Cross-border mediation in civil and commercial cases[1]

SCENARIO 1

ARTUR DRINKS DISTRIBUTION

v

O'TOOLE WHISKEYS AND LICQUEURS

International Sales and Distribution Contract Dispute

Co-funded by the Justice Programme 2014-2020 of the European Union

[1] Developed by Professor Brian Hutchinson.

Artur Drinks Distribution v O'Toole Whiskeys and Liqueurs

Common Facts[2]

Artur Drinks Distribution SIA ("ADD") is a Latvian company engaged in alcoholic beverage distribution in the Baltic states. Since it was established 10 years ago, it has become very successful in selling premium wines and has built up an impressive network of high-end clients in the hotel, restaurant, and night-club sector. ADD has acquired a widespread reputation for quality. Recently, it has been looking to expand its offerings in the premium beverage market by moving into whiskey and whiskey related product sales. To this end, it engaged with O'Toole Whiskeys and Liqueurs Ltd ("OWL"), an Irish family-owned company, which has been involved in whiskey distilling for over 150 years, and which has a reputation for products of exceptional quality, including its flagship product, *O'Toole's Irish Whiskey Cream.*

Last year, ADD piloted the sale of 200 1 litre bottles of *O'Toole's Irish Whiskey Cream* to its Baltic clients. The product sold so well that ADD entered into a sales and distribution agreement OWL providing, amongst other things, for:

1. A 5-year exclusive distribution agreement whereby the Producer (OWL) contracted to supply *O'Toole's Irish Whiskey Cream* only to the Customer (ADD) in the Baltic region;
2. A fixed purchase price of €18 per litre, incrementing by 5% per annum for the lifetime of the contract;
3. A guarantee that the goods supplied would be of "quality consistent with that of the goods supplied in the pilot order";
4. A promise that the Producer (OWL) would indemnify the Customer (ADD) "against any and all economic loss in the event that the goods supplied [were] not of the quality contracted for";
5. A time limitation clause which provided that any claims against the guarantee and indemnity by the Customer (ADD) had to be "notified to the Producer "(OWL) "within one month of delivery of the goods" or else the "claim is deemed to be barred"; and
6. A disputes clause, where the parties agreed that they would attempt to resolve any disputes by "friendly negotiation, and, failing that, mediation under the rules of a recognised mediation body".

Under this agreement, the product was to be shipped (at the Customer's expense) to Latvia in bulk plastic containers, each containing 1,200 litres. There, it would be bottled, labelled, and distributed by the Customer according to its needs.

Soon after, ADD ordered 5 containers (6,000 litres) of *O'Toole's Irish Whiskey Cream* from OWL. Without explanation, the order was split by OWL into two consignments of 1 container and 4 containers, and only the first consignment was shipped. When it arrived, it was promptly bottled and distributed to three of ADD's best clients. Almost immediately, each client complained to ADD that the product was not of the same quality as the product they had tried during the pilot; indeed, it seemed as though the cream had 'gone-off' and 'turned sour'.

Artur Martins, the managing Director of ADD, immediately telephoned Mary O'Toole (the owner and CEO of OWL) to discuss the issue. Mary O'Toole is the fifth generation of her family to head-up the

[2] *Methodological advice*: this part of the case study should be included in the seminar documentation and made available to all participants.

O'Toole distillery business and she has 50 years' personal experience in it. This was a point she made forcefully, possibly rudely, to Artur over the telephone: telling him that his was the only complaint she had ever received in all her 50 years of the business, and that he must be mistaken, at fault, or lying, since she had personally tested the product before dispatching it. She followed with a lengthy tirade of criticisms of youth, inexperience, and eastern European business practices, such that Artur could hardly get a word into the conversation. When he did, in due course, it was simply to say abruptly that he was sorry that Mary was not prepared to settle the matter civilly and that he would follow with a formal claim in writing, then he put down the phone.

In due course Artur formally wrote to Mary invoking the guarantee and indemnity provisions of the agreement and seeking monetary compensation in the amount of €140,000. He very soon received a e-mail in reply from Mary in which she stated that she was grievously offended by Artur's attitude and not prepared to be taken for a fool; that she considered that by his actions Artur had breached the distribution agreement which was now at an end; and stating that OWL would not be sending the remaining 4 containers to ADD but would instead in the future be dealing through other distributors in the Baltic region or directly with clients in that region.

At that point Artur considered that any attempt at mediation would be futile, and thus ADD initiated litigation proceedings against OWL in the Latvian courts. In court, however, counsel for OWL drew the judge's attention to the agreement to mediate contained in the distribution agreement. Counsel for ADD disputed the agreement to mediate on the basis that Mary O' Toole had already intimated in her e-mail that the distribution agreement was at an end. The Court adjourned to give the parties an opportunity to consider mediation, and the judge gave a strong impression that it was in the parties' best interests to mediate the dispute. Artur Martins and Mary O'Toole both thus informed to the court that they would be prepared to participate in a mediation.

Artur Drinks Distribution v O'Toole Whiskeys and Liqueurs

Confidential Information for the Claimant[3]

You are Artur Martins. The company you established ten years ago – Artur Drinks Distribution SIA ("ADD") – has risen to become a very successful distributor of premium wines to hotels, restaurants, and night-clubs throughout the Baltic States. To leverage the excellent reputation which ADD has earned, your company now wishes to expand its product offerings in the high-end beverage market.

Two years ago, you made personal contact with Mary O'Toole, the owner and fifth-generation managing director of O'Toole Whiskeys and Liqueurs Ltd ("OWL"), an Irish distillery with a heritage extending back 150 years. You fostered the personal connection, and in due course ADD agreed a 'pilot' order with OWL for 200 bottles of *O'Toole's Irish Whiskey Cream.* The product sold extremely well with your clients, and in early course ADD and OWL entered into the sales and exclusive distribution agreement already detailed in the common facts.

You then placed an order for 6000 litres, and launched an extensive marketing campaign among your clients, expecting enthusiastic demand. You were surprised to be told by OWL that the order would be dispatched in 2 consignments, some months apart. This could cause some friction among your clients, but you reckoned that the limited supply might have the effect of heightening the interest in and demand for the product, all of which would be good for your company in the long run. You could not escape the feeling, however, that something unusual was happening at OWL, and it shook your confidence in them just a bit.

When the first consignment arrived, it was quickly bottled at ADD's Latvian bottling plant and the 1,200 bottles were dispatched to ADDs two best clients.

You were concerned shortly after to receive complaints from both customers that the product was not of the same quality as before; indeed, that it tasted 'sour' or 'off'. You were extremely embarrassed that products of a poor quality should be distributed by your company, especially to your best clients, and you feared for the damage to your company's reputation and business.

Knowing Mary O'Toole to be a person of high integrity and therefore likely to want to resolve the issue quickly and amicably, you picked up the phone and called her directly. You were surprised that Mary's attitude was cold from the start, and you were disappointed by her outbursts in response to your telling her that the first consignment was of 'poor' quality and that your company was facing economic losses as a result.

A few days later you wrote a letter to Mary O'Toole reiterating that the 1200 litres in the first consignment were of poor quality and requesting €140,000 in compensation in accordance with the sales and distribution agreement. Though you did not spell out your calculations in the letter, you roughly calculate your losses to be as follows:

Cost of the 1200 litres supplied in the first consignment:	€21,600
Shipping costs for the first consignment	€7,500

[3] *Methodological advice*: this part should be handed out separately and only to those participants taking over the role of the claimant.

Cost of a marketing campaign to restore reputation	€100,000
Shipping costs for a replacement consignment of 1,200 litres	€7,500

You doubt that Mary will ever agree to give you the full amount, but the figures nonetheless represent your honest belief at the real cost of the loss suffered, more or less. When you wrote the letter you were prepared to compromise, and you remain so, but for all that you also honestly believe that the defect in the product was OWL's fault; it couldn't have been the fault of your bottling plant since the plant had recently been serviced; and it was recently certified as safe by the Latvian public health authorities. The difficulty is that nobody can be certain what caused the product to turn sour without expensive expert testing and reporting – if that must be done, it is likely that each side will produce conflicting expert opinions and nobody will be closer to knowing the truth.

