THE IMPORTANCE OF PROCESS-DESIGN WHEN SELECTING A MEDIATOR FOR CROSS-BORDER DISPUTES

Jeremy Lack, *Lawtech (Switzerland)* and Aloysius Goh, *Sage Mediation (Singapore)*

"Mediation" can be a confusing word, especially in cross-border disputes. Influenced by local judicial cultures (among other factors), mediation can mean either: a facilitative process that is interest-based, looking to the parties' subjective future needs; or an evaluative process where the mediator assesses the parties' positions and helps them to identify, understand and apply possible norms to shape a zone of possible agreement based on past facts. In many jurisdictions it includes both activities, with the mediator moving seamlessly between roles. Cross-border disputes raise challenges that may require different mindsets and approaches, even in similar cases involving similar issues, but where the disputants come from different cultures.

There are many different cultural assumptions about what mediation is, what the role of a mediator should be, and how proceedings should be handled (eg, in joint sessions or in private caucuses). This is evident simply from observing differences in national training programmes for mediators, which vary greatly from country to country. The Australian mediator Joanna Kalowski describes these differences as analogous to fish in fishbowls: there may be great differences in the water in each bowl (eg, saline or fresh) and the cultural context in which the mediators swim. Thoughtful process design can address the problem.

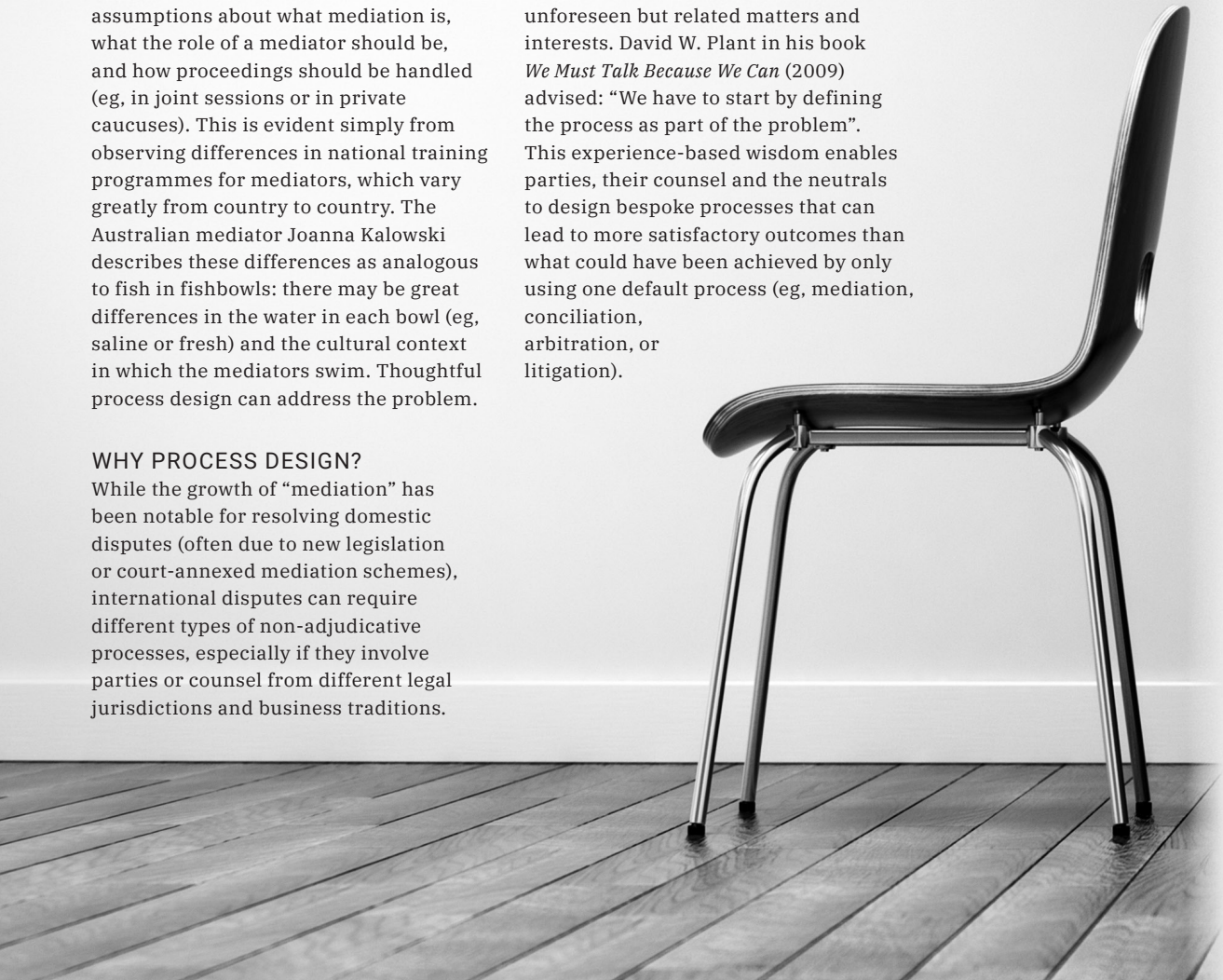
WHY PROCESS DESIGN?

