The Soul of Franchising

GLOBAL DISPUTE RESOLUTION

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INTRODUCTION

- Why international dispute resolution matters
- Why preparation is important
- Goals of this presentation
Negotiation: International Aspects

- Means
  - Face to face meeting
  - Video or phone conference
- Venue
  - Franchisor’s v. Franchisee’s office
  - Neutral location?
- Language
### Key Differences Distinguishing International Mediations

<table>
<thead>
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<th>National Mediations</th>
<th>International Mediations</th>
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<tbody>
<tr>
<td>• Common culture/nationality</td>
<td>• Different cultural backgrounds</td>
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<tr>
<td>• Common language</td>
<td>• Language barrier</td>
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<tr>
<td>• Mediator likely from same country as</td>
<td>• Mediator from country of either party,</td>
</tr>
<tr>
<td>parties</td>
<td>or no party</td>
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- Venue
  - Convenient to parties & mediator
  - Venue determines mediator and vice versa
  - Local applicable laws

- Language

- Nationality of mediator

- Institutional v. ad hoc mediation
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  - FAA limits vacatur grounds
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    » Is there mutuality?
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- Lawyer representing employer states that adding an employee benefit will cost an additional $100 per employee. In fact, it will cost $20 per employee.

- Rather than state a figure, the lawyer simply says providing the benefit would be “far too expensive.” The employer is having a record year in profits.
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- Lawyer fails to prepare a mediation statement
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- Enforcement of Settlement Agreement
  - Recording into judgment or award
  - If judgment: treaties on enforcement (in Europe: Brussels I Regulation)
  - If arbitral award: New York Convention
1958 New York Convention

- Contributes to arbitration being the preferred binding mode of resolution
- 155+ countries
- Exhaustive grounds for refusal of recognition and enforcement
Seat of Arbitration

- Determines the competent court for “supervision” of arbitration
  - Appointment and removal of arbitrators
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  - Annulment of award
  - Determines the lex arbitri
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• Choice of arbitrator
  – Nationality v. Expertise & Competence
  – Limited substantive requirements

• Freedom of choice of counsel
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GLOBAL DISPUTE RESOLUTION

I. INTRODUCTION

Franchisors are increasingly expanding internationally. Along with that expansion come a host of complex issues related to international dispute resolution. While franchisors almost uniformly include a variety of clauses in their franchise agreements that address formal dispute resolution processes, in many instances it may be more practical and cost-effective for the franchisor to seek to resolve disputes through informal channels such as negotiation or mediation. The franchisor may require that these informal dispute processes be exhausted prior to arbitrating the matter. This paper will explore international negotiation, mediation, and arbitration and explain the strengths and weaknesses of these forms of dispute resolution. A goal of this paper is to explore common pitfalls that international franchisors can avoid in using these alternative dispute resolution processes. Franchise lawyers should be familiar with issues discussed here before attempting to use one of these processes in the international context.

II. NEGOTIATION

A. Definition

Negotiation is inherent in any social relation, including any business relation. As Fisher & Ury eloquently noted: “Everyone negotiates something every day. Like Moliere's Monsieur Jourdain, who was delighted to learn that he had been speaking prose all his life, people negotiate even when they don't think of themselves as doing so. A person negotiates with his/her spouse about where to go for dinner and with his/her child about when the lights go out. Negotiation is a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.”

In the context of franchise relationships, negotiation will typically occur at distinct stages: the first one is the pre-contractual stage, when the franchisor and the prospective franchisee try to agree on the terms of the franchise agreement; the second stage is when the franchisor and franchisee disagree on any element of their existing relationship. Depending on the importance of such disagreement, it may become a dispute which the parties will usually attempt first to resolve through direct exchanges or through their legal counsel but without the intervention of a “neutral” third party (being a mediator, an arbitrator or a court).

Therefore, negotiation is usually the very first method of resolving disputes, both in terms of chronology and importance.

B. International Aspects

When a dispute involves opposing parties coming from different countries, its international character requires addressing two specific questions: the venue of the negotiation session(s) and the language of the negotiation.

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1 ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN 6 (2d ed. 1991).
1. **Venue**

Venue may be a sensitive issue: if the franchisor is located in the U.S. and requires that the franchisee travels to its headquarters for a negotiation, this will invariably cause the franchisee (who often is the economically weaker party) to incur significant travel and accommodation expenses, and may create a feeling of imbalance that will negatively affect the spirit of the negotiation or even prevent it from taking place.

Therefore, the first question to be asked is: is it necessary to conduct negotiation by means of face-to-face meetings?

In the age of e-mails, videoconference, Skype, etc, it seems that many disagreements can be resolved without the need for a physical meeting between the parties. Therefore, the franchisor should exercise restraint before compelling its franchisee to travel from far away for a negotiation meeting. Physical meetings should be reserved for crucial negotiations or last chance attempts to resolve a dispute, if emails, phone calls or video conferences prove inefficient.

If a meeting is necessary, the parties should consider several options for its location.

A first consideration is that, given that negotiation is an informal means of resolving a dispute, there is no procedural advantage to be drawn from locating the negotiation session in a neutral country. If a meeting between the parties must take place, its location should therefore be determined primarily, if not exclusively, by the cost factor: where will such meeting be the most cost-effective for both parties?

Holding the meeting in a neutral country will probably be the least cost-effective approach, as it will require both parties to travel and incur accommodation expenses. However, if the parties must both travel to the same destination anyway (for instance, for attending an international franchise trade fair), they should of course take advantage of it. Therefore, it may be worthwhile postponing (if possible) the meeting so as to make it coincide with an event that both parties have planned to attend.

Another cost-effective option is to schedule the negotiation session at a time when either party must be at, or near, the other party’s location: if, by the terms of the franchise agreement, the franchisee must travel to the franchisor’s headquarters to attend a training session or participate in a franchisees’ council, it may make sense to organize the negotiation meeting immediately before or after the event. Similarly, if the franchisor organizes a training session in the region of the franchisee, it may be appropriate to couple the negotiation meeting with such session.

If a meeting must take place at the location of one of the parties, this may, as already noted, create a perceived imbalance between the parties, only one of whom has to bear travel and accommodation expenses. Such imbalance will not always hamper the negotiation process, as there might be instances where a party will agree to travel and bear the related costs, simply because of its strong interest in having the dispute quickly resolved. Therefore, it may be appropriate for the franchisor to request the franchisee to travel to its headquarters, especially when the franchisee is on the demanding end of the negotiation. Conversely, if it is the franchisor that is more on the demanding end, it may be more reasonable for it to travel to the place of the franchisee and bear the associated costs.
In many instances, however, and as already noted, the party required to travel may feel some frustration at the imbalance of the situation. The parties should therefore think of possible solutions for minimizing such negative emotions.

One possibility is for the franchisor to agree that the meeting will take place outside of its offices, for instance, in a meeting room in a nearby hotel or business center, or at a law firm (even if no outside counsel attend the meeting). In such case, it would seem normal for the franchisor bears the cost (if any) of renting the meeting room.

Another possibility is for the franchisor to agree to reimburse part of the travel expenses incurred by the franchisee. While it is admittedly quite unusual for a party to propose to cover (part of) the other party’s travel and accommodation expenses incurred for the purpose of participating in a meeting, a more attractive option is to link the reimbursement of the franchisee’s travel and accommodation expenses to the successful outcome of the negotiation. Alternatively, the franchisor may offer to compensate the franchisee’s costs, not by reimbursing them, but by making a substantive offer or concession in case of positive outcome of the discussions.

As seen from the above, there is no hard rule for determining the venue of a negotiation session in an international dispute. The obvious concern is that the selected venue should be the one where both parties will feel most at ease, as this will be instrumental for the success of the negotiation. If one party is objectively advantaged by the selected venue, it should be ready to agree to some form of compensation for the other party, especially when the outcome of the discussions is positive.

2. **Language**

In principle, the fact that the parties are not native speakers of the same language should not raise considerable difficulties that will harm the negotiation process. Given that the process is informal, the only question in relation to language is to make sure that the parties properly understand each other, regardless of their proficiency in the language used.

Typically, when a dispute arises, parties have already been dealing with each other for a certain time (months or years) and have usually used one language for that purpose (most often English, which is nowadays the *lingua franca* of international business). In addition, the agreement is generally drafted in a single language. It is natural that a negotiation between parties attempting to resolve a dispute arising out of an agreement, be conducted in the language of the agreement.

However, depending on the importance of the disputed issue(s), a party may feel more comfortable in using its native language (different from that of the other party) in the negotiation. As a good negotiation requires that both parties feel at ease as much as possible, the other party should not object to the first party coming to the meeting with an interpreter.

Use of an interpreter is not without inconvenience: it results in extra cost to be incurred by one party; it makes the discussion less fluid; it extends the duration of the meeting; and, more importantly, it may create difficulties by causing a distortion of the party’s expression.²

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² As goes the famous Italian adage: *Traduttore, traditore* (translator traitor).
To the extent possible, a negotiation should, therefore, be conducted in a single language. If one of the parties does not have a sufficient command of that language, it will still have the possibility to ensure that any settlement agreement resulting from the negotiation be reviewed by a person (usually a lawyer) who has a good command of that language.

III. WHAT IS MEDIATION?

The essence of mediation involves a negotiation between the parties to a dispute that involves a non-biased third party who assists the parties in developing a mutually agreeable resolution. Mediation allows the parties to avoid the adjudicative process and instead craft an agreement that may involve more than just the narrow issue that gave rise to the dispute. One of the reasons why mediation allows for broader agreements is because generally mediation proceedings are confidential: information disclosed and positions taken are not allowed into evidence in subsequent court proceedings. In the franchise context, mediation most often takes place pursuant to the franchise agreement (generally pre-suit and likely as part of an escalating set of procedures) or is required in connection with ongoing litigation.³

A defining attribute of mediation is its sometimes free-wheeling atmosphere. The parties may not have exchanged formal discovery beforehand. In many mediations, it is the parties themselves, rather than their attorneys, who will do most of the speaking. Mediators frequently use a tactic popularly known as “shuttle diplomacy,” which involves the mediator traveling back and forth between the parties to discuss settlement offers and strategies. The mediator may wish to discuss a party’s legal position as a means to bring the party closer to a realistic settlement position, but the mediator will generally not evaluate the respective claims and defenses in litigation unless asked to.

Perhaps the most significant benefit of mediation is that it is relatively inexpensive. There are no formal procedural mechanisms, and thus the parties will not become engaged in significant arguments about issues having only collateral significance to the dispute.⁴

A. Goals of Mediation

First and foremost, the goal of mediation is to reach a settlement. It has been said that the mediator, like the attorneys, has a client: the deal itself.⁵ The deal likely is not going to be all of what one party wants; instead, the deal will often require mutual compromises that the parties can live with. This is particularly true in the world of international franchising, where franchisors would generally prefer to avoid costly international litigation and instead desire to salvage the parties’ relationship.⁶ Mediation is particularly well-suited to cooling tensions between the


⁵ Asbill, Jankowski, Leitner, & Meyers, supra n. 3, at 4.

