



International Mediation Institute
www.IMImediation.org

Olé!

Concise Case Analysis & Evaluation Tool

Olé is a process to help you to analyze and assess specific disputes in order to determine the best possible way forward - potentially reducing risk, uncertainty, cost and time.

- **Olé can be used by a disputant and legal counsel.**
- **Olé is simple to use.**
- **Olé prompts the right questions and encourages concise answers.**

Olé! is also available to complete online at: www.imimmediation.org/ole

It is not necessary to complete all sections of Olé! and there are no mandatory sections.

Olé! is an excellent aid to evaluating a particular case historically and prospectively, and for determining the best management strategy for each dispute.



What Olé! covers

1. Basic Facts of the Dispute

An opportunity to summarise the key facts, claims made and positions taken by each side both formally and off-the-record, an opportunity to consider which stakeholders have most to gain or lose as a result of the case, and how far the dispute has escalated.

2. Case Analysis

An aid to analysing the future interests of both sides separately from the past and present positions, and to focus on the historic and prospective costs for both sides.

3. Strategy Analysis

A series of questions that can impact on the strategy behind the dispute.

4. Financial Loss Analysis

A simple method for assessing the financial impact of the claims made in the dispute by each side.

5. SWOT Analysis

Assessing the Strengths, Weaknesses, Opportunities and Threats for each side.

6. BATNAs, WATNAs and PATNAs

Identifying the best, worst and probable outcomes if the dispute does not settle.

7. Way Forward Options

A scorecard for comparing the relative attraction of the alternative ways forward for the dispute.

8. Future Strategy Summary

Based on the Olé! analysis, this is a chance in a few words to summarise the strategy for each dispute looking to the future, and to identify the action steps and options to implement them.

9. Ongoing Review

An option to reconsider the strategy depending on certain trigger events.

10. Performance Measurement

Identifying how to measure success.

1. Basic Facts

1.1 Description of the dispute

1.2 Value of the dispute

1.3 Relevant Countries

1.4 Extent of communications between parties to date (in quality/number)

1.5 Main claims made/positions taken formally to date by us

1.6 Positions taken/offers made off-the-record by us

1.7 Main claims made/positions taken formally by the other party

1.8 Positions taken/offers made off-the-record by the other party

1.9 Our main stakeholders in this dispute (Consider who has most to gain/lose from the outcome of the dispute, who may raise or remove obstacles for you, both internal and external.)

1.10 What stage has the dispute reached on the Escalation Ladder? [Footnote 1]

1.11 Any other significant considerations? [Footnote 2]

2. Case Analysis

2.1 Our present and future interests, concerns, needs and motives as distinct from our past and present positions. **[Footnote 3]**

2.2 Our guess at the other party's past and present positions and their present and future interests, concerns, needs & motives