While the growth of "mediation" has been notable for resolving domestic disputes (often due to new legislation or court-annexed mediation schemes), international disputes can require different types of non-adjudicative processes, especially if they involve parties or counsel from different legal jurisdictions and business traditions. When appointing international mediators, the processes they are most familiar with need to be reconsidered before assuming they may be appropriate in the case at hand. Appointing two neutrals rather than one may also be preferable in some cases, depending on the size and complexity of the dispute. They may enable processes that can consider both subjective interests and objective norms.

Process Design involves one or more neutrals helping the parties understand their procedural needs and interests (eg, in terms of budgets, deadlines, evidence to be collected, stakeholders involved, relationships to be maintained, etc.) and helping them to construct the most appropriate dispute resolution process based on these parameters. Intelligent process design enables all participants to take a step back and consider possibly unforeseen but related matters and interests. David W. Plant in his book *We Must Talk Because We Can* (2009) advised: "We have to start by defining the process as part of the problem". This experience-based wisdom enables parties, their counsel and the neutrals to design bespoke processes that can lead to more satisfactory outcomes than what could have been achieved by only using one default process (eg, mediation, conciliation, arbitration, or litigation).

BALANCING PROCESS DESIGN WITH FAMILIARITY AND THE PARTIES' INTERESTS

Many law firms prefer to hire mediators they know well. The Global Pound Conference (GPC), a series of conferences held between 2016 and 2017, was a unique project that collected data from over 2,800 experienced stakeholders involved in dispute resolution from around the world. It found that parties tend to rely on the advice of their lawyers, who in turn tend to recommend processes and neutrals they are most familiar with. A balance needs to be struck between three elements: the design needs of the dispute itself (eg, budgets, deadlines, relationships, external pressures);



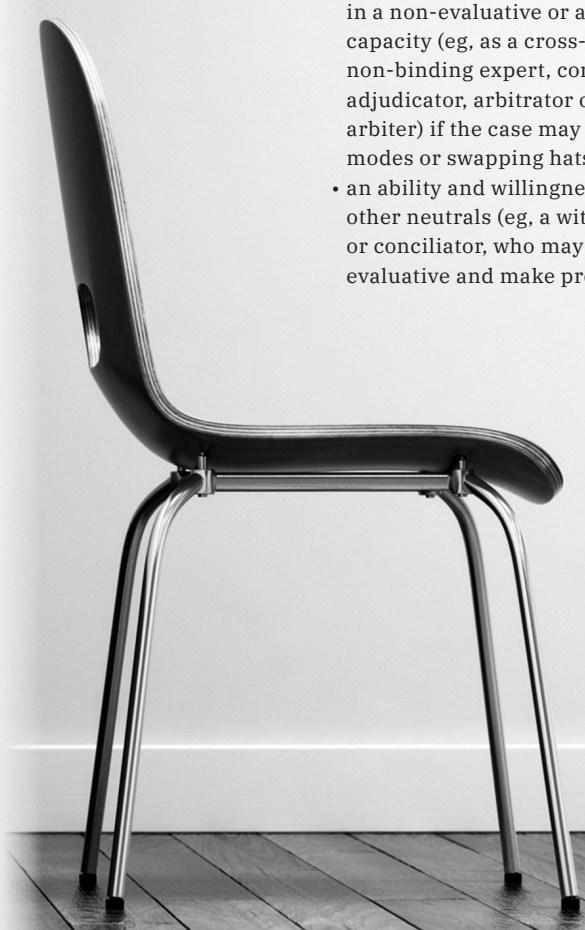
the parties' procedural choices (eg, adjudicative and/or non-adjudicative); and the counsel's or parties' desire for familiarity. When selecting a mediator, it may be advisable for the parties and their counsel to combine different forms of dispute resolution (eg, negotiation, mediation, conciliation, neutral evaluation, adjudication, arbitration or litigation) to bring the parties to an optimal outcome in the most effective way. Positive results are often obtained in international mediations when the parties focus not only on the destination they hope to reach (eg, winning a litigation or arbitration) but also on the journey itself: knowing who is on the bus, what the terrain is, how the bus is driven, whether the right people are on board, whether there are better routes to take them from A to B, whether they all want to go in the same direction and whether they have sufficient resources to do so.

