²⁸⁶ Or, ODR can refer to more mixed processes, offered by traditional providers like the American Arbitration Association, where the parties submit some information via email, web forms and web-based video conferences, but still meet face to face or on the phone at other times.²⁸⁷

285 Collaborative law is growing very fast among family law practitioners in the U.S. because it is very successful in helping settle cases. See *Collaborative Counselors*, ABA JOURNAL, 52 (June 2006). However, at least one state ethics committee has found it to be in violation of the Rule of Professional Responsibility. *A Warning to Collaborators*, ABA JOURNAL, 22 (May 2007). The article notes that five other jurisdictions in the U.S. have found collaborative law to not violate ethics rules. *Id.*

286 See "Modria ODR" at <http://www.modria.com/technology/> (last visited April 1, 2014).

287 See, e.g., *Settling It On The Web*, ABA JOURNAL, 40 (October 2007).

Glossary of ADR Terms

The following is a glossary of terms commonly used in connection with alternative dispute resolution techniques.

Alternative Dispute Resolution (ADR). ADR refers to a variety of techniques that can be used to resolve disputes outside of court litigation. The most common are negotiation, mediation and arbitration.

Arbitration. Arbitration is a process that looks similar to a court proceeding. The parties present limited evidence to the arbitrator, and then the arbitrator makes a decision. The process can be very limited or very lengthy, depending on the agreement of the parties. The decision can be either binding or non-binding and is usually only appealable in limited circumstances. Participation in arbitration can be either voluntary or mandatory, depending on the circumstances.

Award. An award is the term often used to describe the arbitration panel's decision in a case. Under most laws, arbitration awards are in writing. Under the Georgia LoA, an arbitration award is considered enforceable like a court judgment. In addition, under that same law, parties can settle their case before or during the arbitration process and agree to call the settlement an award.

Binding. A binding agreement or decision is something that the parties must follow because it is legally enforceable. A binding arbitration decision is legally enforceable like a court judgment.

Caucus. A caucus is a private meeting during a mediation session between a mediator and party. It is used to help discuss issues out of the presence of the other parties. Parties are sometimes more honest and reasonable in a caucus than when they are talking in front of the other parties.

Conciliation. Conciliation refers to all types of proceedings where a neutral person assists parties to reach an amicable settlement. In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (called caucuses) and through suggesting specific solutions. In other traditions, the neutral takes a more passive approach and allows the parties to control the process. Both approaches are valid.

Conciliation is generally used interchangeably with the term *mediation*. For the purposes of this book, the term mediation is usually used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term is used.

Conciliator. The conciliator is the neutral person in a conciliation proceeding.

Confidentiality. Information shared during an ADR process is generally considered confidential and not to be revealed to the outside world. This is one important reason why parties favor ADR over other dispute resolution methods.

Court-Annexed ADR. A court-annexed ADR program is one that is sponsored in some way by an official court. Court-annexed ADR programs can be voluntary or mandatory for the parties.

Defendant. The defendant is the party in a dispute against which the plaintiff has filed some form of claim or complaint.

Hearing. A hearing is a proceeding in which factual evidence is given to the neutral so that the neutral can form a decision. Hearings can include live witness testimony, documents and other forms of evidence being presented to the neutral.

Mediation. Mediation is assisted or facilitated negotiation. Mediation usually involves two or more disputing parties attempting to negotiate a settlement with the assistance of a third party, the mediator, who is neutral towards the parties and the outcome. The mediator does not have authority to impose a settlement.

In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (called caucuses) and through suggesting specific solutions. In other traditions, the neutral takes a more passive approach and allows the parties to control the process. Both approaches are valid.

Mediation is generally used interchangeably with the term *conciliation*. For the purposes of this book, the term mediation is used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term is used.

Mediator. The mediator is the neutral person in a mediation proceeding.

Negotiation. Negotiation is an informal dispute resolution process where two or more parties discuss their respective positions and try to work out an agreement. This is the most common form of ADR

Neutral. A neutral is a person that is independent of the parties to a dispute and is empowered in some way to help resolve the dispute. The neutral might serve as a mediator, conciliator, facilitator or arbitrator. The neutral's role may be active or passive depending on the circumstances.

Non-binding. A non-binding agreement or decision is something that the parties are not legally obligated to follow because it is not legally enforceable. For instance, a non-binding arbitration decision is not legally enforceable.

Panel. The panel is the group of arbitrators, usually numbering three, who serve as the neutrals in an arbitration. Their role is similar to that of a judge in traditional litigation. At the end of the process, the panel usually issues an *award* to one or more parties. Sometimes, an arbitration panel is called an *arbitration tribunal* or *arbitral tribunal*. The term panel and tribunal refer to the same thing.

Parties. Parties are the people and/or entities involved in a dispute.

Plaintiff. The plaintiff is the party in a dispute that has filed some form of claim or complaint against the defendant.

Tribunal. The term tribunal usually refers to an arbitration tribunal. The arbitration tribunal (sometimes also called the *arbitration panel* or the *arbitral tribunal*) is the group of arbitrators, usually numbering three, who serve as the neutrals in an arbitration. Their role is similar to that of a judge in traditional litigation. At the end of the process, the tribunal usually issues an *award* to one or more parties. The term panel and tribunal refer to the same thing.

