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CROSS-CULTURAL DEAL MEDIATION AS A NEW ADR METHOD FOR INTERNATIONAL BUSINESS TRANSACTIONS

Garrick Apollon*

ABSTRACT

This article aims to explain why and how cross-cultural deal mediation can be established as a new and effective Alternative Dispute Resolution (ADR) method for international business transactions. This article aims to explain: the difference between deal mediation and cross-cultural deal mediation; how cross-cultural deal mediation works; the cross-cultural deal mediator's role; and the benefits and potential problems associated with cross-cultural deal mediation. This article promotes the intervention of a cross-cultural deal mediator in the pre-contractual phase (contract formation) or bargaining phase of international business transactions to help the parties to improve their mutual cross-cultural understanding to reach mutually satisfactory agreements. This article makes theoretical arguments in favor of cross-cultural deal mediation, but also presents empirical justifications on the basis of the developed and well-tested cross-cultural models of Geert Hofstede's Five Cultural Dimensions, and Trompenaars and Hampden-Turner's Seven Cultural Dimensions. Overall, this article promotes the intervention of a cross-cultural deal mediator to assist parties from different cultures in the negotiating and drafting processes of their international business contracts to create more efficient and durable cross-cultural business relationships.

I. INTRODUCTION

“**Y**OU don't get what you deserve, you get what you negotiate” is a well-known saying amongst negotiators. Following this logic, bad negotiators will usually reach bad deals that

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inevitably lead to bad contracts. This leads a negotiator to consider whether a mediator could be helpful in cross-cultural deals,¹ just as they are in cross-cultural disputes.² American businesspeople and lawyers are often wrongly assumed to be skilled negotiators.³ After all, to become a successful businessperson or lawyer in a competitive masculine society like that of the United States, it is a well-known and well-evidenced fact that a person must be smart, tough, and—to some extent—have a big ego.⁴ In a competitive masculine society like the United States, it is more

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1. L. Michael Hager & Robert Pritchard, *Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets*, ICSID REV. FOREIGN INVESTMENT L.J., 2–3 (1999) (proposing a role for lawyer-mediators in international transactions, particularly if cultural differences exist); see also Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators In Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283, 288–90 (2004) (presenting a complete overview of the theoretical arguments and empirical evidences in favor of deal mediation in U.S. deal-making and negotiations. However, this article does not present the theoretical arguments and empirical evidences in favor of deal mediation for cross-cultural transactions); Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORDHAM J. CORP. & FIN. L. 449, 450 (2004) (discussing “the overlay of additional problems that international mediation presents,” and discussing “particular mediation tactics—including playing the ‘culture card’—that can be employed to overcome cultural problems in international business mediations”).
 2. John Barkai, *What's a Cross-Cultural Mediator To Do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 43–44 (2008) (discussing the role of a mediator in cross-cultural commercial mediations).
 3. See Peppet, *supra* note 1, at 361–62 (discussing the barrier to entry to deal mediation called “Optimistic Overconfidence.” This barrier is evidence by research showing that “negotiators tend to be overconfident in their own assessments, predictions, and abilities and that they tend to be overly optimistic about their chances of success in their endeavors”); see also Robert S. Rendell, *Making Global Deals: Negotiating in the International Marketplace*, 47 BUS. LAW. 361 (1991) 361–62 (discussing the book review of *Making Global Deals* by Jeswald W. Salacuse that seeks to guide the general practitioner for international business negotiations. Robert S. Rendell explains that this book provides valuable information “because most lawyers do not make good negotiators.” He states that “they are trained in the skills of legal research, analysis, drafting and argumentation. And these skills do not necessarily prepare one to be a successful negotiator of a business deal. This is particularly true in the case of international negotiations. When dealing with foreign parties, the United States lawyer will face problems and situations not previously encountered in a domestic setting.”); Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 475–97 (2002) (proposing the new educational approach adopted at Columbia Law School to teach transactional business law. This article explains that most American law schools teach transactional business law and corporate deal-making through the conventional “Karate Kid Method.” This method teaches courage and discipline, but “seems foolish to expect a young Karate student (or law student) to go out and compete in a tournament without first bloodying his nose in the practice ring.” In other words, this article argues that traditional and conventional methods of teaching in American law schools don’t teach law students to become successful transactional business lawyer with great negotiating and deal-making skills and competencies).
 4. GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS, SOFTWARE OF THE MIND: INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL* 135–87 (3d ed. 2010) (evidencing by empirical data that masculine societies and business cultures, like in the United States, are defined by general societal norms such as challenge, earnings, recognition, advancement, competition, praise for excellence, failing at work is a disaster, performance means ego-boosting, etc.).

difficult to understand why a negotiator would candidly admit that he needs assistance from a deal mediator to help him to negotiate a deal.⁵ From my practical experience, I think this could be viewed as the first major obstacle to selling the idea of deal mediation and cross-cultural deal mediation to American businesspeople and lawyers. But the concept of cross-cultural deal mediation might be more readily accepted by American businesspeople and lawyers practicing international business. I am offering this proposal because most experienced international business negotiators realize that someone might be a great negotiator within his own national culture, with his own people, but could be a poor or average negotiator with foreign counterparts from different cultures.⁶ Operating in a new economic, cultural, legal, and political environment, there are great challenges facing the international business negotiator.⁷ Dealing with cultural differences remains the single most challenging task for the international business negotiator.⁸

To illustrate the challenges of international business negotiations to my students, I often use the Olympics as an analogy.⁹ I explain that Olympians are all top athletes and national champions, but only a select few will become Olympian medalists. The level of competition and talent increases and reaches its apogee at the Olympics. Similarly, for an American or Chinese negotiator, negotiating and closing deals at home might

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5. *Id.* at 123. (discussing that in masculine societies business people and lawyers (especially men) should be assertive, ambitious and thorough). Therefore, an American lawyer may fear a negative reaction from his client to propose that a third-party lawyer-mediator assist the negotiation process.
 6. Jeswal W. Salacuse, *Ten Ways that Culture Affects Negotiating Style: Some Survey Results*, 14 *NEGOTIATION J.* 221, 221–25 (explaining research report on ten ways that culture affects negotiating style. In a survey of 310 persons from twelve countries and eight occupations, the author asked participants to rate their negotiating style covering ten negotiation process factors on basis of ten negotiation factors. The countries that were represented in the survey were Spain, France, Brazil, Japan, the United States, Germany, the United Kingdom, Nigeria, Argentina, China, Mexico, and India. The occupational specialties included law, military, engineering, diplomacy/public sector, students, accounting, teaching, and management/marketing. Overall, the research shows that culture has a profound impact on negotiations and profoundly influences how people think, communicate and behave. The author states, “[t]he great diversity of the world’s cultures makes it impossible for any negotiator, no matter how skilled and experienced, to understand fully all the cultures.”).
 7. CLAUDE CELLICH & SUBHASH C. JAIN, *GLOBAL BUSINESS NEGOTIATIONS: A PRACTICAL GUIDE*, 4–13 (2004) (presenting an overview of challenges that an international business negotiator is facing in the global business environment).
 8. FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS* 20–24 (2d ed. 1998) (discussing that there is limited debate in the scholarship related to international business that the single most influential factor is culture).
 9. The author has taught international business negotiations in French and English since 2005 at the MBA and EMBA programs at the University of Ottawa’s Telfer School of Management from a strategic, cultural, legal, and ethical perspective. The author was the youngest professor to ever teach at the MBA program at the age of twenty-eight years old. The author has also taught organizational behavior and cross-cultural management at the undergraduate level of the Telfer School of Management since 2006.

be a simpler task than doing so abroad. If negotiation is often metaphorically defined in literature in terms of games, war, and fighting,¹⁰ then these metaphors lead us to remember the conventional belief of the “home-field advantage.” Therefore, what is the solution for international businesspeople: to stay at home? This solution might sound impracticable and impossible, given the importance of globalization in today’s business world. Nonetheless, facing the high failure rate of international strategic alliances (research shows that international joint ventures failed at the rate of 50 percent¹¹ and that cross-border M&As failed at a rate of 83 percent),¹² the existing literature suggests that acquisitions be confined to organizations with similar cultures.¹³ But regardless of the perceived similarity between venturing/merging organizations, cultural misalignments will always exist.¹⁴ Culture is defined by the pioneer Geert Hofstede as “software of the mind.”¹⁵ Culture is complex and has multi-facets and multi-layer levels of influence on negotiators’ behaviors.¹⁶ For

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10. Mark Young & Erik Schlie, *The Rhythm of the Deal: Negotiation as a Dance*, 27 NEGOTIATION J. 191, 191–203 (2011) (discussing “[i]n all the literature on the theory and practice of negotiation, the governing metaphors have been games, war, and fighting.” Arguing “[t]his is true not only for tactical schools of power-based negotiation but even for more constructive, interest-based approaches This article explores the possible consequences of abandoning” these metaphors in favor of a metaphor of dance).
 11. Seung Ho Park & Gerardo R. Ungson, *The Effect of National Culture, Organizational Complementarity, and Economic Motivation on Joint Venture Dissolution*, 40 ACAD. MGMT. J. 279, 279 (1997).
 12. John Bing, Gene Gitelson & Lionel Laroche, *Culture Shock*, CMA MGMT., March 2001, at 40–41, available at <http://itapintl.com/facultyandresources/articlelibrary/main/the-impact-of-culture-on-mergers-a-acquisitions.html> (affirming that 83 percent of all mergers and acquisitions failed to produce positive outcomes and half of them destroyed the value. Moreover that according to the “interviews of over 100 senior executives involved in these 700 deals over a two-year period revealed that the overwhelming cause for failure is the people and the cultural differences.”).
 13. David M. Schweiger & Philip K. Goulet, *Facilitating Acquisition Integration Through Deep-Level Cultural Learning Interventions: A Longitudinal Field Experiment*, 26 ORG. STUD. 1477, 1478–85 (2005) (presenting the concept of Deep-level cultural learning (DCL) interventions to mitigate risk of cultural clashes between organizations and people involved in cross-border/cross-cultural strategic alliances).
 14. *Id.* at 1478 (theorizing on the complexity of cross-border mergers and acquisitions).
 15. HOFSTEDE ET AL., *supra* note 4, at 5 (using the analogy “software of the mind” as the way computers are programmed, culture is based on learned behaviors and enables patterns of thinking, feeling, and acting mental programs).
 16. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 20–24 (theorizing that culture can be defined in three layers: first layer of culture (the outer layer: explicit products (“[e]xplicit culture is the observable reality of the language, food, buildings, houses, monuments, agriculture, shrines, markets, fashions, and art”)); second layer of culture (the middle layer: norms and values) (“while the norms, consciously or subconsciously, give us a feeling of ‘this is how I normally should behave,’ values give us a feeling of ‘this is how I aspire or desire to behave.’” A norm serves as a criterion to determine what is “right or wrong,” whereas a “value serves as a criterion to determine a choice from existing alternatives.”); third layer of culture (the core: assumptions about existence (“[t]o answer questions about basic differences in values between cultures it is necessary to go back to the core of human existence.”) The core assumption is that “the most basic value people strive for is survival. Historically, and presently, we have witnessed civilizations

instance, if national culture is the first influence to consider, organizational culture (or corporate culture) and professional culture (e.g., lawyer, accountant, or engineer) also have a great influence on a negotiator's behavior.¹⁷ As a result, the concept of culture is often analogically illustrated with an iceberg because it runs deep and the visible portion is only a small piece of a much deeper thing which may not be easily visible.¹⁸

Following the theory that cross-border strategic alliances should be confined to organizations with similar cultures, many will assume, for instance, that Canadians and Americans share very similar cultures and are such very compatible for a forming cross-border alliances. But theoretical and empirical studies demonstrate that these two cultures share not only many similarities, but also many fundamental cross-cultural differences.¹⁹ Therefore, there are always cross-cultural differences at play that can affect international business transactions. Even though wise international negotiators must "weigh culture against other important factors,"²⁰ national culture always remains the first and single most influential factor on international business negotiations.²¹ This does not mean that national culture should be the only factor taken into consideration; such a narrow focus can lead to the pitfalls of over-generalizations.²² However, if ignored, cross-cultural differences between the parties can become a source of conflict at the bargaining stage or later when the relationship is established and the contract has been signed. Consequently, I argue that unlike financial, political, and legal risks, cultural risks associated with international business transactions are too often overlooked and underestimated by lawyers and the contracting parties.

This article advocates for a preventive legal risk-management approach by allowing a cross-cultural deal mediator to assist the parties in improving their cross-cultural understanding during the bargaining stage in order

fighting daily with nature: the Dutch with rising water; the Swiss with mountains and avalanches; the Central Americans and Africans with droughts, and the Siberians (and Canadians!) with bitter cold.")).

17. HOFSTEDE ET AL., *supra* note 4, at 11 (theorizing that mental programming corresponds to different levels of cultures such as a person social class level, associated with educational background and profession).
18. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 24.
19. Nancy J. Adler & John L. Graham, *Business Negotiations: Canadians Are Not Just Like Americans*, 4 CAN. J. ADMIN. SCI. 211, 211-58 (1987) (this empirical study based laboratory buyer-seller negotiation simulations investigated the determinants of business negotiations between business people from the United States and business people from Canada (i.e., Francophone and Anglophone Canadians). The Francophone Canadians' negotiation style was found to be significantly different from that of both the Americans and the Anglophone Canadians. The Americans and the Anglophone Canadians also presented some cultural differences.).
20. HARVARD LAW SCH. PROGRAM ON NEGOTIATION, INTERNATIONAL NEGOTIATIONS: CROSS-CULTURAL COMMUNICATIONS SKILLS FOR INTERNATIONAL BUSINESS EXECUTIVES 2 (2010) (discussing effective cross-cultural communications and negotiations), available at <http://www.pon.harvard.edu/freemium/international-negotiations-cross-cultural-communication-skills-for-international-business-executives/>.
21. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 21.
22. *Id.* at 20.

to mitigate the cultural risks. After all, the bargaining of the contract represents the creation of the business relationship. Why take the risk to start the relationship on the wrong foot? Why wait for a dispute to arise after the contract has been signed? Why not tackle the existing or potential cross-cultural issues in a preventive manner? If these contracts can be metaphorically defined as a “corporate marriage” between two foreign parties, I would like to introduce cross-cultural deal mediation as premarital counseling for an intercultural or interracial couple.²³ Premarital counseling makes sense because, “the best divorce is the one you get before you get married!”²⁴ If a cross-cultural strategic alliance is like an intercultural or interracial union, from my experience as a child of an intercultural and interracial union,²⁵ differences may be a source of happiness and pride. But this does not mean that they will not face challenges. Some people even from their respective culture and ethnicity or family and friends may not approve of the intercultural and/or interracial union.²⁶ Most importantly, it is proven that children from intercultural or

23. See Charles T. Hill, Zick Rubin & Letitia Anne Peplau, *Breakups Before Marriage: The End of 103 Affairs*, 32 J. SOC. ISSUES 147 (1976) (discussing “[f]actors that predicted breakups before marriage, investigated as part of a two-year study of dating relationships among college students, [which] included unequal involvement in the relationship (as suggested by exchange theory) and discrepant age, educational aspirations, intelligence, and physical attractiveness (as suggested by filtering models). The timing of breakups was highly related to the school calendar, pointing to the importance of external factors in structuring breakups. The desire to break up was seldom mutual; women were more likely than men to perceive problems in premarital relationships and somewhat more likely to be the ones to precipitate the breakups. Findings are discussed in terms of their relevance for the process of mate selection and their implications for marital breakup”).

24. *Id.* at 147.

25. My mother is a Caucasian French-Canadian (Québécoise) and my father is black, from Haiti. My opinion is also based on the self-observation of Fons Trompenaars, who concluded that his natural cultural sensitivity emerged from his bicultural background (i.e., French mother and Dutch father). Fons Trompenaars, TROMPENAARS HAMPDEN-TURNER CONSULTING, <http://www2.thtconsulting.com/about/people/fons-trompenaars/> (last visited May 6, 2014). Fons Trompenaars is one of the most respected and cited authors on cross-cultural management in the academic world. Fons Trompenaars is highly respected by the international business community and was listed in the 2001, 2003, 2005, 2011, and 2013 prestigious top Thinkers50 listing. *The Thinkers50 Ranking 2013*, THINKERS50, <http://www.thinkers50.com/t50-ranking/2013-2/> (last visited May 6, 2014). I will refer to his cross-cultural theory and research extensively in this article.