Careful mediator selection can have a great impact on this journey. Some mediators are comfortable working primarily on their own and prefer to stick to their traditional procedural formulae. Others have knowledge, experience and skills they prefer to adapt to each dispute they mediate – for example working with other neutrals to take into consideration the disputants' procedural needs, interests and concerns, and whether norms may be of use or a distraction. Considering budgets, deadlines, the need for technical or legal expertise, and the importance of future relationships may result in completely different processes being proposed.

WHAT TO DO?

What should a party or lawyer who is newly arrived to the field of cross-border alternative dispute resolution do? Should they appoint a neutral they are used to working with in domestic disputes, or consider new mediators (or even co-mediators) for such disputes? Other typical considerations that may be relevant are:

- international or cross-cultural experience;
- relevant substantive expertise;
- familiarity with the cultural backgrounds of parties and their traditional norms;
- language skills;
- Their understanding of different styles of mediation (eg, "evaluative", "transformative" or "facilitative") and different types of ADR (eg, mediation, conciliation, arbitration);
- a willingness to act, if and as required, in a non-evaluative or an evaluative capacity (eg, as a cross-cultural coach, non-binding expert, conciliator or even adjudicator, arbitrator or mediator/arbiter) if the case may require mixed modes or swapping hats; and
- an ability and willingness to work with other neutrals (eg, a with co-mediator or conciliator, who may be more evaluative and make proposals).



Answers to many of these questions can be found in Michael Leathes' book, *Negotiation: Things Corporate Counsel Need to Know But Were Not Taught* (2017).

Users should check the CVs of possible mediators and ask them whether they would be comfortable working in a mixed mode process, or being a co-mediator. The book *International Arbitration & Mediation: A Practical Guide* (2009) by Michael McIlwrath of General Electric and John Savage QC of King & Spalding also includes a wide range of advice on finding appropriate mediators.

WHAT USERS SAY THEY WANT

The GPC's data was collected in 24 countries from 433 disputants, 734 advisers, 407 adjudicative providers, 873 non-adjudicative providers and 431 influencers, such as thought leaders, government officials and judges. When considering the role of ADR neutrals, these stakeholder groups recommended:

- obtaining early guidance regarding different possible ways of resolving a dispute;
- seeking assistance in first assessing procedural options, and then adapting them as required to the range of issues and interests involved in each case; and
- leaving the door open for "mixed-mode" processes, where different types of processes could be combined; these possible mixed-mode processes include adjudicative proceedings (where findings of fact, law or other norms may be involved), and non-adjudicative processes (where subjective interests, concerns and motives may be explored, looking to the future).

For the detailed results and initial reports of the GPC project, see: www.globalpound.org.

The GPC data suggests that, in some cases, disputants may be better off working with several neutrals having different roles or qualifications, instead of merely identifying and appointing a single neutral who will follow a prescribed linear procedural track. The GPC participants showed a growing appetite for combining adjudicative processes (eg, arbitration or litigation) with non-adjudicative processes (eg, mediation and conciliation), or different types of non-adjudicative processes (eg, mediation/conciliation). Such mixed modes

are believed to correlate with higher settlement rates and satisfaction ratings. As a result, the International Mediation Institute, the College of Commercial Arbitrators and the Straus Institute for Dispute Resolution at the Pepperdine School of Law have created a mixed-mode task force of international ADR experts who are considering new guidelines for such dynamic, more flexible, processes. (See www.imimediation.org/about/who-are-imi/mixed-mode-task-force/.)

