RESOLUTION THROUGH MEDIATION

Solving a Complex International Business Problem

An Interactive Training Exercise in Mediator-Assisted Interest-Based Negotiation
Based on the Powerbrands Case Study

Training Guide

© 2006 International Institute for Conflict Prevention & Resolution-CPR Institute.
CONTENTS

Section 1. Getting the Most from this Training Guide

Section 2. Powerbrands - Basic Facts

Section 3. Analysis of the Video

Section 4. Role Play Tools for Tutors

The circumstances depicted in this Training Guide are hypothetical and fictitious but based on real experiences. The Training Guide is intended purely for use in educational environments to depict and describe the process of mediating a business dispute in order to demonstrate how a dispute can be settled through the services of a skilled neutral. Any similarity in form or substance to actual products, companies, people or circumstances is accidental and coincidental and no analogy to any real or historic situation is intended or implied.

The International Trademark Association and CPR Institute acknowledge with thanks the permission of Bols Distilleries BV to use the distinctive eight sided bottle used in the Powerbrands video and Training Guide, and accept that all rights in such bottle shape and design belong exclusively to Bols Distilleries BV.

This Training Guide was prepared by the CPR Institute, which reserves all rights thereto. It was based upon Mediation in Action: Resolving a Complex Business Dispute, Videotape Study Guide, which is a publication of CPR Institute, written by Catherine Cronin-Harris. The Powerbrands Role Play and accompanying materials, and the Training Guide, were written by Michael Leathes and edited by F. Peter Phillips.
Section 1. GETTING THE MOST FROM THIS TRAINING GUIDE

This Guide has been prepared by the CPR Institute to accompany the INTA video Resolution through Mediation: Solving a Complex International Business Problem.

The video demonstrates how mediation can be deployed to resolve an apparently deadlocked business dispute. It also demonstrates effective use of interest-based negotiation techniques. This Guide has been designed to assist not only trainers of mediation and negotiation skills, but also disputants (and their advisors) who are preparing themselves for an assisted settlement negotiation.

To get the most from this Guide, approximately 6 hours 30 minutes is required. An abbreviated session involving Steps 3 and 4 requires approximately 3 hours 45 minutes:

Step 1. Assemble a Group of up to 20 trainees. Ask for four volunteers willing to play the roles of the parties and their lawyers. The Trainer acts as Mediator. Give each member of the group, including the volunteer role players, a copy of the General Background in Section 4 of this Guide. Give to each role player the confidential instructions found in Section 4. These are not to be shared with anyone else in the Group.
Total time – 15 minutes.

Step 2. Playing the role of Mediator, the Trainer opens the session with a standard Mediator opening, and the role play then begins. Aim to complete the entire mediation in 2 hours and 30 minutes. There are two alternatives for what the other trainees may be doing whilst this mediation is taking place. Firstly, if resources are permitting there could be five mediations running concurrently, however, this would require five Trainers. The alternative is that the first mediation is watched by the other trainees before attempting it themselves.
Total time – 2 hours, 30 minutes.

Step 3. After a break, show the video to the entire Group. Before doing so, distribute among the Group the Questions set out in section 3: “Analysis of the Video.” Invite them to keep notes their comments on the Question sheets as the video plays.
Total time – 45 minutes.

Step 4. Assign a particular question to each trainee and run through the Questions as a group. There should be focus on each trainee individually as well as group discussion. Allow the trainee to lead with observations on the Question assigned to them. Allow about 10 minutes of discussion on each question. Consult particular parts of the video as needed, chapter and time stops are referenced in the footnotes of the study guide.
Total time – 3 hours.
Section 2. **POWERBRANDS - THE BASIC FACTS**

A dispute has arisen between two of the largest alcoholic beverage companies in the world.

**Wonderbrandski A/O** is a Russian vodka producer. One of its brands is PICO BELLO, a potato-based vodka. For the past 7 years, Wonderbrandski has owned in Russia, but never used, the registered trademark OCTAVE. About a third of its shares are owned by a Russian Government agency. Wonderbrandski’s President is the entrepreneur Peter Tchaikovsky.

**Alcopops Inc** is a Chicago-based beverage alcohol marketing company. It sells KYK (pronounced – “KICK”), a triple-charcoal-distilled rye vodka, internationally (though not on the domestic Russian market) as three main variants – HIGH OCTANE (42 proof), OCTANE (40 proof) and CLASSIC (38 proof). Until recently, Alcopops had no presence in Russia except in Moscow Airport Duty Free, where small quantities of KYK CLASSIC had been available for several years. Alcopops’ President is DD Kruze, a well-known business leader.

Alcopops’ KYK vodka has always been marketed in an 8-sided bottle. In 1992, by a brief exchange of letters, Alcopops granted Wonderbrandski a non-exclusive, royalty-free license to use its 8-sided bottle design in Russia on any of Wonderbrandski’s alcoholic beverages. Wonderbrandski never made use of the license because 8-sided bottles were costly; nevertheless, the licence was never terminated.

Alcopops recently met with Vladivod, a leading former State-run distillery based in the Russian Far East, with a view to appointing Vladivod as Russian distributor of all three variants of KYK vodka. A deal was agreed verbally but not yet signed.

Wonderbrandski then precipitously re-launched its PICO BELLO OCTAVE vodka in an 8-sided bottle and in trade dress that Alcopops considers makes it look like KYK OCTANE. Alcopops filed a complaint with the Russian Anti-Monopoly Committee claiming unfair competition by Wonderbrandski. Wonderbrandski, in response, argues that (a) they own the trademark OCTAVE in Russia and consider Alcopops’ use of OCTANE a violation of Wonderbrandski’s Russian trademark, and (b) Wonderbrandski has a license from Alcopops itself to use an 8-sided bottle.

DD Kruze of Alcopops called Peter Tchaikovsky of Wonderbrandski directly. She noted that legal action between the two companies could last for years, and she suggested that together they consider an alternative approach. She explained that Alcopops was a member of both INTA and CPR, and as such had publicly pledged to consider non-binding and confidential negotiations, using a neutral Mediator, prior to actively litigating any dispute. She therefore proposed that this escalating conflict be referred to a Mediator from the INTA - Panel of Neutrals.

Peter Tchaikovsky agreed. Because the mediation was non-binding and confidential, he felt he had nothing to lose and could walk away at any time.

The parties selected Peter Mueller from the INTA - Panel of Neutrals as their Mediator. They also signed an agreement to share the costs and maintain confidence. They also agreed that the
discussions would not be referred to by either of them in subsequent legal proceedings. The mediation takes place in a Munich hotel. Peter Tchaikovsky and DD Kruze are present in person, accompanied by their respective outside lawyers, Alex Pushkin for Wonderbrandski and Mush Striver for Alcopops.

The Powerbrands role-players:

Left to Right:
Alex Pushkin, Attorney for Wonderbrandski
Mediator
Peter Tchaikovsky, President of Wonderbrandski
DD Kruze, President of Alcopops
Mush Striver, Attorney for Alcopops

Eugene Arievich
Peter Müller
Igor Boubnov
Elizabeth Regan
David Gryce
Section 3. ANALYSIS OF THE VIDEO

1. This mediation worked. The parties not only resolved their specific dispute – they emerged better off than either of them was before the conflict began. What were the key factors that made this particular mediation successful?

2. In this case, both parties sued before the idea for mediation was raised. Is there an optimal time in a dispute to propose mediation? If so, is it at the same point in every dispute?

3. What issues are typically addressed before the mediation?

4. How does the Mediator open the process and what are the goals of the opening?

5. Mediation is ordinarily a highly confidential process. What does the assurance of confidentiality add to the process? What practical steps do Mediators take to maintain confidentiality?

6. In Powerbrands, how were the parties asked to present their perspectives of the dispute in the first joint session?

7. How did the mediator make sure that each party understood the positions of the other party? Is that technique always applicable?

8. How does the Mediator deal with emotional outbursts?

9. What goals does the Mediator pursue in the initial private sessions to advance the search for a solution? What role does empathy play?

10. What techniques does the Mediator employ in the initial joint sessions?

11. What are some common mistakes that Mediators might make in the initial joint sessions? How many of these did the Powerbrands Mediator avoid?

12. What is “reality testing” and how is it used?

13. What goals and techniques does the Mediator use in later private sessions?

14. What goals and techniques does the Mediator use in later joint sessions?

15. What methods are used to break impasse?

16. How does the mediation conclude?
17. What roles did the lawyers play in the mediation, and did those roles change during the process?

18. What legal protections apply to ensure confidentiality in mediations?

19. How did Alcopops avoid conveying a perception of weakness – after all, it was they who proposed mediation? What more might Alcopops do to avoid sending out signals to Wonderbrandski that Alcopops considered its position weak?

20. How can cultural factors play a part in disputes and the ways in which settlement can be facilitated?

21. The mediation was conducted on neutral ground with a Mediator. What are the implications of this?

22. What characteristics of disputes make them more or less susceptible to resolution through mediation?
1. This mediation worked. The parties not only resolved their dispute – they emerged better off than either of them was before the conflict began. What were the key factors that made this particular mediation successful?

Negotiations with the aid of a Mediator are quite different from unassisted one-on-one negotiations. Someone neutral and uninvolved, by whom the parties have agreed to be guided, is also in the room. This person is someone whom the parties come to respect and trust. The Mediator, having the benefit of knowing each party’s private and real business interests, eventually enjoys a unique position that permits him or her to see shared interests, thus resolution options, to which each party is initially blind. Possessed of a uniquely complete understanding of the context of the dispute, the Mediator can then, without violating confidence, steer the parties to a resolution that each party recognizes as addressing its own long-term interests.

The use of a trusted neutral in whom confidences may be shared, and who is looked to in order to add value to the terms of a settlement, is the essence of business mediation. That is why it works.

A combination of factors led the Powerbrands scenario to a successful outcome:

- Business leaders with the power and authority to settle were present and in control (Q11)
- Once having expressed their hostilities, the parties were prepared to move from competitive bargaining based on their comparative legal or economic strengths, to negotiations based on their long-term business interests (Q17)
- The lawyers were quick to perceive and act upon opportunities for mutual gains through cooperation (Q17)
- The Mediator was able to manage the parties’ cultural differences (sometimes a real hurdle) and keep the disputants focused on their shared business concerns (Q20)
- Wonderbrandski did not misinterpret Alcopops’ proposal to mediate as weakness in Alcopops’ legal or market position (Q19)
- The mediation took place before positions had become entrenched, but at a time when all salient facts were known to all parties so that the matter could be discussed and alternatives could be assessed in an informed manner (Q2)
- The parties had prepared well, and chose a Mediator who was both competent in the field and skilled as a neutral (Q3)
- The Mediator inspired trust, assured the parties of his confidence, and insisted on a positive approach (Q4)
- The neutrality of the Mediator and of the process was never in serious question (Q21)
- Confidences were always respected (Q5, Q18)
- Impasses were broken with skill (Q15)
- Questioning by the Mediator secured fulsome responses that elicited the appropriate information (Q6, Q9, Q10)
• The parties were able to decide upon priorities based on their business interests, and those priorities were accurately understood by their counsel, the mediator and their counterparties (Q9, Q10)
• The Mediator permitted an inevitable indignant outburst but skilfully prevented indignant emotions from destroying the possibility of a mutually beneficial business outcome (Q8)
• “Reality testing” was effectively applied by the Mediator to both parties in a timely way (Q12)
• “Prioritizing” was effectively applied by the Mediator to both parties in a timely way (Q13)
• The Mediator led both attorneys in the beginning from a confronting attitude to a more understanding attitude by asking both to repeat the legal position of the other side, then turning immediately to the business interests by addressing the business people. (Q7)
• The Mediator attempted to focus on the business issues as opposed to the legal positions of the parties by not commenting or even mentioning the legal positions again in joint sessions. after the initial joint session where counsel were asked to summarise their legal stance. (Q10)
• The Mediator suggested options as hypothetical ideas, without attribution or endorsement (Q 14 )
• The dispute, although complex, was theoretically capable of settlement (Q22)
• The parties were able to recognize, and were willing to consider, ideas that might add value to them – even if they also added value to their counterparty (Q9, Q15)
• Post-mediation steps were clearly defined and agreed upon (Q16)
2. In this case, both parties sued before the idea for mediation was raised.
Is there an optimal time in a dispute to propose mediation? If so, is it at the same point in every dispute?

