Ten Considerations for International Mediation Clauses

*By Barb Dawson, Sabu Mathai and Nicole Ong**

Litigators in the United States are increasingly finding the need for international dispute resolution tools as the business marketplace continues its global expansion. One area where a U.S. litigator's understanding of the rules of engagement may not be shared when negotiating across cultures is with alternative dispute resolution. In particular, while U.S. litigators may consider mediation to be a standard part of the dispute resolution process, they may find that their non-U.S. counterparts are not familiar with, or interested in, mediation. While the non-U.S. intrigue with mediation is growing, use of mediation remains limited beyond U.S. borders.

Given this differing level of experience and different expectations, dispute resolution clauses are particularly important in international agreements. Building an expectation of mediation into a contract when non-U.S. parties are involved can prevent problems if disputes do arise. Anticipating--and eliminating--areas of possible misunderstanding or contention regarding the use of mediation may be much easier when all are anxious to enter a deal rather than later when communications break down and the parties are at odds.

This article provides an overview of ten considerations for navigating the somewhat unchartered waters of structuring international mediation clauses. In the process of raising these issues, the article points out areas where miscommunications are likely, with ideas on ways to avoid such difficulties at the outset.

1. Speaking the Same Language

Thoughtful parties that speak different languages and follow different cultural norms can take measures to avoid many communication issues long before the need for mediation arises. As a prime example, parties to a contract should agree on the language in which to conduct mediation.

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The parties could specify that mediation will be conducted in a particular language (e.g., French). Alternatively, the parties could specify the language in which the contract is written as the language for mediation. In the event that the contract is written in multiple languages, the clause could provide for the mediation to be conducted in either one or both of the languages.

> Any mediation between the parties shall be conducted in the [specify] language.
>
> OR
>
> The mediation shall be conducted in the language in which the contract was written.

The parties also should take further steps to ensure that messages conveyed by each side are correctly interpreted by intermediaries, effectively communicated to the other side and ultimately understood. Choosing a single mediator fluent in two or more languages is one way the parties may be able to minimize the risk of miscommunication.[1] The parties also might opt to use co-mediators.[2] By providing an additional safeguard against miscommunication, a co-mediator fluent in the language of the other side can increase the sense of trust and security in the mediation environment.[3] Regardless of whether parties choose a mediator or co-mediators, interpreters chosen by both sides may provide additional support.[4]

Cultural differences can pose a more difficult challenge. But as with purely linguistic barriers, mediators can minimize any negative impact. Mediators attuned to the cultural differences between parties in a particular mediation may be able to diffuse potential conflicts as they arise.[5]

2. Determining who can help—Neutral Selection

Attorneys familiar with even the most local mediation know that the importance of selecting a neutral mediator cannot be overstated. Thus, establishing a mechanism for mediator selection is an important part of any international mediation clause. In agreeing on such a clause, it is typical for parties to define expectations for a mediator, including both their neutrality and their full disclosure of all relationships they have to the parties to the mediation and their counsel.[6]

Mediation clauses may also point to an alternative dispute resolution (ADR) organization to provide a roster of potential mediators. Organizations that the parties may choose to conduct the mediation usually offer such rosters as well as mediation rules and support for conducting the mediation.[7] Examples

of international organizations include: International Chamber of Commerce (ICC); American Arbitration Association (AAA); CPR International Institute for Conflict Prevention & Resolution (CPR); World Intellectual Property Organization (WIPO); Commercial Arbitration and Mediation Center of the Americas (CAMCA); London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC).[8]

3. Defining the Rules of Engagement

Attorneys and clients outside of the United States may have limited experience with mediation. Moreover, to the extent that attorneys and clients in other countries do have mediation experience, such experiences may be very different from their U.S. counterparts. Specific, model clauses can be used to help bridge these divergent expectations and experiences.

Using a model clause may be the simple solution for many mediation issues. Attorneys and clients can avoid conflicts that might arise while drafting an ad hoc clause by using a model clause offered by an international organization.[9] Although a model clause might not be designed for the unique subject matter of the parties' relationship, the parties will have the advantage of using tried and tested language. [10] Indeed, the simple approach of using an international organization's standard clause has been proven highly effective in thousands of disputes.[11]

Of course, the parties should be wary of boilerplate language that does not meet their specific needs and expectations. Also, the parties may choose to tailor language to fit the specific context in which mediation would occur, such as a patent dispute.[12] Another basis for customization by the parties is whether the parties should use mediation to address all of their disputes or only certain types.[13]

> The International Centre for Dispute Resolution (ICDR), the international division of the AAA, offers this model clause:
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> In the event of any controversy or claim arising out of or relating to this contract, the parties hereto agree first to try and settle the dispute by mediation administered by the International Centre for Dispute Resolution under its rules before resorting to arbitration, litigation, or some other dispute resolution technique.

