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I. INTRODUCTION

The United States and China are business competitors—and global partners. These superpowers represent the two largest economies in the world, with the United States first and China second. Chinese companies dominate global exports, and a number are starting to purchase significant foreign assets.[1] Increased Sino-American trade also increases economic interdependency. During the recent economic downturn, China was deeply affected by the downturn of the American economy, the most critical economic depression since the Great Depression. Arguably, this economic interdependency increases the need to understand political, economic, legal, and cultural relations between these nations.

This article's objective is to improve how Americans and Chinese understand cross-legal and cross-cultural relationships. The article focuses on how Sino-American business negotiators and lawyers understand their relationships, including the connection between contract law and negotiation techniques. Accurately characterizing the relationship between the United States and China requires analyses of political, economic, legal, and cultural relations.

Business negotiation literature tends to focus on the communication, strategy, ethics, and cultural aspects of negotiation. Rarely does the literature discuss the connections between contract formation and negotiation techniques. Yet businessmen across the world negotiate

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1. Mitchell Silk & Richard Malish, *Are Chinese Companies Taking Over the World?*, 7 CHI. J. INT'L L. 105, 105–06 (2006).

relationships on the basis of verbal and written agreements. Therefore, contract law is a vital (and often overlooked) component of all negotiations. As William Ewald noted,[2] comparative law should focus on matters that concern practicing attorneys, but it too often fails at this task.[3]

This article is significant because businessmen and practicing lawyers want to improve their negotiation skills in effectively constructing deals and achieving desired outcomes. In the international business context, negotiation is a fundamental mechanism for dispute resolution. This article demonstrates the historical and cultural preference for Alternative Dispute Resolution (ADR) in China. Further, it shows the strategic advantages gained when American negotiators and lawyers utilize ADR mechanisms as opposed to litigation. There are three approaches to resolving commercial disputes: rights-based or legally binding litigation and arbitration; interest-based negotiation, which offers consideration, reconciliation, mediation, or conciliation; and power-based, which is the ability to coerce the other party with power and force. The rights-based approach to resolving disputes usually occurs after the contract is drafted and signed. On the other hand, the interest-based and power-based approaches are applied more during the contract formation and bargaining processes. In sum, ADR should be perceived as the interplay of these three fundamental approaches to negotiating and resolving commercial disputes.

This article is based on the author's practical experience in cross-cultural management, and on the knowledge acquired from founding and operating a small cross-cultural management consulting firm in Canada. The author has also taught comparative or cross-cultural management and taught international business negotiation[4] at the Executive MBA, MBA, and undergraduate programs at the University of Ottawa, Telfer School of Management for eight years. Discussions on the importance of a cross-disciplinary approach to comparative law are beyond the scope of this article. As an educator and lawyer, the author has observed firsthand the

2. William Ewald is a Professor of Law and Philosophy at the University of Pennsylvania Law School. Professor Ewald is one of the most cited American legal scholars in the field of comparative law.

3. William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try a Rat?*, 143 U. PA. L. REV. 1889, 1894 (1995). In response to Ewald's support of the practicality of comparative law, this article aims to discuss Sino-American contract formation (i.e. bargaining process) and focuses mainly on two of the three approaches to resolving commercial disputes during this process: interest-based approach (i.e. conciliation, reconciliation, and cooperation) and power-based (i.e. ability to coerce). The third approach, right-based (i.e. litigation and arbitration), will not be the focus of this article. For three approaches on resolving disputes, *see* WILLIAM URY, JEANNE M. BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED 3–19 (1988) (discussing the three approaches to resolving disputes: Interests, Rights, and Power).