Benefits of Early Use
Mediation can be instituted at any point in a dispute, from when a problem first arises until the case is in arbitration or trial. One school of thought asserts that the earlier the mediation occurs in the life of the dispute, the more likely it will succeed and the greater the savings of transactional costs. At such early stages, settlement potential may be optimal because positions have not been hardened by legal posturing and parties have not been subject to advisors’ assurances about the likely outcome of the case. Before litigation begins, parties are freer to use private mediation, and to select Mediators and structures to suit particular needs without a requirement of complying with imposed court-related mediation rules. If the parties need more facts before they can consider settlement, the mediation process has the flexibility to arrange a limited exchange of salient documents and information, without resorting to formal and expensive court-ordered discovery.

Benefits of Later Use
Once litigation begins, parties seeking to mediate may face some limitations associated with court-related mediation programs. Such programs vary but some courts may dictate the type of case to be mediated, the Mediator to be employed, the procedures to be applied, and the timing of the process. Some courts require Mediators to report back to the court on the progress of the mediation. Parties wishing to use private mediation outside the court may need formal court permission to do so.

Nonetheless, initiating mediation after litigation begins may be advisable:

i) where judicial persuasion or mandates may induce an otherwise reluctant opponent to use the process;

ii) where parties cannot agree to a limited discovery plan and court-supervised discovery is needed in order for each party to assess its risks and engage in serious interest-based negotiation; or

iii) where provisional remedies or relief such as a confidentiality protective order may be needed.

In the Powerbrands case, the dispute went to mediation at a very early stage. Wonderbrandski had not even started substantial sales of its new PICO BELLO product. There was much less “face” to be preserved, or lost, in the privacy of the mediation room than if the case had been public and the companies’ reputational interests had become implicated. Alcopops was able to consider Wonderbrandski as a potential distributor because it had not yet bound itself contractually to a third party. Financial damages were not a great issue because neither party had yet incurred significant market losses.
In other cases, the right moment to mediate may well be later in the litigation cycle. A party may not be willing to mediate early on, but the costs of continuing, or the realisation of a higher risk of losing, should make mediation an active prospect at any stage of any dispute.

Though exceptions of course exist, as a general approach it is usually never too early, nor too late, to at least try mediation. Over 85% of deadlocked disputes that go to mediation settle, and this proportion does not seem to be affected by whether mediation is tried early or late in the litigation cycle. The “right” time to offer to mediate is when sufficient facts are available to permit both parties to negotiate intelligently; when direct negotiations have come to impasses; and when both parties want to resolve the case.
3. What issues are typically addressed before the mediation?

Before the mediation, parties are likely to have had several discussions with the Mediator:

**Mediator Background and Credentials**
Before a Mediator is selected, the parties or their lawyers will probably first want to consider background information on the Mediator's experience, expertise, references and the particular style of mediating. (Some Mediators are *facilitative*, and believe that the Mediator should just help the parties communicate, without inserting or reflecting the Mediator’s thoughts about the issues. Others are *evaluative* and willing, upon request, to express their opinions on the likelihood that a party will prevail on a particular issue. Most Mediators employ a combination of these techniques.) Much of this information about the Mediators appointed to the INTA - CPR Trademark Panel of Neutrals is available online ([www.inta.org](http://www.inta.org) and [www.cpradr.org](http://www.cpradr.org)). If the parties want to interview the Mediator directly, before making their choice, they should do so jointly to maintain the Mediator’s perceived neutrality if later selected.

**Conflicts of Interest**
When a Mediator is proposed, each party’s counsel should inquire about potential conflicts of interest. Mediators should disclose in writing any past, present or prospective business, professional or social relationships with the parties or law their firms, or any other matter that could possibly call the Mediator's impartiality into question.

**Scheduling of Mediation**
Once a Mediator is selected and retained, discussions regarding procedural issues may occur. Mediators may prefer joint discussion on those issues with all parties participating, again to maintain the perception of neutrality. Except in the case of “administered” proceedings, Mediators, in consultation with parties, typically arrange for the scheduling, location and duration of mediation sessions, and will discuss any limitations on the entire time frame for the process.

**Mediator's Retainer Agreement**
Parties and the Mediator should enter into a retention agreement that addresses the selection of the Mediator, the procedural rules, confidentiality obligations, immunity of the Mediator and the sponsoring organization, restrictions on future relationships, and provisions on how the Mediator will be compensated (fees and disbursements). For a precedent, see the CPR Model Agreement between Mediator and Parties at [www.cpradr.org](http://www.cpradr.org) (click “Procedures and Clauses” and then “Online Form Book”) or [www.inta.org](http://www.inta.org) (click on ADR).

**Selection of Appropriate Business Representatives**
It is important that the business executives attending the mediation are knowledgeable of the facts giving rise to the dispute and the interests of the company with respect to the dispute, and are empowered to settle the entire matter on the spot, without referring back to a higher authority for approval.

**Pre-Mediation Submissions**
Mediators typically ask each party to prepare pre-mediation submissions summarizing facts,
issues and legal positions to acquaint the Mediator with the outlines of the case. Key documents may also be requested. Mediators frequently impose limitations on such submissions, including page limits (e.g., 10-15 pages per party) and submission timetables (e.g., 5 to 10 days before the mediation session). Each side usually submits its paper to the Mediator, not to the counterparty, though Mediators may encourage exchange of papers if they feel this will help settlement.
4. **How does the Mediator open the process and what are the goals of the opening?**

The Mediator begins the process by introducing him- or herself, welcoming the parties, and highlighting key aspects of the mediation process and procedure as specified below.¹

**Content**
The Mediator's opening will typically:
- ensure everyone at the table is properly introduced and their capacities are known²
- specify the goal of reaching a mutually satisfactory solution crafted by the parties themselves
- specify the Mediator’s neutrality and role as a settlement facilitator, not as a judge/decision-maker³
- inform the business executives of the need for them to actively participate
- verify the authority of each business executive to agree to settlement terms on behalf of their respective organisations without having to refer back to higher authorities
- explain the procedures to be used including a joint and private sessions
- explain the Mediator’s expectation of frank discussion by everyone
- explain the confidentiality associated with the mediation process
- ask if the participants have any questions about the process.

The *Powerbrands* Mediator can be seen touching upon most of these aspects.

**Goals**
This simple introductory rite achieves a number of goals. In laying out these points, the Mediator:

1. **Starts building a trusting relationship** with each of the parties by being balanced, non-positional, open, honest, competent and positive;

2. **Educates** by explaining mediation goals and procedures. The Mediator prepares business executives, who may be unfamiliar with the process, for what will occur in order to avoid surprises; the key point that the Mediator makes is that “I am not a judge, and I am not an arbitrator. So, actually, you are negotiating and I don’t decide anything;”⁴

3. **Demonstrates competence** by showing command of the process and neutrality regarding its outcome. This helps in developing the parties' trust in the Mediator’s abilities;

4. **Creates a positive tone** by emphasizing the ultimate goal is a solution acceptable to everyone, and by repeating the importance of frankness and confidentiality.

---

¹ Chapter 2 – 2:17-3:07
² Chapter 2 – 2:27
³ Chapter 2 – 3:05
⁴ Chapter 2 – 3:00
5. Mediation is ordinarily a highly confidential process. What does the assurance of confidentiality add to the process? What practical steps do Mediators take to maintain confidentiality? (see also Q18)

In the opening segment, the Mediator usually reminds participants that the process will be confidential as to third parties, and furthermore that the Mediator will not disclose to a party any information that was identified by another party as confidential.

Private sessions enable each side to meet alone with the Mediator to disclose facts, concerns, interests, limitations and offers that they would not ordinarily reveal to an opponent. Without certainty about the confidentiality of disclosures made in private sessions, parties would be reluctant to share this information, the Mediator would be denied it, and the Mediator’s task of perceiving underlying interests and shaping value-added outcomes would be made much more difficult. This trust in the Mediator and in the confidentiality of information shared with the Mediator is vital to the success of a mediation.

Identifying Confidential Data.
You will notice in the Powerbrands video that the Mediator colour-codes some of his notes. Mediators should ensure that their private notes highlight confidential information so that accidental disclosure in the heat of the process is avoided. Mediators should carefully protect their private notes from view by the parties.

No Written Record Reduces the Chance of Erroneous Disclosure.
In mediation, confidential information is disclosed only to the Mediator and often only verbally. The absence of a written documentation reduces the risk of human error in sharing documents that contain confidential information. Mediation affords greater protection for confidential information than a protective order or in camera record.

Reconfirming.
At the start of the first private session with each party, Mediators typically repeat the assurance that information identified as confidential will not be conveyed to the other party. At the end of each private session, the Mediator may repeat the specific confidential data that cannot be revealed or ask which specific data is not confidential which can be disclosed to the other party. This practice assures the disclosing party of the Mediator’s firm understanding and promotes that party’s trust in the Mediator but also allows for the channels of communication to be opened by recognising that not all information is confidential.

Incorporating Confidential Information without Attribution or Disclosure.
During discussions, Mediators and participants often propose possible solutions for consideration. These proposals generally aim to satisfy both sides to some degree. They are an amalgam of creative solutions, information and party interests. Mediators may convey proposals, whether party-generated or Mediator-generated, as hypothetical suggestions (phrased

---

5 Chapter 3 – 12:02-12:50
6 Chapter 3 – 10:20
7 Chapter 3 – 14:00
by the mediator as "What if . . .?" or "Suppose . . .?"). In the final joint session, the Mediator in the *Powerbrands* video uses the phrase, “I was thinking . . .”\(^8\) to advance a proposal that a party had suggested, but was unwilling to state directly. In so doing, the Mediator called on the confidential information he had learned, but maintained the confidentiality of the information.

**Returning Documents/Retaining No Records.**
Many Mediators honour a practice of returning all documents and destroying notes at the conclusion of the mediation. The Mediator might retain a brief memo of who participated, the date, the general nature of the dispute, and whether an agreement was reached. Mediators need not retain copies of settlement agreements.

**Alert All Parties if Subpoenaed.**
If there is an attempt to force the Mediator to give evidence in a court proceeding regarding the dispute mediated, the Mediator should alert all parties so they can protect their rights to confidentiality along with the assertion of any such rights by the Mediator.

\(^8\) Chapter 8 – 32:55
6. In Powerbrands, how were the parties asked to present their perspectives of the dispute in the first joint session?

The Powerbrands Mediator first asked the lawyers of each side to present their positions – briefly! Inevitably, these were quite legalistic in nature. By asking the lawyers to speak first, the Mediator accomplished several objectives at once:

- the lawyers felt active in handling their respective clients’ interests;
- there was an opportunity, controlled by the Mediator, to let the lawyers say what they had already advised their clients privately;
- the business leader on each side really gets to focus on the other side’s legal position;
- the legal issues are explained, and put on the table early, rather than left to boil away unexpressed for possible interference later.

After the lawyers had each spoken, the Powerbrands Mediator then turned to the business leaders and asked them to focus on their business interests:

"Mrs. Kruze, would you please explain what are your intentions, your business intentions, in Russia?"

