

DEVELOPING SKILLS TO ADDRESS CULTURAL ISSUES IN ARBITRATION AND MEDIATION

*Theodore K. Cheng**

The increasing globalization of commerce and the growth of multinational companies have, among other things, resulted in an increased use of arbitration and mediation to resolve commercial disputes, both domestically and internationally. Accompanying this growth is a greater need for arbitrators, mediators, and advocates to develop critical cross-cultural competency skills. More and more parties to disputes hail from different legal systems, social traditions, faith-based customs, and family backgrounds. These disparate perspectives permit disputants to look at the same set of facts and circumstances and interpret them differently because of their respective cultural paradigms. They then bring those paradigms with them as they engage in the arbitration and mediation processes, affording endless opportunities for cross-cultural misunderstandings, even among citizens of the same country. Thus, developing cultural sensitivity and cultivating awareness of subtle cultural nuances in an arbitration or mediation proceeding can lead to prompt recognition and identification of cultural issues so that they can be addressed in a manner most useful to the proceeding. This is neither a simple nor straightforward process, but well worth the effort.

Culture can arise at almost every juncture. Cultural issues may:

- impact how the parties or their counsel select the arbitrator or mediator;
- shade what and how issues are raised and discussed during a preliminary hearing or a pre-mediation conference call;

* **Theodore K. Cheng** is an Arbitrator and Mediator with the American Arbitration Association (AAA), the CPR Institute, Resolute Systems, and several federal and state courts, principally focusing on intellectual property, entertainment, technology, and labor/employment disputes. He has also handled intellectual property and commercial litigation matters for the past 20 years. Mr. Cheng also serves on the Council of the AAA and the Boards of the Justice Marie L. Garibaldi American Inn of Court for ADR, the New Jersey State Bar Association's Dispute Resolution Section, the Copyright Society of the U.S.A., and the Association for Conflict Resolution – Greater New York Chapter. He is also the Vice-Chair of the New York State Bar Association's Dispute Resolution Section. More information is available at www.linkedin.com/in/theocheng. He can be reached at tcheng@foxlex.com.

- influence how the process itself is structured;
- affect how a party's conduct during the process is perceived by the arbitrator, the mediator, the opposing party, and the opposing party's counsel;
- color how the evidence adduced at the hearing is viewed and/or received by the arbitrator, or how the factual background and perspectives articulated during the mediation session are viewed and/or received by the mediator; and
- have an impact on how credibility determinations are made.

At the core of these cultural issues are communication style differences that lead to how information is presented, received, and processed.

I. DIFFERING FORMS OF COMMUNICATION STYLES

Perhaps most indicative of the importance of cultural issues relates to how information is presented and received, which manifests itself in differing forms of communication that can have a profound effect on how the information will be processed. For example, as explicated in Edward T. Hall's 1976 book "Beyond Culture,"¹ most East Asian cultures are described as being "high-context," meaning that much is left unsaid, letting the background culture itself explain and fill in the gaps. In such a culture, words and word choice become highly important because just a few words can communicate not only a large amount of information, but also a complex level of information, to those sharing that same cultural background, while also communicating less effectively to those who do not. By contrast, the United States is described as a "low-context" culture, meaning that the speaker typically needs to be more explicit, and the value of any single word is less important. Just imagine how these culture differences can manifest themselves in both the quantity and quality of the answers that a witness from an East Asian culture might give in response to traditional American-style trial examinations. That witness may appear less forthcoming, curt, and perhaps even evasive. All of this has a marked impact on how others may assess an individual's credibility and how the information being presented by that individual is received and processed. Sometimes, in multi-cultural disputes, where no common language is available, the use of an interpreter is unavoidable. However,

¹ Edward T. Hall, "Beyond Culture" (Anchor Books 1976).

if at all possible, the use of an interpreter should be discouraged. No matter how competent, an interpreter can compound whatever communication problems may exist between the various individuals in an arbitration or mediation simply because of the very act of having to translate from one language to another.

For example, if the circumstances warrant, allowing a witness from a high-context background additional time to tell her/his story or permitting the examining attorney more leeway to ask leading questions may accomplish the purpose of fleshing out a more robust record for the arbitrator or tribunal. Perhaps viewing a party's compliance with contracts using a different lens can assist in providing more background or perspective for the conduct at issue. In some cultures, like in the United States, strict adherence to the language of the contract is upheld as paramount. However, in other cultures, like in China, the obligations embraced in the contract are meant to describe the overall relationship between the counterparties, and, thus, technical compliance with its terms and conditions is not valued as highly as how the parties treat each other. The contract simply functions as a document that embodies and reflects the parties' commercial relationship and, thus, is often viewed in those cultures as simply the beginning point for further negotiations when rifts in those relationships arise. Understanding that this view may be at the core of the dispute between the parties can have tremendous implications for assessing a party's good faith in complying with the terms and conditions of the contract, thereby having a direct impact on an arbitrator's evaluation of any claim of bad faith or assisting the mediator in beginning to build the necessary trust between disputants in order to arrive at a business resolution.