4. The author teaches international business negotiation from a strategic, cultural, legal, and ethical perspective.

tendency of many lawyers to act as "politically conservative creatures of habit."[5] They often lack the "legal sensibility"[6] to appreciate the constructive, imaginative, and interpretative power of the law, a power rooted in the collective resources of culture rather than in separate capacities of individuals.[7]

For example, the author is frequently asked by North American lawyers to explain the reasoning behind cross-cultural contract negotiation strategies. Attorneys ask why such strategies tend to involve North American negotiators adapting to other cultures. Italian diplomat Daniele Vare stated that "the art of negotiation and diplomacy is the art of letting someone else have it your way." Therefore, a wise negotiator is always mindful of persuasive and skilled negotiators; a wise negotiator is at times critical and skeptical. Negotiation is not a science. It is conducted between humans with rational and irrational thoughts and with underlying concerns, fears, and interests. Therefore, empathy and sensibility are absolutely required for effective negotiation.

Robert Greene, author of the bestselling book "48 Laws of Power," stated that "every individual is like an alien culture. You must get inside his or her way of thinking, not as an exercise in sensitivity but out of strategic necessity."[8] Coming from a bicultural and biracial background—from a Québécoise mother and Haitian father—I quickly learned the strategic

5. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplant*, 43 AM. J. COMP. L. 489, 509 (1995) (discussing a new approach to study legal transplant).

6. "Legal sensibility" is one of the most influential concepts of the internationally respected American anthropologist Clifford Geertz, who describes legal sensibility "as both a set of normative ideas and a structure of decisions, for pervading sensibilities and broad principles must work themselves through an actual case in court. Law is a cultural system, a frame of mind, a framework." "Legal facts," he went on, "are made, not born, are socially constructed; facts are not 'discovered' somewhere out of their nature but are produced by a legal system" (and also by the legal sensibilities of the jurists within that legal system). *See* JAMES W. ST. G. WALKER, "RACE," RIGHTS AND THE LAW IN THE SUPREME COURT OF CANADA: HISTORICAL CASE STUDIES 44 (The Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997). Therefore, the concept of legal sensibility for the purposes of this article should be interpreted as follows: the ability of lawyers to be self-aware of their own culture and legal system, but also open to other cultures and legal systems to efficiently discover and interpret facts for their legal cases and matters. *Id.*

7. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY 215 (3d ed. 1983).

8. ROBERT GREENE, THE 33 STRATEGIES OF WAR 169 (Penguin Group eds., 2007) (discussing the importance of viewing adaptation not as an exercise of sensitivity but as an exercise of strategic necessity for winning wars).

necessity of "legal sensibility"[9] in life. This highly regarded approach to law, proposed by Clifford Geertz,[10] has helped me to imagine, construct, and interpret my own world, a world defined by the complexity of my bicultural and biracial background, and by my constant fight and quest for justice.[11]

This article aims to increase the "legal sensibility"[12] of American and Chinese negotiators,[13] by increasing awareness of the influence of culture and contract law on the Sino-American contract formation process. Increased awareness of the cultural dimensions of contract negotiations should help both American and Chinese negotiators: they can adapt and alter negotiation styles to achieve optimal, mutually beneficial outcomes for both contracting parties.

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9. *Id*.

10. *Id*.

11. As a member of the only bi-racial family in a region of Québec, the author of this paper was the target of severe racism throughout his childhood. However, as Friedrich Nietzsche once said, "that which does not kill us makes us stronger". This traumatic experience merely reinforced this author's conviction that love is the source of all lasting strength, and is thus far superior to hate as a response to inequality and injustice. With the intention of encouraging other victims of cultural and racial clashes to constructively direct their energies toward the betterment of society, this author wishes to briefly share two ways in which he has done so. First, in 2010, the author conducted extensive pro bono work in Haiti (and received the Humanitarian Excellence Award at the Department of Justice Canada for this effort). More recently, in 2012, the author provided extensive pro bono service as a graduate student at Penn Law (and received the Exemplary Public Service Award at Penn Law for that effort). While the author is deeply grateful for such external recognition, he wishes to affirm that the greatest reward is the knowledge that he has transformed his negative experiences with social problems into contributions toward social solutions, and he wholeheartedly encourages his readers to do the same. In the regard of the power of multiculturalism, the author also wishes to openly express his respect for Fons Trompenaars, a pre-eminent cross-cultural management researcher, who has similarly concluded that his own natural cultural sensitivity emerged from his bicultural background (i.e. French mother and Dutch father). Trompenaars' cross-cultural theory and research are cited extensively in this article. 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 prestigious top Thinkers50 listing. THINKERS50, http://www.thinkers50.com /results. I will refer to his cross-cultural theory and research extensively in this article.