You are firmly of the opinion that OWL is in breach of its contractual obligations under the sales and distribution agreement by:

(a) failing or refusing to honour the guarantee and indemnity provisions of the agreement;
(b) failing or refusing to deliver the second consignment of 4800 litres;
(c) threatening to sell directly to competitors or clients in the geographical market.

Moreover, you are generally shocked at Mary's rude and indignant attitude.

In contrast, you are happy that ADD has complied with all of its contractual obligations, including the provisions of the sales and distribution agreement concerning negotiation, and the time-limitation clause.

From a business perspective you wish you could continue the sales and distribution agreement for *O'Toole's Irish Whiskey Cream* in the Baltic market – the product still has an exceptional reputation and you know it will sell well. Moreover, if OWL start to sell directly to competitors or to your clients it could weaken your business in the wine market as well. You think you could see your way to working with OWL in the future if Mary would be reasonable and acknowledge the harm caused to ADD's reputation on this occasion and give assurances that it will not happen again.

Artur Drinks Distribution v O'Toole Whiskeys and Liqueurs

Confidential Information for the Respondent[4]

You are Mary O'Toole. You are the fifth-generation owner and managing director of the O'Toole Whiskey and Liqueurs Ltd ("OWL"), the Irish family distillery business which has been operating for over 150 years. Whiskey bearing the O'Toole label has been enjoyed by presidents and kings, it has won gold medal at the most prestigious international competitions, it has been celebrated in movies and it has even been enjoyed in space on the International Space Station!

Maintaining these standards and reputation for excellence is your defining personal mission, and attention to detail and personal dedication characterise everything you do. You demand high standards from yourself and you expect nothing less from your company and its products. You have worked in the business for over 50 years, and it is no exaggeration to say that you have personally tested almost every batch of whiskey distilled by the company during that time, making sure that none is released unless it meets the very highest standards.

Such personal dedication may have taken its toll: last Summer you were diagnosed with a rare digestive disorder, and in the Autumn, you had to take time off for surgery. Luckily, the medical intervention appears to have been a success, and you are once again enjoying good health.

Two other things happened last Summer. One was that the sixth-generation of the O'Toole dynasty, your only child Owen, formally joined the family business. You had been worried for a number of years that Owen, who studied Law at University, would choose the lawyers' profession over the family business, so you were delighted when he made the choice to follow in your footsteps and you have done everything within your power since to encourage him and to educate him in the whiskey business.

The other thing that happened was that your company entered a sales and exclusive distribution agreement with a distributor, Artur Drinks Distribution (ADD), in the Baltic region. This marked an important expansion for your company into a new and improving geographical market, and an opportunity to gain a foothold in that market in advance of the competition. You came to know the managing director of ADD, Artur Martins, quite well in the lead-up to signing the deal – after all, you would not do business with anyone unless you were happy they understood, appreciated, and valued the O'Toole label. Perhaps that explains why you were so annoyed by what followed.

ADD's order 6000 litres of *O'Toole's Irish Whiskey Cream* came in shortly before you were due to undergo your surgery. Knowing that you were going to be unavailable for a month or more, you split the order into two consignments – one of 1200 litres which would be ready for you to test before your surgery, and the balance of 4800 litres which you would ready to test when you returned six weeks later. Your son Owen helped you to check the first consignment. In some recent company e-mails Owen has confided in you that he feels in some way responsible for the problems which followed, but you have reassured him that such doubts are normal without experience, and that there is no reason to be worried since you also personally checked the first consignment. You are keen to distance Owen

[4] *Methodological advice*: this part should be handed out separately and only to those participants taking over the role of the respondent.

from this dispute – if he were to be connected, fairly or unfairly, with a drop-in quality, it would devastate his career.

When Artur Martins telephoned you to complain about the quality of the first consignment you were eager to deflect him immediately. You did not like his manner or tone, and you were offended by his language, describing your product as 'poor'. You were angry with yourself at having misjudged Artur as someone who understood and valued your brand, and you were angry with him for trying to hold your reputation to ransom.

You were equally offended when you received Artur's letter, which you view as a blackmail demand, considering the amount of compensation demanded far exceeds the purchase price of the whiskey supplied. You refuse to accept any liability because to do so could damage your brand globally as well as in this new market; in any event you are satisfied that the product was perfect when it left OWL's distillery since you tested it yourself. Perhaps it was contaminated during shipping, or, more likely, during bottling. You also think that ADD will have a hard job proving that any quality issues emanated from OWL; it would require expensive expert opinion, and even then, there would be room to provide conflicting expert opinion to dispute their expert.

Moreover, you believe there are technical legal reasons why ADD might be unable to progress the claim in the courts – you believe they are out of time having regard to the time-bar clause in the contract, because the formal letter of complaint was received more than 30 days after delivery of the first consignment of whiskey.

So, in response to Artur's letter, you sent an e-mail stating that all liability was denied, that OWL refused to pay any compensation, and stating that OWL regarded the contract to have been repudiated by ADD and that in the future OWL would be dealing directly in the Baltic market.

From a business perspective, however, you realise that your company needs a distributor in this market, and that no others in this market have the reputation or network of high-end customers that ADD offers. For this reason, you are prepared to consider again whether the sales and distribution agreement can be revived. However, the €150,000 claimed by ADD is far too great relative to the purchase price of the wine supplied, and you have no idea where the figure comes from if it is not merely a ransom. You further believe an apology is required from Artur before you can progress any further, let alone do business together.

Artur Drinks Distribution v O'Toole Whiskeys and Liqueurs

Advice for Trainers[5]

Legally speaking, this is, at first glance, a relatively standard quality dispute arising under a sales and distribution contract. The goods supplied are alleged to be below the standard required by the contract and the purchaser is seeking compensation for loss. The vendor alleges that any defect happened after the goods left the vendor's control and the vendor further considers that the claim for compensation is variously unfounded, overinflated, and possibly extortionate. The vendor also believes that the claim for compensation could be outside the contractual limitation period. Following some abrupt, angry and emotionally charged communication, the vendor purports to treat the contract as being at an end and threatens to distribute the goods in future either directly or via the purchaser's competitors. The purchaser feels indignantly that it has done nothing wrong, that it is entitled to some compensation, and that it needs to act decisively to protect its good name and market position. The dispute is pending before the Latvian courts, currently adjourned to allow the parties to consider mediation.

The problem, however, is that if the central issue (the claim for damages) is to be decided by a court or arbitrator there will be a need for technical expertise and, arguably, discovery. This will inevitably be costly and time consuming for both parties. Moreover, the legal issue of whether the claim was made in time will likewise require legal opinion and argument – again at cost to the parties. It is difficult at this stage for anyone to predict with certainty what a court or arbitrator will decide on those issues.

1. Preparing the mediation procedure

Remembering that there are at least 5 distinct phases in a mediation procedure (Preparing, Opening, Exploring, Negotiating, and Concluding), we consider now the preparation phase for this scenario. This can be played out by a single role-play group in front of the plenary group of participants; or the entire group of participants can be broken into groups of three or more where the roles of both parties and the mediator are played out in each group.

a. Suitability for Mediation

The first theme participants can be invited to explore from the perspective of preparation is whether this is a suitable case for mediation, and why (or why not?). Depending on the trainer's needs, this can be done either in a plenary group discussion of all the participants, or in role-play groups where participants are invited to list their own - and their counterparty's – perspectives on this mediation. A variation could be that the trainer would supply the role-play mediators only with the information provided in the first paragraph above and they would then be invited to explore and devise the means by which they would find out more about the case.

