

Mediation in Research & Development projects – the WIPO Arbitration and Mediation Center¹

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Alternative Dispute Resolution (ADR), especially mediation, has enjoyed particular attention in the recent past. Following long-standing discussions starting with the Vienna Action Plan in 1998, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters was adopted in May 2008 and its provisions will have to be implemented by the EU Member States by May 2011.

At the same time, innovation through co-operation in science and technology with international key partners plays an increasingly important role to overcome economic difficulties worldwide. This is foreseen in the Seventh Framework Programme (FP7) and is reflected in the "wide opening of the [European Research Area] ERA to the world" announced in the Ljubljana process² and, among other documents, the European Commission Communication on the strategic European Framework for International Science and Technology Cooperation³ published in September 2008.

Given such growing use and awareness of mediation, the internationalisation of research projects fostered by the above-mentioned developments and the recent case experience of the World Intellectual Property Organization's Arbitration and Mediation Center (WIPO Center) in administering mediation cases involving research collaboration and technology transfer agreements, it can be affirmed that mediation is increasingly foreseen as an ADR mechanism for the resolution of disputes in R&D collaborations.

Parties choose mediation for various reasons. When research partners with different cultural and social backgrounds - for example research organisations, universities, large companies and SMEs - collaborate, they may have diverging expectations and understandings of commercial and legal concepts which may lead to conflicts. Once a conflict has arisen, cognitive, cultural, social and emotional forces can distort rational decision-making. This may put personal relationships and the timely performance of work to be carried out at risk, or even endanger the project itself. In the context of research

collaborations, the importance of IP and IP management, including dispute resolution, does not require elaboration. IP is fundamental to carry out projects, and results generated under the project are protected by IP rights in many cases. Finding a way to solve related conflicts in a timely and cost-effective manner is important.

Mediation is a procedure, agreed upon by the parties, in which a neutral third party, the "mediator", facilitates communication and dispute resolution by the parties and helps them reach their own decision to settle the dispute. The role of the mediator is primarily to facilitate the process but, if the parties so request, the mediator may also offer an informal evaluation of the dispute.

The involvement of a mediator may significantly alter the dynamics of negotiation. He may help the parties understand each other's views and help them realistically assess alternatives to settlement. Additionally, he may stimulate the parties to suggest creative settlements and help to find solutions that meet the fundamental interests of all parties.

Mediation helps preserve parties' relationship or even enhance it, whereas adversarial proceedings tend to polarize parties. Collaborative projects may take several years and involve many partners from different countries. Choosing a method for resolving disputes that preserves partners' relationship for the pending project - and for future collaborations - is important.

Mediation is a non-binding procedure. This means that even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. Also, the mediator cannot impose a solution on the parties and, in order for any settlement to be concluded, the parties must voluntarily agree to accept it.

Mediation is a confidential procedure. Confidentiality applies to the existence of the mediation process and the outcome. The parties, the mediator, and all other participants will have to agree not to use or disclose to any outside party any infor-

mation related to the mediation. In innovation driven research projects, in particular, confidential treatment of IP is of utmost importance, and should be preserved during all phases of a project, especially in controversial situations.

Parties may agree to submit future disputes to mediation by including a dispute resolution clause in consortium agreements or preparatory documents, such as memoranda of understanding. The WIPO Center offers the following model clause:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language]."

Parties may also agree at any stage of the project to submit existing disputes to mediation⁴.

For instance, such a submission agreement was used by the parties in a WIPO Mediation relating to a pharma patent license. In this case a European university holding pharmaceutical patent applications in several countries negotiated a license option agreement with a European pharmaceutical company. The company exercised the option and the parties started to negotiate a license agreement. After three years of negotiations they were unable to agree on the terms of the license. At that point the parties submitted a joint request for WIPO mediation.

As requested by the parties, the Center appointed a lawyer with longstanding working experience in the pharmaceutical industry and considerable licensing experience to mediate. The parties requested that the mediator help them reach an agreement on the terms of the license. In a one-day session, the parties and the mediator identified the legal and factual issues. On this basis, the parties continued direct negotiations amongst them-

selves and reached a settlement agreement.

