



OUTCOMES - TRAINING ACADEMY

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## CHECKLIST (PRE)CONDITIONS TO DISCUSS WHEN NEGOTIATING UNDER THE GUIDANCE OF A DEAL-FACILITATOR

At the outset of the procedure the deal-facilitator should reach agreement with the parties and their (legal) counselors about the role and assignment of the deal-facilitator as well as any (pre)conditions and rules that apply to the negotiation. Unlike a mediation procedure applicable to a dispute, the facilitator and the parties are not necessarily governed by formal rules or a code of conduct that govern issues like confidentiality and impartiality. Therefore it is necessary to specifically agree on the applicable ground rules. This can be either done at the beginning of the first meeting, or earlier on in a process consultation.

### Process consultation with (legal) counselors and/or the parties



#### Confidentiality and privacy

- The deal-facilitator does not provide any information to third parties about the parties, the content of the negotiation or the fact that the deal-facilitation is taking place, unless parties have explicitly granted permission or have requested disclosure (*in writing*).<sup>1</sup>
- To what extent do the parties appreciate confidentiality among themselves?  
Regarding:
  - third-parties about the fact that the deal itself takes place between these parties,
  - information from or arising or related to the deal, and
  - information obtained from a caucus.Is everything confidential or will parties specifically agree upon or specify what is confidential?
- Are there other parties that should be consulted? And if so, should they also sign a confidentiality undertaking?
- Is there a risk of publicity? If so, how should the press be dealt with?



#### Impartiality and neutral attitude of the deal-facilitator

- Should the deal-facilitator be totally independent? If not, to what extent could (s)he be acceptable to act as a neutral? Facts or circumstances which might interfere with the neutral's impartiality that should be revealed in advance to the parties are for example:
  - Having a personal or business relationship with one of the parties.
  - The deal-facilitator (or his firm) has acted previously on behalf of one of the parties.
  - Any substantial interest or stake (directly or indirectly) which might be gained from the negotiations.
  - Insider trading implications<sup>2</sup>
  - Having had prior access to confidential information with regard to one of the parties or the subject of the negotiation.



#### Managing expectations

- Finding out for all parties what are their objectives in the negotiation.
- Explore BATNA, RATNA, WATNA & ZOPA to get an idea of the potential settlement range. Exploration of the BATNA assures that the negotiated deal is better than the alternatives at hand. The worst alternative, WATNA can support reality testing. The RATNA is what will most likely happen. ZOPA shows the likely range for a possible deal.<sup>3</sup>

<sup>1</sup> Please note: a request of the parties to making something public does *not* imply the obligation for the deal-facilitator to do so.

<sup>2</sup> Eg – should the deal facilitator be formally considered an “Insider” from a share trading standpoint and governed by the same restrictions as the party representatives?

<sup>3</sup> Remember to expand the pie. Do not lock yourself or the negotiators onto ZOPA. It's to get a first idea what is realistically possible.



#### The assignment of the deal-facilitator during the deal-facilitation

- The deal-facilitator tries to the best of his abilities to bring the negotiations to a favorable outcome. What does this imply, do parties expect that the deal-facilitator is:
  - Responsible only for process management.
  - Making an assessment of the content of the deal, helping to find a solution or evaluating the business or other merits and drawbacks?
- Advising only if all parties explicitly request him to do so? To what extent or under which circumstances is his judgment binding to the parties? <sup>4</sup>Can/will the deal-facilitator hold separate private sessions with the parties in a caucus?



#### The role and mandate of the parties

- Which representatives from what organizational level and background are taking part in the negotiations? How many representatives of each party are required?
- Are parties represented by legal or other counselors? Powers of attorney?
- To what extent should the mandate of the representatives include range of authority?
- Who is the constituency, what are the procedures for agreeing/getting endorsement or approval with or from the constituency?



#### The assignment of the deal-facilitator after the conclusion of the deal

- Do the parties expect the deal-facilitator to remain available as an advisor, implementation manager or as a contract broker after the conclusion of the deal?
- Should (s)he be allowed to represent a party, for example in or out court, in a case with the same or similar underlying subject matter and if so under what strict conditions?<sup>5</sup>



#### Formal and administrative aspects

- **Cost-aspects**
  - The fee, which activities will be charged, allowance for travel expenses and time, writing reports or agreements and preparation.
  - How are the costs divided among parties?
  - Indication about the expected time/costs.
- **Process management aspects**
  - Agenda (issues that need to be covered).
  - Venue.
  - Time planning:
    - Required time for negotiation and the individual consultations?
    - Is there a deadline for the parties that needs to be considered?
- **Observing agreements**  
Do parties work with **package deals**?
- **Governing law, language and dispute management**
  - Which law applies to the negotiation and the resulting agreement?
  - How to handle possible disputes that might arise during or after the negotiation?
  - What is the official language being used during the negotiating?  
Is it wise calling in an interpreter?

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#### Note for deal-facilitators

Transparency and clarity are very important, especially regarding possible conflict of interests, or a lack of impartiality.

Manage expectations and clarify your way of working and your role in the process. What will you do, what can parties not expect you to do and in what capacity are you acting and for whom (are you a deal-maker for one of the parties or an impartial deal-facilitator)?

What is your approach of the negotiating process? Are you prepared to give advice or offer an evaluation? If so, under what conditions and what is the status of your advice?

Due to potential civil liability issues it is advisable to request the parties to sign a written deal-facilitation agreement.

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<sup>4</sup> For instance when this assignment has been confirmed in writing beforehand.

<sup>5</sup> For instance: never, under pre-determined circumstances, or only with an explicit written consent of all parties.