4. Agreeing on the Role of Mediation

The differences in the experiences and expectations of U.S. attorneys and non-U.S. attorneys may not be limited solely

to more technical aspects with mediation clauses. Because conceptions of the nature of mediation and the role of mediation in ADR vary both regionally and culturally, the parties should at the outset discuss and define the role of mediation.[14]

Critically, the parties should first understand the nature of mediation and that a mediator functions as an intermediary for the parties to discuss settlement terms. They can then include a definition in the mediation clause by either referencing an international organization's standard definition or by using more detailed language that embodies their shared expectations.[15]

A clear understanding of the differences between mediation, negotiation and arbitration is even more critical when mediation is part of a hybrid ADR framework.[16] Parties will need to think through whether mediation will be part of a hybrid ADR framework. Increasingly, international ADR follows three steps: negotiation, mediation, and arbitration. Once parties agree on an ADR framework, they should understand their obligations at each level.

5. Inviting the Right People

The attendance of authorized decision-makers on both sides can make a mediation more effective in many ways. The presence of decision-makers at a mediation limits the possibility that an agreement will be vetoed by a higher authority that did not attend the mediation.[17] In addition, many mediations may not result in an agreement without the appropriate decision-makers attending, and as a result they may solely provide an opportunity for parties to gain a better understanding of the other side's claims with an eye towards arbitration or litigation.

Thus, the parties should first identify key decision-makers on both sides. Many factors might complicate identification. For instance, some cultures do not place authority in the leader of a negotiating team and thus leave it unclear who has the authority to make decisions. Such an approach stresses the importance for parties to explicitly identify the individuals on both sides who should participate by name, position or other specific description. The mediation clause should then require identified decision-makers to attend any mediation and describe what is expected from them during the mediation.

6. Timing is Everything

In order to put time to best use in a mediation, the mediation clause should also make clear what is expected from participants. Mediation should facilitate good, meaningful communication as the parties want to resolve their dispute

efficiently during the actual sit-down mediation because they have probably come from different parts of the world. Although mediation should be flexible, it needs to be moved along in a timely manner. Therefore, the parties may want to establish a timetable in the contract for initiating and completing the mediation process with clear consequences for a breach, such as liquidated damages or recovery of attorney's fees.[18]

Drafters should also be aware that a reluctant party might try to avoid mediation or use it to delay arbitration.[19] If the parties are serious about mediation, specific time frames set forth in the medication clause can help prevent unnecessary delays.[20] For instance, the parties can avoid delay by establishing time frames for procedures like requests for information or documents. If one party makes a request, the parties should establish the time for response and whether it is mandatory. In this way, a party avoids being stonewalled by another party who fails to respond in the hope that the dispute will go to arbitration.

7. Controlling Costs

In order to ensure that all parties are clear as to cost allocation before the need for mediation arises, the mediation clause should specify how the costs of mediation and the parties' separate costs will be handled. Furthermore, terms such as "cost splitting" should be clearly defined so that the parties share the same expectations.

The parties may rely on the rules of international organizations that address fees and costs. One such organization, the ICC, requires parties to pay a deposit in the amount likely to cover administrative expenses and the fees of the neutral mediator before the mediation can occur.[21] The ICC rules also provide that the parties equally share the costs and deposits of the mediation unless they agree otherwise in writing, while a party's outside expenditures remain the responsibility of that party.[22] As when relying on other model language, the parties should still discuss the fee splitting arrangement and whether unique circumstances exist where exceptions should apply.

8. Exchanging Information

As a general rule, arbitration in the U.S. presumptively allows for at least some discovery, while non-U.S. arbitration may not. This major difference is likely to carry over into international mediation. Thus, one party to a mediation may expect a full exchange of documents while the other may be used to a legal system that does not provide for such a full exchange.[23] Given these differing expectations, parties may choose to directly address the exchange of

information and possible discovery in the mediation clause.[24]

Parties that choose to address information disclosure in a mediation clause should consider two aspects of discovery. First, the mediation clause should provide whether the parties will exchange information. If the clause allows for information to be exchanged between the parties, the parties might also include time limitations within which the exchanges should be completed.[25] Second, the mediation clause should address whether the parties will provide information to the mediator.