⁶ See Paul Jones, Christopher Nowak, Karen Satterlee, & Frank Zaid, Enforcing International Agreements: Non-Litigation Issues, International Franchise Association, at 26 (2008) (explaining that, because of high litigation costs, “[i]t is common for an international franchisor not to pursue an international franchisee for breach of contract.”); Jennifer Dolman, Robert Lauer, & Larry Weinberg, Structuring International Master Franchise
parties because of its confidential nature. Both parties can air grievances without the anxiety and potential embarrassment that comes with a public, adjudicative process.\(^7\)

**B. Approaches to Mediation**

There are two primary approaches to mediation, facilitative mediation and evaluative mediation.\(^8\) These approaches are designed to do exactly what they sound like: the facilitative mediation is designed to facilitate settlement, while the evaluative mediation is designed to have an independent third party evaluate each party’s litigating position.\(^9\) Even in a facilitative mediation the mediator is likely to form an evaluation of the merits of a case. Some mediators are not shy about sharing these opinions and may try and beat one party into submission with them. Former judges are particularly suitable for performing this task as they have a unique perspective as to what a court may do if the case does not settle.\(^10\) On the other hand, the parties may seek a mediator that can propose creative solutions to resolve a dispute. In this event, the parties might consider seeking a commercial litigator to serve as the mediator.\(^11\)

**C. Topics of International Franchise Mediation and Negotiation**

Certain topics are more likely to be successfully resolved through mediation and negotiation than others. Disputes that involve a simple and straightforward contract breach (such as a failure to pay royalties) are unlikely to be resolved through these avenues. Negotiation may be better suited to those disputes where the franchisor has made policy judgments or exercised its discretion in a manner that allegedly harms the franchisee.\(^12\) The franchisee may complain that the franchisor has harmed its business by making X policy decision, but the franchisee’s true goal may be to get the franchisor to agree to Y. In this situation, negotiation (and also mediation) benefits the franchisee because there is at least a possibility the franchisor may agree to Y, even though, based upon the franchisee’s alleged harm, there would be no basis for a court order granting that relief.\(^13\)

A wide range of international franchise disputes have been submitted to mediation. The International Institute for Conflict Prevention and Resolution Negotiation has reported that issues that have been mediated pursuant to its program have included encroachment, underreporting of sales or other financial violations of the franchise agreement, development rights of the franchisee, termination or renewal of the franchise, and customer service.

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\(^{7}\) Dolman, Lauer & Weingberg, *supra* n. 6, at 38.

\(^{8}\) See Asbill, Jankowski, Leitner, & Meyers, *supra* n. 3, at 6.

\(^{9}\) Id.

\(^{10}\) Brimer, Dolman, Lindsey, & Metzlaff, *supra* n. 3, at 14.

\(^{11}\) Id.

\(^{12}\) Id.

\(^{13}\) Id.
There are a variety of specific reasons why mediation may be the best alternative in a given case. One example would be where a party is reluctant to submit to the jurisdiction of a foreign court. Mediation may also help to de-escalate disputes that are primarily fueled by emotion: the right mediator may foster a feeling of mutual cooperation, which contrasts with the overt partisanship seen in litigation proceedings.

D. **Key Differences Between Franchise Mediations Occurring in the United States and Those Occurring Internationally**

While perhaps obvious, the key difference between a mediation occurring in the United States and one occurring internationally are likely to be culture, language, and business practices between the parties. For instance, cultural differences may mean there are divergent views on the desirability of reaching a final, complete agreement. Some cultures may prefer the outline or shell of an agreement be reached at the mediation but then expect continued negotiation will occur after the mediation; other cultures may prefer a final agreement where continued negotiation is neither anticipated nor desired. Another consideration is that having a language barrier may also cause misunderstandings of the respective positions of the parties. Obviously the likelihood the parties speak different languages increases dramatically in international mediations. The mediator in an international mediation thus has the added responsibility of recognizing whether the parties understand what the other party is communicating.

### IV. ADVANTAGES OF MEDIATION OVER ARBITRATION AND LITIGATION

A. **Avoidance of Litigation or Arbitration Cost and Inconvenience**

Mediation is facilitated negotiation. As such, it is normally of shorter duration than arbitration or litigation and, thus, cheaper and more convenient.

B. **Less Confrontational Setting to Resolve Disputes and Preserve Commercial Relationships**

Adversarial resolution often damages the business relationship between the parties and becomes an obstacle to future commercial dealings. Mediation rarely has the same effect. Moreover, mediation has greater flexibility than arbitration or litigation to accommodate a solution tailored to the parties’ needs and expectations.

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14 Id. at 8.

15 Id. at 9.

16 See id.

17 See, e.g., Jiaqi Liang, *The Enforcement of Mediation Settlement Agreements in China*, 19 AM. REV. INT’L ARB. 849, at 509 (2008) (opining that, when Chinese business people are pressed to make an agreement, “they feel demeaned since they assume they are considered untrustworthy or unreliable.”).


19 Id.
C. Preserving Control Over the Outcome and Crafting Creative Compromises

Mediation keeps decision-making authority in the hands of the parties who best know the problems and issues instead of putting it in the hands of third parties.\(^{20}\) In the end, it is the parties who settle with each other and the mediator simply facilitates the settlement as opposed to deciding any issues.

D. Successful Track Record of Mediation

By most accounts, mediation has a high success rate.\(^{21}\) Success is measured by the percentage of mediation that ends with an enforceable settlement agreement. Some surveys show a 75% success rate.\(^ {22}\)

E. Reality Check on Perspectives in Litigation

Mediation gives the parties the opportunity to test their positions prior to adjudication. The parties may gain a better grasp of which arguments work best or are more persuasive. It will give the parties an idea of the strengths and weaknesses of their position.

F. Exchange of Information Prior to Arbitration or Litigation

Even without discovery, the parties receive information about the case of the adversary which is helpful if there is a need to litigate or arbitrate. The mediation process will assist in shaping a discovery plan and narrowing the issues for arbitration or litigation.\(^ {23}\) If the mediator allows some document discovery, the parties will know what documents to request and use in arbitration or litigation. On rare occasions, the parties may even use an expert to explain their position to the mediator, thus clarifying the technical issues of the case.

G. Set Stage and Parameters for Further Negotiation Down the Road if the Matter Does Not Settle or Reach Agreements Other than Settlement

Even if the case proceeds to litigation or arbitration, the mediation may serve as a basis to continue negotiations later at an appropriate time. If a minor issue remains unresolved at the mediation, a party may obtain information in discovery related to arbitration or litigation proceedings that convinces it settlement is best. Moreover, interim agreements other than a final resolution of the disputes may be reached such as, a pact to use arbitration instead of litigation to resolve the dispute.

H. Confidentiality

Mediation is supposed to be confidential. Mediating parties may agree on confidentiality of all mediation materials during the mediation and after the mediation is adjourned. However,

\(^{20}\) Id.

\(^{21}\) Id. at 313; see also Carolina Secondo, Why Not Mediation, International Bar Association, 7 DRI 159 (2013).

\(^{22}\) See also Stephen P. Younger, Symposium on Business Dispute Resolution: ADR and Beyond: Effective Representation of Corporate Clients in Mediation, 59 ALB. L. REV. 951, 960 (1996).

\(^{23}\) Id.
mediation is not free from confidentiality problems. Mediation laws do not exist in every jurisdiction. For instance, there is no uniform protection of confidentiality even in the U.S., where federal law only deals with the subject in a very general way leaving the protection of confidentiality to the courts. Thus, protection could be limited under certain circumstances. The various states have very different confidentiality regulations about mediation. Also, all mediation services have rules on confidentiality. Nonetheless, parties should have a binding agreement to supplement and expand what those rules and regulations provide.


See FDIC v. White, 76 F. Supp. 2d 736, 738 (N.D. Texas 1999) (the court allowed the use as evidence in court of statements made during mediation when one party argued that the settlement agreement was obtained under duress exerted by the mediator and the other party to the mediation); see also Molina v. Lexmark Int’l, Inc., No. CV 08-04796, 2008 WL 4447678, at *8 (C.D. Cal. 2008) (collecting cases). In the federal and state jurisdictions there are rules of evidence which exclude the use of compromise offers and settlement negotiations as evidence of liability. See e.g., Fed. R. Evid. 408.

Owen, supra n. 24 at 921.

For instance, Article 9 of the International Chamber of Commerce Mediation Rules (ICC Rules) provides:

1. In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law:
   a) the Proceedings, but not the fact that they are taking place, have taken place or will take place, are private and confidential;
   b) any settlement agreement between the parties shall be kept confidential, except that a party shall have the right to disclose it to the extent that such disclosure is required by applicable law or necessary for purposes of its implementation or enforcement.

2. Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings:
   a) any documents, statements or communications which are submitted by another party or by the Mediator in or for the Proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitral or similar proceedings;
   b) any views expressed or suggestions made by any party within the Proceedings with regard to the dispute or the possible settlement of the dispute;
   c) any admissions made by another party within the Proceedings;
   d) any views or proposals put forward by the Mediator within the Proceedings; or
   e) the fact that any party indicated within the Proceedings that it was ready to accept a proposal for a settlement.

I. **Shortcomings of Arbitration**

1. **Impact of adversary proceedings on ongoing commercial dealings**

   As previously noted, arbitration and litigation could cause the permanent interruption of a commercial relationship. Mediation brings parties together. Arbitration and litigation tends to push parties apart.

2. **Final arbitral decision with limited judicial review**

   Arbitration ends with an adjudication, but the possibility of correcting mistakes on appeal is extremely limited. For instance, the Federal Arbitration Act’s grounds for vacating an award are exceptional, such as bias, fraud, failure to decide all issues submitted for arbitration or deciding issues not so submitted, etc. \(^{28}\)

3. **Cost and delays to enforce arbitration clauses**

   Occasionally, the parties have to litigate in court the validity or scope of an arbitration clause prior to proceeding to arbitration. If one party wants to litigate in court instead of arbitrating, it will raise issues such as unconscionability, lack of mutuality or that the arbitration agreement does not cover the particular controversy between the parties. \(^{29}\) Although often disposed of in an expedited manner, such court battles may delay and raise the cost of dispute resolution.

J. **Particularly Fruitful Use of Negotiations and Mediation Versus Arbitration or Litigation**

1. **Disputes concerning fact-specific disputes or disputes which do not end the relationship**

   The type of dispute which is fact-sensitive and circumstantial, such as a claim for encroachment, is best suited for mediation. Disputes which involve tweaking a commercial relationship which will continue for a substantial period of time are ideal for mediation because the goal is to good environment for such a relationship. \(^{30}\)

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\(^{28}\) See 9 U.S.C. sec. 10.

