

**Seventh Annual Singapore Mediation Lecture
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On tiptoes through the minefield: cultural dimensions of mediation

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On 23 August, I participated in the session on *Current Developments in Mediation: The UNCITRAL Draft Convention and Model Law on Enforcement of Settlements* at the International Law Association congress held in Sydney.¹

The title of this year's congress was *Developing International Law in Challenging Times*. Challenging times indeed.

Emeritus Professor Catherine Kessedjian of Paris II, who had been an observer in the formulation of the convention, presented her views, I was commentator, and we then opened the floor for what turned out to be a lively discussion.

To give you a flavour of the discussion, the following issues and questions were among those canvassed:

- The UN Commission on Trade Law already has a convention on conciliation; is this change to mediation nothing more than a change of terminology?
- If it is not, what does the use of the term mediation in this context signify? Is it because mediation is

beginning to be more widely used in international settings, or because they want to encourage its use?

- Is the Singapore Convention principally aimed at easing enforcement of negotiated settlements after successful mediation?
- If mediation is so successful, why is the Convention necessary?
- Why are there so many grounds to oppose enforcement? Professor Kessedjian counts eleven.
- Does Article 5 point to a more structured style of mediation in some parts of the world?
- The grounds for resisting enforcement resemble the New York convention grounds, and one has to hope they would be narrowly interpreted.
- There seems no capacity to invoke hardship provisions, and that could be an important addition.
- (From the Austrian branch): Settlements in Austria are recorded as awards by consent, not as settlements as such. What are the benefits of enforcement over awards by consent?
- It is unclear at the moment whether and at what point parties can call on the New York Convention.
- Can parties contract out of Article 5? The Singapore convention is silent on this point. After all, fraud and/or deceptive conduct would always be available to challenge a settlement agreement.

As I listened to the debate and joined in the discussions, it occurred to me that in the context of creating binding commercial agreements in an international context, mediators might find that more is expected of them by business, particularly in the intercultural arena.

The UNCITRAL Convention for Mediated Settlement Agreements, to be known as the Singapore Convention, is likely to increase the use of mediation in cross-border disputes, and it is bound to make intercultural issues even more pertinent.

Given your geographic position, Singapore is likely to be the site of many of those mediations. How to choose mediators to conduct those matters is, I suggest, an important consideration for business and government.

Much has been said and written about culture and its influence on thought, behaviour, action. Until the advent of the neuroscience revolution, what could not be understood through the lens of one group's expectations of another was sheeted home to the culture of that other, and there it remained, incognito.

Quite apart from the fact that we are none of us on cultural "auto-pilot" twenty-four hours a day, and that it is a nonsense that our responses and reactions can all be sheeted home to culture, neuroscience can now shed light on why people see the same phenomenon and interpret it in different ways. It also - usefully - sheds light on the phenomenon of priming, and the ways in which cultural influences predispose us to see the same issue so differently.

Business users and countries embarking on international negotiations can hardly be expected to stop and ask themselves whether their style of negotiation and their

approach to settlement will be shared by their counterparts. This will fall to mediators, whose role, increasingly, will be to facilitate durable solutions precisely because they are adept at mediating interculturally.

In 2014, I co-chaired a committee of the International Mediation Institute right here in Singapore, with the task of setting the criteria for IMI accreditation as an intercultural mediator. The committee members were from Singapore, Switzerland, USA, Sweden via Holland, New Zealand, Russia and Australia. I promise you it was quite an experience. You can find those criteria on the IMI website.²

We developed a term to cover the range of concerns we felt it useful for mediators to take account of: we called them cultural focus areas.

They now seem to me also to be useful preparation tools for representatives of parties entering international negotiations.

They include, among other things:

communication styles (formal-informal, direct-indirect);

mindset towards conflict (risk-taking, high or low?)

relationship v task orientation

the nature of the process itself (the roles parties and mediators play, predictability, social protocols)

time orientation and decision-making

There are others, but these few give you an idea of our thinking.

