DIVERSITY IN MEDIATION

Domestic and International Challenges
Presented by Ricardo J. Cata
Of Upchurch Watson White & Max
INTRODUCTION

Cultural differences can have impacts on mediation and negotiation styles and strategies.
Cross-border disputes are becoming increasingly common.

Even “domestic” mediators in Florida are increasingly likely to be involved in disputes between people who represent distinctly different ethnic, racial, or national origin cultures.
Don’t assume mediation is understood, practiced or accepted everywhere in the same way as it is in the U.S.

- Challenges:
  - Foreign legal frameworks
  - Cross-cultural issues
  - Growing number of cross-border litigations and arbitrations

- Be aware of:
  - Local mediation rules and practice, if any, and what opponent may expect of the process
  - “Mediation window” that may be incorporated into arbitration rules
MULTIPLE CULTURES

What is Culture?
Culture can be compared to water around fish, or air around people.

Geert Hofstede defines culture as “... the collective programing of the mind that distinguishes the members of one group or category of people from others.”
Cultural differences:

- Are more significant if the parties, counsel and mediator come from different cultures
- Are usually interpreted from the standpoint of one’s own culture
- Can make us question whether the other party is playing fair and whether we want to negotiate with them or continue a business relationship with them
COMMUNICATION
CONTEXT

Language Is Only the Beginning.
Explore each party’s knowledge of the culture and values of the opposing party, and the communication style of the parties.
Low-Context Communicators

- USA
- Canada
- Australia
- Europe (with exceptions)
- Israel
- Scandinavia

- Communicate directly
- Rely on verbal communication (words) as opposed to non-verbal communication
- Straightforward and to the point
- Discuss important issues explicitly, no matter how sensitive the subject matter is
- Are present- and future-oriented
- Value change over tradition
High-Context Communicators

- Asia
- India
- Mexico
- Most Middle Eastern countries
- France
- Spain
- Greece

- Communicate indirectly
- Are more likely to infer, suggest and imply than say things directly and to the point
- Expect meaning to be “programmed” into the receiver of the message as a result of shared experience and history
- Are past-oriented
- Value tradition over change
Mediator as communication ‘translator’
INDIVIDUALIST VS. COLLECTIVIST NEGOTIATIONS

Clarifying decision-making procedures for parties at mediation
Individualist Negotiators

- U.S.
- Northern and Western Europe

- Insist on getting down to business, because in these cultures “time is money”
- Communicate directly leaving little unsaid
- Ask direct questions; their language is often colorful, loud and forceful

Social pattern of negotiation emphasizes the individual’s personal preferences, goals, rights, needs and interests, all of which tend to be self-reliant and competitive. Positive words in an “individualist” culture are: self, friendship, do your own thing, contract, litigation, self-respect, I, me, individual, self-interest, dignity, pleasure and privacy.
Collectivist Negotiators

- Africa
- The Middle East
- Most of Asia
- South America
- Mexico,
- Nepal
- Parts of Eastern Europe

- May tend to be more focused on group harmony
- Base solidarity on a sense of communal duty and responsibility.
- Focus less on rigid rules or standards of behavior and more on how the behavior itself impacts group harmony and solidarity.
- Want to preserve family, company or societal relationships.

Positive words in a collectivist culture are: harmony, face, obligation, sacrifice, group, family, tradition, honor, duty, loyalty, decency, shame. There is a high correlation between high-context communication and collectivist cultures.
Implications for Mediation

**Individualist**
- Lineal mode

**Collectivists**
- Relationship-oriented
ASSERTIVENESS VS. COOPERATIVENESS

Hofstede identifies this related comparison
Assertiveness

- Australia
- China
- Japan
- Slovakia
- Switzerland
- Austria
- Venezuela
- Italy
- Mexico
- Ireland
- Jamaica
- Great Britain
- Germany,
- Arab World

- Values achievement, control, power, money and wealth, independence, recognition, “hardball”, aggressiveness, dominance, challenges, ambition, competition, physical strength – “win at all costs.”

- Tends toward rigid gender roles and “live to work” orientation.

Positive words: career, competition, fight, aggressive, assertive, success, winner, deserve, merit, excel, force, big, fast, tough, quantity, power and action.
Cooperativeness

- Scandinavian countries
- Finland
- Thailand
- South Korea

- More “win-win” approach to negotiations
- Values not raising your voice, small talk, agreement, being warm and friendly in conversation, cooperation, nurturing, and relationship solidarity
- Tends toward “work to live” ethic

Positive words: caring, solidarity, modesty, compromise, help, love, grow, small, soft, slow, tender and touch.
Impact on Mediation

**Assertiveness**
- Masculinity
- Power tactics

**Cooperativeness**
- Femininity
- Discussion
UNCERTAINTY AVOIDANCE

Are people in a culture are prone to avoid risks or to take risks?
High Uncertainty Avoidance

- Greece
- Israel
- Portugal
- Guatemala
- Uruguay
- Belgium
- El Salvador
- Japan
- Former Yugoslavia
- Peru
- France
- Chile
- Spain
- Costa Rica
- Panama
- Argentina

- Tends to be rule-oriented
- Dislikes risky and unclear situations
- Values precision
- Needs structure and ritual

Positive words: structure, duty, truth, law, order, certain, pure, clear, secure, safe, predictable, and tight.
Low Uncertainty Avoidance