A wide variety of responses is possible to the question, but it is expected that the cost, complexity and uncertainty of determining the factual issue (what caused the defect?) and the legal issue (is the claim

[5] *Methodological advice*: this part should be provided only to the designated trainers, well in advance to the date of the training.

out of time?) as well as the earliness of the reputational claim (can damage to be reputation actually be shown at this stage?) should feature as main reasons, along with the fact that there remains a sound business opportunity from which both can benefit if they can overcome their differences. All participants can be invited to consider how they would go about establishing, practically, pre-mediation, whether this is a suitable case for mediation – how would they engage, and with whom? Consideration should be given to the role of the lawyers: perhaps managing their intervention so that they assist the parties in the mediation whilst protecting their interests.

b. Mediation strategy

Participants considering the role of the mediator should give consideration to a broad mediation strategy, and to how they would adapt or tailor that strategy as the mediation progresses. Strategies range anywhere along the spectrum from evaluative and interventionist through to facilitative with minimum intervention. This is an exercise in conflict analysis. Participants should give consideration to identifying the interests or goals that must be satisfied in a potential settlement; to the range of possible and acceptable dispute outcomes; and to the conflict resolution approaches that may assist disputants in reaching individual and/or collective goals. This should lead participants towards identifying and assessing criteria for selecting a mediation approach and to selecting and making a commitment to an approach.

c. Framework for the mediation

A third theme the participants can be invited to discuss concerns the framework for the mediation. How will the parties go about selecting and agreeing a mediator? What formal qualifications and personal qualities should the mediator have? How many mediators are required? Will ready-made or institutional mediation procedures be adopted? These questions can be asked of the role-play parties as well as of the role-play mediator and responses can be compared.

A formal agreement to mediate should be put in place – the roleplay mediator can be invited to take the lead on this, and the form and content of the agreement can be explored. Among the practical matters that are normally ideally fixed in the formal agreement are:

i) a formal agreement to commit to the mediation process;
ii) possible adoption of formal (ready-made) mediation procedures;
iii) agreement to the appointment of the mediator(s);
iv) agreement to the mediator's terms of business;
v) agreement on confidentiality before, during, and after the process;
vi) 'without prejudice' agreement – ie. that the information exchanged in the process cannot be used in other proceedings;
vii) suspension of limitation / prescriptive periods;
viii) possible exclusion of liability.

In this scenario it makes sense to agree a fresh agreement to mediate, and, moreover, there are a variety of reasons why ready-made procedures could be adopted or adapted – not the least reason being that institutional procedures are mentioned in the sales and distribution agreement. Rules that give the mediator the power to appoint a sole expert if he or she thinks it necessary could be particularly helpful.

d. Establishing the relationship

Participants should be invited to explore how the mediator will go about establishing the right relationship with the parties. The goals of the mediator in this regard should be:

i) to build trust;
ii) to foster positivity;
iii) to educate the parties about mediation and the process;
iv) to secure a commitment to mediation.

Once established, the mediator must maintain, preserve and protect the relationship – again, this can be explored and developed. It should become apparent that in this scenario, as in many, the parties have differing requirements and expectations when it comes to developing and fostering the relationship of trust and positivity. Role-play mediators should be encouraged to listen for and to seek out those needs, and to reinforce their reassurances to each of the parties. They should also consider how they can get the parties lawyers to assist them in building the trust of the parties in the mediator and in the process. They should also give consideration to sensitivities or risks – what should be done to avoid making the conflict worse?

e. Who, what, when and where?

The mediator should consider and manage the who, what, when and where of the mediation process:

i) Who? In this scenario we are told that the two principals will participate in the mediation along with their lawyers. Participants should explore whether this is the best *dramatis personae* or whether it should be changed. The "CAKE" acronym can be considered here: are the persons *committed* to the mediation process; do they have the *authority* to agree a settlement; do they have the *knowledge* needed to be able to inform the decision whether to agree a settlement; do they have the *expertise* to be able to overcome any issues that could hamper a settlement? In this scenario, consideration can be given to whether expertise is needed at the mediation – not merely about the cause of the defect (a historic issue), but about e.g. the finances of each company; the market; the technical means of ensuring future quality; etc, so that the prospects of a deal in which the parties continue to work together into the future can be examined.

ii) What? What matters will the mediator raise with the parties?

In preparing for any mediation it would be a mistake for the mediator to assume that he or she knows the whole story, or that the solution is obvious. The mediator should always, therefore, approach any mediation with an open mind and an actively listening ear. Nonetheless, a mediator would be foolish to engage with the parties without some loose form of agenda.

This scenario is characterised by two questions that cannot easily be answered in mediation – what caused the defect, and, is the claim contractually time barred? It will be necessary to manage these questions carefully in the mediation and in

preparing for the mediation the mediator will need to explore whether to 'park' them, either altogether or until later, or to secure agreement on a mechanism to deal with them (e.g. independent expert). Trainers can additionally encourage discussion on whether the mediator should become directly involved in answering those questions.

Another obvious feature of this scenario is that there was a lot of emotion and acrimony in the exchanges between the parties. This also needs to be managed, and in preparing for the mediation the mediator should give some consideration to how it will be managed. It should emerge in the role play that the telephone and e-mail interactions and reactions were possibly impulsive, emotional and hasty; nonetheless there are deep concerns on both sides that need to be brought to the surface and addressed so that the same does not happen again or become a barrier to settlement. The mediator should programme into the proceedings an opportunity to allow those emotions to be vented safely, and to allow the deep-rooted concerns to be explored.

A further matter that mediators would be expected to explore in this scenario (as in most scenarios) is the prospect, if any, of the parties doing new business together as part of a potential solution. The original underlying business idea made sense for both sides; a question the mediator should have the parties examine is whether the risks are too great for them to continue to work together in the future, or what measures could be put in place to manage those risks. Rather than begin with a focus on risk, perhaps the mediator would first have the parties focus on the positive benefits.

There is also a possible need for the mediator to 'reality-check' and manage expectations in this scenario - eg. the quantum of compensation sought may be founded on incorrect assumptions of entitlement; and there has been no focus on the financials of the combined business opportunity.

iii) When? In addition to the timing of the matters considered in the preceding paragraph (eg. the mediator might programme separate private meetings with each party before the mediation 'hearing'), there are further questions concerning timing, such as: do we need the lawyers all the way through this mediation? Do we need expertise all the way through it? Lawyers sometimes think that a case is not 'ripe' for mediation until the damages become quantifiable; in this scenario the same could be argued, but that misses the point that there is an early opportunity for the parties to work together to mitigate any damage and even to profit. The mediator should consider working with the lawyers in the early stages to reinforce why mediation is preferable in this scenario (cost of discovery and expert opinion and uncertainty of the legal issue regarding commencement / time.)

iv) Where? This is an international mediation. Participants can explore whether it makes sense to hold this mediation in a neutral venue, or a number of venues with the mediator shuttling between them. Consideration should be given to the use of online communications. Whilst in principle it should not matter where the mediation is held as long as the parties are comfortable and safe, the adoption of local Mediation Laws by Member States may mean that there are local regulatory concerns to be observed.

f. Directions

The mediator will direct the parties. Participants can consider the shape, form and content of the directions, how they will be communicated, and how they can be decided and delivered while building the confidence of the parties in the mediator and in the process.

2. **Opening the Mediation Procedure**

The 'opening' phase of the mediation is that part of the mediation procedure in which the mediator makes his or her first interventions with the parties. The shape of those interventions *should* have been planned in the preparation phase, already examined above – for example: whether there will be a joint opening session; whether the parties will give opening statements; whether the mediator will meet with the parties separately before meeting in joint session; who will go first, etc. The early phases of the mediation should not happen by accident, and, naturally, the shape of the intervention may have to change as the process progresses.

The opening phase forms the bridge between the preparation phase and the exploration phase of the mediation. The goal of the mediator in this phase is therefore to create the appropriate environment for the phases to follow – this involves building and maintaining trust; informing the parties about the mediation process; fostering a positive approach from the parties and tackling any barriers that arise.

