

1ST ASIAN MEDIATION ASSOCIATION CONFERENCE

Theme: Mediation Diversity – Asia and Beyond

4th & 5th June 2009, Singapore

Do You Hear Me Clearly From Over There?

(Communicating on Different Planes in Cross-Culture Mediations)

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We often speak of deals forged ‘at arms length’; deals made by parties who are equals of each other and entered into voluntarily. Yet, where cross-culture mediations are concerned, seemingly insurmountable communication barriers make it such that the parties are barely ‘at arms length’ with each other. Oftentimes in fact, it may seem as though parties are communicating on entirely different planes! What then, is the role of the mediator when faced with such a predicament? How does he go about conducting the session? The following discussion will explore the impact of culture upon the *process* and *substance* of mediation, paying particular attention to the high-context / low-context divide.

(I) Conceptions of Culture

Before any meaningful discussion on the impact of culture on mediation can begin, one must define what is meant by ‘culture’. Unfortunately, there is no straightforward answer to this. Throughout the years of academic debate, there have

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appeared numerous definitions of 'culture'. Conceptions on what culture entails often centre on the 'totalist' versus 'mentalist' debate. While totalists believe that culture includes all aspects of a person's values, beliefs, perceptions and behaviours, mentalists believe that culture only includes a person's thought processes². Other conceptions of culture have been more technical. For example, culture has been defined as "the integrated system of learned behaviour patterns which are characteristic of the members of a society and which are not the result of biological inheritance"³.

Meanwhile, there are the occasional few writers who argue that there is simply no such thing as culture in the sense of ethnic or national divisions, that 'culture' in the way we have been conditioned to understand it is simply a "red herring", turning our attentions away from the fact that "[e]very mediation is intercultural" and "it is only a matter of degree as to how different the parties' cultures are"⁴. These writers point to the fact that no culture is completely homogeneous, and that increased globalisation and the accessibility of information have resulted in there being few 'pure' cultures as it were. While this may be true to some extent, it is perhaps a little too presumptuous to assert that there are no broader ties that bind members of a particular community or social group, or that these ties

² Cynthia A Savage, "Culture and mediation: A red herring" (1996) 5 Am. U. J. Gender & Law 269 at 272.

³ E Adamson Hoebel, *Anthropology: The Study of Man*, 4th ed. (New York: McGraw-Hill, 1972) at 7.

⁴ *Supra* note 2 at 291.

are of lesser influence than the subcultures which are included in a person's makeup. The fact remains that we cannot be certain which culture or subculture is the dominant driving force behind a person's thought-processes, actions or tendencies, and to dismiss the existence and influence of ethnic or national cultures entirely is perhaps premature.

Despite the different conceptions of 'culture', however, there appears to be more or less a consensus among academics as to these points:

- (a) Culture affects a person's values, beliefs, perceptions and behaviours;
- (b) Both individual and cultural differences contribute to differences in values, beliefs, perceptions and behaviours;
- (c) The degree of interculturalness is a *continuum* rather than a dichotomy; and
- (d) An individual may belong to numerous subcultures, each contributing to his cultural identity⁵.

Based on this consensus, we can therefore define culture as 'that portion of a person's identity which influences his values, beliefs, perceptions and behaviour'. In this way, the definition would encompass broader 'cultures' such as ethnicity or

⁵ *Supra* note 2 at 272-273.

nationality, as well as narrower ‘subcultures’ such as professional standards and work ethics.

In light of the difficulties highlighted above by the frequently used conceptions of ‘culture’, perhaps it would be wise to add a 2nd tier above our existing definition of culture – that of Edward T Hall’s original conception of culture as a form of communication. In a fascinating piece of work, published in 1959, Hall defined culture as “the link between human beings and the means they have of interacting with others”⁶. Hall defended his definition of culture as a form of communication by pointing to the fact that “[m]ost people’s difficulties with each other can be traced to distortions in communication. Good will, which is so often relied upon to solve problems, is often needlessly dissipated because of the failure to understand what is being communicated”⁷.