12. GREENE, *supra* note 8.

13. This article aims to provide an extensive analysis of the Chinese philosophy of contract law and negotiation. In addition, the comparative analyses between the American and Chinese culture should be helpful for Chinese negotiators. Sun Tzu once stated that "if you only know yourself, but not your opponent, you may win or you may lose. Know your enemy and know yourself and you can fight a thousand battles." *See* SUN TZU, THE ART OF WAR (Classic eds., Lionel Giles trans., 2009). Following Sun Tzu's logic, contract negotiators engaging in foreign relations should first seek to improve his self-awareness before improving his cultural awareness of the other contracting party. This article aims to accomplish both objectives simultaneously.

II. COMPARATIVE METHODOLOGY USED TO COMPARE THE PHILOSOPHY OF AMERICAN AND CHINESE CONTRACT NEGOTIATION

Comparative law is an often overlooked area of law. The leading American business schools teach comparative management—also called cross-cultural management—and many students take this type of course.[14] However, few law students study comparative law, and relatively few legal articles contribute to the subject.[15] Catherine A. Rogers argues that legal scholarship on comparative law continues to decline and that it has become a field of limited practical relevance for practicing attorneys.[16] Yet Rogers also argues that globalization should make comparative law more relevant and significant for practicing attorneys.[17]

Comparative legal scholars contribute to the current state of comparative law by acting like *des malades imaginaires* (people pretending to be sick), as Molière would say.[18] Legal scholars may see comparative law as irrelevant, but scholars should focus on helping practicing attorneys in the field—and this will show them relevant applications for such law. Thus, the second part of this comparative analysis primarily uses the well-developed and well-tested Seven Cultural Dimensions Model ("7-D Model") by Trompenaars and Hampden-Turner.[19] As comparative management theorists and practitioners, Trompenaars and Hampden-Turden use sociological empirical

14. Comparative management (or cross-cultural management) theories are studies in virtually all business undergrad and MBA programs in North America through the mandatory course of Organizational Behavior. This course is usually mandatory for all business students in all Canadian and American business schools. The author has been teaching Organizational Behaviour at the undergraduate level at the University of Ottawa's Telfer School of Management since 2006. The author also studied Organizational Behavior at the University of Pennsylvania Law School with the renowned professor Adam Grant from the University of Pennsylvania's Wharton School.

15. Catherine A. Rogers, *Gulliver's Troubled Travels, or The Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 150–51 (1999) (discussing that the study of comparative law in the United States is today in a state of disarray).

16. *Id*.

17. *Id*. ("The recent burgeoning in international trade, regional alliances, and international travel has spurred corresponding interest in the political, legal, and cultural backgrounds of the other nations of the world. Against the backdrop of this fervid interest in all things foreign, stands the paradox of comparative law's identity crisis.")

18. MOLIERE, LE MALADE IMAGINAIRE (1673).

19. 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, 420–21 (2008).

data to support their theories.[20] Comparative legal scholars have no consensus on the relevance of sociological data. Some argue that comparative law should use sociological data more often, while others tend to reject the study of law and sociology as "bad journalism."[21] Still other scholars argue that unlike "law and economics" the discipline of "law and sociology" is poorly defined.[22]

