

Seven Reasons Why You Should Mediate Cross-Border Disputes Now

By PETER KAMMINGA, ESQ.,
PH.D.

In many parts of the world, businesses are moving closer to what seemed like a normal world before COVID-19. Companies are starting to switch out of survival mode, picking up where they left off, and even exploring new opportunities. However, forging a path forward means mending relationships and resolving conflicts that resulted from the pandemic and may have been lingering for months.

Mediation offers a path to resolution in cross-border disputes, lends itself to repairing damaged relationships, discussing ways forward for the future, resolving problems from the past, or reaching a clean and swift mutual ending with appropriate damages.

Doing business across borders has unique challenges, and resolving the disputes that may arise across jurisdictions is perhaps even more challenging. Legal, cultural, and even political issues can affect such conflicts and add additional hurdles and complexity. All the more reason to be on the lookout for the most efficient ways to resolve these disputes.

Here are seven reasons to mediate cross-border claims.

1) Resolve so you can rekindle and grow.

Damage to relationships caused by late delivery or failed performance of a promised service can be significant. In a recent matter, a large computer company blamed a business partner for the loss of millions of dollars resulting from hacking due to failed cybersecurity protections. At the same time, the supplier had a solid and well-oiled relationship with other departments. Ending the collaboration would mean starting over, finding new suppliers and investing the associated cost and time—a potentially disastrous requirement where both were eager to rebuild and grow. Too much had happened between the parties to reopen discussions, so they opted for mediation. This allowed them to isolate the hacking experience, keep it private, and find solutions that allowed the relationship to continue.

2) Move on smoothly with as little pain as possible.

A small, family-run startup suddenly took off when its products were shown being used by celebrities in their Instagram posts.



This meant a sharp increase in scale of production and led to the onboarding of professional management. The startup wanted to replace its supplier with a company that was larger and more sophisticated. The parties opted for mediation, which allowed them to have discussions that facilitated terminating the contract with the small supplier and helped all parties to work through the disappointment and legal issues. They negotiated a settlement that allowed them to move on swiftly and continue in other directions.

3) Avoid the legal minefield of cross-border claims.

A dispute involving investor entities and accounting firms

in different countries promised to be a lengthy process. It was unclear where to sue, as courts in all jurisdictions were backed up, multiple government agencies were involved, and hundreds of millions of dollars were at stake. Before the dispute escalated, the parties decided to try mediation. This pivot consciously lifted the conflict out of the uncertainties of legal proceedings and allowed for a risk-analysis and business focused discussion instead.

4) Prevent destructive all-or-nothing scenarios.

In another matter, one party wanted to end a long-standing contract and go in a different direction. The other party, a distributor, was in dire situation and ready to fight to the end. The distributor had made large investments, and due to COVID-19 with stores closed in Europe had missed out on income. The distributor had invested a great deal in the relationship and missed the signals that it was about to end. A settlement allowed the distributor to avoid bankruptcy, providing just enough financial relief for it to get by. It also gave both parties a sense of pride for having settled their dispute and avoiding litigation with their reputations intact.

5) Limit the fallout and unpredictability of cross-border insolvency.

A major energy company with U.S. directors and European operations went into bankruptcy. Relevant U.S. and European

bankruptcy laws swirled in a perfect storm to create uncertainty regarding: how things would turn out, how long the proceedings would take, and even what risks of arrest or personal jurisdiction consequences may attach with travel to targeted countries. Mediation gave both sides, and particularly the directors, a foothold and peace of mind by significantly reducing the potential exposure of billions of Euros through a successful agreement that narrowed the gap through bracketed negotiation.

6) Use a cross-border mediator to adjust the process.

A dispute arose between two parties regarding the interpretation of a contract. After a promising start to mediation, trust was quickly eroded, which threatened to end the parties' mutually lucrative relationship. The mediator was able to design a hybrid process that gave space to each side's expectations and needs by incorporating a litigation-like opening session followed by a more informal personal meeting between principals. This customized process provided transparency to how the relationship was perceived from both sides and led to the creation of a set of new terms and dispute escalation mechanisms to deal with issues going forward.

7) Resolve disputes now before it's too late.

Delivery problems and stalled or slowed operations in different

countries have created situations where sellers and buyers are in a holding pattern. The magic of this moment of relative stasis can be leveraged to all parties' advantage. Engage in mediation while there is focus on and eagerness to settle disputes, and before attentions are drawn to more pressing concerns.

There is no reason not to resolve matters now. Mediation of cross-border disputes can continue throughout the globe, even when circumstances are constantly changing.

Peter Kamminga, Esq., Ph.D. is a full-time JAMS panelist with 20 years of experience as mediator, arbitrator and resolver of complex disputes in the U.S., Europe, and globally. He has a track record resolving a wide variety of disputes including contentious cross-border, commercial, banking and financial market, cyber, construction, and energy conflicts. He can be reached at pkamminga@jamsadr.com.