IMPLICATIONS FOR ADR PRACTITIONERS

These results indicate that prospective neutrals being considered for cross-border disputes should increasingly be prepared to discuss the pros and cons of mediation, conciliation, arbitration and litigation with the parties and their counsel, and how they may best be combined to resolve certain issues more satisfactorily, rapidly or cost-effectively in the case at hand. The results also suggest that international arbitrators, judges and ADR institutions should be increasingly willing to provide opportunities for mediations (eg, mediation windows) or conciliations in the course of adjudicative proceedings, and encourage amicable dispute resolution discussions on specific issues. This is especially important where there appear to be strong subjective interests looking to the future (eg, preserving good relationships, new business opportunities, new revenue streams, synergies, or strengthened market shares) that may outweigh the benefits of focusing on narrower past, forensic or technical so-called "facts" or norms (eg, comparative laws).

EAST MEETS WEST

Consider, for example, a large commercial dispute between Western and Asian enterprises. Mediation practitioners in some jurisdictions can be predominantly evaluative as a result of also being lawyers, experts, arbitrators or judges. Many mediators view their role as being "norms generators", "norms educators" or "norms advocates". This can give rise to different ethical considerations, as discussed in *Mediation Ethics* (2011) by Professor Ellen Waldman. Influenced in part by a strong preference for authoritative direction and efficiency, it is not uncommon that parties in some Asian jurisdictions may ask their mediators to also evaluate or arbitrate at some stage in their proceedings. This may be frowned upon by many Western professionals, and viewed as a violation of their traditional ethical norms. However, the growing interest in mixed modes, especially for cross-border disputes, is increasingly favouring neutrals who are willing to swap hats or work with other neutrals offering a different ADR approach, one that may be more or less evaluative.

The practice is sufficiently prevalent in numerous cross-cultural circles to necessitate consideration of how ongoing mediation proceedings may benefit from being adapted to meet the circumstances. The critical proviso is that the mediators who have been appointed must be able to adapt to these new requirements and work with service providers, standards bodies and other neutrals to ensure that such mixed mode processes are crafted with sufficient rigour and expertise. Users must receive sufficient assurances of security and professionalism. Mediators must ensure that appropriate steps are taken to verify that users have a sufficient understanding of the possible consequences of their procedural choices, and of how how information obtained in caucuses is handled; and they must obtain any waivers that may need to be signed at appropriate procedural junctures. Advisers need to be sure they are all on the same wavelength procedurally and comfortable with these issues. Before a mixed-mode mediation begins, mediators should satisfy themselves that the parties are well-advised about the details and implications and have the capacity to provide sufficiently informed consent.

As Asian corporations grow in size and bargaining power, it is likely that they may request mediation processes that can be shaped flexibly in a variety of adjudicative and non-adjudicative ways, which can take into consideration not only legal norms, but collectivist and individualist cultural factors as well. The Arbitration-Mediation-Arbitration (AMA) Protocol jointly pioneered by the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC), as well as new procedural choices allowing combinations of proceedings (eg, MEDALOA, med-arb, arb-med) through the same secretariat, as also provided for in the new rules of the Swiss Chambers' Arbitration Institute (SCAI) and the World Intellectual Property Organization, are examples of of how providers are preparing to offer such flexibility. They are evolving to be able to cater to increasingly sophisticated and thoughtful users and advisers who wish to adapt processes to their social context, benefit from efficiencies and lower costs, as well as ensure the international enforceability of any outcomes that are generated. It is no surprise that the United States and China both agreed to sign the new United Nations Convention on International Settlement Agreements Resulting from Mediation on 7 August 2019, and that the venue for this ceremony is Singapore.

Singapore and Switzerland (where the two authors of this paper are located) are examples of small jurisdictions that have benefited from cultural and professional diversity in the field of ADR. They have both been able to attract international disputants and provide them with new services that are designed to accommodate combined processes implemented by ADR institutions that provide more than one type of ADR process. The authors of this article believe that combining the know-how that exists in both of these countries would be another step forward for the international ADR community. Processes jointly administered by Swiss and Singaporean ADR institutions may give rise to new ways of combining the best of common and civil law systems, as well as new cross-cultural combinations of adjudicative and non-adjudicative processes. Joint programmes between these countries and others should be encouraged to encourage even greater diversity.

