

MEDIATING INTERNATIONAL BUSINESS DISPUTES

*Daniel Q. Posin**

INTRODUCTION

Even as mediation has come to be a dominant force in settling such cases as rear-end SUV collision accident claims in Terrebonne Parish, Louisiana,¹ mediation has become a major force in settling international business disputes.² The principles and techniques involved in mediating the two kinds of disputes are very much the same, with a leavening of cross cultural complexity for the latter.³ The purpose of this paper is to show the fundamental similarity of international business mediation to

* Judge René H. Himel Professor of Law, Tulane University. The author also serves as a mediator on the panel of Mediation Arbitration Professional Systems, Inc. (MAPS), in New Orleans, where his area of specialization is corporate and commercial mediation. The author is also an arbitrator with the American Arbitration Association, the National Association of Securities Dealers, and the National Arbitration Forum. He has served as Corporate and Securities Editor of the *World Arbitration and Mediation Report*, where he wrote monthly on recent developments in business mediation and arbitration. He has made presentations on negotiation and mediation to large law firms and Fortune 500 companies, as well as to international audiences. He has served as a Special Counsel to the Corporate Section of the Jones Walker law firm in New Orleans. He has served and serves as a consultant/expert witness in corporate, securities and class action cases both domestically and internationally. He is also a co-author, of *FEDERAL INCOME TAXATION OF INDIVIDUALS* (6th ed. 2003). He is the author of *CORPORATE TAX PLANNING: TAKEOVERS, LEVERAGED BUYOUTS AND RESTRUCTURINGS* (1990 & Supp. 1997).

1. "Parish" is Louisiana-speak for "county."
2. All of the leading international arbitration organizations provide the choice of mediation. Among these organizations are: the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Center for Settlement of Investment Disputes (ICSID, itself an organization of the World Bank), the Center for Public Resources (CPR) and the World Intellectual Property Organization (WIPO).
3. Although there are those who might say that, given the extreme diversity in Louisiana, mediating in Terrebonne Parish presents as much of a cultural challenge as any international mediation.

domestic mediation, to discuss the overlay of additional problems that international mediation presents, and to discuss particular mediation tactics—including playing the “culture card”—that can be employed to overcome cultural problems in international business mediations.⁴

I. MEDIATION ACROSS THE BOARD

Unlikely as it may sound, the principles involved in mediating the international business dispute are the same as mediating the rear-end SUV collision in Terrebonne Parish. I say this because I happen to have a rather wide exposure to mediation and alternative dispute resolution, having mediated or attended as an observer or arbitrated cases ranging from indeed rear-end SUV collisions in Terrebonne Parish on up through business and securities problems, finally on up through employment and financial problems arising from major international transactions.

In all of these various types of cases, the advantages of mediation remain the same: avoiding the risks, expense, delay and the stress of litigation.⁵ These factors are discussed further below.

As a backdrop to the discussion it should be noted that recent data suggest that the settlement rate for litigated cases is exceedingly high, belying the public myth of a “litigation explosion.”⁶ It would appear to be much more accurate to say that there is a “settlement explosion.”

4. International political mediations are not discussed in this Article. For that fascinating topic, see *HERDING CATS: MEDIATION IN A COMPLEX WORLD* (Chester A. Crocker et al. eds., 1999) (providing a variety of case studies, but giving little attention to overall mediation technique).

5. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 44 (1983) (stating that cases that run the full course of litigation are likely to be “more protracted, more elaborate, more exhaustive, and more expensive”). Also note that avoiding arbitration is another advantage of mediation.

6. With respect to business litigation, the settlement effect is very powerful. Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation*, 25 *LAW & SOC. INQUIRY* 789, 797 (2000) (finding that in cases with at least one business entity on each side, less than 3% of the cases even reached the opening of the trial). Interestingly, the rates of settlement of cases vary depending on the area of law involved. The Civil Litigation Research Project (CLRP), sponsored by the U.S. Department of Justice and the University of Wisconsin, collected litigation data in both state and federal court in five judicial districts. Their results showed the following trial rates: torts 10%; civil rights 15%; domestic relations 25%. The

Mediation is right in the thick of this "settlement explosion." The data indicate that the settlement rate for mediation approaches 80%.⁷ It might be argued that while 80% is a good settlement rate, it is not as high as the overall case settlement rate which is apparently as high as 92%.⁸ Thus it might be argued that mediation is not apparently effective.

However, such an argument could not be more in error. These settlement percentages make reference to different populations. Many of the cases that go to mediation are cases that the attorneys involved could not settle by themselves. Thus the mediation population is made up of disproportionately tough cases. In most of the cases that I encounter in my mediation practice, the attorneys have previously attempted to settle. From these perspectives, an 80% settlement rate is an outstanding result. As another anecdotal piece of evidence, I see many lawyers as repeat players in the mediation practice. Since they have had ample opportunity to observe the process, they must think the process has value or they would not keep coming back.

And what value does mediation bring to the table? As alluded to above, the value of mediation lies in its avoidance of the following hazards of litigation or arbitration: costs, risk of a poor result, delay, and stress.⁹ Perhaps the greatest over-arching principle is this: In mediation, the parties don't ever get a result they have not agreed to. The parties are, to use an overworked phrase, "empowered." Not only are the parties empowered as to result, they are empowered as to process.

I have had parties in private caucuses stand up, pace around and tell their lawyers to "shut up," while they sounded off about the case. The lawyers sit there meek as a lamb, which can be a good thing. This never happens in a courtroom—it cannot. For many parties in a case, this is

relatively high domestic relations trial rate may arise from the high emotional content of such cases. However, it probably also reflects the fact that the court record in a domestic relations case must show a resolution and thus a trial must be recorded. Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Grey*, 70 JUDICATURE 161, 164 (1986).

7. Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOT. J. 259, 261 (1996) (noting settlement rate of 78%).

8. *See id.*

9. A further disadvantage of arbitration, of course, is the lack of any appeal. One bite at the apple is all one gets, bitter or misguided as the bite might turn out to be.

the only lawsuit they will ever experience. In a mediation, their memory of it will not only be the result—it will be that they had some say about what happened, that they called a shot, that their agreement was required.