In this particular case, as the parties responded, they also both began asserting that the other side was at fault. The Russian side felt insulted by Alcopops’ allegations of bad faith and ignorance and vice versa for Alcopops. The Mediator found such finger pointing unproductive. As soon as the Mediator brought the situation under control after the emotional outburst – which he did by adjourning the private session and going into a private session – he repeated to Wonderbrandski exactly what he had asked in the joint session before the outburst: “I have to know the business issues, you know?”

Questioning Technique (see also Q10)
The Powerbrands Mediator’s questioning technique was interesting. In posing the questions, the Mediator kept his questions very open-ended. That is to say, they were framed in a way that required the party to explain something, not simply say “yes” or “no.” For example, the mediator asked Wonderbrandski: “So what do you think about the complaints Alcopops has?” and to Alcopops: “I need to know more. What are your real intentions in Russia?” Both of these questions required lengthy explanation, and it was impossible to answer the question “incorrectly.”

With this format, the Mediator was able to maintain total neutrality on party positions throughout the mediation. At no stage throughout the mediation does it feel like the questions are leading or that there is any neither direct nor indirect value judgments implicit on such questions. The form

---

9 Chapter 2 – 3:20
10 Chapter 2 – 7:19-8:20
11 Chapter 2 – 8:14
12 Chapter 2 – 8:40
13 Chapter 2 – 9:40
14 Chapter 2 – 10:00
15 Chapter 3 – 10:26
16 Chapter 3 – 11:02
17 Chapter 4 – 15:16
of the question, focusing on a broad topic, also allowed the speaker to respond as he or she saw fit without the Mediator narrowing or targeting the question on any particular aspect of the topic. At this stage, the Mediator was gathering information and wanted parties to dominate and structure responses that might offer clues for later crafting of possible solutions.\textsuperscript{18}

**Counter-Argument Presentational Technique**

In this case, after each side briefly explains their positions, the Mediator invites each side to summarise the position of the other.\textsuperscript{19} This has the effect of simultaneously forcing everyone to focus on the other side’s case, and everyone feels that they have been heard, and heard correctly. It reduces the likelihood of misunderstandings. The Mediator timed this invitation to follow the opening case summaries, while the process was still in the preliminary phase of getting the parties respective positions into the open.

In this case, the attorney for Alcopops, Mush Striver, when asked to summarise Wonderbrandski’s case omitted to mention that the Russians were claiming that Alcopops use of OCTANE infringed Wonderbrandski’s OCTAVE trademark in Russia, and Alex Pushkin, Wonderbrandski’s attorney, had to opportunity to pick up the point.\textsuperscript{20}

---

\textsuperscript{18} Chapter 3 – 12:44, Chapter 4 – 16:17, Chapter 4 – 17:00

\textsuperscript{19} Chapter 2 – 6:00

\textsuperscript{20} Chapter 2 – 7:12
7. How did the mediator make sure that each party understood the positions of the other party? Is that technique always applicable?

The *Powerbrands* Mediator first asked the lawyers of each side to present their positions briefly. Inevitably, these were quite legalistic in nature. Then, the Mediator asked each attorney to repeat the legal position of the other party, in doing so the Mediator accomplished several objectives at once:

- the lawyers had to reflect on the positions of the other side, thereby also instinctively evaluating their own positions from another angle;
- there was an opportunity, controlled by the Mediator, to let the business people, again, hear their own legal position in the words of the other party, sounding much less convincing than from their own lawyer;
- often, this is the first time the business leader on each side really gets to focus on the other side’s legal position, by listening to the explanation of their position twice, they really start to understand;
- both parties realize that there is some credible argument on both sides.

After the lawyers had each spoken, the *Powerbrands* Mediator then turned to the business people and asked them to address their business interests. This is an attempt to get the mediation onto the commercial path and away from strict legal rights and interpretations of the dispute. Throughout the mediation, the Mediator continues avoiding a concentration on the legal positions but instead focuses on addressing the business interests. By doing this, as well as not referring to the history of the dispute but by focusing on the future the lawyers start to think about business opportunities, as opposed to their original legal positions.

This technique is not always applicable. It should not be used with the business people. They might find it childish to repeat the business interests of the other side. The Mediator can always disguise such “exercise” by asking the lawyers to do that in order to help the Mediator to clearly understand the legal positions.

---

21 Chapter 2 – 3:20
22 Chapter 2 – 6:00-7:19
8. How does the Mediator deal with emotional outbursts?23

The Mediator's reaction to outbursts can be highly productive if well orchestrated as shown at the end of the first joint session of the *Powerbrands* video.24

Emotional outbursts are quite common not only in interpersonal disputes that involve individual interest, such as employment termination, consumer problems, custody and family matters, but also in business problems, which may produce anger as one-on-one negotiations turn sour. This consequence is especially likely where one or more of the parties consider that their rights have been violated, they have been insulted, or that they have been subjected to cultural insensitivity. Experienced mediators recognize that some direct venting of pent-up emotions can help clear the air. For a mediator to ignore such an outburst, or to cut it off too quickly, would deny the legitimate emotional aspect of the conflict and may be perceived as implied criticism. It is usually preferable to let it happen, not let it get out of control, acknowledge the feelings without offering any evaluations and move to the next phase.25

Emotional outbursts can occur for a number of reasons. Commonly they are related to the frustration of not being heard or understood, having a belief that there is not just a legal but a moral basis for a position that is being denied and being insulted. In this case, the parties were both heard and understood because each side was asked to summarise the case of the other.26 However, Wonderbrandski, the smaller of the two, felt they were morally in the right and Wonderbrandski’s President felt insulted by being told he was a “cheap pirate” the combination of which then boiled over into Wonderbrandski’s President threatening to walk out.27 It always helps if the mediator can understand the emotional drivers in order to deal with them most effectively.

When the parties in *Powerbrands* got heated in the joint session over bad faith allegations, the Mediator allowed the outburst to take place.28 He listened patiently without interjection, expressly acknowledged the anger, and then offered a justification that both parties could accept for the fact of the outburst, making it no one’s fault. ("I very well understand that you are upset. I understand the feelings are running high. So I propose that we adjourn into a private session")29 He thus prevented further polarization that could have disrupted settlement efforts by calmly asserting his control over the process and directing the parties that it was time to move on.

The Mediator judged that the Russians were on the receiving end of the bad faith allegations thus were therefore more likely to be the most upset from the outburst so the Mediator asked Wonderbrandski to enter into the first joint session with him. The Mediator’s first question to Mr. Tchaikovsky was business-related and interest-based: “I have to know the business issues,
you know? What do you intend to do with the new PICO BELLO brand?  

This invitation to work calmed Mr. Tchaikovsky down, and turned him to focus on his own business interests rather than on Alcopops’ allegations of bad faith.

30 Chapter 3 – 12:49
9. What goals does the Mediator pursue in the initial private sessions to advance the search for a solution? What role does empathy play?

Rather than dwell on legal positions, the *Powerbrands* Mediator intentionally and rapidly shifted focus in the early private sessions to developing trust, uncovering party interests and determining priorities.

**Eliciting the Parties’ Concerns and Interests**
In private sessions, Mediators can question the parties directly to uncover their underlying business interests, both those related to the particular dispute and concerns that at first may appear unrelated to the dispute, but tangentially affected by it.\(^{31}\) This strategy helps reveal information that may be part of potential solutions designed to satisfy as many interests of both parties as possible. These inquiries go well beyond legal positions such as liability, remedies and damages that were presented by the attorneys in joint session. Mediators work to uncover other interests, such as:

- long and short term economic interests related not only to the dispute but also to the business issues giving rise to the dispute;
- political interests related to the business (e.g. confidentiality and business development needs, proving a point, deterrence, impact on other business);\(^ {32}\)
- relational or social interests (e.g. public relations, publicity concerns, inter-company relations, business development, satisfying constituents, linkage to other real or potential business relationships and business disputes);\(^ {33}\)
- personal or emotional interests (e.g., revenge, vindication, personal satisfaction, exposing wrongdoing, "face-saving", promotion expectations);\(^ {34}\)
- timing considerations (e.g., delay, speed, contingent plans that rely upon resolution or delay of this particular dispute).

**Determining Priorities**
Businesses typically have multiple interests in the resolution of any dispute. Mediators must first gain a sense of what those interests are, ensure all of them are identified,\(^ {35}\) and then work out the relative importance that the parties themselves ascribe to these interests. Then – but only then – the Mediator will attempt to match up each party’s common interests or create terms reflecting trades that capitalize on each party’s priority interests.\(^ {36}\)

**Building Trust**
In private sessions, the Mediator takes pains, through questioning and through demonstrations of empathy, to ensure that all participants feel that they have been heard and understood. This technique helps develop the crucial sense of trust that participants must place in the Mediator if

---

\(^{31}\) Chapter 3 – 12:29  
\(^{32}\) Chapter 4 – 15:00, Chapter 4 – 18:00  
\(^{33}\) Chapter 7 – 29:50  
\(^{34}\) Chapter 3 – 14:20  
\(^{35}\) Chapter 3 – 13:09  
\(^{36}\) Chapter 8
mediation is to be successful. You may note that the Powerbrands Mediator often punctuated his remarks with phrases such as “Yes… I understand… I know… I see….”\textsuperscript{37}

**Clarifying Details**

As interests, concerns and priorities are sought, Mediators may need to seek clarification or more details on the information offered to assure full understanding.\textsuperscript{38}

\textsuperscript{37} Chapter 3 – 12:38, Chapter 3 – 13:18, Chapter 4 – 15:13

\textsuperscript{38} Chapter 3 – 13:11
What techniques does the Mediator employ in the initial joint sessions?

To elicit interests, determine priorities and develop trust, the Powerbrands Mediator used various questioning techniques.

**Open-Ended Questions to the Business Representative**

Mediators intentionally direct questions about interests, goals and concerns to the business representative, not the attorney. Since parties may be reluctant to disclose information that weakens their own insistence on positions, the Mediator often must dig for such information and will typically start such inquiry with open-ended questions.\(^\text{39}\)

Good open-ended questions appear to focus on a topic, but are phrased to allow a speaker to decide what events to discuss, what sequence to use in discussing them, and what aspects of those events to describe. These questions elicit maximum response from the speaker without any narrowing of the topic by the questioner. Important open-ended questions typically used by Mediators include: "What do I need to know to understand this matter?" and "What did you hope to get out of this course of action?" and "What is your goal in this mediation?"

Narrower or more focused questioning comes later, such as when the **Powerbrands** Mediator asked Mr. Tchaikovsky, "Do you have any interests outside Russia?"\(^\text{40}\) and to Ms. Kruz, "Do you intend to take High Octane into the Russian market?"\(^\text{41}\) At the early stage, a Mediator typically probes indirectly for the party’s interests and priorities which narrower detailed questions will not elicit.

In this case, the Mediator tried several open-ended questions before he got a proper answer. His first question to Wonderbrandski, “What are your main goals?”\(^\text{42}\) was merely responded to with a demand for an apology, because Mr Tchaikovsky was still angry and hurt. The Mediator tried a different open-ended question, “What do you think about Alcopops complaints?”,\(^\text{43}\) which also produced no straight reply. But when he re-phrased it as a business question – “So what do you think are the intentions of Alcopops?”,\(^\text{44}\) then he got a proper response. And this line of questioning led to the essence of Wonderbrandski’s concern – their basic fear of Alcopops threatening their business in Russia.

**Follow-Up Questions**

As part of the process of getting at hidden concerns and interests, Mediators carefully listen to responses and pursue critically important follow-up questions.\(^\text{45}\) This is particularly important when the speaker reveals a goal or interest vaguely. Questions such as, "Why did you say that?" or "What do you mean?" enable the Mediator to get at the speaker’s real intentions and priorities, rather than for the mediator to presume or guess what they are.

