



ISSN : 1875-4120
Issue : Vol. 12, issue 6
Published : November 2015

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2015
TDM Cover v4.1

Transnational Dispute Management

www.transnational-dispute-management.com

Practical and Cultural Aspects of International Mediation by E. Birch

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

2015 MEDIATION SYMPOSIUM-June 2015
Center for International Legal Studies
Salzburg, Austria

The following articles were selected for publication from the Center for international Legal Studies (CILS) first symposium for alternative dispute resolution focusing on mediation. The symposium, co-chaired by Prof. Dr. Renate Dendorfer-Ditges (Germany) and The Honourable Ken Fields (Unites States), attracted members of the international dispute resolution community including legal practitioners, academics, mediators as well as users of mediation. The symposium was designed as an exchange of ideas among mediators and users of mediation.

The result was a lively exchange of ideas, techniques and theories regarding mediation as a dispute resolution approach. The exchange pointed out many similarities and differences between mediation in Europe, Israel, the United States, China and Australia. Common comments among the attendees were that the symposium was “exciting, informative and highly interactive”.

The feedback from the first CILS mediation symposium calls for a second symposium which is now tentatively scheduled for 8-11 June 2017.

Practical and Cultural Aspects of International Mediation

By Elizabeth Birch¹

Contents

Executive summary.....	1
Key Words and Phrases	2
Introduction.....	2
Section I: Practical Aspects of International Mediation	3
Section II: International Mediations and Inter-Personal Interaction.....	12
Section III: Conclusion	21
Appendix 1: Handling the Process in International Mediation.....	23
Appendix 3: Graph of High and Low Context Cultures by Claire Halvorsen.....	27
Appendix 4: Degree of Identity and Acculturation in Individuals by M. Westwood and D. Massey	28
Bibliography	29

Executive summary

In this paper Elizabeth Birch shares her experience of international mediation. She considers some of the theories on cultural behavioural patterns as applicable to international commercial mediation and considers some of the practical aspects of dealing with these to reach a successful outcome. In particular, she advocates a flexible approach to the process in such mediations and the finding of a third way which weaves between the needs and desires of parties coming from very different cultural backgrounds, to find a process that all parties can accept.

¹ 3 Verulam Buildings, Gray's Inn, London, WC1R 5NT. International Barrister, Arbitrator and Mediator (www.3vb.com). Previously published in "Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2013)" ISBN13: 9789004274938. © Brill | Nijhoff - republished with kind permission.

Key Words and Phrases

Mediation	Acculturation
International Mediation	High Context
Commercial Mediation	Low Context
International Commercial Mediation	Cognitive Science
Mediation Processes	Individualism
Culture	Collectivism
Multi-cultural	Outsider-Neutral Model
Inter-cultural	Insider-Partial Model
Cross-cultural	Mediation with Skype
Inter-personal Interaction	Mediation by video conferencing

Introduction

This paper shares my experience of international mediation and the approaches that have yielded the best outcomes for me. I begin with some of the practical and preparatory aspects of international mediation and then discuss some of the cultural issues that arise.

These mediations cover a wide area of international commercial disputes including everything from maritime, oil & gas, international sales and transportation, commodities, international distribution and franchise, pharmaceuticals, banking and so on.

The common element in these disputes is that the parties come from different jurisdictions around the world. They arise in an arena where different cultures rub up against each other. There are seldom individuals involved, although of course each corporate company is very much made up of a number of individual representatives at the mediation, and each of them have their own particular agenda, position or interest so that complex individual issues are superimposed on the corporate point of view. Consequently, international commercial

mediation gives rise to cultural differences both on an individual interpersonal level and at a higher level between the companies or institutions. An international mediator has to be consciously aware of these issues at all stages of the process while at all times acting instinctively to the particular and individual challenges presented in the mediation. A consideration of the theory of cultural² differences has its place here because awareness of those differences makes the mediator sensitive to the causes of misunderstandings between parties and ultimately possible impasse in negotiations and provides a way in which to conceptualise those differences and difficulties. In short it may assist the mediator in helping the parties to find a route to settlement when the going gets tough. Section II of this paper considers some of the learning available in this field where it assists in the practical aspects of international mediation.³

Section I: Practical Aspects of International Mediation

Since these disputes tend to be high value and often complex as a matter of both fact and law, the mediation format most commonly used in the United Kingdom of a one or two day mediation meeting is often insufficient. A different approach is often more successful. A slower pace can allow the different approaches and cultures of the parties to be understood and assimilated and it can afford the parties the opportunity to re-establish their relationships and to explore alternative business solutions. I discuss this in more detail below.

A key difference with international mediation is that the parties are based in geographically distant places and the issues that are involved inevitably cross borders. This means that a distribution dispute in, say, Russia may involve satellite IP litigation in Sweden, Austria and

² The term "culture" is used here in its anthropological sense.

³ This paper does not attempt a complete review of the learning in this field as that would be a vast exercise, but simply to highlight some of the learning of relevance and interest.

a number of other nearby countries. Each patent will be subject to different regimes and different laws. Another dispute emanating initially from contractual obligations in Italy and Greece may result in a negotiation of rights in respect of the all of the Western and Eastern European countries and beyond with quite different application of law and with different obligations and problems arising in each country. The view of possible solutions to the dispute tends to involve a much wider and broader vision than that of domestic litigation. Many possibilities exist which have often not yet been identified and this is particularly so because the parties are focused on their dispute, rather than the positive aspects of how much business they could offer each other to a mutual benefit. Neutral exploration can bring surprising results in all types of mediations, domestic and international, but negotiations in a global context can provide particularly wide opportunities, once the trust is rebuilt between the parties. Such mediations, which seek to find a globally enhanced value for the parties, may not fit into the conventional model of a one or two day meeting. It may take time to reach the best results.

