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Navigating Complex Commercial Disputes in Mediations: International and Intercultural Disputes

This article highlights strategies that a mediator may want to consider adopting when mediating disputes between parties from different cultural backgrounds.

By **Myrna Barakat Friedman**

Disputes involving parties from different legal jurisdictions and nationalities generally involve complex substantive issues revolving around the merits of the claim and its judicial treatment. Such cases often also require particular attention on a number of levels that go beyond the legal matters at hand. The most obvious one is language, namely ensuring that the parties are comfortable enough with the language of the mediation to be able to engage effectively.

Familiarity with the legal particularities of the chosen jurisdiction is also an element to consider. And then there are less visible, but sometimes more sensitive differences to consider including, for example, subtle nuances in language, general intercultural sensitivities, and varying interpretations of nonverbal cues. In mediating such disputes, it is important for the mediator to recognize these subtle matters and ensure they have the tools to address them.

In this article, I highlight certain strategies that a mediator may want to consider adopting when mediating disputes between parties from different cultural backgrounds.

Explain the Rules and Objectives of Mediation. Mediation can mean different things in different jurisdictions. It is therefore imperative that mediators start by explaining the process and ensuring that all constituents have a clear understanding of the objectives and "rules of the game" of the mediation at hand. It is also important to explain the legal framework that surrounds the mediation. At the very least, this would include clarifying whether discussions held during a mediation are confidential, whether settlement offers can be disclosed to a court or arbitration panel, and the forms a mediated settlement must take to be binding. More generally, a mediator should err on the side of caution and ensure that there is no ambiguity regarding any of the procedural matters and scope of the mediation.

Don't Make Any Assumptions, People Will Surprise You and Others. To separate the parties from the dispute, as some would favor, is an unrealistic strategy. Rather, I believe in embracing the parties as people first,

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disputants after. In doing so, however, I would urge everyone to start with a clean slate. Indeed, as part of our extensive cultural sensitivity efforts, we typically "learn" about different cultural norms and protocols.

We also generally tend to draw our own conclusions about the cultural mores of certain nationalities and groups, some of which will prove to be accurate, but others may not be. In fact, as global interaction and communication become increasingly prevalent, our preconceived ideas are becoming less accurate.

I would argue that many of us are truly citizens of the world and thus difficult to associate with a single group. Although it is always important to avoid making assumptions about constituents, I find that it is even more important in matters involving international parties. It is also probably somewhat less obvious given our tendency to assume certain matters related to persons we identify as belonging to specific groups. With that in mind, I believe it is important for a mediator to ensure that they don't make any assumptions when working with such parties. Rather, they would be well served by giving themselves the time and opportunity to get to know the parties as individuals. To that end, I would encourage mediators to spend time with each party before the mediation date to familiarize themselves with not just the dispute but also the persons behind the dispute.

Start Fresh With Facts and Law. I generally favor opening statements in mediations, even though the parties are typically already very familiar with each other's positions and view of the facts. I believe opening statements are even more important when disputes involve different nationalities and often different legal jurisdictions. More often than not, starting with such presentations allows the mediator to ensure that there is a clear understanding of the matters amongst all constituents, notwithstanding any language barriers and differences in legal aptitude. It also gives the mediator the opportunity to explain, correct, and elaborate as needed so that all parties are on the same page. Generally, this reduces the risk of any easily avoidable misunderstandings.

Fluency in Technical Terms Doesn't Imply Fluency in Social Banter and Vice Versa. We should not presume that if someone isn't fluent in English that they aren't as literate in the financial and legal matters. Similarly, we shouldn't assume that fluency in language invariably means fluency in the legal principles. Pre-mediation discussions and caucuses may be useful to inform the mediator of the parties' comfort level with both social and technical exchanges in the language of the mediation. The mediator can then tailor the communications and discussions accordingly.

They can also ensure that the opposing party is aware of any language limitations. In this regard, it isn't uncommon for non-native speakers to be more comfortable with written communications. When that is the case, a mediator can use slides or white boards to jot down some points. This can go a long way to helping non-native speakers' understanding and appreciation of the nuances of a dispute. It empowers them to engage effectively during a mediation.

Give the Parties an Opportunity To Explore Their Similarities. A while back, I was working on a significant transaction involving parties from four different countries. For our final negotiations, all parties agreed to meet for as many days as needed to ink a deal. We had a board room full of party representatives and their respective counsel and other advisors. The negotiations were fierce. Every detail was discussed for hours

on end. A lot was at stake and we had a limited timeframe to agree on terms. Invariably, there would be one party who would take issue with a matter. Obtaining consensus was a particularly strenuous exercise.

Coincidentally, at the same time that we were meeting to finalize the deal, the World Cup finals were being held. Much to my surprise at the time, as difficult as it was for the parties to agree on anything related to the deal they were trying to ink, every single person in that room agreed, without any discussion or hesitation whatsoever, that the negotiations would pause during the key matches leading up to the World Cup finals. As someone who is somewhat removed from sports, I was particularly amazed by this: these people spoke different languages, came from very different cultures and legal jurisdictions, spent hours arguing every single point related to the matter and yet there wasn't a single objection to the proposal to not only pause but ensure we secure a proper venue at our hotel for all to be able to watch the games.

Allowing the parties to focus on their common interests and not their differences can sometimes work wonders. It doesn't mean they will de facto agree on all the disputes but it definitely helps bridging the psychological gap of "otherness." Sports is one example of a topic that could motivate parties to engage on a more human level. Family can also serve that purpose.

Wherever one may come from and whoever they may be, we all tend to have similar concerns when it comes to our families. Whether it is ensuring the children grow up healthy and happy, or attending to an elderly parent or spouse, the themes are generally universal and transpire all cultures. Mediators have the ability to get to know the parties beyond the dispute. I believe this is particularly important when working with constituents from different nationalities. By getting to know them and giving them the opportunity to get to know each other on a less formal level, we allow all to "humanize" the other side. When doing so, even the toughest points of contention become slightly easier to address.

Mediation is a unique dispute resolution mechanism in that it is a voluntary process that requires each party to agree to a settlement. Nothing is imposed and either party can withdraw or elect not to settle. The role and scope of a mediator's role is also rather unique. The objective is clear, namely to resolve a legal dispute. The means to reaching that objective can be more nebulous. They involve clarity regarding the legal dispute and advancement on that front, which require buy-in from the parties. The personal interaction with the parties and between the parties is therefore a crucial element in reaching the stated objective.

Unlike an arbitrator or a judge, the mediator has the luxury of getting to know the parties. This can be a necessity in certain cases, especially those involving parties from different backgrounds. Taking the time to get to know the persons behind the dispute, reducing the rush to accept stereotypes, taking steps to ensure the risk of misunderstandings is mitigated, empowering all parties to engage effectively, and tailoring the process to ensure all of the foregoing goals are met are key elements to a successful mediation.