Consequently, some legal scholars may question or disapprove of the application of the 7-D Model to the study of comparative law. I believe Trompenaars and Hampden-Turner comparative management theories go further, however, than just the simple assembly of sociological data. Trompenaars and Hampden-Turner also seek to understand how managers across the globe feel, think and act. In discussing Richard A. Posner's economic approach to law, William Ewald emphasizes the task of comparative lawyers: not just to assemble lists of statistics, but to explore the legal conceptions at work in the foreign system and to describe the system from the point of view of these conceptions.[23]

Statistical data on comparative law can be easily manipulated and misinterpreted. It must be analyzed with historical, cultural, and other socio-economic factors. As a practicing corporate lawyer, I often avoid overly abstract thinking. Comparative management and comparative law are both very complex disciplines; however, that should not be simplified for matters of practicality. Most persons would agree that studying foreign managerial or legal systems is not easy. Yet I believe that the 7-D Model follows Ewald's proposal for comparative lawyers: it transcends the simple dichotomy between law-in-books and law-in-action, or law-in-economical or law-in-sociological-statistics, and it constructively focuses on what Ewald

20. CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, RIDING THE WAVES OF CULTURE, UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS 252–64 (2d ed. 1998). Trompernaars and Hampden-Turner's statistical approach and empirical results are explained in detail in Appendix 2 of their book. For instance, the data for the Universalist/Particularist dimension were collected from the results of a hypothetical dilemma presented to approximately 70,000 managers across 65 countries.

21. Rogers, *supra* note 15, at 183 (discussing criticisms of "Law and Sociology" as bad journalism). Some legal scholars have interpreted that "sociology is no more rigorous than media reporting," and even worse than journalism because "it lacks the interesting narrative, and perhaps the dedication to verifiable support, that gives journalism its social value." *Id*.

22. *Id*. (quoting Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389, 399 (1997) (discussing that sociology of the law has no core assumptions and no dominant paradigm and arguing that sociology of the law remains "driven more by data than theoretical paradigm, and certainly no paradigm has dominated sociology the way the neoclassical model has dominated economics.")).

23. Ewald, *supra* note 5, at 494.

calls "law-in-minds."[24] For example, the theories behind the comparative management 7-D Model are inspired by the theories of Geert Hofstede,[25] also called the father of cross-cultural management. He defines his whole comparative management enterprise as the discovery of the mental programming, or "Software of the Mind," of business managers around the world.[26] In addition, the 7-D Model aims to help international business people reconcile the difficult philosophical dilemmas in their minds and in the minds of their international counterparts, regarding organizational and cultural interactions.[27] These may include their approaches to personal relationships, time, and the environment.[28]

Essentially, the comparative management theories by Trompenaars and Hampden-Turner are not just based on sociological empirical data but also embrace Ewald's "comparative jurisprudence" model. The latter aims to understand what informs management, or for Ewald, what informs the law. Ultimately, we can argue that law-in-minds is a crucial part of law-in-action.[29] Trompenaars and Hampden-Turner's theories seek to improve the interpretation of international businessmen's philosophical dilemmas, so they can communicate more effectively.[30] One of Ewald's main "law-in-minds" goals is also to improve communication between foreign lawyers.[31]

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24. Ewald, *supra* note 3, at 2111. Ewald discusses the debate on the concept of law in the Middle Ages from the perspective of German legal historians. *Id*. Ewald takes from that debate the agreement that to promote a more holistic and practical understanding of the law, one should not use the German concept of *Gewohnheitsrecht* (customary law), but *Rechtsgewohnheiten* ('legal customs'). *Id.* Ewald offers a reconstruction of the concept *Rechtsgewohnheiten* in his concept of law-in-minds as a more holistic analysis that skilled lawyers can use in practice. *Id*.

25. GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, CULTURES AND ORGANIZATIONS, SOFTWARE OF THE MIND, INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL 80–81 (McGraw Hill eds., 3d ed. 2005) (discussing cross-cultural differences between cultures, the title of the book is also "Software of the Mind").

26. *Id*. at 3, 20.

