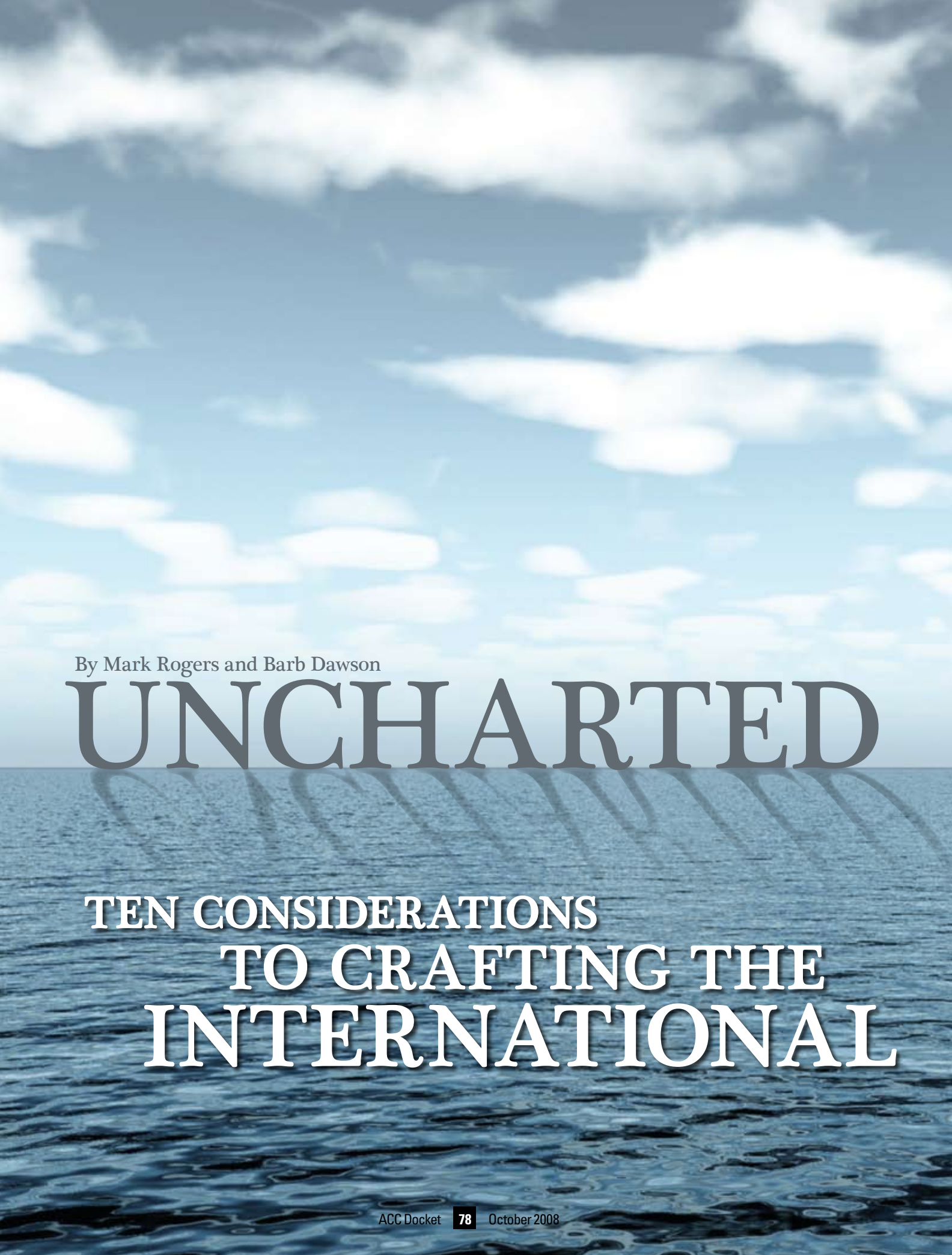

By Mark Rogers and Barb Dawson

UNCHARTED

TEN CONSIDERATIONS TO CRAFTING THE INTERNATIONAL

WATERS: MEDIATION CLAUSE

Corporations are increasingly finding the need for international dispute resolution tools as the business marketplace continues its global expansion. One area where the expectations of corporate counsel based in the United States may not be shared when negotiating across cultures is with alternative dispute resolution (ADR). In particular, while US counsel may consider mediation to be a standard part of the dispute resolution process, they may find that their non-US counterparts are not familiar with, or interested in, mediation. While the non-US intrigue with mediation is growing, use of mediation remains limited beyond US borders.

Given this differing level of experience and the real potential for expectation gaps, dispute resolution clauses are particularly important in international agreements. Building an expectation of mediation into a contract when non-US 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.