---

\(^{39}\) Chapter 2 – 8:14, Chapter 3 – 10:30  
\(^{40}\) Chapter 3 – 13:34  
\(^{41}\) Chapter 4 – 16:30  
\(^{42}\) Chapter 3 – 10:30  
\(^{43}\) Chapter 3 – 11:02  
\(^{44}\) Chapter 3 – 11:28  
\(^{45}\) Chapter 6 – 25:40
In *Powerbrands*, the Mediator asked: "Are you afraid that KYK might be introduced into the premium and super-premium market?" after Mr. Tchaikovsky said, "We think that our market is somehow threatened by the entrance of KYK." The Mediator’s use of the word “afraid” prompted Mr. Tchaikovsky to reveal to the Mediator that the arrival of KYK HIGH OCTANE in Russia was his main “fear” and could be a “disaster” for his business, which in turn revealed exactly why the dispute had arisen with such virulence in the first place.  

**Active Listening, Summarization, Reframing, Prioritization**

Six common listening and response techniques help the Mediator build trust and assure the Mediator and the participants that the Mediator accurately understands the concerns and interests: Active Listening, Summarization, Reframing, Prioritization, Shelving and Confirmation.

- **Active listening.** Active listening empathetically acknowledges what a party has said by reflecting back the essence of the statement with understanding but without evaluation. By going beyond a simple nod of the head as a person speaks or verbal signals that the Mediator is listening, the Mediator's use of active listening assures a party that they've been heard. The *Powerbrands* Mediator was an active listener. Not only did he often exhibit that he was listening (“I understand…” “Yes, I see…”) But he often used these demonstrations to prod for more information, as when he said to Alcopops’ counsel, “Yes I clearly understand, you know? But I need to know more. I mean, what are your real interests in Russia? Why do you now do the big launch?”

- **Summarization.** Periodically, Mediators summarize the business executive's or attorney's priorities or concerns. This technique allows the Mediator to test his comprehension and permits the client to adjust any misunderstandings. It also gives the speaker immediate assurance of having been heard and understood. In *Powerbrands*, the Mediator said to Mr. Tchaikovsky: "If I understood right, you have the luxury Zenitskaya, the super-premium Spartakskaya and you have the premium Dynamoskaya…” which showed the Mediator’s understanding of the Wonderbranski portfolio. At the beginning of the second joint session, the Mediator presented a non-confidential list of the major issues in dispute and was so comprehensive that the parties both affirmed the correctness of the list and were reminded that they were indeed “in good hands." At the end of the last joint session, the Mediator summarised the disclosable points on each side as he had identified them.

- **Reframing.** When a Mediator believes that a party's interest or priority would be totally unacceptable to the counterparty and couldn't form the basis of an agreement, the Mediator might try to reframe the interest into acceptable terms that could become part of a settlement. In *Powerbrands*, the Mediator heard Wonderbranski’s threat: “If they still

---

46 Chapter 3 – 12:00-12:40
47 Chapter 4 – 15:14
48 Chapter 3 – 13:18
49 Chapter 5 – 18:56
50 Chapter 8 – 36:37
launch KYK HIGH OCTANE in Russia we will keep and fight for this PICO BELLO OCTAVE to the end,”\textsuperscript{51} and reframed it a few minutes later more positively, and more usefully, as: "Ah, OK, so you would be happy with HIGH OCTANE as long as you are doing the distribution."\textsuperscript{52}

- **Prioritization.** Not all interests have the same weight and priority. Nor are priorities necessarily obvious, even to the party itself. So Mediators take care to ensure they painstakingly elicit and perfectly understand the business priorities of each party. Having drawn out of each party in the first private sessions what were the key interests of each of them, the \textbf{Powerbrands} Mediator made a list of the six major issues\textsuperscript{53} for the start of the second joint session. All were business issues – none was a legal position. He began the second joint session with a discussion to confirm that these were, for both parties, the main business interests.\textsuperscript{54} Having done that, the Mediator then asked the parties if they would prefer to continue discussion in private sessions with each party to try and help them forge a deal based on those priority interests. By prioritizing the areas of conflict, the Mediator simultaneously confirms what they are, determines there is nothing else, and gets a feel for which are the most important for each side. Prioritization can thereby help identify suitable areas for concession. Prioritization is not just important in relation to areas of conflict, but also in identifying and ranking reciprocal benefits in a deal.\textsuperscript{55}

- **Shelving.** When angry, Wonderbrandski made a demand for an apology\textsuperscript{56}, which was repeated a short time later, but only once.\textsuperscript{57} A little later Mr Tchaikovsky expressed the need for “big money”\textsuperscript{58} to surrender the 8-sided bottle license, though this sounded like macho playacting, and was not repeated. The mediator chose not to explore either of these demands, which he correctly recognised as bargaining barriers, believing that if they lay at the root of the deal they would re-surface, which they did not. In the event, his decision to shelve the demands, both of them made in private, prevented these elements interfering in the deal-making progress and both were forgotten by the Russians as they had other, and more significant, gains to secure.

- **Confirmation.** On many occasions, the Mediator sought confirmation from the parties, partly to get them to focus on their main concerns, partly to ensure there was nothing else that had not surfaced.\textsuperscript{59}

\textsuperscript{51} Chapter 6 – 22:40  
\textsuperscript{52} Chapter 6 – 25:46  
\textsuperscript{53} Chapter 5 – 19:09  
\textsuperscript{54} Chapter 5 – 19:50  
\textsuperscript{55} Chapter 6 and 7  
\textsuperscript{56} Chapter 3 – 10:38  
\textsuperscript{57} Chapter 3 – 14:10  
\textsuperscript{58} Chapter 6 – 23:55  
\textsuperscript{59} Chapter 4 – 15:54, Chapter 4 – 16:37, Chapter 6 – 23:20, Chapter 8 – 34:55
11. What are some common mistakes that Mediators might make in the initial joint sessions? Which of these did the Powerbrands Mediator avoid?

A Mediator employing a predominantly interest-based mediation model will avoid the following common mistakes that impede development of mutually beneficial interests that are shared by the disputants.

**Failure to Actively Involve the Business Participant**
Mediators sometimes fail to involve business representatives directly in the mediation process. The early questioning about interests and concerns is the ideal time to get the business leaders busy talking and revealing their interests. These business questions should be directed to the client, not the attorney, as the Powerbrands Mediator did when he directly questioned the business representatives as soon as the lawyers had explained their positions.  

**Specific Topical Questioning Too Early, or Focusing on Positions Rather than Interests**
Mediators should guard against questioning on particular factual, positional or legal issues before gaining a broader sense of the client's interests and priorities. While clarification questions have an appropriate role, if they are presented too early, the parties fail to focus on their interests and so the necessary revelation of client's interests and concerns may be buried in detail or simply unexpressed. Once a broad interest picture is revealed, details fit more appropriately into the overall framework.

**Failure to Follow-Up on Business Executives’ Leads**
Mediators too often fail to follow-up and determine why a business executive considers that a particular concern or objective is important. Mediators should not assume they know why something is important, why a party is apprehensive, or why a goal is considered critical.

**Mediator Use of Confrontational Questions before Trust and Rapport Have Developed**
The initial private sessions should be devoted to obtaining information and should be dominated by parties’ responses to the Mediator’s open-ended and non-judgmental questions. Confrontational questions that box-in a person's responses may be more appropriate in later private sessions or in extreme forms of reality-testing, but not in the delicate initial phases of the mediation.

**Offering Advice or Evaluations**
Offering advice about legal claims and theories, or responding to questions that call for the Mediator's personal opinion should be avoided.

**Allowing Attorneys to Dominate Responses**
If attorneys try to dominate responses, the Mediator should acknowledge those responses but redirect questions to the business executives by name. Allowing attorney domination of the colloquy may result in more positional bargaining that reflects the attorney’s desired litigation outcomes rather than the party’s own interests. A good Mediator will nevertheless actively seek

---

60 Chapter 2 – 7:19
61 Chapter 4 – 17:40
to make the attorney an integral part of the process. For example, in the *Powerbrands* initial joint sessions, the Mediator first directed open-ended questions to the attorneys, confirming their essential role. Then, he directed questions to the business leaders, underscoring the value of the legal perspective while he explored the business perspective.63

---

62 Chapter 2 – 3:26
63 Chapter 2 – 7:19
12. What is “reality testing” and how is it used?

Mediators frequently serve as "reality testers." In private sessions and thus away from the risk of humiliation, Mediators gently question participants to induce a more realistic view of positions and expectations, and to highlight uncertainties about their positions or claims that they may be optimistically overlooking or undervaluing. Mediators avoid expressions of opinion, but nevertheless encourage the listener to reassess a position or claim that they rely upon. Much information that the Mediator uses in reality testing comes to light as part of the opposing positions stated by the parties.

Timing of Reality Testing

Reality testing typically occurs during the “option generation” stages of mediation, after the Mediator has elicited the parties’ interests, and assisted them to clarify and determine their priorities. Introducing doubt at these later stages can help move parties off fixed positions and prepare them to consider alternative settlement options. Used too early, reality testing can seem hostile and detract from development of trust.

Forms of “Reality Testing”

In Powerbrands, we see a number of reality-testing instances including:

- **Confronting a Party with Objective Principles or Standards that May be Applicable.** Mediators sometimes confront a party with objective principles or standards that may have impact on an aspect of the case. Typical examples include express contract terms, principles of law, equitable principles or industry practices. When discussing distribution arrangements that Alcopops was about to conclude with Vladivod, for example, the Powerbrands Mediator asked Alcopops: “What do you think if you encounter difficulties with the Russian Government, which is a co-owner of Wonderbrandski, on your distribution channels?”

- **Confronting a Party with Contrary Factual Information or Possibilities.** Mediators may isolate an apparently provable fact that is asserted by a party, and that may signal a weakness in the opposing party’s claims. The Mediator will then ask the opposing party how that fact would affect its claims. For example, the Powerbrands Mediator asked the President of Wonderbrandski: “What do you think [would happen] if Alcopops gets rid of OCTANE... just uses KYK and introduces into the standard market?” The question prompted Wonderbrandski’s counsel to concede to his client, “Obviously there is no case ... because there is no infringement then.”

- **Inquiring about the Uncertainty of Litigation.** Mediators may inquire about the possible consequences of losing a lawsuit or an issue in a lawsuit. The Powerbrands Mediator asked Alcopops: “What if they succeed with the trademark infringement? What happens?” And Alcopops’ representative realized, “It would be devastating to have to market only in Russia without our Octane label, where otherwise we’re selling worldwide

---

64 Chapter 4 – 17:16
65 Chapter 6 – 20:40-20:52
with that Octane label.”

- **Inquiring on the Consequences of Failing to Resolve the Dispute.** Mediators frequently inquire about the alternatives to settlement to confront a party with the actual consequences of not resolving the case – today – in this mediation. This type of questioning can also focus on whether the cost, time delay, and animosity of litigation would truly advance a previously stated goal or interest of the party. In *Powerbrands*, issues of litigation cost did not arise. However, the Mediator did ask Alcopops: “What happens if they [Wonderbrandski] use Spartakskaya or Dynamoskaya, which are well-known in Russia and market them outside, competing with HIGH OCTANE and OCTANE?” The question prompted Alcopops to reflect that many real-world events might take place while this dispute remained unresolved, suggesting that it may be preferable to delineate Alcopops’ relationship with Wonderbrandski now rather than later.

---

66 Chapter 4 – 15:55-16:16
67 Chapter 4 – 18:00
13. What goals and techniques does the Mediator use in later private sessions?