9. Keeping Proceedings Confidential

Potential confidentiality is an important point that often attracts non-U.S. parties to international mediation. Parties want to be able to speak freely without the fear that sensitive business information or trade secrets will be revealed to the public, or that communications made during mediation will be admissible in subsequent judicial proceedings.[26]

However, the lack of experience by non-U.S. parties with international mediation fosters suspicion about what is "really" considered confidential. Parties can counter such suspicion by defining the parties' expectations for what information should remain confidential. In order to do this, parties might incorporate by reference institutional mediation rules that protect confidentiality.[27] Alternatively, the parties can define information exchanged and discussed during mediation as confidential along the lines of the following clause:

> The mediation process is confidential. Neither a party nor the mediator may disclose the existence, contents, or results of any mediation unless the parties agree in writing to such disclosure or unless such disclosure is required by law.[28]

Crucially, suspicions may not be abated unless the clause lays out consequences for a party that violates the confidentiality provisions of the mediation clause. The need to enforce such consequences for violations might also influence the location of the mediation.

10. Location, Location, Location

The mediation clause should also specify a mutually acceptable location for the mediation.[29] One primary consideration when choosing a location is convenience. Convenience may be measured by the availability of local counsel, transportation, hotels and meeting facilities. The available pool of qualified mediators may be another primary consideration in determining the

location for mediation. But while some parties may look solely to the pool of qualified mediators available in a particular geographical area, the parties may be wise to consider qualified mediators able to travel t the region.

> Consider mediating a matter in the jurisdiction in which its result most likely would need to be enforced.

Another major consideration in choosing location is the enforceability of any agreement the parties reach during the mediation. Mediation agreements made regarding more complex business issues may necessarily involve some future performance by either one or both of the parties. In some instances, future performance may require negative action by a party, such as not using confidential information. Unlike arbitration, mediation does not conclude with an order. Once the parties reach a mediation agreement, they should be able to rely on an enforcement mechanism that will assure an end to the issue. If there is a likelihood that the parties will stipulate to a resolution that needs enforcement through courts, the parties should be aware of whether a mediation agreement has the same legal force as a final judgment issued by a court in the country where the mediation would occur.[30] In countries that follow the United Nations Model Law, mediation settlement agreements may be equal to court judgments; other jurisdictions, however, may require the parties to reduce a mediation agreement to a judgment before it will be enforceable.[31] The drafter should be aware of these differences when choosing a location.[32]

Conclusion

These ten considerations may aid drafters in avoiding ambiguity that might shelter divergent expectations and experiences held by parties from different countries and cultures. By addressing areas where miscommunications about mediation are likely to arise, drafters can develop a clause based upon a shared understanding about mediation at the outset of their business relationship.

(Endnotes)

1 Alexandra Alvarado Bowen, The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships, 60 Disp. Resol. J. 59, 61 (July 2005).

2 David J. A. Cairns, Mediating International Commercial Disputes: Differences in U.S. and European Approaches, 60 Disp. Resol. J. 62, 68 (Oct. 2005).

3 Id.

4 Bowen, supra note 1 at 61.

5 Id.

6 Peter J. Comodeca, Ready … Set … Mediate, 56 Disp. Resol. J. 32, 34 (Jan. 2001).

7 Holland, supra note 7 at 458.

8 Id.

9 Id. at 458-59.

10 Id.

11 American Arbitration Association (AAA), Drafting Dispute Resolution Clauses-A Practical Guide, Amended and Effective July 1, 2004, 539 PLI/Real 423, 436 (2007).

12 Id.

13 Comodeca, supra note 6 at 34; AAA supra note 12 at 428.

14 Holland, supra note 7 at 459.

15 Id.

16 Cairns, supra note 2 at 68.

17 Comodeca, supra note 6 at 38.

18 Abramson, supra note 7 at 326.

19 Holland, supra note 7 at 459.

20 Comodeca, supra note 6 at 36.

21 International Chamber of Commerce, ADR Rules, in force as from 1 July 2001, available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf.

22 Id.

23 Comodeca, supra note 6 at 35.

24 Id.

25 AAA, supra note 12 at 447.

26 Bowen, supra note 1 at 63.

27 Cairns, supra note 2 at 68.

28 Comodeca, supra note 6 at 36.

29 Comodeca, supra note 6 at 36.

30 Bowen, supra note 1 at 62.

31 Id.

32 Cairns, supra note 2 at 68.

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