

CORPORATE COUNSEL

Leading General Counsel Mull Over Mediation

Top legal officers from Visa, Assurant, Estee Lauder and Fluor Corporation discuss the potential use of mediation in acquisitions and other business ventures; the use of “stand by” mediators; and what they look for in a mediator

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During a recent Business Roundtable hosted by The CPR Institute, which I moderated, General Counsel from Visa, Assurant, Estée Lauder and Fluor discussed some of the challenges they face—and opportunities they’ve found—in utilizing mediation to prevent and resolve their business disputes. The panel featured [Kelly Mahon Tullier](#), Visa, Inc.; [Bart R. Schwartz](#), Assurant, Inc.; [Sara E. Moss](#), Estée Lauder; and [Carlos M. Hernandez](#), Fluor Corporation. Here’s what they had to say on some key issues:

The potential for using ADR approaches in M&A, joint ventures and other business transactions

The panelists concurred about the significant potential of mediation in such pre- and non-litigation business contexts.

“It’s an interesting concept to think about mediation in the context of acquisitions or other business relationships,” said Sara E. Moss, of Estée Lauder. “In acquisitions, there are generally one or two issues that are potential deal breakers. As the deal gets closer, there’s typically a time problem for one or both sides, so how do you resolve that? It has always seemed to me that a mediation of those issues could be helpful. Now, of course a mediator would have to know the business and the transaction, because time is of the essence. But it could result in a quicker, fairer resolution, something quite positive that will stand the test of time.”

Moss added, “I’ve recently talked to another party with whom I’ve have a long term business relationship about the possibility of using a stand-by mediator. This other party has the right to license Estee Lauder property in certain areas, with permission that is ‘not to be unreasonably withheld.’ A mediator who would understand the issues of both parties, their needs and desires and the business context, could come in as needed to help resolve whether permission was unreasonably withheld or not. Engaging a mediator for this purpose would certainly be an interesting and good use of this tool.”

Kelly Mahon Tullier, Visa Inc., described an international joint venture that she worked on while based overseas: “It was a very complicated deal, cross-jurisdictional and with many countries, regulations and products, many opportunities for things to go wrong, but strategically it was very important to the company. So we decided to build in a mechanism where, once we signed the deal and the joint venture was off and running, we had a process where the lawyers and business people could come back together on a regular basis, and have a mediator on stand-by, with the intention of keeping this complicated thing from going off the rails.”

The parties agreed that mediation could be similarly effective in the areas of M&A and joint ventures.

“Unless a party was trying to hold us up, I would imagine it would be very viable—provided someone wasn’t parachuting in at the very last minute without an understanding of the deal. But I also think it would be hard to do unless you have experience and trust with that mediator,” said Moss.

“Joint ventures are absolutely a fertile ground for mediation,” opined Assurant’s Bart Schwartz, “especially if they are long-term and cross border. Of course, you always try to anticipate and set precise and predictive formulas, but all the careful crafting in the world won’t anticipate every problem. The challenge would be on agreeing on a standing neutral upfront but if you can do it, I think it would be very helpful.”

While most of the panelists agreed that they would be amenable to using standing neutrals, Fluor’s Carlos Hernandez pointed out that joint ventures are generally run by an active board of directors with representatives from both parties, and issues are often resolved at that level.

The panelists discussed “50/50” joint ventures and whether mediation might be helpful when the parties have reached a deadlock. Tullier (Visa) explained that, in the joint ventures she’s worked on, there are typically many elevations but if there is a true deadlock on a material matter, her team has typically utilized a buyout provision. Schwartz (Assurant) and Moss (Estee Lauder) agreed that they generally advise against 50/50 JVs, because of the difficulty of resolving disputes, but Tullier and Hernandez noted that these types of arrangements are pretty much inevitable, especially when doing business globally.

Noah Hanft, CPR’s President and CEO, commented that joint ventures, as well as other long term relationships, can benefit enormously from very simple steps aimed at preserving relationships. “Dispute resolution is often not given enough thought or proper attention. If parties utilize processes to identify potential areas of conflict before they arise, and have in place a standing neutral to help navigate such issues, far fewer ventures and partnerships will blow up.”