These emotional, client-empowering arguments for mediation can easily be seen to be important to the parties in the case of the rear-end SUV collision in Terrebonne Parish.¹⁰ In the Terrebonne Parish case, the injured plaintiff, with his Cajun cadence, was being paid by Tri-West Insurance Company for lost future wages, for past and future medical bills, for back injuries and for pain and suffering.¹¹ This was paid, after mediation, by the Tri-West adjuster flown in from Atlanta and her local outside counsel, as they took this one off their case management file, hitting a little below the number they were authorized, and moved on to the next case, coming out of Grand Isle. The parties were not too unhappy, and the black cloud that was this case has been wiped out of their lives and careers. They controlled it. In lawyer-speak, Tri-West didn't take a big pop and the plaintiff didn't get zeroed. Anything can happen when you put it to a jury. Even if the jury talks like you, that doesn't mean they'll give you home cooking.

The same considerations come into play when the case is at the other end of the business spectrum. Let us consider the example of a failed agreement by a French company to license a line of clothes in the U.S., which triggered a resignation by the CEO. The CEO wants to collect his severance package, which is disputed by a shareholders' derivative suit. Notwithstanding that the parties and their attorneys are all experienced in business, there is the same concern about the loss of control and about matters going in directions unfathomed. This creates a desire to throw some fixed, predictable amount of money at the complex problem to make it go away. And the great thing about it is that you don't have to do the law school thing—analyze doctrines, facts, consider motions, venues, and all the rest. You don't have to write an exam. Just a check.

From humble beginnings, mediation is moving to the forefront of dispute resolution. In Europe, it is coming to challenge arbitration as the leading method of resolution of business disputes.

10. Terrebonne Parish lies in Southwestern Louisiana, and is home to the cities of Houma and Thibidoux. Quail hunting in the region is excellent.

11. This case is a fictitious amalgam of cases that I have encountered in my experience.

II. THE LOGIC THAT DRIVES PARTIES TO MEDIATION

I have seen it happen over and over again: parties posturing, threatening to walk out, asserting that their hands are tied and that they cannot make a deal, and giving their bottom line number way out of the range of the other side. And yet, several hours later, they sign on to a deal that is much less favorable than their earlier "bottom line" positions. Why? A number of factors drive parties to settle. The existence of these factors make the mediator's job easier. In some ways, the mediator's job is best viewed as facilitating the parties' grope toward settlement, smoothing away the rough edges. The costs and the flaws in the legal system drive parties to settlement, with the mediator there to ease the way.¹²

As Judge Jon Newman of the Second Circuit said:

Whether we have too many cases or too few, or even, miraculously precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike. No one should have to wait five years for a case to come to trial, but many litigants in this country face this reality. Legal expenses should not exceed damage awards, yet in the asbestos litigation morass, for example, those expenses total \$1.56 for every \$1 provided to a victim. If long delays and high litigation costs were aberrational, systemic change could safely be avoided. But we know the problem is more serious. Even if the modern defenders of our current litigation level are right, system wide averages should not obscure the long delays and high costs imposed upon hundreds of thousands who use or participate in the litigation process and the losses endured by those who are deterred from seeking redress in court.¹³

12. JAMES S. KAKALIK & NICHOLAS H. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION vi-vii (1986) (noting that the total nationwide expenditure for tort litigation in state and federal courts in 1985 was \$29 to \$36 billion and that plaintiffs received \$14 to \$16 billion of this amount after deduction of their litigation costs).

13. Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644-45 (1985).

The delay can have various pernicious effects. The injured personal injury or business plaintiff must continue to pay legal and other expenses while waiting for the supposed ship to come in.¹⁴

In fact, what may be happening is that the litigation system is just serving as a backdrop or "dumb show" against which the real action—settlement/mediation—is played out. Essentially what each side tries to do in mediation—with the mediator's assistance—is to show the other side the strengths of its case and the weaknesses of the opponent's case. That at least is what happens in the zero-sum positional bargaining that characterizes mediations for auto accidents, legal or medical malpractice, property damage, business tort, interference with contractual relations, breach of fiduciary duty and many other business damage cases.

These kinds of cost and mini-litigation factors drive many cases to settlement, whether they are auto accident or international business matters.

Even if a party presses doggedly ahead to litigation and gets "more" than perhaps would have been received in a mediated settlement, the costs—whether in stress or internal employee time consumed—could still render the net amount received negative.¹⁵

Often the legal system is used strategically to wear down the other side, rather than to serve the goal of a "quest for truth." In corporate hostile takeovers, for example, litigation frequently arises out of supposed failures of the other side to comply with the myriad applicable state and federal rules. The purpose of the litigation can be simply to

14. In personal injury cases, the plaintiff's medical bills may or may not have been covered by some third party, such as health insurance or workman's compensation or union insurance. The third parties may then under state law have a lien against any judgment the plaintiff receives. The existence of the lien can complicate the mediation process as these third parties may intervene in the case and indeed have to be included in the mediation, where they may give up some of what they are in order to facilitate a settlement.

The delay in a personal injury case can cause a further "deadweight loss," to employ a law and economics analysis. Since one of the claims of the injured party is often a claim for future wages, the delay in the case can mean that the plaintiff may decline to take a constructive job that he could actually perform, so as not to undermine his future wages claim.

15. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 78-79 (1983).

wear down the other side, or to keep them off balance.¹⁶ The ability of one side to impose a high litigation cost on the other side is a factor that, for better or worse, has to be taken account of in the cold light of reality when mediation settlement negotiations are approached. The wear-down litigation threat is a factor that can drive all forms of litigation to a mediated settlement, since it often proves to be expensive both for the plaintiff and the defendant.