\(^{29}\) If California law were applicable, for example, unconscionability and lack of mutuality could be at issue regarding arbitration. See **Nagrampa v. MailCoup Inc.**, 469 F.3d 1257 (9th Cir. 2006). If the applicable law were Puerto Rico’s Dealership Act, **Law 75 of June 24, 1964, P.R. Laws Ann. §278, et seq.**, the standard applied would be whether the arbitration clause is enforceable under Puerto Rico law applicable to all contracts. Defenses against arbitration may be contained in the law of any foreign country including signatories to the New York Convention which allows reservations to its application.

2. **Disputes which are not covered by the express terms of the agreement but rather involve the application of equitable considerations and good faith**

Mediation is appropriate in cases involving particular circumstances which do not impact general contract interpretation such as, for example, a dispute regarding the transfer of an ownership interest in a franchisee to someone that the franchisor does not find acceptable. Moreover, it may be wise to mediate even if the issue has some precedential or system-wide importance when there is a substantial danger of not prevailing because the dispute involves bad facts. Where the confidentiality of arbitration should in principle avoid the risk of creating a harmful precedent, such risk cannot be avoided if the dispute is litigated.

3. **When the basis for the opposing party’s position is obscure**

When the parties do not have key information to defend their position, mediation may help clarify the adversary’s position. It is possible to request information from the adverse party through the mediator to aid in such clarification.

4. **When the opposing side has more resources to arbitrate or litigate**

If the adversary has more resources and, thus, can defray litigation or arbitration expenses with ease, the mediation has an equalizing effect which benefits the weaker party.

V. **DISADVANTAGES OF MEDIATION**

A. **Extra Cost and Time Invested With Little to Show for it if Unsuccessful**

If the mediation does not succeed, then the expense of mediating becomes an added expense for both parties.

B. **When the Prospect of Settlement is Dim Because of Bad Faith or Otherwise**

When one party has no real interest in negotiating a solution or is acting in bad faith, mediation just adds to the cost of resolving the dispute.

C. **When Temporary Injunctive Relief or Other Immediate Relief is Necessary**

If any party is interested in obtaining emergency temporary relief, mediation could be an unwanted delay. Certain interim remedies may be carved out of the mediation clause so that a party is allowed to obtain such relief despite compulsory mediation.

D. **When a Party Needs to Establish a Legal Precedent**

Sometimes one or both parties wish to create a favorable precedent because there are other possible claims waiting in the wings. This happens, for instance, when the dispute

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31 *Id.* at 5.
32 *Id.* at 5.
33 *Id.* at 296.
involves an issue applicable to the whole system such as, for instance, a dispute over the use or control of an advertising fund.

E. When Necessary Information is Withheld or Distorted

Distorting facts or withholding necessary information from the mediator could constitute bad faith. It may be impossible to mediate meaningfully if one party refuses to provide key information regarding the dispute which the other side does not have. For instance, consider a dispute where the franchisee seeks an audit regarding royalties or ad fund contributions. If the information is only in the hands of one party, the other party would not be able to dispute the withholding party’s position. The party without information would simply be flying blind.

VI. DRAFTING EFFECTIVE MEDIATION CLAUSES

A. Applicable Laws and Regulations

It is important to consider which law will be substantively applied to the controversy being mediated. If the controversy is based on a contract and the contract has a choice-of-law clause, any evaluation of the case will depend on the application of the chosen law. In the absence of a choice-of-law clause, be prepared to argue which law applies unless the parties can agree on the issue. Moreover, it might be advisable to contractually require that the mediator be versed in that law and even the language in which it was originally written.

The enforcement of any settlement agreement reached in mediation will depend on the law of the country where it will be enforced. The applicable law will affect important matters such as confidentiality, provisional relief and statute of limitations.

For U.S. franchisors, the issue would be whether the chosen law would allow enforcement in the target foreign country. In arbitration, there is an international treaty (the “New York Convention”) which facilitates enforcement. Some countries have signed the New York Convention with certain reservations.

For instance, China “will apply the Convention only to differences (disputes) arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.” In other words, only awards involving contractual relationships which are accepted under Chinese commercial law will be enforced. The enforcement of settlement agreements pursuant to mediation could also be prevented by Chinese law.

Thus, it is important for U.S. franchisors to ascertain, at the time the mediation agreement is executed, the conditions under which such an agreement will be enforced in any foreign country, including the possible application of any bilateral or multilateral treaties which might affect the dispute. Even signatories of the New York Convention, may decide not to

34 Id.
37 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. There are other important treaties on the subject of international arbitration such as the Inter-American
honor an arbitration award if it is contrary to its public policy.\textsuperscript{38} Again, the same goes for any settlement agreement whose enforceability would hinge on the applicable law of the target country.

Also, some mediation services have rules of mediation which provide that the law applicable to the mediation shall be the law of the jurisdiction where the mediation takes place.\textsuperscript{39} It is advisable to check the rules of the chosen mediation service to avoid any unpleasant surprises. Normally, franchisors include choice-of-law clauses in their franchise agreements, which presumably override the choice of law of a mediation rule.\textsuperscript{40}

\textbf{B. Mandatory or Optional}

Sometimes mediation is court mandated or required by contract. Either any applicable legal provisions or the contract between the parties will determine whether the mediation is compulsory although, of course, no one is obligated to agree to settle any controversy. It is likely more advantageous to include a mandatory mediation provision in the franchise agreement than an optional one because it directs the parties to engage in negotiations prior to litigation and increases the prospects for early resolution of controversies.\textsuperscript{41} Mandatory mediation forces a cooling off period on both parties.\textsuperscript{42}

Mandatory mediation avoids the first-to-file pressure. If any party files in court without mediating, however, U.S. courts have disagreed about whether the other party may request dismissal or stay for failure to mediate.\textsuperscript{43} It might be advisable in some circumstances to combine mandatory mediation and mandatory arbitration in the U.S. This would likely ensure dismissal or stay of any court proceeding, pursuant to the Federal Arbitration Act.\textsuperscript{44} Again, bear in mind that arbitration awards must be enforceable (whether the New York Convention applies or not) and, likewise, settlement agreements obtained in mediation must also be enforceable in the target country.\textsuperscript{45}

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\textsuperscript{38} Id. at Article V.
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\textsuperscript{39} See Article 17 of the JAMS’ mediation rules, http://www.jamsadr.com/international-mediation-rules; then follow Appointment-of-the-Mediator.
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\textsuperscript{40} In the United States, some state relationship statutes prohibit choice-of-law and/or choice-of-forum clauses which require the application of the law of another jurisdiction or require transferring the case to another forum.
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\textsuperscript{41} Klarfeld, supra n. 30, at 12.
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\textsuperscript{42} Id.
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\textsuperscript{43} Id.
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Mandatory mediation often benefits franchisees more than franchisors because often franchisees are less able to withstand the cost of litigation. But, as we have seen, there are also many instances when franchisors stand to benefit from disposing of disputes quickly in mediation.

C. Coverage

Once both parties decide that mediation is appropriate, both parties would benefit from crafting the mediation agreement as broadly as possible in order to avoid any litigation concerning which disputes might be covered. The broadest possible language would provide that “all claims between the parties shall be mediated.” A narrower clause would be preferred only if a party wants to exclude any particular kind of dispute. For instance, the clause could be limited by providing that “all claims between the parties shall be mediated except intellectual property disputes and matters involving any sort of injunctive relief.”

D. Organizations to Administer the Mediation

Some parties prefer to use their own methods to mediate because it is likely cheaper than a mediation service. There is one aspect of the mediation, however, which might require the help of a third party. If there is an impasse regarding the appointment of the mediator, a mediation service will be needed to appoint one. It might be possible to use a mediation service only for this purpose without having to adopt all of its rules and, instead, use certain rules crafted by the parties. It will depend on the flexibility of the mediation service and how far it will go regarding the application of its rules. If parties decide to use a mediation service, it is advisable to review their rules and procedures to choose the one that better suits their needs. The whole point of the mediation is to maximize flexibility.

The International Centre for Dispute Resolution of the American Arbitration Association (“ICDR”), the International Chamber of Commerce (“ICC”) and JAMS, among others, provide international mediation services which include solving any impasse in the selection of mediators as well as offering a pool of mediators, scheduling the mediation and providing rules of procedure. The mediation services have different procedures to appoint mediators. Some of those procedures are less prone than others to prolong the selection process.

E. Site of Mediation

This is a matter of convenience and considerable expense to both parties. The site could be the home office of the franchisor where the arbitration will also take place if the mediation fails. However, franchisors often opt for a more convenient location for the franchisee to encourage a positive attitude in resolving the dispute. Again, remember that at least one of

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46 Klarfeld, Lewis & Silverman, supra n.12.
50 Compare, for instance, Article 4 of the ICDR rules with Article 5 of the ICC rules.
51 Rupert Barkoff and David Kauffman, Crafting the Perfect ADR Clause, ABA Forum on Franchising 40 (1995).
the mediation services applies the law of the jurisdiction of the physical situs of the mediation. Thus, the locus of the mediation could be important in the absence of a choice-of-law clause in the mediation agreement.

F. Mediation Qualifications and Number

The parties may establish the mediator’s qualifications, such as, whether she must be an attorney, be knowledgeable about the specific applicable law and relevant cultures, be experienced in franchising disputes, have a certain mediating style (i.e., facilitative versus evaluative), etc. The problem with establishing detailed qualifications is that it might later be difficult to find an available mediator who meets those qualifications and, at the same time, is acceptable to both parties.

Use of multiple mediators or only one mediator is another determination which the parties must make depending on the complexity of the dispute. Having only one mediator is often preferred to keep costs down. Usually, when three mediators are chosen, one of them is neutral (i.e., not chosen by only one party). This could complicate matters because non-neutral mediators would obviously be regarded with suspicion by the opposing side and their ability to contribute would likely be impaired. Moreover, they would likely be sending mixed or hostile signals to the parties. Using three mediators appears appropriate only when the dispute is exceedingly complex.

G. Establish a Deadline to Mediate

One way of dealing with the timing issue is to establish an invariable and definite period of time to start and finish the mediation. The problem with this approach is the waste of time that will result when it is obvious that the mediation will be unsuccessful. The dispute could worsen by the passage of time such as failure to upgrade food facilities. The rationale behind having a definite period is that, often, compelling the parties to attend the mediation during certain period of time may open the lines of communication and induce a change in position of recalcitrant parties. If there is good faith, having a definite time to end the mediation will also induce the parties to make the most of the available time.

Another recurring theme is the possible need to obtain interim relief to maintain the status quo. Having a definite period of mediation would be an obstacle unless “carve outs” are included in the mediation provision allowing the parties the opportunity to obtain temporary relief under certain circumstances and for certain specific reasons. If such relief is requested, however, mediation is likely to be difficult since the parties would have waged a legal battle which is not conducive to a mediation environment.

H. Cost of the Mediation

The mediation clause should establish who will bear the cost of mediating. The most equitable solution is for each party to bear its own costs and share the cost of the mediator. The idea is to facilitate a climate of negotiation. Of course, it is no secret that the combined cost

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52 Id. at 39.  
53 Id. at 41.  
54 Id.
of compulsory mediation and arbitration may be an incentive for both parties to negotiate prior to mediation and to mediate with an open mind.