The statistics from Singapore, where the AMA protocol was launched in November 2014, are already telling. In the first four years of its existence there have been 14 AMA cases, all of them cross-border disputes, whose average value exceeded US$10 million. Settlement rates during the mediation step for such AMA cases currently stand at 80 per cent. For the remaining 20 per cent of disputes that do not settle, the parties nevertheless give high satisfaction ratings. This could be due to a reduction in the number of contentious issues remaining at the end of the mediation process, even if the entire dispute did not settle, clarifying the issues to be referred to arbitration or litigation in each case. Such subsequent adjudicative processes may benefit from considerable savings in costs and time due to a prior non-adjudicative process having occurred.

The statistics from the Netherlands (where mixed modes are already more common) are similar. This is one of the rare jurisdictions that has provided for co-mediation by a facilitative mediator working with an evaluative (but non-binding) conciliator who can make settlement proposals, anecdotally leading to almost 100 per cent settlement rates. The Netherlands has also pioneered arb-med processes where the neutral first acts as an arbitrator (but provides the award in a sealed envelope without revealing it to the parties) and then "swaps hats" to mediate the dispute under time constraints, such that the sealed award will be opened and revealed to the parties, and become binding, if no settlement is reached during the mediation phase.

RULES ENABLING SWAPPING OF HATS

In the Swiss SCAI Rules and the Singaporean SIAC-SIMC AMA Protocol, as well as other international ADR rules that allow for mixed modes, the arbitrator and mediator are expected to be different individuals. These rules, however, allow parties to change this expectation by mutual consent, providing an important potential opportunity to users. The neutrals can swap hats by mutual consent of the parties: acting sometimes as mediators, other times as arbitrators. Not all cases are suitable for such hat-swapping but these hybrids suggest that counsel should work with their clients to consider the selection of possible arbitrators and mediators, or co-mediators, who may be willing to help guide and design such combined processes, while providing sufficient procedural safety checks (such as waivers and rules on disclosure of information obtained in caucuses). Regardless of the divergent levels of sophistication or experience that users may have with different forms of ADR, and regardless of whether the same neutral will swap hats or work with other neutrals, it is important in cross-border disputes to appoint neutrals at the outset who can help triage the different procedural interests at stake and adapt each case to its needs. This allows each case to evolve as effectively as possible, bringing in neutrals from other jurisdictions if useful. It is one of the greatest ways in which ADR institutions can add value in the future.

SOCIAL ENGAGEMENT AS PART OF PROCESS DESIGN

A good international mediation may require a variety of good project management and interpersonal skills, as well as substantive dispute resolution expertise or technical or legal skills. Social activities that may be perceived as time-wasting in some cultures often provide a critical turning point for participants from other cultures, and move the parties towards greater adoption of mediation. They may shift unconscious and innate patterns of behaviour from “out-of-group” scripts to “in-group” scripts.

The selection of a good international mediator may require cultural flexibility and fluency just as much as experience or expertise. Many Western lawyers and mediators prefer to do most of their work in private sessions or caucuses, to such an extent that some mediators are even beginning to dispense with opening joint sessions altogether. Many mediators will also assume the matter will take one full day to mediate, and will start by being non-evaluative and


Jeremy Lack


Aloysius Goh

facilitative in the morning, but become increasingly evaluative in the afternoon to try and reach an outcome by the end of the day. They will often prepare to give a mediator's proposal by 5pm. This too can be viewed as a mixed-mode process, and it is better if this is expressly understood in advance.

The expectation of the neutral(s), the parties and their advisers in domestic disputes is often that the mediator should be left to use his or her own judgement and experience to know whether and when to become more evaluative, and should make a mediator's settlement proposal at any time if this is deemed appropriate. In international disputes, however, it may be advisable to spend more time in joint sessions to get to know one another (including the mediators) better, and openly explore new ways of optimising social interactions between the co-disputants, for example through shared meals, joint meetings and shared experiences.