In addition to the debilitating effects of costs and delays on the parties, there is another factor that confuses the issue when it comes to the decision to mediate. With all due respect to my judge friends, I call it the myth of judicial infallibility. How likely is it that a judge, pressed as he or she is with many other cases and duties, is going to get the "right" answer in every case? A similar argument can be made with respect to a jury (again no slur on family members of mine or readers who have served on juries). The judge and/or jury are necessarily not going to know the case as well as the parties. This raises the distinct possibility of an "oddball" or outlier decision. A number could be produced that is far too high or too low, outside the parties' expectations. As the mediator says to the parties, in persuading them to mediate: In litigation, one party could make out like crazy while the other party gets killed. Who wants to take that chance? Most people are risk averse¹⁷ and would prefer not to play that game.

In mediation, the knowledge that both sides come to possess through painstaking discovery or by virtue of living through it can be taken fully into account in helping both sides to evaluate the case. This

16. See DANIEL Q. POSIN, *CORPORATE TAX PLANNING: TAKEOVERS, LEVERAGED BUYOUTS, AND RESTRUCTURINGS* 949-1305 (1990 & Supp. 1997) (giving blow-by-blow descriptions of hostile takeovers and associated litigation).

17. See Harry Markowitz, *The Utility of Wealth*, 60 J. POL. ECON. 151 (1952) (explaining that people will take large chances of a small loss for a small chance of a large gain); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 101-07 (1971) (explaining economic model predicting when litigants will choose settlement over trial); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (explaining economic model predicting that suits that do not settle split 50-50 for plaintiffs and defendants); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989) (explaining economic model predicting when litigants will choose settlement over trial); Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982) (discussing the divergence between private and social goods in litigation).

is an argument that can be used by a mediator to encourage the settlement of any kind of case. Indeed a fairer result is achieved in mediation, if one is concerned globally with ultimate fairness in dispute resolution. The case for mediation is indeed most persuasive in the complex business or international transaction, where the potential for misunderstanding on the part of the judge or jury is greatest. Moreover, the potential for creative remedies is severely truncated in judicial proceedings. Settlements that grow out of a mediation can contemplate a rich panoply of remedies, including agreements to work together in the future, covenants not to compete, structured settlements,¹⁸ earn-outs¹⁹ and apologies.²⁰ In international business transactions, apology can indeed play a major role, as an apology is extremely highly regarded in some cultures.²¹

The "win or lose" aspect of a judicial decision can also be quite stressful to the parties, bringing on an intense emotional experience even in the business setting. Who among litigators has not had a client who sees himself or herself as a warrior in some historic confrontation—"the whole world is watching." In fact, the whole world is not watching. A mediator can drain some of the starch out of the parties' overheated view of themselves in a way that the party's own lawyer often cannot. The mediator can indeed serve as a face-saving device for aggressive

18. In the accident case, structured settlements (or payments over the lifetime of the young, severely injured plaintiff) can be attractive to all hands. It puts the money in safekeeping and away from perhaps the grasping hands of older relatives. There can be tax advantages to the insurance company setting the program up. See DANIEL Q. POSIN & DONALD TOBIN, *FEDERAL INCOME TAXATION OF INDIVIDUALS* app. 1 (6th ed. 2003). Plaintiffs' attorneys are sometimes resistant to structured settlements since it means they will have to wait for their money as well.

19. Earn-outs, or payments that are a percentage of future profits or revenues, can be very attractive in the business setting when the value of a business is in dispute. See POSIN, *supra* note 16 at ¶1.31.6; see also Max H. Bazerman & James J. Gillespie, *Betting on the Future: The Virtues of Contingent Contracts*, 77 HARV. BUS. REV. 155, 156-58 (Sept.-Oct. 1999) (suggesting that a contingent contract might have been a way to settle the lengthy Department of Justice case against IBM, although it is doubtful that the government would ever agree to that kind of settlement).

20. See Ann J. Kellett, *Healing Angry Wounds: the Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 J. DISP. RES. 111 (1987).

21. See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986).

counsel.²² The parties' self-aggrandizement of the dispute in the international business setting can be destructive of their ability to work together in the future if that is to be contemplated.

Moreover, the decision in the court case is a matter of public record the way a mediation is not. In the mediated settlement, there is not a public decision as to who was "right" and who was "wrong."²³ This can be a major factor in the complex international business setting for various reasons. A public finding of "wrongdoing" in the business setting can have repercussions for further business transactions, reputational and otherwise. In addition, a public finding of an example of "wrongdoing" might set the table for further litigation by other plaintiffs on collateral matters. Again, this is an argument in favor of mediation (under a confidentiality agreement—which is the way most mediations are conducted).²⁴

22. In my experience, on numerous occasions an attorney will ask the mediator to "work on the client," in the sense of lowering the client's expectations.

23. An example here is the recent divorce settlement of Jack Welch, former CEO of General Electric, and his wife Jane Beasley Welch. Although a mediator was not involved in the case, the settlement of this case four days before it was to come to trial obviously spared the Welches considerable public embarrassment and public "judgment." Apparently, Mr. Welch had become involved with another woman during his marriage, and the details of that relationship might have surfaced in court. However, the settlement did not come soon enough to spare Jack Welch substantial public attention. Ms. Beasley filed papers in court in September, 2002, detailing a variety of perks that G.E. had agreed to provide to Mr. Welch, some of them for the rest of his life, these included floor-level seats to New York Knicks games and courtside seats at the U.S. Open Tennis matches. Also included were all costs associated with a Manhattan apartment that the Welches lived at when they were in New York. These apartment costs included wine and food, laundry, toiletries, newspapers, and dining expenses at the restaurant in the building, the Jean Georges. The existence of these perks was not explicitly set forth in the securities filings by GE and would not have come to light but for the litigation disclosures. The revelation of these perks caused a furor among investors and corporate governance critics. Mr. Welch defended the perks, but ultimately agreed to pay for a number of them himself. This example demonstrates not only that settlement is a good idea, but that settling sooner (*i.e.*, before key court papers are filed) is better than settling later. The utility of settling sooner rather than later has been detailed in ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 225 (Harvard Univ. Press 2000). For details of the Welch marital breakup, see Geraldine Fabrikant, *Welches Reach Divorce Settlement*, N.Y. TIMES, July 4, 2003, at C2.

