INTERNATIONAL MEDIATION:
BEST PRACTICES PRIOR TO CROSS-CULTURAL MEDIATION

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In February of 2007, the *Economist* newspaper reported that the lawsuit by the Bank of Credit and Commerce International (BCCI) against the Bank of England lasted 13 years and cost £100 m in legal fees. BCCI's action was described as the (then) 'most expensive fishing exercise in history' and a 'farce'.

The *Economist* suggested that it probably would have taken a day and cost a few thousand pounds if it had been mediated according to the London-based Centre for Effective Dispute Resolution rules. The CEDR reports a 70 – 80% settlement success rate with another 10 – 15% settling within days thereafter.

The *Economist* was remarking upon a then emerging trend: litigation as the preferred method for resolution in cross-cultural disputes, with international arbitration following to avoid perceived home court advantage. When international arbitration became a litigation 'avatar' (and equally or more expensive), parties started to look to alternative methods of dispute resolution.

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Hence the advent and attraction of cross-cultural mediation.

This paper discusses issues to consider in preparing for cross-cultural mediation.

Preparation for Cross-Cultural Mediation is the Same as Preparation for any International Negotiation:

- Know the cross-cultural differences in the Negotiation Process
    - Direct vs. Indirect Communication
    - Economical exchange of Information vs. Less Efficient Exchange.
    - Interests of the Individual (company or person) vs. Interests of the Group.
    - Individual Decision Making vs. Group Decision Makers, Participants may not have Authority to Decide.
    - Focused Communication for Resolution vs. Pre-Negotiation Socialization
    - Focus upon the Legal Rights under Contract vs. Focus upon Relationships
    - Negotiating Style of 'ticking off' from List of Negotiating Issues vs. All Issues Simultaneously Subject to Negotiation
    - Focus upon the Present or the Effect upon Profitability vs. Focus upon Future business/ Market Share
    - Ultimately Interest is Business vs. Ultimately Interest in Friendship / Relationship.

The criteria listed above are generally termed 'Western' vs. 'Eastern' with regard to the different cultural predilections in the West, including Europe and North America (and Israel) vs. Eastern Europe, Asia, South America and the Middle East (excluding Israel).

Another concept is the idea of 'low context' (Western) vs. 'high context' (Eastern) methods of communication.

Low context communication is direct and communicators rely upon verbal communication.

High context communication is less direct and uses non-verbal methods of communication.

Before an international mediation, it is wise to take note of these *possible* cross cultural differences in communication. Nonetheless, flexibility and ability to react are essential. These are, after all, stereotypes.

Parties might act differently from pre-conceived cultural norms based upon their provenance. (They read the same articles).

Listening and following = communication

It is useful to be aware of these cultural 'norms'; to follow the verbal and non-verbal signals and to communicate. Misinterpretation will occlude following, digesting and communicating; thus leading to impasse.

For example, during our international mediation competitions, the American teams (including Rutgers) tended to have the attorney take the laboring oar in presenting the side's position. International Mediators and Judges were partial to hearing from the clients rather than from their attorneys. They felt that it was the 'clients' position or problem at issue even though we tend in the United States to have the attorneys act as our spokespeople.

I have clients in New York in the importing textile industry. Their motto is 'don't get even, get business'. But they have operated for decades in the Far East. Thus, they know that ultimately for them to 'get business' they also must preserve relationships. I had a complex

negotiation in Hong Kong involving a contract and relationship that had soured. Although we were well within our rights (statute of limitations bar to the claim, and other defenses), and the clients were so advised, the Far East representatives of the client were eager to resolve the dispute, to preserve the relationship with the Far East factories, and to avoid the American legal system and feared potential 'runaway' jury verdict.

There are other general concepts necessary for preparation prior to mediation in addition to the cross-cultural issues discussed above. These too should be thoroughly vetted and preparation is the key.

Preparation prior to mediation is often more important than the actual mediation itself. I devote more time prior to the mediation in understanding the problems, reading the submissions, which might be voluminous especially if the matter has had a long procedural history through litigation. I communicate separately with counsel prior to actual attendance at mediation.

From the practitioner's standpoint, I recommend the following pre-mediation activities.

Step One Gathering Information:

Make a list of Information to obtain from your client, information to be revealed either to the Adverse Party and/ or the Mediator, and information that is to be kept confidential.

Regardless of whether your client is the Claimant or the Respondent, you as counsel should be in a position to prepare a list of all written communications that will assist you in analyzing your client's position either pre-litigation or for negotiation preparation.

If the issue concerns a contract, the list would obviously include all documents related to the contractual relationship. If the issue concerns a tort claim, then the documentation

surrounding liability and damages (be it medical reports, accident reports, damages, occupational limitations).

In cross-cultural mediation, especially with tort or potential statutory claims, it is also necessary to perform an analysis of the choice of law, or conflicts of law. You must be prepared to meet any claim of expansion or contraction of liability depending upon which law is applied.

Step Two: List the Interests of Your Client/ Adverse Party:

Make a list of the interests of each party and any non-party who might be affected by whether or not the litigation settles. This again depends upon the cultural bent of each party. The 'Western' party might focus upon the present and the effect that the settlement would have on current operations. The 'Eastern' party might focus upon saving face and preserving a relationship.

Western parties tend to focus upon rights but in mediation the interest should be, well, the 'interests'. The interests of each party will again depend upon the parties' cultural predilection and aim. In American domestic mediation, I tend to tell parties, live in the present, you cannot change the past, and hope for a better relationship in the future. This might not work in cross-cultural mediation if 'Eastern' parties have a focus upon the past and the past relationship and view the current dispute as an evolution of a historical relationship.