27. HAMPDEN-TURNER & TROMPENAARS, *supra* note 20.

28. *Id*. at 1–12.

29. Ewald, *supra* note 3, at 2111 (discussing William Ewald's exhortation for comparative lawyers to follow his "Comparative jurisprudence" model to transcend the simple dichotomy between law-in-books and law-in-action and to focus on what he calls "law-in-minds"). Ultimately, law-in-minds is a crucial part of law-in-action: there are no legal acts without human actors, and laws in turn do not exist apart from human interpretation. *Id*.

30. HAMPDEN-TURNER & TROMPENAARS, *supra* note 20, at 26–27 (explaining that cultures vary in solutions to common problems, dilemmas, and orientations such as relational, time, activity, man-nature, and human nature orientation).

31. Ewald, *supra* note 3, at 1896 (discussing that the primary object of study for comparative law should be the philosophical principles that lie behind the surface of the rules in order to improve cross-cultural understanding and communication between foreign lawyers).

When parties negotiate a contract, they must communicate efficiently. Contract negotiations are all about communications that crystalize the parties' real intentions in writing. Efficient communication better enables contracting parties to reach the common law concept of a "meeting of the minds." More specifically, in a cross-border Sino-American context, forming an efficient and durable contract is undeniably based on efficient cross-cultural communications.[32] Yet most lawyers drafting the contract will often approach it from a more mechanical or technical approach: the words in the contract are everything. These words are undeniably important because, as any contract lawyer knows, words can be manipulated, misinterpreted, or fought over in exhausting legal battles. A skilled contract lawyer, however, should aspire to build durable and efficient contracts that reflect the material communications between the parties.

Finally, my ultimate *argumentaire* in support of Trompenaars and Hampden-Turner is that, unlike some legal scholars, they have better diffused the importance of comparative management among management scholarship,[33] business schools across the world, and the business consulting industry.[34] Ultimately, they have the respect of actors in the business world. Both Trompenaars and Hampden-Turner were listed in the prestigious top Thinkers50 as top management thinkers in the world.[35] As scholars will certainly point out, this fact does not necessarily prove the theoretical relevance of their work. Yet in the language of Clifford Geertz, "business culture is also the fabric of meaning in terms of which human beings interpret their experience and guide their action."[36]

In sum, Sino-American contract negotiations should be discussed in terms of four hierarchical and interdependent influences: (1) national culture, (2) organizational culture,[37] (3) professional legal culture,[38] and (4)

32. 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).

33. *See* THINKERS50, http://www.thinkers50.com/results (last visited on May 2, 2011).

34. *Id*.

35. *Id*. Therefore, the fact that Trompenaars and Hampden-Turner appeared on The Thinkers50 List means that actors in the business world see great practical value in their comparative management theories. *Id*. It is important to mention that there is no legal scholar on that list. *Id*. Also, Harvard Business School is an official sponsor of The Thinkers50 List. *Id*.

36. *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (Basic Books 1973).

37. National cultural differences are also influenced by organizational cultures, and different global law firms have different organizational/corporate cultures. For example, Baker Mckenzie LLP does not operate the same way that its competitor Skadden, Arps, Slate, Meagher & Flom LLP operates. This premise is also true for an in-house corporate counsel at Exxon Mobil, or a legal counsel at the U.S. Department of Justice. For instance, in many organizations, lawyers are often

the negotiator's personality.[39] Such analysis avoids over-focusing on national cultural differences, by analyzing culture in broader context.[40]

This article focuses on cross-cultural differences between Chinese and American contract negotiators. The mirror theory of law—which suggests that law mirrors cultural and social forces[41]—has led us to realize that the law flows from internal and external factors. Therefore, with inspiration from Montesquieu's Spirits of the Laws,[42] I argue that *l'état de droit est un*

instructed to use the template agreements (boiler-plate contracts) generated by the organization. Moreover, large public or private organizations in North America often make the use of such boilerplate templates mandatory via internal corporate policies. As noted by Trompenaars and Hampten-Turner, when people set up an organization, they will typically borrow from models or ideals that are familiar to them. The organization (corporation) is therefore significantly influenced by the national culture. The cultural preferences explored in the Seven Dimensions also influence the legal and management structures of an organization. Negotiators negotiate contracts for the benefit of their organizations, thus it is important to better understand their organizational behavior as an important factor of influence in the "laws-in-minds" and "software of the mind" of negotiators.