26. Kyle D. Killian, *Reconstituting Racial Histories and Identities: The Narratives of Interracial Couples*, 27 J. MARITAL & FAM. THERAPY 27–42 (2001) (discussing “the process by which interracial spouses construct narratives about their racial histories, identities, and experiences in their relationship together. Ten black-white couples were interviewed individually and conjointly. The results reflected interracial spouses’ experience of their life together their perception of others’ perceptions of them, and their unique processes of negotiating racial, gender and class differences. Black spouses, compared with white spouses, demonstrated a greater awareness of and sensitivity to social resistance to interracial couples, and black spouses’ familial and personal histories were sometimes relegated to silence in the couple relationship.” This article discusses “recommendations for marriage and family therapists working with interracial spouses.”); see generally Sonia Nourin Shah-Kazemi, *Cross-Cultural Mediation: a Critical View of the Dynamics of Cul-*

interracial unions may face an identity crisis.²⁷ Therefore, it is important to keep in mind that a cross-cultural strategic alliance is like an intercultural and interracial corporate marriage requiring special attention.

Furthermore, Samuel Huntington argues that all cultures around the world tend to have some racist or ethnocentric propensities in cross-border conflicts.²⁸ Therefore, a cross-cultural deal mediator may also help parties to moderate racism or/and ethnocentrism in cross-cultural disputes.

In summary, international transactional lawyers negotiate on behalf of their clients when making deals and resolving disputes on almost a daily basis. International businesspeople and lawyers spend, on average, more than 50 percent of their time in formal and informal negotiations.²⁹ Therefore, negotiating effectively cross-culturally is one of the single most important skills to have in the increasingly “globalized” world. “Global negotiations contain all of the complexity of domestic negotiations, with the added dimension of cultural diversity.”³⁰ Why not seek the help of a professional if needed when the stakes at play in international deals are usually greater? I will argue that businesspeople and lawyers are usually like men in romantic relationships; they prefer to wait for their relationship to be on the verge of breaking up before considering the idea of marriage counseling. Despite being a macho generalization, this statement is evidenced in psychology researches.³¹ I also purposely

ture in Family Disputes, 14 INT’L J.L., POL’Y & FAM. 302 (2000) (supporting cross-cultural mediation for family disputes and discussing the use of cross-cultural mediation in cross-cultural family disputes. In other words, this article “argues that an appraisal of cultural dynamics is a fundamental prerequisite to understand the process of family mediation”).

27. Francis Wardle, *Are You Sensitive to Interracial Children’s Special Identity Needs?*, 42 YOUNG CHILDREN 53, 56 (1987) (presenting guidelines for teachers of young interracial children. This article emphasizes that teachers must provide a supportive environment during early childhood, when the “interracial child is exposed to the social pressure of being different”).
28. SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 20–47 (1996) (affirming the importance of culture as the primary variable for both development, and the conflict (based on racism and/or ethnocentrism) generated by that development. Huntington asserts that the world is divided into eight major “cultural zones” based on cultural differences that have persisted for centuries. These zones were shaped by religious traditions that are still powerful today, despite the forces of modernization. The zones are Western Christianity, the Orthodox world, the Islamic world, and the Confucian, Japanese, Hindu, African, and Latin American zones).
29. NANCY J. ADLER, *INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR* 210 (South-Western Educational, 4th ed. 2002) (discussing the challenges of negotiating globally and cross-culturally).
30. *Id.*
31. See James M. O’Neil, *Summarizing 25 Years of Research on Men’s Gender Role Conflict Using the Gender Role Conflict Scale: New Research Paradigms and Clinical Implications*, 36 COUNSELING PSYCHOLOGIST 358, 358–59 (2008) (theorizing and evidencing by empirical data “how men’s gender role socialization contributes to their psychological and emotional problems. The goal of this [article is] to contribute to understanding male roles and the ways human services professionals can promote the growth of men.” This research presents “a conceptual model of how men’s psychological problems are related to masculine gender role con-

use this metaphor because the American business culture and legal profession tend to be masculine and dominated by men and women with masculine attitudes.³² Therefore, this article aims to invite American businesspeople and lawyers to put their egos aside and to try deal mediation and cross-cultural deal mediation. The main goal of this article is to explain why and how cross-cultural deal mediation can be used as a new and effective Alternative Dispute Resolution (ADR) method for international business transactions.

II. WHAT IS DEAL MEDIATION AND CROSS-CULTURAL DEAL MEDIATION

A preliminary definition of deal mediation is: a mediator that intervenes in the pre-contractual or bargaining phase of a contract to facilitate the creation of a durable and efficient contractual relationship for the benefit of the parties.³³ The role of a cross-cultural deal mediator is principally to serve as a neutral cross-cultural facilitator for the parties to help

flicts.” This research “hypothesized that men are oppressed by rigid gender role socialization processes (i.e., sexism) that limit them from being fully functioning human beings. The model established men’s gender role conflict (GRC) as a research and clinical area in Counseling Psychology”); see also Jean Duncombe & Dennis Marsden, *Love and Intimacy: The Gender Division of Emotion and ‘Emotion Work’ A Neglected Aspect of Sociological Discussion of Heterosexual Relationships*, 27 *SOCIOLOGY* 221, 221 (1993) (discussing “the role of ideologies of love and intimacy in heterosexual coupledness, and examines the applicability of theories of the gender division of ‘emotion work’ to the field of intimate personal relationships.” This research states that “despite dissatisfaction with gender inequalities in domestic tasks and finance -many women express unhappiness primarily with what they perceive as men’s unwillingness or incapacity to ‘do’ the emotional intimacy which appears to them necessary to sustain close heterosexual couple relationships”). These two studies in the field of socio-psychology are important for this article because they support the empirical findings of Hofstede that in a masculine culture like the American culture, “being caring and gentle is for women” and men should be viewed as tough and not overly relationship-oriented or emotional. Therefore, the masculine American culture poses a barrier to deal mediation and cross-cultural deal mediation since both types of mediation can be negatively interpreted as emphasizing “overly caring and gentle” behavior. HOFSTEDE, ET AL., *supra* note 4, at 159 (discussing masculine orientation.)).

32. See Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 *DUKE J. GENDER L. & POL’Y* 119, 121–22 (1997) (discussing the American ultra-masculine “‘gladiator’ model of legal education and lawyering celebrat[ing] analytical rigor, toughness, and quick thinking.” Defining “successful performance as fighting to win: an argument, a conflict, or a case. Even in more informal settings such as negotiations or in-house advising, lawyering often proceeds within the gladiator model.” Discussing “[t]he lawyer reasons back from the ultimate fight—in the courtroom, at the bargaining table, or in the administrative hearing—to develop strategies and legal responses that would best position the client to win should a crisis occur”). See also HOFSTEDE ET AL., *supra* note 4, at 135–85 (theorizing and offering empirical data about the key differences between a masculine culture like the United States and more feminine cultures like Canada, Finland, Denmark, Norway, and Sweden).

33. Peppet, *supra* note 1, at 301 (proposing that a deal mediator is like a “contract embellisher.” A skilled mediator or deal “mediator might find trades or packages that the parties had overlooked because of carelessness, time pressure, limited skills or experience, or strategic posturing.”).

them compare and bridge their cultural and legal differences that are often a source of dispute in the bargaining process or later in the performance of the contract. Both deal mediators and cross-cultural deal mediators work in a neutral way to facilitate the bargaining process between the parties to help them reach an efficient and durable contractual relationship.³⁴ However, the role of a deal mediator is not to force the development of contractual relationship.³⁵ A deal mediator acts on the basis of objective, neutral, and independent standards and should advise the parties to not sign the contract, if necessary.³⁶ This is especially important if a party (or both parties) feels like the lack of cross-cultural understanding between the parties cannot be mitigated and that their cross-cultural miscommunications and lack of cross-cultural synergy³⁷ may be interpreted as a high³⁸ cultural risk for the development of an efficient and durable contractual relationship.

Because these concepts originate from ADR, the ideal cross-cultural deal mediator is an international commercial lawyer with ADR skills.³⁹ As a result, it is important to first define ADR in the context of international commercial disputes. ADR is usually defined as, “any process that allows the parties to resolve their dispute without going to court.”⁴⁰ The usual three ADR methods are negotiation, mediation, and arbitration. ADR is voluntary in the sense that the parties must choose to refer their dispute to ADR. In practice, well drafted international business contracts will normally contain a multi-step (or multi-tier) dispute resolution clause that will force the parties to attempt to resolve disputes arising out

34. L. Michael Hager & Robert Pritchard, *Lawyers As Deal Mediators: The Value Of Neutrality In International Business Negotiations*, 28 INT'L BUS. LAW. 404, 405 (2000) (defining deal mediation is essentially “assisted negotiation” and the person assisting needs to be a true neutral, endowed with the facilitative skills of a mediator).

35. Peppet, *supra* note 1, at 323–24 (asserting “that if a mediator becomes driven to close deals, then she loses her impartiality and objectivity. Not all deals should close. Moreover, to earn the parties’ trust and confidence, the parties must believe that the deal mediator is not trying to force them to reach agreement.”).

36. *Id.*

37. ADLER, *supra* note 29, at 103–33 (identifying the problems caused by cultural diversity. Discussing the potential advantages and disadvantages from cultural diversity for organizations. Presenting strategies to manage cultural diversity by leveraging and creating cultural synergy between cross-culturally diverse organizations and people).

38. Again research show that international joint ventures failed at the rate of 50 percent and that cross-border M&As failed at the rate 83 percent, *see* Bing, Gitelson & Laroche, *supra* note 12, at 41; Schweiger & Goulet, *supra* note 13, at 1478–85.

39. Hager & Pritchard, *supra* note 34, at 405 (profiling commercial lawyers with ADR skills as ideally suited for the role of deal mediator. This article identified lawyers as the best qualified professionals to use for deal mediation. This article states that lawyers are best suited for their listening skills, dispassionate judgment, and patience to deal with difficult people and situations). However, this article failed to identify the best suited candidate for cross-cultural deal mediation and which abilities they should possess. This articles aims precisely to fill that gap in deal mediation literature.

40. MITCHELL MCINNIES, *MANAGING THE LAW: THE LEGAL ASPECTS OF DOING BUSINESS* 51 (Pearson Education Canada, 3d. ed. 2011).

of the contract by recourse to the three main ADR methods identified in the following sequence unless agreed otherwise by the parties:

A) Negotiation in Good Faith

The parties shall endeavor to resolve any Dispute amicably by negotiation between executives who have authority to settle the Dispute [and who are at a higher level of management than the persons with direct responsibility for administration or performance of this agreement];⁴¹

41. See International Bar Association (IBA) Guidelines for Drafting International Arbitration Clauses, 2010, available at http://www.ibanet.org/ENews_Archive/IBA_27_October_2010_Arbitration_Clauses_Guidelines.aspx [Hereinafter IBA Guidelines for Drafting International Arbitration Clauses], pp. 30–32 (last visited May 21, 2014) (offering DRAFTING GUIDELINES FOR MULTI-TIER DISPUTE RESOLUTION CLAUSES). Negotiation should be the first step. The top executives should be designed as the participant because from my practical experience top executives have usually all the necessary legal authority to make a settlement, they tend to see the “bigger picture” and do not have time to be involved in stupid arguments. Also, culturally speaking, as mentioned in this article, the hierarchy (Power Distance following Hofstede) is fundamental in most foreign cultures. Finally, the good faith requirement should be inserted. American business people and lawyers may disagree, but they must be aware that the legal aspects of international business negotiations practices and theories are largely based on civil law principles since more than 75 percent of the world’s legal systems can be classified as civil law systems and mixed systems with a civil law tradition, see *Civil Law Systems and Mixed Systems with a Civil Law Tradition*, UNIVERSITY OF OTTAWA, <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-civil.php> (last visited May 6, 2014). Therefore, European civil law recognizes a general area of pre-contractual liability and the duty of good faith negotiation not recognized under U.S. commercial contract law; however, it is important to note this legal concept is recognized in U.S. labor law for collective bargaining. See Anthony Forsyth, Chairman’s Lunch Seminar U.S. National Labor Relations Board: Good Faith Bargaining: Australian, United States and Canadian Comparisons (Nov. 20, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509825; see LARRY A. DiMATTEO & LUCIEN J. DHOOGHE, *INTERNATIONAL BUSINESS LAW: A TRANSACTIONAL APPROACH* 233–37 (Thomson-West, 2nd ed. 2006) (discussing the concept of pre-contractual liability and duty of good faith in negotiation in European civil law and international business transactions. Failure to negotiate in good faith in international business negotiations, such as never intending to enter into contract to obtain confidential information, is grounds for a claim of damages. Thus, terminating lengthy negotiations without giving a viable reason or justified reason may also lead to pre-contractual liability. UNIDROIT Principles of International Commercial Contracts at articles 2.1.15 (2) and 2.1.16 clearly stipulate this principle by stating that “a party who negotiates or breaks off negotiations in bad faith is liable” when it discloses or improperly uses confidential information obtained in the course of negotiations. Breach of confidentiality may entitle the injured party to compensation based on the benefit the party in breach received by disclosing the information. The UNIDROIT Principles are indicative of how most civil law legal systems are likely to affix liability in the negotiation stage), see Anne M. Burr, *Ethics in Negotiating: Does Getting to Yes Require Candor?*, 56 JUL-DISP. RESOL. J. 8, 9 (2001) (discussing that in U.S. business contract negotiations “existing law generally provides that the duty of good faith applies only to the performance and enforcement of agreements, not negotiations. The unscrupulous [American] negotiator might take this as a license [(carte blanche)] to behave unethically during [U.S. domestic] negotiations for as long as such behavior is not out-and-out fraudulent. The author argues, however, that there is such a thing as a reputation effect, and that a bad reputation is ultimately deleterious. In this article, the author dis-

B) Non-Binding Mediation in Good Faith;⁴²

Any Dispute not resolved by negotiation in accordance with paragraph (A) within [30] days after either party requested in writing negotiation under paragraph (A), or within such other period as the parties may agree in writing, shall be settled amicably by mediation under the [designated set of mediation rules].

[All communications during the negotiation and mediation pursuant to paragraphs (A) and (B) are confidential and shall be treated as made in the course of compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law.]

C) Arbitration

All disputes arising out of or in connection with the present contract shall be exclusively and finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules⁴³

cusses the benefits of [good faith], and also the difficulties and costs of requiring such [good faith] in business negotiations”).

42. See IBA Guidelines for Drafting International Arbitration Clauses, pp. 30-32. *Supra* n. 41 (offering drafting Guidelines for Multi-Tier Dispute Resolution Clauses). See also Good Faith Participation in Mediation: Recent Decisions in New York and California, Quinn Emanuel Urquhart & Sullivan, LLP, available at <http://www.jdsupra.com/post/documentViewer.aspx?fid=6941b9d9-265b-42e8-9e42-e7e67a63771d> (last visited May 6, 2014) (discussing “[i]n an effort to alleviate the growing congestion of court dockets around the country, [American] judges increasingly require parties to engage in alternative dispute resolution, particularly mediation, prior to trial. Mediation is designed to be a confidential process lacking the formality and adversarial nature of court proceedings. However, participation in any court-ordered mediation is ultimately monitored by a judge. As a general rule, courts require parties to participate in mediation in good faith, and judges have the authority to sanction parties that fail to do so. The judge’s authority to impose sanctions for mediation conduct is grounded in the court’s inherent authority to regulate proceedings before it, and is further supported by local rules, Federal Rule of Civil Procedure 16(f) (requiring good faith participation) and statutes such as 28 U.S.C. § 1927 (prohibiting unreasonable or vexatious litigation). As in other areas of the law, however, ‘good faith’ is not well defined. This article examines some recent decisions by federal courts in New York and California enforcing the requirement of ‘good faith’ participation in mediation. While it is well settled that a court may compel a party to mediate, it cannot compel a party to settle. Moreover, courts take care to protect the confidential nature of mediation proceedings. Accordingly, the requirement of ‘good faith’ in mediation has clear limits” [if the parties don’t want to act in good faith]. However, a cross-cultural deal mediator will be able to define the term “good faith” in the Cross-cultural Deal Mediation Agreement between the parties, as a concept including, without limitation: attending, and participating, in meetings at reasonable times; respecting the participants (separating the people from the issues); timely disclosure of information when require and when disclosure is legally authorized; responding to proposals in a timely manner; considering genuinely the proposals of the other side in a interested-based manner for the mutual benefits of the deal.

