

## 6 Key Factors For Successful Cross-Border Dispute Mediation

By **Peter Kamminga** (September 22, 2023, 2:23 PM BST)

In the realm of dispute resolution, mediation has become a prominent tool in navigating the turbulent waters of complex business disputes. In the U.S., countless high-stakes cases have found their resolution through this method.

However, as the global landscape shifts and the need for efficient and cost-effective resolution intensifies, the call for mediation in disputes involving a U.S. party as well as European and U.K. parties, and those brought in foreign jurisdictions, grows louder.

To succeed in this endeavor, one must decipher the unique parameters that govern success beyond U.S. borders and chart a new course of action.



Peter Kamminga

### Evolving Landscapes

The expansion of mediation's purview beyond the boundaries of the U.S. can be attributed to a confluence of factors that have merged into a perfect storm of transformation.

The rise of class action laws in various jurisdictions, echoing the U.S. model, has thrown open the floodgates for a deluge of mass damage claims that once seemed inconceivable.

A shining example is the Dutch Collective Mass Damage in Class Actions Act, or WAMCA, introduced in its current form on Jan. 1, 2020, which has ushered in a wave of class actions in the Netherlands against international corporate giants, causing reverberations in the realm of Big Tech.

This trend has extended across the pond to the U.K., the latest example of which is a £500 million (\$620 million) class action brought by British consumers in July against Apple Inc. and Amazon.com Inc., claiming collusion to unjustly inflate product prices.

Days later, a \$1 billion proposed class action was brought against Apple in antitrust court, further intensifying the ongoing battle between the tech behemoth and app developers over the iron grip of the App Store in the U.K.

Simultaneously, foreign courts assert their newfound roles and develop themselves as fora for global collective investor actions.

After laying down the legal groundwork, European courts, which were historically reticent to venture

into the domain of large-scale cases, are boldly affirming their presence.

The pages of legal history now record instances like the Dutch collective investor action against Petroleo Brasileiro SA, known as Petrobras, where a Rotterdam district court, in a recent ruling, found in favor of the Stichting Petrobras Compensation Foundation, finding that Petrobras had indeed misled investors by disseminating deceptive financial information.[1]

After the U.S. Supreme Court issued its ruling on June 24, 2010, in *Morrison v. Australia National Bank*[2] and, in many instances, removed the option for global investors to bring their claims to U.S. courts, a continuous debate has arisen about whether a court in a different jurisdiction could settle collective investor actions, further paving the way for a surge in class actions across international borders.

The case *Laydon v. Coöperatieve Rabobank UA*, which was decided by the U.S. Court of Appeals for the Second Circuit on Oct. 18, 2022, is a recent instance involving European banks embroiled in allegations of manipulating benchmark interest rates stands as a testament.[3]

The Second Circuit's pronouncement that the claims brought by a proposed class of investors are predominantly foreign — even though the conduct in question happened inside the country — as well as the question of how to determine when claims are predominantly foreign, is currently in front of the Supreme Court. [4]

As these monumental matters navigate the labyrinth of legal proceedings, the natural progression is toward attempts at settlement, including via mediation.

The call for resolution becomes resounding as parties seek to untangle the complex web of disputes that span borders. Signs of growth are evident, particularly in countries like the Netherlands, which has established itself as a hub for cross-border matters.

### **Cross-Border Matters That Lend Themselves to Mediation**

Amid evolving landscapes and contentious legal battles, a diverse range of cases finds their way into cross-border mediation.

One prominent category is insurance disputes. These disputes often involve substantial sums and intricate issues.

For instance, the 2018 mediation case *Fortis v. Ageas* led to a €1.3 billion (\$1.4 billion) settlement, the largest sum in a European investment case under WAMCA, formerly known as WCAM. The *Fortis* case resolved an underlying coverage dispute, resulting in an additional settlement worth several hundred million euros.[5]

Furthermore, cross-border mediation is a mechanism for resolving financial disputes, particularly those concerning international investments, securities, banking and complex financial instruments.

Another area where it is applied is the intricate landscape of international construction disputes, where projects span borders and complexities arise from contracts, delays, quality concerns or payment issues.

The stage is also set with high-profile bankruptcy cases, and the intricate maze of complex professional liability matters involving insurers. Frequently, these disputes unfurl their wings on the international

stage, drawing parties and insurers from diverse jurisdictions into the fold.

As class action laws evolve globally, cross-border disputes involving consumer rights, antitrust violations and mass damage claims may turn to mediation.

## **Unveiling the Challenges**

While mediation has been a popular mechanism for achieving resolution in the U.S., the landscape of cross-border and European disputes diverges markedly from the U.S. experience and presents some unique challenges.

### ***Cultural Diversity and Mediation***

One of the most profound challenges in cross-border mediation is the amalgamation of diverse cultures, legal systems and negotiation styles. What is acceptable in one country might be perceived entirely differently in another.

The art lies in fostering an environment where parties feel heard and understood despite the vast cultural differences that may exist.