ANNEX A

IBA Rules on the Taking of Evidence in International Arbitration

Adopted by a resolution of the IBA Council
29 May 2010
International Bar Association

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ISBN: 978 0 948711 54X

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Foreword

These IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules of Evidence') are a revised version of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, prepared by a Working Party of the Arbitration Committee whose members are listed on pages i and ii.

The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings. The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations. The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.

Since their issuance in 1999, the IBA Rules on the Taking of Evidence in International Commercial Arbitration have gained wide acceptance within the international arbitral community. In 2008, a review process was initiated at the instance of Sally Harpole and Pierre Bienvenu, the then Co-Chairs of the Arbitration Committee. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee, assisted by members of the 1999 Working Party. These revised Rules replace the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which themselves replaced the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, issued in 1983.

If parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they add the following language to the clause, selecting one of the alternatives therein provided:

'[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].'

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of

Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures.

The IBA Rules of Evidence were adopted by resolution of the IBA Council on 29 May 2010. The IBA Rules of Evidence are available in English, and translations in other languages are planned. Copies of the IBA Rules of Evidence may be ordered from the IBA, and the Rules are available to download at <http://tinyurl.com/iba-Arbitration-Guidelines>.

Guido S Tawil
Judith Gill, QC
Co-Chairs, Arbitration Committee
29 May 2010

The Rules

Preamble

1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.

2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.

3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions

In the IBA Rules of Evidence:

‘Arbitral Tribunal’ means a sole arbitrator or a panel of arbitrators;

‘Claimant’ means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

‘Document’ means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

‘Evidentiary Hearing’ means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;

‘Expert Report’ means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;

‘General Rules’ mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

‘IBA Rules of Evidence’ or ‘Rules’ means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

‘Party’ means a party to the arbitration;

‘Party-Appointed Expert’ means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;

‘Request to Produce’ means a written request by a Party that another Party produce Documents;

‘Respondent’ means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counter-claim;

‘Tribunal-Appointed Expert’ means a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and

‘Witness Statement’ means a written statement of testimony by a witness of fact.

Article 1 Scope of Application

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.
2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.
3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.
4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to

their purpose and in the manner most appropriate for the particular arbitration.

5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
 - (a) the preparation and submission of Witness Statements and Expert Reports;
 - (b) the taking of oral testimony at any Evidentiary Hearing;
 - (c) the requirements, procedure and format applicable to the production of Documents;
 - (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
 - (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.
3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
 - (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
 - (b) for which a preliminary determination may be appropriate.

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:

- (a)
 - (i) a description of each requested Document sufficient to identify it, or
 - (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms individuals or other means of searching for such Documents in an efficient and economical manner;
 - (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
 - (c)
 - (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
 - (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.
 5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.
 6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.
 7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that
 - (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome;
 - (ii) none of the reasons for objection set forth in Article 9.2 applies; and
 - (iii) the requirements

of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.
9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.
10. At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.
11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements

or Expert Reports submitted or produced, or in other submissions of the Parties.

12. With respect to the form of submission or production of Documents:
 - (a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
 - (b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;
 - (c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and
 - (d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.
13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.
14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4 Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.
4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.
5. Each Witness Statement shall contain:
 - (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
 - (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
 - (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
 - (d) an affirmation of the truth of the Witness Statement; and
 - (e) the signature of the witness and its date and place.
6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that

witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.
9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.
10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

Article 5 Party-Appointed Experts

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal,
 - (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and
 - (ii) the Party-Appointed Expert shall submit an Expert Report.
2. The Expert Report shall contain:
 - (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
 - (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
 - (c) a statement of his or her independence from the Parties, their legal

- advisors and the Arbitral Tribunal;
- (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
 - (f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
 - (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
 - (h) the signature of the Party-Appointed Expert and its date and place; and
 - (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.
3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
 4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.
 5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.
 6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6 Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.
2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.
3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.
4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:
 - (a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and

- experience;
- (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - (c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
 - (d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
 - (e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
 - (f) the signature of the Tribunal-Appointed Expert and its date and place; and
 - (g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.
5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.
6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.
7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of

the costs of the arbitration.

Article 7 Inspection

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
 - (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
 - (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
 - (c) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially

presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

- (d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;
 - (e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;
 - (f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);
 - (g) the Arbitral Tribunal may ask questions to a witness at any time.
4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.
5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

Article 9 Admissibility and Assessment of Evidence

- 1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
- 2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
 - (a) lack of sufficient relevance to the case or materiality to its outcome;
 - (b) legal impediment or privilege under the legal or ethical rules

- determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
 - (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
 - (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
 - (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
 - (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
- (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
 - (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
 - (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
 - (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
 - (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.
4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.
5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.
6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one

Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

ANNEX B

IBA Guidelines on Conflicts of Interest in International Arbitration

1. Problems of conflicts of interest increasingly challenge international arbitration. Arbitrators are often unsure about what facts need to be disclosed, and they may make different choices about disclosures than other arbitrators in the same situation. The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator.
2. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and their right to a fair hearing and, on the other hand, the parties' right to select arbitrators of their choosing. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international arbitration community apply different standards in making decisions concerning disclosure, objections and challenges.
3. It is in the interest of everyone in the international arbitration community that international arbitration proceedings not be hindered by these growing conflicts of interest issues. The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group of 19 experts in international arbitration from 14 countries to study, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality and independence and disclosure in international

arbitration. The Working Group has determined that existing standards lack sufficient clarity and uniformity in their application. It has therefore prepared these Guidelines, which set forth some General Standards and Explanatory Notes on the Standards. Moreover, the Working Group believes that greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that, in the view of the Working Group, do or do not warrant disclosure or disqualification of an arbitrator. Such lists – designated Red, Orange and Green (the ‘Application Lists’) – appear at the end of these Guidelines.

4. The Guidelines reflect the Working Group’s understanding of the best current international practice firmly rooted in the principles expressed in the General Standards. The Working Group has based the General Standards and the Application Lists upon statutes and case law in jurisdictions and upon the judgment and experience of members of the Working Group and others involved in international commercial arbitration. The Working Group has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international commercial arbitration. In particular, the Working Group has sought and considered the views of many leading arbitration institutions, as well as corporate counsel and other persons involved in international arbitration. The Working Group also published drafts of the Guidelines and sought comments at two annual meetings of the International Bar Association and other meetings of arbitrators. While the comments received by the Working Group varied and included some points of criticisms, the arbitration community generally supported and encouraged these efforts to help reduce the growing problems of conflicts of interests. The Working Group has studied all the comments received and has adopted many of the proposals that it has received. The Working Group is very grateful indeed for the serious considerations given to its proposals by so many institutions and individuals all over the globe and for the comments and proposals received.
5. Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in the light of comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).

6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection. The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation. The Working Group is also publishing a Background and History, which describes the studies made by the Working Group and may be helpful in interpreting the Guidelines.
7. The IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be comprehensive, nor could they be. Nevertheless, the Working Group is confident that the Application Lists provide better concrete guidance than the General Standards (and certainly more than existing standards). The IBA and the Working Group seek comments on the actual use of the Guidelines, and they plan to supplement, revise and refine the Guidelines based on that practical experience.
8. In 1987, the IBA published Rules of Ethics for International Arbitrators. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here.

Part I: General Standards Regarding Impartiality, Independence And Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.

Explanation to General Standard 1:

The Working Group is guided by the fundamental principle in international arbitration that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator

and must remain so during the entire course of the arbitration proceedings. The Working Group considered whether this obligation should extend even during the period that the award may be challenged but has decided against this. The Working Group takes the view that the arbitrator's duty ends when the Arbitral Tribunal has rendered the final award or the proceedings have otherwise been finally terminated (eg, because of a settlement). If, after setting aside or other proceedings, the dispute is referred back to the same arbitrator, a fresh round of disclosure may be necessary.

(2) Conflicts of Interest

- (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.
- (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).
- (c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.
- (d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

Explanation to General Standard 2:

(a) It is the main ethical guiding principle of every arbitrator that actual bias from the arbitrator's own point of view must lead to that arbitrator declining his or her appointment. This standard should apply regardless of the stage of the proceedings. This principle is so self-evident that many national laws do not explicitly say so. See eg Article 12, UNCITRAL Model Law. The Working Group, however, has included it in the General Standards because explicit expression in these Guidelines helps to avoid confusion

and to create confidence in procedures before arbitral tribunals. In addition, the Working Group believes that the broad standard of ‘any doubts as to an ability to be impartial and independent’ should lead to the arbitrator declining the appointment.

(b) In order for standards to be applied as consistently as possible, the Working Group believes that the test for disqualification should be an objective one. The Working Group uses the wording ‘impartiality or independence’ derived from the broadly adopted Article 12 of the UNCITRAL Model Law, and the use of an appearance test, based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12 (2) of the UNCITRAL Model Law, to be applied objectively (a ‘reasonable third person test’). As described in the Explanation to General Standard 3(d), this standard should apply regardless of the stage of the proceedings.

(c) Most laws and rules that apply the standard of justifiable doubts do not further define that standard. The Working Group believes that this General Standard provides some context for making this determination.

(d) The Working Group supports the view that no one is allowed to be his or her own judge; ie, there cannot be identity between an arbitrator and a party. The Working Group believes that this situation cannot be waived by the parties. The same principle should apply to persons who are legal representatives of a legal entity that is a party in the arbitration, like board members, or who have a significant economic interest in the matter at stake. Because of the importance of this principle, this non-waivable situation is made a General Standard, and examples are provided in the non-waivable Red List.

The General Standard purposely uses the terms ‘identity’ and ‘legal representatives.’ In the light of comments received, the Working Group considered whether these terms should be extended or further defined, but decided against doing so. It realizes that there are situations in which an employee of a party or a civil servant can be in a position similar, if not identical, to the position of an official legal representative. The Working Group decided that it should suffice to state the principle.

(3) *Disclosure by the Arbitrator*

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties,

the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.