Additionally, parties may want to combine mediation with arbitration or expedited arbitration to submit unresolved issues after the mediation process to arbitration. Such step-by-step systems can help avoid an escalation of processes while combining benefits where necessary. It is important to define time limits for each phase to avoid undue delay in the resolution of the dispute.

The WIPO Center provides advice on and administers mediation procedures under the WIPO Mediation Rules. It assists the parties in selecting and appointing a mediator with expertise in the subject matter in dispute, administers financial aspects of the mediation and assists in finding meeting rooms and providing other services. The subject matter of the cases administered by the WIPO Center has included research and development agreements, distribution agreements for phar-

maceutical products, patent licenses, software licenses, trademark co-existence agreements, copyright issues, as well as patent infringement disputes.

Further information:
<http://www.wipo.int/amc/en/mediation/>

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¹ This article follows a general introductory article on Alternative Dispute Resolution in Research & Development collaborations published in the *IPR Helpdesk Bulletin*, num. 41, March 2009 (<http://www.ipr-helpdesk.org/newsletter/41/html/EN/>) and will be followed by an article on arbitration in R&D collaborations.

² Competitiveness Council of 29-30 May 2008, Council conclusions on The Launch of the "Ljubljana Process"- towards full realization of ERA, as adopted by the Competitiveness Council at its meeting on 30 May 2008

³ Communication from the Commission to the Council and the European Parliament, COM (2008) 588 final of 24.09.2008

⁴ Model clauses and submission agreements are available at <http://www.wipo.int/amc/en/clauses/index.html>.

The 72-Hour Race to Innovation – a proof of concept turned television programme

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Can you create a completely new product in 72 hours? And can you do this even though you're not a professional inventor? Professor Kaj Mickos is convinced you can, and that anyone can produce an innovation. In his TV programme on Swedish television, "The 72-Hour Race to Innovation", he wants to prove this by putting ordinary people to the test in a systematised process he calls the Innovation Plant.

Kaj Mickos is a professor of innovation technique. During his career he has guided approximately 2,500 people with great ideas, who lacked the tools and knowledge, through the innovation process, shaping their ideas into products. He also developed a production system for innovation he calls the Innovation Plant.

A couple of years ago, Mickos wanted to take his Innovation Plant a step further to prove that his method actually works. To do this, he needed to put his systematised method to the test in a powerful way and decided to demonstrate that it's possible to produce innovations and have products ready for the market in 72 hours.

Since he based a big part of his concept on the idea that anyone can be an inventor and that it is the willpower and enthusiasm of ordinary people that drive development, his process needed to be "democratic". This meant having laymen come up with the ideas and use the knowledge of experts to turn the idea into a product that was ready to go to market. Another prerequisite for this method was the ability to work in a virtual production centre.

Since an innovation process like this normally takes up to a year, "the 72-Hour Race" was a serious challenge. But it also helped him point out that the art of invention is no longer an individual sport, but a team effort.

After several meetings and discussions, Mickos joined forces with the interested parties and started a new production company called 72-Hour Race Productions. Mickos felt strongly about not turning it into a reality show where people would be voted off the programme, but instead wanted to create an inspiring programme that would help people believe in their power to make things come true.

"The 72-Hour Race" has been turned into a TV programme using the Innovation Plant concept. It is meant to enable people with different backgrounds and experiences to develop and commercialise their own ideas for new products and services in 72 hours. The contenders are not professional innovators but have specific problems to solve and ideas that are judged on the basis of their potential for commercialisation.

According to Mickos, the ultimate objective for an innovation is to create cash flow. Hence, enterprising is more important than the innovation itself. This is one reason to speed up the innovation process and adjust it to new conditions in the market. Another aspect is the environmental threats we face today which make it critical to find new, more environmentally friendly ways of manufacturing products.

- The world of innovation has been and still is in a state of intense change, Mickos says. The whole information and communication technology sector has developed at a rapid pace, and the Internet revolution, which allows users to control and