Participants may be invited to give consideration to these early interventions having regard to this scenario.

Opening Statements

Most mediations require some form of opening statement to be made by the mediator. Commonly this is done at the first joint session of a mediation hearing, but participants can be invited to consider whether that is appropriate in the given scenario, and to consider why.

i. Mediator's Opening Statement

A mediator's opening statement could be expected to address the following:

- Introduction of the mediator and, if appropriate, the parties
- Commendation of the willingness of the parties to cooperate and seek a solution to their problems and to address relationship issues
- Definition of mediation and the mediator's role
- Statement of impartiality and neutrality (when appropriate)
- Description of the proposed mediation procedures
- Explanation of the concept of the caucus (private meetings)
- Definition of the parameters of confidentiality (when appropriate)
- Description of logistics, scheduling, and length of meetings
- Suggestions for behavioural guidelines or ground rules
- Answers to questions posed by the parties
- Securing a joint commitment to begin

(Christopher W. Moore. The Mediation Process: Practical Strategies for Resolving Conflict (Jossey Bass 2003, pp212-13).

Participants can be invited to prepare and deliver the opening statement appropriate to the given scenario. Attention should be paid to protecting and fostering trust and commitment throughout.

ii Party Opening Statements

The decision whether to have opening statements from each party during the opening session should be made well in advance of the opening session! Careful consideration needs to be given to whether such statements should be invited (ie. what needs to be achieved by allowing opening statements); to how they should be directed (eg. time limits, guidance as to content and delivery, rules to be observed whilst the other party's opening statement is being delivered, etc).

It should be remembered that the opening session may well be the first time – in some cases ever – that the parties have discussed the problem face to face. For this reason, and other perhaps obvious reasons, it has to be managed carefully, not only by the mediator, but by the parties. Common strategies include the following:

- Limiting the time for party opening statements - eg. 5 minutes;
- Directing that statements should be respectful and measured;
- Directing that no intervention should be made by the other side during delivery;
- Asking that the opening statement should focus on what the party wishes to achieve in the mediation;

Participants may be invited to consider how, in this scenario, the opening can be managed so that it does not become personal or ruled by emotions. Clearly, a point will come when both parties have to vent their emotions – that could be made clear to the parties so that they can focus on relationship building during the opening phase.

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Cross-border mediation in civil and commercial cases[6]

SCENARIO 2

HELENA DULIT v ANÉMONE DIAGNOSTIC SA

Workplace / Employment Dispute

[6] Developed by Professor Brian Hutchinson.

Helena Dulit v Anémone Diagnostic Ltd

Common Facts[7]

Anémone Diagnostic Ltd is a UK company founded in 2011 by Mr. Aaron Fleischmann, an entrepreneur and MBA graduate of University of Warwick Business School. He is CEO and Chairman of the board of directors the company, and he is the majority shareholder. Anémone Diagnostics performs laboratory analysis of human tissue for use by hospitals and medical research institutes and diagnostic equipment manufacturers. Its headquarters are in Glasgow, and it has four laboratories, two located in Scotland and two in Spain.

In September of 2017 Mr. Fleischmann headhunted Dr Helena Dulit, a renowned academic in the field of medical diagnostics, to join Anémone Diagnostic SA. Dr Dulit left her job as professor at CHU Toulouse, a renowned University Teaching Hospital in France, to join the company. The contract of employment provided that:

- Dr Dulit would serve as 'director in charge' of quality control for a period of five years;
- Dr Dulit had the authority and responsibility to control and direct all scientific procedures at each Anémone Diagnostics laboratory, subject only to the supervision of Mr. Fleischmann;
- Dr Dulit was to be paid a salary of UK£150,000 per year and was to receive various bonuses based on the company's net profit;
- Dr Dulit was required to visit and inspect each of the four laboratory facilities at least once every month;
- Dr Dulit was to report her inspection results and all quality assurance recommendations directly to the Vice Chairman of Operations, Mr. Patrick Courtauld. Mr. Courtauld would then transmit the report directly to Mr. Fleischmann;
- If employment was terminated before the expiry of the 5-year period without "good cause" (which was not further defined) Dr Dulit was entitled to be paid a fixed sum of UK£500,000 in liquidated damages in addition to any other remedies to which she might be entitled for breach of contract, to compensate her for the interruption of her academic and research career.

Between 2016 and 2018, Anémone Diagnostics had experienced substantial success, particularly through its Barcelona laboratory, which was headed by Dr Abdul Ismael, and which was the best performing laboratory by far during this period. But in January 2018 productivity dipped. Things did not improve over the coming weeks. In March, Mr. Fleischmann sent the following e-mail:

From: Aaron Fleischmann <a.fleischmann@Anémonediagnostics.com>
To: Helena Dulit <h.Dulit@Anémonediagnostics.com>
CC: Pat Courtauld <p.courtauld@Anémonediagnostics.com>
Sent: 23.23 GMT 10 March 2018
Subject: Quality Assurance Protocols

[7] *Methodological advice*: this part of the case study should be included in the seminar documentation and made available to all participants.

Dear Helena,

I've been having some thoughts about how we might better organise the laboratory visits going forward to take some of the pressure off you and to make sure that QA is seen as a positively as possible. I'd welcome your views on the following:

1. *In future, Pat Courtauld will accompany you on laboratory visits in his capacity as Vice Chairman of Operations.*
2. *Each laboratory director will have primary responsibility for quality assurance and for sending a monthly Quality Assurance report to both yourself and Pat Courtauld.*

Also, and I hope you won't take this the wrong way, but it I think that in this industry some people might not be that used to working with females, let alone young, attractive, intelligent and dynamic ones like yourself, and could interpret off-site meetings as something more than they are. For your own protection I will be recommending that you do not conduct business meetings outside of office hours or off-site unless accompanied by a member of the senior management.

Sorry if this is a bit awkward. I look forward to discussing further with you at your convenience.

Enjoy the rest of the weekend.
Kind regards,
Aaron

Dr Dulit very soon replied by e-mail as follows:

From: Helena Dulit <h.dulit@Anémonediagnostics.com>
To: Aaron Fleischmann <a.fleischmann@Anémonediagnostics.com>
To: Pat Courtauld <p.courtauld@Anémonediagnostics.com>
To: Abdul Ismael <a.ismael@Anémonediagnostics.com>
CC. Helena Dulit <profhelena@gmail.com>
Sent: 23.53 GMT 10 March 2018
Subject: Re: Quality Assurance Protocols

Dear Aaron Fleischmann,

How dare you strip me of my responsibilities just because I am a woman?!!! If your repressed and bigoted employees have problems working with a woman, then I suggest that they – not I – are the problem. There can be no justification for having Pat Courtauld – a non-scientist - accompany me on laboratory visits. What is clear to me is that you intend to terminate my contract on a trumped-up cause in order to slither out of your obligation to compensate me in accordance with the contract, and because you are too mean or too weak to sort out the sexists. You will be hearing from my solicitor on Monday.

Sincerely

Dr Helena Dulit

Director of Quality Assurance
Anémone Diagnostic Ltd

Since that, Dr Dulit has retained an employment solicitor, and has commenced a lawsuit before the Employment Tribunal in Glasgow against Anémone Diagnostic Ltd for breach of contract and for sexual discrimination in the workplace. Aware that Civil Procedure Rules in the UK impose possible costs sanctions on parties who refuse unreasonably to mediate, the solicitor for Anémone Diagnostic Ltd has suggested – strategically – that the matter should be referred to mediation.

Helena Dulit v Anémone Diagnostic Ltd

Confidential Information for the Claimant[8]

You are Dr. Helena Dulit. You are very angry and upset over how you have been treated by Mr Fleischmann, Mr Courtauld and Dr Ismael.