2.3 A comparison of both parties' present and future interests, concerns, needs and motives

2.4 Our legal and expert fees and costs to date

2.5 Our non-legal costs to date

2.5.1 Cost of management time on this dispute

2.5.2 Lost opportunity costs

2.5.3 Cost of being unable to use funds for other purposes

2.5.4 Other potentially hidden costs

2.6 Our guess at the other party's legal and expert fees and costs to date

2.7 Our guess at the other party's non-legal costs to date

2.7.1 Cost of management time on this dispute

2.7.2 Lost opportunity costs

2.7.3 Cost of being unable to use funds for other purposes

2.7.4 Other potentially hidden costs

2.8 Estimate of our legal and expert fees and costs in the future

2.9 Estimate of our non-legal costs in the future

2.9.1 Cost of management time on this dispute

2.9.2 Lost opportunity costs

2.9.3 Cost of being unable to use funds for other purposes

2.9.4 Other potentially hidden costs

2.10 Our guess at the other party's legal and expert fees and costs in the future

2.11 Our guess at the other party's non-legal costs in the future

2.11.1 Cost of management time on this dispute

2.11.2 Lost opportunity costs

2.11.3 Cost of being unable to use funds for other purposes

2.11.4 Other potentially hidden costs

3. Strategy Analysis

3.1 Is there a strategy in place for this dispute?

3.2 Has the strategy changed over time?

3.3 To what extent have negotiations been positional?

3.4 To what extent have negotiations been interest-based?

3.5 Which side has been dominating the agenda

3.6 How many discussions have there been between business principals?

3.7 Why did they not succeed?

3.8 How may you have contributed to their not succeeding?

3.9 What intentions did you attribute to the other side?

3.10 What intentions do you think they attributed to you?

3.11 In what way are you a victim?

3.12 In what way has the other party been evil/inconsistent with your values?

3.13 In what way has the other side been a victim?

3.14 In what way have you been evil/inconsistent with your values?

3.15 What are the other party's values?

3.16 What did you expect from the other party?

3.17 What did you think the other party expected from you?

3.18 What effect has each party's strategy had on the relationship between the parties?

4. Financial Loss Analysis

4.1 Indicate on the table how losses are calculated, both for Us and the Other Side.

The way in which damages may be calculated can vary from jurisdiction to jurisdiction. The quantum of damages can vary greatly, depending on the theory that is to be applied and the evidence in support. The assessment of quantum is sometimes left until late in proceedings, after issues of liability have first been determined. However, this can lead to unsatisfactory situations, where the costs of the proceedings become disproportionate to the damages that can be obtained. An early understanding of the likely theoretical bases on which damages may be claimed and their approximate assessment is an important step to be done at the beginning when a conflict arises. These calculations should be revised continuously throughout the case. Complete the chart:

Financial Analysis of Loss	For Us	For the Other Side
Restitution Damages		
Expectation Damages		
Unjust Enrichment Damages		
Industry-specific norms		
Value of any additional remedies		
What, realistically is the best claim		

5. SWOT Analysis

5.1 Our main strengths

5.2 Our main weaknesses

5.3 Our main opportunities

5.4 Main threats to our case

5.5 Other side's main strengths

5.6 Other side's main weaknesses

5.7 Other side's main opportunities

5.8 Main threats to the other side's case

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5.9 Now summarise on the charts:

SWOT Analysis for Us

Positive	Negative
Strengths:	Weaknesses:
Opportunities:	Threats:

SWOT Analysis for the Other Side

Positive	Negative
Strengths:	Weaknesses:
Opportunities:	Threats:

6. BATNAS, WATNAs & PATNAs

Effective negotiators and dispute strategists evaluate BATNAs, WATNAs and PATNAs.

BATNA = **B**est Alternative To a Negotiated Agreement now - ie the most favourable realistic scenario if there is no settlement (e.g. we win on all significant points at trial)

WATNA = **W**orst Alternative To a Negotiated Agreement now - ie the least favourable realistic scenario if there is no settlement (e.g. we lose on all significant points at trial)

PATNA = **P**robable Alternatives To a Negotiated Agreement now - ie the most likely realistic scenario if there is no settlement (e.g. what the Court or Tribunal is likely to decide)

6.1 Assess our BATNA, WATNA and PATNA, and, assess them hypothetically on four levels:

- The amount of time it is likely to take to arrive at a **final** judgment or award (i.e. taking into account all possible appeals and tactical delays).
- The total cost involved in getting to the **final** judgment or award.
- What the **final** Judgment or Award will be - i.e. the final outcome.
- What the consequences of that outcome would be.

6.2 Then assess the Other Side's BATNA, WATNA and PATNA on the same four levels.

6.3 Capture these with keywords on the chart:

		Us	Other Side
BATNAS	Time		
	Cost		
	Award/Outcome		
	Consequences		
WATNAS	Time		
	Cost		
	Award/Outcome		
	Consequences		
PATNAS	Time		
	Cost		
	Award/Outcome		
	Consequences		

7. Way Forward Options

After completing sections 1-6 of Olé!, score each of the following options in terms of relative attraction as a process for delivering the PATNA. 1=low; 5=high

Bear in mind the practical aspects such as risk, costs, time. Also consider enforceability of outcomes, in particular that negotiated and mediated settlements are usually contractual and can also often be converted into a legally binding and enforceable judgement or award.

Note that all of the Way Forward options can be combined. For more information on hybrid forms of dispute resolution, please see: <http://www.imimmediation.org/hybrids>

Option	Score				
	1	2	3	4	5
Negotiation (including collaborative law)	<input type="radio"/>				
Neutral Fact Finding	<input type="radio"/>				
Facilitative Mediation	<input type="radio"/>				
Evaluative Mediation	<input type="radio"/>				
Mini-Trial	<input type="radio"/>				
Arbitration	<input type="radio"/>				
Litigation	<input type="radio"/>				

Negotiation by parties personally. No neutral involved, parties negotiate directly with one another. Some negotiations use lawyers who are Collaborative Practitioners - meaning that if the negotiations do not result in a settlement and the dispute is pursued in litigation or arbitration, then the practitioners will step aside and the disputants must use other law firms to pursue their case.

Neutral Fact Finding utilises a third party neutral with expertise to examine disputed facts central to the case. Usually a step in a settlement process.