- (b) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset or resigned.
- (c) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure.
- (d) When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.

Explanation to General Standard 3:

(a) General Standard 2(b) above sets out an objective test for disqualification of an arbitrator. However, because of varying considerations with respect to disclosure, the proper standard for disclosure may be different. A purely objective test for disclosure exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law. Nevertheless, the Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view. Because of the strongly held views of many arbitration institutions (as reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure. The Working Group has adapted the language of Article 7(2) of the ICC Rules for this standard. However, the Working Group believes that this principle should not be applied without limitations. Because some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties' perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required. Similarly, the Working Group emphasizes that the two tests (objective test for disqualification and subjective test for disclosure) are clearly distinct from each other, and that a disclosure shall not automatically lead to disqualification, as reflected in General Standard 3(b).

In determining what facts should be disclosed, an arbitrator should take into account all circumstances known to him or her, including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals.

(b) Disclosure is not an admission of a conflict of interest.

An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination or resigned. An arbitrator making disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether or not they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. The Working Group hopes that the promulgation of this General Standard will eliminate the misunderstanding that disclosure demonstrates doubts sufficient to disqualify the arbitrator. Instead, any challenge should be successful only if an objective test, as set forth above, is met.

(c) Unnecessary disclosure sometimes raises an incorrect implication in the minds of the parties that the disclosed circumstances would affect his or her impartiality or independence. Excessive disclosures thus unnecessarily undermine the parties' confidence in the process. Nevertheless, after some debate, the Working Group believes it important to provide expressly in the General Standards that in case of doubt the arbitrator should disclose. If the arbitrator feels that he or she should disclose but that professional secrecy rules or other rules of practice prevent such disclosure, he or she should not accept the appointment or should resign.

(d) The Working Group has concluded that disclosure or disqualification (as set out in General Standard 2) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act or whether a challenge by a party should be successful, the facts and circumstances alone are relevant and not the current stage of the procedure or the consequences of the withdrawal. As a practical matter, institutions make a distinction between the commencement of an arbitration proceeding and a later stage. Also, courts tend to apply different standards. Nevertheless, the Working Group believes it important to clarify that no distinction should be made regarding the stage of the arbitral procedure. While there are practical concerns if an arbitrator must withdraw after an arbitration has commenced, a distinction based on the stage of arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

- (a) If, within 30 days after the receipt of any disclosure by the arbitrator or after a party learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest by the arbitrator based on such facts or circumstances and may not raise any objection to such facts or circumstances at a later stage.
- (b) However, if facts or circumstances exist as described in General Standard 2(d), any waiver by a party or any agreement by the parties to have such a person serve as arbitrator shall be regarded as invalid.
- (c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator or continue to act as an arbitrator, if the following conditions are met:
 - (i) All parties, all arbitrators and the arbitration institution or other appointing authority (if any) must have full knowledge of the conflict of interest; and
 - (ii) All parties must expressly agree that such person may serve as arbitrator despite the conflict of interest.
- (d) An arbitrator may assist the parties in reaching a settlement of the dispute at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings.

Explanation to General Standard 4:

(a) The Working Group suggests a requirement of an explicit objection by the parties within a certain time limit. In the view of the Working Group, this time limit should also apply to a party who refuses to be involved.

(b) This General Standard is included to make General Standard 4(a) consistent with the non-waivable provisions of General Standard 2(d). Examples of such circumstances are described in the non-waivable Red List.

(c) In a serious conflict of interest, such as those that are described by way of example in the waivable Red List, the parties may nevertheless wish to use such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. The Working Group believes persons with such a serious conflict of interests may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well established in some jurisdictions but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as effective waiver of a potential conflict of interest. Express consent is generally sufficient, as opposed to a consent made in writing which in certain jurisdictions requires signature. In practice, the requirement of an express waiver allows such consent to be made in the minutes or transcript of a hearing. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective if the mediation is unsuccessful. Thus, parties assume the risk of what the arbitrator may learn in the settlement process. In giving their express consent, the parties should realize the consequences of the arbitrator assisting the parties in a settlement process and agree on regulating this special position further where appropriate.

(5) Scope

These Guidelines apply equally to tribunal chairs, sole arbitrators and party-appointed arbitrators. These Guidelines do not apply to non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws.

Explanation to General Standard 5:

Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards should not distinguish among sole arbitrators, party-appointed arbitrators and tribunal chairs. With regard to secretaries of Arbitral Tribunals, the Working Group takes the view that it is the responsibility of the arbitrator to ensure that the secretary is and remains impartial and independent.

Some arbitration rules and domestic laws permit party appointed arbitrators to be non-neutral. When an arbitrator is serving in such a role, these Guidelines should not apply to him or her, since their purpose is to protect impartiality and independence.

(6) Relationships

- (a) When considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists or whether disclosure should be made, the activities of an arbitrator's law firm, if any, should be reasonably considered in each individual case. Therefore, the fact that the activities of the arbitrator's firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure.
- (b) Similarly, if one of the parties is a legal entity which is a member of a group with which the arbitrator's firm has an involvement, such facts or circumstances should be reasonably considered in each individual case. Therefore, this fact alone shall not automatically constitute a source of a conflict of interest or a reason for disclosure.
- (c) If one of the parties is a legal entity, the managers, directors and members of a supervisory board of such legal entity and any person having a similar controlling influence on the legal entity shall be considered to be the equivalent of the legal entity.