While it is a common belief that people from other cultures lead emotional lives that are entirely different from one’s own, anthropology teaches us that in actual fact, human beings across a wide range of cultures exhibit similar emotional responses⁸. In simpler terms, this means that the emotional experiences of people

⁶ Edward T Hall, *The Silent Language* (New York: Anchor Press, 1959) at 188.

⁷ *Ibid.* at 187.

⁸ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner’s Guide* (San Francisco: Jossey-Bass, 2000) at 75.

from different cultures are similar; rather, it is the *choices* and *modes* of expression of such emotional experiences that vary from culture to culture.

Thus, on a broader level, culture can be viewed as “a ‘silent language’ which parties need in addition to that which they are speaking if they are truly to communicate and arrive at a genuine understanding”⁹. By viewing culture as a form of communication, the communication barriers become the common enemy which must be overcome with the aid of both parties. People can therefore be perceived as part of the *solution* rather than the problem.

(II) The Impact of Culture on Mediations

Since the writer has chosen to define culture as first and foremost a form of communication, the discussion which follows will refer not only to the mediator’s role and how the mediator handles cross-culture conflicts but also how the parties interact with each other, i.e. the impact of culture on the negotiation process (which in turn affects the approaches to be employed by the mediator). A person’s culture may have an impact upon the approaches *surrounding* as well as *within* a mediation. In the words of one writer, when parties in cross-culture mediations communicate,

⁹ Jeswald W Salacuse, “The top ten ways culture affects negotiating style”, found at <http://fletcher.tufts.edu/salacuse/topten.html>

“there can be no guarantee that the meanings encoded by one and decoded by the other will be at all related”¹⁰.

To complicate matters further, cross-culture mediations oftentimes involve parties communicating in entirely different languages. From the outset, it should be noted that language barriers present an added dimension to the dynamics of the cross-culture mediation. This is because the structure of language varies greatly: similar words have different meanings in different languages, and words that have similar meanings in different languages often have very different emotional impacts. “When [parties] communicate through translators, the richness, nuance, and emotional complexity of a message can easily be lost, and the intent of the speaker can easily be misinterpreted.¹¹” Extra care must therefore be taken when dealing with cross-culture mediations in which language is an additional barrier.

In terms of approaches *surrounding* mediation, culture affects one’s perceptions of dispute resolution options, attitudes towards intermediaries, attitudes towards the role, identity or choice of the mediator, as well as the very purpose of

¹⁰ Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* (Washington DC: United States Institute of Peace, 1997) at 27.

¹¹ *Supra* note 8 at 80-81.

mediation itself¹². It is important for one to realise that the concept of mediation is not universally comprehended among the different cultures¹³.

Within the process of mediation and negotiation, fundamentals that are affected by culture include interests, priorities and strategies. ‘Interests’ refer to the needs or reasons underlying the negotiator’s positions, ‘priorities’ refer to the relative importance of various interests or positions, while ‘strategies’ refer to an integrated set of behaviours chosen because they are thought to be the means of accomplishing the goals of negotiating¹⁴. “Cultural *values* direct attention to what issues are more and less important and influence negotiators’ interests and priorities” while “[c]ultural *norms* define what behaviours are appropriate and inappropriate in negotiation and influence negotiators strategies”¹⁵. A party’s cultural values, norms and ideologies form the bases or shared standards through which he interprets the behaviours of those around him.

On the issue of the effects of culture on interests and priorities, it is interesting to note that “the same values that generate cultural differences may also act as cultural blinders. Negotiators from one culture, expecting preferences to be

¹² Laurence Boulle, *Mediation: Principles, Process, Practice*, 2nd ed. (New South Wales: LexisNexis Butterworths, 2005) at 79.

¹³ *Ibid.*

¹⁴ Jeanne M Brett, *Negotiating Globally: How to negotiate deals, resolve disputes and make decisions across cultural boundaries* (San Francisco: Jossey-Bass, 2001) at 6.