For in-house corporate counsel who decide to secure the right to mediate up front, the first step may be to simply define what that means. An "ADR Primer" offered by the International Institute for Conflict Prevention and Resolution (CPR) provides a no-frills definition of mediation that captures the common understanding prevalent in the United States:

> *Mediation is a facilitated negotiation with the objective of consensual resolution of a dispute on terms upon which the parties themselves agree. It is a form of alternative dispute resolution in which a neutral party (a mediator) selected by the parties seeks to determine the interests of the parties, discover which of these interests may be shared, and alert them to a resolution that may further those interests.*[1]

Once corporate counsel obtains buy-in to the generic concept of mediation, the next step is to define what that mediation process may entail.[2]

1. Speaking the Same Language

Thoughtful parties who 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. 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 one or more of those 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 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.[3] The parties also might opt to use co-mediators.[4] 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.[5] Regardless of whether parties choose a mediator or co-mediators, interpreters chosen by both sides may provide additional support.[6]

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.[7]

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.[8]

Mediation clauses may also point to an 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.[9] Examples of international organizations include: International Chamber of Commerce (ICC), American Arbitration Association (AAA), International Centre for Dispute Resolution (ICPR), 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).[10]

While a temptation may exist to set out detailed criteria for the experience and/or characteristics of the mediator in the mediation clause, or even go so far as to specify a particular individual to mediate any disputes, this approach can create challenges down the road. For example, the parties will be at the mercy of the selected mediator's schedule. Or they may be dipping into such a limited pool of "qualified" mediators that the mere selection process becomes a drawn-out ordeal.

A middle ground approach allowing for some organizational help and yet some flexibility is to agree to a mediator to be selected from the roster of a mutually acceptable established organization "or such other neutral as the parties may agree upon." That way the parties have a good roster of neutrals as a fallback if they cannot agree upon a specific individual when a dispute arises.

3. Defining the Rules of Engagement

US counsel should keep in mind that attorneys and clients outside of the United States are likely to have very limited experience with mediation. Moreover, to the extent that they do have mediation experience, their experiences may be very different from their US counterparts. The differences in the experiences and expectations of US attorneys and non-US 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.[11]

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.[12]

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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.[13] 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. [14] Indeed, the simple approach of using an international organization's standard clause has been proven highly effective in thousands of disputes.[15]

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.[16] Another basis for customization by the parties is whether the parties should use mediation to address all of their disputes or only certain types.[17]

The likely scenarios for when mediation might be needed should be considered up front. For example, if counsel anticipates that mediation will come into play only after a major dispute threatening the entirety of the parties' relation has arisen, counsel likely will want the ability to mediate all claims to full and final resolution in order to preserve the overall relationship and underlying deal.