You believe that Anémone Diagnostic Ltd is a sexist environment. For example, one evening, while getting your coat as you were leaving the Barcelona laboratory, you overheard one of the administrators commenting that your outfit was 'provocative' and that you were 'again' 'dressed for dinner more than for work'. You believe this is a widely held attitude within the organisation. You believe that Aaron Fleischmann is aware that the workplace is sexist, and that while he does not necessarily support sexual discrimination, he has decided that it is cheaper to get rid of a woman in the midst of men than to enforce a policy of non-discrimination. You are certain that that is why he constructively terminated your contract by imposing the new procedures outlined in the e-mail.

You never encountered anything like this in academia, and you would love now just to return to your faculty position at CUH Toulouse. You have decided that working in industry is not for you, especially not when it is sexist.

However, your stellar reputation is vital to you if you are to be able to apply for and secure future research grants from the various funding agencies. You don't want this dispute to tarnish your reputation, nor to result in you being labelled – or targeted – as a trouble maker.

You want, therefore, to leave with a clean personnel file, and you want to be sure that any other negative references are removed from your file.

Having consulted with your solicitor, you believe you are entitled to every penny of the £500,000 in liquidated damages for your de facto termination without cause. It might take you years to get back to the position you were in before you took up the post with Anémone Diagnostic SA.

You further believe personally that you are entitled to be compensated a further £700,000 for the sexual discrimination which you suffered, which was both humiliating and potentially damaged your reputation. You also want the remainder of your salary as promised under the contract (£600,000) and your legal fees (£60,000).

You have been advised by your solicitor as follows:

1. Your case for 'no cause' termination under the contract is very strong - but damaging surprises can nonetheless surface during discovery and you'd need to worry about how that could affect your reputation even if you do get damages;
2. The discrimination case is weak due to the lack of evidence;
3. The amount of the liquidated damages clause may not be upheld by the tribunal if it agrees with the respondent's likely argument that the amount is out of proportion to the damage actually suffered

[8] *Methodological advice*: this part should be handed out separately and only to those participants taking over the role of the claimant.

Helena Dulit v Anémone Diagnostic Ltd

Confidential Information for the Respondent[9]

You are Aaron Fleischmann and you are upset and more than a little angry at how this dispute has turned.

In March 2018, your vice chairman of operations, Pat Courtauld, telephoned you to say that he had been called by Dr Abdul Ismail, director of the Barcelona laboratory, complaining that Dr Dulit was interfering too much with his lab. He complained that Dr. Dulit's testing protocols were outdated and were slowing output and were interfering with his ability to maintain the high standards that he had developed over the last two years. He also said that Dr Dulit had wrongly criticised various lab technicians who were using more modern methodologies. He added that Dr Dulit had also acted inappropriately with a number of male lab technicians when she made her visits. He stated that her dress was unnecessarily provocative, and that she insisted on late dinner meetings in fancy Barcelona restaurants with some of the male lab technicians.

Mr. Courtauld expressed his concern that the stellar reputation of Anémone Diagnostic SA, and the Barcelona laboratory in particular, was in danger of being compromised by these issues. He also stated that members of the non-scientific management staff located in the Glasgow headquarters had also complained about Dr Dulit's tendency to insist on late evening restaurant business meetings, often with male employees, at a variety of trendy Glasgow city restaurants.

The matter of Dr Dulit's dress does not greatly concern you – all you are worried about is that your employees do misinterpret her dress and demeanour as a sexual invitation.

Dr Dulit is, in your view, a brilliant researcher but an inefficient administrator. If she were supported in her quality assurance visits she might do better. *You* can't accompany her on every visit, so that is why you think that Mr Courtauld should assist – he is of sufficient standing within the company; if someone of lower standing was given the accompanying role it might be seen as a slight on Dr Dulit.

You are adamant that as founder, president, and chairman of the board you have the right and obligation to make decisions about quality assurance at your laboratories, and you believe that the new procedures outlined in your e-mail are reasonable and in the best interests of the company.

Since you did not terminate Dr Dulit's contract but merely simplified her responsibilities without reducing her pay, you believe that the company did not breach the employment contract.

If Dr Dulit is prepared to stay on with the company and to accept the new procedures you have outlined, that is fine. You welcome the opportunity to benefit from her trailblazing research in the future, but if she wants to leave, she is certainly free to do so. Until she does so voluntarily, you will pay her in accordance with the five-year term of her employment contract.

You believe that Dr Dulit's threats of litigation for sexual discrimination are baseless and you want your lawyers to make that clear to Dr Dulit and her lawyers. You will not pay one penny in response to any threat of legal action and will not surrender any of your decision-making authority. You have been advised, however, that Dr Dulit's claim for constructive dismissal is not totally frivolous. So, you realise that you may have to pay something to settle that part of the claim.

[9] *Methodological advice*: this part should be handed out separately and only to those participants taking over the role of the respondent.

Helena Dulit v Anémone Diagnostic Ltd

Advice for Trainers[10]

This is a classic workplace / employment dispute. The employer proposed changes to the working responsibilities of the employee which the employee interprets as constituting constructive dismissal motivated by sexual discrimination. The employee wants compensation for loss of office and for discrimination, and she seeks to invoke a penalty clause in the contract. The employer believes these claims are unfounded, and that the claims are opportunistic and inflated. The dispute is pending before the Employment Tribunal in Glasgow, Scotland, which places an imperative on parties first giving reasonable consideration to mediation, and where the local civil procedural rules allow for costs sanctions to be imposed where parties unreasonably fail to consider mediation.

If the central issues are to be decided by a tribunal there will possibly be a need for discovery, including cross-border discovery - which will take time and add to costs. In this case the search for discovery could be futile as much of the relevant communication took place verbally over the phone – this will make it even more difficult and costly for the claimant to establish their claim, particularly on the discrimination issue.

Despite the claims for dismissal and discrimination, both parties' deep-rooted concerns are for their reputations and their future business or employment, as the case may be. This begs the question whether the parties' interests might be better met by mediation rather than by adjudication.

1. Preparing the mediation procedure

Remembering once that there are at least 5 distinct phases in a mediation procedure (Preparing, Opening, Exploring, Negotiating, and Concluding), we consider now the preparation phase for this scenario. This can be played out by a single role-play group in front of the plenary group of participants; or the entire group of participants can be broken into groups of three or more where the roles of both parties and the mediator are played out in each group.

a. Suitability for Mediation

The first theme participants can be invited to explore from the perspective of preparation is whether this is a suitable case for mediation, and why (or why not?). Depending on the trainer's needs, this can be done either in a plenary group discussion of all the participants, or in role-play groups where participants are invited to list their own - and their counterparty's – perspectives on this mediation. A variation could be that the trainer would supply the role-play mediators only with the information provided in the first paragraph above and they would then be invited to explore and devise the means by which they would find out more about the case.

[10] *Methodological advice*: this part should be provided only to the designated trainers, well in advance to the date of the training.

A wide variety of responses is possible to the question, but it is expected that the cost, complexity and uncertainty of determining the factual issue (are the changes motivated by discriminatory influences or do they have discriminatory effect) and the legal issues (is the contract penalty unlawful; were the changes constructive dismissal) as well as the potential for damage to the reputations and relationship of the parties by the adjudication of the claims should feature as main reasons, along with the possibility that there remains in principle a prospect that the parties could continue to work together. All participants can be invited to consider how they would go about establishing, practically, pre-mediation, whether this is a suitable case for mediation – how would they engage, and with whom? Consideration should be given to the role of the lawyers: perhaps managing their intervention so that they assist the parties in the mediation whilst protecting their interests.

b. Mediation strategy

Participants considering the role of the mediator should give consideration to a broad mediation strategy, and to how they would adapt or tailor that strategy as the mediation progresses. Strategies range anywhere along the spectrum from evaluative and interventionist through to facilitative with minimum intervention. This is an exercise in conflict analysis. Participants should give consideration to identifying the interests or goals that must be satisfied in a potential settlement; to the range of possible and acceptable dispute outcomes; and to the conflict resolution approaches that may assist disputants in reaching individual and/or collective goals. This should lead participants towards identifying and assessing criteria for selecting a mediation approach and to selecting and making a commitment to an approach.