- U.S.
- China
- Jamaica
- Denmark
- Singapore
- Hong Kong
- Ireland
- Great Britain

- Usually tolerates greater uncertainty, variety of opinions, risks and change
- Tends to be less rule oriented, more creative in problem solving approach
- May be less expressive and anxious

Positive words: maybe, creative, conflict, tolerant, experiment, spontaneous, relativity, insight, unstructured, loose, and flexible.
Importance of Uncertainty Avoidance

High
- Unwilling to change position

Low
- Seeking and proposing options
LONG-TERM VS. SHORT-TERM ORIENTATION

Hofstede identifies this related comparison
Long-Term Orientation

- Asian countries score high on this dimension.
- There is no score for Israel in this Index in Hofstede’s scale.
- Embraces traditional, forward thinking values and exhibits a pragmatic future oriented perspective
- Values “sacrifice for the future”
- Strong work ethic. Respects thrift, status, perseverance, order, sense of shame, saving.

Positive words: work, safe, moderation, endurance, duty, goal, permanent, future, economy, virtue, invest, afford, and effort.
Short-Term Orientation

- Most Western countries
- The Philippines
- Australia

- Expects that efforts should produce quick results
- Concern for saving face
- Tends to experience people from long-term-orientation cultures as being stingy and cold

Positive words: relation, gift, today, yesterday, truth, quick, spend, receive, grand, tradition, show, image, and bottom line.
What Negotiators Should Know

Long-Term Orientation

- Present orientation can bring needed change

Short-Term Orientation

- Opposing parties may see past or future as part of present
MONOCHRONIC VS. POLYCHRONIC

Cultures vary in their perception of time
Monochronic Culture

- European-influenced cultures of the U.S., Switzerland, Japan and Scandinavia

- Values efficiency
- Has sense of urgency
- Tends to view unforeseen events and interruptions as nuisances
- Approaches time as linear and sequential

Perceives time as linear, quantifiable, and in limited supply; people from these cultural groups believe it is important to use time wisely and not waste it.
Polychronic Culture

- Mediterranean and Latin American cultures
- Africa
- The Middle East

- Sees time as elastic
- Changes schedules and deadlines as needed
- Expects “multi-tasking.” Unnecessary to finish one thing before starting another

Involves simultaneous occurrences of many things and the involvement of many people. Time is perceived as limitless and not quantifiable, and time is adjusted to suit the needs of people.
CROSS-CULTURAL APPROACHES TO NEGOTIATION

United States, Japan, Europe, and Latin America
United States

• Americans tend to be competitive; come to table with fallback position, but begin with unrealistic offer;
• Are energetic, confident, persistent, enjoy arguing, and talk about broad applications of ideas;
• Concentrate on one problem at a time;
• Focus on areas of disagreement, not of commonality;
• Like closure and certainty.
Japan

- Japanese focus on group goals, interdependence and hierarchical orientation;
- Are aware of group needs and goals; defer to higher status;
- Are known for politeness and emphasis on relationships;
- Prefer use of power in muted and indirect ways, are concerned with face-saving and avoiding confrontation;
- Prefer harmony and calm; disclose less about themselves and their goals than French and Americans.
Europe

- Styles vary according to region, nationality, language and other contextual factors;
- French are very aggressive negotiators, using threats, warnings, and interruptions to achieve goals;
- German and British are moderately aggressive.
Latin America

- Role expectations influence negotiations;
- Responsibility to others more important than schedules and tasks accomplished;
- Polychronic orientation to time;
- High-context communication and communitarianism;
- Negotiation done within networks, relationships emphasized;
- Open ruptures avoided;
- Prefer a storied, holistic approach to negotiations.
Impact of Culture and Traditions on Decision Making

- In parts of Asia, having tea or light meal with an adversary shows courtesy, helps build trust;

- People with consensus-based or familial attitude to negotiations may seek guidance and feedback of patriarch, matriarch or older sibling before making decision;

- Latino families, often very close-knit (and often operate business together), may come to mediation knowing that there are other “stake-holders” who may need to be consulted and may need to approve any proposed deal;

- Most American mediators prefer to deal with issues sequentially; however, parties from other cultures or other American sub-cultures may take global approach and try to resolve the issues in integrative manner;
Impact of Culture and Traditions on Decision Making (continued)

- Certain cultures, including Mediterranean, Arab, and Latin American, are more tactile and allow more touching. Asian, indigenous Americans, Canadians, and U.S. cultures discourage touching;

- Some cultures allow cross-gender touching, including U.S., while same-gender touching may not be acceptable in other cultures;

- In Arab cultures, considered disrespectful to cross one’s legs so that soiled soles of one’s shoes are exposed;

- Among Asians, business cards are offered and accepted with both hands, scrutinized, but never written on;

- At mediation, offering chair on mediator’s immediate right to CEO or highest officer in Asian or Arab corporations may be expected.
Conclusion

■ Learn cultural stereotypes as well as cultural differences of parties;
■ Investigate actual people who will be involved, their relative “rank” in respective organizations’ hierarchy, as well as issues involved in dispute;
■ Be flexible and patient; understand that parties may act differently than their cultural stereotypes, but knowing stereotypes is useful in planning and preparing for mediation.
■ A mediator must identify and address his/her own cultural and gender perceptions and biases and discourage attitudes that may be judgmental or stereotypical, in order to avoid creating barriers, so as to develop credibility and trust necessary for a successful mediation.