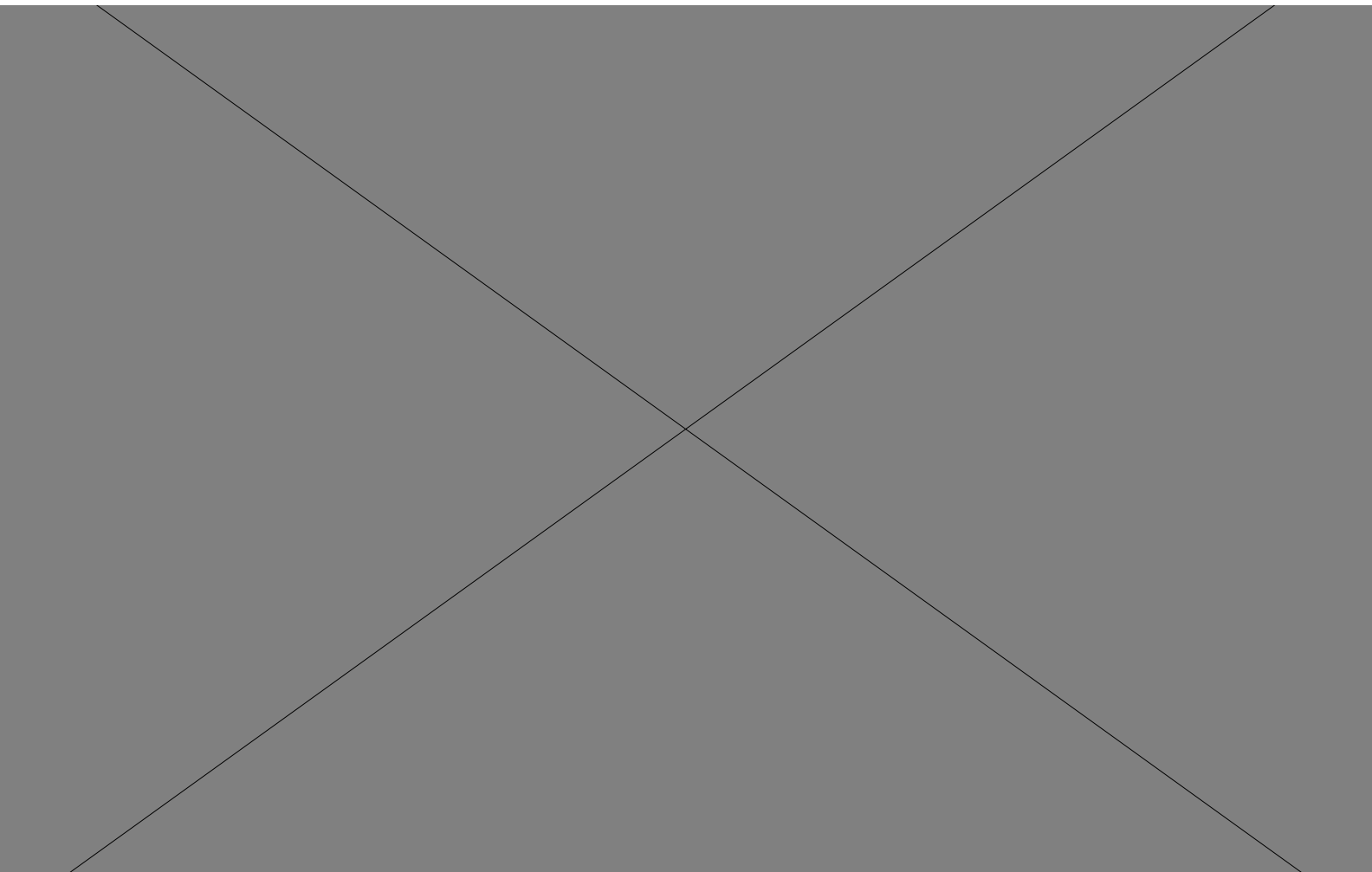
On the other hand, if counsel believes that mediation will be helpful from time to time to resolve smaller issues between parties with a web of relationships, a mediation clause that will allow for individual issues to be addressed will likely make the most sense. These circumstances may exist, for example, with parties in the construction industry who are working together on a variety of projects, any of which may result in disputes that must be resolved. In such circumstances, it may be most practical to make clear that the parties are prepared to mediate issues taking one dispute at a time in order to avoid any one mediation getting bogged down with unrelated issues that would best be addressed separately.

The ICDR offers this model clause:

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. Considering a Three-Step Approach

Parties also will need to think through whether mediation will make sense as part of a hybrid ADR framework as, increasingly, international ADR follows three steps: negotiation,



mediation, and arbitration. If so, clearly defining the differences between mediation, negotiation, and arbitration is critical.[18]

While a multi-step ADR clause may raise issues exceeding the bounds of this article, the basics are pretty straightforward. First, for negotiation to be meaningful, individuals with appropriate authority must communicate in good faith and with the common goal of attempting to resolve the dispute. If that step is not successful, mediation or assisted negotiation comes next. And finally, if no voluntary resolution of the parties' own choosing can be reached with or without the involvement of a third party neutral, the result will be determined by one or more neutrals in arbitration or some comparable process.[19]

Even parties reluctant about mediation likely can see its unique role in this three-step process. It allows the parties to look to a third party neutral for assistance and yet maintain their ability to make their own choices. When US counsel speaks to non-US counterparts about the virtues of mediation, the fact that a mediator cannot force any outcome may indeed be a selling point worth emphasizing.

5. Inviting the Right People

The attendance of authorized decision-makers on both sides can make mediation more effective in many ways. The presence of decision-makers limits the possibility that an agreement will be vetoed by a higher authority who did not attend the mediation.[20] 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.

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Quick References

- *China International Economic and Trade Arbitration Commission Arbitration Rules.* The China International Economic and Trade Arbitration Commission website provides the rules for arbitrating disputes arising from economic and trade transactions of a contractual or noncontractual nature in China. *www.acc.com/resource/v8361*
- *Drafting the International Arbitration Clause.* This outline excerpted from the 2007 ACC Annual Meeting presents the critical factors that ought to be considered in drafting an international arbitration clause for business-to-business agreements. Sample dispute resolution language is included. *www.acc.com/resource/v9005*

Another consideration is whether additional parties are needed for a mediation to be successful. For example, a parent company or guarantor may be critical to offer the authority necessary for a binding resolution to be reached. If so, the mediation clause should require their involvement.