24. Many states have enacted mediation confidentiality statutes. These statutes generally rely on a combination of privileges, testimonial incapacity, and/or evidentiary

In discussing the drawbacks of litigation, of course, attention must be paid to Lon Fuller's seminal article *The Forms and Limits of Adjudication*,²⁵ in which he argues that a number of institutional rigidities surrounding court decision-making render courts unable to respond to a variety of issues.²⁶ We demand from adjudication an extremely high level of rationality, as opposed to just random individual choice or preference.²⁷ Moreover, Fuller argues, whatever is submitted to judges for decision tends to be converted by them into a claim of right or an accusation of fault or guilt.²⁸

As applied to the discussion of international mediation, the phenomenon Fuller identifies—namely, rigidity in the decision-process, or the “winner take all” approach—is particularly troublesome to the parties to an international business dispute. This creates the kind of sophisticated incentive to mediate to which the parties to a complex business transaction are likely to understand and respond.

Fuller makes the related point that there are some areas of human activity that do not lend themselves to a pervasive delimitation of rights and wrong.²⁹ This would certainly be the case with respect to the complex arrangements one finds in international business transactions. Thus, mediating out of a complex cave-in of business affairs makes a whole lot more sense than trying to line the parties up for a decision on who is right and wrong on a variety of issues. Money carries no moral imperative. Saying “we just throw money at the problem to make it go

exclusions to foreclose testimony regarding mediations in legal proceedings. Many states provide exceptions to confidentiality on various issues. However, a major issue with these types of statutes is the extent to which confidentiality can be breached to prove the existence of the mediated agreement for enforcement purposes. *See generally* Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1578–79 (1994); Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 121–22 (2003).

25. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

26. *Id.* at 366.

27. *Id.* at 365.

28. *Id.* at 368.

29. *Id.* at 371. *See also* Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3 (1963).

away" is a good face-saving approach. Again, these are points the mediator can make to the sophisticated parties as the mediation unfolds.³⁰

It is indeed in the areas of complex business transactions that Fuller's analysis as to what is inherently unsuited for adjudication applies the best. Fuller gives as one of his examples of controversies that courts are unsuited to adjudicate the instance of receiving the task in a socialist regime of setting all wages and prices.³¹ Fuller points out that the repercussions of a change, for example, in the price of aluminum, on a variety of areas of the economy are beyond the ken of a court.

I would add that this is why courts attempt to avoid making economic or managerial decisions or running business by relying on such doctrines as the business judgment rule.³²

III. MEDIATION TECHNIQUE

The standard mediation process would be modified in various ways to take account of the fact that the dispute involves international business transactions.

The mediator's opening statement is a very important place for the mediator to start to play. Mediators often fail to take full advantage of the opening statement to salt it with some ideas that can help them down the road. Where all the parties are sophisticated, as usually happens in international business transactions, it is often easy for the mediator to miss some opportunities in the opening statement. It is often assumed by mediators that the opening statement is just for the uninitiated party who has not done this before.

But in the international business mediation, one may find only lawyers and corporate party representatives who are themselves professionals, who have done it before. In that event, the mediator, observing that there are only "professionals" in the room, may be

30. I will also say that dropping Lon Fuller's name and the Harvard Law Review, while making a point, is a good way to command the parties' attention and move them a little closer to settlement.

31. Fuller, *supra* note 25, at 394.

32. See *Shlensky v. Wrigley*, 237 N.E. 2d 776 (Ill. App. Ct. 1968) (holding that Chicago Cubs owner P.K. Wrigley's decision not to allow night baseball at Wrigley field, thereby losing attendance revenues, was a matter of business judgment and not reviewable by the court). See generally *THE ROLE OF COURTS IN AMERICAN SOCIETY: FINAL REPORT OF COUNCIL ON THE ROLE OF COURTS* (Jethro K. Lieberman ed., 1984).

inclined to give short shrift to the opening statement. This would be on the grounds that "everyone already knows what's going on." However, everyone doesn't "already know what's going on." If they did, they would have already settled this case. What many of the most professional of lawyers and party representatives may not be ready for is that they are probably going to agree to a result that they do not like and were not contemplating. The sooner they hear some general statements about "over-optimism" by parties-litigant, the better.

The opening statement is the one certain opportunity that the mediator has to be able to address all the parties and their counsel simultaneously. It is a good opportunity for the mediator to establish him or herself as a player in this dispute in which the parties have hitherto been engaging without the mediator and to give the impression that "things are going to be a little bit different now."³³ The mediator's opening statement can be used to drain off some of the drama and create a sense of forward motion in the process, remind the various sides (often an international mediation is multi-lateral) that a process will occur here, not just a rubber stamp of the position they brought in.

The parties themselves in their opening statements should be encouraged to tell their story from the beginning, even though the other parties may know the story well. Once again, it's useful for the other parties to hear the contrasting story from the beginning. If everyone lays out his or her position one after the other, that "normalizes" all the stories. There's an implication that all the stories are equally valid (or flawed). That conveys a very valuable message that no lawyer from any one side can convey to his or her client: "This is not going to be a cakewalk for anybody."³⁴

Using the terminology of Leonard Riskin's well-known grid methodology,³⁵ the mediator in the international business dispute should

33. MNOOKIN ET AL., *supra* note 23, at 230-32, (favoring the use of a mediator or negotiation counsel to "change the game" in intractable negotiations).

34. Unless, of course, the facts and law of the case are heavily weighted in favor of one side or the other. This process is then a quick way to let the weaker side know just how outgunned it is.

35. Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES 111 (1994). Professor Riskin is updating his grid in an article forthcoming in the Notre Dame Law Review. In this updated version he places emphasis on whether the mediator or the parties influence the decision process across a wide variety of issues.

review in preparation whether he or she is taking a narrow role and is thus likely to be more evaluative, or a broader role and thus likely to be more facilitative.³⁶ Given the complexity of the usual international business transaction, one might expect that the mediator would take a broader view and would be on the look-out for integrative opportunities that the parties themselves may have overlooked.³⁷ As to the narrower view, though it would be expected that the mediator would have subject-matter expertise, it is likely that the parties themselves are capable of going very far in analyzing the case if the issue is really one with a narrow focus. Thus the evaluative mode might only be helpful in closing the final gap. At the same time of course, the closer one gets to the final gap, necessarily the less evaluative guidance the mediator can provide. Who can say whether a particular claim or a particular business is worth \$10,750,000 or \$10,250,000?³⁸

It is also to be expected that counsel in an international business mediation are going to be extremely able. Able counsel on both sides can greatly facilitate a mediation. The circumstance of able counsel, coupled with the fact that in an international business transaction, there is likely to be a great deal of money at stake, strongly suggests a facilitative mode by the mediator. I suggest the mediator consider an extreme facilitative mode in such a case. As an initial approach, just help the parties find their deal, don't get in the way. Also, as suggested above, the facilitative mediator should keep his or her eyes open for integrative possibilities or deals that can create value for both sides.

In my view, the mediator should make extensive use of caucuses in international business disputes.³⁹ The mediator should plant in the

36. See *id.*

37. See MNOOKIN ET AL., *supra* note 23, at 224–49 (offering advice for settling disputes integratively, including exploiting differences in time or risk preferences, increasing the range of trades available, settling early and using decision analysis to evaluate a case); DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR* 90–95 (1986) (stating that gains from negotiations arise because negotiators differ from one another and have different preferences about the issues; thus fruitful trades can occur.) Cf. Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO L.J. 369 (1996).

38. Once the parties' get that close, the age-old technique of "split-the-difference," is of course an excellent way to proceed. Other gap-closing techniques include: "Would you take X if I could get it from the other side?" "Would you offer Y if they'll offer Z?"

39. See generally Christopher W. Moore, *The Caucus: Private Meetings that Promote Settlement*, 16 MEDIATION Q. 87 (1987).

opening statement the likelihood that the parties will break into separate caucuses, so that the parties do not find the procedure surprising.

There are a number of advantages of caucuses. First, it's different. While the parties and/or their attorneys have probably tried to negotiate the dispute previously (and by hypothesis failed), it's extremely unlikely that they did so by ensconcing themselves in separate rooms in a suite and then walking back and forth among the rooms.

So the mediator brings something different and of value to the process by establishing the separate caucuses. In the caucuses, the mediator can also speak more freely in terms of suggesting weaknesses in the case of the party to whom he or she is speaking. It is also useful in caucus to point out more generally the great disadvantages of the default dispute resolution process in the case, whether it be litigation or arbitration.⁴⁰ Also, it may help to point out to the particular party in a caucus why it especially wants to eschew litigation, because of good will problems created, or the potential of bringing other hidden plaintiffs out of the woodwork, or the expense, time and risk. The private caucuses, of course, also afford the mediator the opportunity to do a little "double-entry bookkeeping"—namely, emphasizing to each side privately why their case is weak—all in the spirit of good old-fashioned mediator technique.

Early in the mediation in the complex international business dispute, it may be helpful to identify the issues and lay them out. Indeed, if there are multiple complex issues, it can be useful to list them on a blackboard, a whiteboard, or simply a giant Scotch Post-it. The mediator should make sure that the parties in each room have the same list to look at. This helps break a complex problem down and promotes the possibility of integrative bargaining as the parties, in looking at the list with the mediator's help, may see issues they can swap.

A good technique in the complex case is to start with the easy problems first, to get some momentum going. More complex issues can be postponed.⁴¹ While most accident-type cases settle in less than a day, there is no reason why a complex international business case must meet

40. Arbitration has many of the disadvantages of litigation including being, time-consuming, expensive and stressful. In addition, as pointed out above, it has the major disadvantage of no appeal.

41. See Susan S. Sibley & Sall E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 17-18 (1986).

that short time frame, although it can be quite an effective technique to create an atmosphere of: "We have to settle it today. If Floyd has to fly out of town this afternoon, we'll get his cell phone number and he should call from the plane if he can." Creating some end-of-the-day excitement and panic that "we don't have much time to wrap this up" has its place as a technique. Of course, matters can be continued by phone the next day or scheduled for a subsequent meeting, if need be. In that case, the mediator might want to try to give each of the parties some "homework," for the problems that they are having.

Another approach in the complex international business environment is the "Agreement in Principle."⁴² Under this concept an overarching formula is created which is then applied to individual issues.⁴³ This is the opposite of the break-it down approach described above. There is obviously no one correct way to approach a complex international business dispute. Indeed, the illusion of progress in the negotiations can be created with the parties by discussing whether they would like to use the break-it-down approach or the "agreement in principle" approach. Once they agree on the approach, we have progress! The attractive aspect of either of these approaches is that they afford the opportunity for the parties to agree on small parts of the problem one-step-at-a-time, thus breaking the problem down and creating the illusion of momentum as agreement is reached on the smaller problems. As the old saying goes, "You eat an elephant one bite at a time." Another approach that can be employed in the complex, international business environment is the "Single Text Negotiating Document."⁴⁴ A document is proposed that purports to deal with all problems. The parties then make additions, modifications, and/or corrections to it.⁴⁵ This ensures that at least all of the answers are in the same place at the same time. This is also extremely useful for multiple party cases,⁴⁶ and once again it allows for the agreements in small steps.

42. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT*, 204-06 (1986).

43. *Id.*

44. *Id.* at 212-16.

45. *Id.*

46. I have used this technique in multiple party negotiations. I put out a draft with all the key points filled in as a "starting point." The parties energetically marked it up and the final consensus draft bore little resemblance to the original. The approach

Reference to external standards is a major mediation and negotiation technique at all levels of cases. This principle was advocated early in Fisher, Ury and Patton's "Getting to Yes."⁴⁷ While the literature has not hitherto made the connection, the external standards level of analysis is very similar to the concept of "bargaining in the shadow of the law."⁴⁸ Thus in a substantial number of cases, the law is the relevant external standard. In that sense all mediations and negotiations are conducted "in the shadow of the law."