I. Party Representatives to Mediation

First and foremost, the representatives must have thorough knowledge of the facts and issues as well as authority to settle. Otherwise, a successful mediation is more difficult to attain, particularly when time is of the essence. The representative negotiating in the mediation must have invested substantial effort in the mediation and have a stake in its success. It would be even better if, in addition to being knowledgeable and having authority to settle, the representative is also an engaging and persuasive individual.

J. Tolling the Limitations Period of any Claims During Mediation

This is a critical issue when the limitations period to file a lawsuit or an arbitration complaint is short. It is possible that, under the circumstances, the claimant might have to draft a complaint at the same time that the matter is being mediated in order to cover all bases. The parties may provide for a tolling of the limitations period in the mediation agreement to eliminate the time pressure and give the mediation their undivided attention.

K. Interim Injunctive Relief

The mediation agreement should provide whether, under certain specific circumstances, one or both parties may seek court relief prior to mediation. Such relief might be necessary when the franchise dispute involves danger to public health, a violation of trademark rights which might injure the franchisor’s goodwill, or the need to enforce the confidentiality clause of the agreement before it is too late. In such circumstances, the dispute might become ripe for settlement after the injunction hearing, but it is more likely that the climate would be too hostile to lead to a settlement.

It is necessary to establish the proper venue so that interim relief may be enforceable later. As noted above, some countries submit foreign court judgments to substantial obstacles or simply ignore them. Normally, arbitration is superior to litigation because of the enforceability of arbitration awards under the New York Convention. Also note that arbitrators may issue interim injunctive relief under the rules the arbitration service uses such as Rule 6 of the AAA International Rules.

L. Confidentiality

One purpose of mediating is to avoid creating any sort of precedent and to avoid the disclosure of information which one or both parties wish to keep away from the public domain or from each other. Thus, there should be a clear agreement prohibiting the parties, their representatives and the mediator from disclosing to any third party information elicited or used during mediation and, presumably, after the mediation is over. Moreover, the parties may agree to waive any right to use any statements or documents of the mediation as evidence in any proceeding except if such evidence becomes necessary to enforce or rescind the settlement

55 Klarfeld, supra n. 30, at 15.

agreement resulting from the mediation. In order to enforce confidentiality, injunctive relief and liquidated or real damages could be included in the confidentiality clause. Many franchise agreements have detailed confidentiality provisions for arbitration which can be extended to mediation.  

M. Settlement Agreement

One important aspect under this topic is who will draft the settlement agreement or memorandum of understanding (“MOU”) if the mediation is successful. The second issue is how detailed such a document will be. The mediator could draft it, instead of the parties, to avoid disputes over contract language or distrust between the parties concerning the specific drafting of the settlement. Most parties to mediation prefer that the document be detailed enough to be enforceable as a binding contract, but sometimes they can only muster an MOU which must be fleshed out and refined thereafter. The parties could also agree to leave the mediation open until the parties can refine the MOU and enlist the help of the mediator with any sticking points. This would require leaving the lines of communication open with the mediator at least by telephone and email to increase the chance that the parties would arrive at the final document. The mediator can refresh the recollection of the parties if there is disagreement regarding what was agreed during the mediation sessions.

VII. SPECIFICITIES OF INTERNATIONAL MEDIATION

Like negotiation, mediation is also an informal method of resolving disputes. What has been said above in relation to the specific aspects of an international negotiation, therefore, applies also to mediation. But an international mediation raises additional specific questions, linked to the intervention of a third party in the process, the mediator.

A. Venue

The mediation should be held at a place that is convenient, not only to the parties, but also to the mediator. This in turn triggers the following question: should the venue of the mediation be agreed after a mediator has been selected, or should the mediator be selected only after the venue has been agreed? This is not a trivial point: an efficient mediation requires finding an available mediator who will be able to assist the parties in resolving their dispute in the shortest time span possible. This efficiency goal may therefore prompt the parties to agree first on the place where the mediation will be held, which will allow circumscribing the search for an appropriate mediator.

57 Crafting the Perfect ADR Clause, ante, pages 31-32.

58 Trachte-Huber & Huber, supra n. 18, at 312-313.

59 In the U.S., an agreement may be adjudged invalid because there was no meeting of the minds due to mistake, duress or fraudulent misrepresentations. There are other bases to invalidate a compromise such as when the purported agreement is unconscionable or against public policy. See Alan Scott Rau, Edward Sherman & Scott Peppet, Processes of Dispute Resolution 494-96 (4th Ed., Foundation Press) (2006). Many countries share similar doctrines.

60 For a general overview of the characteristics of international mediation, see Michael McIlwrath & John Savage, International Arbitration and Mediation: A Practical Guide 173-224 (2010).
Consider the example of a dispute involving a franchisor located in Nebraska and its master franchisee in Romania. If the parties did agree in advance on the place of mediation, for instance London, it will be more efficient to find a mediator in London, who will be much more flexible as to the dates of the mediation, because no travel will be required from him. This will also reduce the costs of the mediation.

Thus, an important factor in agreeing in advance on the place of the mediation is the ability for such place, because of its local tradition of and openness to mediation, to make it easier for the parties to find a suitable mediator. To keep the same example as above, it will probably be easier to find a mediator for an international dispute in New York, London or Paris, than in Omaha, Nebraska, or Bucharest, Romania.

Finally, when agreeing on the venue of mediation, parties should always consider whether the laws applicable in the country where the mediation will take place contain specific rules easing the enforcement of any settlement agreement that would be reached in the mediation. If not, this might be a good reason for locating the mediation in another country offering the legal possibility to record the settlement agreement in a judgment or otherwise so as to make it enforceable.

B. Language

As stated above with respect to international negotiation, the efficiency and success of a mediation may be hampered by the fact that the meetings are conducted in different languages. It is therefore obvious that the mediator must be able to conduct the mediation in the language used by the parties.

By contrast, it does not appear necessary that the mediator speak the native language of both parties. Even in caucuses, where the mediator engages in separate and confidential discussions with each party, the efficiency of the mediation may not be substantially enhanced by the fact that the caucus takes place in the native language of the party with whom it is held. What is more important is the ability of the mediator to have constructive discussions with both parties, which will usually be in the same language of the agreement, and to understand each party.

When it is not possible for the mediation to be conducted in a single language, two practical possibilities should be explored: the use of interpreters (with the disadvantages identified above) or the recourse to a co-mediator, who will be able to hold discussions with a party in its native language. Co-mediation, however, is not easy to organize, as it usually supposes that the co-mediators know each other very well and can effectively mediate together.

C. Nationality of the Mediator

While nationality is an important element for the selection of arbitrators, one should not overemphasize its importance in the context of international mediation.

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61 See Section X.B above.

62 See the chapter on International Negotiation.
The role of a mediator is to assist both parties in reaching a settlement, not to issue decisions that will be binding on the parties, and, thus, it is not critical that the mediator comes from a neutral country. The mediator’s personal skills in helping the parties to settle or knowledge of the relevant industry or of the applicable law, matter much more than the mediator’s nationality.

Where the dispute contains (as often) a ‘cultural’ dimension and one of the parties appears to be aggrieved by the actions of the other, it may even be helpful to engage the services of a mediator who has the same culture of the aggrieved party, or is close thereto, and who will be in a better position to understand its cultural concerns. Of course, selecting an arbitrator who has the same nationality or culture as one of the parties will necessarily require that such person has an excellent track record as mediator and cannot be suspected of being biased.

D. Use of Institutional Mediation Rules v. Ad Hoc Mediation

The international character of a dispute appears to be a strong argument in favor of institutional mediation; that is a mediation that will be framed by existing rules and organized by a specialized institution.

First, the different legal cultures and backgrounds of the parties may create bigger difficulties for them to agree on a mediation process than those one may face in a purely domestic context. The identification of a mediation center in the franchise agreement will therefore contribute to a faster and more efficient mediation process.

Next, while one may assume that mediation will always be confidential (as the ability for a party to speak freely and in confidence to a mediator is key to the success of the process), this may not necessarily be the case everywhere, especially in countries with no specific statute on mediation. By referring to the rules of an established mediation center, which always provide for confidentiality, the parties will avoid the burden of having to negotiate the terms of a confidentiality agreement, with the risk of delay or even failure of their talks.

VIII. PREPARATION FOR MEDIATION

A. Use of Settlement Counsel Instead of Trial Counsel

Because the whole point of mediation is to settle disputes, arguably the most appropriate mindset to achieve that goal is not that of the trial advocate. The most productive approach to engage the other party in mediation is “positive-sum” (both parties gain) or facilitative (creative solutions to avoid litigation). Sometimes, having settlement counsel separate from trial counsel is the most productive approach. Meanwhile, trial counsel could prepare to litigate while the parties are engaged in mediation.

This separation of tasks is not always possible because of the cost. In any event, it is always necessary to conduct legal research before the mediation about contested matters of law. Thus, if separate settlement counsel and trial counsel are used, both should share all legal and factual information available.
B. Rules of Mediation

Although mediation services offer their rules to their customers, it is possible for parties to depart from certain rules established by the services such as the manner of choosing the mediator or the choice of applicable law.

In addition to ICDR, JAMS and the ICC mentioned in Section VI, the International Institute for Conflict Prevention & Resolution ("CPR") is another dispute resolution body which offers full mediation service, including procedural rules. Interestingly, CPR Rules specifically contemplate that the parties may conduct discovery, albeit voluntarily. Discovery is a problematic proposition in mediation. It may create the wrong mindset for negotiation if the parties are fighting over discovery. Moreover, parties may be reluctant to provide too much ammunition for litigation later. On the other hand, there might be instances when it is critical to obtain key information in the possession of the opposing side to make the mediation worthwhile.

Finally, the United Nations Commission on International Trade Law ("UNCITRAL") provides model rules to conduct mediation. The goal of UNCITRAL is "to harmonize and unify the law of international trade", but it does not provide any administrative services such as a pool of mediators.

C. Selection of Mediator

It is possible to design a method of appointing a mediator without using the mediation services. One way is to develop a separate list of candidates for each party and compare them to ascertain if there is a common name in both lists or if they can agree on a candidate from any of the lists after interviewing them. If agreement is not possible, the parties can use the list provided by a mediation service and the strike-list method. Some organizations may allow the parties to suggest a mediator if that individual qualifies under its criteria and is willing to comply with its administrative protocols. The parties may include in their mediation clause all the qualifications they seek as well as their preferences regarding mediation style, subject matter expertise and geographic location. Mediation services will generally try to accommodate the parties by suggesting candidates from their rosters. The danger is that the roster will not include any candidate with all of the requirements agreed to by the parties or that such candidate will not be available or acceptable to both parties.