38. Cross-cultural differences between Americans and the Chinese are also influenced by professional cultures. American and Chinese mathematicians discussing game theory (this mathematic theory has been applied to negotiation theories) or physicists discussing quantum physics arguably share more in common than American and Chinese lawyers. For instance, mathematics and physics are considered by many as "universal sciences" that can be interpreted on a more objective and universal basis compared to law. This means it is important to focus on the interconnections between contract law and negotiation techniques by comparing 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.

39. One of the greatest challenges of an international negotiator is to understand and communicate with a foreign lawyer in the pluralist legal context of international negotiations. Therefore, trying to understand a negotiator's personality can assist negotiators in adopting a more contextual approach to the negotiation process. The influence of the first three layers (national culture, organizational culture, and professional legal culture) on the negotiation process is largely centered around cultural differences between American and Chinese societies. A skilled international business negotiator must embrace a more situational and contextual approach to discover the "law-in- minds" or "software of the mind" of foreign negotiators. As a result, a cross-cultural negotiation process must be based on a more situational and contextual approach taking into consideration other factors such as business interests, emotions, and ethical orientation of the negotiator to not overly focus on cultural differences because these considerations are more universal and often transcend cross-cultural differences between the parties.

40. PERVEZ GHAURI & JEAN-CLAUDE USINIER, INTERNATIONAL BUSINESS NEGOTIATIONS 21–37 (Pergamon eds., 1st ed. 1996) (explaining how national culture, organizational culture, and personality impact international business negotiations). This article explains the interplay between these factors and the importance for an international business negotiator to avoid over-focusing on national cultural differences. *Id*.

41. Ewald, *supra* note 5, at 491.

42. CHARLES DE SECONDAT & BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, Book XI, ch. 6 (1748) (reprinted Cambridge: Cambridge University Press, 1989) (theorizing of Montesquieu in Spirits of the laws of the Mirror-Theory).

état d'esprit (rule of law is a rule of mind). The mirror theory has some relevance. Yet to truly understand a foreign negotiator, a skilled negotiator should not just aim to superficially enter the mind of the foreign negotiator, but rather should aim to uncover the deeper and multilayers of their minds. Again, my *argumentaire* supports Elwad's comparative law theory on comparative jurisprudence (the "law-in-minds")[43] and also the definition of comparative management by Trompenaars and Hampden-Turner in their study of the multi-layers of a national culture.[44] Therefore, a cross-cultural business negotiation analysis cannot just be examined on a superficial level. Analyzing the four layers of culture helps clarify the approaches that American and Chinese negotiators should adapt in formulating contractual relationships.

III. THE TROMPENAARS AND HAMPDEN-TURNER 7-D MODEL APPLIED TO SINO-AMERICAN BUSINESS CONTRACT NEGOTIATIONS TO IMPROVE CROSS-CULTURAL UNDERSTANDING DURING NEGOTIATION AND DISPUTE RESOLUTION

Culture is the single most influential factor in negotiations.[45] The first job of an international negotiator is to better manage and prepare for cultural clashes.[46] Yet as I previously mentioned, international negotiations must also "weigh culture against other important factors."[47] If national culture is the most influential factor on international business negotiations, it cannot be the only factor taken into consideration because such a narrow focus can lead to overgeneralizations. Cross-cultural business negotiations cannot be based on stereotyped conclusions, such as "American negotiators are contract-oriented" or "Chinese negotiators are relationship-oriented."