The question of venue is a difficult one for the parties as each typically wants the other to travel to their home ground and there may be a number of parties coming from a wide selection of countries. Generally, in international mediation, it is better to find a neutral venue for the meetings. Sometimes parties will agree to the first meeting being on the home ground of one party and the second (if there is to be a second) on the home ground of the other. In my experience international mediation organisations such as the ICC in Paris or the SIMC (Singapore International Mediation Centre) can be very helpful. They can be tenacious in working with the parties to find an agreement as to the country or city where the meeting can take place. Parties can become both tactical and competitive in their selection of the country for the meetings and it can be more economical to pay the organisation to administer the dispute than to pay the mediator to get too involved in the nuts and bolts of

where the meetings will take place and even getting the parties to the initial stage of agreeing to mediate. They also have good experience, I have found, in locating suitable venues with good facilities within the eventual country or city of choice. An advantage for the mediator is that they take fees on account for the mediator, which is important when dealing with companies and advisors in several different jurisdictions.

When it comes to the choice of the mediator, my own view is (although I know not everyone agrees), that in international mediation the residence of the appointed mediator is fairly irrelevant. Much more important is that the right mediator is appointed for the dispute. Some organisations, for example, work hard to find a “local” mediator once they have agreed with the parties where the mediation is to take place. This misses an essential point: while a first meeting might be for example in Germany, the next meeting is likely to be expected by the parties to be closer to the location of another party, which might be India, Singapore, Australia, Dubai or elsewhere. In such circumstances there is no such thing as a “local” mediator. Such an approach is only relevant if there is only one meeting and in high value and complex international mediations there is often more than one meeting because any negotiation (and following settlement) is necessarily complex and may require a pause for additional information, documents or even reflection. A better approach is to agree on the mediator first and then to determine the venue. Most international mediators will travel to a place of convenience to the parties.

Very important, however, is that the mediator should be aware of any quirks of the legal process in the chosen place of the mediation. A mediator mediating in some countries will need to be aware that the law may not accord private sessions with confidentiality unless the parties so agree in writing in the mediation agreement. Other jurisdictions will have their own other particular idiosyncrasies.

I adopt a number of approaches to safeguarding the process of mediation where I am mediating an international dispute outside London. It is important, since the parties will be from different countries, with possibly different understandings of the process, that the mediation agreement sets out in as much detail as possible what the process will be and what are the consequences. The English model of mediation appears to be generally regarded as acceptable around the world and since English law is often neutral to the dispute, because more often than not the parties are from everywhere other than England. However, in an international mediation, there can be no assumptions and the process needs to be fully explained, negotiated and adapted as necessary to the parties' needs. The process of doing this usually takes care of any oddities of local law and process particularly those relating to confidentiality or enforceability. Of course, the parties can agree that they want the local law to apply, but in reality what they usually want is a process that follows an international norm, not one that follows the quirks of a particular European or other jurisdiction. Recently I held the first meeting of a mediation in Frankfurt. One party was Italian and Greek with Swiss lawyers and the other party was Indian with German lawyers. What the parties wanted was an internationally accepted process and this was particularly so as they then went on to meet in Milan, Dubai and London at different stages of the mediation.

While it is common in domestic mediations in England to present the parties with the mediation agreement for signature at the start of the first day of mediation, in an international dispute I will negotiate and circulate the terms of the mediation agreement and will also ask the parties to sign the agreement and scan it back to me, so that I have their prior firm agreement to the terms on which everyone is attending. This is particularly important where parties are travelling substantial distances across the world and where the lawyers and parties may have a very different understanding and have very different ideas as to the usual content of a mediation agreement.

Sequentially, the next issue is whether any party representative needs a visa in order to attend the mediation meeting. I have found the ICC both experienced and very helpful in handling the practicalities of mediations taking place under their rules. The secretariat will write the necessary letters to ensure that a visa is obtained.

Like domestic mediation, international mediation varies enormously in its form. The needs of the parties are always different. Some cases, particularly standard international trading or shipping disputes, will suit the simple one or two day formula where the process may be very akin to a standard domestic mediation proceeding in the UK, although there will always be superimposed on it some cross-cultural aspects albeit confined to the more obvious characteristics of the negotiating parties. A Greek shipowner may typically be animated and direct in negotiation while a Scandinavian trader may be more reserved in his expressions. The more global the organisation, the less obvious are the national characteristics of the participants. There grows a sort of omni-cultural behaviour in which national characteristics are quite suppressed. But mediation is the sum of the individuals who participate, and the extent of evident cultural characteristics will vary with every participant. It is the skill and expertise of the international mediator to be aware of the differences between the parties, including those that arise out of cultural differences, so as to spot the areas of misunderstanding and bring the parties back together to do the business that is in their joint best interests in a spirit of trust. This is often easier than might be imagined. The parties originally did business out of mutual respect and interests. Unless those interests have changed, they still need each other. They simply need to understand why the other party takes a different view of the dispute and to know that there is no malice or bad motive at play.

In contrast to that standard type of mediation, there is another type of case which arises in the international context and which gives rise to a very different form of mediation. It is what I

call slow burn mediation. These can be hard to identify beforehand although it is possible to get a hint of what is to come from the nature of the dispute. Sometimes, they only become obvious at the first meeting. These are the cases where the parties are in a long term business relationship, where there are fundamental misunderstandings leading to a breakdown in trust, but where the business interests on both sides are in continuing to work together. It may be a pharmaceutical product where a dispute in arbitration will cause the sort of delay that allows a third party to steal the market first, it may be a packaging company with an innovative design where they want to grab the big retailers before the competition, or it may be a refinery company doing deals with an oil major where the refinery needs to court the oil major back to doing further business. Once the parties get past the breakdown in trust, stop blaming each other and think about their interests and needs objectively, they realise that there is much more to be gained from continuing in business together than in fighting arbitration or litigation while others march off with the market.