In the private sessions, the Powerbrands Mediator's goals started with gaining the trust of the parties by using empathy and understanding, followed by determining all existing business interests and seeking clarification and finally generating and refining options for resolution based on business aims, all listed and prioritized. The Mediator used:

**Reality Testing** (See Q12) – for breaking impasse and re-focusing thoughts and ideas

**Open Questions** – to avoid any limitation as to what may be an option

**Asking for any overlapping business field or product threat between the Parties**
This approach formed the basis of the Powerbrands Mediator's later strategy when trying to find out the real fears of both parties, especially in the super premium field for Wonderbanski and the distribution field and the get-up problem of Alcopops.

**Prioritizing**
A vital technique for finding possible business resolutions by asking – if not forcing – parties to clearly prioritize their business needs and interests. Only by showing the parties that not all of their interests and needs have the same priority the Mediator is then – later on – able to find fields of interests, products, rights or licences which can be traded against fields of interests, products, rights or licences of the other party having a higher priority as it may be. Thereby, added value can be created for each party so that each party gains more through such mediation than it gives away – the ideal basis for a later joint session.

Note how the Mediator keeps on asking both parties to prioritize their needs and goals in order to find common interests and “items to trade.”

**Identifying and Exploiting “Items to trade” That Allow Maximum Value to Each Party**
The key to this technique is to identify goods or services that one party can supply more efficiently, and that address the interests of the other party. A classic example of a trade-off is where a manufacturer offers goods at fair market value to a claimant, but is able to supply them at only the cost of production to the manufacturer itself. In Powerbrands, by agreeing to domestic production in Russia, Alcopops realized a savings on customs duties that would otherwise be due on imported KYK, and was therefore able to agree to a slightly higher margin on local production for Wonderbrandski, yielding benefits to both parties.

---

68 Chapter 4 – 15:50-18:50, Chapter 5 – 19:30, Chapter 6 – 20:24-26:48
69 Chapter 4 – 16:17-16:46
70 Chapter 4 – 14:42-18:30
71 Chapter 4 – 14:42-18:30
72 Chapter 4 – 14:42-18:30
73 Chapter 8 – 34:24
14. What goals and techniques does the Mediator use in later joint sessions?

In the later joint sessions, the *Powerbrands* Mediator's goals shifted from gaining trust, determining interests and seeking clarification, to generating and refining options for resolution based on their business aims.

**Decreasing Commitment to Positions**

Commercial parties often enter mediation with adversarial postures and positions reflecting different expectations about the strengths and weaknesses of each party’s case if they were in court. These different expectations about litigation outcomes often are reflected in “positional” rather than “interest-based” bargaining. Parties exchange offers and counteroffers on one dimension reflecting their litigation expectations until they reach a preconceived settlement range. They argue about who gets how much of the pie.

Interest-based bargaining, on the other hand, allows parties to make the pie bigger. They consider a wider range of alternative solutions than mere offer/counter offer, and think up possible outcomes designed to meet a broader range of parties' underlying interests, including their economic interests and issues far outside those in dispute. Interest-based bargaining searches for solutions that might produce mutual gain – solutions that make sense to both parties, where no one is a “loser” in the bargaining.

Mediators may need to pry parties loose from positional bargaining, and coax them, in order to get them focused on interest-based bargaining and expand the available range of solution options. Bargaining may then switch, as it did in *Powerbrands*, between positional and interest-based bargaining. After the parties made some concessions, they shifted to interest-based bargaining on new distribution rights. But the final impasse occurred over a potential for Wonderbrandski to surrender the 8-sided bottle license.

Wonderbrandski’s President said: “If they [Alcopops] would like to get this 8-sided bottle, we might give it to them but for big, big money. They need to pay us big.” Keeping with that approach might have scuttled the chances of a really beneficial outcome to both parties. The Mediator converted this positional demand, expressed privately, to an interest-based solution that favoured both parties, concerning local production and distribution.

Having determined interests and effectively having loosened parties from insistence on their incoming positions, the *Powerbrands* Mediator encouraged consideration of possible alternative solutions in two ways:

**Party or Mediator Generated Solutions.** The *Powerbrands* Mediator encouraged problem solving by asking for possible solutions to maximize each party's interests and satisfy some

---

72 Chapter 8 – 32:33
73 Chapter 6 – 23:40
74 Chapter 8 – 32:55
apparent interests of the opponent.  

**Hypothetical Proposals.** While shuttling between the parties, the Mediator proposed possible solutions or variations, frequently using phrases like "*What if . . . ?*" This technique emphasizes that the idea is only a possibility and encourages parties to refine or modify the possibilities offered or to propose new ones. The *Powerbrands* Mediator agreed to present to Alcopops in private session, as his own idea, an proposal actually made by Wonderbrandski whereby Alcopops would appointed Wonderbrandski as its local producer and distributor of KYK in exchange for Wonderbrandski’s dropping the PICO BELLO 8-sided bottle and striped label.  

---

77 Chapter 6 – 20:00, Chapter 8 – 32:25  
78 Chapter 6 – 20:00  
79 Chapter 8 – 32:55
What methods are used to break impasse?

Throughout the option generation and refinement stages, the Mediator in this case called upon different techniques to overcome impasse. Many of these techniques are also helpful in generating resolution options when parties are engaged in interest-based negotiation.

**Reality Testing** (See Q12)

**Demonstrating the Limits of Positional Bargaining** (See Q13).

**Considering a New, Mutually Beneficial Relationship between the Parties**

This approach formed the basis of the *Powerbrands* Mediator's framework for a workable solution when he focused on a distribution relationship between Alcopops and Wonderbrandski.

**Identifying and Exploiting Differences That Allow Maximum Value to Each Party**

In this case, the final impasse on the 8-sided bottle license was resolved through an exchange based on the differing values that the parties placed on distribution rights. The Mediator had uncovered these differences in confidence and employed the differing interests in a creative trade-off without breaching his confidentiality pledge.

The key to this technique is to identify goods or services that one party can supply more efficiently, and that address the interests of the other party. A classic example of a trade-off is where a manufacturer offers goods at fair market value to a claimant, but is able to supply them at only the cost of production to the manufacturer itself. In *Powerbrands*, by agreeing to domestic production in Russia, Alcopops realized a savings on Customs duties that would otherwise be due on imported KYK, and was therefore able to agree to a slightly higher margin on local production for Wonderbrandski, yielding benefits to both parties.

**Offering to Change the Process to Meet the Parties’ Changing Needs**

Fluidity of structure is at times critical to success. The Mediator must be sensitive to the possibility that going forward may not be the most prudent option. For example, Mediators might suggest that the parties take a break, or perhaps suspend the process while a particular point is submitted to an arbitrator for a decision (whether binding or non-binding). One difficult decision for a mediator is when to end a joint session and return to private sessions. In this case, on one occasion, the Mediator tested the parties’ feelings on the subject and asked them if they were ready for a private session, which both thought was a good idea.

**Identifying the Underlying Reasons for an Impasse and Suggesting Ways to Move Forward**

An example of this technique is an impasse based on different perceptions of industry “best practices.” Asking about the existence of industry norms or conventions, or published industry standards – or even the parties’ own experiences in similar circumstances – can be held up by the Mediator as a mirror for the parties to reflect upon the current situation, to save face, and to

---

80 Chapter 8 – 34:10
81 Chapter 8 – 34:24
82 Chapter 5 – 20:00
move forward, for instance, where the Mediator highlighted to Alcopop the stake that the Russian government has in Wonderbranksi and the environment in which they are trying to launch their product which was taken on board by both the Director and the Attorney. 83

**Evaluation by the Mediator of a Specific Issue or Key Point**

If the parties request it, an expression of opinion on a particular issue by the Mediator can be very helpful to the search for a solution. This must be approached with care. The degree of formality/informality can range from the Mediator’s “gut feel” or an expression of personal view through to a formal opinion if the parties so request. However, one must approach such steps with caution. Once a Mediator has rendered an adverse evaluation of a party’s contention it may be very difficult to regain that party’s trust and confidence.

83 Chapter 4 – 17:00, Chapter 7 – 30:45
14. How does the mediation conclude?

In *Powerbrands*, the Mediator used the common practice of ensuring that parties executed a memorandum of agreement before leaving the session. Failure to do so invites uncertainty and, in some cases, dissolution of the entire agreement.

**When Agreement is Reached**

When an agreement is reached in principle, even if all the details may not be completely worked out, the Mediator, despite the hour, should assure that the agreement is reduced to a memorandum containing the salient points of agreement, and have each participant sign the memo. In most countries, this memo will serve as sufficient written evidence of a contract to be enforceable. Among companies seeking to continue to do business together, it provides a “road map” and commitment of the terms of their ongoing relationship.

Rather than listing all commitments by one party and then those of the other, Mediators will ordinarily prefer phrasing components of the agreement in a balanced fashion with one concession offset by the other side’s concession. This balancing helps underscore the mutual advantages in the agreement and allows mutual "face-saving" by showing concessions on both sides.84

Before closing the session, the Mediator typically secures agreement from advocates regarding drafting, timing and exchange of the more detailed long form agreement that will reflect the memorandum of agreement. The lawyers should ensure that the memorandum of agreement is subject to execution of the more detailed version. Mediators may be available to offer assistance if significant difficulties arise that cannot be resolved by the parties. In court-related mediation, advocates might consider making dismissal of the court case conditional on entry of a consent order incorporating the terms of the agreement.

**When No Agreement or Partial Agreement is Reached**

Mediators will terminate the process when it becomes clear that no agreement is possible or when a party is clearly unwilling to continue to participate.

Parties can terminate the process at any time without consequence and resort to other dispute resolution processes where decisions are made by third parties. CPR’s Model Mediation Procedure allows parties to terminate the mediation only after the first session has been held.

It is common that mediation does not resolve every issue in contention, but does resolve many, thereby narrowing the range of issues to be determined at trial or in arbitration. If any partial agreement is reached in mediation, the parties might conclude an agreement on those issues alone and dismiss that portion of the case. The outstanding issues can then be adjudicated.

---

84 Chapter 8 – 36:25
17 What roles did the lawyers play in the mediation, and did those roles change during the process?

As *Powerbrands* illustrates, attorneys play a central role throughout the mediation process as advocate and client counsellor. Attorneys also play important roles prior to the mediation session. See also Q2 and Q3.

**The Attorney as Counsellor**

Attorneys play a critical pre-mediation role in advising clients on the mediation process, settlement options, and alternatives to a negotiated agreement. This includes the identification of a broad range of client interests beyond those that the litigation process may advance (See Q8). Such counselling will also usually entail explaining the mediation process to the client including its stages, the uses and consequences of confidential disclosure, the client's ability to control the process, and termination options. Beyond procedure, the lawyer should emphasize the unique roles of each player in the mediation, since they vary significantly from court and arbitral processes with which the business client may be more familiar. The lawyer should emphasize that the Mediator may engage in questioning techniques in an effort to assist the client in identifying interests and options; the lawyer's own presentation and advisory roles; the valuable opportunities to listen to the business rationale of the counterparty; and the client's own response and decision making roles, so critical to the mediation process. To fully prepare, attorneys and clients need to anticipate their opponent's interests from existing knowledge, brainstorm possible solutions, and frame an evaluative methodology that will serve as a tool to gauge proposed settlement options. Analysis of the “Best Alternative to a Negotiated Agreement” (BATNA) – as well as the “worst” and “most likely” alternatives -- will provide further guidance to counsel and the client in recognizing when a proposal worthy of adoption is proffered.

Other significant preparation tasks include designing the procedures to meet particular needs, selecting the Mediator (a critical issue), determining documentary needs, drafting pre-mediation submissions and determining the need, if any, for presentation of oral evidence. Attorneys must also advise clients whether it is in the client's interest to suspend litigation while mediation takes place, or to pursue both processes simultaneously.