An international negotiator should be aware of cultural orientations and tendencies, which can be provided by comparative management theories for the purpose of mapping cross-cultural negotiations. It can be problematic, however, if an international negotiator assumes that cultural tendencies

43. Ewald, *supra* note 3.

44. HAMPDEN-TURNER & TROMPENAARS, *supra* note 20, at 20–24 (discussing the three layers of culture: 1) explicit products (explicit culture is the observable reality of the language, food, buildings, houses, monuments, agriculture, shrines, markets, fashions, and art); 2) The middle layer: norms and values; and 3) The core: assumptions about existence).

45. Hampden-Turner Trompenaars 7D Model, *supra* note 20.

46. *See International Negotiations: Cross-Cultural Communication Skills for International Business Executives*, PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL, 2 (2010), *available* at http://www.pon.harvard.edu/freemium/international negotiations cross cultural communication skills for international business executives (last visited May 2, 2013) (discussing effective cross-cultural communications and negotiations).

47. *Id*.

always predict an individual's behavior.[48] Cross-cultural theories, like all theories, are never completely accurate: they only provide a point of reference. Skilled negotiators need to move from cultural assumptions to "educated cultural guesses."[49]

Each individual is shaped by his culture and, therefore, we can make an "educated guess" as to the cultural differences and similarities between American and Chinese negotiators. Culture should always be approached as the main factor influencing human behaviour: it is the "software of the mind."[50] With the emergence of cross-cultural psychology, psychology now also recognizes cultural differences on behaviors and personalities.[51] The first five dimensions of the 7-D Model[52] explain cross-cultural differences in the formation of contracts, which is to say, in the nature of the contractual relationship and rules:

1. American Universalism versus Chinese Particularism (rules versus relationships);
2. Chinese Diffuseness versus American specificity (the range of involvement);
3. American achievement-oriented versus Chinese ascription-oriented society (how status is accorded during negotiations);
4. Chinese Collectivism versus American Individualism (the group versus the individual);
5. Neutral versus Affective (the range of emotions expressed during the negotiations and invested towards the contract formation);

The sixth dimension explains cross-cultural differences in concepts of time and time management during contract formation:

6. Time management:
    a. Chinese past-oriented culture versus American future-oriented culture
    b. American negotiators' sequential approach versus Chinese negotiators' synchronic approach

48. *Id*. at 3.

49. This concept shall be attributed to my Professor, Steven Blum, who taught me Negotiation and Dispute Resolution at the MBA program of the University of Pennsylvania Wharton School.

50. *See* Hofstede's Five Cultural Dimensions, *supra* note 25, at 4–7 (defining culture by using the analogy of the way computers are programmed. Hofstede explains that culture is an overall good predictor of human behavior that can predict how people think, feel, and act in various social contexts.).

51. *See, e.g.*, Eric B. Shiraev & David A. Levy, CROSS-CULTURAL PSYCHOLOGY: CRITICAL THINKING AND CONTEMPORARY APPLICATIONS (Allyn & Bacon eds., 2009).

52. The 7D Model applied to Sino-American business contract negotiations is adapted from Hampden-Turner Trompenaars 7D Model. *See* Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 29–160.

The seventh dimension explains cross-cultural differences in the development and control of contractual relationships:

7. American inner-directed versus Chinese outer-directed

The following sections discuss each dimension in detail.