But very often the business which was being done is no longer precisely the business that can be done by the time of the mediation. And it is these disputes which lead to the most creative of procedures and the most rewarding results. So, a company developing and distributing pharmaceuticals in one part of Europe, say Germany and France, with background development partners in those countries, has to look at other options. They thought they had an arrangement for exclusive jurisdiction in those countries, but they no longer have that. The manufacturer of the pharmaceutical has done a deal with a bigger player in the market and he can't, or won't, go back on that deal. But he needs to settle the dispute because if he doesn't then injunctive proceedings may be taken by the other party against the intruder into the market. He may lose both deals, so he needs to satisfy this party. What can he offer instead? Greater geographical limits, more products, a deal on different terms, a deal (perhaps) that takes over the responsibility for packaging or otherwise divides the

responsibilities differently between the parties. The mediation becomes a deal-making negotiation. When global parties are operating beyond the borders of individual countries, anything is possible. The background partners of the distributor come into the mediation. They are not part of the dispute, but they are part of the solution. Our Spanish businessman cannot settle the dispute without bringing them on board too as he might otherwise be in breach of his joint venture agreement.

Now we turn beyond the details of the companies, to look at those who come to the first meeting. Personnel who seemed sufficient for the resolution of the original dispute are no longer the people to negotiate a new deal with different and greater geographical boundaries. They may have the wrong expertise and they may also be too junior, so the top level personnel become involved. The mediation which started as a simple two day meeting progresses through modern means of communication by Skype as well as telephone. The trust builds as the higher level of personnel are involved. The Spanish CEO is now, at last, speaking to his counterpart. The deal is no longer for (arguably) exclusive distribution rights in two countries (one of the likely issues between the parties on a badly worded contract) - now it is a possible deal to include all other Western European countries and most of the Eastern European countries. It is a different creature. Everything is up for grabs. But all the time, there is a restraint in the negotiations because there is the backdrop of the dispute. The parties are cautious - they cannot negotiate as two parties doing new business would, because they are not sure how much to trust the other party. They each hold onto some of their original claims and to some of the blame game. So the mediator's role is a continuing one. And in all of this, modern communications can play their part.

Everywhere Skype is now being used to enhance communications and this includes businesses and particularly global businesses. Sometimes video conferencing is useful,

particularly where a private caucus is going to involve a lot of participants, and there are now some very high quality systems in place in a lot of India and other similarly distant countries giving good links to the UK. Successive sessions can also be held on Skype with individuals within an organisation and that sometimes has its benefit too. Once the mediator has met the representative, the conversation is very easy to continue by electronic means. Where the mediator has not yet met the representative, then a prior meeting on Skype or by video can pave the way for a quicker, smoother route into discussions with that person when a mediation meeting comes about.

Similarly in a dispute involving a refinery against an oil major, the senior personnel at the mediation may negotiate a settlement in principal, but the oil major may want to limit its immediate cash pay-out. They offer US\$17 million against a claim of, say, US\$25 million. The refinery wants, more than anything else, to re-establish business with the oil major. It offers to do business, yet to be identified, over three years. But the traders are not at the mediation, so the mediation is adjourned with a substantial money amount on the table and a promise by both parties to negotiate a three year trading deal. The question is what are the available deals and what are the prices? Then, again, the mediation has changed its nature. Those on the trading side have less allegiance to settlement than their bosses because they did not witness the dynamics of the mediation meeting. Indeed, the ill-feelings between the parties may have emanated at this level. The senior personnel have to be brought into the Skype and telephone discussions to encourage their traders to find suitable deals and suitable prices. It takes some months to bottom out these deals, and a good deal of telephone and Skype conversations, but when it happens both parties are very happy. The oil major pays out less money than it might have and the refinery has good value deals going forward to make up the difference. More than that, the refinery has a chance to re-build the business

with the oil major. Everyone is happy, but it is a slow game. It is not a one day or two day fix.

Perhaps I have to pause here to deal with an increasingly important question. Some schemes are developing in certain fields where Skype is the only means of communication between the mediator and the parties. I think in international mediation this has its limitations for a number of reasons. First, the issues are complex and require some substantial reflection. Second, the teams tend to be large and Skype is not a good way of communicating with groups, nor does it lend itself to the subtleties of break-out sessions with particular party representatives within the process. Third, the issue of building trust is central to this sort of mediation - trust is, of course, important in all mediations but in a developing situation with parties in different time zones and many people in business constantly on planes and travelling, there is a slowing down factor in electronic communication. There is nothing to replace the face to face discussions which build the relationships, have the flexibility of being able to bring the parties together to speak directly when appropriate and to keep a pace and energy in the process so that parties make pragmatic decisions, eventually, within a target of time. So, I see Skype as a very good way of keeping things warm between meetings, and to advance the negotiations so that the parties do not lose heart, but not a replacement for face to face meetings in international mediation.

All these negotiations and discussions involve different cultures rubbing up against each other. As I mentioned earlier, the disputes are almost entirely one company against another. There are seldom individual parties involved, although of course the delegation for each corporate company is very much made up of a number of individuals who have their own particular internal issues superimposed on the corporate point of view. So there are cultural

aspects of international mediation that a mediator has to be very much aware of at all stages of the process and I now turn to discuss some these.