II. IDENTIFYING CULTURAL ISSUES IN ARBITRATION

In an arbitration, at minimum, identifying cultural issues begins at the preliminary hearing, where the arbitrator, the parties' counsel, and perhaps even the parties themselves will begin to get a sense of how information is being transmitted and received. This might lead to a recognition that cultural differences are influencing the observed conduct. Then, the parties and their counsel, guided and facilitated by the arbitrator, may choose to probe whether modifications in the "typical" or "standard" process need to be made to accommodate any cultural issues.

The arbitrator, the parties, and their counsel should also stay attuned to this heightened sensitivity to cultural differences during subsequent status conferences and information exchange disputes, as the positions taken, and the kinds of arguments made, by the participants can afford invaluable insights into how differing cultural frameworks are affecting the process. The evidentiary hearing is also another opportunity to remain vigilant to the cultural differences that may be in play. For example, the presentation of the evidence to the arbitrator or tribunal is an exercise that is markedly different between civil law countries – where the tendency is to let witnesses recount their stories without much direct assistance from the counsel – and common law countries – where the tendency is to have counsel rehearse and prepare witnesses in advance before taking the stand. Much can also be gleaned from norms developed in the international arena, where cultural differences have been particularly germane in areas such as arbitrator disclosures, witness preparation, and witness examination.²

III. IDENTIFYING CULTURAL ISSUES IN MEDIATION

In a mediation, it is paramount for the mediator not only to facilitate communication between the parties so as to ensure that there is no miscommunication, but also to uphold and honor the business expectations of the parties, which may differ markedly depending upon their respective underlying cultural backgrounds. The mediator can raise perceived cultural issues, or invite the parties to do so, through appropriate and sensitive questioning during the pre-mediation calls, either jointly or *ex parte*, which can be even more productive (if not at least revealing) if the parties themselves participate. Mediation (or conciliation in some international spheres) is viewed very differently in different cultures, so it is critically important to understand the parties' expectations from the very beginning. For example, one of the parties may be influenced by a consensus-driven culture where no one wants to appear being blamed. Another party may view individual caucuses with suspicion, like they are in some countries where the parties only engage each other in joint sessions.

² For other views on the issue of culture in arbitration, *see, e.g.*, William K. Slate II, "Paying Attention to 'Culture' in International Commercial Arbitration," *Dispute Resolution Journal*, Vol. 59, No. 3 (August 2004), available at <https://www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/paying-attention-to-culture-in-international-commercial-arbitration.pdf>.

The mediator can also set an appropriate tone during joint sessions by emphasizing collaboration and cooperation so that offers and demands are received in the most positive manner. Because a mediation does not usually take place within a rigid legal framework, and, in fact, is much less formal than in an adjudicated proceeding like an arbitration or a court litigation, the mediator, as well as the advocates, need to be able to read the level of emotional intelligence in the room in order for the mediation to make progress, which includes developing cultural flexibility and adaptability, as well as a greater overall awareness and sensitivity towards cross-cultural issues. Thus, for example, some parties may desire additional representatives at the mediation session than what we are accustomed to here in the U.S., which will likely require advance planning and coordination of multiple schedules. Another party may need additional time to fully consider a settlement proposal, which may counsel for taking more frequent breaks during the session or even scheduling multiple days of sessions.³

I once conducted a mediation involving an infringement claim against a large U.S. multi-national corporation over a U.S. patent issued to a Chinese-owned company. For the benefit of that patent owner, I took my time describing in more detail, but in general terms, both the mediation and litigation processes so as contrast them to what the principals of that party might be more accustomed in their home country. In particular, the U.S. patent laws were a framework with which these individuals were not very familiar, including the measure of damages and how to establish an entitlement to them. I also began my individual caucus with them by saying a few words in my limited Mandarin (mostly about my parents and where they came from), which started to build some trust and rapport between us. These steps helped lay a foundation upon which a resolution was ultimately possible.⁴

³ For other views on the issue of culture in mediation, *see, e.g.*, David J.A. Cairns, "Mediating International Commercial Disputes," *Dispute Resolution Journal*, Vol. 60, No. 3 (August 2005). For some insights into the "ethical conundrums" that can arise when there is a "clash of cultures," *see, e.g.*, Carrie Menkel-Meadow and Harold Abramson, "Mediating Multiculturally: Culture and the Ethical Mediator," in "Mediation Ethics: Cases & Commentaries" (Ellen Waldman ed. San Francisco: Jossey-Bass 2011), at 305, available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1968&context=facpub> (Digital Commons @ Georgetown University Law Center © 2011).