At the level of mediating the rear-end SUV accident in Terrebonne Parish, the parties may make reference to jury verdicts that have come down in court and have been upheld on appeal. At the level of mediating a shareholders' derivative suit challenging a CEO's severance package, for example, bargaining in the shadow of the law—e.g., using external standards—would involve making reference to any case law that had addressed that issue.⁴⁹

The external standards-bargaining in the shadow of the law approach does not provide a final answer. However, it can eliminate extreme "outlier" possibilities and narrow the scope of the negotiation/mediation. This reference to external standards-bargaining in the shadow of the law helps narrow the issues on the basis of 1) fairness and 2) that which is possible in litigation.

Nevertheless, the parties are certainly not in total thrall to external standards or the shadow of the law. A party can rightfully see his or her case as different or more complex than anything in the contemplation of external standards/shadow of the law.⁵⁰ A theme throughout the process is that the mediator is both a conduit of information between the

seemed to create a good atmosphere because the parties were in a sense knocking me down instead of each other.

47. See FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 81–95 (2d ed. 1991).

48. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950 (1979).

49. Cf. *Brehm v. Eisner*, 746 A.2d 244 (Del. Super. Ct. 2000) (derivative suit challenging CEO compensation based on waste).

50. See Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

opposing sides and an impediment to transparent communication among them.⁵¹

Or as I like to say: "It's the parties' negotiation, so don't mess it up."

Let us now examine the deeply-rooted cross-cultural issues that can confront the mediation of international business disputes.

IV. CROSS-CULTURAL ISSUES

In the previous section we discussed adapting the general mediation technique to deal with international business disputes. We now explore the cross cultural issues that are often confronted in the international mediation of business transactions.

Any such discussion should start with the seminal study by Geert Hofstede concerning various cultural attitudes toward work.⁵² Hofstede

51. See Jennifer Gerarda Brown and Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994).

52. GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES* (1980). See also DEAN ALLEN FOSTER, *BARGAINING ACROSS BORDERS—HOW TO NEGOTIATE BUSINESS SUCCESSFULLY ANYWHERE IN THE WORLD* 264–70 (1992) (applying Hofstede's research to international negotiations); Jeanne M. Brett et al., *Culture and Joint Gains in Negotiation*, 14 NEGOT. J. 61 (1998) (emphasizing the importance of sharing important information that will help in trade-offs and dealing with information and issues polychromatically instead of monochromatically); GARY P. FERRARO, *THE CULTURAL DIMENSION OF INTERNATIONAL BUSINESS* (2d ed. 1994); GLEN FISHER, *INTERNATIONAL NEGOTIATION: A CROSS CULTURAL PERSPECTIVE* 17–59 (1980) (examining five considerations: 1) collect information about how other side views negotiations; 2) understand other side's style of negotiating—centralized or not, consensus or diffused; 3) investigate the "national character" of the other side, attitudes toward compromise, styles of reasoning and the like; 4) cross cultural noise—for Americans, this includes such things as using the first name prematurely, starting speeches with a joke; 5) be on guard for problems arising from interpreters); DONALD W. HENDON ET AL., *CROSS-CULTURAL BUSINESS NEGOTIATIONS* (1996) (specifying seven categories of cultural differences); DAVID W. AUGSBURGER, *CONFLICT MEDIATION ACROSS CULTURES* (1992) (specifying nine dimensions); JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* (2001) (examining the negotiating strategies and results achieved by groups of Americans, Israelis, Germans, and Hong Kong Chinese enrolled in Northwestern University's Kellogg School of Management Executive Master's program on cross-cultural negotiations; the problem had great integrative potential, and the best results were reached by the Israelis, with the Americans lagging).

outlined four cultural dimensions that seem to explain value differences among cultures that can affect the negotiation and mediation process.⁵³

The first dimension is whether the culture follows high or lower power distance.⁵⁴ In Hofstede's lexicon, a lower power distance culture contemplates people valuing equalization of power and competence over seniority.⁵⁵ In a high power distance culture, people value status, formality and hierarchy.⁵⁶

The second dimension in Hofstede's model is whether people in the culture are risk takers or risk avoiders.⁵⁷ Risk avoiders are averse to risky and ambiguous situations. They prefer safe behavior and conformity. Risk takers are more open to new ideas and problem solving.⁵⁸

Hofstede's third dimension is whether the culture emphasizes individualism or collectivism.⁵⁹ In individualistic cultures, people value individual needs and independence over the community's needs. In a collectivist culture, there is a high recognition of individuals' interdependence, the importance of cooperation and the overriding needs of the group.⁶⁰

Hofstede's fourth dimension relates to gender.⁶¹ The question is whether the culture is more "masculine" in that it values assertiveness, competitiveness, and independence, or whether the culture is more "feminine" in that it values nurturing, cooperation, and relationships.⁶²

The leading commentator Jeswald Salacuse in his book, "Making Global Deals,"⁶³ specified ten ways that culture could impede a deal. It would be up to the mediator who is on top of his job to defuse these problems. Although Salacuse presents his points in the context of

53. *Id.*

54. *Id.* at 92.

55. *Id.*

56. *Id.*

57. *Id.* at 153.

58. *Id.*

59. *Id.* at 213.

60. *Id.*

61. *Id.* at 261.

62. *Id.* Apologies for the sexist tone of Hofstede's analysis. A better lexicon for this dimension would have been, say, "assertiveness and cooperativeness." The use of gender terms adds nothing to the analysis.

63. JESWALD SALACUSE, MAKING GLOBAL DEALS: WHAT EVERY EXECUTIVE SHOULD KNOW ABOUT NEGOTIATING ABROAD 58-70 (1991).

negotiating a deal *de novo*, these same issues can come up if a deal comes unglued and a mediator is called upon to try to patch it up. Moreover, from time to time mediators are called upon to help in the negotiation of a deal *de novo*.