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to use the arbitrator of its choice and the importance of maintaining confidence in the impartiality and independence of international arbitration. In the opinion of the Working Group, the arbitrator must in principle be considered as identical to his or her law firm, but nevertheless the activities of the arbitrator's firm should not automatically constitute a conflict of interest. The relevance of such activities, such as the nature, timing and scope of the work by the law firm, should be reasonably considered

in each individual case. The Working Group uses the term ‘involvement’ rather than ‘acting for’ because a law firm’s relevant connections with a party may include activities other than representation on a legal matter.

(b) When a party to an arbitration is a member of a group of companies, special questions regarding conflict of interest arise. As in the prior paragraph, the Working Group believes that because individual corporate structure arrangements vary so widely an automatic rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies should be reasonably considered in each individual case.

(c) The party in international arbitration is usually a legal entity. Therefore, this General Standard clarifies which individuals should be considered effectively to be that party.

(7) Duty of Arbitrator and Parties

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator. The party shall do so on its own initiative before the beginning of the proceeding or as soon as it becomes aware of such relationship.

(b) In order to comply with General Standard 7(a), a party shall provide any information already available to it and shall perform a reasonable search of publicly available information.

(c) An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.

Explanation to General Standard 7:

To reduce the risk of abuse by unmeritorious challenge of an arbitrator’s impartiality or independence, it is necessary that the parties disclose any relevant relationship with the arbitrator. In addition, any party or potential party to an arbitration is, at the outset, required to make a reasonable effort to ascertain and to disclose publicly available information that, applying the general standard, might affect the arbitrator’s impartiality and independence. It is the arbitrator or putative arbitrator’s obligation to make

similar enquiries and to disclose any information that may cause his or her impartiality or independence to be called into question.

PART II: Practical Application of the General Standards

1. The Working Group believes that if the Guidelines are to have an important practical influence, they should reflect situations that are likely to occur in today's arbitration practice. The Guidelines should provide specific guidance to arbitrators, parties, institutions and courts as to what situations do or do not constitute conflicts of interest or should be disclosed.

For this purpose, the members of the Working Group analyzed their respective case law and categorized situations that can occur in the following Application Lists. These lists obviously cannot contain every situation, but they provide guidance in many circumstances, and the Working Group has sought to make them as comprehensive as possible. In all cases, the General Standards should control.

2. The Red List consists of two parts: 'a non-waivable Red List' (see General Standards 2(c) and 4(b)) and 'a waivable Red List' (see General Standard 4(c)). These lists are a non-exhaustive enumeration of specific situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence; ie, in these circumstances an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts (see General Standard 2(b)). The non-waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, disclosure of such a situation cannot cure the conflict. The waivable Red List encompasses situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable only if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a)).

4. It should be stressed that, as stated above, such disclosure should not automatically result in a disqualification of the arbitrator; no presumption regarding disqualification should arise from a disclosure. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — ie, from a reasonable third person’s point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator’s impartiality or independence. If the conclusion is that there is no justifiable doubt, the arbitrator can act. He or she can also act if there is no timely objection by the parties or, in situations covered by the waivable Red List, a specific acceptance by the parties in accordance with General Standard 4(c). Of course, if a party challenges the appointment of the arbitrator, he or she can nevertheless act if the authority that has to rule on the challenge decides that the challenge does not meet the objective test for disqualification.

5. In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non- appointment, later disqualification or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.

6. The Green List contains a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. In the opinion of the Working Group, as already expressed in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of ‘the eyes of the parties.’

7. Situations falling outside the time limit used in some of the Orange List situations should generally be considered as falling in the Green List, even though they are not specifically stated. An arbitrator may nevertheless wish to make disclosure if, under the General Standards, he or she believes it to be appropriate. While there has been much debate with respect to the time limits used in the Lists, the Working Group has concluded that the limits indicated are appropriate and provide guidance where none exists now. For example, the three-year period in Orange List 3.1 may be too long in certain circumstances and too short in others, but the Working Group believes that the period is an appropriate general criterion, subject to the special circumstances of any case.

8. The borderline between the situations indicated is often thin. It can be debated whether a certain situation should be on one List of instead of another. Also, the Lists contain, for various situations, open norms like 'significant'. The Working Group has extensively and repeatedly discussed both of these issues, in the light of comments received. It believes that the decisions reflected in the Lists reflect international principles to the best extent possible and that further definition of the norms, which should be interpreted reasonably in light of the facts and circumstances in each case, would be counter-productive.

9. There has been much debate as to whether there should be a Green List at all and also, with respect to the Red List, whether the situations on the Non-Waivable Red List should be waivable in light of party autonomy. With respect to the first question, the Working Group has maintained its that the subjective test for disclosure should not be the criterion but that some objective thresholds should be added. With respect to the second question, the conclusion of the Working Group was that party autonomy, in this respect, has its limits.