43. *Standard ICC Arbitration Clauses*, INTERNATIONAL CHAMBER OF COMMERCE (ICC), available at <http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=19327358445> (last visited May 6, 2014). Apart from this standard clause from ICC, in practice lawyers drafting and negotiating the commercial international arbitration

(i.e., arbitration is final and binding and can be enforced via the New York Convention).⁴⁴

The parties usually insert such clauses to preserve a fair and durable business relationship. ADR also demonstrates the willingness of the parties to respect the cultural preference of collective cultures like Japanese⁴⁵ and Chinese⁴⁶ businesspeople to resolve commercial disputes through cooperation and collaboration to maintain harmony. All experienced international businesspeople and lawyers know that “litigation is the less preferred method of dispute resolution in many countries.”⁴⁷ It is important to stress the practical importance of cross-cultural deal mediation because, as mentioned before, “the best divorce is the one you get before you get married.” In addition, a cross-cultural deal mediator will be able to mediate disputes after the contract is signed. The use of negotiation and mediation in dispute resolution for international business transactions should always be preferred in practice because even though a foreign country may be a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (New York Convention), other issues such as local government enforcement and corruption issues often make these types of treaties moot in those instances.⁴⁸

clause should always considered if the following issues should be covered: seat of arbitration (i.e. legal jurisdiction to which the arbitration is tied), location of the arbitration hearings, governing law (choice-law-clause to mitigate conflict of law issues), arbitral rules, confidentiality, language(s) or arbitration, interim measures, etc. See Practical Law (A Thomson Reuters Legal Solution providing legal know-how), International Arbitration Resources, available at http://us.practicallaw.com/practice/us-international-arbitration#tab2_tabsdefault (last visited May 12th, 2014).

44. As last resort to adjudicate an international commercial dispute the international business community turns to arbitration: “[a]rbitration awards are far easier to enforce across national boundaries than are the judgments of national courts. This is because more than 140 countries that have ratified the New York Convention on Recognition and Enforcement of International Arbitration Awards (the New York Convention), are treaty bound to enforce foreign arbitral awards. There is no comparable international treaty for the enforcement of foreign court judgments.” See e.g., Henry Chen, *The Enforcement of Foreign Arbitration Awards in China*, *Bloomberg Law Reports-Asia Pacific*, BLOOMBERG LAW REPORTS (2009), available at http://mwe.com/info/pubs/BLR_1109.pdf. The well-known advantages of arbitration are summarized as faster and less expensive than litigation, parties can select the arbitrator(s), the process is confidential, and the arbitral decision is binding and enforceable via the New York convention. *Id.*
45. KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 302 (3d ed. 1998) (discussing that arbitration is very popular in Japan, but it would be wrong to overemphasize the Japanese preference for resolving disputes via negotiation and mediation based on Confucianism. Many people familiar with Japan believe it to be a myth that the Japanese are reluctant to litigate. The court system in Japan has long been under strain (few litigators, judges and lengthy process); that is why arbitration is growing in importance).
46. *Id.* at 292–93 (discussing the historic cultural preference for conciliation and mediation in China).
47. See DiMATTEO & DHOOGHE, *supra* note 41, at 123 (discussing ADR for international commercial disputes).
48. John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT’L L. 329, 379 (2006) (discussing even though China is a party to the UN Con-

Deal mediation and cross-cultural deal mediation focus on the first method (negotiation) and the second method (mediation) to facilitate negotiation and dispute resolution. Negotiation in good faith means that the parties will engage in a cooperative and interests-based discussion to settle their commercial dispute.⁴⁹ Mediation is a process in which a neutral and usually qualified attorney,⁵⁰ called a mediator, helps the parties to negotiate a mutually satisfactory settlement to avoid having to adjudicate their dispute in court or through arbitration.⁵¹ Mediation can also be defined as a negotiation session for conflict resolution with the assistance of an expert (mediator). Mediation is neither conclusive nor binding. Therefore, the mediator only proposes a settlement decision subject to the good will and good faith of the parties.

Legal scholarship defines deal mediation or facilitation as “the application of . . . [ADR] principles to the negotiation of any transaction or other agreement,” including, for example, “joint ventures, licensing contracts, employment agreements, mergers and acquisitions.”⁵² Therefore, the main purpose of deal mediation is defined as using a neutral third party to assist with the bargaining of a transaction or contract and drafting of the contract prior to the consummation of the deal and signature of the contract.⁵³ Deal mediation is also referred in legal scholarship and practice as transactional mediation or conciliation; a deal mediator can also be named a transactional mediator, facilitator, or conciliator.⁵⁴

vention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (New York Convention), “other issues such as the local government enforcement issues make these types of treaties moot in those instances”). This practical observation from this article can also be extended many other countries like China presenting problems with corruption and the Rule of Law.

49. Burr, *supra* note 41, at 10 (discussing good faith in ADR).
50. David I. Bristow & Reva Seth, *Good Faith In Negotiations*, 55 DISP. RESOLUTION J. 16, 16 (2001) (discussing neutrality of the attorney in mediation and also defining the scope of a party’s duty to negotiate or bargain in good faith by a duty consisting of two obligations. “The first is to act ‘in good faith’ and the second is the obligation to bargain. The former is negative in content as it prohibits certain forms of bargaining behavior. The latter is positive in nature because it requires the parties to negotiate with a view to the actual conclusion of an agreement”).
51. See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 592–604 (2001) (defining mediation, as a form of alternative dispute resolution, “is premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved.” Mediation is unique, as it is nonbinding, and the mediator is present to facilitate “communication and negotiations between the parties,” and not to impose a settlement on them. As a result of the voluntary nature of mediation, “the potential to exploit bargaining power or abuse the process is ripe.”).
52. Joan Stearns Johnsen, *Alternative “Deal” Resolution: The Facilitated Negotiation Of Transactions*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 193, 194 (2011) (defining deal mediation or facilitation).
53. *Id.* at 194 (providing examples of the type of contracts appropriate for deal mediation or facilitation).
54. Peppet, *supra* note 1, at 283–84 (using the terms transactional mediator and transactional mediator all through his article).

There is currently no definition in American legal scholarship of cross-cultural deal mediation.⁵⁵ Like deal mediation, this concept appears to be relatively new in legal scholarship. But there are a few articles on cross-cultural mediation and the cultural aspects of mediation.⁵⁶ Legal scholar John Barkai⁵⁷ defines cross-cultural mediation as the competency of a mediator to “understand and adapt to the cross-cultural differences of the parties and use different approaches from those in domestic U.S. mediations.”⁵⁸ In compliance with the definitions of deal mediation and cross-cultural mediation presented by legal scholars in the ADR field, I offer this definition of cross-cultural deal mediation:

The application of ADR principles and principled negotiation to international business transactions, particularly complex international joint ventures, and cross-border mergers and acquisitions where the development of an efficient and durable cross-cultural contractual relationship between the parties is vital for the success of the transaction. A cross-cultural deal mediator’s role is to compare, understand, and adapt to the legal and cross-cultural differences of the parties and use different approaches from those in domestic U.S. mediations to leverage the cultural diversity of the parties as a competitive advantage. Without the help of a cross-cultural deal mediator, cultural differences often become a deal breaker. However, a cross-

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55. Scott R. Peppet states that there is currently a “lack of discussion [and]/or promotion of” deal mediation (or transactional mediation or facilitation) intervention in U.S. domestic deals in the legal scholarship and ADR community. “Few mediators seem to discuss or even be aware of [deal mediation].” See Peppet, *supra* note 1, at 340. There is only one article arguing for transactional mediation in the international context, see Hager & Pritchard, *supra* note 1, at 2–3, which proposes a role for lawyer-mediators in international transactions, particularly if cultural differences exist. On the widely used Internet search engine for legal academics called “Legal Trac” there are no scholarly publications on topic related to “cross-cultural deal mediation” or “cross-cultural transactional mediation or facilitation” when last visited January 27, 2012. No related publications can be found on the Internet search engine WestLaw (last visited January 27, 2012). There is also nothing specific on this topic on the Google Scholar Internet search engine (last visited January 27, 2012). Therefore, the concept of “cross-cultural deal mediation” or “cross-cultural transactional mediation or facilitation” appears to be a new concept. I also asked Edwin J. Greenlee, Associate Director for Public Services and Professor of U.S. Legal Research at the University of Pennsylvania Law School to confirm that this concept is new and that no scholarly articles have been published on the topic. Mr. Greenlee’s legal research confirms that “cross-cultural deal mediation” or “cross-cultural transactional mediation or facilitation” is introduced by this article. I would like to thank Mr. Greenlee for his legal research and contribution to this article.
56. See Phyllis E. Bernard, *Bringing Soul To International Negotiation*, 25 *NEGOTIATION J.* 147 (2009); Keren Lavelle, *Ancient Ceremony Transformed Into Cross-Cultural Mediation Training*, 43 *L. Soc’y J.* 22 (2005); Lonnie Lusardo & Donna M. Stringer, *Bridging Cultural Gaps In Mediation*, 56 *DISP. RES. J.* 29 (2001); Herbert Fishgold, Douglas Henne, Marvin J. Levine & W.J. Usery, Jr., *A Case Study In Cross-Cultural Mediation: The General Motors-Toyota Venture*, 41 *ARBITRATION J.* 5, 5–15 (1986); Barkai, *supra*, note 2, at 43.
57. Barkai, *supra*, note 2 (John Barkai is Professor of Law at the University of Hawaii’s William S. Richardson School of Law and has researched on commercial cross-cultural negotiation and dispute resolution.).
58. *Id.* at 44.

cultural deal mediator can work to leverage these differences as synergic forces for the parties. In sum, the role of a cross-cultural deal mediator is to compare, understand, and reconcile the cultural differences of the parties to allow the parties to develop an efficient and durable contract if they choose to do so.

The above definition of cross-cultural deal mediation may still be too theoretical and broad for practicing attorneys. Therefore, I feel it is important to go back to the definitions of negotiation and mediation in the context of ADR. First and foremost, to understand deal mediation and cross-cultural deal mediation, it is important to understand that negotiation and mediation are too often simplified by the dual-concern theory, meaning the duality between a collaborative win-win approach versus a competitive win-lose approach⁵⁹ As noted by G. Richard Shell in *BARGAINING FOR ADVANTAGE*, defining negotiation as a dual-orientation between “win-win” (i.e., collaborating by enlarging the “pie” and crafting value to a deal that will allow both parties to completely satisfy their concerns and interests) versus “win-lose” (i.e., when the negotiator focuses only on his individual profit and satisfaction) is a non-practical simplification of negotiation.⁶⁰ Experienced negotiators know that there are too many situational and personal variables for a single strategy to work in all cases.⁶¹ Also, a recent data-driven study in cross-cultural management demonstrated that the dual-concern model of conflict management theory is not a good candidate for predicting negotiation behaviors during cross-cultural business negotiations in a culture like China.⁶²

If the dual-concern theory is overly simplistic, how should negotiators and mediators approach the process of negotiating or mediating? They should perceive the process as interplay of the three fundamental approaches to negotiating and resolving commercial disputes:

- 1) **Rights-based** (i.e., legally-binding litigation and arbitration and non-binding rights-based mediation, such as mini-trial,⁶³ or when the mediator acts like a judge or arbitrator, but with no binding author-

59. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* xvi-xvii (2006).

60. *Id.* at xvii.

61. *Id.* xvi.

62. Zhenzhong Ma, *Chinese Conflict Management Styles and Negotiations Behaviours: An Empirical Approach*, 7 *INT'L J. OF CROSS CULTURAL MGMT.* 101, 114 (2007).

63. The ADR method of mini-trial has certain features that permit the accommodation in international business transactions, especially with regard to cross-cultural disputes such as Chinese or Japanese preference for non-judicial dispute resolution and the American preference for arbitration or for face-to-face negotiations within the context of judicial dispute resolution. See Leo Kanowitz, *Using the Mini-Trial in U.S.- Japan Business Disputes*, 39 *MERCER L. REV.* 641, 646 (1988) (Defining the mini-trial is a voluntary, confidential, and nonbinding ADR method just like mediation and conciliation. “The parties agree to the procedural groundwork in advance of the mini-trial. Both the American Arbitration Association and the Center for Public Resources have developed mini-trial procedures. The mini-trial is not a trial in the sense of an adjudicatory proceeding. It is rather a method of structuring the settlement process in complex disputes. While the mini-trial can be custom-tailored to a dispute, it often includes a foreshortened period of pre-trial

- ity. In the case of legally-binding litigation and arbitration, there are winners and losers; therefore; this rights-based method can also be associated with the power-based method);
- 2) **Interest-based** (i.e., non-binding negotiation, reconciliation, mediation, or conciliation, where interests are considered and considerations are offered to reach an agreement or settlement between the parties); and
 - 3) **Power-based** (i.e., the ability to coerce the other party with the law, power, or force).

These three approaches are the common ways people attempt to resolve their disputes.⁶⁴ However, it is important to realize that there are cross-cultural dimensions associated with these three approaches. Some cultures, like the American business culture, are known to be more legalistic, litigation-oriented, and focused on the right-based approach.⁶⁵ Overall, the strategic advantage of mediation is to encourage the parties to embrace a more interested-based approach to conflict resolution. Nevertheless, the interplay of the three approaches in practice will always remain. For instance, the theory and practice of mediation has evolved to allow the mediator to play the role of a judge or arbitrator using a rights-based approach and also the role of a facilitator using an interests-based approach to the conflict management between the parties simultaneously:

Evaluative mediation leans the process towards so-called 'rights-based approaches,' and is indeed referred to by some as 'rights-based mediation'. . . . As such, this approach arguably moves towards a form of non-binding, persuasion-based adjudication. By contrast, facilitative mediation focuses more on an interest-based process and a less interventionist role for the mediator. The facilitative mediator focuses on enhancing and clarifying communications between the parties to help them decide themselves what to do, presuming that they are better placed to devise effective solutions than is the

preparation, after which the lawyers for each party present to corporate management a brief 'best-case' scenario of the merits of the dispute.”).

64. WILLIAM URY, JEANNE M. BRETT & STEPHEN GOLDBERG, *GETTING DISPUTES RESOLVED* 3–19 (1988) (discussing the three approaches to resolving disputes: Interests, Rights, and Power).
65. RICHARD SCHAFER, BEVERLEY EARLE & FILIBERTO AGUSTI, *INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT* 74 (6th ed. 2005). (affirming that in international business Americans are known as notorious litigators, quickly turning to the courts to redress grievances. This combative stance usually results in a “win or lose” mentality.”). *See also* TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, 29–50 (offering empirical evidence that Americans are Universalists and are more oriented towards universal justice principles, the Rule of Law, and also the contracts in their business relationships. On the other hand, Particularist cultures like China, Mexico, Brazil, India, and Russia seek justice and fairness by treating all cases on their special merits.). Therefore, this moral clash tends to create many cross-cultural conflicts in negotiations and dispute resolutions since both parties tend to see each other as corrupted.

mediator.⁶⁶

In summary, a mediator's mandate is to mediate the interplay of these three approaches in the negotiation and conflict resolution process. The mediator mitigates the power-based struggles between the parties, and ensures a more interest-based focus by using the appropriate balance of interested-based and rights-based interventions. This holistic approach towards negotiation and conflict resolution helps the mediator, deal mediator, or cross-cultural mediator to resolve the dispute between the parties. The ultimate objective of a mediator will always be to get the parties to work together to avoid litigation or arbitration or acts of coercion causing the potential alienation of a contracting party.

A. MEDIATION, DEAL MEDIATION, AND CROSS-CULTURAL DEAL MEDIATION SHOULD BE PRACTICED IN TERMS OF AN INTERESTS-BASED APPROACH

Like mediation, deal mediation should be primarily based on resolving the dispute by adopting an interests-based approach. In practice, following an interests-based approach in mediation or deal mediation for an American mediator or deal mediator usually means assisting the parties to follow the four basic Principled Negotiation principles from the book, *Getting to Yes*.⁶⁷

These four principles have led to the development of the well-known ADR concept of principled negotiation (the win-win approach).⁶⁸ Therefore, effective mediators, deal mediators and cross-cultural mediators should be experts in principled negotiation.⁶⁹ They should be able to educate and persuade the parties to embrace principled negotiation in the mediation process. However, in the context of international business a

66. Caroline Rees, *Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges* 4-5 (John F. Kennedy School of Government, Harvard University, Corporate Social Responsibility Initiative Working Paper No. 56, Feb. 2010) (discussing the practical utility of mediation as a legitimate and compelling dispute resolution mechanism in business-related human rights disputes).

67. Barkai, *supra*, note 2, at 50 (discussing that many American mediators generally follow many of the basic negotiation principles from the book, *Getting to Yes*, as the leading American model of negotiation and mediation, with its interest-based framework). The four principles are the following:

1. Separate the people from the problem;
2. Focus on interest, not positions;
3. Generate options and a variety of possibilities deciding what to do to settle the dispute; and
4. Insist that the results be based on some objective standard.

68. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., 2d ed. 1991). "The central ideas of the book are: separate the people from the problem focus on interests and not positions, invent options for mutual gain, insist on using objective criteria, and understand your BATNA (Best Alternative To a Negotiated Agreement)." Barkai, *supra*, note 2, at 50. Professors Roger Fisher, William Ury, and Bruce Patton are all from the Harvard Negotiation Project (HNP) at Harvard Law School. The mission of HNP is to improve the theory and practice of conflict resolution and negotiation by working on real world conflict intervention, theory building, education and training, and writing and disseminating new ideas.

69. See Barkai, *supra*, note 2.

cross-cultural mediator should understand that principled negotiation emerged from Harvard Law School⁷⁰ and is therefore infused with American cultural values. “Many American mediators generally follow many of the basic negotiation principles from the book *Getting to Yes*, without thinking much about how this approach is infused with key American values such as individuality, equality and self-determination, and an infatuation with creative solutions.”⁷¹

Therefore, a cross-cultural mediator understands that principled negotiation, like the English language, may be dominant in international negotiations and dispute resolution,⁷² but it must be subject to cultural adjustments in the context of cross-cultural mediations and deal mediations.⁷³ John Barkai argues that the concept of principled negotiation is consistent with effective cross-cultural negotiation and mediation as long the mediator is able to identify interests that seem to have a basis in cultural differences. John Barkai refers to this method of conceptualization as the Cultural Dimension Interests (CDI).⁷⁴ In summary, I argue that all ADR methods such as negotiation, mediation, deal mediation, cross-cul-

70. FISHER & URY, *supra* note 68, at 2.

71. Barkai, *supra*, note 2, at 50.

72. See GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* 69 (6th ed. 2005) (“It would be desirable for Right-oriented legal cultures to develop a deeper appreciation for the potential of pluralistic thought in the law. But the imperial flavor of Anglo-American legal influence should be a cause of concern. The fact that international negotiations are conducted primarily in English gives Anglo-American lawyers a natural advantage in the market place of ideas and terminology. It would be better if American jurists developed more respect for the languages and legal cultures of the rest of the world so that these exchanges became reciprocal and mutually enriching.”).

73. *Id.* at 17, 69 (This book discussing international negotiations are usually conducted primarily in English gives American negotiators and lawyers, “a natural advantage in the marketplace of ideas and terminology;” therefore, this is a strategic advantage for American or English speaking native negotiators because they can more easily influence and manipulate the negotiating and drafting of international business contracts. However, this strategic advantage can also easily become a disadvantage because collective wisdom shows us that majority and dominant groups in our society often lacks adaptability.); see also Chunlin Leonhard, *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law*, 21 *PACE INT’L L. REV.* 1, 1–36 (discussing that U.S. contract law has developed on the basis of certain essential cultural assumptions such as freedom of contract, autonomy and liberal individualism and that the bargain theory often does not produce durable and efficient cross-cultural contracts).

74. John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-cultural and Dispute Resolution*, 8 *PEPP. DISP. RESOL. L. J.* 403, 444 (2008) [hereinafter Barkai, *A Perspective on Cross-cultural and Dispute Resolution*] (explaining that Hofstede himself acknowledges that *Getting To Yes* reflects high individualism, medium power distance index, and low uncertainty avoidance. *Getting-To-Yes* may reflect low masculinity in its search for “mutual gain” and a high long-term orientation in its search for enduring agreements. However, these last two factors may be contrary to American culture, which seen as high on masculinity and with a short-term orientation. In international negotiations, the negotiators may hold different values, objectives, and truly play the game of negotiation by different rules. They are accustomed to doing different negotiation dances and listening to different music. However, the *Getting-To-Yes* concept of “interest” can encompass all those different via Barkai’s Cultural Dimension Interests (CDIs) as a useful conceptualization.).

tural mediation, and cross-cultural deal mediation (if the CDIs are taken into consideration) should be put into practice based on the theory of principled negotiation.

B. MEDIATION, DEAL MEDIATION, AND CROSS-CULTURAL DEAL MEDIATION CAN ALSO BE DEFINED IN TERMS OF A RIGHT-BASED APPROACH

The rights-based approach to resolving disputes usually occurs after the contract has been drafted and signed via litigation or arbitration, but it also occurs when the mediator is acting as a judge or arbitrator providing “non-binding, persuasion-based adjudication”⁷⁵ decisions to the parties. In practice, the mediator will often tell the parties, “Based on my twenty years of experience, I think that if you go to court or arbitration, this is what’s going to happen; therefore, you may want to reconsider your position.” The rights-based approach in deal mediation means that the deal mediator is acting like a judge or arbitrator by providing his/her non-binding and persuasion-based legal opinions to the parties drafting the terms and conditions to be inserted in the contract.

III. HOW DOES CROSS-CULTURAL DEAL MEDIATION WORK AND WHAT IS THE CROSS-CULTURAL DEAL MEDIATOR’S ROLE

Even though, I have defined the concept of cross-cultural deal mediation in the introductory sections of this article, it may still appear theoretically abstract. Therefore, the points below outline the cross-cultural deal mediator’s role in this new ADR method for international business transactions.

A. HOW CROSS-CULTURAL DEAL MEDIATION WORKS: THE PROCESS, CONTENT, AND ORIENTATION OF A CROSS-CULTURAL DEAL MEDIATION SESSION

First, what is the cross-cultural deal mediator’s role? How does the cross-cultural deal mediator build, organize, and arrange the constituent elements of a cross-cultural deal mediation to achieve concrete results? The role of a cross-cultural deal mediator in practice can be viewed as a dance instructor teaching a one-two-three step dance. **Step One:** The cross-cultural mediator will also explain the process and answer questions. The cross-cultural deal mediator should get all parties to present a summary of their values, points of views, interests, concerns (i.e., each party gives a synopsis of the facts and aspirations in relation to the contract they would like to sign). **Step Two:** After the parties have told the facts and their interests, the cross-cultural deal mediator should ask for clarification or elaboration on particular issues. The cross-cultural mediator may meet with each party separately in caucus to discuss the issues in

75. Rees, *supra* note 66, at 5.

greater detail in order to gain a better sense of how the parties will be able to reach a mutually satisfactory agreement. The role of the cross-cultural deal mediator is to identify the interests by using questions and probing. A skilled cross-cultural mediator shifts the focus from positional bargaining to interest-based negotiation to list and evaluate options for satisfying as many interests as possible. Ultimately, this process helps the parties to formulate a proposed draft agreement incorporating all of their mutual interests identified. Attorneys for the parties may be present, but because many cultures, like the Chinese culture,⁷⁶ view lawyers negatively, the cross-cultural deal mediator should conduct at least one session without lawyers. The process should be kept confidential via a cross-cultural deal mediation agreement that contains a confidentiality agreement. This confidentiality requirement will be respected and enforced in most jurisdictions in the United States.⁷⁷ **Step Three:** Finally, if successful, at the end of the process, a detailed written agreement is developed and signed by the parties, usually after one or two days (or more) of caucuses and collective sessions with the parties, the contract can then be reduced to writing and signed by the parties. For purposes of stability and continuity, the cross-cultural deal mediator can help with renegotiations at the closing and when the contract is signed; he can become the official mediator for any legal dispute between the parties.⁷⁸

76. See ZWEIFERT & KÖTZ, *supra* note 45, at 292–93. Legal scholars Zweigert and Kötz argue that the reactionary movement against “Western spirit” and the laws of the early ideological perspective of the People’s Republic of China were marked by an anti-legal movement (with even incidents of extreme violence against lawyers, who were considered enemies of the revolution). Following Zweigert and Kötz, the idea of the law as a positive and fundamental component of a health society is relatively recent and a radical change in China.

77. See Nat’l Conference of Comm’rs On Unif. State Laws, *Uniform Mediation Act-2001*, 3 PEPP. DISP. RESOL. L.J. 449, 504 (2003) (“Mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.”) (“The communications by the mediator to the court or other authority are broadly defined. The provisions would not permit a mediator to communicate, for example, on whether a particular party engaged in “good faith” negotiation, or to state whether a party had been “the problem” in reaching a settlement. Section 7(b)(1), however, does permit disclosure of particular facts, including attendance and whether a settlement was reached. For example, a mediator may report that one party did not attend and another attended only for the first five minutes. States with “good faith” mediation laws or court rules may want to consider the interplay between such laws and this Section of the Act.”). Therefore, it is important for the parties to select a governing law for the cross-cultural deal mediation agreement (confidentiality agreement) that will protect the confidentiality to not affect the arbitration or litigation.

78. Peppet, *supra* note 1, at 316–21 (discussing the benefits of mediators to manage disputes that arise during the renegotiation phase after the contract is signed (control post-contractual opportunism) and how the deal “mediators can help the parties during the closing to incorporate legal terms *ex ante* that constrain *ex post* opportunism.”).

B. WHAT KIND OF CONTRACTS SHOULD BE SUBJECT TO
CROSS-CULTURAL DEAL MEDIATION?

Second, what kind of contracts should be subject to cross-cultural deal mediation? I argue for any international business contracts. Particularly, cross-cultural deal mediation should be used for more complex and relationship-oriented contracts such as cross-border strategic alliances (international joint venture and cross-border M&As) because of the necessity to leverage synergic forces between the parties⁷⁹ and their high failure rate.⁸⁰ Cross-cultural deal mediation can also be used for all international business contracts that may imply that the parties will have to build a relationship and work together on a longer-term basis, such as international distribution agreements, franchise agreements, licensing agreements, R&D agreements, etc. More transactional contracts like international sale agreements can also be subject to cross-cultural deal mediation. For instance, a party may feel mediation is needed because it feels uncomfortable during the bargaining process due to lack of negotiation experience or lack of bargaining power. Also, the parties may find it appropriate because they envision the development of a long-term business relationship with potential future contracts. Cross-cultural deal mediation can also be useful for domestic commercial contracts in the United States between parties from different cultural or racial backgrounds. This means cross-cultural deal mediators can be used to mediate the drafting and negotiating of domestic commercial contracts, such as shareholder agreements or franchise agreements between parties from different ethnic, racial, or national origin cultures. For instance, it is a well-known fact that many popular American franchises, such as McDonald's, 7-Eleven, and Denny's,⁸¹ are owned by immigrant investors, such as African-Americans, Asian-Americans, Hispanic Americans, South-Asian Americans, etc. Therefore, a prospective franchisee that is of a different cultural or national origin may not be accustomed to the American style of negotiation and legal culture, and thus may not understand all the

79. Schweiger & Goulet, *supra* note 13, at 1477–78 (proposing the strategy of Deep-Level Cultural Learning Interventions (DCL) to leverage the cultural synergies between in a strategic alliance. “Although acquisitions are a salient part of international business landscape, research has consistently found that they neither lived up to the financial expectations of those who have transacted them or nor produced shareholder value for acquirers.”).

80. See Bing, Gitelson & Laroche, *supra* note 12, at 40–41; see also Schweiger & Goulet, *supra* note 13, at 1477.

81. MICHAEL KERR, RICHARD JANDA, & CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 317 (Chip Pitts ed., 2009). American franchises should avoid the costly lesson of Denny's before leveraging cultural diversity as a competitive advantage. In 1994, Denny's agreed to pay USD \$54 million to settle two lawsuits involving some 300,000 racial minority customer claimants who claimed that Denny's was systematically refusing to serve them or subjecting them to differential treatment such as insisting that they pay before being served at the table. While the claimants sought and received compensation, they also sought to change the way the corporations behaved and to have their needs and interests engaged. By 1998, Denny's was among Fortune's best rated corporations in the United States for engagement with Asians, Blacks, and Hispanics.

terms and conditions of the agreement. Similarly, the American franchisor may not be sensitive or receptive to the cross-cultural and interracial differences at play in the development of their contractual relationship.⁸²

C. WHO SHOULD BE A CROSS-CULTURAL MEDIATOR?

Third, who should be a cross-cultural deal mediator? The ideal candidate should be an experienced commercial lawyer with ADR skills or a professor of law in the field of ADR.⁸³ The candidate should possess expertise in the fields of comparative management⁸⁴ (i.e., cross-cultural management, particularly in the fields of international organizational behavior, cross-cultural communication, negotiation, and dispute resolution) and also comparative law⁸⁵ (i.e., the ability to compare and

82. See Leonhard, *supra* note 73, at 2; see also Robin J. Ely et al., *Rethinking Political Correctness*, 84 HARV. BUS. REV. 79, 80 (2006) [hereinafter *Rethinking Political Correctness*] (Interactions in American organizations “among people of different races, genders, religions, and other potentially charged social identity groups” is now inevitable. In the American “culture regulated by political correctness, people feel judged and fear being blamed.” White people feared to be perceived as racist, men feared to be perceived as sexist, racial minorities and women are afraid to be perceived as “playing the race or gender card.” “They worry about how others view them as representatives of their social identity groups. They feel inhibited and afraid to address even the most banal issues directly. Resentments build, relationships fray, and organizational performance suffers.”). This article proposes strategy to go beyond political correctness and leverage diversity in American organizations as an asset and not a liability.

83. Hager & Pritchard, *supra* note 34, at 405 (profiling “commercial lawyers with ADR skills as ideally suited for the role of deal mediator.” This article identified lawyers as best qualified professionals to use for deal mediation. This article states that lawyers are best suited for their abilities to listening skills, dispassionate judgment and patience to deal with difficult people and situations). However, this article failed to identify the best suited candidate to mediate cross-cultural deal mediations and which abilities they should possess.

84. Comparative management (or cross-cultural management) theories are studies in virtually all undergrad and MBA programs in North America through the mandatory course of Organizational Behavior. This course is usually mandatory for all understand and MBA students all Canadian and American business schools. Recognizing that although legal knowledge, analytical and communication skills are critical to career success, several decades of research demonstrate that raises, promotions, and satisfaction in the legal profession also depend on expertise in management and organizational behavior, the University of Pennsylvania Law School has launched a new course for the Spring 2012 Semester called “Organizational Behavior.” This course focuses on the managerial methods for the effective accomplishment of tasks, goals, and projects in legal profession; how to work effectively with other people and how to supervise and lead other people. This course represents a unique collaboration between Penn Law and Wharton School to develop knowledge, skills, and self-awareness relevant to management and organizational behavior in the legal profession. Therefore, understanding the human side of management is an essential complement to the legal and technical skills of all lawyers and especially cross-cultural deal mediators. See ADLER, *supra* note 29.

85. By comparative law, I refer to the study of differences and similarities between the law (legal systems) of different countries. Comparative law is has more importance in today’s society because of globalization and internationalization of business. For instance, international business law or international customary law is based on legal transplants of various ideas from civil law and common law. Professor Ewald (leading scholar in the United States in the field of comparative law) emphasizes

understand differences between legal systems and cultures). The candidate should additionally possess a special legal expertise or knowledge in the field of the international business contracts. A cross-cultural deal mediator should also be emotionally and culturally intelligent because technical and legal skills are insufficient.⁸⁶

Should the mediator in international business transactions be a man? What religion or ethnicity should the mediator belong to? U.S. societal and business values promote achievement over ascription;⁸⁷ therefore, such questions are viewed as outrageously discriminatory. Americans strongly value anti-discrimination laws and they have contributed to the materialization of the American dream. Most Americans believe that a person should not be judged on the basis of age, gender, country of ori-

that "comparative law should be geared toward studying the sorts of things that concern practicing attorneys". See William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1894 (1995)

86. Cross-cultural deal mediator must seek to be pragmatic and find human competencies that transcend political, technological, legal, economic, organizational, professional and cultural differences. Emotional intelligence (EI) in negotiation means the ability of a negotiator to view and use emotions as useful sources of information that help one to make sense of and navigate successfully through the negotiation, dispute resolution and mediation process. This concept is important in cross-cultural negotiations, because a recent study conducted at the multinational Johnson & Johnson demonstrated that EI competencies can be identified throughout the world, indicating that these abilities matter for businesspeople and can be assessed anywhere a company operates. See DANIEL GOLEMAN ET AL., *PRIMAL LEADERSHIP: LEARNING TO LEAD WITH EMOTIONAL INTELLIGENCE* 37 (2002); ADLER, *supra* note 29, at 164–207 (discussing global leadership, motivation and decision making); THOMAS VULPE, DANIEL KEALEY, DAVID PROTHEROE AND DOUG MACDONALD, *GOV'T OF CANADA, A PROFILE OF THE INTERCULTURALLY EFFECTIVE PERSON* 14–19 (2nd ed., 2001). The Centre for Intercultural Learning (CIL), Canadian Foreign Service Institute, Department of Foreign Affairs and International Trade, has developed the Profile of the Interculturally Effective Person (IEP). This cross-cultural theory is used for instance by the Canadian Foreign Service Institute to train Canadian diplomats and soldiers on cross-cultural sensitivity. Following CIL's concept of cultural intelligence, there are nine core competencies that a cross-cultural deal mediator must possess to be considered culturally intelligent:

1. Adaptation Skills;
2. An attitude of modesty and respect;
3. Understanding the concept of culture;
4. Knowledge of the host country and culture;
5. Relationship-building;
6. Knowledge of self;
7. Intercultural communication;
8. Organizational skills; and
9. Personal and professional commitment.