In international arbitration, understanding the cultures involved in the mediation is important, as well as the mediator’s willingness to learn about those cultures. As we will see in the following sections, differences in cultural idiosyncrasies may be critical in reaching an understanding between parties in any sort of dispute, including those involving franchises. Another important ingredient would be the mediator’s knowledge of the languages spoken by the parties. Misunderstandings may occur because of faulty communication or a bad choice of

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66 ICPR Rules, Art. 2.
words. It would be unfortunate if a participant is alienated or even takes offense at something said or done as a consequence of ignorance of cultural differences.

Also, experience in franchising as a mediator may be important to avoid the learning curve problem. Often, time is of the essence and a mediator with experience in franchise matters will likely provide a quick “reality check” to both parties. Moreover, mediating style could be as important as experience in complex commercial disputes. Finally, personal qualities of the mediator such as whether she has an engaging personality, tact and empathy, may be critical to bring the parties together.

D. Preparing the Client for the Mediation

First, the client should receive a thorough explanation of the mediation process. This includes the roles of the various participants and the rules of procedure, the different mediation styles and the informal nature of the mediation proceedings. In explaining the role of the mediator, care should be taken to explain that the mediator will help the parties explore alternative solutions, focus discussion and preside over all sessions. One important aspect of this is to explain that the mediator might, on occasion, play devil’s advocate in caucuses with each party, which should not be interpreted as bias. Also, it is important to explain that the mediator must preserve the confidentiality of any information provided in confidence from the opposing party and third parties. This means that the parties may be open while exploring solutions with the mediator. The mediator will ask probing and hypothetical questions when aiding parties to find out the strength and weaknesses of their positions. It is also important to explain that the goal of the mediation is to arrive at a written enforceable settlement agreement with the adversary.

It is necessary to decide whether the party, as opposed to just counsel, will have full and active participation. It will probably depend upon whether the party or its representative is a credible and circumspect individual. Another consideration is whether the case is legally complex and the party can address the issues meaningfully. Also, if the party has a personality that is likely to clash with the opposing side or is too modest or subdued to face up to the adversary, perhaps the lawyer should do the talking. If it is decided that the client should participate, the lawyer must discuss the topics that are likely to come up and decide which topics might be appropriate for the client to tackle and rehearse with his/her client the content of any such intervention.

When making contested or controversial statements, the party and its counsel should maintain eye contact with the mediator rather than with the opposing side to avoid any unnecessary acrimony. This does not mean that the party and its counsel should not be mindful that persuading the other side of the merits of their substantive position or settlement target is a major goal of the mediation.

68 Id. at 93.
69 Id.
70 The settlement target is often assessed by using the BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worse Alternative to a Negotiated Agreement). See Rau, Sherman & Peppet, supra n. 59, at 88-89. Moreover, each party should consider the adversary's BATNA and WATNA in order to be effective.
Arguments should be left to counsel. The party should state facts in a persuasive manner without being overly argumentative. Of course, it is sometimes difficult for counsel to limit the client’s interventions, but an attorney can always rehearse what will be said.

Some authors suggest that the client should display no emotion or reaction (including facial expressions) to settlement offers, apart from politely listening to them, because such reactions may ruin the chance of getting a better deal or alienate the adversary. Likewise, the parties should not overreact to the other side’s initial unrealistic expectations. It is advisable to show patience, flexibility, open-mindedness and courteous treatment of the opposing side.

The party should be warned by counsel that it should never submit to cross-examination type questions from the opposing side or the latter’s attorney. Difficult questions propounded to a party should be fielded by counsel. This includes questions which might involve admissions against interest, or require information beyond the knowledge or expertise of the party.

Finally, a party should not interrupt the other side. It is better to take notes and wait its turn. Each party should carefully listen to the adversary.

The party and its counsel should discuss their settlement goals and the strategy to achieve it. This includes the arguments and themes to be used during the mediation, which documents and visual aids might be necessary, a fair settlement value range, etc. It is important to have a clear view of what the party’s interests and needs are at the time of the mediation because they may have changed over time. Moreover, it is important to update and collect key evidence supporting or detracting from the party’s stated position to arrive at realistic settlement goals for the mediation.

E. Initial Memoranda

The initial memorandum contains certain disclosures that the mediator will need and, sometimes, request. Mediation services do not specifically detail the contents of the initial memoranda. Those memoranda could include the material facts and a brief discussion of the applicable law as well as the settlement history of the dispute. Finally, it could include the parties’ initial settlement offer. There is one issue which immediately comes to mind and that is whether those memoranda should be shared with the adversary. Sharing the memos means that the parties will be less forthcoming in their stated positions than if the memos are only sent to the mediator on a confidential basis. Each party would usually try to show its best face and never identify any weaknesses in its case. Even if the memos are not shared, the parties will often gloss over their weak points to some extent in an attempt to win over the mediator. Perhaps, the best option is to share certain portions of each party’s memos, but send separate confidential portions to the mediator which must not be disclosed to the other party. In those confidential memos, the parties may be more willing to disclose information which can help the mediator truly get a sense of what the sticking points in the negotiation are and the strengths and weaknesses of the parties’ positions.

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71 Id. at 100.
72 Id.
73 Id. at 101.
F. Strategy: Consideration of Cross-Cultural Communication Issues

1. Decide whether an interpreter is necessary

An interpreter may be indispensable to attain a full understanding of the parties' factual and legal positions if there is no common language that they can use. The problem with consecutive interpreters is the delay and the inevitable squabbles regarding the accuracy of the translation. Simultaneous interpretation is quicker because the speaker and the interpreter talk over each other, but using it is problematic because it does not allow the participants to gauge the accuracy of the translation. Consecutive interpretation is slower, but safer. If both parties and the mediator have a working knowledge of a common language, the interpreter should be used only when necessary and not all the time.

The mediator is probably the best person to choose the interpreter after reviewing her qualifications although the parties may suggest candidates. The interpreter should be familiar or become familiar with the mediation process and confidentiality concerns. There should be a written agreement with the interpreter, particularly regarding confidentiality. The interpreter should be fully prepared with any equipment necessary to interpret. If the interpreter is actually familiar with the culture of the countries of the parties, he would be more likely to help rather than hinder the negotiations.

Going over technical words of the case with the interpreter is also advisable. Sharing factual background and showing some case documents to the interpreter before the mediation might help the interpreter become familiar with specialized vocabulary and the gist of the mediation.\(^74\)

2. Possible language barriers

Even with an interpreter, there are sometimes difficult communication barriers to overcome or simply inaccuracies in the translation. If consecutive interpretation is used, listen to both the statement and its translation whenever possible. A long statement that is translated with one or two words might hint that the interpreter did not translate all that was said. Summarizing and paraphrasing on the part of the interpreter may move things along smoothly, but the interpreter has to be very skilled at accurately summarizing or paraphrasing. Thus, it is safer to instruct the interpreter to translate every word. If you believe that something was not accurately translated, you should wait until the speaker has finished. Again, parties and counsel should avoid interrupting the adversary.

It is critical to observe the body language of the speaker reacting to the translation because it may signal an inaccurate translation or, more importantly, how the other side feels about the substantive issues being discussed. Of course, the same body language may have different meanings in different cultures. A gesture which is regarded as guarded in one culture might be regarded as dismissive in another culture.

The parties should try to use simple words and be as direct as possible. The use of idioms, slang, and colloquial or informal expressions sometimes causes translation difficulties.

confusion or worse. Even the same words in the same language may mean different things to people in different countries who speak that language.

Lastly, when speaking, it is best to look at the mediator or the other party if appropriate instead of looking at the interpreter. The same applies when listening to the adversary. It is necessary to establish rapport with the other party as well. All speakers should speak slowly and pause often to ensure an accurate translation.

3. Avoiding stereotypes and ethnocentrism

This is a very sensitive topic. A negotiation may fall apart simply because of condescension or the appearance of prejudice. Respect for the idiosyncrasies of other cultures may make the difference between success and failure in the mediation. This seems quite obvious, but people tend to forget in the heat of the moment. Mediation is more difficult than persuading a jury. The whole point is to persuade the adversary. This is no small feat, but the mediator is there to help make it possible.

It is important to let go of stereotypes and even business myths during the mediation, because they are often wrong. Stereotypes should not be mentioned during the mediation because they are bound to be offensive even in jest. They can only create a bad feeling and tension. For example, people say things like “you don’t sound (or worse, “look”) like a (nationality)”. Even if it is meant to be flattering, it almost never is. Moreover, stereotypes tend to hinder objectivity “because an individual selectively perceives information that corresponds to the stereotype.” The stereotypes substitute for actually striving to better understand the culture or country in question. Stereotypes more often than not underestimate the intellectual capacity or the level of education of the adversary. Underestimating the adversary is never advisable. Moreover, beware of assuming that the adversary does not understand the other party’s language at all just because an interpreter is being used. A party could say something in a recess or break without realizing that the adversary understands.

Ethnocentrism means judging other cultures solely by the preconceptions originating from the standards, customs and values of one’s own culture. It creates an insurmountable hurdle when it comes to learning about other cultures with the right attitude.

An effort to familiarize oneself with an adversary’s language goes a long way in creating goodwill. Sometimes it is simply not possible to go very far in this effort, but one can try.

4. Use of symbols and amounts

Dates, numbers and amounts are often used in mediation of franchise disputes. It is also useful for the interpreter, the parties and the mediator to become familiar with the different ways in which each country uses them. For instance, dates are written differently in Spanish and English. In Spanish, 2/5/80 means May 2, 1980 whereas in English it means February 5, 1980. Numbers are also written differently. In Mexico, one thousand is expressed as 1,000. In Spain, five hundred dollars and 10 cents is written 500,10. There are a wide variety of currency symbols some of which may be similar, but not quite the same. The symbol for Mexican pesos

75 Barker, supra n. 65, at 25.
76 Id. at 27.
is one vertical line through an “S” instead of two vertical lines through the “S” which is used to symbolize U.S. dollars.

5. **Demeanor and customs**

As indicated above, demeanor and nonverbal messages may affect the tone of the mediation. More importantly, demeanor and cultural idiosyncrasies affect the parties’ approaches to negotiation.\(^{77}\)

Some of those cultural differences are: low context to high context communications; low power culture to high power culture; individualism versus collectivism; uncertainty avoidance; long-term to short-term orientation; attitudes toward interpersonal space;\(^ {78}\) and differential treatment according to gender.\(^ {79}\) Some of these differences are explained in depth below.

In cultures with high context communications, a high proportion of the meaning of communications is implied from context or surrounding circumstances as opposed to the actual words being spoken.\(^ {80}\) Low context cultures enjoy a more direct and explicit approach (i.e. China *vis a vis* U.S.). For instance, an American negotiator is likely to be very direct in making a point or setting forth a position whereas a Chinese negotiator is likely to be more indirect and expect the other side to read between the lines. For instance, instead of saying “no,” persons from Asia may use indirect phrases like “that might be difficult.”