Additionally, a merger or acquisition could throw off the dynamics. While the parties should not complicate an otherwise streamlined mediation clause with every "what if" potential contingency, they should simply think through the likely possibilities. For example, if a merger is looming when a mediation clause is being drafted, consideration should be given to the "right people" to be involved in the mediation if the merger comes to fruition.

6. Timing is Everything

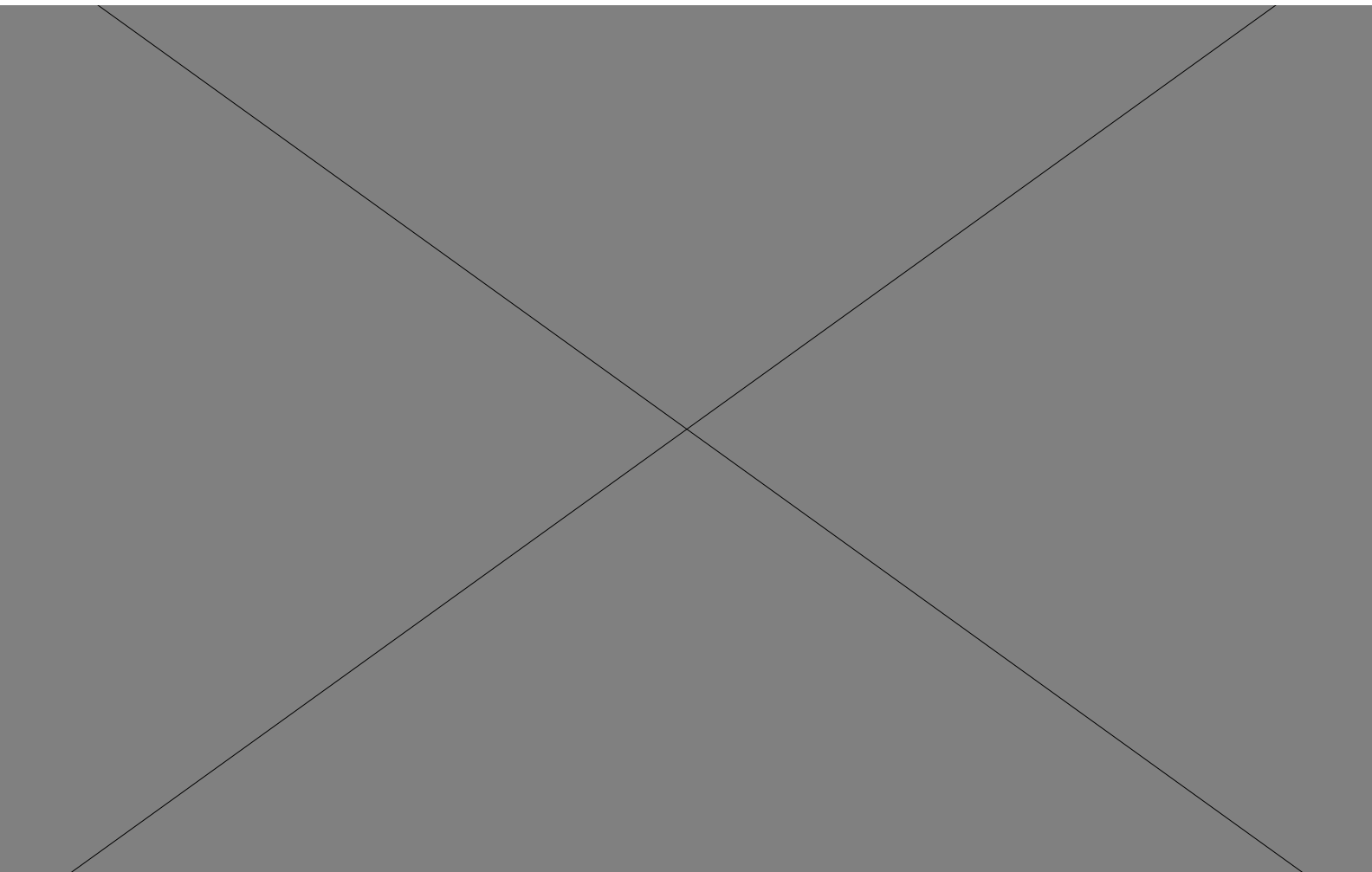
In order to make the best use of time in mediation, the mediation clause may also make clear what is expected from participants. Mediation should facilitate good, meaningful communication; the parties want to resolve their dispute efficiently during the actual sit-down mediation because they have probably 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 attorneys' fees.[21]

Drafters should also be aware that a reluctant party might try to avoid mediation or use it to delay arbitration.[22] If the parties are serious about mediation, specific time frames set forth in the mediation clause can help prevent unnecessary delays.[23] 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, for example, 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.[24] The ICC rules also provide that the parties equally share the costs of the mediation unless they agree otherwise in writing, while a party's outside expenditures remain the responsibility of that party.[25] 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 United States presumptively allows for at least some discovery, while non-US 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.[26] Given these differing expectations, parties may choose to directly address the exchange of information and possible disclosure and/or discovery in the mediation clause.[27]

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.[28] Second, the mediation clause should address whether the parties will provide information to the mediator and, if so, in what form.