See generally *Center for Intercultural Learning*, FOREIGN AFFAIRS & INT'L TRADE CAN., <http://www.international.gc.ca/cfsi-icse/cil-cai/pubpap-pubdoc-eng.asp> (last visited May 6, 2014).

87. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 105–122 (theorizing and offering empirical comparison between Achievement-oriented societies like the United States and Ascription-oriented societies like China, Latin American and Middle East societies). In North American society we accord mostly status on basis of achievement and merit, in ascription-oriented societies like Argentina or China where they accord status on basis of age, gender, social status, education, seniority, etc.

gin, or racial background, but rather should be “judged by the content of their character,” as Martin Luther King, Jr. once said. In contrast, as evidenced by the empirical study by Trompenaars and Hampden-Turner, most non-western cultures (such as East Asian, South Asian, Latin American, African, and Caribbean) operate on the basis of ascription. Age, gender, country of origin, religion, social class, and racial background are all ascription factors that can determine a person’s leadership capabilities.⁸⁸ Western nations like the United States, Canada, France, and England are committed to democratic systems in the form of meritocracies; however, social injustice based on gender, sexual orientation, race, country of origin, and religion still persist today. In the United States, the concept of equality is set forth in the constitution and remains a powerful aspirational dream, but inequalities still persist.⁸⁹ Harvard Business Review published an article titled *Re-Thinking Political Correctness* about the importance and prevalence of interactions in American organizations among people of different races, genders, religions, and other potentially charged social identity groups are now inevitable. The article stresses the point that these interactions should not be ignored or engaged in on a basis of political correctness.⁹⁰ In the international business world, ignorance of political correctness towards cultural and racial diversity can undermine the development of a durable and efficient cross-cultural contractual relationship. Because most cultures are ascription-oriented, studies suggest that the ideal cross-cultural mediator for international transactions is an older (gray hair is associated with wisdom (“*matière grise*”)), heterosexual Caucasian man,⁹¹ who has very high so-

88. *Id.* at 102.

89. See EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS: CASES AND MATERIALS*, (2d ed. 2005) (introducing law students to a systematic examination of the interdisciplinary dimensions of increasing economic inequality and the role of identity in the distribution of wealth in the United States. This casebook is promoting economic justice in the United States).

90. See Ely et al., *supra* note 82.

91. See THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 222–266 (2001) (discussing race relations in global area and the white supremacy in race relations since the end of the cold war. The author who is a professor of modern world history at the University of Nebraska-Lincoln affirms the importance and predominance of white authority in the global area). As a practitioner in international development, I have observed many Canadians (including from the government of Canada) challenging the status and legitimacy of my father’s NGO incorporated under the federal laws of Canada. For example, the Government of Canada has designated my father’s NGO as a NGO from the Haitian diaspora. Thus, this status may sound like a positive recognition of the Haitian cultural origin and Black racial origin of my father and his NGO, but my father has never been treated by the Canadian government or Canadian NGO community as a “real” Canadian. Also, black Africans and Haitians have also challenged the authority and leadership of my father as the president-founder of a Canadian scientific-based NGO. His strategy for dealing with racism was simple and pragmatic: he always secured the support of respected white professors and experts from Canada for his NGO. He also always made sure to always bring a “white man” with him for his missions in Haiti. For instance, one of his white associate agronomists, emeritus professor Claude A. St-Pierre from

cial status.⁹² Although this is considered discriminatory profiling for many, this profile is often considered ideal for most ascription-oriented business cultures.⁹³ There are two options to avoid falling into the trap of discrimination and choosing a cross-cultural deal mediator on basis of achievement.⁹⁴

- 1) To choose the most skilled and competent cross-cultural deal mediator solely on the basis of achievement or meritorious criteria:

Pros: this will correlate with American egalitarian values and the achievement-oriented way of doing business. This could be perceived as a political, legal, and ideological statement by the Americans to other parties. Such statements are often useful or necessary in diplomacy. American and European multinational corporations often operate under the same anti-discriminatory policies in foreign countries by following a corporate accountability policy or Corporate Social Responsibility (CSR) policy. Also, American corporations abroad may be subject to U.S. anti-discriminatory laws if Congress has clearly intended such an extraterritorial reach.⁹⁵ Also, it is important to mention that recent empirical research conducted for the World Bank shows that gender differences do not really affect the performance of an international firm.⁹⁶

Cons: the cross-cultural deal mediator selected on the basis of achievement-oriented criteria may have difficulty fulfilling his mandate successfully. Parties from ascription-based cultures may chal-

Université Laval is one of the most renowned agronomists in Canada, holding a PhD from Cornell University and many patents in the field of agricultural biotechnology. I also had a friend (Indo-Canadian) who went on an international assignment for two years in India for a Canadian technology company tell me that all Indians thought the manager was my father's white Canadian colleague, when he was in fact the manager who had been selected based on his superior technical, managerial, linguistic and cultural skills. Racism in international business negotiations is a taboo topic in North American literature, but this is still a sad reality. I feel this topic should never be avoided until we find solutions to this problem based on equality.

92. *Id.*; see also HOFSTEDE ET AL., *supra* note 4 at 53–88 (theorizing and offering empirical data to measuring the degree of power distance (degree of ascription and tolerance to inequality in a society). Following these empirical data, the United States is an equalitarian society with a low power distance index and cultures like China, Latin American, and Middle Eastern cultures are societies with very high power distance index).
93. HOFSTEDE ET AL., *supra* note 4 at 53–88.
94. This question is also valid for the selection of members of an American negotiation team that will be involved in cross-cultural negotiations.
95. See DETLEV F. VAGTS, WILLIAM S. DODGE & HARNOLD HONGJU KOH, *TRANSNATIONAL BUSINESS PROBLEMS* 98–117 (4th ed. 2008) (discussing the examples of extraterritorial application of U.S. anti-discriminatory laws.) The application of U.S. federal employment law operates under the general presumption that U.S. laws will not be presumed to apply beyond U.S. territorial jurisdiction unless the U.S. Congress clearly has intended such extraterritorial reach. See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).
96. See, e.g., Shwetlena Sabarwal & Katherine Terrell, *Does Gender Matter for Firm Performance? Evidence from Eastern Europe and Central Asia* (World Bank Policy Research, Working Paper 4705, 2008), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/6783/WPS4705.txt?sequence=2>.

lenge this leadership role.⁹⁷

- 2) The second and more pragmatic option (but more costly) is to find the right balance between the ascription and achievement-oriented ways of mediating an international deal by having two cross-cultural deal mediators.

One cross-cultural deal mediator should be selected on ascription-based criteria to co-lead the people involved in the cross-cultural deal mediation. The structure of the cross-cultural deal mediation should give the mediator a high, authoritative status.⁹⁸ The structure should also give him an image of power and prestige and he must appear to be the true leader.⁹⁹ It is important to remember that the cross-cultural deal mediator is acting as the co-leader to assist the parties to reach a deal. Therefore, the selection of the cross-cultural deal mediator must coordinate with to the cross-cultural leadership orientation of the parties.¹⁰⁰ American culture values leadership based on achievement-orientation¹⁰¹ and inference-based perception.¹⁰² However, cultures like China, Japan, Mexico, and India are more ascription-oriented and value leadership based on collectivism and high power-distance.¹⁰³ The second cross-cultural deal mediator should be selected on the basis of achievement-oriented criteria in order to lead the process content and formulate the interested-based and right-based opinions for the parties to consider as a way to reach an efficient and durable contract. His role will also be to act as an advisor to the cross-cultural deal mediator on the basis of ascriptive criteria to help him to co-lead all the parties efficiently and to assist him in fulfilling his mandate. The pros and cons of this method of selection for the cross-cultural deal mediator are as follows:

Pros: Co-leading is a more pragmatic solution that strikes the right balance between achievement and ascription-oriented values when selecting the cross-cultural deal mediators.

Cons: The cost of two cross-cultural deal mediators is much higher. Also, having two mediators might affect the process and cause it to be more time consuming. For instance, instead of one or two days,

97. Jun Yan & James G. Hunt, *A Cross-Cultural Perspective on Perceived Leadership Effectiveness*, 5 INT'L J. OF CROSS CULTURAL MGMT. 49, 51-52 (2005) (discussing a theoretical model to explain how societal/cultural settings may influence the leadership perception process of the followers and the way they perceived leadership effectiveness to be achieved. This article offers empirical data evidencing that Americans perceived leadership effectiveness on basis of inference-based perception (i.e. functional aspects of leadership and achievements of the leader) and ascription-oriented societies like China, Latin American, and Middle Easter societies perceived leadership effectiveness on basis of recognition-based perception (i.e. people emerge as group leaders by fitting the shared conceptions of followers). Therefore, culture influences leadership perception.).

98. *Id.*

99. *Id.*

100. *Id.*

101. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8 at 104.

102. Yan & Hunt, *supra* note 97 at 51-52.

103. *Id.* at 53-56.

the parties may need three days of cross-cultural deal mediation. However, as a practicing transactional lawyer, I will argue that if you think cross-cultural deal mediation is expensive or causes additional unnecessary transactional costs, wait to see the cost of failing to reach an agreement or signing a contract that leads to litigation or arbitration! A few thousand dollars extra spent on the formation of a multi-million dollar contract should be viewed as a marginal investment. Finally, this option may also be perceived as a compromise by Americans to accommodate the discriminatory practices of ascription-oriented cultures.

D. WHERE SHOULD THE MEDIATION TAKE PLACE?

Fourth, where should the cross-cultural mediation take place? It should be the cross-cultural mediator's responsibility to select a location in consultation with the parties. Ideally, a wise cross-cultural mediator will choose a neutral territory where the parties will arguably be more likely to work cooperatively. The mediators should also take the parties' budgets into consideration. Whichever location (usually a hotel conference room) is chosen, it should be large enough to accommodate all the parties and it should be fully equipped with a telephone, internet, computers, comfortable chairs, visual aids, videoconferencing, and food and refreshments. For example, as an alternative to the boardroom table, the cross-cultural deal mediator could arrange the tables so that the parties sit on the same side of the table. In "facing the problem" this way, they compete with the problem, not with the people.¹⁰⁴ The ideal city will also allow the parties to do social activities together after the cross-cultural deal mediation in evenings to solidify developing relationships.¹⁰⁵

E. WHEN SHOULD THE CROSS-CULTURAL MEDIATION HAPPEN?

Fifth, when should the cross-cultural mediation take place (timing) and how long should the cross-cultural deal mediation take place (duration)? The timing should be at the early stage of negotiations. The cross-cultural deal mediator should not intervene at the outset of negotiations and should let the parties get to know each other. However, the cross-cultural mediator should intervene in the early stage of the contract negotiation, more precisely, before the parties start to draft and negotiate the specific terms and conditions. The duration should be a minimum of one day, with the possibility of two, three, four, or even more days depending on the complexity of the contract to be negotiated and the behaviors of

104. ADLER, *supra* note 29, at 218 (discussing the physical arrangements for negotiating globally in an effective manner).

105. *Id.* at 225-26 (discussing that social activities are vital in many cultures for interpersonal relationship and trust building); see also ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 60 (2005) (discussing that reducing personal distance is vital in cross-cultural negotiation and mediation).

the parties. As discussed, more time may be required if there are two cross-cultural deal mediators.

F. WHO BEARS THE COST OF MEDIATION?

Sixth, who pays for the cross-cultural mediation session? The parties should equally pay the costs of the cross-cultural deal mediation services (i.e., cost for the cross-cultural deal mediators' services and travelling expenses), and each party should pay their own costs of participating in the cross-cultural deal mediation. A party with more bargaining power and financial means could offer to pay the other party's share of the cost for the cross-cultural deal mediator as a good faith gesture. As a transactional lawyer, I have often observed government agencies or large corporations paying for the cost of mediating a commercial dispute. Their decision to bear the cost of the mediation for the other party was not based on altruism, but was seen as investment to show good faith and to maintain a business relationship. There is also a strategic benefit in offering to pay the costs of mediation. If the dispute reaches a court or arbitral tribunal, such behavior could be viewed by the judge/arbitrator as evidence of good faith by the party with more bargaining power. Even though the contents of cross-cultural deal mediations are confidential, participation in mediations is typically not kept confidential. If it is usually evidence that a contract is unconscionable in American contract law, in civil law jurisdictions like China, bad faith (i.e., lack of fair dealing, inequality of bargaining power of the parties, and unfair standard agreements imposed during the negotiation phase) is taken into consideration by the Chinese courts in gap-filling.¹⁰⁶ Therefore, cross-cultural deal mediation may be used strategically as a shield against such claims.

In sum, it is important for the cross-cultural mediator to consult with the mediating parties in planning the mediation session. The mediator should select a location agreeable to both parties; prepare the location to be accommodating to both parties; determine the participants on the basis of their CDIs,¹⁰⁷ and structure the form and content of the cross-cultural deal mediation in consultation with the parties.

106. John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L. L. 329, 351 (2006) (discussing the gap-filling approach in Chinese contract law). If the unconscionability defense in American contract law is difficult to successfully plead, Chinese courts operate under the concept of "gap-filling." This means that the courts have great interpretative discretion and power to interpret the fairness of the contract on a case-by-case basis. This looks like a nightmare for many American attorneys.

107. Barkai, *A Perspective on Cross-cultural and Dispute Resolution*, *supra* note 74, at 1-2. As practitioner I have observed that it is important to ensure that the people responsible to the implementation (e.g. technicians, engineers or mid-level managers) of the deal/project to be integrated in the negotiating and drafting of the contract. Their feedback and contribution will ensure that the contract is realistic, efficient and durable.

G. THE CROSS-CULTURAL DEAL MEDIATOR'S ROLE: THE TASK OF
MEDIATING CULTURAL INFLUENCES ON THE NEGOTIATING AND
DRAFTING OF INTERNATIONAL BUSINESS TRANSACTIONS

I will offer a toolbox to help cross-cultural deal mediators compare, understand, and adapt to cross-cultural differences. Comparative management theorists have developed theoretical tools based on extensive empirical research¹⁰⁸ for cross-cultural deal mediators to perform their main task (i.e., dealing with cultural differences). There are unfortunately no specific tools available for the cross-cultural deal mediator to uncover the other layers.¹⁰⁹

The toolbox I have developed will help the cross-cultural deal mediator compare, understand, and adapt the cross-cultural differences of the parties and use different approaches from those in domestic U.S. mediations to leverage the cultural diversity of the parties as a competitive advantage. This toolbox is composed of four indispensable tools.

The first tool is Hall's comparative model with the notion of cultural context high and low cultural contexts.¹¹⁰ Following Hall's low context business communication means, the verbal or written (e.g., emails, letters, contracts, etc.) communications must be made direct and explicit. In a

108. See TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 252–63 (discussing the empirical data and database of 7-D model); see also HOFSTEDE ET AL., *supra* note 4, at 27–49 (discussing the empirical data and database of Hofstede's Five Cultural Dimensions).

109. I will argue that the *first layer is national culture* because the first job of a cross-cultural deal mediator is to, “cope with cultural clashes” and “prepare for possible cultural barriers” in the deal mediation process. See INTERNATIONAL NEGOTIATIONS: CROSS-CULTURAL COMMUNICATIONS SKILLS FOR INTERNATIONAL BUSINESS EXECUTIVES, *supra* note 20. The *second layer is organizational culture or corporate culture* (e.g. the organizational culture of the U.S. Department of Justice as a governmental organization is very different from the organizational culture of Google or LG). There are a lot of similarities between national cultures and organizational cultures because when people set up an organization they will typically borrow from models or ideals that are familiar to them. The organizational culture is therefore significantly influenced by the national culture. The *third layer is the legal culture* or system (e.g. civil law or common law or Islamic law) or the *professional culture* of the negotiators (e.g. lawyers, accountants or engineers, etc.). For instance, it is important to compare the American and Chinese professional legal cultures. Since contracts are legal instruments, the way a legal profession is structured will inevitably influence the negotiation process between foreign negotiators. The *fourth and last layer is the negotiator's personality*. The influence of the first three layers (national culture, organizational culture and legal and professional cultures) on the negotiation process is largely influenced by cultural differences between Americans and foreign cultures. Sometimes culture matters a lot, sometimes not at all! This is why the study of behavioral psychology can also help the cross-cultural deal mediator. As a result, a cross-cultural deal mediator must possess high emotional and social intelligence).