¹⁵ *Ibid.* at 7.

compatible, cannot understand the rationality of negotiators from another culture whose views on the same issue are at odds with their own”¹⁶. What follows is usually a judgment by one party that the other is ‘irrational’. However, such labelling harms more than facilitates the negotiation as it “encourages persuasion to get the other party to adopt [one’s] view of the situation and distributive outcomes, rather than the search for differences and the trade-offs that are the foundation of integrative agreements”¹⁷. By adopting such a posture, parties simply cling tighter to their original positions and the perfect opportunity for generating a new and diverse range of options goes to waste.

As for the issue of how culture affects negotiation strategies, 4 strategies are of particular interest to this discussion, namely:

- (1) Confrontation;
- (2) Motivation;
- (3) Influence; and
- (4) Information¹⁸.

Confrontation in a negotiation ranges from direct to indirect, with indirect confrontation displaying itself in terms of indirect verbal messages or non-verbal

¹⁶ *Ibid.* at 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 11.

behaviour. This point will be further explored in the later discussion of high-context and low-context cultures. A negotiator's motivations range from self-interests to collective interests and/or other interests, while influences affecting a negotiator range from BATNA (or the Best Alternative to a Negotiated Agreement) to fairness standards. Lastly, the use and transmission of information ranges from direct to indirect.

Of the above 4 strategies, information is probably the most crucial. The use and transmission of information is what determines a successful negotiation or mediation. In fact, one writer opines:

*“Information is the currency of negotiation. Information about BATNAs, status, and other fair standards affects distributive agreements. Information about interests and priorities affects integrative agreements. When negotiators do not understand the information conveyed by the other party, integrative potential is almost always left on the table, and sometimes negotiations end in impasse.”*¹⁹

Linking this back to culture, culture affects whether information is communicated directly, indirectly or at all. In practical terms, culture also affects the way groups are organized and the way organizations function²⁰; this in turn affects the decision-making processes within organizations, making ‘culture’ an element which possesses

¹⁹ *Ibid.* at 14.

²⁰ *Supra* note 9.

the unique ability to be both a potential catalyst and a potential obstacle to the resolution of conflict. It is with this in mind that we proceed to a discussion of communication in high-context and low-context cultures.

(III) High-Context vs Low-Context Cultures

Communication occurs in more than one dimension. While verbal communication entails special problems in terms of language and words used, non-verbal communication carries with it a separate set of problems and difficulties. Throw in the overarching issue of cultural differences, and what you get is a complicated mass of signals passing (most of the time) over the heads of the negotiating parties. A mediator's role in such a situation would then be to ascertain the different forms in which information is being conveyed on both sides and to bring this to the attention of the parties. Edward T Hall's works were among the early efforts to categorise the world's cultures. He achieved this by separating high-context and low-context communication along a continuum to differentiate amongst cultural groups.

High-Context Cultures

High-context cultures tend to be communally-minded rather than individualistic. This in turn leads them to place great emphasis on maintaining “face” and “group harmony”²¹. As communally-minded persons are concerned about how they appear to others, the culture is shame-oriented rather than guilt-oriented, with disapproval being the most powerful sanction²². Examples of high-context cultures include Japanese, French and the Arab cultures²³.

In terms of communication, high-context cultures tend to communicate allusively rather than directly. This indirectness is displayed in both verbal and non-verbal forms. In verbal communication, “[t]he concern with social effect and not just the transmission of information results in a propensity for rhetoric and verbal posturing”²⁴. Members of a high-context culture are highly sensitive to the effect of what they say, and words tend to be weighed very carefully²⁵. They often wish to please, and “prefer inaccuracy and evasion to painful precision”²⁶. For this reason, outsiders to the culture often mistake their politeness for agreement, resulting in misunderstandings and much frustration. Careful attention is paid to non-verbal

²¹ *Supra* note 10 at 31.