Each Cultural Focus Area has a subset of topics intended to lead mediators to consider in advance the possible approach of the parties they are working with, and how to accommodate different approaches.

Let us assume, then, that a growing body of interculturally skilled men and women will be available to mediate the kinds of international commercial matters (not necessarily disputes) the Singapore Convention governs.

How will they differ from other mediators, and how will business users of mediation and their legal advisers be able to judge and select them?

It occurred to me as I listened to the discussions at the ILA that little was said about the cause of failed intercultural mediations, a useful starting point.

In my experience, parties to significant mediations do not negotiate in bad faith. The occasional fishing expedition is not unheard of: the kind of exchanges structured to lead the other side into disclosing details they didn't necessarily intend to reveal; the types of questions designed to see what kind of witnesses the other side would make if the negotiations fail and the matter ends up before a court.

No, the far more common cause of failure is what I like to term intercultural blindness, or the assumption that when sophisticated commercial parties negotiate, they are operating on a shared platform, loosely termed the Western industrial model. To some extent this is true. And it suits Western countries to believe this, and may even absolve them from the need to ask whether the way they conduct business is the best or even the only way.

A study conducted in Sri Lanka ³ revealed that anthropologists were in strong disagreement with Western, mostly American, trauma specialists who rushed in to mount a campaign to deal with the post-traumatic stress they assumed would follow the end of that country's bloody and protracted civil war. Puzzled by the unexpected reactions of local populations, especially those where perpetrators and victims continued to live side by side, the traumatologists embarked on "a campaign to educate the survivors, as if local populations were utterly unaware of what happens to the human mind after terrible events."

Arthur Kleinman, a medical anthropologist from Harvard university, put his finger on precisely what was happening. "Most of the disasters in the world happen outside the West...yet we come in and pathologize their reactions...as if (they) don't know how to live with this situation. We take their cultural narratives away from them and impose ours."⁴

Imposing one side's 'cultural narrative' on another, or worse, imposing the mediator's on both, is hardly helpful in international negotiations, whether traumatic or not. My colleagues in the business of peacemaking, however, tell me it's a critical issue, and the greatest care must be taken not to make the situation worse by falling into this trap.

I wonder how often a failed mediation arises not merely out of differences between the parties (as we mediators like to believe) but rather from the mediator's failure to grasp key intercultural narratives that need to be woven into discussions and into agreements.

Negotiations start out well enough, but when problems arise, so does heightened sensitivity as to why the others

are not 'playing ball', 'playing along' or 'playing by the rules'. That is when parties revert to tried and true tactics, by definition tactics that have worked for them before, either because they are used to being the more powerful party or because they have been negotiating with like-minded parties, parties with a similar mindset, culturally speaking.

While both may well operate on similar Western industrial terrain, they do not put aside their cultural assumptions and preferences, indeed they are often seeking to satisfy them in this very matter.

Where much rides on the outcome of a dispute or a negotiation, parties know they are in the spotlight. The level of scrutiny to which they are subjected, by their board or by their government, makes them hypersensitive to the risk of failure. In this I include parties' legal representatives, who are often as understandably nervous as the parties themselves, and can become negative advocates for their clients.

So let us assume in high-stakes negotiations there is tension and hyper-arousal, sensitivity to the risk of failure and to the least hint of a slight on the national character of the party or its national (international) preoccupations.

One has only to read *How Israelis and Palestinians negotiate, a cross-cultural analysis of the Oslo peace process* ⁵ to recognise how close parties have come to agreement in international affairs, only to slide apart at the last moment.

The role of culture in the failed Oslo negotiations is cogently put in the introduction:

..."Culture plays a subtler and more multifaceted role than simply provoking misunderstanding... Culture's role in this case ... is best understood as an intervening variable that operates at different levels, through the impact of cultural identity and cultural categories of thinking on political leaders, on the domestic politics of each side that constrain the negotiations, and on each side's evaluation of the other's beliefs and intentions regarding the issue (conflict) being negotiated. "

Thus culture has "an intermediary and multidimensional role", and cannot be reduced to either-or dichotomies, any more than success or failure can be wholly attributed to culture.