110. See generally EDWARD T. HALL, THE SILENT LANGUAGE (1959); EDWARD T. HALL, THE HIDDEN DIMENSION (1966); EDWARD T. HALL, BEYOND CULTURE (1976); EDWARD T. HALL, THE DANCE OF LIFE: THE OTHER DIMENSION OF TIME (1983); EDWARD T. HALL, HIDDEN DIFFERENCES: STUDIES IN INTERNATIONAL COMMUNICATION (1985); EDWARD T. HALL, HIDDEN DIFFERENCES: DOING BUSINESS WITH THE JAPANESE (1987); EDWARD T. HALL, UNDERSTANDING CULTURAL DIFFERENCES, GERMANS, FRENCH AND AMERICANS (1990).

low context culture like the United States, someone is considered a good communicator for his/her ability to get to the point, and be concise and precise in his communications. Low context communications are marked by informal communication (no need to say Dr., Sir, Mr.; "just call me Jack" attitude), "let's get it straight," "what's your point," or "let's get down to business" attitudes that can be interpreted as rude for high context communicators such as the Japanese, Chinese, Arab, or Latin American businesspeople (especially at the early stage of a business relationship). High context communication means: the verbal and written communications are more indirect, evasive, tactful, and even ambiguous. High context communicators are known to be diplomatic and put great importance on using flourishing language. In written communications, words are considered carefully and subject to deep reflection. For instance, my father, who is from a high context Haitian culture, can take up to two days to draft a letter as the president-founder of his scientific-based NGO in agriculture. I have also observed that during negotiations my father uses metaphors and stories when addressing letters to the President of the Republic of Haiti, ministers, or peasants, which are rarely straight on the point at issue. I asked him once why he uses such methods, and he said "My son, you talk too much. You're always like an open book. People don't need to know what you think exactly. You need to give them space to think." This led me to believe that high context communicators like my father are more skilled at diplomacy and power games in some ways due to cultural tendencies. The fourth law of the bestseller *48 Laws of Power*, by Robert Greene, is "Always Say Less than Necessary."¹¹¹ As a result, a great cross-cultural communicator and negotiator knows how to balance and manage low and high context communications.

The second tool is the comparative model of Hofstede's six Cultural Dimensions, as he recently added a sixth dimension. This cross-cultural management tool is based on extensive empirical research and is probably the most utilized tool in international business.¹¹² Hofstede offers a map of the world for each cultural dimension, which enables one to quickly see how similar or different countries or regions are on the basis of five cultural dimensions:

1. Power Distance (importance of hierarchy and ascription in a society);
2. Individualism (if the society is individualist or collectivist);

111. ROBERT GREENE, *THE 48 LAWS OF POWER* (2000) ("the more you say the more you appear just like everyone else. Deal in opaqueness, never let anyone really know the truth of what you are saying. The more you talk, the more information you give away and thus, the more your power decreases. This is because by talking, we reveal our intentions, biases, quirks and personality (basically, we reveal who we are). When this information reaches the ears of other people, it can be used to stop your plans, it can be used against you or it can be used to gain your favor.").

112. HOFSTEDÉ ET AL., *supra* note 4.

3. Masculinity (“A preference in society for achievement, heroism, assertiveness and material rewards for success. Society at large is more competitive. Its opposite, femininity, stands for a preference for cooperation, modesty, caring for the weak and quality of life. Society at large is more consensus-oriented”);¹¹³
4. Uncertainty Avoidance (UAI) (“The degree to which the members of a society feel uncomfortable with uncertainty and ambiguity. The fundamental issue here is how a society deals with the fact that the future can never be known: should we try to control the future or just let it happen? Countries exhibiting strong UAI maintain rigid codes of belief and behaviour and are intolerant of unorthodox behavior and ideas. Weak UAI societies maintain a more relaxed attitude in which practice counts more than principles”);¹¹⁴
5. Long-Term Orientation (It can be interpreted as dealing with society’s search for virtue. Societies with a short-term orientation are generally highly concerned with establishing the absolute truth. They are normative in their thinking. They exhibit great respect for traditions, a relatively small propensity to save for the future, and a focus on achieving quick results. In societies with a long-term orientation, people believe that truth depends very much on situation, context, and time. They show an ability to adapt traditions to changed conditions, a strong propensity to save and invest, thriftiness, and perseverance in achieving results);¹¹⁵

Hofstede recently added a sixth cultural dimension:

6. Indulgence versus Restraint (INR);

INR is a new dimension that was recently added to the traditional five dimensions model. “Indulgence stands for a society that allows relatively free gratification of basic and natural human drives related to enjoying life and having fun. Restraint stands for a society that suppresses gratification of needs and regulates it by means of strict social norms.”¹¹⁶

The third tool is the comparative model of Trompenaars Hampden-Turner’s seven cultural dimensions. This cross-cultural management tool complements Hofstede’s six cultural dimensions and is also based on extensive empirical research.¹¹⁷ The seven Cultural Dimensions are:

1. Universalism vs. particularism (What is more important, rules or relationships?)
2. Individualism vs. collectivism (communitarianism) (Do we function in a group or as individuals?)

113. *Dimensions*, THE HOFSTEDE CENTRE, <http://geert-hofstede.com/dimensions.html> (last visited May 6, 2014).

114. *Id.*

115. *Id.*

116. *Id.*

117. HOFSTEDE ET AL., *supra* note 4 at 5.

3. Neutral vs. emotional (Do we display our emotions?)
4. Specific vs. diffuse (How separate do we keep our private and working lives)
5. Achievement vs. ascription (Do we have to prove ourselves to receive status or is status given to us?)
6. Sequential vs. synchronic (Do we do one thing at a time or several things at once?)
7. Internal vs. external control (Do we control our environment or are we controlled by it?)

The fourth tool is the comparative model of Barkai's Cultural Dimension Interests. Barkai argues that effective cross-cultural negotiations and dispute resolution requires an understanding of Cultural Dimension Interests (CDIs).¹¹⁸ As a legal scholar, his theory reviews many of the cultural interests that impact negotiation and dispute resolution by: 1) specifically reviewing the cultural theories of Edward T. Hall, Geert Hofstede, Fons Trompenaars and Charles M. Hampden-Turner, and Richard D. Lewis; 2) considering country-specific anecdotal accounts of national negotiating behaviors; and 3) reviewing some specific beliefs, behaviors, and practices that impact national negotiation styles and approaches. The thirty-six Chinese strategies are reviewed and applied to negotiations. CDI focuses mainly on cross-cultural differences between American and Asian negotiation styles and behaviors.¹¹⁹

Finally, it is important that there are other very useful comparative models available to the cross-cultural deal mediator, but in my opinion, the theories mentioned are the main ones that should always be in each cross-cultural deal mediator's toolbox.¹²⁰

118. Barkai, *A Perspective on Cross-cultural and Dispute Resolution*, *supra* note 74, at 444.

119. *See generally id.*

120. *See* Laurent's cross-cultural theory of EXPERT v. PROBLEM SOLVER MANAGER. *See* André Laurent, *The Cultural Diversity In Western Conceptions Of Management*, 13 INT'L STUDIES OF MGMT. & ORG. 75, 86 (empirical study that leads to the development of the cross-cultural comparison model of the role of the manager/negotiator as an Expert v. Facilitator/Problem Solver. For instance, 77 percent of Spaniards and 78 percent Japanese will think that "it is important for managers/negotiators to have at hand precise answers to most questions their subordinates may raise about their work" and there be an expert, however 10 percent of Swedish and 18 percent of Americans disagree with this statement and think that a manager or negotiator should be a facilitator or problem solver). For a discussion of universal values as latent motivations and needs, see Schwartz's cross-cultural theory of Basic Human Values. *See* Shalom H. Schwartz, *Universals In The Content And Structure Of Values: Theory And Empirical Tests In 20 Countries* 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 5-12 (1992), available at <http://cite.seerx.ist.psu.edu/viewdoc/download?doi=10.1.1.220.3674&rep=rep1&type=pdf> (this theory based on empirical study identifies ten motivationally distinct value orientations that people in all cultures recognize, and it specifies the dynamics of conflict and congruence among these values:

1. Self-Direction: Independent thought and action; choosing, creating, exploring;
2. Stimulation: Excitement, novelty, and challenge in life;
3. Hedonism: Pleasure and sensuous gratification for oneself;

IV. WHAT ARE THE BENEFITS OF CROSS-CULTURAL DEAL MEDIATION?

It has taken more than three decades for American attorneys to accept the benefits of ADR and realize that there is more than one way (other than litigation) to resolve disputes.¹²¹ In the United States, virtually all international commercial disputes are solved by ADR methods (i.e., negotiation, mediation and arbitration). A survey of more than 530 corporations in the Fortune 1,000 category shows that 90 percent of the polled corporations viewed ADR as a critical cost-control technique, and more than half (54 percent) said cost pressures directly affected the decision to use ADR.¹²² Users of ADR said that ADR provided better outcomes than litigation (66 percent) and preserved confidentiality and good business relationships (59 percent).¹²³ If ADR is now universally accepted in international business and, “it is well accepted that mediators can help to settle disputes, it seem equally well accepted that there is little or no role for such mediators in helping the parties with commercial transactions.”¹²⁴ Therefore, just like ADR once was, deal mediation and cross-

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4. Achievement: Personal success through demonstrating competence according to social standards;
 5. Power: Social status and prestige, control or dominance over people and resources;
 6. Security: Safety, harmony, and stability of society, of relationships, and of self;
 7. Conformity: Restraint of actions, inclinations, and impulses likely to upset or harm others and violate social expectations or norms;
 8. Tradition: Respect, commitment, and acceptance of the customs and ideas that traditional culture or religion provide the self;
 9. Benevolence; and
 10. Preserving and enhancing the welfare of those with whom one is in frequent personal contact (the “in-group”).

See also Michael H. Hoppe, *Culture, Leadership, and Organizations: the GLOBE Study*, available at <http://www.inspireimagineinnovate.com/PDF/GLOBEsummary-by-Michael-H-Hoppe.pdf> (last visited May 6, 2014) (Culture, Leadership, and Organizations reports the findings of the first two phases of the ten-year Global Leadership and Organizational Behavior Effectiveness (GLOBE) research program. GLOBE is a long-term program designed to conceptualize, operationalize, test, and validate a cross-level integrated theory of the relationship between culture and societal, organizational, and leadership effectiveness. A team of 160 scholars worked together since 1994 to study societal culture, organizational culture, and attributes of effective leadership in sixty-two cultures).

121. Johnsen, *supra* note 52, at 195–96 (2011) (discussing the historical resistance to ADR in the U.S.). At the international level the emergence of ADR and arbitration can be easily explained by the New York Convention in 1980 was probably the main historical and legal factor to explain the development of ADR in international commercial disputes.
122. *See* Darryl Geddes, *U.S. Corporations Now Widely Use Alternative Dispute Resolution Over Litigation to Solve Disputes, National Survey Shows*, CORNELL CHRONICLE (May 21, 1997), <http://www.news.cornell.edu/stories/1997/05/survey-also-finds-lack-confidence-qualifications-arbitrators> (a joint initiative of the Institute on Conflict Resolution at Cornell’s School of Industrial and Labor Relations, the Foundation for the Prevention and Early Resolution of Conflict (PERC) and Price Waterhouse LLP, polled more than 530 corporations in the Fortune 1,000 category).

123. *Id.*

124. Peppet, *supra* note 1, at 288.

cultural deal mediation are new, cutting-edge concepts that will certainly have to overcome the conservatism of the American legal profession before being widely promoted and utilized in dispute resolution.¹²⁵

A. ECONOMIC, STRATEGIC BENEFITS OF CROSS-CULTURAL DEAL MEDIATION

One way to convince the American legal profession is to demonstrate the economic and strategic advantages of deal mediation and cross-cultural deal mediation.¹²⁶

1. *Discovering and Optimizing Gains from Trade*

Bargaining theory teaches us that in a transaction parties often fail to negotiate strategically in a value-creating manner, cooperative, or interests-based approach (win-win).¹²⁷ Many empirical studies consistently show that negotiators both seek and provide far less information about each other's interests and priorities than one might expect.¹²⁸ Each side makes exaggerated offers or demands to hide its true reservation price. Some cultures have the reputation of always starting with excessive offers or demands, or keep their reservation price secret.¹²⁹ Beyond cultural preference for high offers or demands, strategic negotiators are known to always start their negotiations with their Maximum Plausible Possibility (MPP), strengthen their BATNA, and weakening the other side's BATNA to capture greater gains.¹³⁰ Therefore, the cross-cultural deal mediator can mitigate strategic posturing and help negotiating parties to

125. *Id.* at 362–63 (discussing that the conservative attitude is primarily related to economic reasons called the “Agency Barrier.” The Agency Barrier means that in addition to the principals’ reluctance to use mediators, lawyers, bankers, brokers, and other agents that currently assist in transactions may resist mediator assistance. Transactional lawyers may be reluctant to allow a mediator into their negotiations, given that transactional lawyers often pride-and sell-themselves on their bargaining abilities. Deal mediators can also be viewed as reducing billing hours of the lawyers. Finally, a lawyer or other agent may fear that a client will turn exclusively to using a deal mediator, completely eliminating the agent from the transaction. The second problem explaining the conservative and negative attitude of American legal profession against deal mediation is the “Fear of Transaction.” Contracting parties may believe that a deal mediator can do little for them that they can do for themselves and will only increase the cost of the transaction).

126. *Id.* at 291–321 (discussing economic and strategic justification for deal mediation).

127. *Id.* at 291–296 (discussing the economic and strategic advantage of deal mediation is to help the parties discovering gains for trade).

128. *Id.* at 296.

129. *Id.* at 292–93.

130. ROY J. LIWICKI, BRUCE BARRY & DAVID M. SUNDEERS, *NEGOTIATION: READINGS, EXERCISES AND CASES* 98 (5th ed. 2007) (discussing the Secrets of Power Negotiating by Roger Dawson. Following Dawson power negotiating strategy and tactic a negotiator should always start by his Maximum Plausible Possibility (MPP)—which is the most you can ask for and still appear credible). *See also* ADLER, *supra* note 29, at 233 (discussing initial offers in international business negotiations. For instance, Chinese and Russians habitually use extreme initial offers and requests as their opening bargaining strategy. Also, research show that Americans negotiating domestically consistently reach higher and more satisfactory outcomes using extreme rather than moderate opening offers).

work in a more value-creating manner, cooperative, or interested-based approach (win-win).¹³¹ The cross-cultural mediator can do this by managing the transfer of information.¹³²

2. *Renegotiation*

Renegotiations mean the continuing struggle of life against form in international business transactions.¹³³ Negotiation costs time and money. Therefore, there are always high economic and transactional costs associated with negotiations. Experienced lawyers and executives know that the challenge of international business negotiations is not just “*Getting to Yes*,” but also staying there.¹³⁴ The renegotiation of business deals is a constant and common phenomenon of the international business environment.¹³⁵ For instance, for Americans, a trustworthy negotiator honors the contract (American businesspeople will commonly say “A deal is a deal, a contract is a contract.”). In contrast, for the Chinese, a trustworthy negotiator honors changing mutualities. A contract must be capable of adapting to a changing business relationship. For particularist cultures like in East Asia, South Asia, Africa, Middle East, Caribbean, or Latin America, the contract only marks the beginning of a business relationship.¹³⁶ Therefore, a cross-cultural deal mediator can be useful in three ways:

1. To balance the universalism (contract-orientation) of Americans versus the particularism (relationship-oriented or situational-oriented) of foreign cultures;¹³⁷
2. To manage the renegotiations before the closing of a deal between the parties by not letting all terms and conditions be entirely renegotiated.

131. See Peppet, *supra* note 1, at 293.

132. *Id.*

133. Jeswald W. Salacuse, *Renegotiating International Business Transactions: The Continuing Struggle of Life Against Form*, 35 INT’L LAW. 1507, 1507–41 (2001) (discussing renegotiations in international business transactions).

