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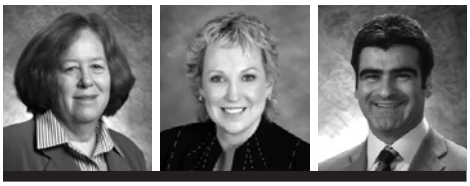
THE RECORDER

ARBITRATION AND MEDITATION

Cross-border mediation

When negotiating with a party in Asia, patience and knowledge of local customs are key to a successful resolution



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Alternative Dispute Resolution

When mediating a dispute in Asia, or with Asian companies in the U.S., lawyers and mediators cannot expect the mediation process to be "business as usual." Mediation is not an established practice in most Asian countries. Attitudes in regard to mediation are akin to those in California 30 years ago.

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The adage that success in life can be achieved by "just showing up" does not apply to mediation of cross-border disputes. A well-designed process is a must.

There is a high cost to failure with cross-border mediations. While international arbitration is a reasonably familiar dispute resolution technique, mediation is not. The failure of one poorly planned mediation often creates a viewpoint that "mediation does not work" and sends the parties back to the courtroom for good.

PATIENCE IS A VIRTUE

It is important to understand that while U.S.-only mediations are often done in a day — albeit a long day — cross-border mediations often take more time. It may be a wise investment to plan for a two-day mediation. Though it is understood in a typical U.S. mediation that the decision makers must be present or at least that participants have authority to settle at the mediation itself, this will seldom happen in a cross-border mediation with Asian parties. In Asia, a consensus culture necessitates a long process back home that simply must occur for a case to settle.

There is more emphasis on process and less on efficiency. Patience is a virtue, if the U.S. party is seriously interested in resolving the dispute.

CHOOSE YOUR MEDIATOR CAREFULLY

Often, it is simply not possible to choose a single mediator who alone has the credentials, skill set and patience to settle a cross-border dispute. A prestigious former federal or state court judge may be important to provide the necessary gravitas to reassure the Asian company participants. On the other hand, a former-attorney mediator with the patience to manage the pre-mediation, mediation and follow-up process may be the key to settling cross-border disputes. The litigators should check and double-check the credentials and references of any proposed panelist. It is a common practice to call and interview the potential mediator about his or her actual experience mediating similar cross-border disputes.

While many mediators want to mediate cross-border disputes because they are complicated and challenging, few have done so successfully. Although it is expensive to use co-mediators, it may be a wise investment which will save your client the time, expense and distraction of further protracted litigation.

The mediator or mediators need to have some basic understanding and empathy with individuals and companies caught up in a foreign legal system. They may also need skills necessary to "co-mediate" with a foreign national with very different training. However, empathy and patience are not enough; sometimes it is important that one of mediators be a more traditional, U.S.-style, evaluative mediator, able to explain American litigation process and risks.

PRE-MEDIATION: DESIGNING THE PROCESS

Pre-mediation work in advance of the mediation session is essential. Once the mediator is selected, intense preparation by the attorneys and principals is crucial. Planning a mediation with Asian participants is often more akin to planning a diplomatic meeting, with a great deal of effort spent on "size of the table" and "rules of engagement" issues.

Conference calls led by the mediator should be set up with all parties to obtain buy-in as to the mediation process. Consider an in-person meeting. The agenda should include who will attend the mediation, the briefing schedule, a description of the actual negotiation process of caucusing back and forth, and how offers and demands will be handled. Briefs should be exchanged early so that each party can carefully consider the other's positions. A "mediative tone," rather than bravado, should be employed in brief preparation. Mediators will often request confidential briefing in an effort to define for the mediator the obstacles for each party, and what obstacles each side perceives the other to have.

Most U.S. litigators take for granted that mediation is strictly confidential and that written or oral statements cannot be used in pending litigation. That is not the norm in Asian countries where a court may expect to be kept informed regarding negotiation developments.

Agreements about litigation stays, or restraint in initiating additional litigation to permit the mediation process to work often involve extensive negotiation before the mediation is convened.

The "usual understandings" embodied in California law and practice cannot be taken for granted. Extensive involvement of the mediator and parties in resolving pre-mediation issues can create trust needed for later agreement on substantive matters.

ACCOUNT FOR DIFFERING LEGAL TRADITIONS

Most Asian jurisdictions have no jury system, and have limited or no discovery. There is great fear of U.S.-style discovery. Where a case is venued will influence usual incentives toward settlement, such as litigation risk analysis, litigation expense and the likelihood of potential publicity motivating a party's decision making. The question of "apologies," difficult for most U.S. companies to consider in light of implications regarding future litigation, are often critical to an Asian party.

MEDIATION AND THE NEGOTIATION PROCESS

Opening statements and joint sessions are critical. Extensive time needs to be devoted to presentations by lawyers, and potentially by witnesses and experts, on each side to define the parties' competing positions, before settlement proposals are likely to be given serious consideration.

U.S.-style, direct adversarial contact is often unfamiliar to Asian participants. It is important for attorneys to evaluate their clients' tolerance for conflict in the context of the mediation process, and to prepare the clients for the frank, and often critical, discussion of issues during the mediation. Clients should understand the role of the mediator in articulating and testing the parties' respective positions. As in a well-planned U.S. mediation, a total negotiating strategy is required for success.

For U.S. participants, both lawyers and clients, the number of participants on the other side, the slowness of the process, and cultural issues regarding consensus decision making, may lead impatient Americans to conclude they are "wasting their time." It is important for the mediator to discuss and defuse this issue in advance.

The usual pace of an American mediation would be deemed rude by Asian participants. American participants should be prepared to temper their expectations to permit their opponents sufficient time for group consideration of proposals, and necessary consensus building to occur.

For all participants, it is also important to understand and manage issues regarding authority to settle. It would be very unusual for Asian participants, including U.S. subsidiaries of Korean, Japanese or Chinese companies, to have authority to conclude a final agreement on the day of the mediation. The consensus decision making process virtually always will require approvals from home country executives or even government regulators, which cannot be immediately obtained.

POST-MEDIATION FOLLOW-UP: GETTING TO THE FINISH LINE

Even more than in a U.S.-based mediation, reaching a final agreement in a cross-border mediation will require extensive follow-up. American lawyers and clients should anticipate getting a signed final deal may take as much, if not more, effort than the mediation. Assuming a deal was not reached during the mediation session, further negotiating across many time zones will prove challenging.

The continued participation of the mediator or mediators will be critical for reaching a successful conclusion.

Patience is involved in all aspects of a cross-border mediation, from the pre-mediation process, through the follow-up required to reach a final and binding settlement. It is essential that you educate your clients in the complexity and pace normal in cross-border mediations to maximize the chances for a successful outcome.