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MEDIATION Q&A: US (NEW YORK)

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USA - specific information concerning the key legal issues that need to be considered when mediating a dispute.

This Q&A provides country-specific commentary on *Practice note, Mediation: Cross-border* and forms part of *Cross-border dispute resolution*.

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JUDICIAL ATTITUDE TOWARDS MEDIATION

1. Is mediation a commonly used alternative dispute mechanism in your jurisdiction, especially in relation to cross border disputes? What proportion of commercial disputes are settled through mediation? What is the judicial attitude towards mediation in relation to commercial disputes?

Mediation is arguably the most common alternative dispute mechanism used in the United States to resolve commercial disputes, including cross border disputes. Given its prevalence as a dispute resolution mechanism, it is not surprising that a large percentage of disputes are settled through mediation. Courts strongly favour mediation as a means of exploring dispute resolutions. Virtually every court in the United States, during the course of a commercial litigation that proceeds past the pleading stage, will either encourage the parties to consider mediation or, depending on the court and circumstances, order them to participate in non-binding mediation.

COMMERCIAL ATTITUDE TOWARDS MEDIATION

2. How do commercial parties commonly view mediation? Do parties typically opt for institutional mediations or do they prefer the flexibility of independent/ad-hoc mediations?

Sophisticated commercial parties commonly view mediation as a cost effective means of resolving complex disputes. Depending on the circumstances and the amount at issue, commercial parties often favour private mediation over institutional mediation, such as those run by the courts themselves. Typically, where both parties consent, the courts are amenable to allowing parties to opt-out of institutional mediation programs in favour of private mediation.

LAWS ON MEDIATION

3. Are there any national laws or regulations that govern the conduct of mediations in your jurisdiction?

There are no national laws or regulations governing the conduct of mediations in the United States, and the practice of mediation varies from state to state in accordance with each state court's local rules. Additionally, because the Alternative Dispute Resolution Act of 1998 requires each United States district court to implement "its own alternative dispute resolution program, by local rule," mediation also varies between federal district courts (28 U.S. Code § 651).

INTERNATIONAL TREATIES ON MEDIATION

4. Is your jurisdiction a signatory to any international treaties or directives on mediation?

The United States of America is not a signatory to any international treaty that per se governs the conduct of mediation. Rather, disputes suitable for mediation that may also implicate a particular international treaty must be considered on a case-by-case basis, with a litigant taking guidance with respect to its alternative dispute resolution rights from the treaty itself or jurisprudence interpreting the treaty.

MEDIATION AS A PRE-CONDITION TO LITIGATION

5. In the absence of a dispute resolution clause, which calls for mediation, are parties required to engage in mediation as a pre-condition to accessing the local courts?

As a general rule in commercial disputes, engaging in mediation is not a pre-condition to accessing the courts. In some jurisdictions and under some statutory schemes, however, most often involving non-commercial claims arising under State or Federal employment, discrimination or family law statutes, there may be a court or statutory mandate to engage in pre-complaint mediation.

COSTS CONSEQUENCES OF REFUSING TO MEDIATE

6. Can local courts force parties to mediate, especially in commercial or employment disputes? Do local courts impose costs for:

- **Delay in consenting to mediation?**
- **Failure to mediate?**
- **Refusal to participate in mediation, particularly if that party is also a losing party in subsequent court proceedings?**

It is well established that a court may compel a party to mediate, but it cannot compel a party to settle. In New York courts, parties are generally required to participate in mediation in "good faith." Failure to do so may warrant judicial sanctions stemming from the court's broad and inherent power to regulate proceedings before it, the applicable rules of procedure, and statutes. Additionally, many federal courts and state courts have local rules that reinforce the "good faith" requirement. However, what constitutes "good faith" participation is subject to debate. In In re A.T. Reynolds & Sons, Inc., 452 B.R. 374 (S.D.N.Y. 2011), the court attempted to provide an objective standard for "good faith" participation. In the court's view, "good faith" necessitates compliance with orders to attend mediation, to provide pre-mediation statements and memoranda and to produce a representative with settlement authority. In general, New York courts have found a violation of the "good faith" standard and imposed sanctions where a party fails to appear at the mediation in defiance of a court order to do so.