**The Attorney as Conciliatory Advocate**

Lawyers play a traditional advocacy role within mediation in presenting the client's perspective on the dispute in joint session. However, its tone and objective are different in important ways. Ideally, the presentation of facts, claims and remedies that a party’s counsel presents to the Mediator in the presence of the counterparty resembles an opening statement at trial or arbitration; however, it is characterized by reasonable, non-confrontational tones and is typically aimed at informing the counterparty rather than persuading a trier of fact. Avoiding opponent sensitivities, presenting an optimistic outlook and demonstrating full preparation are equally important.

Where an individual is the counterparty, and has suffered extreme hardship from the problem being discussed, genuine expressions of sympathy may help establish a positive working
The lawyer hopes to impress the counterparty with the reasonableness of his or her client's position, to demonstrate the business and legal rationale for the client’s actions and the likelihood of success in court if mediation fails. Advocates also try to impress the Mediator with the logic of a client’s position. A sound and reasonable presentation may prompt the Mediator to engage in “reality testing” with the counterparty calculated to support the party’s position later in the process.

The Attorney as Negotiation Strategist

Attorneys may approach mediation with a negotiation game plan that resembles their approach to one-on-one negotiation. Negotiating behaviour can roughly be divided into three models.

- "Competitive" ("zero-sum" or "win-lose") negotiators focus on legal positions and justification for winning, conceal interests, hide information for fear of opponent exploitation and are rigid regarding concessions. Extremely competitive negotiators may use insults and threats against opponents and their counsel, or other methods of making the process unpleasant. Competitive negotiators view resolution as a distributive game similar to advancing on a football field: What one loses, the other gains, and any value realized by the opponent is value lost by the client. This concept leads to a "negotiation dance" characterized by argument, exaggerated preliminary demands and offers, and conditional moves along a money dimension. At some point, a serious offer is made. If properly reciprocated, these figures help establish the range of final settlement.

- "Principled" ("interest-based" or "win-win") negotiators are those who view negotiation as a problem solving process that must yield a result acceptable to both sides. They are conciliatory, flexible and attentive to both parties’ information, and they reach for creative outcomes based upon shared information. Characteristically, they focus on interests rather than positions; they separate people from the problem; they insist on objective benchmarks to support claims and demands; and they “brainstorm” possible settlement options to maximize mutual gain.

- “Responsive” (“tit-for-tat”) is a third model of negotiation behaviour. Such a negotiator adopts a principled approach until the other side responds competitively. Then the co-operator, in retaliation, expresses willingness to compete until the other side comes around and then behaves competitively until the other side does come around. If so, they return to a cooperative approach. This negotiator has been described as cordial, responsive, forgiving and transparent so that the opponent readily understands the reasons for the behavioural adaptations.

Each negotiation model has its own inherent risks. “Competitives” may never have occasion to consider solutions based on real interests rather than legal arguments, and their clients may therefore not realize maximum benefit from the negotiated outcome. “Principled” negotiators may be exploited by “Competitives” and may spend inordinate time being reactive instead of strategic. "Tit-for-taters” may misread reactions and get locked into competitive strategies.
Mediation alleviates some of these one-on-one negotiation problems. It allows optimal disclosure of interests and information in private sessions with the Mediator without fear that the other side will exploit that information, and it allows the Mediator’s skills to intervene between negotiators whose conflicting styles may disrupt or delay communications.

Mediators intent on fostering solutions that optimize all parties’ interests generally prefer that the parties use a principled (“interest-based”) approach. This method results in revealing business objectives, facts, and underlying interests in private sessions and relies on objective standards and principles to support demands and offers that tend to be rationally based. Also, principled negotiators are less likely to see the Mediator as an opponent to be negotiated with.

Some examples of these styles may be viewed in Powerbrands. The Powerbrands negotiators began by being competitive, which led to an outburst of emotion and temporary breakdown of direct communication. The Mediator then moved each negotiator into a primarily cooperative role. By demonstrating the limits of competitive negotiating, the Mediator steered them into a principled negotiation route. Advocates can usually maximize the likelihood that an outcome will be devised that addresses their client's underlying interests by following the Mediator's lead to principled approaches.

Nonetheless, negotiators need to be alert to more than the Mediator's invitation to principled negotiation. They must also evaluate the opponent's negotiating behaviour. Where a principled approach is not reciprocated, resort to a tit-for-tat approach may help assure maximization of gain (or minimization of loss) along with maximization of resolution.

### The Attorney as Protector
Counsel should alert clients to confidential data that should not be revealed in joint session (e.g., privileged data, trade secrets). The attorney should prepare the client to respond to direct Mediator questions and to be prepared at all times to consult with the attorney if the client is uneasy about sharing sensitive information. A mediation is not a deposition or a direct examination, and a skilful attorney will protect clients from feeling as though it is.

### The Attorney as Generator of Value
The more ideas are floated in a mediation, the more options the parties have in framing mutually satisfactory outcomes. Indeed, some Mediators suggest a period of 20 – 30 minutes when the parties do nothing but dream up outcomes, without comment and without attribution, simply to get as many ideas in play as possible. The attorney, as well as any participant, can play a role in creating and polishing proposals.

For example, Alcopops’ President was asked by the Mediator whether there was anything Alcopops could give to Wonderbrandski in return for a transfer of the OCTAVE trademark. Alcopops’ President said they would not consider paying money for this. Then counsel interjected: “But is there something else we might be able to do that we can give them..."
This suggestion of non-cash value prompted the Alcopops President to raise the prospect of distribution.

Attorney input is particularly useful in pinpointing desirable features of proposals from a uniquely legal perspective. An example in the Powerbrands video is Wonderbrandski’s counsel’s contribution when the possibility of distribution and production came up. He pointed out that a production agreement had favourable tax implications for Alcopops – a concept that added substantial value to both parties and that only an astute attorney was likely to raise.

**The Attorney as Confidential Mirror**

Reality testing (Q12) is not a skill reserved exclusively to the Mediator. Each party’s legal counsel can perform this task in private. Deliberate reality testing by the lawyer (sometimes benignly labelled “playing Devil’s Advocate” or “taking another view for the sake of argument”) enables the legal counsel to act as a mirror for the client to see how a proposal may be perceived by others, to test its rationale, or to consider other options or consequences.

**Changing Hats**

Lawyers typically change their roles as the mediation progresses, responding to the needs of the moment. Generally the lawyer begins as an advocate, explaining the client’s positions as effectively as possible. But as the process develops and the discussion slips away from positions to the exploration and matching of interests, so the role of the lawyer changes. Legal counsel becomes more of a business adviser than an advocate, enabling the lawyer to be more creative.

---

85 Chapter 7 – 29:55
86 Chapter 8 – 35:04
87 Comparison between Chapter 2 and Chapter 8
18. What legal protections apply to ensure confidentiality in mediations?

It is vital that the parties reassure themselves, before the mediation begins, that:

- any non-public information they may disclose to the Mediator privately will be kept confidential by the Mediator unless the disclosing party agrees otherwise; and
- the opposing party cannot misuse information disclosed in the mediation if the mediation process fails to resolve the conflict.

As a general rule, confidentiality can be ensured by one or more of the following:

- the ethical rules of professional conduct under which the Mediator is obliged to operate (such as the model ethical rules promulgated by CPR);
- a contractual agreement between the parties, or any procedural rules they agree to invoke (such as those promulgated by organizations such as CPR);
- a contractual agreement between the parties and the Mediator (such as the model retainer agreement promulgated by CPR);
- any statutory or other legal protections that may apply;
- any relevant rules of a Court or Arbitration body (where the mediation takes place as a result of an instruction of a judge or arbitrator).
How did Alcopops avoid conveying a perception of weakness – after all, it was they who proposed mediation? What more might Alcopops do to avoid sending out signals to Wonderbrandski that Alcopops considered its position weak?

Although not demonstrated in the video, the Role Play General Instructions explain:

*On May 1st, DD Kruze phoned Peter Tchaikovsky. She suggested that legal action could last for years, enriching lawyers. She suggested that together they consider an alternative approach. She explained that Alcopops was a member of both the International Trademark Association and of CPR Institute and as such had publicly pledged to consider non-binding and confidential negotiations, using a neutral Mediator, prior to actively litigating any dispute. In fulfilment of that pledge, she therefore proposed that this escalating conflict be referred to a mutually-agreeable Mediator chosen from the INTA - CPR Trademark Panel of Neutrals.*

The Alcopops President was using well-used techniques for avoiding a weakness perception by calling for negotiations. Membership in such bodies as INTA and CPR is a low-cost way to demonstrate alignment with the conflict resolution philosophies espoused by these bodies and provides a method of initiating negotiation on a basis other than the relative strength or weakness of one’s legal or business position. CPR’s Corporate Pledge ([www.cpradr.org](http://www.cpradr.org)) is a public statement that signing companies will consider mediation and other forms of alternative dispute resolution in all conflicts involving other signers - and it waives no legal rights, claims or defenses and has no binding or restrictive effect on the signing companies.

Some companies have gone a step further, and have published unilateral policies on dispute resolution in relation to some or all types of conflict. Others make clear their commitment to mediation and other forms of ADR in other ways.

All of these methods enable companies to propose mediation to parties with whom they are in conflict without the counterparty’s misinterpreting the suggestion as an indication of weakness. Engaging in interest-based negotiation as an alternative to arbitration or trial is a rational decision in practically every instance, and should be conveyed as such.
20. How can cultural factors play a part in disputes and the ways in which settlement can be facilitated?

*Powerbrands* involves two very different cultures – American and Russian.

American cultural characteristics demonstrated in the Powerbrands video included:
- Cards on the table. Up front.\(^{88}\)
- Push other side to the limit, even to the point of alleging corporate bad faith.\(^{89}\)
- Provoke reaction/conflict.\(^{90}\)
- Quick to concede in return for gain. Decisive. Decisions based on logic.\(^{91}\)

Russian cultural characteristics demonstrated included:
- Negotiation is chess. Plan, take time. Watch. Think. Get others to move first.\(^{92}\)
- Respect toughness on key points, but not when used as a ploy or tactic.
- Proud. Deserves genuine respect. Semi-Oriental. Concerned about “face.”\(^{93}\)
- Can switch from theatrics to icy tight-lipped inscrutability in seconds.

Some of these cultural elements can conflict with one another in negotiations. Alcopops provoked conflict with allegations of bad faith and lack of understanding. Wonderbrandski was genuinely insulted by this. Allegations of dishonesty notwithstanding, however, the Russian side might have walked out of the mediation entirely if the quality of their vodka had been called into question. Wonderbrandski asked the Mediator to put to Alcopops the distribution possibility as if it were his own idea, because Wonderbrandski wanted to assess the Americans’ reaction before expressing enthusiasm for a prospect on which they were actually very keen. There was no hint from Wonderbrandski’s President that he was the real author of the idea.

Different societies have different ways of approaching business and discussions on business affairs. Some are direct, others indirect. Mediators need to be aware of these characteristics, as was the *Powerbrands* Mediator, to anticipate potential problem areas and correctly identify different approaches and meanings.

---

88 Chapter 4 – 14:43  
89 Chapter 2 – 9:30  
90 Chapter 2 – 9:39  
91 Chapter 8 – 34:10, Chapter 8 – 36:20  
92 Chapter 8 – 32:33, Chapter 8 – 34:10  
93 Chapter 2 – 9:40, Chapter 3 – 14:10
21. The mediation was conducted on neutral ground with a Mediator. What are the implications of this?

Many negotiators feel uncomfortable engaging in negotiations on another party’s home ground. This is common human psychology.

As noted in Q1, each of the parties must develop a sense of trust in the Mediator. Without trust, a positive outcome is much less likely. It is possible, depending on the qualities of the Mediator, for a party to develop a sense of trust with a Mediator sharing the cultural credentials of their opponent; possible, but often difficult.