9. Keeping Proceedings Confidential

Potential confidentiality is an important point that often attracts non-US 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.[29]

However, the lack of experience by non-US parties with international mediation may foster suspicion about what is "really" considered confidential. Counsel can counter such suspicion by defining the parties' expectations for what information should remain confidential. In order to do this, counsel might incorporate by reference institutional mediation rules that protect confidentiality.[30] 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.[31]

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

Counsel also may want to specify a mutually acceptable location for the mediation up front.[32] One consideration that frequently comes to mind 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 to the region.

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

A more significant 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 affirmative performance by one or both of the parties. In other instances, future performance may require negative action by a party, such as not using confidential information. It is reasonable to consider the settlement agreement resulting from a successful mediation as a contract that might require enforcement, and consider the same factors that would come into play with any such business contract.

If there is a likelihood that the parties will stipulate to a resolution that needs enforcement through courts, the parties should be aware of the extent to which a mediation agreement will be enforceable under the host jurisdiction's contract law and/or will be given the same legal force as a final judgment issued by a court in the country where the mediation would occur.[33] In countries that follow the United Nations Model Law, for example, 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.[34] The drafter should be aware of these differences when choosing a location.[35]

No Boilerplates Allowed

While the use of mediation in the international context is evolving, consideration of these factors may aid corporate counsel in avoiding ambiguity that might shelter divergent expectations and experiences held by parties from different countries and cultures. No one agreement should address all of the factors noted here. By considering and addressing areas where miscommunications about mediation are most likely to arise, however, corporate counsel is apt to develop

a clause based upon a shared understanding about mediation and minimize potential conflict down the road.

Ms. Dawson and Mr. Rogers wish to acknowledge the contributions of Sabu Mathai and Nicole Ong, who assisted with this article.

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NOTES

1. International Institute for Conflict Prevention and Resolution, *An ADR Primer*, available at *www.cpradr.org/glossary.asp*.
2. The nature of the mediation allows for much flexibility as the neutral mediator does not make decisions and bind the parties, as in other forums, but rather facilitates the parties' selection of the terms by which they choose to be bound.
3. Alexandra Alvarado Bowen, "The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships," 60 *DISP. RESOL. J.* 59, 61 (July 2005).
4. David J. A. Cairns, "Mediating International Commercial Disputes: Differences in US and European Approaches," 60 *DISP. RESOL. J.* 62, 68 (Oct. 2005).
5. *Id.*
6. Bowen, supra note 1 at 61.
7. *Id.*
8. Peter J. Comodeca, "*Ready … Set … Mediate*," 56 *DISP. RESOL. J.* 32, 34 (Jan. 2001).
9. Holland, supra note 7 at 458.
10. *Id.*
11. Holland, supra note 7 at 459.
12. *Id.*
13. Id. at 458-59.
14. *Id.*
15. American Arbitration Association (AAA), "Drafting Dispute Resolution Clauses-A Practical Guide, Amended and Effective July 1, 2004," 539 *PLI/Real* 423, 436 (2007).
16. *Id.*
17. Comodeca, supra note 6 at 34; AAA supra note 12 at 428.
18. Cairns, supra note 2 at 68.
19. For an overview of the ADR options with definitions of com. monly used terms, see CPR's "An ADR Primer," supra note 1.
20. Comodeca, supra note 6 at 38.
21. Abramson, supra note 7 at 326.
22. Holland, supra note 7 at 459.
23. Comodeca, supra note 6 at 36.
24. International Chamber of Commerce, "ADR Rules, in force as from 1 July 2001," available at *www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf*.
25. *Id.*
26. Comodeca, supra note 6 at 35.
27. *Id.*
28. AAA, supra note 12 at 447.
29. Bowen, supra note 1 at 63.
30. Cairns, supra note 2 at 68.
31. Comodeca, supra note 6 at 36.
32. Comodeca, supra note 6 at 36.
33. Bowen, supra note 1 at 62.
34. *Id.*
35. Cairns, supra note 2 at 68.