

International Development Law Organization

Development Lawyers Course

(DLC – 20E)

MEDIATION – ADR

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MEDIATION: LEADING PEOPLE TO NEGOTIATE

1. CONCEPT AND DEFINITION

2. PURPOSES

3. APPLICATIONS

4. OTHER ADR PROCEDURES

**5. SYNOPTIC COMPARISON
BETWEEN CONTENTIOUS AND
NON CONTENTIOUS PROCEDURES**

1. CONCEPT AND DEFINITION

MEDIATION IS AN ADVANCED APPLICATION OF NEGOTIATION. WHEN THE PARTIES ARE UNABLE TO MANAGE ALONE THEY ASK A PROFESSIONAL TO HELP THEM: HE IS APPOINTED TO FACILITATE THEIR NEGOTIATION.

The starting scenario is like a civil process or an arbitration:

- two conflicting parties, at least
- an independent, impartial, neutral third party between them
- the tendency to put an end to the conflict

But the working method is completely different since:

- the parties establish the decision
- the third party only gives advice
- the final decision is only a binding contract

Any coercion element is not admitted, what is only and always required is:

CONSENSUS in agreeing on:

- the acceptance of the mediation procedure
- the possibility of being summoned separately
- the decision of trying to reach an agreement
- the spontaneous execution of the agreement
- the possible re-negotiation or re-mediation

2. DIFFERENT PURPOSES

Contentious procedures aim to establish the possible violation of a party in the preceding behaviour and then the sentence of compensation for damages (alternate obligation) or the execution in a specific form:

- the suitability of the sum of money expressing the compensation is not remarkable for an effective solution of the problem;
- whether the organization and the risk of the solution falls back to the damaged and indemnified party is not remarkable;
- the almost unavoidable circumstance that the relation between the parties will be damaged is not remarkable for the judge's evaluation or for the arbitrator's.

On the contrary, negotiation procedures, and in particular mediation, aim to solve the problem through an agreement completely detached from the initial complaints of the parties, to re-build the damaged relation and to create new

(economical or not) interests so that the relation between the parties may become more intense:

- mediation is useless only when you wish to create the instrument to "destroy" the other party in any case.

3. APPLICATIONS

- Consumer defence,
- Big building contracts
- Family relations
- Environment safeguard
- Schools, barracks, sport clubs
- International conflict resolution
- Business administration

4. OTHER ADR PROCEDURES

- Arbitration, a private court constructed on the parties will
- Small claims resolution, for disputes of little importance
- Dispute review board, during the execution of big contracts
- Early neutral evaluation, caused by State Courts
- Minitrial, it is a middle procedure between mediation and arbitration. The decisional college is formed by managers of both societies, assisted by lawyers, who take part to the procedure to make a thesis prevail on another.
- Private judging, an exam done by a private judge
- Summary jury trial, without any legal effects, of a jury to estimate the effects of a possible sentence and the advantages of an agreement.

**5. SYNOPTIC COMPARISON BETWEEN
CONTENTIOUS PROCEDURES AND
NON CONTENTIOUS PROCEDURES**

PRINCIPLES

	TRIAL	ARBITRATION	MEDIATION	NEGOTIATION
LENGHT	Years	Months	Days	Hours
COSTS	High	Very high	Low	Very low
DISCRETION	Null	Moderate	Complete	
APPLIED RULES or SCIENCES	Law or equity		Communication, ethics, interculturality, law, economy, creativity	
APPROACH	Turned to the past		Turned to the future	
TECHNIQUE	Professional-closed		Spontaneous-open	

PARTIES

	TRIAL	ARBITRATION	MEDIATION	NEGOTIATION
LEADER	Lawyers		Mediator/parties	Parties
RELATION	Antagonistic		Cooperative	
COMMUNICATION	Null		Complete	
PSYCHOLOGY	Stress		Relaxation	
APPOINTMENT	State	Parties		
APPEARENCE	Lawyers		Parties	

PROCEDURE AND PHASES

	TRIAL	ARBITRATION	MEDIATION	NEGOTIATION
INITIATIVE	The defendant resists		The defendant agrees	
FORMALITIES	Abstract and formal		Concrete and practical	
TESTS	Formal	Informal	Free	
MEETINGS	Respect of the debate		Also separate meetings (caucuses)	

FINAL SOLUTION

	TRIAL	ARBITRATION	MEDIATION	NEGOTIATION
DECISION	Third person		Parties	
FORMULATION	Lawyers		Mediator	Parties
CONTENTS	On request		Also "ultra petita"	
EXECUTION	Coercive		Spontaneous	
PURPOSE	Winning at any price Defeating the other party		Agreeing, satisfying interest, improving relations	
SUCCESS IN US			75%	
EXECUTION	30%	60%	90%	100%