New York state courts, however, have not definitively ruled on whether participation in mediation (as opposed to just showing up) carries with it a "good faith" requirement. At least one New York state court has imposed sanctions on a party for proceeding in bad faith during settlement negotiations under section 130-1.1 of the Rules of the Chief Administrator of the New York State Courts, which allows for the imposition of sanctions for frivolous conduct (IndyMac Bank F.S.B. v. Yano-Horoski, 890 N.Y.S.2d 313 (Sup. Ct., Suffolk Cnty. 2009)). Bottom line, if ordered to mediate, a party needs to show up and, once at the mediation, would be wise not to behave in a way that is completely disruptive or that shows contempt for the proceeding.

LIMITATION PERIOD

7. What is the limitation period for filing a civil and commercial claim? Is the limitation period for initiating judicial or arbitral proceedings extended/suspended in cases where parties attempt to settle their disputes through mediation? What are the formalities required to trigger such extension/suspension?

Each discrete type of claim (for example, breach of contract, fraud, negligence) pled in a litigation in the United States has its own applicable statute of limitations that varies by jurisdiction. In addition, because there are numerous variations in state law and statute of limitations defences, there is no simple answer to the question of what limitation period applies to any particular claim or whether a claim is time barred. At present, there are no laws that provide for automatic extension or suspension of the limitations period if the parties decide to first attempt to mediate their dispute. If a party wants to mediate before commencing suit, but is worried about its claims being time barred, it may demand that its adversary, in writing, "promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract." (New York Gen. Oblig. Law § 17-103.1.)

DISPUTES SUITABLE FOR MEDIATION

8. Are there any class or type of disputes that are not considered suitable, either by law or otherwise, for mediation in your jurisdiction?

No. All types of commercial disputes and claims are suitable for mediation. Criminal matters, however, are rarely suitable for mediation.

MEDIATION AGREEMENT

9. Is it customary in your jurisdiction to execute a written mediation agreement before the start of the mediation proceedings to record the rights and obligations of the parties and the mediator?

Yes, particularly where the parties opt for private mediation. Typically, a mediation agreement will address, at a minimum, the timing, locale, agreed to duration, cost sharing, confidentiality obligations and protocol for the mediation.

STANDARD CLAUSES FOR MEDIATION AGREEMENT

10. Are there any clauses that would be usual to see in a mediation agreement and/or that are standard practice in your jurisdiction?

Yes. Virtually all mediation agreements should include some language stating that the proceedings are confidential and that all communications during the mediation, whether written or oral, are settlement negotiations for purposes of the applicable rules of evidence. This way, should the mediation fail to result in a settlement, admissions made or concessions offered in the conduct of the proceeding will not later be admissible to prove (or disprove) the substantive claims.

TIMING OF MEDIATION

11. When do parties usually mediate?

There is no stock answer as to when is the best time to mediate. In many situations, particularly where the issues are narrow or not overly complex, mediating before the commencement of a lawsuit can be effective. In other situations, however, mediating too soon can be ineffective, particularly where the issues between the parties have not yet coalesced or the evidentiary record is not yet fully developed.

Once a proceeding has commenced, it is typical for the court to integrate into the pre-trial schedule a date by which the parties must participate in non-binding mediation. Alternatively, where no such date is set by the court (or reached by agreement of the parties), it is common for the court, during the course of the proceeding, to inquire whether mediation might be useful and, if so, whether the court should order it to be completed.

If the parties decide to engage in mediation, they may petition the court for a stay of the proceedings. Whether the court grants a stay is highly dependent on the circumstances of the case. Often, courts are reluctant to delay the case to enable mediation if, in the court's view, such a delay will have a detrimental effect on its calendar. In this regard, it is not atypical for a court to reason that, notwithstanding the parties' agreement to mediate, maintaining its existing pre-trial schedule is the best way to incentivise settlement. In instances where courts are amenable to a stay, such stays are usually short and only long enough to provide the parties a reasonable opportunity to let the mediation process run its course.

CHOOSING A MEDIATOR

12. How do parties usually choose a mediator? What happens if the parties cannot reach an agreement?

How the mediator is selected depends on the mediation programme the parties invoke.

Many mediation programmes run by courts automatically assign the mediator and do not allow the parties any input into the selection process.