Section II: International Mediations and Inter-Personal

Interaction⁴

We all know that even people within the same country and culture (which in these days of multi-culturism may be unusual, even in a domestic mediation) may differ widely in their belief and value systems.⁵ The anthropologist Gregory Bateson⁶ identified several basic levels of natural response depending upon experience, hierarchies in perceptions and patterns of thinking. He identified these as broadly:

Environment – location in time and space

Behaviour – actions taken

Capability – strategies and skills available

Belief – values and meaning

Identity – sense of self

In relation to an organisation these might be applied as:

Identity What is the institution, what does it stand for?

Beliefs and Values What is important, what does it care about? This is likely to be an internal belief system that feeds down from the person at the top; or at least the top of that section or department; these may be quite local in the sense that different parts of an international

⁴ I would like to acknowledge the enormous contribution to my knowledge in this field made by Joanna Kalowski who teaches the IMI Intercultural Mediation Course. Many of the materials drawn on in this section were initially introduced to me by Joanna.

⁵ In past centuries there would have been cultural differences between different parts of the UK e.g. between London and, say, Devon or Manchester.

⁶ *Steps to an Ecology of Mind: Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology.* University Of Chicago Press (1972)

company may display different beliefs and value systems to those displayed by other sections or departments in other countries.

Capability	What is the product, service, speciality - which the organisation may be protecting?
Behaviour	What does it do, how does it portray itself to the world, what is the party line - tough on disputes, good to do business with, knowledgeable and expert in their field etc.?
Environment	Where and when do they do what they do? The answer to this may these days be “all over the world” but in relation to global companies may in reality be as parochial as ever it was if local branches are given autonomy. So this may be an issue of corporate structure.

The individuals within each team will have their own superimposed natural response inclinations, which will be more or less suppressed by the corporate response inclinations depending upon their seniority and the extent of autonomy within the organisation, their comfort level within the mediation process, the level of their security/loyalty within the company, that company's approach to management and the strengths of personalities that form part of the team for the mediation process. Those working within a U.S. organisation will have a very different response inclination to those operating within a Chinese or Indian organisation. One will be quite individual, another will be extremely collective in its approach and the Indian organisation may be quite hierarchical.

The mediator's task is to make the bridge between the parties' different ways of processing information, translating them from one level to another, so as to develop the communication between the parties. In doing so, the mediator will be doing the same between the individuals within the corporate teams, and particularly so where the individuals are acting as individuals

rather than as a single corporate entity (e.g. in private sessions where the mediator will hope to have a frank conversation with the individuals who make up the corporate party so as to get under the skin of their thinking). A conversation with the chairman of an organisation may only take the mediator so far. So, in a breach of warranty dispute on a take-over involving an Australian company, for example, the Managing Director is, perhaps, a different personality and the Chairman will not override him, he values the Managing Director and knows that he needs him. But, the mediator may succeed in working with the Chairman as a helpful balancing and persuasive force.

Moving from the individual/corporate level to a broad cultural level, and particularly in the behavioural context, there will be marked differences in attitude and behaviour which are deeply set in environment and culture and often tied very closely to belief and value systems. One way in which these differences have been conceptualized, is by defining cultures as “High Context” or “Low Context”. Claire Halvorsen’s graph at Appendix 2 sets out her view of the contrasting behaviour of High Context and Low Context cultures.⁷ In a mediation situation, in low context cultures parties will want to focus on what they see as objective facts and place little focus on the surrounding circumstances of an event, while in high context cultures the surrounding circumstances play a key role in interpreting data. Factors such as gestures, postures, tone of voice, and the social status of the speaker are often used to interpret the spoken word.

Of course, in reality, every individual may be higher or lower context within their own culture, but this graph gives an idea of the boundaries of behaviour likely to result from

⁷ The content of this graph and table is based on the following works by anthropologist Edward T. Hall, all of which were published in New York by Doubleday: *The Silent Language* (1959), *The Hidden Dimension* (1969), *Beyond Culture* (1976), and *The Dance of Life* (1983). Contents compiled by Joanna Kalowski (Source: *The 1993 Annual: Developing Human Resources*, Pfeiffer & Company).

particular nationalities and a mediator is always on his or her mettle to ensure that he or she adapts suitably to the cultural expectations of every individual at the mediation. This can become a bit like weaving through a maze with the many nationalities that may attend an international mediation. So, for example, a German media company (low context) may have merged with a company from a high context country and this will change the nature of the approach. But a mediator is always adapting the communication style to be appropriate to the situation (and this may differ between private caucuses and plenary sessions and between private sessions with important individuals and private sessions with the larger group of one party). In mediation there are likely to be substantial misunderstandings between the parties arising from cultural differences and occasionally there may be a very big cultural taboo. But the international mediator is always subliminally trying to detect whether, when and how cultural considerations may impact on the mediation process as it progresses and trying to adapt the process and make appropriate interventions to mitigate any deleterious effects.⁸

To return to Gregory Bateson's patterns of thinking outlined above, some of these may need to be explored in the course of a mediation and become the subject of an open discussion in private session. Questions like "what is the identity of the business" and "what is the capability of the business" may be very closely tied together i.e. what is the core business, what is the product, service or speciality? Is that core business changing or likely to change, how might it change as a result of this dispute or this mediation? Can the mediation be used as an opportunity to bring something positive out of the dispute by fashioning a settlement that suits the company and its present situation or even provide a new direction of interest?

⁸ In talking about culture we should distinguish between Cross-Cultural and Inter-Cultural interaction. Cross-Cultural refers to an interaction between people of different backgrounds living in long-term, open-ended contact with one another in the same society, where that society's policies are based on equality and are multi-ethnic, multicultural, bi-cultural (e.g. US, Canada, Australia, New Zealand and numerous others). Inter-Cultural refers to contact between people of different backgrounds where one enters the other's society for a time-defined stay and/or for a defined purpose. International mediation is an example of an intercultural interaction, although within each party group there may be a cross-cultural element.

