

## We'll (Virtually) Always Have Paris: An Online Adventure in Cross-Border Mediation

By LORRAINE BRENNAN

### Cultural Competency Opens Dispute Resolution Doors

Imagine my great delight when I was chosen to co-mediate a large matter in Paris, France. I've never missed a chance to visit my favorite city. The mediation would be multi-party, bilingual and multicultural, and would require three mediators. After thanking my lucky stars that I defied my engineer father and majored in French literature at Cornell instead of something "practical" (I was right about having no adult use for trigonometry as well), the planning to work out the logistics (no small undertaking) began.

Enter COVID-19. While the parties initially wanted to delay the mediation until things improved, the federal judge in charge of an enormous mass tort litigation related to the mediation ordered that we complete the mediation by the end of March 2020.

There was only one option: virtual mediation. I was disappointed and skeptical. At that time (which feels like ages ago),

all the other complex cases I had mediated had been in person, and I felt that talking to the parties directly and being able to look them in the eye and observe their body language was important.

### Communication, Preparation and Specialized Tech Tools Clear the Way

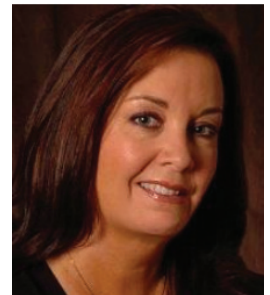
Despite my initial misgivings and those of others, we forged ahead. We went back and forth on which platform to use, ultimately deciding on Zoom. The other mediators and I had several planning calls before the mediation took place. This was not only necessary to make sure we were on the same page, but it also allowed me to develop a collegial relationship with my two French co-mediators. Luckily, we got along quite well and were able to work together as a real team. We generated a list of questions for the parties to answer beforehand to identify the relevant issues. One of the mediators took charge of the Zoom logistics and created at least six breakout rooms for the different parties and the mediators. The

parties received daily emails with instructions for participating in the mediation.

### Patience, Flexibility and Solid Contingency Plans Keep Everyone on the Learning Curve

The parties were in different time zones and spoke different languages. A typical 9-to-5 mediation would not work. When we began, Europe had not yet moved to daylight saving time, but a week into the proceedings, the time difference was six hours. That meant some early mornings for the Americans and some late nights for the Europeans, but generally, no one complained, at least not during the sessions themselves.

We had parties that spoke English only, parties that spoke French but little or no English and parties that were bilingual/multilingual. To accommodate this, we used a remote simultaneous interpreting program.



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Each party could listen to the mediation in either English or French. While there were a few glitches and a few people who had to be reminded to speak more slowly, for the most part it worked out quite well. I did not need the English translation, but when I spoke, I did so in English. This was because I am far more articulate in English, especially with specific business terms, and because there were so many parties on the line that spoke English.

After several weeks of mediation sessions, I came away with the following takeaways:

### **1. Virtual Dispute Resolution Platforms Actually Work**

While in a perfect world I believe it is preferable to have all of the parties in the same place, the online format worked quite well. It was easy, and costless, to set up as many private and confidential virtual breakout rooms as were necessary to accommodate the parties and their counsel. The mediators were able to move quite easily between these various virtual breakout rooms, and we went to our own dedicated room when we needed to talk among ourselves.

### **2. Adapting to Remote Platforms Comes Naturally**

There were no major technological glitches that would deter me from using this format again. A few phones rang, and a few calls got dropped, but these things happen in in-person mediations too. The key to success

was having multiple channels of communication and clear back-up and contingency protocols.

### **3. Online Technical Solutions Provide Ease and Efficiency**

The online live translation service generally worked well, saving us from needing to have translators present for the mediation.

### **4. “Mediating from Home” Saves Everyone Time and Money**

The cost savings were significant. There were no costs associated with airfares, hotels, meals, etc. Because everyone was appearing from their home or office, there was little disruption to their lives. As the COVID-19 pandemic continued to grow, we realized that we probably would not have been able to return to the United States had we held the mediation in Paris.

### **5. Screen-Based Interfaces Encourage Active Engagement**

The parties were conscientious and actively participated. Everyone was paying attention, and everyone had the chance to intervene if they chose.

### **6. Online Mediation Can Provide Progress in Global Conflicts**

After three weeks of meaningful exchange, the parties (and mediators) concurred that it was still premature to talk settlement. Pending litigation needed to progress, and additional information needed to be shared. Although this determination led us to “suspend” the mediation, we left the door open to returning to the process in the future.

### **Keep Your Webcams Ready and Never Say Jamais!**

While I missed out on indulging in *pain au chocolat*, a Kir Royale and some great window shopping, I believe the decision to proceed online was best for the parties. One of the benefits of mediation is that skilled mediators can help ensure there is ample space for conversations to continue. The fact that this could happen across cultural differences and without expensive airline tickets or disrupted schedules is even more promising for the future role of remote cross-border mediation. As for Paris, it will always be there, and hopefully, I will revel in its beauty and elegance before too long.

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