1. Non-Waivable Red List

- 1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.
- 1.2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.
- 1.3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
- 1.4. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

2. Waivable Red List

- 2.1. Relationship of the arbitrator to the dispute
 - 2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.
 - 2.1.2 The arbitrator has previous involvement in the case.
- 2.2. Arbitrator's direct or indirect interest in the dispute
 - 2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
 - 2.2.2 A close family member⁴ of the arbitrator has a significant financial interest in the outcome of the dispute.

- 2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.
- 2.3. Arbitrator's relationship with the parties or counsel
 - 2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
 - 2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
 - 2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.
 - 2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate⁵ of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
 - 2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
 - 2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
 - 2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income there from.
 - 2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.
 - 2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

3. *Orange List*

- 3.1. Previous services for one of the parties or other involvement in the case
 - 3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.
 - 3.1.2 The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an

- unrelated matter.
- 3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.⁶
 - 3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.
 - 3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.
 - 3.2. Current services for one of the parties
 - 3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.
 - 3.2.2 A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.
 - 3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.
 - 3.3. Relationship between an arbitrator and another arbitrator or counsel.
 - 3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.
 - 3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.⁷
 - 3.3.3 The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.
 - 3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.
 - 3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
 - 3.3.6 A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.
 - 3.3.7 The arbitrator has within the past three years received more than

three appointments by the same counsel or the same law firm.

- 3.4. Relationship between arbitrator and party and others involved in the arbitration
 - 3.4.1 The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.
 - 3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.
 - 3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.
 - 3.4.4 If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties.
- 3.5. Other circumstances
 - 3.5.1 The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.
 - 3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.
 - 3.5.3 The arbitrator holds one position in an arbitration institution with appointing authority over the dispute.
 - 3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. *Green List*

- 4.1. Previously expressed legal opinions
 - 4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).
- 4.2. Previous services against one party
 - 4.2.1 The arbitrator's law firm has acted against one of the parties or

an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

- 4.3. Current services for one of the parties
 - 4.3.1 A firm in association or in alliance with the arbitrator's law firm, but which does not share fees or other revenues with the arbitrator's law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.
- 4.4. Contacts with another arbitrator or with counsel for one of the parties
 - 4.4.1 The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.
 - 4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.
- 4.5. Contacts between the arbitrator and one of the parties
 - 4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.
 - 4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.
 - 4.5.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate of one of the parties, have worked together as joint experts or in another professional capacity, including as arbitrators in the same case.

A flow chart is attached to these Guidelines for easy reference to the application of the Lists. However, it should be stressed that this is only a schematic reflection of the very complex reality. Always, the specific circumstances of the case prevail.

Notes

- 4 Throughout the Application Lists, the term 'close family member' refers to a spouse, sibling, child, parent or life partner.
- 5 Throughout the Application Lists, the term 'affiliate' encompasses all companies in one group of companies including the parent company.
- 6 It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice

for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.

- 7 Issues concerning special considerations involving barristers in England are discussed in the Background Information issued by the Working Group.

ANNEX C

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) *UNCITRAL Conciliation Rules*

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GENERAL ASSEMBLY RESOLUTION 35/52

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Model Conciliation Clause

**RESOLUTION 35/52 ADOPTED BY THE GENERAL ASSEMBLY
ON 4 DECEMBER 1980**

**35/52. Conciliation Rules of the United Nations Commission on
International Trade Law**

The General Assembly,

Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Noting that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session²⁸⁸ after consideration of the observations of Governments and interested organizations,

1. *Recommends* the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;
2. *Requests* the Secretary-General to arrange for the widest possible distribution of the Conciliation Rules.

²⁸⁸ *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 105 and 106.*

UNCITRAL CONCILIATION RULES

APPLICATION OF THE RULES

Article 1

- (1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.
- (2) The parties may agree to exclude or vary any of these Rules at any time.
- (3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

- (1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.
- (2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.
- (3) If the other party rejects the invitation, there will be no conciliation proceedings.
- (4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATORS

Article 4

- (1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

- (b) In conciliation proceedings with two conciliators, each party appoints one conciliator;
 - (c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.
- (2) Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular,
 - (a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or
 - (b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5

- (1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.
- (2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.
- (3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

*In this and all following articles, the term “conciliator” applies to a sole conciliator, two or three conciliators, as the case may be.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

- (1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
- (2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
- (3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
- (4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

- (1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.
- (2) Unless the parties have agreed upon the place where meetings with

the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

- (1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.
- (2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.** If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.
- (3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

**The parties may wish to consider including in the settlement agreement a

clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

- (a) By the signing of the settlement agreement by the parties, on the date of the agreement; or
- (b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- (c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- (d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

- (1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term “costs” includes only:
 - (a) The fee of the conciliator which shall be reasonable in amount;

- (b) The travel and other expenses of the conciliator;
 - (c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;
 - (d) The cost of any expert advice requested by the conciliator with the consent of the parties;
 - (e) The cost of any assistance provided pursuant to articles 4, paragraph (2)(b), and 8 of these Rules.
- (2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

- (1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.
- (2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.
- (3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.
- (4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

- (a) Views expressed or suggestions made by the other party in

- respect of a possible settlement of the dispute;
- (b) Admissions made by the other party in the course of the conciliation proceedings;
 - (c) Proposals made by the conciliator;
 - (d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force. (The parties may agree on other conciliation clauses.)