Environment may also arise here. What are the geographical boundaries of the business at the present time, could these change and would or could that change be desirable or disastrous for the business (or, of course, it may be neutral but bring with it other advantages or disadvantages)?

But when we come to the category of beliefs and values, we meet a very different situation. A value can be defined as a broad preference for one state of affairs over another to which strong emotions are attached, and which feels instinctively “right”, “just” or “normal”. Peoples' internal values are rarely the subject of direct discussion or introspection because it is rare that there is language to explain them. Values are learned by example and experience and people typically only notice their own values when those values are challenged or undermined. It is seldom helpful to challenge a person's values and beliefs in mediation. This is the one area where the mediator has to be very cautious and for that reason it is helpful to identify what the beliefs and values are and what constitutes other responses and patterns of thinking identified above. If a challenge to a belief or value is necessary in the mediation context, then this requires a very sensitive approach with considerable attention to timing, manner of seeding the thought, choice of representative as the initial medium and so on.

Where people are removed from their original environment or culture, then the degree to which they hold onto their learned values and beliefs depends on the extent of their acculturation. Typically, the longer people move in wider global circles, the less attached they are to their original learned values and beliefs. This will of course depend on a lot of factors such as whether the person retains a base in their original place of culture and frequently returns, whether they have close relations there - whose own values and beliefs may be strong enough to create the tie to those values and beliefs - and ultimately the

personality of the person concerned. As Christopher Leeds says "Each person is partly like all others, partly like some others, partly like no-one else".⁹

All mediators know that parties often have a different view of the truth and that there is, in fact, not just one truth ... but the truth of every party involved in an incident or a dispute. Each one of those "truths" will have a base which is true to that person. Pedersen¹⁰ says that "Culture provides a unique perspective where two persons can disagree without one being right and the other being wrong ... when their arguments are based on culturally different assumptions".

Ultimately the mediator needs to take the parties away from the discussion of right and wrong, truth and untruth and into the arena of needs and interests and particularly to help the parties to find the areas of mutual possibilities. Pedersen says "The cultural perspective seeks to provide a framework for understanding the complex diversity of a plural society while identifying bridges of shared concern which bind culturally different persons to one another". It is the identification of these "bridges of shared concern" which is at the heart of the practice of the mediator and the issues that arise in so doing are particularly poignant in international mediation.

The purpose of this paper is to focus on international mediation and this is not the place for a detailed examination of Cognitive or Psychological Science. We must give just a quick nod to much of the useful work done by, for example, Hofstede¹¹ in identifying the five dimensions of national culture, the distinctions that have been drawn between Individualism and Collectivism and so on. It is useful, however, to define culture which Hofstede speaks of as the "collective programming of the mind" or "an expression of all the experiences of a

⁹ Christopher Leeds "Managing Conflicts across Cultures: Challenges to Practitioners".

¹⁰ Counselling across Cultures.

¹¹ Cultures and Organisations: Software of the Mind by Geert Hofstede.

particular people or group over time which help shape their personality and manner of perceiving”¹². Hall (1976) gave us the distinctions between high- context and low-context societies in the context of the indigenous people of North American and the Euro-American population. Since then Lessem and Neubauer (1994) developed a typology of response clusters which they apply to Western Europe, North America and Japan, describing the Anglo-Saxons (including the United States and Canada) as pragmatic, primarily sense-based, supported by thinking; the Franco-Nordic group characterised by rationalism (thinking supported by intuition); the Germanic/Nippon cluster (largely intuition and feeling) characterised by wholism; and the Italian/Latin group as characterised by humanism (feeling supported by intuition). Southern Europeans, interestingly, are often identified as sharing several traits associated with non-Western societies. Hofstede has made the point that in terms of variety of mental programming Europe’s cultural diversity implies that it represents a miniature variant of the world.

Individualism and collectivism are often regarded as the most important dimensions underlying cultural differences. More recently, there has been a growing interest in the application of the broad scholarship on culture to negotiation theory. It is here that the international mediator may need to help the parties to adapt their approach to the process to lead them towards a successful negotiation. The assumption that international diplomatic and business negotiations should normally open with a tough adversarial phase is less obvious to many non-Western societies. Asian and many other cultures value harmony, consensus and indirectness in communication. Countries such as Japan and France are often equally associated with non-confrontational strategies. The Japanese people often prefer to use the formal session to announce agreement reached through bargaining at the informal level. In

¹² Christopher Leeds “Managing Conflicts across Cultures: Challenges to Practitioners”.

many parts of the Middle East, Mexico, France, Russia and elsewhere compromise has a negative connotation, often associated with a second-best solution, with surrendering principles and losing face. Western Cultures are less concerned with “face” considerations.¹³

What the process is called may even assume a considerable importance.

Rahim and Blum¹⁴ identified five main options for handling organisational and industrial problems:

- Integrating (win-win) – high concern for self and others
- Dominating (competitive, win-lose) – high concern for self, low concern for others
- Compromising (no win/no lose) – intermediate concern for others
- Avoiding/withdrawing (lose-lose) – low concern for self and others
- Obliging/accommodating/smoothing (losing more than one gains) – low concern for self and high concern for others

So, for example, a five-country study demonstrated that Americans made most use of the competitive style while the collectivist cultures, Japan, Korea, China, Taiwan, utilised more obliging and avoiding styles. Similarly, in the context of an international mediation, it is necessary to help the parties to respect the approach of the other, mitigating the effects of a particularly tough, competitive or domineering style adopted by one party and re-interpreting for that party the apparently gently style of the other, so that they are under no illusion as to the seriousness of that party's stance in the negotiation. Gradually, during the course of the mediation and with the help of the mediator, there will usually be an equalizing effect in which the parties build mutual respect and understanding of each other.