134. *Id.* at 1507.

135. *Id.* at 1508.

136. *Id.*

137. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 29–50 (theorizing and offering empirical comparison between Universalist (rules-oriented) and Particularist (relationship-oriented) business people). American society is based on Universalism. This means for Americans justice and fairness is embedded in the contract: a contract ensures that all parties are treated in a transparent, accountable, and consistent manner (universal justice is based on the contract—a “deal is a deal”). If a contract is considered to be unfair, an American party will readily dispute the contract via negotiation/mediation/litigation/arbitration. On the other hand, justice and fairness does not always reside in the contract for Particularist cultures like the Chinese, Arabs, or Latin American business people. They will instead often seek fairness by treating all cases on their special merits on basis of relationships (natural justice if preferred over the contract—therefore a deal is subject to be revisited on basis of the evolution of the relationship and situations). Particularists are relationship-oriented and situational-oriented, but Americans are Universalists or right-based and contract-oriented. Americans prefer to avoid or minimize renegotiations.

tiated (in other words not letting the deal breakdown at the last minute) and;

3. as the cross-cultural dispute mediator and help the parties resolve the dispute if they experience a legal dispute in their renegotiations after a contract with problematic terms and conditions is signed or negotiations of amendments to an original agreement. The mediator will have the advantage of having contributed to the building of the relationship between the parties, will be familiar with their behaviors, and will possess a “corporate memory” of the deal bargained (in other words, the mediator will know the bargaining history behind each clause of the contract). Therefore, his involvement will help preserve the business relationship established by the parties by assisting with legal disputes over contractual renegotiations and amendments.¹³⁸

The cross-cultural deal mediator can later become the cross-cultural mediator when the contract is signed and the parties can avoid having a new mediator starting from zero. All of the parties will save time and money and can expect better results from mediation.

B. BEHAVIORAL BENEFITS OF DEAL CROSS-CULTURAL MEDIATION

The theoretical and empirical study of behaviors in relation to business communication and negotiation is usually associated with the academic discipline of organizational behavior.¹³⁹ Organizational behavior “explores how mediators can help contracting parties to manage psychological, emotional, and relational issues that may impede reaching agreement.”¹⁴⁰ Humans are not programmed robots and emotions always play a crucial role in any negotiation or conflict resolution.¹⁴¹ They can have a positive impact if well-managed or a destructive impact if mismanaged or misinterpreted.¹⁴² Understanding the behavioral and emotional process of a negotiation is always a complex task. Cultural

138. See Peppet, *supra* note 1.

139. Ewald, *supra* note 85. Also, Organizational Behavior can be simply defined like the study of individuals and their behavior within the context of the organization in a workplace setting. It is an interdisciplinary field that includes sociology, psychology, communication, and management. Keywords related to Organizational Behavior are Organizational Change, Organizational Development, Corporate Culture, Corporate Communication, Group Behavior, and Human Decision Making. See *Organizational Behavior*, CORNELL UNIVERSITY, available at <http://www.ilr.cornell.edu/library/research/subjectguides/organizationalbehavior.html> (last visited May 6, 2014).

140. See Peppet, *supra* note 1, at 325.

141. See FISHER & SHAPIRO, *supra* note 105, at 3 (explaining emotions in negotiation and dispute resolution are powerful, always present, and hard to handle. We cannot stop having emotions any more than we can stop having thoughts. The challenge is learning to simulate helpful emotions in those with whom we negotiate and in ourselves).

142. *Id.* at 5 (discussing that emotions can be obstacles to negotiation and dispute resolution).

differences magnify this complex task.¹⁴³ The behavioral benefits of cross-cultural deal mediation¹⁴⁴ are obvious because negotiators are humans with feelings, intuitions, fears, and emotion; they are not robots. Therefore, the cross-cultural mediator helps the parties to overcome the following behavioral barriers to effective cross-cultural communication, negotiation and conflict resolution:

Adverse Selection: Adverse selection is a term often used in economics, risk management and bargaining theory. In bargaining theory, it refers to a negotiation process in which “bad” results occur when the parties have asymmetric information (i.e., access to different information).¹⁴⁵ In bargaining theory and contract theory, information asymmetry means one party has more or better information than the other. This creates an imbalance of bargaining power and leads to inefficient and nondurable contracts. As a result, contractual obligations may not be performed and, once signed, contracts may be breached often on the basis of the theory of efficient breach.

Fairness: American negotiators are culturally conditioned to often care more about fairness and are sometimes willing to “kill a deal” over it.¹⁴⁶ However, assessments of fairness are often biased and self-serving.¹⁴⁷ The cross-cultural deal mediator may be able to offer a neutral assessment or fair proposal that the parties may be more willing to adopt.¹⁴⁸

Reactive Devaluation: This means the tendency of one party to perceive the offers and demands of the other side as negative or suspicious by saying, for example, “Something must be wrong.” Sometimes it might

143. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 70–82 (theorizing and offering empirical comparison between Neutral vs. Affective Cultures). In Neutral Cultures like United States, emotions negotiators try hard to suppress and not reveal what they are thinking or feeling—they try to keep a “poker face.” Emotional expressiveness is interpreted as a lack of control over your feelings and inconsistent with high status. In contrast, in Affective Cultures like in Latin America or Middle East, emotions play an important role in communication because transparency and expressiveness are expected in all communications.

144. See Peppet, *supra* note 1, at 325–39 (discussing behavioral justifications for deal mediation).

145. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 240 (1993) (discussing unreciprocated approaches to creating value leave their maker vulnerable to claiming tactics. On the other hand, focusing on the distributive aspects of bargaining can often lead to unnecessary deadlocks and, more fundamentally, a failure to discover options or alternatives that make both sides better off. A simple example can expose the dilemma. The first involves what game theorists call “information asymmetry.” This simply means each side to a negotiation characteristically knows some relevant facts that the other side does not know).

146. The English language of negotiation is based on fairness and reasonableness: as taught at the Harvard Negotiation Project at Harvard Law School and in principled negotiation. “English pattern of usage—relying heavily on fairness and reasonableness—[influenced] all cultures engaged in international commerce and legal relations.” Therefore, American negotiators are more likely to demand that the foreign negotiator think in the idiom of reasonableness like them. FLETCHER & SHEPPARD, *supra* note 71, at 65.

147. Peppet, *supra* note 1, at 326.

148. *Id.* at 329.

be wise to doubt the other side's offers and demands because the other side may use false concessions (shadow warriors) or overstate their bottom line (reservation point) or play dirty tricks.¹⁴⁹ The cross-cultural deal mediator may be able to help offer a more neutral assessment.

Framing and Endowment: Empirical studies in the field of bargaining theory show that negotiators tend to overvalue items they own, as compared to items they do not. In other words, negotiators demand more to give up something they already own than they would offer to purchase that same item. Therefore, a neutral cross-cultural deal mediator is less susceptible to the framing and endowment effect in the bargaining process than a partisan lawyer acting on behalf of his client.¹⁵⁰ The price is not the only issue; the proposed legal terms and conditions to be inserted in the contract are also often subject to the framing and endowment effect.¹⁵¹ This is especially the case when the parties are accustomed to trying to impose their standard agreement (boilerplate template) on the other side. Therefore, a cross-cultural deal mediator can help the parties to work more collaboratively to build a mutually satisfactory contract.¹⁵²

Attributions and Emotions: Negotiators make explanatory attributions (inventing stories about others or circumstances) to understand the negotiation process and seek reasons for offers, demands and behaviors of the other side. For instance, a negotiator may explain his/her poor performance and outcome by focusing on the other side's intentional actions (e.g., "they tricked me") or circumstances (e.g., there wasn't enough time to negotiate" or "they were too rich, too powerful" or "their culture is weird and incompatible with ours").¹⁵³ Sometimes attributions about others are correct, but often in cross-cultural negotiations they are inaccurate and biased. Perceptions and interpretations are culturally determined and can lead to cross-cultural misperceptions and misinterpretations.¹⁵⁴ International business negotiators can easily fall into the trap of cross-cultural miscategorization based on cultural stereotyping (i.e., using his own national culture values to make sense of cross-cultural situations or use descriptive cultural stereotypes of other cultures from his own culture (e.g., Americans think that Chinese are Arabs think that Americans are)).¹⁵⁵ Fisher and Shapiro argue that dealing with emotions should be one of the central focuses of a negotiator or mediator.¹⁵⁶ Emotions can be obstacles or assets to the negotiation process depending on the

149. Dirty tricks in negotiation may be described as illegal and unethical strategies such deliberate deception (misrepresentation about facts or phony facts), or ethically questionable strategies and tactics such misrepresentation of authority, the Good-Cop and Bad-Cop strategy, imposing calculated delays, silence or refusal to negotiate ("take-it-or-leave-it agreement"), escalating demands, threats, etc.

150. Peppet, *supra* note 1, at 333.

151. *Id.*

152. *Id.*

153. *Id.* at 334.

154. ADLER, *supra* note 29, at 77-78 (discussing problems in cross-cultural communications).

155. *Id.*

156. FISHER & SHAPIRO, *supra* note 105.

way they are managed.¹⁵⁷ Fisher and Shapiro identify five core concerns that are important to almost every person; in virtually every negotiation: appreciation, affiliation, autonomy, status, and role.¹⁵⁸

However, each emotion may have a different degree of importance in a specific culture. For instance, appreciation and affiliation will be more important for collectivist cultures found in Argentina, China, or Japan.¹⁵⁹ Autonomy will be more important for individualistic cultures like that of Canada or the United States.¹⁶⁰ Status will be fundamental for high power distance and ascription-oriented cultures such as those of China, Japan, or Russia.¹⁶¹ The role of hierarchy is often crucial in high power distance and high uncertainty cultures such as France or Japan.¹⁶² Furthermore, some cultures are affective (expressing emotions) and some cultures are neutral (repressing emotions) in communications, negotiations, and dispute resolution.¹⁶³ For Americans, being rational, fact-oriented, objective, and reasonable is associated with legitimacy.¹⁶⁴ For Argentineans, Mexicans, or Haitians, expressing strong emotions is associated with conviction and legitimacy.¹⁶⁵ Therefore, a cross-cultural deal mediator can help the parties interpret their own emotions more accurately (i.e., help them to be more emotionally and culturally intelligent by improving emotional self-awareness and cultural awareness) and to interpret the emotions of the other side more accurately. Research has shown that angered negotiators tend to pay less attention to each other's interests, and find fewer mutually beneficial solutions than those who are not angry.¹⁶⁶ Therefore, the overall job of a cross-cultural deal mediator is to create positive emotions and leverage an emotional climate for the parties to work cooperatively. Overall, this means a cross-cultural deal mediator should be someone with high cultural intelligence (C.I.) and high emotional intelligence (E.I.) because a recent study conducted at the multinational Johnson & Johnson Ltd. demonstrated that E.I. competencies can be identified throughout the world, indicating that these abilities

157. *Id.* at 5–6.

158. *Id.* at 17 (explaining five core emotional concerns in negotiation and dispute resolution).

159. HOFSTEDE ET AL., *supra* note 4, at 89–134 (offering an empirical classification and theoretical comparison between Individualist and Collectivist cultures).

160. *Id.*

161. *Id.* at 53–88 (offering an empirical classification and theoretical comparison between Low Power distance cultures like the American equalitarian society and High Power Distance society like China, Japan, and Middle Eastern societies).

162. *Id.* at 187–234 (offering an empirical classification and theoretical comparison between low uncertainty avoidance culture like the United States and high uncertainty avoidance culture like France or Japan).

163. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 70–82 (offering an empirical classification and theoretical comparison between Neutral and Affective Cultures). *See also* John Wade, *Negotiating With Difficult People*, 2 FAULKER L. REV. 221, 228 (2011) (discussing cultural differences that affect conflict resolution such as expressing emotions).

164. *Id.*

165. *Id.*

166. Peppet, *supra* note 1, at 335.

always matter for businesspeople and can be assessed anywhere a company operates.¹⁶⁷ This research leads to the conclusion that E.I. abilities transcend cross-cultural differences, and an emotionally intelligent negotiator or mediator is more likely to be efficient in all negotiations and mediations.¹⁶⁸

Decision Traps (A.K.A. cognitive heuristics): A decision trap means to oversimplify complex decision-making.¹⁶⁹ Negotiation is not just about communication, it is also about leadership and decision-making. To be a truly effective negotiator a person should possess both great communication and leadership (decision-making) skills and competencies. Decision-making in negotiation and mediation is a complex task in U.S. domestic business transactions, subject to many studies in the field of bargaining theory.¹⁷⁰ However, most bargaining and organizational theories in U.S. scholarship are not aimed to explain or help to improve decision-making in negotiation in the context of cross-cultural business negotiations.¹⁷¹ Despite being a more global world, the majority of bargaining and organizational theories are “made in the U.S.A.” and therefore shaped by the political, economic, legal, and cultural contexts of the United States.¹⁷² Cross-cultural decision-making is even more complex because the stakes are usually higher and cross-cultural differences often misguide American negotiators to base their decisions primarily on their own experience at home and within the national culture.¹⁷³ Cross-cultural misinterpretations and misperceptions cause cross-cultural decision-making to be more complex and subject to more “shortcuts” and “traps.” The most frequent decision-making shortcuts and traps for cross-cultural negotiators are as follows:¹⁷⁴

- I. Anchoring (over-relying on first thoughts);
- II. Entrapment (protecting earlier choices);
- III. Fixed-pie beliefs such as “I win, you should lose,” “You win, I lose,” or, the most popular belief, “Negotiation is always about losing some and getting some” (negotiators refusing to create-value for the deal and refusing to perceive the negotiation process as finding mutually-beneficial solutions. Such a belief leads parties to ignore others’ interests and perceptions and the fact that negotiation is not always about “losing

167. DANIEL GOLEMAN ET AL., *supra* note 86, at 37.

168. Wade, *supra* note 163, at 244.

169. *Id.*

170. See, e.g., Peppet, *supra* note 1, at 294 (discussing bargaining theory in relation to dispute resolution and mediation); Avinash Dixit & Barry Nalebuff, *Making Strategies Credible*, in STRATEGIES AND CHOICE 161 (Richard J. Zeckhauser ed., 1991) (discussing mediation as a coordination mechanism); Robert H. Gertner & Geoffrey P. Miller, *Settlement Escrows*, 24 J. LEGAL STUD. 87, 120–21 (1995) (exploring how a mediator may serve as an informational escrow to facilitate settlement and comparing mediation to settlement escrows).

171. ADLER, *supra* note 29, at 164.

172. *Id.*

173. *Id.*

174. Wade, *supra* note 163, at 244 (listing and explaining the more frequent decision-making shortcuts and traps in negotiation and dispute resolution).

- some and getting some,” but rather finding workable mutually-beneficial solutions.);
- IV. Status quo;
 - V. Confirming evidence (seeing what you want to see);
 - VI. Framing (triggering premature answers with wrong questions);
 - VII. Relying on easily available information (e.g., finding some legal information on a “Wikipedia” without confirming the validity);
 - VIII. Winner’s curse (“Perhaps we could have done better?” when you did excellent);
 - IX. Loser’s curse (“We did what we could, this is not great but satisfactory”—when in reality you did very poor);
 - X. Dreamer’s curse-unrealistic expectations (“We will make it,” when common sense, probabilities, and facts all say otherwise);
 - XI. Over-confidence or optimistic overconfidence trap (negotiator is too sure of his/her knowledge and abilities);
 - XII. Based-rate trap (relying on exceptions and the law of small numbers);
 - XIII. Self-serving bias (environment versus personality);
 - XIV. Prisoner’s dilemma (The prisoner’s dilemma emerged from the Game Theory discipline studied in Bargaining theory. Empirical studies in Game Theory show that negotiators might not negotiate on an interests-based (mutually win-win) approach, even if it appears that it is in their best interest to do so); and
 - XV. Agency problems (The role of agents such as lawyers, bankers, brokers, and other agents are all subject to conflict of interests; therefore, a cross-cultural deal mediator can help to objectify the bargaining and deal-making process. The cross-cultural deal mediator can also mitigate the risk of conflicts of interests occurring in the transactions by holding agents accountable for relationships which appear to pose conflicts of interest(s)).