Why did this dispute arise? Moore's Circle of Conflict (Moore, The Mediation Process, Practical Strategies for Resolving Conflict (Jossey Bass, 2003, p 66) can be employed here to analyse the conflict under the following headings:

- Structural conflicts
- Relationship conflicts
- Data conflicts
- Interest conflicts
- Value conflicts

It should emerge that there are especially structural, data and relationship conflicts in this dispute, which would point to particular strategies for overcoming the differences between the parties.

c. Framework for the mediation

A third theme the participants can be invited to discuss concerns the framework for the mediation. How will the parties go about selecting and agreeing a mediator? What formal qualifications and personal qualities should the mediator have? How many mediators are required? Will ready-made or institutional mediation procedures be adopted? These questions can be asked of the role-play parties as well as of the role-play mediator and responses can be compared.

A formal agreement to mediate should be put in place – the roleplay mediator can be invited to take the lead on this, and the form and content of the agreement can be explored. Among the practical matters that are normally ideally fixed in the formal agreement are:

i) a formal agreement to commit to the mediation process;
ii) possible adoption of formal (ready-made) mediation procedures;
iii) agreement to the appointment of the mediator(s);
iv) agreement to the mediator's terms of business;
v) agreement on confidentiality before, during, and after the process;
vi) 'without prejudice' agreement – ie. that the information exchanged in the process cannot be used in other proceedings;
vii) suspension of limitation / prescriptive periods;
viii) possible exclusion of liability.

There was no original agreement to mediate in this scenario and it makes sense accordingly to agree a fresh and formal agreement to mediate. There is no obvious reason why ready-made or institutional mediation procedures would need to be adopted or adapted in this scenario; by the same token, there is no obvious objection to going that route if the parties are agreed.

d. <u>Establishing the relationship</u>

Participants should be invited to explore how the mediator will go about establishing the right relationship with the parties. The goals of the mediator in this regard should be:

i) to build trust;
ii) to foster positivity;
iii) to educate the parties about mediation and the process;
iv) to secure a commitment to mediation.

In this mediation, where the mediation is imposed as a precursor to adjudication, the mediator may have an added difficulty in getting the parties to commit and to engage. The expectations of the parties will need to be managed – particularly given that they both wish to send strong messages to each other that they mean business and are not to be trifled with.

Once confidence and trust are established, the mediator must maintain, preserve and protect the relationship – again, this can be explored and developed with participants. It should become apparent that in this scenario, as in many, the parties have differing requirements and expectations when it comes to developing and fostering the relationship of trust and positivity. Role-play mediators should be encouraged to listen for and to seek out those needs, and to reinforce their reassurances to each of the parties. They should also consider how they can get the parties lawyers to assist them in building the trust of the parties in the mediator and in the process. They should also give consideration to sensitivities or risks – what should be done to avoid making the conflict worse?

e. <u>Who, what, when and where?</u>

The mediator should consider and manage the who, what, when and where of the mediation process:

i) Who? In this scenario we are not told who will participate at mediation. It will probably be presumed that the two 'principals' – Aaron Fleischmann and Helena Dulit, will participate in the mediation along with their lawyers. Participants should explore whether this is the best *dramatis personae* or whether it should be changed or added to. The "CAKE" acronym can again be considered here: are the persons *committed* to the mediation process; do they have the *authority* to agree a settlement; do they have

the *knowledge* needed to be able to inform the decision whether to agree a settlement; do they have the *expertise* to be able to overcome any issues that could hamper a settlement? In this scenario, consideration can be given to whether and what expertise is needed at the mediation – not merely about the cause of the defect (eg. Dr Ismael, Mr Short, other employees), or about the legal strength of the cases, but to assist in evaluating any deal that might be reached in resolution (what if, for example, Anémone Diagnostic Ltd agrees to sponsor a research project to be conducted by Dr Dulit who returns to her research University; or agrees to partner research).

ii) What? What matters will the mediator raise with the parties?

In preparing for any mediation it would be a mistake for the mediator to assume that he or she knows the whole story, or that the solution is obvious. In this case there is a clear information deficit in that the employer knows what his motivations were and the basis for his decision, whereas the employee is left to prove particular motivations or effects without having the full story to hand, and the mediator has much to find out. The mediator should, therefore, approach the mediation with an open mind and an actively listening ear.

This dispute is characterised by anger, upset, and some deep value concerns. If this mediation is to become more than a positional bargaining negotiation where the parties haggle the amount, if any, of compensation to be paid, without addressing any of the underlying concerns, the mediator will have to change the focus of the parties to addressing those deeper concerns and to exploring and generating other solutions. Since there is a lot of anger involved, space for safe venting and harnessing of anger will be needed. The parties in this scenario seem also to be very committed to sending a message to the other side. Participants can be invited to explore how the mediation can be managed so that those messages do not become a barrier to settlement.

If successful, a mediator in this scenario would be expected to explore the prospect, if any, of the parties doing new business together as part of a potential solution. There seems little likelihood of the parties returning to the original agreement in this scenario; a question the mediator should have the parties examine is whether the risks are too great for them to continue to work together in the future, or what measures could be put in place to manage those risks. Rather than begin with a focus on risk, perhaps the mediator would first have the parties focus on the positive benefits.

There is also a possible need for the mediator to 'reality-check' and manage expectations in this scenario - eg. the quantum of compensation sought may be founded on incorrect assumptions of entitlement; and there has been no focus on the financials of the combined business opportunity.

iii) When? In addition to the timing of the matters considered in the preceding paragraph (eg. the mediator might programme separate private meetings with each party before the mediation 'hearing'), there are further questions concerning timing, such as: do we need the lawyers all the way through this mediation? Do we need expertise all the

way through it? Lawyers sometimes think that a case is not 'ripe' for mediation until the damages become quantifiable; in this scenario the same could be argued, but that misses the point that there is an early opportunity for the parties to work together to mitigate any damage and even to profit. The mediator should consider working with the lawyers in the early stages to reinforce why mediation is preferable in this scenario (cost of discovery and expert opinion and uncertainty of the legal issue regarding commencement / time.)

iv) Where? This is capable of being characterised as a cross-border mediation, given that Dr Dulit *appears* to hail from France whilst the Employer is a UK company, and the issues in dispute straddle the UK and Spain with personnel located in both jurisdictions. Participants can explore whether it makes sense to hold this mediation in a neutral venue, or a number of venues with the mediator shuttling between them. Consideration should be given to the use of online communications. Whilst in principle it should not matter where the mediation is held as long as the parties are comfortable and safe, the adoption of local Mediation Laws by Member States may mean that there are local regulatory concerns to be observed.

f. <u>Directions</u>

The mediator will direct the parties. Participants can consider the shape, form and content of the directions, how they will be communicated, and how they can be decided and delivered while building the confidence of the parties in the mediator and in the process.

2. Opening the Mediation Procedure

The shape of the mediator's opening interventions *should* have been planned in the preparation phase, already examined above – for example: whether there will be a joint opening session; whether the parties will give opening statements; whether the mediator will meet with the parties separately before meeting in joint session; who will go first, etc. The early phases of the mediation should not happen by accident, and, naturally, the shape of the intervention may have to change as the process progresses.

As before, the opening phase forms the bridge between the preparation phase and the exploration phase of the mediation. The goal of the mediator in this phase is therefore to create the appropriate environment for the phases to follow – this involves building and maintaining trust; informing the parties about the mediation process; fostering a positive approach from the parties and tackling any barriers that arise.

Participants may be invited to give consideration to these early interventions having regard to this scenario.