A clash of cultures regarding preferences regarding the use of joint sessions or private caucuses can frequently arise, especially where when one party has representatives or advisers who are more familiar with litigation or arbitration advocacy and want to plead their client's case; and the other has collaborative advisers, who more interested in exchanging new information. It is not uncommon for Asian state-owned enterprises to indicate that their company policy forbids the use of private caucuses, and that everything must be done in joint session. Imagine the impact of appointing a highly experienced foreign mediator for such a case, who is used to working primarily in private sessions.

Many highly experienced mediators have different views on this. Some believe that joint sessions are necessary to foster a spirit of open discussion and amicable settlement. From a neurobiological perspective, joint sessions may trigger social plasticity and activate innate "in-group" pro-social behavioural patterns; whereas working primarily in caucuses may trigger innate "out-of-group" anti-social behavioural patterns between competing disputants. But such joint or separate meetings also enable parties to test out a broader range of hypotheses and address deeper realities, such as cognitive or cultural biases, which may affect the mediator(s) as well as the other participants to the process, especially in jurisdictions that offer few tools for procedural checks and balances, intervisions or insights into mediators' preferred practices. By understanding and knowing how to trigger "in-group" as opposed to "out-of-group" heuristics, especially in cross-cultural disputes, it is possible to avoid certain group-think biases, trigger better listening skills and enhanced empathy, working in a more compassionate state of mind, while avoiding negative emotional spiralling.

THE NEED FOR A FLEXIBLE AND INCLUSIVE APPROACH IN MEDIATOR SELECTION

In this paper, we have illustrated the value of a mixed-mode approach that can be tailored to the exigencies of the dispute and the parties and advisers involve in it. We have also emphasised the potential added-value of co-mediating cross-border disputes. Mixed-mode processes and co-mediation often go well together.

It is crucial to consider carefully the choice of mediator for a cross-border dispute. The impulse to simply select a mediator with whom counsel is already familiar, or to rely purely on reputation or phone-a-friend referrals, needs to be revisited

Advisers and mediators who take on cross-border disputes need to focus on how and why the needs of the parties, and the demands of their dispute, may require a much more versatile and flexible process approach than may typically be involved in domestic disputes. Many of these needs and demands are driven by different cultures, practices, expectations and contextual influences that often shape the nature of international disputes and the possible mechanisms for resolving them. From a user and adviser perspective, it is crucial to consider carefully the choice of mediator for a cross-border dispute. The impulse to simply select a mediator with whom counsel is already familiar, or to rely purely on reputation or phone-a-friend referrals, needs to be revisited. Not every experienced mediator is necessarily right for the case at hand. Competence and suitability are not the same thing. A good international dispute resolution provider with a top panel of neutrals and a close knowledge of their skills and aptitudes can go a long way to setting up a cross-border dispute in the best possible way with the optimum process design and service support.

Individual neutrals who possess equal expertise in all the domains of ADR are rare. Their ability and willingness to work alongside other neutrals with complementary skill sets may be far more important. Users with real and pending needs often do not want a stranger to come in and impose their procedural preferences. Team mediation and team dispute resolution approaches already exist in practice, encouraging advisers and neutrals to discuss early-on comprehensive dispute resolution services that best meet their clients' procedural needs. It is thus increasingly accepted for parties and their advisers to appoint two complementary neutrals or co-mediators, who will know how to work effectively with one-another. Two brains are often better than one, and it is said that the truth often begins in pairs. It is also better to think in terms of "and" rather than "or."

The selection of international mediators for cross-border disputes is as much an art as it is a science. But combining mediators from different cultures who know how to work together and who are open to discussing process design issues is likely to provide a more enlightening journey that can take the disputants to far better destinations than they might originally have envisaged. Appointing neutrals who know how and when to swap styles at different stages and who can work compatibly with other ADR professionals may prove to be far more important than substantive expert knowledge, or years of experience managing the same types of disputes. Rather than asking what types of processes a candidate may intend to use, or selecting a mediator based on his or her preferred style, interviewers should be prepared to ask broader questions based on how prospective mediators feel about mixing modes and possibly changing gears and styles, in accordance with the terrain they will need to navigate together. A very early focus on all these issues can generate greater opportunities and flexibility when surprises arise, which is one of the few constants of international dispute resolution.