

The Mediator's Role in Cross-Border Commercial Disputes: Navigating Three Dimensions of Culture

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In today's global economy, commercial agreements often involve parties from different ethnic, corporate and legal cultures. Mediation attributes such as confidentiality, closure, self-determination and tailored solutions can be particularly compelling for disputants seeking to resolve international disputes. Mediation also offers parties from different backgrounds the unique ability to account for cultural values and to salvage valuable relationships.

This article outlines practical strategies mediators can adopt to address the cultural dynamics of cross-border disputes.

International commercial mediations are influenced by three cultural layers: each party's ethnicity, the corporate culture in which they operate, and the legal tradition of their home jurisdiction.

All three of these dimensions impact how parties communicate, their approach to both the process and substance of the negotiations, their assessment of settlement terms and their negotiation postures.

Mediators must understand and appreciate these intricate facets to adapt their approach to the specifics of the disputes and successfully guide the cross-cultural parties toward resolution.

1. Ensuring the Parties Have a Common Understanding of the Mediation Process and Goals.



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Mediation may be understood differently in different jurisdictions. In some countries, the mediator's role is limited to the facilitative neutral, while in others the mediator is expected to take an evaluative approach. Confidentiality, generally regarded as a fundamental element of mediation in the United States, may not be presumed in other legal systems. The mediator should be familiar with the various mediation styles and ensure that the mediating parties have the same understanding of the agreed mediation process. These matters can be fleshed out in the mediation agreement to secure alignment and buy-in by the parties.

2. Understanding the Different Legal Traditions and Their Impact On the Merits.

The legal regimes from which the parties stem will likely color their perception of the merits of the dispute and their respective negotiation positions and posture. The mediator should have some basic knowledge of the legal framework governing the dispute as well as that of the likely jurisdiction of enforcement of a settlement agreement. This allows the mediator to be effective in helping international parties craft a workable settlement that can withstand both domestic and foreign legal challenges.

3. Early Engagement With Counsel. Early, open and candid discussions with counsel can be particularly useful for the mediator to adapt the mediation process, anticipate obstacles and support parties in preparing for their participation. The mediator should explore with counsel all the elements of the three layers of culture and discuss their potential impact on negotiation posture. Counsel can help in understanding different legal traditions and in appreciating the internal dynamics and cultural nuances of each party. They can provide guidance on the relationship and information flow between a foreign holding company and its domestic subsidiary, the decision-making process when several layers of approvals are necessary and, more generally, both ethnic and corporate cultural matters that should be considered. Counsel can also guide the mediator on the roles each mediation participant is expected to play in the process and who the ultimate decision makers are. Insights into a client's fluency in both spoken and legal/technical English may also be helpful to the mediator in preparing for the mediation session. The mediator can then ensure that the other stakeholders are also aware of, and prepared to attend to, any potential language barriers.

4. Meeting With the Parties Beforehand. Meeting with each party separately before the day of the mediation session gives the mediator an opportunity to build a rapport with the participants and put them at ease, notwithstanding any cultural differences. It also allows the mediator to assess language fluency and comfort level with the process firsthand. For the

parties, it provides a relaxed and private forum to ask questions freely and share thoughts about their own cultural sensitivities as well as their understanding of the other party's cultural background. The mediator can encourage the parties to be open about these potentially sensitive issues by raising them directly and even acknowledging head-on that cultural differences may exist and impact all stakeholders. Parties will generally be receptive to such candor and respond in kind. Most importantly, when participants arrive at the mediation session already familiar with the mediator and confident in the process, discussions are likely to be more open and productive.

5. Logistical Matters To Consider Before the Meeting Starts:

- **Attendance:** Some cultures may perceive the absence of senior decision-makers at the mediation session not just as annoying and unproductive but as truly disrespectful. Ensuring both parties are represented by persons who are perceived as "equally" ranked within their respective institutions avoids offending. This may mean suggesting that a senior executive not be present at a session if an equally senior counterpart attendee won't be attending.

- **Working hours and breaks:** The customary number of working hours in a day as well as the appropriateness of working meals may vary depending on one's culture. It's not uncommon for a US party to plan for a mediation session to continue through dinner and counsel to order an evening meal for all attendees while the foreign party decides to pause for the day, skip the working dinner session, and reconvene for a working session the following morning. With thoughtful preparation, such logistical matters can be discussed and agreed beforehand to avoid disagreements that may add to any tension on the day of the mediation.

- **Language proficiency and need for translators:** Unlike arbitration and litigation, it may be more effective for counsel or one of the attendees to handle translations during a mediation session. Adding a third-party translator could hinder the process and add a layer of formality that is both unnecessary and potentially counter-productive.

6. Starting the Mediation by Ensuring All Parties Are On the Same Page. It's generally advisable to start the mediation session by outlining to all participants the process, objectives, role of the mediator, confidentiality, and language to be used in the joint mediation sessions. For mediations involving cross-border disputes, it ensures that all attendees have a common understanding of the procedural matters even if they are not accustomed to them.

Further, although some mediating parties may be reluctant to start with brief presentations, openings allow them to hear firsthand where the other party is coming from, including the cultural nuances that may impact negotiation postures. They can also help participants appreciate the positions their own colleagues have taken when decision-makers were removed from the matters that led to the dispute or if there are cultural differences amongst the party representatives themselves. Openings allow the mediator to clarify and elaborate as needed thereby reducing the risk of misunderstandings related to party positions, whether or not they're due to culture differences. The mediator should weigh the risk that openings may harden the parties' adversarial positions against such potential benefit.

7. Encouraging parties to raise concerns throughout the process. If a mediating party has a specific concern that is left unattended during the mediation session, it could become a true obstacle to settlement. Participants from some cultures may be reluctant to speak openly with mediators out of fear of offending them or hindering the process. Mediators may therefore want to remind parties at the onset that their objective is to attend to all parties' concerns and to adapt the process to ensure momentum and buy-in. By surfacing and addressing issues promptly, mediators prevent hidden obstacles from undermining settlement efforts.

8. Even in commercial disputes, personal dynamics are involved and should be considered. Mediators should take time to reflect on personal and cultural undertones to avoid pre-judging and relying on

misleading assumptions and stereotypes. They should get to know the mediation participants as individuals prior to the mediation session and as the process advances. Parties from the same country may have different backgrounds and their approach will generally be impacted by both their life experiences and the corporate culture in which they work. Appreciating such distinctions and their impact on the process requires a nuanced assessment by the mediator and is crucial to successfully mediating international disputes.

9. Fostering human connections. Encouraging mediation participants to view each other as people rather than merely adversaries can shift the negotiation dynamics significantly. A mediator should help parties recognize the aspects of the other party's culture that may impact their negotiation posture and approach to the mediation. In parallel, the mediator should consider strategies to foster and promote personal connections on a human level. Shared experiences such as family life, sports and hobbies often transcend cultural differences and can generate personal bonds and empathy. Encouraging parties to focus on their common interests and not their differences helps move parties from positional bargaining to collaborative problem-solving.

Conclusion

Mediations of international disputes require a combination of procedural expertise, business acumen and cultural fluency. An international disputes mediator must tailor the mediation process to the parties involved, their corporate culture and the legal traditions to which they are accustomed. Recognizing, understanding and adapting to the three cultural dynamics that impact negotiations reduces misunderstandings, promotes human connections and supports the crafting of effective and legally enforceable settlements.

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