

## INTERNATIONAL COMMERCIAL MEDIATION INVOLVING PARTIES FROM DIFFERENT CULTURES — THE DIFFERENT “LANGUAGES” OF NEGOTIATION

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In a globally connected era due to developments in technology such as the Internet, video conferences, and electronic filing in the legal field, commercial mediation has also expanded itself from a strictly domestic realm. It is not uncommon to have mediation involving parties from different parts of the world who speak in different languages. These different “languages” in particular refer not only to the actual languages people speak but also to the particular negotiation styles the parties use because of their cultural background. As a result, although two parties may be negotiating in English or in another common language with the help of a translator, they will still likely be speaking in different “languages” of negotiation. Consequently, negotiators often doubt whether they want to do business with the opposing side because of the strange, insulting, or sometimes offending behaviors the prospective business partner exhibit during negotiations.<sup>1</sup>

One of the most significant roles of a mediator is to clarify to the parties what each side truly wants. In order to do so, a mediator must listen carefully to first understand each side’s views. Without this initial step, a mediator can neither work to develop trust nor suggest creative ways to settle. It is, therefore, the mediator’s role to accurately interpret the different cultural languages the parties use in these cross-border commercial mediations.

In order to ultimately assist mediators dealing with parties from different cultures, three examples of negotiation styles that are culturally based will be explored; 1) anthropologist Edward T. Hall’s research on high and low-context communications arguing that a mediator should use the evaluative method when dealing with high and

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<sup>1</sup> John Barkai, Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution, 8 PEPP. DISP. RESOL. L.J. 403, 404 (2008).

low-context parties, 2) Geert Hofstede's five different cultural dimensions offering an example of how a mediator's knowledge of the cultural dimensions can benefit mediation, and 3) the use of apology in Japan and Korea's legal arenas to illustrate how mediation can become an ideal forum for the parties to employ the culture of apology.

The cultural studies on high and low-context, cultural dimensions, and the culture of apology are significant because they can help not only the international mediators but also the negotiating parties to choose the right mediators in international mediation. Parties can review whether the prospective mediators have sufficient training in or exposure to dealing with international parties either from their education or from their careers. Ultimately, these cultural studies can inform potential participants of international mediation, including the mediators, that many unfamiliar cultural factors contribute to differing outcomes in mediation involving international parties.

## I. HIGH-CONTEXT AND LOW-CONTEXT COMMUNICATIONS

Anthropologist Edward T. Hall first fully explained the difference between high-context and low-context communications.<sup>2</sup> High and low-context refers to how much meaning a communication derives from its "context" or the surroundings instead of the actually spoken words.<sup>3</sup> In high-context cultures, negotiators have to pay attention to the context because the meaning of the communication is not entirely verbalized but may be only inferred or not discussed at all.<sup>4</sup> A prime example of high-context communication is Asian negotiators' tendency to say, "no," without speaking the word, "no." Businessmen who have interacted with Asian negotiators will often express confusion because Asian negotiators tend to express their disapproval by using vague phrases such as "that sounds good," and "we will consider that." As a result, a cultural outsider who is oblivious to these high-context languages could easily fail to understand the major issues in negotiations.<sup>5</sup>

Contrastingly, low-context communication, typically represented by Western cultures, embody the "can-do, problem-solving spirit" that

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<sup>2</sup> *Id.* at 406.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 407.

<sup>5</sup> *Id.*

assumes a “process of give-and-take” and that “[isolates] the people from the problem.”<sup>6</sup> Therefore, the high-context Asian negotiators tend to find the low-context American negotiators to be too blunt, unmindful of the history and hierarchy of the members of parties involved in the negotiation, and unwilling to sacrifice substance to form.<sup>7</sup> Other characteristics of the low-context culture include: valuing individualism, emphasizing linear logic, stressing words and technical signs, favoring highly verbal persons, and so on.<sup>8</sup>

Because Asian and non-Asian parties employ opposite communication styles, a mediator can assist the mediation process more efficiently by using the evaluative method instead of the facilitative or transformative. The evaluative method directs the mediator to offer parties his or her opinion of legal strengths and weaknesses of the case where as the facilitative method encourages the mediator to assist the parties to negotiate themselves. When the high-context party is circuitously voicing their concerns through the context, challenges arise for the mediator to clearly understand the high-context party’s opinions. If the mediator uses the facilitative approach to let the parties negotiate themselves, the mediator will expose the parties to more confusion; the high-context party will not be verbalizing what they truly want while the low-context party will likely be offending the other by its direct style of speech. The result would be undesirable. The mediation would not achieve its goals of reducing personal hostilities or developing each party’s trust on another.