Salacuse's 10 factors are as follows:

1) Negotiating Goal: Contract or Relationship? Salacuse here points out that an American in a contract negotiation tends to view the goal as coming up with a signed contract.⁶⁴ Japanese and certain other cultural groups view the goal of the negotiation as establishing a relationship between the two sides.⁶⁵

2) Negotiating Attitude: Win/Lose or Win/Win? Salacuse here points out that because of culture or personality, or both, a party may approach a negotiation as a win/lose or distributional negotiation or as a win/win integrative negotiation.⁶⁶

3) Personal Style: Informal or Formal? Here, the question is whether a negotiator is "formal" or "informal" in the way he talks, uses titles, dresses, speaks and interacts with others. The informal negotiator inquires about the other side's family life, takes off his jacket and rolls up his sleeves. This kind of conduct can put people off from other cultures such as France, Japan, or Egypt. In those latter countries, for example, using the first name right away is seen as an act of disrespect.⁶⁷

4) Communication: Direct or Indirect? Negotiators from some cultures, such as the U.S. or Germany, communicate directly. Other cultures rely on circumlocutions, figures of speech, facial expressions, gestures and other kinds of body language. This can create problems when the negotiator from the direct culture does not get a firm, clear response from the negotiator from the indirect culture or if the negotiator from the indirect culture gets too forceful a response from the negotiator from the direct culture.⁶⁸

64. *Id.* at 59.

65. *Id.* at 60.

66. *Id.*

67. *Id.* at 63.

68. *Id.* at 64.

5) Sensitivity to Time: High or Low? This area is one of stereotypes (e.g., Germans are always on time; Mexicans are always late; Japanese negotiate slowly; and Americans move quickly to close a deal). One result is that Americans try to reduce formalities and get down to business quickly.⁶⁹ Negotiators from other cultures, who view the negotiation as creating an ongoing relationship, require more time for the parties to get to know one another. Thus they can be suspicious of attempts to shorten up the negotiating time.⁷⁰

6) Emotionalism: High or Low? Here the issue is again based on stereotypes. Latin Americans are thought to show their emotions at the bargaining table, whereas Japanese are thought to hide their feelings.⁷¹ Salacuse states that individual personalities may overcome these cultural stereotypes.⁷² But he does argue that culture provides different rules as to the appropriateness of showing emotions and will influence behavior in this area.⁷³

7) Forms of Agreement: General or Specific? Cultural influences play out heavily here as well. Americans tend to prefer very detailed contracts, with everything spelled out, covering all circumstances no matter how unlikely.⁷⁴ In countries such as China, parties tend to prefer a contract which is in the form of general principles rather than defined rules. This appears to go back to the fact that the deal, to begin with, is about establishing a long term relationship, not just one contract.⁷⁵ Negotiators from these cultures take the view that their relationship will govern the results if there are some unforeseen circumstances.⁷⁶ Taking

69. *Id.* at 65.

70. *Id.* I am constrained to observe here that often in mediations a party will complain that "we are wasting time." This is usually because the other side has not immediately accepted the party's early offer. But in terms of time, mediation is far more efficient than litigation, in which there will be many days of hearings, depositions, preparing and filing motions, and then the trial itself. Complaining that a mediation is "wasting time" is the time sensitivity factor taken to the ultimate degree.

71. *Id.* at 66.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

it one step further, the American drive to nail things down may well be viewed with suspicion or as evidence that the Americans do not trust the long-term relationship.⁷⁷

My dissenting view in this area is that it is possible that the party with the stronger bargaining position seeks to "lock up the deal" with a variety of specific contract provisions whereas the party with the weaker bargaining position often seeks to keep things general in order to avoid the full impact of the bargaining position of the other side. This is a non-cultural factor which may be weighed in the balance.

8) Building an Agreement: Bottom Up or Top Down? This refers to the question of whether the agreement should be reached by settling of a series of little problems or by agreeing on a few overarching principles that are used to fill in the specific problems.⁷⁸ Americans are said to prefer to approach deals by settling each step one at a time.⁷⁹ The French are seen as having the top-down approach of agreeing on a few general principles that are used to fill in the specific issues.⁸⁰

In the "building down" approach, one party presents a maximum deal if the other side accepts all the conditions.⁸¹ In the "building up" approach one party proposes a minimum deal which can be broadened and increased as the other party accepts additional conditions.⁸²

I would add that in these formats the mediator can play an instrumental role in assisting the parties in negotiating which approach will be used. Once agreement has been reached on the approach (*i.e.*, "progress" has been achieved), thereafter, the mediator can assist the parties as they deal with the various particular provisions.

9) Team Organization: One Leader or Group Consensus? This idea relates to how each negotiating team is organized. One extreme is that there is one leader who has full authority to decide all issues.⁸³ This tends to be the American style.⁸⁴ The other extreme is the case with a

77. *Id.*

78. *Id.* at 68.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 69.

84. *Id.*

relatively larger number of negotiators and it is not clear who has the authority to decide what.⁸⁵ Note that this analysis relates very closely to Hofstede's analysis when he talks about high or lower power distance.⁸⁶

10) Risk Taking: High or Low? According to Salacuse, some cultures are more risk averse than others.⁸⁷ The degree that one side or the other is willing to take risks in the negotiation process—to perhaps facilitate integrative bargaining—is affected by the approach and personality of the negotiator, which in turn is affected by his culture.⁸⁸ This dovetails exactly with Hofstede's second area of analysis, which also relates to whether the culture is risk averse or willing to assume risk.⁸⁹

This factor also relates to Salacuse's ninth factor, regarding team organization. It is very difficult for a negotiating team that operates on group consensus to be a risk-taker. The Japanese tend to be risk averse and operate on a team basis, whereas Americans, by comparison, are risk-takers and tend to be organized from the top down.⁹⁰

Again, the mediator should be prepared to explain these differences to each side—preferably in private caucuses. The mediator can also perform the useful role of reminding the parties of these differences as the negotiation proceeds (or starts to break down).

Moreover, as Salacuse indicates, there can be integrative gains to negotiation if the deal is hedged with mechanisms that appear to reduce the risk to the risk-averse side, that are also acceptable to the less risk-averse side. The mediator can play an important role in making these suggestions.

85. *Id.* It has been argued, in the strictly American context, that the side that has more negotiators has an advantage in the sense that "each person should have a say." See Meltsner & Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259 (1973). That's a calculus that would not necessarily hold up in the international setting, nor do Meltsner and Schrag argue that it would.