In addition to current and future goals, the list of interests should be prioritized, i.e. primary and secondary goals and what goals are essential and non-negotiable, if any, vs. those that are of less significance and therefore potential subjects for negotiation.

Step Three: Rank the Interests of the Parties and/ or Non-Parties (Primary, Secondary and Tertiary or Incidental Objectives)

Prioritize the Interests of both your client and those that you anticipate of the adverse party. There may be interests of your client that are of no concern to the adverse party and vice versa. Thus, in that case, the adverse party may 'concede' a point that does not cost it anything and the reverse.

In cross-cultural mediation there is greater opportunity to relinquish points that are not essential to that party. For example, a 'Western' party might be able to fashion a resolution that 'saves face' but does not cost lucre. In that case, the Western party might be more willing to accommodate the need of an 'Eastern' party without actually giving anything up that would be valuable to the Western party.

Example: Company A claims that Company B has wrongfully utilized a website that includes its trade name in the URL address. A claims that B's use of this website will confuse customers, constitutes cyber-squatting and is actionable. B claims that when it first used the website, it had the permission of A. A and B had a relationship in the past but that has now terminated and they are competitors. B also claims that its use of the website was simply to direct customers to its new business. A demands that B cease utilizing the website and cease directing customers from that website to B's new website. A claims that its reputation has been damaged by B's prior re-directing of potential customers. At this point, B does not have an interest in directing customers from the prior website to its new website and can agree without protest to cease such action and accommodate A's concern without settlement payment.

Thus A's interest is accommodated, it is saving face with its customers, and since it cannot prove any real 'damage' from B's prior use, it has achieved its goal.

Step Four: Psychological Issues/ Persuasion vs. Understanding

In advance of the actual mediation, consider: Who settles the cases? The Mediator or the parties? The parties and their counsel may think that the mediator settles the case but it is the parties' case and the parties' volition which propels them to settlement, or not. This is the 'understanding' rather than the 'persuading' model of mediation.

As a mediator, prior to mediation, try to anticipate what you would do if there is an impasse.

I do not recommend going into any mediation with a pre-conceived 'bottom line' from the parties', attorneys', or mediator's prospective. Mediation is fluid. Nothing will be accomplished by drawing a line in the cement, let alone in the sand, prior to arriving at the mediation.

Barriers to Negotiation: consider prior to mediation your cognitive view of the problem and what is the appetite for risk or for risk aversion? What do you think would be the same on the other side?

Reframe issues so that they are presented in a positive way. Define the goals of the parties regardless of their legal rights. This is the interest analysis. Do they have a certain future goal separate and independent of their rights/ claims in the legal proceeding?

There are the obvious detriments to not settling: legal costs, distraction, possible poor result, lack of control in the process, leaving one's fate to a third-party 'neutral' who does not

have a stake in the dispute, devotion of capital resources to a retrospective rather than prospective issue.

In the end the decision to resolve a dispute will occur when the value of settlement at the agreed-upon basis exceeds the value of not settling with an appropriate risk factor applied to the best and worst scenarios.

Other psychological issues: trying to recognize the interest of the other side, again from a cross-cultural perspective. Remind the parties that at one time they were 'in love' so to speak, and despite their cultural differences, they decided to enter into some alliance or contractual relationship.

Letting go: remind the parties that they cannot change the past (even if of an Eastern philosophy) when there is an emotional charge taking over the negotiation. Tell a party to list all the grievances against the other party; bury the list in a vault or draw; and view them ten years from now. But decide now, in the present, not in the past.

Preparation of the Mediator:

Mediator is a stranger to the lawsuit. Mediator must be provided information regarding the parties, the lawsuit, and their past and current relationship if any. Mediator must be apprised of cultural differences. Mediator must understand the factual and legal underpinnings as well as the unexpressed interests. Mediator must understand the current interests of the parties (mediation involves interests; litigation and arbitration involves rights). Those again depend upon the party's culture.

Balance the cost of extensive pre-mediation preparation and submissions vs. mandatory but perhaps unfruitful mediation session if inadequate preparation and education of the Mediator.

Preparation of the Client:

Obviously, the client should be prepared as to what to expect at mediation. Because mediation does not have the same procedural framework as would litigation or arbitration it would make sense to contact the mediator selected or appointed and determine the 'style' of that mediator: Does she separate the parties from the outset? Does she have a joint meeting at the beginning of the mediation to explain the process? Will she adjourn and possibly reconvene the mediation if it would be productive so as to adduce additional information or proofs in the interim?

Can that be done (adjourn) if there are geographic concerns or distances? Can technology overcome any differences in location, time zone, and cost of face to face meetings?[2]

As you and your clients will find out - - if not already discerned - - mediation is a fluid, evolving process. Clients cannot and should not enter the mediation with pre-conceived ideas. They should understand that mediation is less formal than other legal proceedings, in any culture and under any judicial or arbitration system.

Conclusion:

In short, mediators have different styles, will use different techniques, and in their best judgment will try whatever might be helpful to bridge the chasm between the parties. Just as

[2] I will offer SKYPE as a means of conducting mediation if parties are geographically apart and the cost of an in person mediation is prohibitive. I find that to be as effective.

counsel must get to know the mediator, the mediator must become acquainted, to the fullest extent possible, with counsel and their clients. The mediator must understand the parties' interests whether expressed explicitly or implicitly.

The mediator helps the parties listen, follow, and communicate with each other.

As the old saying goes, "*there are three sides to every story."* That would be the claimant's side, the respondent's side and then the mediator's side (and none of them is the truth).