However, the mediator who uses the evaluative method enables both parties to listen to the mediator’s understanding of the case and to correct the mediator’s confusion if there is any. The high-context party can detect any misunderstanding that arose from its indirect communication style. The party can then request a caucus to alert the misunderstanding to the mediator, who can quickly rectify the confusion and announce the correction to both parties during the joint session or through another caucus with the low-context party. Although this circuitous approach may seem inefficient, given the nature of the high-context party to avoid direct confrontation and

<sup>6</sup> Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* 216 (rev. 1997).

<sup>7</sup> *Supra* note 1, at 409.

<sup>8</sup> See <https://www.yumpu.com/en/document/view/7484784/ba101-introduction-to-business-international-business-module/10> (last visited May 5, 2016).

blunt verbal expressions, the constant exchange of feedback with the mediator as an intermediary can protect both parties from distrusting another.

## II. GEERT HOFSTEDÉ'S FIVE DIMENSIONS OF CULTURE

Dutch cultural anthropologist Geert Hofstede's work on cross-cultural differences is significant for those studying negotiations among parties from different background.<sup>9</sup> Hofstede's study on dimensions of culture was based on over 116,000 questionnaires from IBM employees in fifty-three countries.<sup>10</sup> Beginning with discussions of four dimensions of culture, Hofstede later added a fifth dimension related to Chinese culture as well as other information about seventy-four countries. Hofstede's five dimensions are: Power Distance Index (PDI), Individualism (IDV), Masculinity (MAS), Uncertainty Avoidance Index (UAI), and Long-Term Orientation (LTO).

The Power Distance Index (PDI), a measure of hierarchy in a culture, refers to the "extent to which less powerful members [of a culture] expect and accept that power is distributed unequally" in a culture.<sup>11</sup> Members of a group with high scores on the PDI pay high respect for their leaders or the elders.<sup>12</sup> Countries that scored high on the PDI include Malaysia, Philippines, Russia, Mexico, China, Korea and Japan.<sup>13</sup> Countries like the United States, Australia, Germany, United Kingdom, Sweden, and Norway scored low on the PDI.<sup>14</sup>

Individualism (IDV), a second Hofstede dimension, focuses on how much a culture reinforces individual achievement and interpersonal relationship.<sup>15</sup> IDV's central value rests on respecting each individual member's freedom.<sup>16</sup> Individualistic cultures motivate their members by material rewards, honesty, privacy, and individual rights.<sup>17</sup> Typically, Americans think and act individually and respond to individual interests

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<sup>9</sup> *Supra* note 1, at 410.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 411.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 412.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

whereas Asians think and act collectively and respond to collective interests.<sup>18</sup> The United States, Australia, United Kingdom, Canada, and Netherlands have high individualism scores while China, Singapore, Thailand and South Korea have low scores.<sup>19</sup> Interestingly, Japan, unlike the other East Asian countries, scored above the world average and the world mean.<sup>20</sup> Generally, individualistic cultures breed low-context communicators who are direct, confrontational, and self-disclosing.<sup>21</sup> Similarly, collectivist cultures typically generate high-context communicators who are indirect, cautious, non-confrontational, and subtle.<sup>22</sup>

Hofstede's third dimension, masculinity (MAS), indicates the degree to which a culture reinforces traditional male values and gender in areas dealing with achievement, control, power, money, recognition and assertiveness.<sup>23</sup> It is a measure of competitiveness that can be summarized in a following phrase, "win at any cost."<sup>24</sup> Characteristics such as cooperation, security, pleasant relationships, modesty, and care for others represent traditional feminine goals on the opposite end of the masculinity spectrum.<sup>25</sup> Furthermore, feminine cultures often have women directed by male leadership. Japan, Slovakia, Switzerland, Mexico and Middle Eastern countries scored high on the masculinity scale.<sup>26</sup> The Scandinavian countries are among the most feminine, along with Thailand and South Korea.<sup>27</sup>