It is through negotiation and discussion that people establish new relationships or redefine existing relationships. The parties will have discussed the form of their original agreement,

¹³ Getting to Yes: Negotiating Agreement without Giving In by Fisher and Ury; Diagnosing Organisational Culture by Harrison

¹⁴ Global Perspectives on Organisational Conflict by Afzalur Rahmin and Albert Blum; 1994

mostly without formal rules, but according to a culturally accepted, unconscious mode of operation. This “unconscious mode” is not usually noticed unless a clash occurs, whether of styles, of expectations or of behaviours. It may also arise out of a breakdown in trust but this, too, often occurs for the same reasons. It is by bringing parties back to an understanding of the approach of the other that the mediator can re-build trust. It is for the mediator to sense clashes or areas of discomfort as they take place, and to anticipate them where possible, and ensure that they do not derail the negotiation.

While the “Outsider-Neutral” model¹⁵ of mediation is not one that comes naturally to some traditions, since it largely reflects American and Western practices and traditions, nevertheless the use of a neutral international mediator is generally understood and accepted in companies doing global business. However, the mediator does need to adapt the style to the cultural expectations of the individual parties and this may include communication styles as well as content. As Christopher Leeds says *“Out of any polarity, or binary construct, a synthetic third path emerges. In terms of conflict management, negotiating or mediating, this third way depicts the various options an individual or team develops within the space set by the low context-high context and Outsider-Neutral and Insider-Partial confines. Creative ways of handling conflicts often emerge from the adopting of a flexible pragmatic outlook. Such a contingency model necessitates finding the strategy that appears the most appropriate in a specific situation.”*

¹⁵ Collectivist societies would tend to adopt the “Insider-Partial” model.