### ***Heterogeneous Legal Landscapes***

The legal terrain in different countries presents a formidable challenge. While mediation has gained momentum, the legal frameworks that underpin it can vary significantly. This demands a nimble approach, where both attorneys and mediators navigate the legal intricacies and help parties find common ground.

Mediation strategies that flourish in one jurisdiction might require adaptation in another.

## **Challenges of Embracing Mediation**

A common challenge in cross-border mediation is the resistance encountered in certain jurisdictions.

In some cases, parties perceive mediation as a sign of weakness or unfamiliar territory, leading to reluctance to adopt this resolution method. Overcoming this perception necessitates highlighting its successes and portraying it as a pragmatic choice rather than a concession.

Financial considerations play a significant role in steering parties toward a specific resolution method in cross-border disputes.

Mediation often emerges as a cost-effective alternative in the U.S. where litigation costs can skyrocket. However, in jurisdictions with relatively lower litigation expenses, this may be less of a driver.

Overcoming this challenge demands an exploration of potential long-term advantages of mediation, which can include swifter resolutions, preserved business relationships and reduced reputational risks.

## **Practical Steps for Success**

For legal professionals venturing into the realm of cross-border mediation, success hinges upon a deep

understanding of the nuances, strategies and practical steps that propel this complex process forward.

As the boundaries of traditional litigation expand, lawyers equipped with the right tools and techniques can wield cross-border mediation as a potent weapon to secure favorable resolutions for their clients.

This road map delves into practical steps and strategic arguments tailored to legal practitioners, empowering them to navigate the intricacies of cross-border mediation effectively.

Lawyers can consider the following practical steps:

### ***1. Cultivate Cultural Competence***

The bedrock of effective cross-border mediation lies in the cultivation of cultural competence.

Legal professionals should dedicate time to comprehending the cultural nuances that underpin the parties involved. This understanding serves as a bridge, allowing mediators to connect seemingly disparate worlds and foster an environment of genuine mutual understanding.

It enables legal practitioners to anticipate potential pitfalls arising from cultural differences and devise strategies that harmonize these distinct perspectives.

By recognizing the significance of cultural competence, lawyers and mediators can facilitate a mediation process that transcends borders and resonates with all parties involved.

### ***2. Tailor Your Approach***

In cross-border disputes, a one-size-fits-all approach simply won't suffice. Legal professionals must craft mediation strategies that are finely tailored to each jurisdiction's legal and economic contexts.

Flexibility becomes the bedrock of success, allowing lawyers and mediators to seamlessly adapt to the unique needs and expectations of parties spanning multiple borders.

It is imperative to delve deep into the intricacies of local laws, regulations and precedents, as they form the tapestry upon which mediation unfolds.

By customizing their approach, lawyers and mediators can navigate cross-border disputes with finesse, ensuring that every strategy is meticulously aligned with the distinct legal landscapes in play.

### ***3. Informed Decision Making***

Legal practitioners serve as essential advocates, equipping themselves with a nuanced comprehension of both the advantages and disadvantages of this dispute resolution method.

To enlighten clients effectively, it helps to share real-world success stories and examples when the mediation did not lead to a resolution, demonstrating how cross-border mediation can expedite dispute resolutions or not; when it led to significant cost savings and where not; and when it did and did not preserve valuable relationships, and safeguard reputations.

By presenting a balanced approach, legal professionals guide clients toward viewing it not merely as a

legal mechanism but as a strategic tool if aligned with their broader objectives.

A well-rounded understanding of cross-border mediation, its benefits, drawbacks and its strategies is crucial for making informed decisions in the complex landscape of international dispute resolution and is needed for success in this field.

#### **4. Master Communication**

Communication is the cornerstone of effective representation in mediation, and in the cross-border realm, it becomes even more pivotal.

Legal professionals should hone their communication skills to transcend language barriers and ensure that positions are clearly articulated.

Effective communication serves as a conduit for mutual comprehension, enabling parties to traverse the complexities of cross-border disputes with greater ease.

#### **5. Forge Alliances**

The strength of a united front cannot be underestimated in cross-border mediation. Legal practitioners should actively collaborate with other legal professionals and stakeholders who share a common vision for mediation's efficacy.

Creating a robust support network amplifies the message of mediation's potential and enhances its credibility.

By forging alliances with like-minded individuals, lawyers can instigate a ripple effect that influences both clients and the legal community at large, propagating the understanding that cross-border mediation is a potent strategy worthy of exploration.

#### **6. Embrace Technological Tools**

In an era where geographical distances are increasingly irrelevant, virtual mediation sessions enable parties to be separated by vast distances.

Embracing technology enhances the efficiency of cross-border mediation and aligns with the contemporary expectations of a digital-savvy world.

Lawyers who embrace these tools demonstrate adaptability and foresight, creating a seamless platform for cross-border dispute resolution.

As the legal landscape evolves and the demand for cross-border mediation rises, legal professionals armed with these practical steps and strategic arguments hold the key to unlocking the true potential of this transformative process.

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***Disclosure: The author acted as one of the mediators in Fortis v. Ageas.***

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