The fourth dimension, Uncertainty Avoidance Index (UAI), measures the level of tolerance for uncertainty and ambiguity within a culture.<sup>28</sup> It gauges how much people in certain cultures feel threatened by unstructured or unknown situations as opposed to the universal feeling of apprehension caused by identified or understood threats.<sup>29</sup> Accordingly,

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 413–14.

<sup>23</sup> *Id.* at 414.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 415.

<sup>29</sup> *Id.*

a high uncertainty avoidance culture creates a rule-oriented society to reduce the amount of uncertainty in the environment.<sup>30</sup> Greece, Portugal, Japan, Spain, and Korea scored high on the UAI scale, above the world average, whereas Germany, Thailand, United States, United Kingdom, China, and Denmark scored low.<sup>31</sup>

Finally, the Long-term orientation (LTO) focuses on the extent a culture embraces a pragmatic, future-oriented perspective instead of a conventional, historic, or short-term perspective.<sup>32</sup> Cultures with a long-term orientation make long-term commitments and have strong respect for tradition.<sup>33</sup> Examples of long-term orientation cultures are China, Japan, Hong Kong, and Taiwan.<sup>34</sup> The United States, Canada, Australia, United Kingdom, Philippines, Nigeria, and Pakistan have short-term orientation cultures.<sup>35</sup>

The five cultural dimensions can manifest themselves during mediation in various forms. For instance, Japanese negotiators who value hierarchy, as represented by their high PDI score, will likely defer to their leading negotiator's opinions. However, at the opposite end of the negotiation table, American negotiators, with their high IDV score, will be voicing their individual opinions, wondering why the majority of the Japanese side is inefficiently remaining silent. A mediator who is aware of the parties' different cultural dimensions, can first hold a separate caucus with the American side to perhaps encourage them to select a leading negotiator to communicate with the Japanese equivalent.

It is impossible to predict every scenario that results from different cultural dimensions of the participants. However, these studies on cultural dimensions are crucial because they help the mediator to delve deeper beyond the structures and forms of the mediation and identify the cultural dimensional gaps between the parties. If that initial step is fulfilled, with the input from the mediator, any party will be less likely to be puzzled, frustrated, or offended by the other. Accordingly,

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 417.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* See *supra* note 1, at 419 for a complete list of Hofstede dimension scores for seventy-four countries and regions of the world.

minimizing possible misunderstandings that could form mistrust will enable the parties to cooperate to reach a satisfactory resolution.

### III. USE OF APOLOGY IN MEDIATION BY ASIAN PARTIES: CASES OF KOREA AND JAPAN

A mediator should also be aware that countries like Japan and Korea use apology as a prominent method of conflicts resolution. In the two nations, an apology, offered and accepted, often remarkably restores relationships between two individuals or entities after one party's breach of legal or social rules.<sup>36</sup> As mentioned above, the Japanese society's emphasis on collectivism over individualism allows apology to frequently play a significant role in maintaining harmony within a group. For example, police often "request" letters of apology (*shimatsusho*) from Japanese citizens who commit minor infractions.<sup>37</sup> Moreover, a defendant's verbal or written apology for the crime becomes a significant factor in judges' punishment decisions.<sup>38</sup> It is also not unusual to see news footages of Japanese presidents of large corporations issuing formal apologies and bowing deeply towards cameras for the victims of negligence cases.

In contrast, the United States places less value on the apology.<sup>39</sup> Some argue that Americans even tend to view apology as a sign of weakness (especially during negotiations).<sup>40</sup> The American legal system also makes almost no room for apology.<sup>41</sup> Criminal and civil defendants are never requested to apologize to those the victims or to the society whose rules they have breached.<sup>42</sup> If American judges demand verbal or written apologies as Japanese and Korean judges do, the apology would most likely be perceived as "insincere, personally degrading, or obsequious."<sup>43</sup> Additionally, higher rate of lawsuits in the United States compared to in Japan or Korea may be another reason that there is less encouragement for apology in the United States. For

<sup>36</sup> Max Bolstad, *Learning from Japan: the Case of Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 545 (2000).