⁴ For more on how a mediator can help negotiators bridge cultural differences, *see, e.g.*, Harold Abramson, "Selecting Mediators and Representing Clients in Cross-Cultural Disputes," 7 *Cardozo J. Conflict Resolution* 253 (2007). For more on the differences

IV. SOME FINAL THOUGHTS AND RESOURCES

Despite their adherence to being fair and impartial, arbitrators and mediators hold implicit biases, too, and it takes time to both recognize them and to try and account for them. The key is to make course corrections at a human level by being more self-aware and observant of whether there are cross-cultural issues in the proceedings. Being sensitive to the parties' needs and letting them fully present their case consistent with their own preferences and cultural background can ameliorate many of the communication style differences and lead to better information processing. Both arbitration and mediation are well suited to address cross-cultural concerns precisely because they are flexible and customizable, which are distinct advantages over traditional court litigation.

Lest all of this sound too complicated, there are numerous resources to help arbitrators, mediators, and advocates educate themselves about different cultures and their impact on communication and the dispute resolution process. Legal sources are an obvious first place to consult, including various books and treatises; national, local, and specialty bar associations; and law school faculty. There are also a host of non-legal (psychological, sociological, and anthropological) books, journals, and studies that may be of assistance.⁵ In particular, one resource worth noting is "When Cultures Collide: Leading Across Cultures" by Richard D. Lewis.⁶ A noted British linguist, Lewis charted national communication patterns, leadership styles, and cultural identities in his book, which revealed some helpful notions about the way in which people from different cultural backgrounds generally negotiate. For example:

- Americans lay their cards on the table and resolve disagreements quickly with one or both sides making concessions;

between international and domestic commercial mediation, *see, e.g.*, Paul E. Mason, "What's Brewing in the International Commercial Mediation Process," *Dispute Resolution Journal*, Vol. 66, No. 1 (February/April 2011).

⁵ *See, e.g.*, Jeanne M. Brett, "Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries" (Jossey-Bass 3d ed. 2014); Andy Molinsky, "Global Dexterity: How to Adapt Your Behavior Across Cultures Without Losing Yourself in the Process" (Harvard Business Review Press 2013).

⁶ Richard D. Lewis, "When Cultures Collide: Leading Across Cultures" (Nicholas Brealey Publishing 3d ed. 2005).

- People in the United Kingdom tend to avoid confrontation in an understated, mannered, and humorous style that can be either powerful or inefficient;
- Germans rely on logic but “tend to amass more evidence and labor their points more than either the British or the French”;
- The Swiss tend to be straightforward, nonaggressive negotiators. They obtain concessions by expressing confidence in the quality and value of their goods and services;
- The Dutch are focused on facts and figures but are “also great talkers and rarely make final decisions without a long ‘Dutch’ debate, sometimes approaching the danger zone of over-analysis”;
- The Chinese tend to be more direct than the Japanese and some other East Asians. However, meetings are principally for information gathering, with the real decisions made elsewhere;
- Koreans tend to be energetic conversationalists who seek to close deals quickly, occasionally stretching the truth; and
- Indonesians tend to be very deferential conversationalists, sometimes to the point of ambiguity.⁷

Of course, in the face of broad, sweeping pronouncements like the foregoing, one should be cautious not to over-generalize and unnecessarily stereotype an individual from any particular cultural background. Among other things, doing so would exacerbate any implicit biases and their potential adverse impacts on others in the dispute resolution process. But knowing and/or being sensitive to these general norms may prove beneficial or advantageous in any given situation.

Other resources include conferences and seminars, cultural community leaders/members, community organizations/centers, cultural societies, social services organizations, consultants with expertise in the culture in question, professional colleagues from the culture in question, and various culture-related listservs.⁸ The internet itself can also yield

⁷ See Gus Lubin and Jenna Goudreau, “23 Fascinating Diagrams Reveal How to Negotiate with People Around the World,” *Business Insider* (August 14, 2015), available at <http://www.businessinsider.com/how-to-negotiate-around-the-world-2015-8> (quoting from Lewis’ book).

⁸ For example, Transnational Dispute Management sponsors a listserv to promote discussion and sharing of insights and intelligence relating to international dispute management.

extremely helpful resources. It is imperative on all of us to conduct our own due diligence and research, to the extent that we believe necessary, in order to fulfill our respective roles as arbitrators, mediators, or advocates.

Clearly, there is much to be learned. Delivering a dispute resolution process that serves the needs of a multi-cultural, global business community and improves the quality of that process for the participants means developing cross-cultural competency skills that incorporate cultural sensitivity and cultivate awareness of the cultural differences that will undoubtedly emerge. This is a skill set worth having in everyone's toolkit.