Facilitative Mediation is a non-binding and voluntary assisted negotiation process where a third party neutral, agreed by the parties, and who has no power to impose a solution, helps them to elicit their respective interests and helps the parties to reach a mutually acceptable settlement based on their subjective and future interests. For more on facilitative mediation see www.IMImmediation.org

Evaluative Mediation (sometimes called Conciliation or non-binding arbitration) is an evaluative, non-binding and voluntary assisted negotiation process where a third party neutral, agreed by the parties, and who has no power to impose a solution, helps them to understand objective parameters based on which an outcome would be reached using specific norms (e.g., the applicable law of the contract). The Evaluative mediator helps the parties to identify the zone of possible agreement using norms-based criteria (e.g., what a court is likely to rule) and is encouraged by the parties make proposals of his/her own as to where a possible solution may lay. For more on evaluative mediation, see www.IMImmediation.org

Mini-Trial involves the parties' lawyers presenting their cases to a panel comprising senior executives of each of the parties plus a neutral. The neutral helps clarify the issues and evaluate the case.

Arbitration is litigation in private, using party-appointed neutrals, based on an arbitration organisation's Rules or rules agreed between the parties. There is normally no appeal from such as process save for serious cases of error or bias.

Litigation/Opposition Proceedings are the conventional methods for resolving disputes and conflicts in formal actions. They entail using national court systems and using civil servants or former advocates that have reached the status of judges. These courts can be appealed and can have procedural rules that the parties are not free to deviate from.

8. Future Strategy Summary

Summarize future preferred strategy for this dispute.

Based on that strategy, what are the action points needed to implement it, by whom, by when and within what cost constraints. Complete the chart:

Action Point	Implementer	Due Date	Max Budget

9. Ongoing Review

Indicate the most appropriate moments to review the case strategy again. Complete the chart:

Trigger Event / Review Description	Date for review

10. Performance Measurement

Indicate what future milestones would help to measure success. For example:

- Containing future costs below a certain level?
- Concluding a settlement on acceptable terms?
- Concluding a settlement by a certain date?
- Securing other advantages (perhaps beyond the scope of the dispute)?
- Meeting defined business objectives?
- Improving the relationship between the parties?

Complete the chart:

Milestones	Measurements

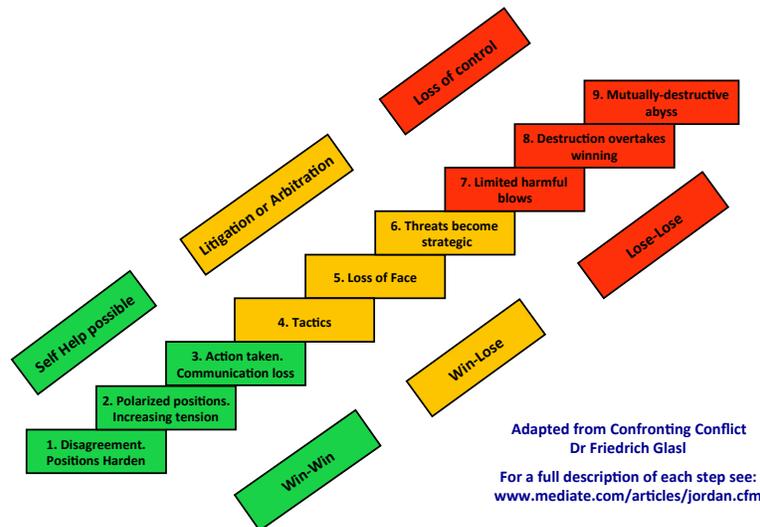
This completes your Olé case evaluation and analysis.

We are always seeking to improve and refine Olé in light of in-use experience. Please let us have your feedback and any suggestions by emailing IMI Operations Manager, Emma Ewart, at Emma.Ewart@IMImediation.org. All comments will be much appreciated and will benefit future users of Olé.

Footnotes

[1] Section 1.10

Glasi Conflict Escalation Ladder



[2] Section 1.11 Some examples:

- Significance of the dispute to our business – locally/internationally
- History of relationship between the parties, including past disputes
- Other relevant contractual and non-contractual relationships
- Need (or lack of need) to maintain an ongoing business relationship
- Other current related or unrelated disputes between parties
- Known attitude of Other Party to disputes
- Known attitude of Other Party to settlements/alternative dispute resolution
- Past inclination of Other Party to settle with us and/or others
- Other known issues involving the Other Party

[3] **Section 2.1** Underlying interests are the basic needs, goals and aspirations of each party, which are not necessarily expressed by the positions they have taken. Focusing on actual and suspected underlying interests can help indicate a party's motivations in continuing with the dispute and how they may prefer to resolve it. For example, what is the commercial importance of the dispute to each party, and are there other relevant interests – e.g. Safety, Revenues, Reputation, Strategic, Economic, Stakeholder Impact, Internal/Organisational, Public Relations, Policy/Precedent Implications. Then use keywords to capture our positions (sections 1.5/1.6) and our interests on the chart.