<sup>37</sup> *Id.* at 555.

<sup>38</sup> *Id.* at 556.

<sup>39</sup> *Id.* at 545.

<sup>40</sup> *Id.* at 563.

<sup>41</sup> *Id.* at 564.

<sup>42</sup> *Id.* at 564.

<sup>43</sup> *Id.* at 564.

instance, American physicians are highly discouraged from apologizing for their mistakes to protect themselves from liabilities.<sup>44</sup>

Nevertheless, some evidence indicates that Americans are often quite interested in both giving and receiving apologies.<sup>45</sup> North America's criminal law scene currently involves more than 120 victim-offender mediation programs in the United States and Canada.<sup>46</sup> Seventy-eight percent of the participating victims stated that the offender's formal apology is an imperative issue for them.<sup>47</sup> Furthermore, a research showed that patients are less likely to sue when a physician is forthright about the accident, apologizes and takes responsibility for the injury.<sup>48</sup>

Mediation can provide an ideal forum for the parties to offer and receive apologies because mediation is not adversarial and encouraging reconciliation.<sup>49</sup> Given the evidence despite the conspicuous absence of apology in American society, a mediator's awareness of apology is likely to provide innovative methods for assisting parties reach a mutually satisfying and beneficial settlement.<sup>50</sup> For example, if the American side utters a matter-of-fact statement acknowledging their mistake on a particular issue, the mediator could perhaps "reformat" the unemotional statement into a statement resembling an apology to the Japanese or Korean negotiators. As long as the American side is aware of and comfortable with the mediator's reformatting of its statement, the mediator can use the culture of apology to both parties' benefit without overstepping his or her boundaries as a mediator.

#### IV. CONCLUSION: WHY ARE ANY OF THESE STUDIES IMPORTANT IN MEDIATION?

The aforementioned studies on high and low-context, cultural dimensions, and the culture of apology are significant in the mediation context because the studies can serve as a useful guide when parties choose their mediators in cases involving multinational parties. In those cases, the ideal mediator should not only be knowledgeable on

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<sup>44</sup> *Id.* at 565.

<sup>45</sup> *Id.* at 545.

<sup>46</sup> *Id.* at 566.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 566–67.

<sup>49</sup> *Id.* at 545–46.

<sup>50</sup> *Id.* at 546.

the nature of the dispute, facts of the case, the industry, and applicable laws but also on the parties' respective cultural background. Parties do not necessarily have to search for mediators who have extensive knowledge in Hofstede's cultural dimensions or the culture of apology in Japan and Korea. Instead, parties can do research on prospective mediators' backgrounds to determine whether they have adequate training in or exposure to dealing with international parties either from their education or from their careers. For example, for a commercial mediation case involving pharmaceutical companies from Korea and the United States, Mediator A, a lawyer who has been practicing in a domestic American law firm that deals with pharmaceutical conflicts, would be less ideal than Mediator B, a Chinese American non-lawyer, who had served as an executive of an international company. For successful international mediation, more valued be Mediator B's personal background as an Asian American and an international company's executive who managed and interacted with people from various cultural background than Mediator A's legal knowledge.

Once the parties choose the mediator, the mediator should review the cultural factors to assess the particular dynamics among the parties. However, the international mediator should not brush aside his or her ordinary duty to determine the personalities of the parties and the nature of the incident leading to this mediation. By considering all of these factors, the mediator should then exercise his or her best judgment in whether to use the evaluative, facilitative, transformative, or a mixed method of mediation. In addition, the mediator can also determine whether to encourage certain parties to use apology or to suppress those wishing to use apology during negotiation.

The cultural studies can inform potential participants of international mediation and the mediators that many factors can influence the outcome of mediation. Most importantly, however, the parties and the mediators should remember that not one culture can be summarized by a few characteristics. Therefore, participants of international mediation should approach these cultural studies with mindsets that no research can perfectly sum up the behaviors of parties from certain cultures.

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