86. See HOFSTEDE, *supra* note 52 at 92.

87. See SALACUSE *supra* note 63, at 69.

88. *Id.*

89. See HOFSTEDE *supra* note 52, at 153.

90. See SALACUSE *supra* note 63, at 69.

V. THE SURPRISING IMPORTANCE OF INTERPRETERS

At this juncture, it is useful to make the important, if obvious, point that if the parties involved in the mediation are not fluent in the same language, it is essential to hire an excellent interpreter. Avoiding misunderstanding in mediation and reaching agreement is difficult enough when the same language is involved. If different languages are involved, the probability of a sheer misunderstanding throwing a monkey-wrench into the works is increased geometrically.⁹¹ Not only must a first-class interpreter be hired, but the mediator needs to keep on top of the language issue, ensuring that some particular turn of phrase has not been understood in two different ways.

VI. PLAYING THE "CULTURE CARD" AS A MEDIATOR

After this extensive discussion of the culture factor, we are "all dressed up with no place to go." What is the mediator of international business transactions and disputes to do with the block of ideas and analysis presented in the previous section?

It is not enough to memorize a load of facts about the particular culture from which one side or the other comes.⁹² It is more important to be sensitive to the fact that these cultural issues exist. The mediator should attempt to pick up on them in the course of the mediation. Is there something going on that we've missed?

An effective tactic is to put the cultural card on the table. Again the mediator is much better suited to doing this than are the parties. The mediator in the opening statement can point out that cultural issues, whether in manners or in approaches to problems, may present a barrier to reaching agreement. He can suggest that the parties may want to be conscious of that fact as they go through the negotiation.

This has the useful effect of "planting the culture seed" early on and raising the parties' consciousness of that factor. The matter can then be

91. See FISHER ET AL., *supra* note 47, at 32-36; Ileana Dominguez-Urban, "The Messenger as the Medium of Communication: The Use of Interpreters in Mediation", 1997 J. DISP. RESOL. 1 (1997).

92. However, that is a good way to start. For a detailed study of the culture of Japan, see generally ROSALIE L. TUNG, *BUSINESS NEGOTIATIONS WITH THE JAPANESE* (1984).

referred to again as negotiations proceed and it appears that cultural issues are kicking up some problems.

At the same time, it may be that such a frank statement of the cultural issue at the beginning may be offensive to some cultures. It is in the American style to bring up any possible problems early on in the proceedings but people from other cultures may find that such a frank statement itself is offensive or slighting of their culture. This is most often a judgment call by the mediator.

The opposite approach to the culture factor is, of course, the stealth approach. The mediator would keep the culture factor in mind and remain alert to when it may be a problem. At such time as the culture factor rears its ugly head, the mediator may want to mention it as a log-jam breaker, possibly just to one side in a private caucus.

Another way to play the culture card is to "laugh it up." If the parties are relatively sophisticated, experienced international negotiators, the mediator can mention the culture factor as an ice-breaker, something each side can laugh about. This has two effects. By pointing at it, this maneuver can help break down the culture factor as a barrier to settlement. In addition, this maneuver also helps build rapport with the parties—"we now have something to laugh about together."

In addition to putting the culture card on the table, there are various other ways for the mediator to cope with the culture issue. The mediator might consider approaching the problem as a value conflict⁹³ rather than a culture conflict.⁹⁴ In a multiple-party international mediation, the mediator might want to consider the role the less powerful parties can play in influencing the stronger parties by appealing to common values.⁹⁵ The mediator might analyze the problem in terms of five cultural issues: language, assumptions, expectations, biases, and values.⁹⁶ The mediator might keep a checklist of "top ten tips" for

93. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 60–61 (2d Edition, 1996).

94. See Cynthia Savage, *Culture and Mediation: A Red Herring* 5 AM. U.J. GENDER & LAW 269 (1996).

95. See Mary Jo Larson, *Low Power Contributions in Multilateral Negotiations: A Framework Analysis*, 19 NEGOT. J. 133 (2003).

96. See SELMA MYERS & BARBARA FILNER, *MEDIATION ACROSS CULTURES: A HANDBOOK ABOUT CONFLICT & CULTURE* 39 (1993).

avoiding cross cultural miscommunication.⁹⁷ The mediator can attempt to bridge the culture gap by explaining the problem from one side to the other and save the face of one side or the other.⁹⁸ Finally, the parties may want to think about who is the most appropriate mediator for their problem based on various criteria.⁹⁹

CONCLUSION

The rise of global business necessarily entails the rise of global disputes. Mediation is a flexible and powerful tool that is particularly well-designed for the resolution of international business disputes. Furthermore, the mediation technique can be tailored to fit the particular problems presented by international business disputes. In particular, the mediator needs to be sensitive to the number of deep differences among countries, cultures, and areas of the world and take account of that in the mediation. One technique that sometimes works (no technique always works) is for the mediator to "play the cultural card": put it explicitly on the table to the parties that various cultural differences amongst themselves may present problems that the parties have to try to surmount. Given the power and efficiency of mediation, business firms should move forward to employ it as a means of resolving international business disputes.

97. Julie Barker, *International Mediation-A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 52 (1996) (highlighting major issues such as recognizing how culture affects bargaining tactics; doing research and understanding how non-business factors such as family, religion and historical influences effect the bargaining environment; showing respect and deference to your counterparts' status and culture; being polite and dressing appropriately; being patient, preparing for uncertainty and delay).

98. See Raymond Cohen, *Cultural Aspects of Intl. Mediation*, in RESOLVING INT'L CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 107, 112-23 (Jacob Bercovitch ed., 1996). See also Paul B. Pedersen & Fred E. Jandt, *Culturally Contextual Models for Creative Conflict Management*, in CONSTRUCTIVE CONFLICT MANAGEMENT (Fred E. Jandt & Paul B. Pedersen eds., 1996) (analyzing case studies of the cultural aspects of mediations in Asia).

99. See Chester A. Crocker et al., *Ready for Prime Time: The When, Who and Why of International Mediation*, 19 NEGOT. J. 151, 151-67 (Apr. 2003) (advocating selection of a mediator based on such factors as operational and political; strategic and diplomatic; and relationship and cultural fit).

Notes & Observations