The prospects for generating trust quickly are enhanced where neutrality is strongly emphasised. The personality, credentials and skills of the Mediator are vital elements in this. The Mediator’s task to generate trust quickly is naturally enhanced where she or he has cultural characteristics that are quite different from those of the parties. This is further assisted by the mediation’s being physically held in a place considered by the parties to be wholly neutral.
22. What characteristics of disputes make them more or less susceptible to resolution through mediation?

There are several situations where mediation may be unlikely to provide a successful resolution of a conflict:

- Where one party’s top priority is to create a legally binding precedent applicable to disputes other than this particular conflict;
- Where one party’s top priority is to create a deterrent effect, to send a signal to other potential disputants, and is willing to forego immediate resolution of this particular conflict on its merits in order to send such a signal;
- Where one of the parties cannot, under any circumstances, be trusted by the other party to respect the terms of a settlement;
- Where the particular conflict is one of a series of actions, all of which are inter-connected in such a way as to require resolution of the global set rather than each individual claim;
- Where the financial interests of one or more of the legal counsel involved in a case are inconsistent with the financial interests of the client;
- Where there are criminal, quasi-criminal, or public policy aspects to the claim at issue, or where punitive or exemplary damages might be recovered at trial.

Virtually all other business-to-business conflicts are likely to be resolvable with the help of a competent Mediator.
Section 4. ROLE PLAY TOOLS FOR TUTORS

General Background - (Available to all role players and audience)

A dispute has arisen between two of the world’s largest alcoholic beverage companies – one Russian, the other American. The Russian company, Wonderbrandski A/O, operates mainly in Russia but has aspirations to develop abroad. The American company, Alcopops Inc., operates almost everywhere that alcoholic beverages may legally be sold, except the lucrative Russian market, where it intends to develop a business.

Background to the Parties

Wonderbrandski A/O
Wonderbrandski A/O is a leading vodka production and marketing company in Russia. It owns several of the best and most highly regarded vodka brands in Russia, including ZENITSKAYA, SPARTAKSKAYA and DYNAMOSKAYA, all of which are grain vodkas. Each of these brands leads a different price category, with ZENITSKAYA dominating luxury vodkas, SPARTAKSKAYA leading the super-premium segment and DYNAMOSKAYA being the brand leader in the premium category. Wonderbrandski has no credible position in the standard vodka category, though it does market PICO BELLO, the only potato-based vodka in the company’s portfolio. PICO BELLO is presented in a standard round bottle with a black label.

Each brand is marketed in flavoured and unflavoured versions. The company has a modern distillery with substantial capacity and has an advanced distribution capability across Russia. For the past seven years, Wonderbrandski has owned in Russia, but over the years has never used, the registered trademark OCTAVE.

Wonderbrandski is one-third owned by a Russian Government agency. Until now, the company has survived relatively unscathed from foreign competition – most of the foreign brands occupy the standard price category, in which Wonderbrandski does not try to compete too seriously because the margins are low.

Wonderbrandski’s President is the entrepreneur Peter Tchaikovsky. He is young, self-confident and wealthy and enjoys a high profile in Russia as a successful business leader.

Alcopops Inc
Alcopops Inc. is a leading Chicago-based international beverage alcohol marketing company. Its only vodka brand is KYK (pronounced – “KICK”), a triple-charcoal-distilled rye vodka. KYK is sold all over the Americas, Western Europe, South Africa and Asia Pacific, and KYK is now the world’s fourth largest-selling spirit brand. KYK vodka is sold internationally as three main variants – HIGH OCTANE (42 proof), OCTANE (40 proof) and CLASSIC (38 proof). All variants are sold in a distinctive 8-sided bottle, and the registered three-dimensional trademark is owned by Alcopops. The KYK label features two-tone black and maroon vertical stripes.
The word KYK is registered as a trademark in Alcopops’ name globally, including in Russia. The label design, and the words CLASSIC, OCTANE and HIGH OCTANE, are registered as trademarks in many countries, though not in Russia.

Until recently, Alcopops had no presence whatsoever in Russia except in Moscow Airport Duty Free shops, where small quantities of the US-distilled KYK CLASSIC variant had been available for several years. As from March 20th, Alcopops started adding KYK OCTANE to the range in the Moscow Duty Free shops.

Alcopops’ President is DD Kruze, a business leader well-known in the US and internationally.

The Bottle Design Issue
KYK vodka has always been marketed in an 8-sided bottle. The company long ago obtained design / three-dimensional trademark registrations in most countries, including Russia.

In 1992, when Alcopops was a much smaller company run by different management, Alcopops granted Wonderbrandski a non-exclusive, royalty-free license to use its 8-sided bottle three-dimensional trademark / design in Russia on any alcoholic beverages. This license, granted by a brief exchange of letters, provided for no limitation on Wonderbrandski to use the bottle for a particular brand, no restriction on sub-licensing, no performance obligations, no requirement to buy the bottles from Alcopops and no term or termination provisions. Wonderbrandski never made any actual use of the license because 8-sided bottles were very costly to produce. This license was related only to the bottle shape and did not include colours or labels (design). No attempt was ever made by Alcopops to terminate the license and everyone in Chicago had forgotten (or had no idea) about its existence.

The New Year’s Party
At the last New Year’s Eve Party hosted by the Russian Beverage Association in Moscow, a visiting brand manager from Alcopops proposed a toast to his companions proclaiming “an exciting future over the next few months for KYK in the home of vodka”. The remark was overheard by an executive from Wonderbrandski and interpreted to mean that Alcopops was about to launch KYK in the Russian domestic market. Depending on the price category at which KYK would be introduced, these plans threatened to erode Wonderbrandski’s share of the local premium or super premium market.

Preparations for the launch of KYK
On March 10th Alcopops met Vladivod, a leading formerly State-run distillery based in the Russian Far East, with a view to appointing them as Russian distributor of all three variants of KYK vodka. A distribution agreement was agreed verbally and in principle, but not signed pending preparation of the paperwork by lawyers. This deal remains unsigned.

The PICO BELLO Re-launch
At 5:00 p.m. on March 15th, suspecting that KYK was soon to appear locally, Wonderbrandski held a “re-launch event” for its PICO BELLO brand vodka in a Moscow hotel. With much fanfare, Mr. Tchaikovsky introduced to the trade and media a re-designed PICO BELLO bottle.
It was 8-sided in shape, thus more upmarket in appearance, with a label comprising horizontal black and maroon stripes. A logo was introduced depicting seven musical notes alongside the prominent new secondary trademark OCTAVE. The proof of the re-launched brand was increased to 40. The consumer price was pitched in the low end of the premium segment of the market, but the alcohol was still potato-based. **PICO BELLO OCTAVE**: “Real Russian Vodka for the Connoisseur” was the caption on the press release, and this claim also appeared on the back of the new bottle.

(Left to right: Alcopops’ KYK OCTANE, Wonderbrandski’s re-launched PICO BELLO OCTAVE, Wonderbrandski’s original PICO BELLO)

**Alcopops’ complaint**

Within a few hours of the PICO BELLO re-launch, details were sent by email to DD Kruze in Chicago. She reacted furiously, and dictated an email to Peter Tchaikovsky, whom she had never met, complaining bitterly about Wonderbrandski’s strategy in flagrantly copying and anticipating the arrangement of the world-famous international KYK brand and demanding an immediate withdrawal of the new version on PICO BELLO OCTAVE in its proposed trade dress.

DD Kruze’s General Counsel simultaneously instructed Alcopops’ lawyers in Moscow to file a complaint with the Russian Anti-Monopoly Committee claiming unfair competition by Wonderbrandski. By April 1st, there was no response from Peter Tchaikovsky, so Alcopops’ local law firm in Moscow served the Anti-Monopoly complaint maintaining that the KYK label and bottle comprised a well-known trademark and as such deserved the protection of the Paris Convention. It is not expected that the Anti-Monopoly hearing will be scheduled before the end of June.
Wonderbrandski’s response
Peter Tchaikovsky eventually responded to DD Kruze by email on April 10th politely saying that the situation was not quite as straightforward as Alcopops had made out. He said that Wonderbrandski owned the trademark OCTAVE in Russia and that Wonderbrandski considered that Alcopops’ recent use of OCTANE in Russian Duty Free shops constituted a violation of Wonderbrandski’s Russian trademark rights. He also said that Wonderbrandski had a valid license to use the 8-sided bottle – a license granted to it by none other than Alcopops -- and he attached a copy of the license to the e-mail. Tchaikovsky concluded by saying he had no alternative but to sue Alcopops for infringement and he attached a copy of the claim (which he had even had translated into English for Kruze’s convenience).

Proposal to mediate
On May 1st, DD Kruze phoned Peter Tchaikovsky. She suggested that legal action could last for years. She suggested that together they consider an alternative approach. She explained that Alcopops was a member of both the International Trademark Association and the CPR Institute, and that the company had publicly pledged to consider non-binding and confidential negotiations, using a neutral Mediator, prior to actively litigating any dispute. In fulfilment of that pledge, she therefore proposed that this escalating conflict be referred to a Mediator whom they agreed upon, chosen from the INTA - CPR Trademark Panel of Neutrals.

Peter Tchaikovsky agreed. DD Kruze sounded sincere and he figured that because the mediation was non-binding and confidential, he had nothing to lose and could walk away at any time.

On May 5th the parties selected from the INTA - CPR Trademark Panel of Neutrals a German Mediator named Peter Mueller, from Munich. On May 8th both parties signed an agreement to share the costs of the mediation, to maintain confidences, and to bar referral by either party to the discussions that would take place in the mediation in the event of subsequent legal proceedings.

The mediation takes place in a Munich hotel in late May. Peter Tchaikovsky and DD Kruze are present in person, accompanied by their respective outside lawyers: Alex Pushkin for Wonderbrandski and Mush Striver for Alcopops.
Confidential Instructions for  
DD Kruze, President, Alcopops Inc.

Your state of mind  
You are still outraged!  Tchaikovsky is acting like a cheap pirate, trying to impede if not completely block your market entry into Russia by capriciously copying your internationally recognized KYK trade dress and then marketing his product in the exact market segment that your business plan had aimed at.  He is using poor-quality potato vodka in the bottle to try to damage consumer perceptions about your brand, without directly using the KYK trademark, and he is clearly intending to cause massive confusion and ill-will in the Russian marketplace by using OCTAVE in comparison with your OCTANE.

What you need from Wonderbrandski  
Russia is the last great market for your renowned vodka.  All you want is to be free to launch and distribute KYK in all its variants, free from the unfair competition of an inferior product in a look-alike bottle with confusing labelling.  Accordingly you want Wonderbrandski to agree to all of the following:

• stop using a label that resembles KYK’s  
• stop using the term “OCTAVE” – indeed assign the “OCTAVE” trademark to Alcopops  
• stop using the 8-sided bottle – indeed agree to terminate that license at no cost to Alcopops

What else you need to get KYK on the Russian market  
• local production to your high specifications – Vladivod has agreed to do this  
• good local distribution – Vladivod can do this, too  
• a label design protected in Alcopops’ name as a trademark in Russia  
• the term “OCTANE” protected in Alcopops’ name as a trademark in Russia

Your legal positions  
To achieve your goals, you have taken the following positions:

• The new PICO BELLO label abuses Alcopops’ rights and entitles Alcopops to a declaration that Wonderbrandski unfairly competes with KYK, actually or prospectively.  [70% chance of success here – but it will take years to get a final judgment and there are questions of effective enforcement.]

• The KYK stripe design – not just the name – is a well-known mark even though it isn’t registered in Russia, and this enables Alcopops to invoke the protection of the Paris Convention.  [But you know that Wonderbrandski can pick holes in this position, because KYK is not well-known in Russia and the Paris Convention does not make clear whether a mark needs to be well-known in the country in which it is sought to be enforced.  20% chance of success.]  