Low power distance culture to high power distance culture refers to differences concerning submissive acceptance of inequality. In high power cultures, there is a well-established and accepted hierarchy. Low power cultures emphasize equality among individuals (i.e. Japan *vis a vis* U.S.).\(^ {81}\) For example, an American negotiator may expect that the consent of a Japanese negotiator is all that is needed when, in fact, certain issues must be approved by a higher level employee. It could also mean that the designated American negotiator should be at the same hierarchical level that the Japanese negotiator is at. High power distance cultures are more formal and less egalitarian than low power distance cultures. They expect to be treated with formality if not reverence.

Individualism versus collectivism refers to the level of tolerance for uncertainty and ambiguity. An example of a country with a high degree of uncertainty avoidance is Argentina.\(^ {82}\) This factor also refers to attitudes towards punctuality and timeliness. An example of how this may apply in practice is that an Argentinean negotiator might need more specific language in a settlement agreement than a negotiator from another country who would be happy with more

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\(^{77}\) See Harold Abramson, *Mediation Representation, Advocating as a Problem-Solver in Any Country or Culture* 452 (2d ed. 2010); see also https://www.legacee.com/the-global-leader/chinese-business-culture/.

\(^{78}\) Barker, supra n. 65, at 39.

\(^{79}\) Id. at 48,51.

\(^{80}\) Id. at 453.

\(^{81}\) Id. at 454.

\(^{82}\) Id. at 456; see also https://www.legacee.com/the-global-leader/chinese-business-culture/.
general language or it might mean that the Argentinean needs more reassurance in the negotiation process. Individualistic cultures tend to be more specific, direct, straightforward and confrontational when negotiating whereas collectivist cultures tend to be more indirect, nonconfrontational, ambiguous and subtle.

Uncertainty avoidance refers to the level of tolerance for uncertainty and ambiguity. An example of a country with a high degree of uncertainty avoidance is Argentina.\textsuperscript{83} This factor also refers to attitudes towards punctuality and timeliness. An Argentinean negotiator might need more specific language in a settlement agreement than a negotiator from another country who would be happy with more general language or it might mean that the Argentinean needs more reassurance in the negotiation process. In general, a low uncertainty avoidance culture is more comfortable with taking risks, trying new approaches, and open to confrontation than a high uncertainty avoidance culture. High uncertainty avoidance cultures are wary of new situations and prefer to avoid conflict, have clear rules of engagement in mediation and have precise answers to questions.

Long-term to short-term orientation refers to cultures that are forward thinking and have a future oriented perspective as opposed to a short term outlook (i.e. China \textit{vis a vis} U.S.).\textsuperscript{84} This refers to cultures that worry about how things will turn out five years after execution of the agreement or about the impact on matters that go beyond the specific negotiation rather than focus on any short-term gain. For instance, Americans are more likely to focus on short-term monetary gain while the Chinese are more likely to focus on future market share, long-term potential and long-term personal connections. Long-term orientation cultures tend to admire thrift and perseverance.

International mediation requires more than researching the law and the facts. Success depends on thorough research of the adversary’s business and personal culture.

6. \textbf{Anticipate Next Steps if Mediation Fails}

If mediation fails, the parties will either proceed to litigation or arbitration. It is advisable to negotiate from a position of strength by being ready for arbitration and litigation after the mediation. Again, it is easier to simultaneously prepare for battle if mediation counsel is separate from trial counsel.

IX. \textbf{MEETINGS DURING MEDIATION}

A mediation may consist of various meetings taking place over the course of a day. The mediator generally has discretion to determine in which order meetings occur, how long meetings last, and even whether the parties will or will not hold joint meetings or separate meetings. Frequently, mediations start with a joint session involving all of the parties and the mediator.

\begin{itemize}
  \item \textsuperscript{83} \textit{Id.} at 456.
  \item \textsuperscript{84} \textit{Id} at 457.
\end{itemize}
A. **First Meetings and Opening Statements**

At the outset, the mediator will likely want to hold a joint session to introduce all participants and to ensure that the parties are knowledgeable of the mediation process. This presents an opportunity for clients to ask any questions they may have regarding the mechanics of the mediation. Some mediators then allow counsel an opportunity to present an opening statement to the opposing party. If given the opportunity, in the majority of cases the authors recommend making an opening statement. This is a unique chance for the lawyer to speak directly to the opposing party prior to trial. The opposing party may not have heard a critical analysis of his/her case before. Flagging issues in the opposing party’s case may make the adversary far more susceptible to settlement. The goal here is to persuade and inspire a critical self-assessment, not to harass or embarrass.

An attorney should identify in their opening statement what type of damages are claimed and/or what form of relief may be received at trial or arbitration. Additionally, if a settlement will only be achieved by satisfying a party’s interests that are distinct from the legal claims they are asserting, the attorney should at least indirectly identify those interests. In what cases should an attorney not make an opening statement? Probably only where emotions between the parties run so hot that being in the same room and hearing the statements may upset the whole mediation.

B. **Caucuses and Shuttle Diplomacy**

After the joint opening session, the mediator will likely separate the parties and begin a process of separate meetings with each party to discuss their respective settlement positions. Information shared in these separate caucuses may be kept confidential. The parties should consult the rules governing the mediation or ask the mediator whether they must ask for information to remain confidential or whether there is a presumption that information shared in a caucus will remain confidential.

Separate caucuses allow each party an opportunity to openly discuss the matter with the mediator. The parties may present proposals to the mediator and ask whether they think the other side will accept them. The mediator will likely advise a party what interests of the opposing party will have to be vindicated for a settlement to be reached. The caucuses also present an opportunity for the mediator to critique a party’s position with candor. It is very often helpful to encourage the mediator to converse directly with the client. These communications may expose a client’s true motivations—and any related views that are obstructing settlement—in a way that may not be possible for the attorney.

Many attorneys believe that the caucusing component of the mediation is where the hard work takes place, and indeed it may take many hours of probing and questioning until the parties take significant steps toward settlement.

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85 Klarfeld, *supra* n. 30, at 21.


87 See id.
C. Drafting an Enforceable Settlement Agreement and Closure

The final stages of a mediation will vary significantly depending upon whether an agreement is reached or not.

1. Settlement Reached at Mediation

An attorney should not allow a mediation to conclude without getting at least the fundamental components of the agreement in writing. There are various reasons why this is true. Depending upon the terms of the agreement, there may be enforceability issues absent a writing because of the statute of frauds. Some jurisdictions may simply preclude the introduction into evidence of what the parties allegedly agreed to absent a writing.\textsuperscript{88} Even if a party is allowed to present evidence of an oral settlement, they likely will not be allowed to call the mediator to testify as to the terms of the arrangement.\textsuperscript{89}

For these reasons, it is strongly advisable for the attorney to write down the essential terms of the agreement and have all parties and their counsel sign it. If the parties intend to be bound by the essential terms they agree to at the mediation the writing should expressly say so.

Franchisor counsel may have pages of boilerplate terms that they may seek the franchisee to agree to as part of the settlement. Rather than surprise franchisee counsel with this boilerplate after the essential terms have been agreed to, franchisor counsel should provide the additional terms they will seek agreement on early in the day. This permits franchisee counsel an opportunity to go through the document during the day and make suggested changes.\textsuperscript{90} Ideally, the parties would then be in a position to agree to the specific provisions on the day of the mediation.

2. No Settlement Reached at Mediation

Attending a lengthy mediation without reaching a settlement can be a frustrating experience. Despite this, counsel should make every effort to remain calm and to respectfully terminate the mediation to leave open the possibility of future settlement efforts. There is always the possibility that movement made at the mediation may pay dividends before trial.

X. BEHAVIOR DURING MEDIATION

Although mediations are far more free-wheeling than litigation or arbitration proceedings, there are still standards of professional conduct that attorneys either must (or at least should) comply with. These include truthfulness to the mediator; professional obligations to opposing counsel; and, the obligation to negotiate in good faith.

\textsuperscript{88} 1 Mediation: Law, Policy and Practice § 7:19 (citing statutes of states in the United States that preclude a party's attempt to offer such evidence).

\textsuperscript{89} See American Arbitration Association, International Dispute Resolution Procedures, Rule 10 (providing that the mediator "shall not be compelled to … testify in regard to the mediation in any adversary proceeding or judicial forum.").

\textsuperscript{90} Chernow, Pressman, & Singer, supra n. 86, at 18.
A. **Truthfulness to the Mediator**

Mediators fully expect attorneys to embellish the strength of the case, particularly in joint sessions with the opposing party. As attorneys often reveal more information about their case as the mediation goes on, mediators also expect the attorney to disclose more as time elapses. What mediators do not expect, and what lawyers must not do, is lie to the mediator, particularly when in a private session. An example of a lie told to the mediator is that a settlement must include a certain condition or a minimum (or maximum) figure, even though the client truly has no intention of requiring such a condition of imposing such a minimum. In the context of private discussions with the mediator (which, the authors believe, is significantly different than the context of joint negotiations with the mediator and the opposing party), there is a serious risk that such misrepresentations violate Rule of Professional Conduct 4.1. But even setting aside the ethical issue, such misrepresentations damage a party’s credibility with the mediator. If a party flat out denies that a certain figure is acceptable but then an hour later seriously considers that figure, the mediator will question the party’s authenticity, which may impact how the mediator interacts with both parties.

B. **Professional Obligations to Opposing Counsel**

American attorneys are taught that only “material” misrepresentations are forbidden in negotiations with the opposing party. In this context, permissible misrepresentations may include inflated settlement demands, whether a client is willing to settle, the client’s bottom line, exaggerating the merits of a case, and failing to volunteer facts or correct misstatements or misunderstandings.

It can be difficult to recognize whether a particular statement violates Rule 4.1. An ABA opinion suggests that grossly exaggerating a known fact that is objectively false likely violates Rule 4.1. The ABA has provided the following example:

[A] false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee.

On the other hand, if this same lawyer representing the employer in labor negotiations were to say the benefit would simply be “far too costly,” that would likely be permissible under Rule 4.1. From this, at least two inferences can be drawn: (1) the more specific the misrepresentation, the more likely it will violate Rule 4.1; and (2) the more a statement can be couched as an opinion, the less likely it will violate Rule 4.1.

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92 MODEL RULES OF PROF'L CONDUCT R. 4.1(a).


Attorneys also owe a duty to opposing counsel not to schedule a mediation solely to interrupt opposing counsel’s trial preparation, or otherwise solely to slow or delay legal proceedings.\textsuperscript{95}

C. The Obligation to Negotiate in Good Faith

In the United States, it is now commonplace for statutes to require that attorneys act in “good faith” in a mediation.\textsuperscript{96} The American Bar Association Ethical Guidelines for Settlement Negotiations do not require parties to engage in settlement discussions, but they do provide that once they have done so they must not act in bad faith.\textsuperscript{97} To be sure, the authors are aware of no international treaty or agreement that broadly requires good faith in negotiating international franchise disputes. This is not to say, however, that the parties to an international franchise agreement cannot contractually agree to a good faith mediation requirement, either by an express good faith provision,\textsuperscript{98} through incorporating particular rules to govern the mediation,\textsuperscript{99} or through a choice-of-law clause selecting the laws of a jurisdiction that may include such a requirement.\textsuperscript{100}

There is minimal authority as to what constitutes bad faith in the context of international franchise mediations. However authority from the United States helps clarify the type of conduct that may be held to constitute bad faith. American courts are prone to find a bad faith failure to participate where a party fails to comply with procedural requirements; this includes not filing a pre-mediation brief or not sending a representative who has full authority to settle the dispute.\textsuperscript{101} On the other hand, rarely have courts in the United States penalized a party for failing to meaningfully participate in the mediation, such as by arbitrarily rejecting a settlement offer or failing to make a reasonable settlement offer.\textsuperscript{102}

\textsuperscript{95} See \textit{Model Rules of Professional Conduct}, Rule 3.2 (imposing a duty on lawyers to expedite litigation consistent with the interests of the client).