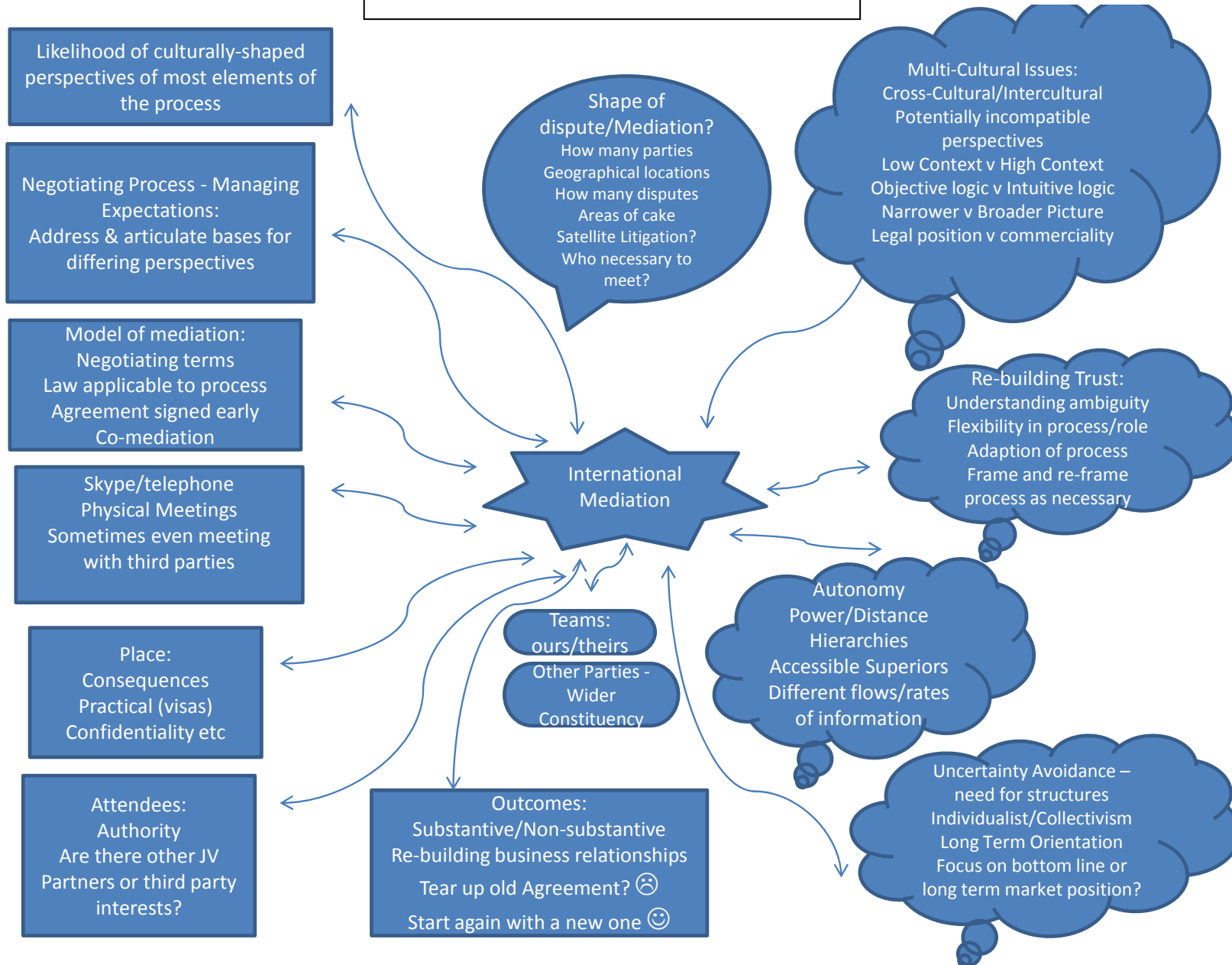
Section III: Conclusion

The early learning on cultural matters concentrated on the visceral nature of particular cultures and traditions and much useful understanding comes from that body of work. More recently authors have concentrated on what that means in terms of global negotiations and the effect of globalisation, inter-cultural communications and the effect of acculturation of individuals. Less has been written in terms of international commercial mediation. My own practical experience of international commercial mediation is that cultural issues often underlie the process. Every participant in a mediation will bring more or less of his or her underlying cultural beliefs and understanding depending on the extent of acculturation arising from working within a global organization. A consideration of the learning in the field brings understanding and sensitivity to the often unspoken issues and the international mediator will constantly draw instinctively on his or her learning, knowledge and experience in this context. In reality all people are different whatever culture they come from and all organisations are equally different. All mediators work instinctively according to the personalities that are involved rather than to seek to pigeon-hole parties with anticipated characteristics. People, after all, never cease to surprise. I have found considerable success in bringing pragmatic flexibility to the international mediation process and avoiding the sometimes formulaic processes that have grown up in many jurisdictions in the domestic context, in particular moving away from a standard one or two day model of mediation where the dispute or the personalities requires it. Different cultures will have very different expectations but within the context of cultures, a third way is always available. The mediator needs to weaves between the needs and desires of parties coming from their very different backgrounds, to find a process that they can all accept. In terms of distance, the use of modern means of communication, such as Skype (and not so new, video conferencing), can

be very helpful to mediations proceeding in a cross-border context and adds to the mediator's ever increasing tool box.

Appendix 1: Handling the Process in International Mediation

HANDLING THE PROCESS



Appendix 2: Edward T. Hall's Context of Cultures

Context of Cultures: High and Low

The list below shows the kind of behaviour that is generally found in high and low context cultures within five categories: how people relate to each other, how they communicate with each other, how they treat space, how they treat time, and how they learn. Few cultures, and the people in them, are totally at one end of the spectrum or the other. They usually fall somewhere in between and may have a combination of high and low context characteristics.

HIGH CONTEXT (HC)	LOW CONTEXT (LC)
<p>Association</p> <ul style="list-style-type: none"> • Relationships depend on trust, build up slowly, are stable. One distinguishes between people inside and people outside one's circle. • How things get done depends on relationships with people and attention to group process. • One's identity is rooted in groups (family, culture, work). • Social structure and authority are centralized; responsibility is at the top. Person at top works for the good of the group. 	<p>Association</p> <ul style="list-style-type: none"> • Relationships begin and end quickly. Many people can be inside one's circle; circle's boundary is not clear. • Things get done by following procedures and paying attention to the goal. • One's identity is rooted in oneself and one's accomplishments. • Social structure is decentralized; responsibility goes further down (is not concentrated at the top).

<p>Interaction</p> <ul style="list-style-type: none"> • High use of nonverbal elements; voice tone, facial expression, gestures, and eye movement carry significant parts of conversation. • Verbal message is implicit; context (situation, people, nonverbal elements) is more important than words. • Verbal message is indirect; one talks around the point and embellishes it. • Communication is seen as an art form—a way of engaging someone. • Disagreement is personalized. One is sensitive to conflict expressed in another's nonverbal communication. Conflict either must be solved before work can progress or must be avoided because it is personally threatening. 	<p>Interaction</p> <ul style="list-style-type: none"> • Low use of nonverbal elements. Message is carried more by words than by nonverbal means. • Verbal message is explicit. Context is less important than words. • Verbal message is direct; one spells things out exactly. • Communication is seen as a way of exchanging information, ideas, and opinions. • Disagreement is depersonalized. One withdraws from conflict with another and gets on with the task. Focus is on rational solutions, not personal ones. One can be explicit about another's bothersome behaviour.
<p>Territoriality</p> <ul style="list-style-type: none"> • Space is communal; people stand close to each other, share the same space. 	<p>Territoriality</p> <ul style="list-style-type: none"> • Space is compartmentalized and privately owned; privacy is important, so people are farther apart.