In sum, in face of decision traps the overall job of a cross-cultural deal mediator is to mitigate the behavioral barriers to effective communication, negotiation, and decision-making to allow the parties to negotiate in a rational, objective, and mutually-beneficial manner. The specific tasks of the cross-cultural deal mediator are as follows: first, to help the parties overcome obstacles to generating options and solutions (facilitating the cross-cultural bargaining and dispute resolution process for the contract formation (pre-contractual phase) in a more focused interest-based and right-based manner); second, to help the parties improve cross-cultural understanding in general by improving cross-cultural communication, negotiation, dispute resolution, and leadership (decision-making) in the bargaining process; and third, to mediate emotionally charged negotiations

to insure that the deal is closed in a reasonable amount of time.¹⁷⁵

Managing Intra-group Conflicts: Cross-cultural deal mediators can help with the management of intragroup conflicts in a negotiation team by effectively channeling the energies, expertise, perceptions, and resources of the group leader and members toward the formulation and attainment of mutually satisfactory outcomes.

Managing Inter-group Cross-Cultural Conflicts: One of the most basic forms of categorization is between “us” and “them.” Collectivist cultures in China and Japan have stronger senses of categorization.¹⁷⁶ Cultural values influence the management of conflicts. *Getting to Yes* and the interests-based approach to negotiation might be the most popular theory in U.S. business and law schools, but still negotiations tend to be conducted in a more power-based and rights-based approach.¹⁷⁷ American negotiators may think that they are negotiating in an interests-based manner when in fact they are not: “[e]ven well-intentioned negotiators often make one or more of three mistakes: failing to negotiate when they should, negotiating when they should not, or negotiating when they should but picking an inappropriate strategy that might damage the business relationship.”¹⁷⁸ Therefore, cultural values and cross-cultural misinterpretations and misperceptions often intensify conflicts between groups (negotiating teams) from different cultures.

Dealing with Cross-cultural Ethical Problems: The topic of deception seems important for management and negotiation around the world; however, there is very little evidence concerning cultural differences and tendencies to deceive.¹⁷⁹ Cross-cultural misperceptions and misinterpretations lead to many cross-cultural ethical issues in negotiation. For instance, the practice of gift-giving is something common and expected in most East-Asian or Middle Eastern business cultures.¹⁸⁰ Such a practice

175. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 143–44 (offering empirical justifications that the American “Sequential” culture prefers that the ideal corporate time orientation for anything (including negotiation) is the straight line and the most direct, efficient and rapid route to your objectives). *See also* Peppet, *supra* note 1, at 338 (citing Alan K. Wells, *Acquisition Intermediaries: Purveyors of Opportunity*, in *DIRECTORY OF M&A INTERMEDIARIES* 13, 14 (2001) (“Intermediaries (mediators) will often . . . mediate emotionally charged negotiations to insure that the deal is closed in a reasonable amount of time.”)).

176. HOFSTEDE ET AL., *supra* note 4, at 89–134 (offering an empirical classification and theoretical comparison between Individualist and Collectivist cultures).

177. *Id.* at 155 (offering an empirical classification of the American culture as masculine and discussing that in masculine societies business people and lawyers (especially men) should be assertive, ambitious and tough.)

178. ROY J. LIWICKI, BRUCE BARRY & DAVID M. SAUNDERS, *ESSENTIALS OF NEGOTIATION* 58 (4th ed. 2007) (discussing strategy and tactics of integrative negotiation (win-win) or principled negotiation and what makes integrative negotiation different and difficult).

179. Harry C. Triandis et al., *Culture and Deception in Business Negotiations: A Multilevel Analysis*, 1 *INT’L J. CROSS CULTURAL MGMT.* 73, 75 (2001).

180. In the United States gift exchange during negotiations is not really culturally and legally acceptable, more likely to happen after a contract is signed. Gift exchange during the negotiation process may be perceived as bribery or the exercise of undue influence or bribery (depending the monetary value of the gift) under the U.S.

can lead to legal complications and liabilities for Americans because of the U.S. Foreign Corrupt Practices Act.¹⁸¹ Furthermore, studies show that people are likely to lie to help save face in important, close relationships.¹⁸² For instance, given the importance of building and maintaining relationships and saving face in Chinese culture, it is expected that the propensity to lie may be greater and more adaptive for Chinese negotiators and lawyers.¹⁸³ Also, the socio-economic and corruption level of a country may also be taken in consideration as indirect evidence.¹⁸⁴ Therefore, a cross-cultural deal mediator will also be able to explain the cultural and legal aspects of ethics in negotiations to the parties to better ensure that the negotiation adheres to the highest standards of ethics.

Managing the Fear of Losing Face: Losing face happens in negotiations when the more diffuse-oriented people perceive something as private being disclosed publically at the negotiation's table.¹⁸⁵ For example, specific cultures, like the American culture, accept the sayings: "Do not take it personally," "This is just business," or "This is the game" and these sayings are used frequently in negotiations.¹⁸⁶ American negotiators and lawyers are known to be "direct, to the point, purposeful."¹⁸⁷ In negotiations with more relationship-oriented and diffuse-oriented people, these approaches can be perceived as an insult.¹⁸⁸ In addition, as mentioned previously, researchers show that people are likely to lie to help save face in important, close relationships.¹⁸⁹ Therefore, the role of cross-cultural deal mediator can also be to help the parties to save face. Without saving face, the prospective of reaching agreements will simply fail. To make a party lose face is often a deal-breaker in international business transactions. Therefore, one of the core responsibilities of a cross-cultural deal mediator is to help American negotiators and lawyers from more specific cultures to negotiate by preserving face and maintaining relationships.

Conclusion on Behavioral Benefits of Cross-Cultural Deal Mediation:

In summary, cross-cultural deal mediation provides the need for cross-cultural negotiation coaching, the need for process management, and

Foreign Corruption Act. Foreign Corrupt Practices Act, 15 U.S.C. § 78 (1977). Gift exchange is a culturally and legally accepted practice in China. Moreover, gift exchange is expected as part of the natural formation of a contractual relationship. Chinese view gift-giving as an investment in "social capital." Yunxia Zhu, Pieter Nel & Ravi Bhat, *A Cross Cultural Study of Communication Strategies for Building Relationships*, 6 INT'L J. CROSS CULTURAL MGMT. 319, 321 (2006) (discussing the concept of social capital as an investment in social relations with expected returns in the marketplace).

181. Foreign Corrupt Practices Act, 15 U.S.C. § 78 (1977).

182. Harry C. Triandis et al., *supra* note 179, at 75.

183. *Id.*

184. *Id.* at 75 (discussing how socio-economic conditions such as social poverty cause people to compromise ethical values and act desperately in the negotiation process or in business in general).

185. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 88

186. *Id.*

187. *Id.* at 100-03.

188. *Id.* at 88.

189. Harry C. Triandis et al., *supra* note 179, at 75.

helps to build and maintain relationships.¹⁹⁰ The mediator also manages conflicts during the bargaining process (in joint sessions or caucusing mediation sessions) and offers a platform for apology and forgiveness to build and maintain a good relationship between the parties.¹⁹¹

V. WHAT ARE THE POTENTIAL PROBLEMS WITH CROSS-CULTURAL DEAL MEDIATION

The main three problems are as follows:

1. American business and legal culture

As mentioned previously, the first obstacle of cross-cultural deal mediation will be cultural: the conservatism of the American business and legal profession,¹⁹² the emphasis on individualism, and masculine orientation of their business culture.¹⁹³ In addition, culturally—unlike Latin Americans, Arabs, or East Asians—Americans prefer fast-paced negotiations.¹⁹⁴ Therefore, cross-cultural deal mediation may be viewed as an unnecessary costly and time-consuming additional step.

2. Mediator: mediators are not omnipotent, neither are they perfects

The second obstacle is related to the mediators itself. As explained by Scott R. Peppet, deal mediation can be affected first by “[t]he problem of ‘gaming the mediator’” and “[t]he problem of self-interested transactional mediators,”¹⁹⁵ and second, by the integrity of the mediator and potential conflict of interests. First, what does “the problem of gaming

190. David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 *NEGOTIATION J.* 263, 286 (2011) (discussing the literature of mediation is replete with cases in which obtaining an apology satisfied all or nearly all of a party’s objectives in the case and thus paved the way to resolution. Mediation creates a unique opportunity for apologies because of the confidentiality of the process. An apology presented in a joint mediation session, spontaneously and unrehearsed, can dramatically shift the negotiation in the direction of settlement).

191. *Id.* at 302 (discussing the advantage of caucusing versus joint-sessions in relationship-building or restoring process in mediation. If the mediator has developed a rapport with each side, these caucus conversations can be conducted in a non-adversarial manner, with the mediator trying to look at the strengths and weaknesses of each side’s case from the vantage point of the party with whom the mediator is meeting and trying to develop a trusting relationship. Such conversations can also explore nonmonetary interests and integrative, “expand the pie” solutions—perhaps exploring options that would not be shared in a joint session. The fundamental point, however, is that the parties and their counsel generally prefer to engage in both reality testing and the exploration of broader interests in private sessions in which they can be more candid with the mediator, and the mediator can be more candid with them).

192. See Peppet, *supra* note 1, at 293.

193. See HOFSTEDE, ET AL., *supra* note 4; Salacuse, *supra* note 6; O’Neil, *supra* note 30; Strum, *supra* note 31; Triandis et al., *supra* note 179.

194. TROMPENAARS & HAMPDEN-TURNER, *supra* note 8, at 143–44 (offering an empirical classification and theoretical comparison between Sequential culture like the United States where time is money (i.e. sizeable and measurable) and Synchronic cultures like in African or Latin America where time is subordinate to relationship-building).

195. Peppet, *supra* note 1, at 321–23 (discussing the problem of “gaming the mediator”).

the mediator” mean and how can you mitigate this problem? Following Peppet, “[t]he first problem is simple: just as parties try to manipulate each other, they will try to manipulate a mediator for their own advantage, thereby eliminating or greatly reducing the mediator’s ability to help parties overcome information asymmetries or adverse selection.”¹⁹⁶ In other words, mediators do not possess special powers and cannot read the minds of the parties. They are not omnipotent; they cannot command the “full disclosure or expect that parties will drop strategic ambitions merely because a mediator is polite or friendly.”¹⁹⁷ There is no miracle remedy against manipulation of the parties; again, mediators are not omnipotent superheroes. However, they should be sufficiently experienced to see through manipulation.¹⁹⁸ A simple strategy to overcome manipulation for a cross-cultural deal mediator should be to take notes of all of the statements and promises that the parties made during the negotiation, and draft a detailed Representations and Warranties clause.¹⁹⁹ Such a clause will contain all the representations and warranties made during the negotiation. The cross-cultural deal mediator will also include the representations and warranties that were omitted and the representations and warranties that he thinks that should have been discussed. This strategy will help to hold the parties accountable and transparent during the contract negotiation process. As Peppet states, “a mediator does not need *perfect* information to add value. Even if a mediator learns only a fraction of the truth, the mediator may be able to prevent unnecessary deadlock, or help the parties to find value-creating terms”²⁰⁰ Second, deal mediation can be affected by the integrity of the mediator and potential conflict of interests. Following Peppet, “the problem of self-interested transactional mediators” means “[j]ust as mediators are not omnipotent, neither are they perfect;” a mediator may act on her own interests rather than the parties.²⁰¹ A cross-cultural deal mediator may be driven:

196. *Id.* at 321

197. *Id.*

198. See also John Barkai, *Teaching Negotiation and ADR: The Savvy Samurai Meets The Devil*, 75 NEB. L. REV. 704, 704–43 (1996) (discussing negotiation is not just a lawyering skill. Negotiation is a life skill. Negotiation and conflict resolution often have elements of battle. The author proposes the negotiator or mediator should be ready to face any situations, including perilous ones like the savvy Samurai. For instance, they need to protect against weapons of war or simply the abuse of stinging words. Like the Samurai negotiator and mediator need to be able to employ all their weapons. A Samurai’s mediator is both skilled at the art of negotiating and convincing but also at the art of knowing—i.e. questioning and active listening.)

199. Peppet, *supra* note 1, at 285 (discussing that business lawyer can use representations, warranties, and other contractual devices to bring the real world’s imperfect market closer to the idealized world of efficient markets). The deal mediator can do the same thing by proposing certain representations or warranties.

200. *Id.* at 322.

201. Peppet, *supra* note 1, at 323.

- To close deals to build a reputation based on his success at closing deals (businesspeople and lawyers will search for a deal mediator that has a history of helping the parties closing a deal); and
- To close deals to get a percentage of the transaction if the deal is closed (flat fee based on success of the transaction instead of billing per hour).

However, we all know not all deals should be closed.²⁰² Businesspeople and lawyers should look at a cross-cultural deal mediator not for his ability to close international deals, but his ability to build efficient and durable contracts and business relationships. If a mediator or arbitrator wishes to preserve his/her reputation, he must strive to the highest standards of competency: impartiality. Paying the cross-cultural deal mediator on the basis of the success of the transaction may affect his impartiality, neutrality, and independence.²⁰³ The potential for conflicts of interests will be greater.²⁰⁴ Therefore, flat fees should be avoided and the cross-cultural mediator should be billed for his services on a per-hour basis (with a cap, if the parties prefer).

3. Cost of Cross-cultural Deal Mediation: may be viewed as an unnecessary additional to the transaction

Most importantly, the last problem is the cost of cross-cultural deal mediation. In the business world, “money talks” and cross-cultural deal mediation will be viewed as an additional and unnecessary cost to the transaction. Businesspeople, especially at the international level, often view business lawyers as an annoying transactional costs or a necessary evil:

Business lawyers are seen at best as a transaction cost, part of a system of wealth redistribution from clients to lawyers; legal fees represent a tax on business transactions to provide an income maintenance program for lawyers. At worst, lawyers are seen as deal killers whose continual raising of obstacles, without commensurate effort at finding solutions, ultimately causes transactions to collapse under their own weight.²⁰⁵

This analysis leads us to two questions. First, why will international businesspeople want to have more lawyers involved in the deal-making process? The answer is simple: a cross-cultural deal mediator is not acting as a lawyer, but first and foremost as a mediator. Almost all relationship-oriented business cultures such as China and Japan have a positive

202. *Id.* at 323. See also Ron S. Fortgang et al., *Negotiating The Spirit Of The Deal*, HARVARD BUS. REV., Feb. 1, 2003, at 66 (discussing the problem of intermediaries seeking to push a deal through despite obvious indicators that the deal should not close).

203. Peppet, *supra* note 1, at 357–58.

204. *Id.*

205. Fleischer, *supra* note 3, at 487 (quoting Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 241–42 (1984)).

opinion of mediators.²⁰⁶ Secondly, why will the lawyers of businesspeople let a deal mediator intervene if they know that they are already viewed as too expensive? In other words, the deal mediator may present a serious threat to the services of the lawyers, after all a deal mediator's job is to facilitate the negotiations; this means lower billing possibilities for the lawyers! Wise businesspeople are usually smart enough to see when their lawyers do not put the clients' best interests first. In other words, having a business lawyer thinking of your best long-term interests is fundamental. I once asked Jay C. Kellerman, an internationally respected senior partner leading the global mining group at a top Canadian firm Stikeman Elliott LLP in Toronto,²⁰⁷ what his secret to being successful was. He responded: "as a business lawyer you only need a few clients, I know my clients very well, they are my friends, I know their families, and most importantly they trust me." Trust is everything in our legal profession. Therefore, I think wise business lawyers thinking in terms of long-term relationship with their clients should see cross-cultural deal mediation as a way to make their clients happy.

VI. CONCLUSION

In conclusion, skeptical readers may say that my overall *argument* and analysis in favor of cross-cultural deal mediation in international business transactions may present symptoms of "optimistic overconfidence" as studied in this article.²⁰⁸ I could not agree more because as a cynical lawyer, I often paraphrase the quote of the famous Hollywood actor, Tom Hanks: "I understand the concept of optimism. But I think with me what you get is a lack of cynicism." But in the face of globalization, my idea for the emergence of cross-cultural deal mediation as a new ADR method for international business transactions has not emerged from optimism. Instead, my idea emerged from skepticism and cynicism towards the traditional way of drafting and negotiating international business contracts considering the high rate of failure for the formation of efficient and durable cross-cultural business contracts.²⁰⁹ Like Voltaire once said, "optimism is the madness of insisting that all is well when we are miserable."

206. ZWEIGERT & KÖTZ, *supra* note 45, at 302.

207. See Jay C. Kellerman, STIKEMAN ELLIOTT, <http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/Profile.htm?ProfileID=16002> (last visited May 6, 2014) (Senior Partner and Head of the Global Mining Group in Toronto).

208. Peppet, *supra* note 1, at 361–62 (discussing the barrier to entry to deal mediation called "Optimistic Overconfidence").

209. See Bing, Gitelson & Laroche, *supra* note 12; Schweiger & Goulet, *supra* note 13.