Where the parties opt for private mediation, however, they retain substantial input into the selection of the mediator. Common practice is for the parties to agree to exchange a list of proposed mediators. If a mediator on either party's list is mutually acceptable, then the selection process is complete. Often, parties will exchange multiple rounds of proposed mediators until agreement is reached on a mutually acceptable mediator. Where the parties reach an impasse, they may petition the court for assistance (although this would be somewhat unusual) or agree to allow a mediation service provider to select a mediator from a list of potential mediators. As a practical matter, if the parties cannot mutually agree on a mediator after reasonable attempts to do so, then the parties should seriously assess whether mediating has any meaningful chance of being productive.

CONDUCT OF MEDIATION

13. How are mediation proceedings conducted in your jurisdiction?

The relative advantage of mediation as a dispute resolution tool is its flexibility. Thus, in any mediation, the parties may organise the proceeding as they see fit. Ideally, the process should be set up to allow both parties to share the most important things they want the other side to know about their case either directly or through the mediator. This, in turn, enables both sides to quickly learn about the perceived strengths (and weaknesses) of the other side's case. It also enables the parties to focus discussion on those few key issues standing in the way of resolution.

Mediation also allows both sides to explore settlement options with the mediator, who will then try to help the parties reach a mutually agreeable settlement. Once selected by the parties, a mediator will often issue a written directive setting out the schedule and any required pre-mediation submissions. Often, mediators will demand pre-mediation statements summarising key disputed facts, legal issues, alleged damages and a range of acceptable settlement options. These pre-trial filings are usually for the mediator's eyes only and not shared with the other side. In some instances, before the mediation, the parties may also agree (or the mediator demand) that the parties exchange position papers, setting out disputed issues, legal positions and claimed damages.

On the day of the mediation, or shortly before it, skilled mediators will typically set out the procedural outline for the mediation. A very common practice is for mediators to engage in "shuttle diplomacy" during the course of the mediation. Under such a scenario, the mediator will commence the mediation by conducting a very brief joint session of the parties. Sometimes, during the initial joint session, each party will give a short presentation about the relative strengths of their case. Thereafter, the parties are often segregated and the mediator will spend time with both sides discussing the issues. If the mediator thinks it useful, or if a party requests it, the mediator may reconvene a joint session.

Because the parties agree in advance to the duration of the mediation, mediations typically proceed until a settlement is reached or the allocated time runs out.

FACILITATIVE OR EVALUATIVE MEDIATION

14. What approach does the mediator usually take to the mediation, is this facilitative or evaluative?

The question of whether to take a facilitative or evaluative approach to the mediation depends on the circumstances. Successful mediations often involve both approaches. Where both parties are entrenched as the result of disagreement over a legal issue, or where one party misunderstands how the applicable law will be applied to the relevant facts, an evaluative approach can be useful, particularly if it enables the parties to recalibrate their views about the likelihood of success on the merits or the value of the claims.

A facilitative approach is often more useful where the parties (or their counsel) are sophisticated and have already had ample time to develop the evidence and assess the law. In such situations, it is often of limited utility for the mediator to attempt to educate the parties about the relative merits. Instead, the mediator can often best serve by focusing less on the substantive issues and more on moving the parties towards a negotiated solution.

TIME FRAME FOR MEDIATIONS

15. What is the general time frame for mediations in your jurisdiction? Is there any statutory period within which mediations must be completed?

The length of a mediation depends on the scope and complexity of the issues. As a benchmark, however, many mediations, even in complex, high stakes litigations, proceed for a business day or two. Thereafter, if the parties have not reached agreement, and if it is the consensus that additional efforts might bear fruit, it is common for the parties to reconvene the mediation on a later date.

Preparing for a mediation can be relatively time consuming. Pre-mediation filings can require a good amount of preparation. In addition, preparing C-Level executives to participate in the mediation process, or to authorise an acceptable settlement amount, also often requires a decent amount of time and attention. Because a mediation does not itself toll any applicable limitations period or automatically stay an on-going litigation (see Question 5), participants must be mindful of the timing and effect of the mediation on the overall dispute.

PROFESSIONAL ADVISORS IN MEDIATIONS

16. Are parties required to be represented by professional advisors, such as lawyers in mediation proceedings? If there is no requirement, are professional advisers usually present?