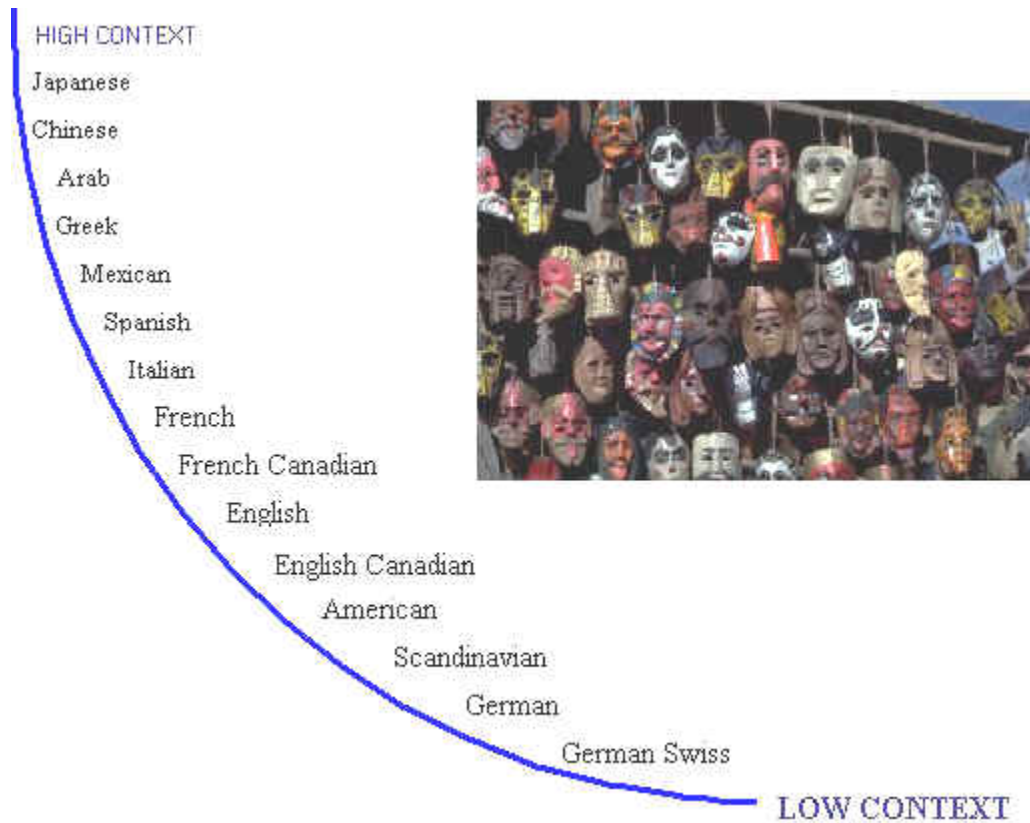
<p>Temporality</p> <ul style="list-style-type: none"> • Everything has its own time. Time is not easily scheduled; needs of people may interfere with keeping to a set time. What is important is that activity gets done. • Change is slow. Things are rooted in the past, slow to change, and stable. • Time is a process; it belongs to others and to nature. 	<p>Temporality</p> <ul style="list-style-type: none"> • Things are scheduled to be done at particular times, one thing at a time. What is important is that activity is done efficiently. • Change is fast. One can make change and see immediate results. • Time is a commodity to be spent or saved. One's time is one's own.
<p>Learning</p> <ul style="list-style-type: none"> • Knowledge is embedded in the situation; things are connected, synthesized, and global. Multiple sources of information are used. Thinking is deductive, proceeds from general to specific. • Learning occurs by first observing others as they model or demonstrate and then practicing. • Groups are preferred for learning and problem solving. • Accuracy is valued. How well something is learned is important. 	<p>Learning</p> <ul style="list-style-type: none"> • Reality is fragmented and compartmentalized. One source of information is used to develop knowledge. Thinking is inductive, proceeds from specific to general. Focus is on detail. • Learning occurs by following explicit directions and explanations of others. • An individual orientation is preferred for learning and problem solving. • Speed is valued. How efficiently something is learned is important.

The content here is based on the following works by anthropologist Edward T. Hall, all of which were published in New York by Doubleday: *The Silent Language* (1959), *The Hidden Dimension* (1969), *Beyond Culture* (1976), and *The Dance of Life* (1983).

Source: *The 1993 Annual: Developing Human Resources*. Pfeiffer & Company.

Appendix 3: Graph of High and Low Context Cultures by Claire Halvorsen

This chart illustrates how cultures fall along the context continuum in relation to some cultures that have been studied



Graph and table compiled by Claire Halvorsen

Appendix 4: Degree of Identity and Acculturation in Individuals by M. Westwood and D. Massey

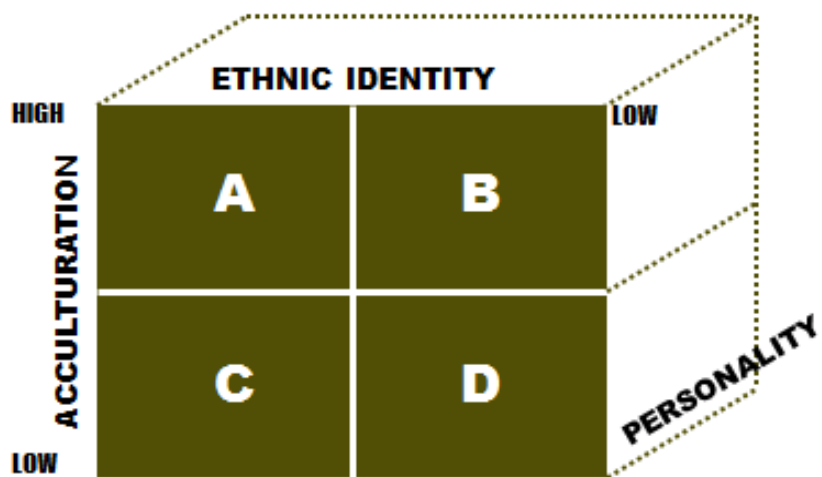
DEGREE OF IDENTITY (ETHNICITY) AND ACCULTURATION FOR THE INDIVIDUAL

A: Ethnic identity is high

B: Ethnic identity is low

C: Ethnic identity is high

D: Ethnic identity is low



M Westwood & D Massey

Bibliography

Gregory Bateson: *Steps to an Ecology of Mind: Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology*. University Of Chicago Press (1972)

Edward T. Hall: *The Silent Language* (1959), *The Hidden Dimension* (1969), *Beyond Culture* (1976), and *The Dance of Life* (1983). All published in New York by Doubleday

The 1993 Annual: Developing Human Resources, Pfeiffer & Company

Pederson: *Counselling across Cultures*

Geert Hofstede: *Cultures and Organisations - Software of the Mind*

Christopher Leeds: *Managing Conflicts across Cultures - Challenges to Practitioners*

Fisher and Ury: *Getting to Yes - Negotiating Agreement without Giving In*

Harrison: *Diagnosing Organisational Culture*

Afzalur Rahmin and Albert Blum: *Global Perspectives on Organisational Conflict 1994*

Claire Halvorsen: *Graph of High and Low Context Cultures*

M. Westwood and D. Massey: *Degree of Identity and Acculturation in Individuals*