²² *Ibid.*

²³ *Supra* note 14 at 21.

²⁴ *Supra* note 10 at 32.

²⁵ *Ibid.*

²⁶ *Ibid.*

communication in high-context cultures, with meanings being derived through alternative forms of communication such as eye contact, body language, interruptions and silences.

Mediations and negotiations are viewed not as the means to an end, but as ends in themselves. These sessions are often simply episodes in an ongoing relationship-forging process. “Since communal affiliation looms large in any interaction, it is hard for members of a collective culture to deal with a stranger from outside their circle... Before a frank exchange becomes possible, let alone the conduct of business, a personal relationship must be cultivated.”²⁷ Timing is also highly important, and much probing and small talk precedes a request, as rebuffs cause great loss of face.

Low-Context Cultures

Low-context cultures, exemplified by the United States, pride themselves on upholding individualism. As a result, “[g]uilt, not shame is the psychological price paid for misdemeanour”²⁸. In low-context communication, directness is very much appreciated. Little meaning is derived implicitly in the context of articulation. On the contrary, what has to be said is done so explicitly. While politeness is not necessarily

²⁷ *Ibid.*

²⁸ *Ibid.* at 33.

precluded, contrived formulas and verbal embellishments serve little purpose. Non-verbal communication is also paid little attention, and meaning is mostly to be derived from spoken words.

Mediations and negotiations are often seen as a means to an end, i.e. contract-forming processes. The approach taken by low-context individuals in negotiations is highly methodical. The party “sets his objective, develops a plan designed to reach that objective, and then acts to change his environment in accordance with that plan... In short, results rather than relationships are paramount.”²⁹

While the above descriptions may appear stereotypical, it is important to note that the distinction is not a dichotomy but a *continuum*, ranging from high to low-context cultures. For easy comparison, however, it is more convenient to refer to prototypes from each extreme. Right from the outset, one can anticipate the types of clashes which may occur when members of high-context and low-context cultures communicate. To begin with, the different cultures view the very purpose of a business negotiation or mediation differently. As one writer observes:

“For many American executives, the goal of a negotiation [or mediation], first and foremost, is to arrive at a signed contract between the parties. Americans consider the signed contract as a definitive set of rights and duties that strictly binds the two sides and determines their interaction thereafter.”

²⁹ *Ibid.* at 37.

*Japanese, Chinese and other cultural groups in Asia, it is said, often consider that the goal of a negotiations [or mediation] is not a signed contract, but the creation of a relationship between the two sides... Although the written contract describes the relationship, the essence of the deal is the relationship itself.”*³⁰

To the low-context individual, “the high-context individual may appear insincere, suspicious, and devious, but these traits are simply part of the veneer of courtesy and indirection essential to preserve social harmony. Nor is mistrust a deviant characteristic but the manifestation of an ingrained caution required for dealing with members of other groups”³¹. On the other hand, the high-context individual may find the low-context individual’s directness unnecessarily harsh, insensitive and disrespectful. Furthermore, the high-context party may be reading into ‘signs’ and ‘signals’ which are unintended by the low-context party, while the latter may take niceties spoken by the former to be facts or expressions of commitment.

(IV) Working Within the Limits of Cross-Culture Mediations

Having explored the ways in which culture impacts the mediation/ negotiation process, the mediator’s responsibility would then be to “intervene in

³⁰ *Supra* note 9.

³¹ *Supra* note 10 at 32.

ways which enhance understanding between the cultural groups involved”³². Here are some useful guidelines for mediators in cross-culture mediations:-

- (1) Be conscious of your own behaviours and predispositions and the impacts these may have on the mediating parties³³.
- (2) Recognise the limits of your own ability to understand someone from a different cultural background³⁴.
- (3) Don’t assume that what you say is being understood or that you understand what is being said³⁵.
- (4) Be culturally ‘literate’ in the broad sense. This entails a general understanding of the impact of culture on the communication of information, approaches to conflict and behavioural differences in negotiation and dispute resolution. For example, have a general understanding of how direct communications should be and how good relations can be promoted between the two parties³⁶.
- (5) Go beyond simple etiquette and courtesies and monitor the inter-cultural interactions between the parties and intervene to facilitate understanding and acceptance³⁷.