Hernandez (Fluor) suggested that one approach, even if you’ve had to agree to 49% in a joint venture, is to build provisions into the JV agreement that you have joint authority, and need unanimity in terms of actions taken (sometimes this has accounting implications). The percentage of ownership, therefore, is not as important as the agreement the parties have entered into regarding the management of the JV. No doubt JVs can sometimes be problematic, Hernandez concluded, but if the parties have a good relationship and their interests are aligned, the matter is typically worked out. If not, typically you see arbitration and dissolution. Hanft (CPR) mentioned that CPR has a transactional committee focused on just these kinds of uses of ADR in the transactional business context.

When should companies initiate mediation?

Most of the panelists encouraged the use of mediation sooner, rather than later – “before positions harden,” said Moss (Estee Lauder), “and people are sure that they are right.”

Hernandez (Fluor) said that he goes to mediation as soon as he perceives they are not making progress in the discussion. “Frequently we don’t have the right to mediate, contractually,” explained. “So we urge the other side to join us. Some may perceive a willingness to mediate as sign of weakness, but I think it is to the contrary, a sign of strength because I’m willing to put our case in front of a third party neutral. If you start too early, each side may not yet have enough information to make it worthwhile, but typically we’ve already been engaged in settlement discussions, so now want a third party.”

“Mediation is not a one-day event,” Hernandez added. “If you don’t get anywhere, you might resume other processes. But there are so many benefits to mediation, even if you don’t ultimately settle. Frequently, people of higher authority within your company will not have a full understanding of the risks of their position, and often mediation allows them to become better informed. It’s a matter of elevating knowledge and bringing it to a third party.”

Should the parties exchange information before a mediation?

Hernandez (Fluor) typically exchanges basic information and position statements that do not require extensive discovery (which would be more like arbitration).

No downside

Frequently, the panelists explained, and especially when you are dealing with a foreign or government entity, the other side doesn't have the authority to pay a large amount of money. They need a court to order them to do that. So there is no downside to mediation in the meantime.

Helpful with the business case

"Most successful mediations of mine have been so because they have helped the business people to understand that there is strength on the other side, even if I've already told them that," explained Moss (Estee Lauder). "It's natural: People drink their own Kool Aid, so having a good lawyer who presents the other side is often an 'ah ha' moment, helping your clients to see the complete picture and perhaps be more reasonable."

Schwartz (Assurant) seconded this, explaining that some senior executives can be such true believers, and feel so strongly about their cases—understandably—that they cannot see how they could possibly lose or where they might have weaknesses. "In such a situation," he explained, "human dynamics come into play. You are and want to be your client's gladiator. If you spend too much time emphasizing the weaknesses in your client's case, that can be a problem. Here's where a good mediator can be particularly helpful. Especially if you get someone the client respects, someone with good credentials and gravitas, perhaps someone you've used before with good outcomes, someone who is not your client's litigator or their gladiator—the mediator can help educate the client about vulnerabilities in the claims or the defense in a way that is sometimes difficult for the in-house lawyer to do."

What do leading GCs look for in a mediator?

The panelists shared similar "wish lists" when it came to mediators. Desired qualities included someone who can help the client understand the complexity and ins and outs of a dispute. Someone who is very well-prepared, who has read everything submitted and who comes to that first session with an understanding of the parties' positions and the dispute being presented. "For me the overriding characteristic in a mediator is not giving up," says Hernandez (Fluor). "It's easy to have just a few days of mediation. But that's often just the beginning."

One thing the panelists agreed they do *not* look for is passivity. A mediator who says, "Okay, the claimant is here, so what do you want to do?" That, the parties agreed, is useless; all wanted a mediator who is proactive and looks for the best ways to bring the parties together.

The panelists described a few mediations that they've seen turn into a "re-do" of the business deal. This may not work if one of the parties has a \$10 million claim, but often the parties just want a business solution. So, in terms of qualities of a mediator, "creativity is also important," says Schwartz (Assurant). "Someone who can help not only with shuttle diplomacy but also suggest alternative,

non-economic arrangements. The panelists reported being pleasantly surprised about non-economic offerings that have helped to resolve a dispute and seal the deal.

Sometimes, the best mediators are chameleons. Hernandez (Fluor) described an unusual experience where a judge presiding over a securities class action also worked with the parties in a settlement conference. When functioning as a mediator, his approach was charming, engaging and persuasive—very different from his approach when he was sitting as a judge, rightly controlling his court more like the kingdom that it was.