We are entering a minefield... Best to tread carefully, on tiptoes.

I have often been asked how I came to be so interested in questions of culture. I then tell stories of my earliest childhood, where I was the interpreter for my German-speaking grandparents who raised me while my refugee parents both worked.

Every Friday, my grandmother, dressed in her dark European clothes with short laced boots, an apron pinned to her dress, used to take me shopping with her. I was the spokes-shopper...

I vividly remember when I was about five or at most six years old that she made me ask the butcher how much chicken livers cost. He looked at both of us with an expression I will never forget and simply told us to come back in the late afternoon. I translated this for my Oma and back we went at closing time.

You must understand that in those days, chicken was expensive and considered a delicacy, and Australian families bought one for Sunday lunch or a special occasion, if at all. Butchers typically prepared chickens for sale on Fridays. No one but refugees from Europe like us ate chicken liver.

So here we were, purse in hand, ready to go in and buy the chicken livers. There stood the butcher, on the doorstep, holding a big paper-wrapped parcel. As we approached, he took a step towards us and handed my grandmother the parcel. Puzzled, she looked past him into the shop and held out her hand with the money in it. He just shook his head and went back inside, and we walked away with what must have been two kilos of beautiful fresh chicken livers.

My grandmother was overwhelmed and delighted at his generosity, and talked about it over and over again. I, however, had the clear impression that he didn't want us in his shop, and was suddenly and for the first time conscious of our strange language, strange clothes and strange ways.

In the end, who was right? My grandmother or my five-year-old self? Perhaps we both were, and certainly my grandmother was right: they did give meat away free in Australia. I'm sure that after starving in post-war Germany, it must have been a very reassuring thought for her. Who was I to say she was wrong? And can I now be certain of the butcher's motives?

I recognised early what my culture of origin predisposed me to believe and value while at the same time recognising that the host culture, Australian society, had very different expectations and behaviours. Unusually, I suspect, I saw my own culture in contrast to the other in

very clear ways. I had a foot in both camps. Discomfort is good training for mediation.

Intercultural blindness is not deliberate: rather it is normal, it is ethnocentricity and we are all ethnocentric, most at home in our own cultural environment. Intercultural blindness is the product of what a Japanese colleague calls the inability to recognise that the way one operates is not universal, but has specific features that are embedded as values, beliefs and expectations. When these fail to materialise, people are at best puzzled, at worst angry. They are quite literally at sea.

My colleague asks people to consider what culture is, and how their own has shaped them. When he asks that question, he is greeted by silence, especially in the West, in countries like the US where he lives and works, but also in Australia. So he follows up with a question that extends my watery analogy. "Do fish know they are in water?"

You can imagine what follows: people discover that their assumptions and expectations about human behaviour are time-, place- and culture-specific. They realise that it is only when they are fish out of water, and in the absence of the things they expect, need, even crave, that they recognise a set of values and beliefs they can properly call their culture. Only then can they name them. In the literature of the intercultural, this is known as gap perception. To sum it up: those who don't expect some phenomenon to be present don't see a gap. For those who do expect a next step which fails to materialise, the gap can be a shock or a yawning chasm. They are thrown into confusion by the absence of something they usually rely on in order to feel they are on solid ground. A UK academic once referred to migration not as grappling with a new world, but living with the shock of the absence of the known world.

Joel Lee and Teh Hwee Hwee in their scholarly book ⁶, *An Asian Perspective on Mediation*, set out a cultural continuum which I have often referred to as helping to demonstrate that the part culture plays in conflict and its resolution depends on the worldview of the proponent, and will shape the proponent's choice of intervention as well as adherence to certain models of mediation. Surely this explains the sterile debates we have all heard as to whether this or that approach is best, as if one size fits all...