³² *Supra* note 12 at 83.

³³ *Ibid.* at 82.

³⁴ Mark D Bennett & Michele S G Herman, *The Art of Mediation* (Indiana: NITA, 1996) at 117.

³⁵ *Ibid.*

³⁶ *Supra* note 12 at 82-83.

³⁷ *Ibid.* at 83.

While these guidelines illustrate that being culturally sensitive is essential, mediators also run the risk of placing *too much* emphasis on culture. There is a danger that in knowing too much about another party's culture, a mediator will act under the assumption that the individual he is dealing with is a cultural prototype. A suggestion made by one writer is that the mediator should "[a]ssume that differences within a given culture are profound, perhaps as great as differences between cultures"³⁸. In practice, what this means is that the mediator should do the background research on the party's 'culture' but maintain an open mind and be prepared to formulate his strategy along the way. "Excellent cross-cultural negotiators [and mediators] proceed slowly, testing their assumptions about what strategy will be effective with the other party"³⁹.

Lastly, a mediator should not lose hope if there appears to be no 'cultural ZOPA (or Zone of Possible Agreement)' within which to communicate. The mediator should bear in mind that while one party may have a broad cultural identity which is incompatible with the other party's, this is in fact not the full picture. Individuals are similarly influenced by narrower 'subcultures', and there remains a possibility that there may be elements in these subcultures which bind the parties. For example, "negotiators from different national cultures but similar occupational or

³⁸ *Supra* note 34.

³⁹ *Supra* note 14 at 23.

professional backgrounds might seek to rely on the elements of their professional culture in trying to bridge the cultural gap between them”⁴⁰. However, on the off chance that not a single cultural or sub-cultural element binds the parties, compromises can be made. For example, the party from the high-context culture can attempt to convey more information in verbal form, while the party from the low-context culture can attempt to ‘cushion the blow’ of his directness.

From the perspective of the parties to the mediation, it has been suggested that (i) building personal chemistry with one’s counterpart; (ii) recognising non-negotiables and (iii) giving ‘face’ are key to a successful outcome⁴¹. Of these 3 elements, the third is often glossed over as parties do not appreciate the full significance which this holds, particularly in respect of high-context cultures. “To obtain the substance of accord it [is] essential to preserve appearances: to maintain – if necessary, contrive – the impression that the accord was an achievement of the other side, concluded on the basis of mutual respect and equal standing.⁴²” This way, even if the terms of the agreement are substantively weighted in favour one party’s interests, the other party, being better placed to acquire the endorsement of the same from his peers, would be more receptive to agreement on such terms.

⁴⁰ *Supra* note 9.

⁴¹ *Supra* note 10 at 223-224.

⁴² *Ibid.* at 224.

(V) Conclusion & Final Thoughts

While cross-cultural mediations may seem like a lot of work, the skills it teaches are invaluable. Ideally, the cross-culture mediator would develop skills of being self-aware and in-tuned to those around him, including being able to discover the conceptions of all participants (including his own) and to forge a process which meets most if not all of the conceptions present⁴³. Such a skill would in itself be a reward as “[l]earning that there is more than one way to go about things not only is enlightening but also enriches one’s palette of alternatives⁴⁴”.

With each cross-culture mediation, it is hoped that the mediator and the parties will take a little something away from the experience, be it a better understanding of the dynamics of another’s culture or a better appreciation of his own. It is also hoped that the process of generating options will bridge rather than widen the gaps between cultures as parties begin to identify common subcultures to which they can relate.

⁴³ *Supra* note 2 at 283-284.

⁴⁴ *Supra* note 10 at 225.

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