• OCTANE does not infringe Wonderbrandski’s OCTAVE.  [50% chance of success.]  

• The United States Trade Representative can support you and cause a political outcry and, possibly, retaliatory trade action [in theory]
• The license to the 8-sided bottle given to Wonderbrandski years ago is invalid [60% chance of success owing to its age]

**Your business options in the event that negotiations fail**

• Drop “OCTANE” for Russia only and find a new sub-brand name.
• Proceed quickly to introduce KYK in Russia before lasting damage is done by PICO BELLO.
• Conclude the production and distribution agreement with Vladivod and get on with a launch within weeks. Spend massively on advertising so that PICO BELLO is seen as the copy of KYK, not vice-versa.
• Buy out Wonderbrandski.
• Abandon the Russian market entry strategy altogether.

Your Board would approve, reluctantly and as the best alternative to a negotiated agreement, the first two options. Abandoning the Russian market is not an option – it is too important long term. You are not authorized to pay to Wonderbrandski anything in excess of your sole signatory limit ($1 million) to resolve this dispute.

**Key considerations**

• Wonderbrandski increased the consumer price point for its re-launched PICO BELLO to enter the low end of the super premium category. KYK would retail in Russia (as it does in most other countries) at anywhere between the mid point of the standard category to the low end of the super premium category.

• You have no idea what Wonderbrandski’s position is likely to be on any point. Peter Tchaikovsky, whom you have never met, seemed unnervingly unemotional and accommodating on the phone call, and expressed confidence that an amicable solution could be found. Is Wonderbrandski uncertain of its business plan or its legal case? Or is it very confident? Where are they coming from? How do you find out? How do you save your own reputation? Have you failed to notice their Achilles’ Heel? Are you imagining things? Losing your edge?

**Handling the mediation**

You have already put forward a submission of the factual background and your positions, which has been circulated to the Mediator and to the other side.

You have agreed with your lawyer to be calm at the very outset and to let Tchaikovsky speak to see what direction he is taking. You will then explode to assess his reaction, and see whether he can be intimidated into capitulating. You have been told that Russians understand only tough talk and will swallow a meal whole if they perceive it to be easily digestible. You will not project such an edible image.

You are wondering how on earth you are going to pull off a miracle deal when your legal position is weak and the business need is urgent.

But, hey, that's why you are President!
Confidential Instructions for  
Peter I. Tchaikovsky, President, Wonderbrandski

Your state of mind
The most important things in your life are money, success and honour. You feel you have strong cards in your hand, but you also know that you have somewhat impetuously stuck your neck on the line here and have incurred the anger of one of the world’s largest companies. The situation suggests that you be calm and collected, dignified and polite, whatever happens. Be the opposite of what they expect.

What you are aiming for
You are aiming for whatever makes you the most money. Based on the pricing in Duty Free at Moscow Airport, KYK’s entry into the Russian market would be just inside the Premium category. This could threaten DYNAMOSKAYA. Curiously, elsewhere in the world KYK sits in the upper quartile of the Standard category where it really will not damage Wonderbrandski because you do not have a serious brand in that category – your profitable brands are all more premium. PICO BELLO drags down your reputation as a luxury drinks producer, makes no money at all, and you have long wanted to sell it. So you want to feel out the situation to see what might be in it for you.

One obvious opportunity is for Alcopops to buy you out. You have fixed in your mind that there is no way you would accept less than $10 million cash. Alcopops could easily afford that kind of money. But they do not have a market to protect, so would they even make an offer?

You could produce KYK in Russia for Alcopops, and/or distribute it. This is a much more attractive idea, because it would complement your portfolio and you would make a margin without any cannibalisation of your own brands. But you don’t want to suggest this to Alcopops. The better route is to listen to what they have to say and keep that strategy in reserve.

What you need from the mediation
You need to come away with your reputation intact and not be seen as the author of an international incident. Indeed, considering the large stake held by the government, it would be best to emerge the hero, not just escape being the goat.

Your legal positions
To achieve your aims and needs, you have taken the following positions:

- there is no act of unfair competition. If Alcopops believed it had exclusive rights to stripes on a label in red and black in Russia, then they would have trademarked it in Russia, which they didn’t do despite having good lawyers. The Paris Convention does not apply, because the product is not widely sold in Russia and therefore the label is not widely recognized in Russia. [50% chance of success in the unfair competition case.]
- OCTANE infringes OCTAVE. You have quite a strong case here, says your lawyer, but it is not 100% because of a potential finding of bad faith by Wonderbrandski. [75% chance of success]
• The license on the eight-sided bottle is valid [30% chance of success owing to its age and disuse]

Your business options in the event that negotiations fail
• Try to make a business out of the re-launched, premium PICO BELLO. However, it is a very crowded area in the standard vodka category and there is a lot of pressure on price, so margins are squeezed and marketing costs are high.
• Fight Alcopops in the courts until it backs off and abandons the Russian market or completely changes its product presentation -- very unlikely for such a global brand.

Key considerations
You do not really want to report the existence of the lawsuit to the shareholders. Heads could roll. Maybe even yours, if it becomes an international political issue. You want this case resolved, not least because government mandarins always ask questions when leading Russian companies get entangled in lawsuits with foreigners. And the press! Will they cast you as a villain, upsetting US/Russia relations? Vodka is always high profile in Russia. However, capitulating would cause morale and loss of face problems within the local sales force and among your own staff.

The greatest threat to your business isn’t KYK OCTANE – it’s KYK HIGH OCTANE. This brand variant stands a fair chance of stealing market share from Wonderbrandski’s most profitable premium lines of vodka -- not PICO BELLO but the others -- and would also enhance the consumer appeal of KYK as a brand. Accordingly, you ideally want Alcopops to drop or seriously delay plans for HIGH OCTANE in Russia. However, there is anti-monopoly law in Russia that prohibits one party from restraining a competitor from doing something that would otherwise be perfectly legal.

You suspect that Alcopops could easily drop the word OCTANE off the KYK pack, and thereby sidestep your strongest card, the trade mark infringement counterclaim. Damages would be minimal because of the absence of brand equity behind OCTAVE. For the same reason, you yourself are not wedded to OCTAVE from a commercial perspective. It has no commercial value. So you could drop this word as part of an acceptable deal if really necessary.

You recognise that some changes would have to be made to the PICO BELLO label, particularly to the maroon. You are willing to make some compromises to get a deal. You are willing to drop stripes and settle for a two-tone bottle, steering away from red. You are much more reluctant to abandon the distinctive 8-sided bottle and return to a standard bottle, but your lawyers say you have only a 30% to 40% chance of proving that the old license is still valid.

Handling the mediation
You have already put forward a submission of the factual background and your positions, which has been circulated to the Mediator and the other side. You want to see what you can get out of a settlement. Alcopops is a key player in the global alcoholic beverage market. Good relations with them could bring some benefits in the longer term which could be a great face saver for the Wonderbrandski sales team. You have excellent new flavours – Coffee, Ginseng and Red Hot Chilli Peppers in particular - and the world needs to know how wonderful and versatile real
Russian vodka can be! The technology in getting the flavours right is tricky, and the Russians are better at this art than other vodka-producing nations.

You have pressure from your own attorney, who is also Secretary to the Board. One of Russia's top lawyers, he is a superficially charming but disconcertingly pushy litigator who thinks this mediation idea is just a foreign fashion and that Wonderbrandski will end up having to compromise and give in for no meaningful benefit with lots of embarrassment. You don't think this will happen but he is getting to you. The Wonderbrandski sales team admire you. It was, after all, your idea to revive the unused OCTAVE mark and associate it with musical notes on the label and in promotions. Your people considered it a stroke of genius as a mechanism for anticipating KYK OCTANE. So you have to live up to this image, but still derive real value from any settlement negotiation.

Too much is unknown. You need to fish for information, to find out how the wind is blowing. Americans are very up-front, an endearing quality that can play into your hands if you handle them properly. But if they get tough, you have your self-respect to preserve.
Confidential Instructions for
Alex S. Pushkin, Attorney for Wonderbrandski

You are reputed to be one of Russia's leading Intellectual Property lawyers. You earn almost all your income from litigation fees. Wonderbrandski is one of your main clients. You are also Secretary to the Wonderbrandski Board.

You have never experienced a mediation, and you do not understand why foreigners, especially North Americans, make such a fuss about it. You have advised Wonderbrandski not to go ahead with this transparent ruse to get Wonderbrandski to compromise from an advantageous legal position. But Peter has already committed himself to the mediation (which was stupid). If your young, impetuous client insists on spending the day this way, then protect the company -- reduce the risk of disclosing anything of value -- and approach it as a fishing expedition. Do everything reasonable in your power to prevent the mediation from leading to a settlement based on compromise – without going so far as to dominate proceedings or to risk the mediation completely degenerating into abject failure.
Confidential Instructions for Mush Striver, Attorney for Alcopops

You are an international trademark litigator based in Chicago. Your reputation and client base over the years has been built on delivering client solutions -- as you repeatedly say, you're in the business of selling successful outcomes, not hours. You believe that resolving is a higher form of success than winning. You have been involved in numerous mediations of trademark conflicts, mostly successfully arriving at win-win solutions. You devised Alcopops’ conflict resolution policy, and it was you who urged DD Kruze to propose mediation to Wonderbrandski.

You have never negotiated with Russians.

Provide wise and practical counsel to your client. Remind DD what are the company's alternatives – good and bad – to a negotiated settlement, and ensure she focuses on them. Bring her back down to earth if she loses her temper.

Be positive, but not a pushover.
Confidential Instructions for the Mediator

You have seen the papers from each side spelling out the facts, over which there is little disagreement, and the positions taken. Clearly much emotion is involved.

Start by trying to place the participants at ease. Only Mush Striver, attorney for Alcopops, has experience of mediation. Introduce the session by explaining that your role is to manage the negotiating process – not to take sides, but to try to help both parties address their underlying interests and achieve a mutually acceptable outcome. To achieve this, the parties need to cede to you control over the process. If needed, ask them to trust that you’ve handled situations like this many times before, that it usually works, and that if they just allow you to handle the process they will be free to focus on the substance. Clarify that you have no antecedents with either party and no vested interest whatsoever in any particular outcome.

Assure them that the process is confidential. Give an outline of how the process can work – say that you propose to begin with a joint discussion where you will invite each person to comment and that you may have a number of clarifying questions. Also say that you may decide at some point that more progress can be made if you had separate discussions with each party – that you will always keep these discussions confidential unless or until you were expressly authorized to disclose information. Stress that your role is to assist the parties devise their own outcome, and that you are not there to express an opinion on any issue other than those related to the process. Ask each party representative to confirm in the presence of the other that they do have authority to settle the issues without having to refer back to a higher authority.

Ask each party’s business leader to begin not by re-stating their case, but by sharing the goals they have with respect to the mediation. Then, ask the attorneys to spend no more than 3 minutes stating legal aspects. After the attorneys have both finished, ask each to then spend one minute to summarise what they understand the other attorney’s legal position to be. Strictly ensure they abide to these maximum time limits.

If you experience emotion, let the party or parties express their feelings, but control that opportunity so that it does not become destructive. One way to do so is to acknowledge that feelings are running high, that this is natural, and that this may be a good moment to break into private discussions with you. Then ask the upset party to meet with you privately along with their lawyer (if you think that’s appropriate).

Use open questions in the initial phases (“Tell me how you feel about…?”) and only gradually move to more closed questions (“Why did you…?”). Focus on winning trust, expressing empathy (but not agreement), and digging beyond the positions taken to the underlying interests.

Get creative in the later stages with “What if…?” type questions. Gradually try to move the parties to a business agreement. Make the business people do as much of the talking as possible. Pace yourself and do not be hurried. Good luck!