So as I listened to the discussion on the Draft Convention, it occurred to me that several significant issues had gone unmentioned in the discussions:

1. The role of relationship building
2. The nature of voluntary agreements
3. Futurity
4. Certainty
5. Satisfaction

Most important of all, none of the attendees who spoke mentioned party satisfaction as key to successful outcomes.

I turn to these five issues in the intercultural context, in the expectation that business users of mediation will be alive to their importance and will ensure that they are built into agreements, to the extent they as parties desire and require.

Mediators have traditionally been trained to view success as a deal concluded between parties - and why not? If they have worked hard to enable a deal to be done, and it answers the needs of the parties, they have a right to be pleased, and to regard the mediation as a success.

Parties normally place a high value on certainty, and that translates to mediators as helping them to conclude the deal. But it doesn't end there. All too often, in complex international and intercultural commercial settings, circumstances change rapidly, and the deal that looked so promising yesterday no longer suits today, let alone tomorrow. In other words, futurity and certainty may clash.

Peter Adler ⁷ calls the complex mediations done today "second or even third wave mediations". Last year's distinguished lecturer, Professor Carrie Menkel-Meadow talked about Mediation 3.0 in much the same terms. In first and second wave mediations, between two or more individuals or companies, mediation was simply an alternative to taking a matter to court, usually because the law governing the transaction was clear, and the outcome, or range of possible outcomes, was known and predictable.

That is no longer the case. Rapidly changing national and international circumstances, the speed of innovation, the rate of obsolescence and the complexity of the issues we face make it less likely that even a straightforward deal will be a once-and-for-all settlement. It may be subject to change and will need modification, so the parties to it will have to be open to renegotiating some or all of it at some time in the future. Future dealings may well have to be built into agreements, with an emphasis on ways of improving upon, adding to or deleting aspects of an agreement reached today in the name of keeping it relevant to unforeseen and unforeseeable events. Certainty is a goal, not a guarantee...

This issue takes on a cultural tinge when passed through the filter of short- and long-term time orientation.

In Paris where I have lived a few months of the year for the past twenty years, they tell a terrific joke to illustrate this point.

President Mitterand decides to pay a visit to Chairman Mao, and to ask him for his views on the French Revolution.

Mao leans back in his chair, looks up reflectively, and then turns to the President and says, "Interesting question. I'd like to comment, but it's too soon to tell."

As you in this room know only too well, cultures high on long term orientation "value long-term commitments, cultivate a respect for tradition and look for future rewards. Cultures low on this scale look towards immediate results and are more amenable to change. " ⁸

Mediators have their work cut out for them if one party wants the deal signed and sealed now, and the other foresees the need to keep talking well into the future.

Where one party favours a long-term view of events and the other has a rather more short-term focus, conflict can arise over the mediator's choice of process and approach. Parties who want a binding agreement now will baulk at the idea that they should invest time in building the relationship between them as a safeguard for future developments. It is as if the future were another country, and they will simply apply for a visa to go there if ever the need arises. With that, they dismiss as irrelevant the need to invest in relationship building... I've seen it all too often.

It is not hard to see why the long-term types see the short-termers as transactional, dismissive and uncommitted while the short-termers see the long-termers as unwilling

to do the hard work of sorting it all out now, and accuse them of postponing the hard work that has to be done now. Is this an unbridgeable gap? In the hands of a skilled and active mediator, it need not be.

Simply using the agenda of issues under discussion to identify those with future ramifications and setting them aside as worthy of further attention can enable very differently disposed parties to follow the mediator's lead. Passivity doesn't work in this setting, I fear. The "what would you like to do now" approach of the pure transformative practitioners can itself produce conflict.

I'm fond of saying that freeing parties from process is high on the list of what mediation offers, although there will be moments where the mediator senses or asks for parties' input into where to go next. Process decisions are ideally imperceptible; I like to think of process as the water various species of fish can swim in together. Freed from the need to make actual process decisions, parties can focus on content. After all, that's what they have come to do.