No, they are not. It is, however, often useful to have the assistance of a lawyer who can help negotiate, advocate the party's position, explain the legal issues and develop the facts.

JUDGES AS MEDIATORS

17. Do judges ever act as mediators? If so, do they commonly give a view as to the merits of a dispute? Are they then removed from involvement in the case if the mediation is not successful?

Judges do act as mediators, but usually only in matters that they are not presiding over. Because the role of a mediator, regardless of who is filling it, requires the mediator to provide an objective analysis of the merits of the dispute, identify the issues and areas of weakness, and quantify the risks associated with adjudication of the dispute, it is a not a role well-suited for the actual trial judge. Indeed, if the mediation is not successful, the trial judge may no longer be sufficiently neutral to preside over the dispute or may have learned things in confidence that render the court incapable of being impartial going forward.

MEDIATOR'S ROLE POST AN UNSUCCESSFUL MEDIATION ATTEMPT

18. Are there any provisions under national law or institutional rules that prohibit a mediator to subsequently act as a judge, arbitrator or conciliator in relation to the same dispute?

As discussed above, it is highly likely in practice that a mediator would not subsequently act as a judge, arbitrator or conciliator in relation to the same dispute. There is, however, no blanket prohibition on a mediator doing so, subject to the local jurisdiction's rules of disqualification.

COURT-ANNEXED, JUDICIAL AND ONLINE MEDIATIONS

19. Are court-annexed or judicial mediations (conducted under the 'shadow' of the court) and online mediations popular in your jurisdiction? If so, what types of disputes are considered suitable for such mediations? Give details of any pilot schemes that currently exist in your jurisdiction. Are any of these schemes compulsory?

A number of State and Federal courts in the United States have incorporated compulsory mediation programmes into their civil litigation dockets. Usually, the mediation is scheduled either at the request of the parties or sometime in advance of trial.

Generally, the court-appointed mediator has no power to impose settlement and cannot attempt to coerce a party to accept any proposed terms. In addition, while the parties may agree to a binding settlement, if no settlement is reached the case remains on the litigation track.

Typically, court staff appoint a mediator based on availability and lack of conflicts of interest. The parties may object to the mediator if they perceive a conflict of interest. Mediators on most court panels are often experienced lawyers admitted to practice in the jurisdiction. In addition, they are also often required to have demonstrated experience in communication and negotiation techniques, knowledge about civil litigation, and to have attended training by the court.

COSTS

20. Who bears the cost in mediations involving civil and commercial disputes?

In the absence of a contractual provision stating otherwise, it is common practice in commercial disputes for both parties to bear equally the cost of the mediation.

CONFIDENTIALITY IN RELATION TO MEDIATION PROCEEDINGS

21. Are mediation proceedings considered confidential? In the absence of an express clause in the mediation agreement, can confidentiality be implied in negotiations conducted through mediation?

Mediation proceedings are not considered per se confidential and it is unlikely, in the absence of an express agreement or applicable rule, that confidentiality will be implied. However, court rules often mandate that parties to a court sponsored mediation sign a confidentiality agreement (see, for example, S.D.N.Y. L.R. 83.8(d)).

The parties may enter into a contractual agreement precluding disclosure, and such contracts are enforceable in court (see for example, Doe v. Roe, 93 Misc. 2d 201 (N.Y. Sup. Ct. 1977)). It is thus imperative that, prior to mediating, the parties expressly agree in writing, whether by application of rule or mutual agreement, that the proceedings are confidential.

CONFIDENTIALITY OBLIGATIONS OF THE MEDIATOR

22. Does the confidentiality obligation extend to the mediator as well?

There is no New York or federal statute that creates a mediation privilege or guarantees confidentiality with the sole exception of McKinney's Judiciary law § 849-b, which prohibits disclosure of a mediator's writings and files, but only applies to community dispute resolution centres, not courts.

However, federal courts in New York have adopted rules extending the confidentiality obligation to the mediator to varying degrees. For example, the U.S. District Court for the Southern District of New York requires that "t]he mediator shall not disclose any information about the mediation to anyone except for Mediation Office staff" and further, that "[t]he mediator shall not be called as a witness or deponent in any proceeding related to the dispute in which the mediator served, or be compelled to produce documents that the mediator received or prepared for mediation." (S.D.N.Y. Procedures for the Mediation Program, 1(a), (d)).