Further information may be obtained from:

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ANNEX D

EUROPEAN CODE OF CONDUCT FOR MEDIATORS

This code of conduct sets out a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility. It may be used by mediators involved in all kinds of mediation in civil and commercial matters.

Organisations providing mediation services may also make such a commitment by asking mediators acting under the auspices of their organisation to respect the code of conduct.

Organisations may make available information on the measures, such as training, evaluation and monitoring, they are taking to support the respect of the code by individual mediators.

For the purposes of the code of conduct, mediation means any structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person – hereinafter “the mediator”.

Adherence to the code of conduct is without prejudice to national legislation or rules regulating individual professions.

Organisations providing mediation services may wish to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as to specific areas such as family mediation or consumer mediation.

1. COMPETENCE, APPOINTMENT AND FEES OF MEDIATORS AND PROMOTION OF THEIR SERVICES

1.1. *Competence*

Mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2. *Appointment*

Mediators must confer with the parties regarding suitable dates on which the mediation may take place. Mediators must verify that they have the appropriate background and competence to conduct mediation in a given case before accepting the appointment. Upon request, they must disclose information concerning their background and experience to the parties.

1.3. *Fees*

Where not already provided, mediators must always supply the parties with complete information as to the mode of remuneration which they intend to apply. They must not agree to act in a mediation before the principles of their remuneration have been accepted by all parties concerned.

1.4. *Promotion of mediators' services*

Mediators may promote their practice provided that they do so in a professional, truthful and dignified way.

2. INDEPENDENCE AND IMPARTIALITY

2.1 *Independence*

If there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act.

Such circumstances include: any personal or business relationship with one or more of the parties; any financial or other interest, direct or indirect, in the outcome of the mediation; the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties.

In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation in full independence in order to ensure complete impartiality and the parties explicitly consent.

The duty to disclose is a continuing obligation throughout the process of mediation.

2.2. *Impartiality*

Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

3. THE MEDIATION AGREEMENT, PROCESS AND SETTLEMENT

3.1. *Procedure*

The mediator must ensure that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator must in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement may, upon request of the parties, be drawn up in writing.

The mediator must conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible imbalances of power and any wishes the parties may express, the rule of law and the need for a prompt settlement of the dispute. The parties may agree with the mediator on the manner in which the mediation is to be conducted, by reference to a set of rules or otherwise.

The mediator may hear the parties separately, if he deems it useful.

3.2. *Fairness of the process*

The mediator must ensure that all parties have adequate opportunities to be involved in the process.

The mediator must inform the parties, and may terminate the mediation, if:

- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or

- the mediator considers that continuing the mediation is unlikely to result in a settlement.

3.3. *The end of the process*

The mediator must take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator must, upon request of the parties and within the limits of his competence, inform the parties as to how they may formalise the agreement and the possibilities for making the agreement enforceable.

4. CONFIDENTIALITY

The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.

ANNEX E

Selected Articles from the Georgian Civil Procedure Code

Article 3. Contraposition Principle

1. The parties initiate proceeding in case at the court by filing the action or application in accordance with the rules specified in this Code. They determine the subject of dispute and decide on filing the action (application) by themselves.
2. The parties may close the proceeding by reconciliation. The claimant may waive a claim, and the respondent may admit the claim.

Article 31. Other Grounds for Challenge of a Judge

1. A judge cannot examine the case or take part in its examination, if he/she:
 - a) is a party to this case, or is under obligations or common rights with any party;
 - b) took part in the earlier examination of this case as a witness, expert, specialist, interpreter attorney, registrar;
 - c) is a relative of a party or its attorney;
 - d) has a personal, direct or indirect interest in the results of case, or there is such other circumstance bringing his/her impartiality into challenge;
 - (e) was involved in this case as a mediator.

Article 94. Persons Who May Be Attorneys in the Court

1. The following persons may be attorneys of the parties in the court:
 - a) advocates;
 - b) employees of the body of state power, local self-government or government body or organizations – on the cases concerning these bodies and organizations;
 - c) one of the accomplices under the commission of the remaining accomplices;
 - d) other capable persons – only in the court of first instance.
- 1¹. A person who has acted as a mediator in a case cannot be a counsel in the court in the same case.

Article 186. Dismissal of Action

1. The judge will dismiss the action within five days, if:
 - a) it is not under the judicial jurisdiction;
 - b) the decision or ruling of the court on waiving the action by the claimant, admitting the action by the respondent or registration of conciliation of the parties is available;
 - b¹) There is a notary mediated settlement certified by a notary;
 - b²) There is a decision of the Head of LEPL National Bureau of Enforcement under the Ministry of Justice of Georgia on the enforcement of the debt or the settlement of the dispute in question;
 - c) the case on dispute between the same parties, on the same subject and under the same grounds has been instituted at the same or other court;
 - d) the parties have made the agreement that the dispute between them will be removed for settlement at the private arbitration;
 - d¹) the dispute falls under the jurisdiction of healthcare mediation agency;
 - e) the case is not under the jurisdiction of this court;
 - f) the action is filed by an incapable person;
 - g) a person who is not authorized to institute the case filed the action on behalf of the person concerned.
 - h) (omitted)

Article 187¹ Judicial mediation

1. Following a lawsuit being lodged with a court, a case falling within the scope of judicial mediation may be referred to a mediator (a physical person or a legal entity) for the purpose of ending the dispute with mutual agreement between the parties.
2. A judicial order referring a case to a mediator shall not be subject to appeal.