\textsuperscript{96} Over 100 state and federal statutes impose this requirement. Klarfeld, \textit{supra} n. 30, at 33.

\textsuperscript{97} See, e.g., \textit{Model Rules of Professional Conduct}, Rules 3.2, 4.4; \textit{Ethical Guidelines for Settlement Negotiations}, at § 4.3.1, Cmt. Note. (“the settlement process should not be used solely to delay the litigation or to embarrass, delay, or burden an opposing party or other third person.”).

\textsuperscript{98} See \textit{Meena Enters., Inc. v. Mail Boxes Etc.}, No. DKC 12-1360, 2012 WL 4863695, at n.9 (D. Ma. Oct. 11, 2012) (recognizing that a provision in the franchise agreement required the parties to attempt to resolve disputes “through good faith, informal negotiations, including, upon mutual agreement, non-binding mediation.”).

\textsuperscript{99} See American Arbitration Association, \textit{International Dispute Resolution Procedures}, Rule 8 (requiring that, as is appropriate to each party’s circumstances, the parties “exercise their best efforts to prepare for and engage in a meaningful and productive mediation.”) (emphasis added).

\textsuperscript{100} See \textit{1 Transnational Business Transactions} § 4:25 (explaining that countries following the civil law will generally impose good faith negotiation obligations unless there has been an explicit agreement to the contrary).

\textsuperscript{101} See Klarfeld, \textit{supra} n. 30, at 33; Asbill, Jankowski, Leitner, & Meyers, \textit{supra} n. 3, at 3 (collecting cases holding a party’s failure to comply with procedural requirements may constitute bad faith).

\textsuperscript{102} See \textit{Avril v. Civilmar}, 605 So. 2d 998 (Fla. Dist. Ct. App. 1992) (reversing sanction imposed against party for failing to make a substantial settlement offer, recognizing that under Florida law, a party is not even required to make an offer at mediation).
One impediment to proving a bad faith failure to negotiate is the general confidentiality obligation that attaches to mediation proceedings. Federal courts in the United States have refused to permit testimony concerning a party’s failure to participate in good faith on the basis allowing such testimony would limit mediation’s effectiveness.\footnote{Klarfeld, \textit{supra} n. 30, at 34.} It is worth noting that the International Dispute Resolution Procedures of the American Arbitration Association (the “AAA Rules”) generally seem to prohibit testimony offered to prove bad faith in subsequent proceedings. Rule 10 of the AAA Rules requires—absent agreement to the contrary or as may be required by law—the parties to “maintain the confidentiality of the mediation” and “not rely on, or introduce as evidence” in any proceeding, among other things: (1) views or suggestions made by a party respecting settlement; (2) admissions of a party made in the course of the proceedings; and (3) the fact that a party did or did not indicate a willingness to accept a proposal for settlement made by the mediator. A court reviewing this rule may well prohibit any attempt of a party to prove bad faith conduct during mediation.

XI. ENFORCEMENT OF SETTLEMENT AGREEMENT

Enforcing a mediated settlement agreement in a foreign jurisdiction is likely to be more difficult than enforcement of an arbitration award, as there has not yet been an international treaty or convention similar to the New York Convention with respect to enforcement of international mediated settlement agreements.\footnote{Liang, \textit{supra} n. 17, at 491.} This means that, for the most part, enforcement of such agreements varies by country, at least for the time being.

There are ongoing efforts inside the United Nations to develop a multilateral convention on the enforceability of international commercial settlement agreements.\footnote{See Beth Trent, \textit{Important Trends in International Dispute Resolution}, International Institute for Conflict Prevention & Resolution, at 2.} In June 2014, the United States delegation to the United Nations Commission on International Trade Law (UNCITRAL) proposed that a working group of the commission develop a multilateral convention on the enforceability of international commercial settlement agreements.\footnote{\textit{Id.}} In February 2015, a UNCITRAL working group recommended that it be given a mandate to work on the topic of enforcement of settlement agreements.\footnote{\textit{Id.}}

Unless and until an international agreement is put in place, counsel must consult local law in the pertinent jurisdiction to determine whether the mediated agreement is enforceable under local law and whether there is an expedited procedure allowing for enforcement.

A. Considerations in Including a Choice-of-Law and/or Forum-Selection Clause in the Mediated Settlement Agreement

An important consideration at the time the settlement agreement is being negotiated is whether it will contain a choice-of-law and/or a forum selection clause. The franchisor may prefer to choose its home jurisdiction, but the franchisor should consider whether the franchisee
has any assets in the jurisdiction or whether the franchisor would have to take a judgment and then seek to have it enforced in the franchisee’s home country. Franchisors must be aware that frequently the judgment from their home jurisdiction will not be enforceable in a foreign jurisdiction; even where it is, having it enforced can come at great difficulty and expense.\footnote{Jones, Nowak, Satterlee, & Zaid, supra n. 6, at 26-27.} The particular circumstances may therefore weigh in favor of selecting the franchisee’s home territory as the forum for any dispute.

**B. Potential Ways to Have a Negotiated Settlement Agreement Swiftly Enforced**

If a mediation has occurred incident to an action in federal court in the United States, the best way to guarantee prompt enforcement in the future of a breached mediated settlement agreement is to have the court retain jurisdiction pursuant to a consent decree or have the court adopt the terms of the mediated agreement into the terms of its order for dismissal.\footnote{Ellen Lokker and Joseph Schumacher, Settling Franchise Disputes: The Settlement Process and Agreement, ABA Forum on Franchising 51 (2000).} At that point, if there is a violation the court can enforce the mediated agreement pursuant to its contempt powers. There is no guarantee, however, that a contempt order will be enforceable in a foreign jurisdiction.\footnote{Pro Swing Inc. v. Elta Golf Inc., 2006 CSC 52.} Two ways to increase the odds it will be enforceable are: (1) limiting the extent to which any relief may be granted to that which could be granted under the relevant jurisdiction’s laws; and (2) clearly delineating in any consent decree or order that the agreement is intended to apply internationally.\footnote{Id.}

In the European Union, a 2008 European Directive mandates the Member States to provide in their legislation that settlement agreements obtained through mediation should be made enforceable by being recorded in a judgment.\footnote{See Article 6 of the European Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters:}

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

All EU Member States had the obligation to complete the transposition of the Directive in their own laws by 21 November 2010.
judgments issued by courts of the country where the settlement agreement was made enforceable. This might be a critical factor for the efficiency of the mediation: in the absence of a treaty on recognition and enforcement of judgments between the United States and any other country, a U.S. franchisor might find it more appropriate to have the mediation taking place in a foreign country where the settlement agreement can be recorded in a judgment and easily enforced in the country where the franchisee has assets.

As an example, consider a dispute between a franchisor from Nebraska and its master franchisee in Romania. If the settlement is likely to result in the franchisee having to pay monies to the franchisor, the latter will see advantages in locating the mediation in a country within the European Union, because of the simplified intra-EU enforcement regime laid down by the European Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (“Brussels I Regulation (recast)”).

A creative solution for parties to an international franchise dispute to increase the likelihood of prompt enforcement of the mediated agreement is to, immediately after settlement has been reached, enter into an arbitral agreement appointing a sole arbitrator to render an arbitral award based upon the mediated agreement. The parties could then seek to have the arbitrator’s award enforced pursuant to the New York Convention.

XII. ARBITRATION

A. Introduction

If the parties have attempted to settle their dispute, by negotiation or mediation, but have failed to agree on a settlement, they will need to have the dispute finally adjudicated by a process resulting in a binding and enforceable decision: this can be achieved by submitting the dispute to a court (litigation) or to a private tribunal specially constituted, by agreement of the parties, to hear and decide a particular dispute or disputes under a contract (arbitration).

Arbitration is traditionally considered the preferred (binding) mode of resolution of international business disputes. Arbitration indeed has clear advantages over litigation as a means for obtaining a binding and enforceable decision settling an international dispute.

First and foremost, it offers neutrality in allowing parties coming from different countries to submit their dispute to a forum that is neutral in its composition (a sole arbitrator coming from a third country or a three-members panel where each party will appoint one arbitrator and the third and presiding arbitrator coming from a third country) and in its location.

Next, thanks to the success of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which was ratified by 155 countries, arbitration offers

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113 Since 10 January 2015 and the entry into force on that date of the Brussels I Regulation (recast), judgments rendered in any EU Member State are automatically enforceable in other EU Member States, without the need for a prior order authorizing the enforcement (exequatur) issued by a court in the country where enforcement is sought. A party may nevertheless resist enforcement of a foreign judgment rendered by a court in another EU Member State, but on limited grounds.

114 Cf. Liang, supra n. 17, at 517.

115 Status as of June 1, 2015.
an unparalleled efficiency over litigation for enforcing a binding decision in another country other than the one where it was issued.

Admittedly, arbitration has also some downsides as compared to litigation. It takes longer to put an arbitration in motion, as the composition of an arbitral tribunal may take several weeks. Litigation will be necessary if the losing party does not voluntarily comply with the award. In many countries (mostly from the civil law tradition), it is more costly than litigation (obviously not so in the United States and other common law countries, where legal proceedings usually trigger discovery and focus on oral evidence).

Overall, arbitration appears however more appropriate than litigation for the resolution of international disputes.

Parties to an international franchise agreement have thus obvious reasons to prefer arbitration over litigation when drafting the dispute resolution section of their agreement. They must, however, be aware of some characteristics inherent to international arbitration that may differ from their expectation based on their domestic arbitration experience.

B. Seat (or place) of the Arbitration

Selecting the seat (or place) of an international arbitration is not a matter of finding a pleasant city with nice hotels and good restaurants to spend some nice time when the arbitral hearing adjourns until the next morning. It is equally not a matter of finding a location with good air travel connections and modern hearing facilities.