EXCEPTIONS TO CONFIDENTIALITY

23. Can the local courts override confidentiality provisions and permit confidential information arising out of, or relating to, a mediation to be disclosed under any circumstances?

Yes. In certain circumstances local courts may override the confidentiality provisions and permit confidential information relating to a mediation to be disclosed.

For example, the U.S. District Court for the Southern District of New York's mandatory mediation confidentiality agreement, as required under S.D.N.Y. L.R. 83.8(d), states that "[t]he parties may not disclose discussions with the mediator unless all parties agree, because it is required by law, or because otherwise confidential communications are relevant to a complaint against a mediator or the Mediation Program arising out of the mediation. The parties may agree to disclose information provided or obtained during mediation to the Court while engaged in further settlement negotiations with a District or Magistrate Judge. The parties may disclose the terms of settlement if either party seeks to enforce those terms."

Further, the Southern District's mediation procedural rules mandate that "[t]he mediation process shall be treated as a compromise negotiation for purposes of Rule 408 of the Federal Rules of Evidence and state rules of evidence. Documents and information otherwise discoverable under the Federal Rules of Civil Procedure shall not be shielded from discovery merely because they are submitted or referred to in the mediation." (S.D.N.Y. Procedures for the Mediation Program, 1(c)).

The U.S. Court of Appeals for the Second Circuit has articulated a three-pronged test that a movant must meet to obtain mediation material: "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents." (In re Teligent, 640 F.3d 53, 58 (2d Cir. 2011)).

DOCUMENTING A SETTLEMENT

24. How do parties usually formalise any settlement? Is the mediator involved in drafting the settlement agreement?

There is nothing unique about settlements reached at mediation, and they are thus formalised in the same way that any settlement reached between sophisticated parties would be formalised.

It would be unusual for a mediator to draft the settlement agreement, although mediators do sometimes draft term sheets or summaries of what the parties agreed to at the mediation. Often, however, mediators do continue to work with the parties as the settlement is formalised, particularly if the parties hit an impasse with respect to issues agreed to in principal during the mediation that prove difficult to resolve in actuality during subsequent negotiations.

DISPOSAL OF COURT PROCEEDINGS

25. How are court proceedings disposed of if settlement is reached at mediation?

Once the parties reach agreement on a settlement, whether via mediation or otherwise, they typically inform the court. Thereafter, they jointly file a stipulation of dismissal which dispenses of the lawsuit and typically indicates how the parties are to bear the cost of the litigation.

ENFORCING SETTLEMENTS

26. Are there any special procedures for enforcing a settlement agreement reached at mediation? Does this differ from a settlement agreement reached outside mediation? Is it easier to enforce a settlement agreement reached at mediation?

There is no substantive difference between enforcing a settlement agreement reached at mediation as compared to one reached outside mediation. Once a settlement is reached, courts typically enforce it by its terms and do not care what, if any, dispute resolution method was used to get there.

MEDIATION INSTITUTIONS AND CENTRES

27. What are the main institutions or centres that provide mediations services, including appointment of mediator in your jurisdiction?

Mediation is a significant part of the legal industry in the United States. Every commercial party litigating a case in the United States has access to literally thousands of highly qualified professional mediators. Out of this group, a substantial number of them also routinely handle cross border commercial disputes. In sum, there is no shortage of skilled mediators at the ready to handle cross border commercial disputes.

ACCREDITATION SCHEMES FOR MEDIATORS

28. Is there an accreditation scheme or regulatory body for mediators in your jurisdiction? Describe the qualifications, continued professional education schemes and training courses that such institutions have in place for mediators

Currently, there is no general accreditation scheme or regulatory body for mediators in New York State. Local mediation organisations have individualised accreditation schemes and regulate their members according to their codes of conduct, as do federal and state courts.

In New York State courts, Part 146 of the Rules of the Chief Administrative Judge establishes state-wide "Guidelines for Qualifications and Training" of mediators and neutrals serving on court rosters and requires the Alternative Dispute Resolution (ADR) Office to "adopt such criteria as may be appropriate for the approval of training programs."

Federal courts in New York have their own criteria for those individuals interested in volunteering as mediators on district court mediation panels.

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