Not everyone can make this switch. A very respected judge, respected for her “judging,” will not necessarily make for a good mediator without shifting her mindset and possibly getting some additional training.

The importance of having parties with authority in the room

A mediation will not be successful if the parties that are in the room do not ultimately have authority to settle. Sometimes, the panelists suggested, a party can ask a mediator to make sure that the opposing party has sent someone with the required authority before the discussions get under way. This means ultimate authority to settle, not authority that only reaches an unrealistic number.

How far should a mediator go? Should they ever indicate how they would rule, or talk to the client out of your presence?

According to Tullier (Visa), “I think that will vary according to the matter, the parties, and the level of sophistication. Some of my best experiences have been when the mediator has gone pretty far. We’ve chosen mediators based upon their knowledge of law and the industry. They need to know, just like I as in-house counsel know, what this means for the business. Sometimes, if they do a number of cases for you and get to know you, in certain cases I think it’s good for the mediator to say, in front of your business colleagues, how a judge is likely to see the issue. Otherwise, your client may not be able to understand that they have major risk.” Schwartz (Assurant) agreed that it would be acceptable for a mediator to say a case might come out this way or that in the caucus room, but not in joint session.

As for a mediator meeting with her clients alone, Tullier explained that she does not like to cede control, but if it was right in a particular case she would consider it.

The impact of different cultures—corporate or geographic—on the use of mediation in business

For some companies, corporate culture drives the nature of dispute resolution. “Having been an assistant US Attorney and a litigator, I like to fight and I want to win,” Moss (Estee Lauder) explained. “But, in a company like Estée Lauder, where the company was founded by family, their name is on the product and they often have contracts with celebrities or models, one wants to handle disputes in a certain graceful and elegant way—not the traditional litigation culture. So the idea of mediation, or arbitration, is positive in that regard.” Moss added that where principle is involved, and in certain cases that might be alleging discrimination, for example, the company certainly would have no hesitation in litigating.

Always better than a more formal, less flexible, dispute resolution process

“With B2B mediation,” Hernandez (Fluor) concluded, “the typically rational business people you’re dealing with understand that a more formal dispute resolution process, even if it’s arbitration (which is still better than litigation) is not what they want to do.

The ADR provision in a contract

Whether in mediation or arbitration, how do in-house counsel protect themselves at every stage, beginning with negotiations, and in every situation, from domestic to international? What is the best way to approach the dispute resolution clause if you are invited to send the first draft? What if the other party doesn’t agree with anything you’ve suggested, be it language, seat, applicable law, etc? How flexible should a party be on those topics? Which ones should be deal-breakers?

As summed up by Tullier (Visa), “This kind of mindset and preparation is especially important. As in-house counsel, our jobs are to be proactive and address risks. When we’re doing agreements, great dispute resolution provisions are fundamental. In a prior role overseas, I noticed that we didn’t have a consistent approach to dispute resolution, and I learned a lesson the hard way early, when I received a surprisingly bad result in a foreign court. I should have had a good arbitration provision! So we set out to create a dispute resolution ‘playbook.’ It was thoughtful and detailed and regionally driven. For example, the provisions vary in Asia versus Europe. I recommend that in-house legal teams work with CPR to develop a pre-set defined approach to possible scenarios, including negotiating tactics, e.g., if the other party won’t accept x, try y and then z, and in this instance, you’ll have to go up the chain of authority to get sign off, etc. This kind of game-plan takes some time, but is definitely worth it.”

CPR’s recently released *Corporate Counsel Guide to Cross-Border Arbitration* provides exactly such an every-possible-scenario “game plan” in the arbitration context.

Final words of Wisdom

Clients and outside counsel often do not spend enough time thinking through the ADR process. Our panel discussion showed that careful planning at the time the ADR provision is negotiated, the selection of the neutral and the conduct of the ADR proceeding are critical. They require a great deal of thought and preparation, especially as ADR, and mediation in particular, becomes more and more prevalent.

Mitchell J. Auslander is co-chair of the insurance & reinsurance: dispute resolution and counseling practice group at Willkie Farr & Gallagher, a member of The CPR Institute. The business roundtable he moderated, featuring several CPR corporate members, was a part of CPR’s 2017 Annual Meeting in Miami.

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