Article 187².

Rules established by this Code, with amendments contained in this Chapter, shall apply to cases falling within the scope of judicial mediation.

Article 187³. Cases falling within the scope of judicial mediation

1. Judicial mediation may be applied to the following:
 - (a) family disputes except for those concerning child adoption, finding child adoption null and void, limitation of parental rights and deprivation of parental rights;

- (b) disputes concerning inheritance;
 - (c) disputes concerning law of neighbors;
 - (d) any dispute if parties agree thereon.
2. In the case described in paragraph (d), paragraph 1 of this Article, a dispute may be referred to a mediator at any stage of its review.

Article 187⁴. Recusal of a mediator

A mediator may be recused on the ground envisaged in Article 31(1) of this Code.

Article 187⁵. Duration of judicial mediation

- 1. Duration of judicial mediation is 45 days but no less than 2 meetings.
- 2. The term indicated in paragraph 1 of this Article may be prolonged by agreement of the parties for the same period.

Article 187⁶. Consequences of the parties' failure to appear in the process of judicial mediation

- 1. Parties are obligated to appear at a place and time appointed by a mediator to participate in the mediation process.
- 2. Should a party fail to appear at a meeting appointed by a mediator in the process of judicial mediation on the basis of Article 187⁵(1) of this Code without a valid cause therefor, the party shall be liable to pay out the judicial expenses in full, regardless of what the final outcome of the judicial review of the case is and a fine in the amount of 150 Lari.
- 3. Should the dispute end with mutual agreement of the parties as a result of the judicial mediation process, the parties will not be liable to pay the fine indicated in paragraph 2 of this Article.
- 4. Paragraph 2 of this Article shall not apply if within the judicial proceedings the dispute ends with a mutual agreement between the parties.

Article 187⁷. End of judicial mediation process

- 1. If a dispute ends with mutual agreement between the parties within the duration established by law, the court, based on a party's motion, will issue an order approving the agreement reached between the parties. Such order shall be final and not subject to appeal.
- 2. If the dispute does not end with mutual agreement between the parties within the duration established by law, the plaintiff may lodge a lawsuit based on general rules.

Article 187⁸. Confidentiality of judicial mediation

1. The mediation process shall be confidential. A mediator shall have no right to disclose information that has become known to him or her while performing the functions of a mediator, unless it is otherwise stated in the agreement between the parties.
2. Parties (and their counsels) shall have no right to disclose information that has become known to them in the process of mediation on the condition of confidentiality, unless it is otherwise stated in the agreement between the parties.

Article 187⁹. Annulment of lawsuit security

The court is authorized, at its own initiative or based on a party's motion, to annul the measure used to secure the lawsuit if, in the cases envisaged in Article 187³ of this Code, the plaintiff does not lodge a lawsuit with a court under general rules within 10 days following the end of the judicial mediation process.

Article 217. Commencement of Hearing

1. In starting the hearing on merits, the judge shall first ask the parties whether they wish to reach conciliation, where after the judge shall report to the court about the case, briefly presenting the main facts cited in the action and counter-claim, which must be based on the case materials. The judge shall formulate the facts, which served as the basis for the claimant's claim, the facts, which served as the basis for the respondent's counterclaim, the facts not disputed and the facts disputed by the parties as well as the evidence presented by the parties, which are appended to the case. After having reported on the case, the judge asks the parties if they wish to add or/and specify something.
2. After the judge's report, the court shall at first hear the pleadings of the claimant and of the third party on his side. Thereafter, the court shall hear the pleadings of the respondent and of the third party on his side.
3. The judge shall set time for a party to plead or/and for each stage of the hearing. In special circumstances, depending on the complexity of the case, the court may afford to a party additional time that does not cause protraction of the hearing.

Article 218. Actions performed by a judge to help the parties reach an amicable settlement

1. The judge shall make his best efforts and take all statutory measures in

order for the parties to end the case by settlement/reconciliation. For the purpose of ending the case by reaching an amicable settlement, the judge is authorized, at his/her own initiative or on the basis of a party's motion, to announce a break while the court is in session and to listen only to the parties or only to their representatives without other persons' attendance.

2. The judge may make a reference to possible consequences of the dispute settlement and to offer the parties the terms and conditions of settling the dispute amicably.
3. The judge may propose to the parties the possibility of ending the dispute by mutual agreement through the case referral to a mediator.

Published:

"Meridiani" publisher

47, Kazbegi Ave. Tbilisi

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Georgia

Steven M. Austermiller

Delaine R. Swenson

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