In high-stakes negotiations with international ramifications, the parties come with concerns, but need to leave with high hopes. If they have satisfied one another's need to build trust and preserve social harmony, however it has been achieved, so much the better. After all, turning your adversary into an emissary, as Roger Fisher famously said, is the essence of good negotiation. Even when the negotiation is over, the parties continue to maintain the sense of respect that was a by-product of their successful dealings, not merely of the outcome.

It is surprising how often failed or stalled commercial mediations can be traced to a loss of trust and confidence in the process and the mediator.

Let me give you a real example.

A London colleague and I were asked to debrief representatives of a Danish and an English company negotiating a very valuable joint venture; their mediation in the UK had just ended in stalemate.

Our role was to discover what each side identified as sticking points, and if possible, to help get the process underway again.

A number of interesting issues emerged from our discussions with the parties and their legal representatives, whom we saw separately.

It became clear that the Danes' focus was on relationship building and gathering information to assist later discussions, while the English company representatives assumed the relationship would begin once the deal was done. The English also felt they now had sufficient information on which to proceed to a deal and could iron out any problems later, as the working relationship developed.

By the time we met them, they saw one other as evasive and deceptive, indeed those are the very words they both used.

It turned out that two days had been set aside for the mediation, and it had been agreed that English would be the common language. So easy when there is shared language to assume all or much else is also shared.

Things started to go wrong when the mediator reminded the parties there was only half a day to go and it was time

to put ideas on the table, using the words, "Let's get going."

Action orientation may seem normal to one party but is not necessarily so for both. It is a component of intercultural mediation well worth exploring.

When those words were spoken, the Danes fell silent. The English party, feeling a deal was imminent, filled the silence with their ideas. They were disconcerted when there was no engagement from the other side.

The mediator suggested private sessions and in caucus asked the parties for proposals to further the negotiations. The Danes made none.

Things went seriously off the rails when the mediator returned to the British party and informed them there was no reaction to their ideas, and that the Danes had none of their own.

There are two parts to that message, and the interculturally skilled mediator needs to know how to convey both.

The mediator could have come to see the English party and instead of stating that there was no reaction to their ideas, should have asked them why they thought it was that their Danish counterparts were not responding. This is a classic display of deference. The parties know one another far better than the mediator possibly could, and posing a question for them to ponder might just have assisted them to recognise that the Danes quite simply weren't ready. They could then have instructed their mediator to extend the time available, bring them back together to explore further. Simple. Yet it didn't happen.

Reflection time might also have helped them all, mediator included, to realise the moment was not right for this stage, and that something else needed to be done right now to bridge a potential difficulty.

It might also have allowed everyone to turn their mind to what was not happening and why, instead of persevering with "what normally happens round about now", and placing a successful outcome at risk.

Another possibility here is the importance of two concepts that are crucial to intercultural mediation: consideration of task and relationship.

It appeared that minimal time had been devoted to building the relationship. There had been an excessive focus on the deal, when there an expectation on the Danish side that this mediation was about building a platform of trust for working together into the future before and as well as framing the deal. These preferences, whether cultural or stylistic in origin, are imperceptible to people for whom they are 'normal'. They can't state them because they are inherent, inchoate, taken for granted. If the parties lack those insights, the mediator must possess them and be able to explore the expectations that underlie behaviours.

The mediator could also have resorted to a genuine posture, that of the naïve enquirer, on the sound basis that she does not and can't know what is in a party's mind. She could also have sounded them out in private in order to preserve commercial-in-confidence elements of their position, not about the deal, but about their silence.

"I'm wondering what to make of your silence, and why you aren't putting any ideas forward at this stage."

Why a quasi-statement instead of a question? Because there is always the risk direct questioning will cause offence, both interculturally and interpersonally. If you assume (correctly, I would say in the intercultural context) that you don't know what you don't know, you can't ask questions about it. I know that goes against everything lawyers are taught...