<u>Opening Statements</u>

Most mediations require some form of opening statement to be made by the mediator. Commonly this is done at the first joint session of a mediation hearing, but participants can be invited to consider whether that is appropriate in the given scenario, and to consider why.

i. Mediator's Opening Statement

A mediator's opening statement could be expected to address the following:

- Introduction of the mediator and, if appropriate, the parties
- Commendation of the willingness of the parties to cooperate and seek a solution to their problems and to address relationship issues
- Definition of mediation and the mediator's role
- Statement of impartiality and neutrality (when appropriate)
- Description of the proposed mediation procedures
- Explanation of the concept of the caucus (private meetings)
- Definition of the parameters of confidentiality (when appropriate)
- Description of logistics, scheduling, and length of meetings
- Suggestions for behavioural guidelines or ground rules
- Answers to questions posed by the parties
- Securing a joint commitment to begin

(Christopher W. Moore. The Mediation Process: Practical Strategies for Resolving Conflict (Jossey Bass 2003, pp212-13).

Participants can be invited to prepare and deliver the opening statement appropriate to the given scenario. Attention should be paid to protecting and fostering trust and commitment throughout.

ii. <u>Party Opening Statements</u>

The decision whether to have opening statements from each party during the opening session should be made well in advance of the opening session! Careful consideration needs to be given to whether such statements should be invited (ie. what needs to be achieved by allowing opening statements); to how they should be directed (eg. time limits, guidance as to content and delivery, rules to be observed whilst the other party's opening statement is being delivered, etc).

It should be remembered that the opening session may well be the first time – in some cases ever – that the parties have discussed the problem face to face. For this reason, and other perhaps obvious reasons, it has to be managed carefully, not only by the mediator, but by the parties. Common strategies include the following:

- Limiting the time for party opening statements - eg. 5 minutes;
- Directing that statements should be respectful and measured;
- Directing that no intervention should be made by the other side during delivery;
- Asking that the opening statement should focus on what the party wishes to achieve in the mediation;

Participants may be invited to consider how, in this scenario, the opening can be managed so that it does not become personal or ruled by emotions. Clearly, a point will come when both parties have to vent their emotions – that could be made clear to the parties so that they can focus on relationship building during the opening phase.

3. The Exploring Phase

During the exploring phase the mediator will work with the parties to help them to identify the interests at stake and to clarify their goals, and to help them to identify possible, probable and acceptable outcomes. This is commonly done in private caucus, and often done in sessions with breaks in between. Techniques that will commonly be used at this stage are:

1. "Active listening" – where the mediator engages with the responses to show that he or she is interested, understands the answer, and appreciates the concerns of the party
2. Use of "open" and "closed" questions – 'open' questions (which do not limit the possible answer) can reveal hidden concerns; 'closed' questions (e.g. which can be answered with "yes" or "no") can be used to analyse or clarify an open response.
3. "Reframing" – can be used to change momentum or perception, to put things in a positive light. 'Leading' questions can be used to assist – but with caution. Eg. "The Employer has come here in person – don't you think that means he'd like to continue to work with you rather than end your career?"
4. "Grounding" and "reality checking" – often, emotions can cloud judgment. Grounding techniques encourage parties deal in realities and facts. It is important, however, to create space for emotions too – these must be acknowledged, and managed. In this scenario, for example, there is an information deficit and it is possible that the claimant has made incorrect assumptions. Analysis of past interactions, and 'standing in the other's shoes', may be helpful. The mediator may be able to help the claimant by getting her to review the facts, and by framing the facts for her in a positive (but not misleading) light.
5. Managing *emotions* – a safe space must be allowed for the expression of emotions, which must then be treated with respect. Emotions can often provide a signpost to underlying concerns or interests, but they can also operate as a barrier to progress. Showing *empathy* can help to build trust and allow for *venting* of obstructive emotions. Mediators must be careful, however, not to react defensively or aggressively to displays of anger or negative emotions. *Naming* and *Framing* can be used effectively when dealing with emotions – ie. specifically identifying the emotion at stake – 'anger', 'sorrow', 'regret', 'embarrassment' etc. There are ample opportunities in this scenario for the mediators to practice these techniques.
6. Identification of *interests* – mediation works well when the mediator helps the parties to focus on their underlying interests rather than on the personalities: Fisher and Ury call this 'being soft on the people and tough on the problem'. In commercial mediation, the 'profit' interest is often the easiest to identify, but this overlooks the fact that businesses are operated and controlled by humans, who are also motivated by personal interests, needs, desires and emotions, so it is often necessary to go beyond the 'profit' interest to see what else needs to be solved so that the parties can get to a position of mutual gain. In this scenario, it would be expected that the mediator will explore the claimant's interest in pursuing her research career and enhancing her reputation; and the respondent's interest in protecting his business interests and reputation.

6. The Negotiation Phase

In the negotiation phase the mediator will work with the parties to negotiate a solution. "Shuttle diplomacy" – ie. where the mediator shuttles between the parties who remain physically separate – is common. Since mediation attempts to find new or creative solutions, and has the potential to be win-win, a degree of 'brainstorming' or 'lateral thinking' will be useful. This should take place in private

caucus, and in the early stages, all kinds of solution should be put forward for consideration, however odd they may first appear. Laterally, it will be possible to analyse them and to discount them or approve them as the case may be, by testing them against reality and fact. It is sometimes possible to brainstorm directly with the other side in plenary session. Note, however, that solutions must be realistic, and ethical.

In this scenario, role play participants often come up with the idea that the claimant will return to her university position and be guaranteed some research funding by the respondent, who will continue to have access to her research, in return for a reduction in the penalty sum and abandonment of the lawsuit. There is, however, no single correct solution!

When negotiating, it is important that the core underlying interests remain the focus. It is also common for broad agreement to be developed first, on the agreed outcomes, and for the detail to be worked out subsequently – involving expert assistance as required. It is not uncommon that the parties or the mediator will have to return to the drawing board where a suggested solution turns out to be unachievable. The mediator may have to caucus privately with the lawyers – if present – separately from the parties, in order to identify any concerns they may have.

7. The Concluding Phase

In the concluding phase the settlement agreement is reduced to writing and ideally signed by the parties and the mediator. In practice, a settlement agreement is often kept short and simple – broad brush strokes with agreement that the fine wording on particular details will be constructed and agreed subsequently. Remember, though a legal document, the agreement works better when the parties are happy with it in principle and are prepared to comply with it in principle. If it is too narrow, or drafted as something that will be 'enforced', it may lose its effect.

Should Lawyers be involved in the concluding phase? Participants can be invited to discuss this. In this scenario, there are many reasons why the lawyers should be involved – they have a bearing on the litigation; they can advise on the legality of the settlement agreement and on the wording.

Of course, not all mediations conclude in a settlement. In such cases, it is important for the mediator to highlight the positive achievements of the mediation, and to offer to be available if the parties wish to progress the matter further in mediation again at a later stage. Experience shows that many disputes are settled directly in the days following an apparently unsuccessful mediation.

The concluding phase will normally involve a plenary session where the mediator will formally thank the parties, highlight what has happened in the mediation, and try to leave the parties with a positive impression about the process, their relationship, and the mediator.

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Cross-border mediation in civil and commercial cases[11]

SCENARIO 3

Wolfgang Schultz v ItaliaIrons.it

Cross-border consumer dispute

[11] Developed by Professor Brian Hutchinson.

Wolfgang Schultz v. ItaliaIrons.it

Common Facts[12]

The claimant, a German national and resident, bought a professional grade home steam iron online from ItaliaIrons.it, a trading name of the respondent who is an electrical retailer established in Italy.

After a year of ownership, four shirts owned by the claimant were damaged while he was using the iron.

The claimant claims that the iron was defective and has sought refund or repair of the iron, which originally cost €499, and he has sought a further €720 as compensation for the damage to the shirts.

Through the intervention of the European Consumer Centre Network (ECC-Net) the parties have agreed to try to mediate their dispute online.