The seat of the arbitration is a concept of paramount legal significance: “The arbitral seat is the nation where an international arbitration has its legal domicile, the laws of which generally govern the arbitral proceedings in a number of significant respects […]”.116

The seat will designate the courts which are being granted a supervisory role over an international arbitration, including the annulment of awards, the appointment and removal of arbitrators, judicial assistance in the taking of evidence, etc. The seat will also designate the law that imposes requirements concerning the ‘internal’ conduct of the arbitral proceedings (like the requirement of independence and impartiality of the arbitrator, mandatory procedural protections, mode of taking of evidence, form and publication of the award, etc.).117

In modern international arbitration, the seat of the arbitration may often be disconnected from the venue(s) of the hearing, which is the geographic location where the arbitral tribunal and the parties will physically meet and where the witnesses will come to offer evidence. This will not result in a change of the seat of the arbitration, being its legal location.118

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117 Id. at 1576-1583.
118 In exceptional cases, however, the local arbitration law applies as soon as the arbitral hearing physically takes place on its territory. The parties and arbitrators should, thus, check beforehand and avoid locating the hearings in a country whose law provides that it applies to any arbitration physically conducted on its territory.
C. Language

While litigation can typically only be conducted in one language, that is the language used before the court that has jurisdiction over the dispute, the procedural flexibility inherent to arbitration allows the parties to modulate the language of the procedure as they see fit. However, one should be aware of the possible existence of any mandatory rule provided by the law of the seat that would require conducting the proceedings in a specific language. Such a limitation to the parties’ autonomy is extremely rare.

While most of the arbitration proceedings taking place in the international arena are conducted in a single language, nothing prevents the parties from agreeing on multi-language proceedings. This may be the case for instance when each party can speak and submit written arguments in the language of its choice, with or without translation or when the arbitrators have the duty to issue their decision in two (or more) languages. Multi-language proceedings should, be discouraged, as they will invariably cause the proceedings to be delayed and, most of all, increase their costs (because of the need for translation).

American parties (just like any party from an English-speaking country) are in this regard somewhat favored because of the lingua franca status of English nowadays. Yet despite such advantage, it will generally not be a problem for a foreign franchisee to accept that arbitration is to be conducted in English.

D. Key Differences Between U.S. Domestic Arbitration and International Arbitration

American parties arbitrating domestic disputes should be aware of some important differences between domestic and international arbitration.

The first and most striking difference is the requirement that every international arbitrator be impartial and independent, even if he/she has been appointed by one of the parties.

The General Standard 1 of the IBA (International Bar Association) Guidelines on Conflict of Interest in International Arbitration holds that “[e]very arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.” The requirement of impartiality and independence is also found in many laws on arbitration.\(^\text{119}\)

By contrast, in the United States, the Code of Ethics for Arbitrators in Commercial Disputes, jointly prepared by the AAA (American Arbitration Association) and the ABA (American Bar Association) which became effective in March 2004, while clearly not favoring the option and excluding it for international arbitration,\(^\text{120}\) still allows the parties to agree in

\(^{119}\) See also Article 12(2) of the UNCITRAL Model Law on Arbitration:

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.

\(^{120}\) See Joint AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Note on Neutrality (Preamble):

The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties,
domestic disputes that party-appointed arbitrators need not be neutral. It would thus be misconceived for an American franchisor appointing one of the three arbitrators in an international dispute to expect that its arbitrator will be predisposed towards it.

Another area where American parties may be surprised by the difference between domestic and international arbitration is the taking of evidence. Typically, rules on the taking of evidence will be either agreed upon between the parties or, in the absence of such agreement, decided by the arbitral tribunal at the outset of the proceedings. On the international scene, arbitral tribunals tend to give more and more weight to the IBA Rules on the Taking of Evidence in International Arbitration, which are often incorporated into the procedural rules applicable to the proceedings or at least referred to as a source of inspiration in case the adopted rules are silent on a specific point. The IBA Rules have been elaborated by arbitration practitioners from all over the world and constitute an attempt to level the playing field of evidence taking between Common Law and Civil Law traditions.

An American party (or rather its attorney) would be erring in expecting to see the federal or state rules of civil procedure applied by analogy to international arbitral proceedings, even where the seat of the arbitration is in the United States.

In practice, though, the legal culture of the sole arbitrator or of the chairman of the arbitral tribunal (who will generally make an initial proposal of procedural rules to the co-arbitrators before they are adopted and will thus be in a position to shape them to suit his/her own style and culture) will play an important role in selecting the rules of evidence, when the parties have not agreed on them. A civil law arbitrator will tend to give more credit than his/her common law counterpart to contemporaneous written evidence, while a common law arbitrator will usually put more emphasis on oral evidence collected during the arbitral hearing.

E. Choice of the Arbitrators

Whereas the nationality of a mediator is a relatively trivial question, it can be an extremely sensitive question in arbitration.

Because of the procedural flexibility of arbitration, the parties may agree in advance on the qualities that a person must have in order to be appointed as arbitrator, including his/her nationality. Many arbitration laws expressly provide that no person shall be precluded, by reason of his/her nationality from acting as arbitrator, but do reserve the right of the parties to agree otherwise. On the other hand, some laws and arbitration rules provide at the same time that, for obvious reasons of neutrality, the presiding arbitrator should have a different nationality than those of the parties, unless otherwise agreed by the parties.

the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. […]

121 See Section XI.C above.

122 See Article 11(1) of the UNCITRAL Model Law on Arbitration.

123 See Article 11(5) of the UNCITRAL Model Law on Arbitration; Article 13(5) of the ICC Rules.
With such flexibility afforded should a party entitled to appoint one of the arbitrators always select a fellow citizen? The answer is not necessarily “yes”, certainly not in commercial disputes.

When selecting an arbitrator, a party will usually want its prospective appointee to be the most receptive to its position (yet, remaining impartial and independent), which implies that such person should have the qualities necessary to fully understand, and hopefully have sympathy for, the arguments put forward by that party. This objective can be achieved by appointing someone with a recognized expertise in the industry or, if the dispute turns around the application of a specific and unusual provision of the law applicable to the merits (which may not be the same law as that of the party), with a good knowledge of that law. These factors do not automatically point in the direction of an arbitrator of the same nationality as the appointing party. In addition, for small disputes, the cost factor may also play a role in prompting a party to appoint an arbitrator from the country where the seat of the arbitration is, or in ensuring that the arbitrator has a good knowledge of the language in which numerous documents to be produced in the arbitration have been drafted, so as to reduce, as much as possible, translation costs.

It would thus be an error for a party in international arbitration to consider appointing as arbitrator only persons of the same nationality as that party.

As to the substantive requirements that a person should meet in order to qualify as arbitrator, the parties will be well-advised to limit them to those only necessary. Imposing in the arbitration agreement too many requirements (for instance: “The chairman of the arbitral tribunal must be a person having at least 20 years of practice as a franchise lawyer, with specific experience in the fast-food industry, and 15 years of active practice of arbitration, with a minimum of 50 previous appointments as arbitrator, a third of which have been in the area of franchise law and a third of which the arbitrator has served in the capacity of sole arbitrator or chairman of the tribunal.”) will just be counterproductive, because it will so narrow down the pool of prospective candidates that it will become impossible to find a suitable candidate.

F. Choice of Counsel

The procedural flexibility of international arbitration gives the parties almost full freedom in the choice of the counsel who will assist and represent them in the proceedings.\textsuperscript{124} In exceptional cases, mandatory provisions of the law of the seat may require that parties be represented by a member of the local bar. Parties should thus avoid agreeing on a seat whose law restricts their ability to select counsel of their choice.

Taking advantage of this freedom, the parties should thus consider several factors when selecting their counsel in an international arbitration. Is the dispute more fact-driven (pointing more in the direction of a lawyer experienced in the substance of the dispute) or law-driven (pointing in the direction of a lawyer trained and practicing under the law applicable to the merits of the case)? Should the party hire co-counsel (e.g., one counsel more experienced in the

\textsuperscript{124} See, e.g. Article 5 of the UNCITRAL 2010 Rules:

Each party may be represented or assisted by persons chosen by it.

See also Article 26(4) of the 2012 ICC Rules.
substance of the dispute and the other more specialized in arbitration, or trained in the law applicable to the merits)?

Whatever the parties’ preference, the party should ensure that the retained counsel has sufficient experience in international arbitration. An error too often committed is to select a counsel who may be an excellent litigator, but who will fare poorly before an international arbitral tribunal, because of his/her natural instinct of replicating court-style advocacy, thereby creating procedural difficulties and risking of alienating the sympathy of the members of the arbitral tribunal.

G. International Enforcement of Arbitral Awards (New York Convention)

As said above, one of the most important advantages of arbitration over litigation is the unified and simplified (almost) universal system of recognition and enforcement of foreign arbitral awards, established by the New York Convention.

Because of the absence of a treaty on enforcement of judgments between the United States and any other country, there is no guarantee that a judgment rendered by a court in the U.S. will necessarily be recognized and enforced abroad, for instance in a country where a franchisee has assets.

By contrast, Article III of the New York Convention mandates the contracting States to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

Foreign awards are thus put on equal footing with domestic awards as far as their recognition and enforcement are concerned. In addition, the Convention exhaustively sets out, in its Article V, the grounds for refusal of recognition and enforcement and further states in its Article VII that it shall not deprive a party of a more favorable treatment it would enjoy under the application of the law or other treaties of the country where the award is sought to be relied upon.

In summary, while the enforcement abroad of an international award is not 100% guaranteed, the New York Convention definitely contributes to the increased efficiency of arbitration as a mode of resolving international disputes by creating a harmonized framework for such enforcement and restricting the ability of the courts of the contracting States to refuse it.

XIII. CONCLUSION

The right form of international dispute resolution depends upon a host of circumstances. International franchise disputes can be extraordinarily complex and it is counsel’s responsibility to think through which method of dispute resolution best accomplishes the client’s objectives. That decision, as demonstrated above, can also be surprisingly complex.
Pascal Hollander

**Pascal Hollander** is a member of the Brussels bar and founding partner of Hanotiau & van den Berg in 2001. Pascal Hollander is considered as one of the leading experts in Belgium in the area of commercial distribution and franchising, assisting clients both in transactions and dispute resolution. For more than fifteen years, he served in the Legal Committee of the Belgian Franchising Federation.

Besides acting as counsel, Pascal built up for the last 15 years a solid practice as arbitrator in international disputes, with a focus on international distribution and franchising. To date, he has acted as chairman of Arbitral Tribunals, co-arbitrator or sole arbitrator, in close to 100 arbitral proceedings, under the aegis of ICC (International Chamber of Commerce), LCIA (London Court of International Arbitration), SCC (Arbitration Institute of the Stockholm Chamber of Commerce), Swiss Chambers, WIPO (World Intellectual Property Organization), CEPANI (Belgian Arbitration Center) or in UNCITRAL and *ad hoc* proceedings, in areas such as commercial distribution and franchising, but also construction & engineering, energy, aeronautics, company law, intellectual property. He was one of the first persons acting as Emergency Arbitrator under the ICC Rules and was the very first Emergency Arbitrator appointed by the Swiss Chambers’ Arbitration Institution.

Pascal also teaches arbitration law at the Professional School of the Brussels Bar. He lectures and regularly publishes articles in the fields of commercial distribution and franchising and of arbitration.

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