Instead, parties and mediators working interculturally all need to cast a wide net, inviting the others at the table to contribute their views, their ideas. That is not an underhand tactic. It is a way of bringing to the surface concerns that might otherwise not have been obvious to everyone at the table, and to deal with issues at a deep level.

What results from discussions of this nature is that elusive phenomenon, satisfaction. It is the quintessential ingredient of voluntariness, and that is the quality of successfully mediated agreements. To return to the questions posed at the outset, two stand out:

- If mediation is so successful, why is the Convention necessary at all?
- Why are there so many grounds to oppose enforcement?

I suggest that it is precisely because of the complex nature of the international transactions that parties will wish to register their agreements and to have the option to have them set aside if they fail the durability test, the test of time.

I suggest, too, that all too many mediations to date might well have failed that test if they had not been entirely past-

focussed, as Professor Menkel-Meadow so cogently pointed out last year.

She foreshadowed the very Convention I am speaking about tonight, and what she had to say about quantity versus quality rings in my ears.

While international arbitration is still used - and will continue to be used - many commercial parties complain about it privately, saying it is now as lengthy, as expensive and almost as adversarial as a court case, certainly in the common law world. For such parties, the Convention will be a further incentive to mediate, with some added safeguards that may well prove attractive.

At the inaugural Global Pound Conference held here in March 2016, and at which I had the privilege to be present, Chief Justice Sundaresh Menon ⁹ identified three major shifts in the global landscape:

- Increased economic openness, mobility of labour and capital
- Increased cross-cultural convergence in transnational commercial dispute resolution, and
- Increased recognition of access to justice outside the courtroom

To quote His Honour:

"Globalisation has brought with it a sharp increase in the incidence of transnational commercial disputes; however, national legal systems, which were primarily designed to deal with intra-jurisdictional disputes, have struggled to deal efficiently with transnational ones. Indeed, the very existence of different legal systems significantly increases the transactional costs of doing cross-border business. Parties in cross-border business will inevitably have to expend resources in attempting to secure compliance with

a web of national laws and regulations. When disputes arise, they then have to invest further resources to navigate unfamiliar foreign legal systems, often having to rely on unfamiliar foreign counsel, as well as to bear the additional risks that accompany the cross-border enforcement of judgments. On the one hand, these constitute barriers or obstacles to transnational trade. On the other hand, this is the backdrop against which there has been a drift towards cross-cultural convergence in the resolution of these disputes. "

With remarkable foresight, His Honour has summed up precisely why the UNCITRAL or Singapore Convention is needed.

Now all that remains is for us to make it work.

Thank you.

1. 2018 Biennial Conference of the International Law Association, hosted by the International Law Association, Australian Branch:
Developing International Law in Challenging Times
2. International Mediation Institute,
<https://www.imimmediation.org>
3. Alex Argenti-Pillen, Professor of Anthropology, University College London: cited in *Crazy Like Us, the globalization of the American Psyche*, Ethan Watters, 2010, pp 108-114.
4. Op cit, p 107
5. *How Israelis and Palestinians negotiate, a cross-cultural analysis of the Oslo peace process*, ed. Tamara Cofman Wittes, US Institute of Peace Press, 2005
6. *An Asian Perspective on Mediation*, Joel Lee and Teh Hwee Hwee, Academy Publishing, 2009.
7. *Leadership, Mediation, and the Naming, Framing and Taming of Type-II and Type-III Problems*, Peter S. Adler Ph.D. in *The Creative Problem Solver's Handbook For Negotiators and Mediators: A Pracademic Approach*, edited by John W. Cooley, American Bar Association, 2005.
8. *An Asian Perspective on Mediation*, Joel Lee and Teh Hwee Hwee, Academy Publishing, 2009.
9. *Shaping the Future of Dispute Resolution and improving Access to Justice*, The Honourable the Chief Justice Sundaresh Menon, Global Pound Conference Series 2016, Singapore