[12] *Methodological advice*: this part of the case study should be included in the seminar documentation and made available to all participants.

Wolfgang Schultz v. ItaliaIrons.it

Confidential facts for the claimant[13]

You are Wolfgang Schultz, 31 years old, and you reside in Trier in Germany where you work as a lawyer. You always purchase your custom-tailored shirts at the Porta Nigra Custom Shirt Shop in downtown Trier.

You used to have your shirts laundered and pressed at the Karl Marx laundry in Trier, but when the owner of that laundry retired, and the business shut down in 2017, you decided to take the laundering and pressing of your shirts into your own hands by buying yourself a professional home steam-ironing press. Having done your research online, you settled on a "Dawson HomeSteam Pro+", which has received a lot of 4 and 5-star reviews on Amazon.de. After searching for "HomeSteam Pro+" on Google, you found an online retailer in Italy – ItaliaIrons.it - selling the product for €499 including value added tax plus express shipping to Germany. This was at least €100 less than the price being charged by any German retailers you could find.

Just to be certain, you e-mailed the Italian retailer to ask them to confirm that this was the same model as the one which was reviewed on Amazon.de and asking them to confirm that it was ok to use on custom made cotton shirts. The reply you received from 'info@ItaliaIrons.it' stated that 'this is the same model and it is ok to use on all shirts'. Thus, you placed your order for a HomeSteam Pro+ on ItaliaIrons.it, paying the purchase price of €499 by electronic funds transfer from your bank account.

The HomeSteam Pro+ was delivered to your home in good time and in apparently good shape. It had a UK plug on it which you removed and rewired with a European plug. Everything worked fine for about a year. To be fair, you hardly used the HomeSteam Pro+ at all because a new laundry opened opposite your home and you found it easier to send your shirts out to be laundered. However, one day about a year later you put the iron to use only to find, having used it on four of your best shirts, that it stained the shirts and burned them irreparably. Turning quickly to the Internet to see if this was a common problem, you found that a number of Irish and UK reviewers had experienced similar problems with the UK model. You concluded that the model you had been sold was also intended for the UK market given the UK plug.

You contacted ItaliaIrons.it by e-mail to complain, seeking a refund or repair of the iron, and looking for compensation for your damaged shirts. The e-mail reply you received from info@ItaliaIrons.it stated as follows:

> *'Dear Mr Schultz,*
>
> *Thank you for contacting us about the problems you have been having with your iron. We will be happy to review the item for defects and provided you will ship it to us at your own expense. If the item can be repaired, we will be happy to arrange same at your expense. We regret that*

[13] *Methodological advice*: this part should be handed out separately and only to those participants taking over the role of the claimant.

> *we are unable to make warranty repairs to the item since more than 12 months have passed since you placed the order, and we note that you have modified the item by attaching a European plug contrary to the terms of the warranty. We further regret that we are not in a position to compensate you for the damage to your shirts, which is something which could not have been foreseen by us.'*

You were very upset by this reply. Each of your custom-tailored shirts would cost you €180.00 new (you have no receipts) – that is €720.00 in total for four. You no longer care about replacing the iron, but you do need to replace your shirts, and you think ItaliaIrons.it should be responsible for compensating you. If you were to compromise, you feel that you could be happy with €360.00 which is a fair compensation given that three shirts that were already one year old, and one was two years old.

ItaliaIrons.it refused to do any more than stated in their e-mail, so you went to your local European Consumer Centre with your complaint. Through their network of consumer centres, and with the assistance of ECC Rome, they have managed to convince ItaliaIrons.it to engage with you using online consumer mediation to try to mediate this dispute.

Wolfgang Schultz v. ItaliaIrons.it

Confidential facts for the respondent[14]

Your family has been in the consumer electronic business in Milan, Italy, for 13 years, where it operates a consumer electronics retail store. In the last 2 years you led the business into the online marketplace by establishing ItaliaIrons.it as an offshoot of the family business. The online business has done well, and it has acquired a fine reputation in the online review sites.

Mr Schultz's complaint is not the only one you have had about the HomeSteam Pro+. At least six other customers have had similar problems; but they are all based locally, and they were all satisfied to receive an apology from you and a 'without prejudice' gift of tickets to the local football final. This is hardly likely to satisfy Mr Schultz, however – he is seeking to have the purchase price refunded and an even larger figure for damage done to some shirts of his. You consider this to be unreasonable – your own shirts cost €20 each – how could anyone in Germany spend €720 on four shirts; and surely no retailer be expected to know that a customer would spend so much on shirts?

You would not consider paying what Mr Schultz is seeking for three reasons: First, if you considered paying the amount he seeks to replace his damaged shirts, all of the other customers would want the same amount. Second, as a small business, you are not prepared financially to take on such a burden, as you have no insurance coverage for this type of loss. Finally, the claimant has offered no proof of the cost of the shirts. You realize that custom-made shirts are likely to be expensive when purchased, but even €90.00 per shirt seems outrageously high for shirts that have been worn for a year.

As a foreign customer you did not believe there was a real prospect of Mr Schultz pursuing you in the small claims court. Only when you received a communication from ECC Rome did you consider that there was a real danger of Mr Schultz taking this matter to law – or worse still, posting a bad review of your business on the review sites on the Internet: those bad reviews, you are sure, are impossible to change, even if they are unjust. You have agreed, therefore, to engage in online consumer mediation as suggested by ECC Rome.

[14] *Methodological advice*: this part should be handed out separately and only to those participants taking over the role of the respondent.

Wolfgang Schultz v ItaliaIrons.it

Advice for trainers[15]

This cross border online consumer dispute is typical. On one side is a consumer who believes they have purchased a defective product and that they are entitled to a full refund, or repair, and to substantial compensation for consequential loss. On the other side is a retailer who is probably surprised that the consumer has had the commitment to pursue their claim this far, who considers the claim to be overvalued, and who is playing along perhaps only because of the intervention of a consumer advocacy agency, in this case the ECC-Net network. The amounts at stake are relatively low, (though the retailer's reputation may also be at stake) and the parties are in different jurisdictions, so it makes sense that the mediation would take place online – in this case, that is what was agreed.

Most of the considerations that arise in respect of preparation and opening of the mediation that have been examined in the other two scenarios, above, could be considered here, and trainers may select from those.

In addition, however, and despite its apparent simplicity, this scenario throws open a myriad of further considerations that might just as valuably be explored. These include:

- How to secure the trust of the parties in an online environment?
- How to secure genuine commitment of the parties to the mediation process?
- How to manage the expectations of the parties? For example, should the legal rights and entitlements of the parties under European Consumer Law be brought to the fore?
- What online systems are available? Which is the most appropriate? Text-based, asynchronous, or online real-time face-to-face? Trainers may take time here to demonstrate some of the variety of systems available, including the EU ODR Platform or, for example, the Risolvi Online platform of the Milan Chamber of Commerce.
- If a platform is available to the trainers, it may be used to role-play the scenario. This may also be achieved by simple e-mail, chat room, or skype or face time if attempting real-time online face-to-face mediation. Some of the limitations of each should become quickly obvious.
- Should personnel from the ECC-Net be directly involved in the mediation? Should the manufacturer of the allegedly defective iron?
- How will language differences and power / information imbalances be managed?
- How realistic is it that a mediator would have the time and resources to explore the deeper concerns of the parties in a dispute of this nature and value? How necessary would it be?
- As the role-play progresses, it will be interesting to observe whether what plays out is mere positional bargaining (ie. haggling over the amount of compensation, if any) or something more (some different form of solution – a different product, an agreement regarding reviews, etc).
- Concluding, participants may be invited to consider and discuss whether this dispute might have been more efficiently resolved by some other form of dispute resolution – eg: small claims court or arbitration.

[15] *Methodological advice*: this part should be provided only to the designated trainers, well in advance to the date of the training.