First Dimension: American Universalism Versus Chinese Particularism (Rules Versus Relationships):

American Universalism is Based on Rule of Law, While Chinese Particularism is Based on Rule of Men

American Universalism means that American society is a rights-based society operating under the *rule of law*: the principle that no one is above the law. This originates from the idea that truth, and therefore law, is based upon fundamental principles that can be discovered and cannot be created through an act of will.[53] Immanuel Kant wrote that "liberty—or freedom—is the central value protected by the concept of [r]ight and the rule of law."[54] As Teemu Ruskola noted, in his comparative legal analysis of American and Chinese law:

> Chief Justice John Marshall said "the government of the United States has been emphatically termed a government of laws, and not of men." Although there is much debate over just what the rule of law means, there is a resounding consensus about what it is not: it is not the "rule of men." Indeed, the idea that the rule of law means precisely not the rule of men is so fundamental that the two terms are best understood as forming a singular expression—"rule of law, and not of men"—even when the clarifying phrase "and not of men" is not tagged to the end. In an important sense, the definition of "rule of law" is thus a negative one. As Paul Kahn observes, this contrast is constitutive of law itself: "Law is not the rule of men."[55]

It is important to note that promoting western rule of law is not just an ideological battle for the triumph of democracy and liberalism in the world; it is also a lucrative business. It is important to note that, after the Cold War, law became "a major American export item."[56] For instance, Dean Michael A. Fitts of the University of Pennsylvania Law School led a historic summit

53. DEFINITION OF RULE OF LAW, http://www.lexisnexis.com/en-us/about-us/rule-of-law.page (last visited May 2, 2013).

54. GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS 60 (2005).

55. Teemu Ruskola, *Law Without Law, or Is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL OF RTS. J. 655, 659–60 (2003) [hereinafter *Ruskola Law Without Law*].

56. Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 227 (2002) [hereinafter *Ruskola Legal Orientalism*].

of U.S. and Chinese deans in June 2011.[57] The summit fostered legal scholarly relationships between the two countries and promoted the rule of law in China. Further, the main objective of this Sino-American summit was to promote American law schools in China. Many graduate students in North American law schools are Chinese. For example, among 114 students registered in the graduate LLM program at the University of Pennsylvania Law School in 2011-2012, approximately 25% were from China, Hong Kong, or Taiwan.[58]

Chinese society is ruled by particularism. China is a more power-based and relationship-based society governed by the *rule of men. Rule of men* (*ren-zhi*) is defined as "a kind of political utopia where those in power derive their authority to govern from their superior virtue—either Confucian virtue, in the case of traditional China, or Communist virtue, in the case of socialist China."[59] Yet American negotiators should avoid viewing the Chinese *rule of men* from a legal ethnocentric approach. Viewing American society as a democratic, progressive human rights champion and Chinese society as one that lacks legal modernity and morality is a dangerous way of thinking for an international business negotiator and lawyer.[60] First, the rule-of-law and *rule of men* distinction should not be based on a philosophy of law comparison that is too moralistic and too black–and–white in order to keep its practical "analytic utility."[61] Second, such a legal ethnocentric approach "foreclose[s] the possibility of meaningful communication between American' and Chinese would-be counterparts."[62]

Finally, American Universalism's reliance on the Rule of Law is also illustrated by the fact that the English language of negotiation is based on fairness and reasonableness. As taught at Harvard Law School's Negotiation Project and in the theory of principled negotiation,[63] English patterns rely heavily on fairness and reasonableness and have influenced all cultures engaged in international commerce and legal relations.[64] Therefore,

57. PENN L. J., Fall 2011, Vol. 46, Number 2, p. 6–7.

58. University of Pennsylvania Law School, Office of Graduate Programs (Fall 2011).

59. *See Ruskola Law Without Law*, *supra* note 55, at 659–60.

60. *Id*. at 668.

61. *Id*.

62. *Id*.

63. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991) (discussing the theory of Principled Negotiation developed by the authors who are founding members of the Harvard Negotiation Project at the Harvard Law School).

64. *See* FLETCHER & SHEPPARD, *supra* note 54, at 65.

American negotiators are more likely to demand that the Chinese think in the idiom of reasonableness.[65]

American Universalist Negotiators are Contract-Oriented, While Chinese Particularist Negotiators are Relationship-Oriented

Universalism means that Americans are rule-oriented and contract-oriented.[66] While relationships are important for wise businessmen, Americans, as Universalists, tend to focus on a more right-based approach to negotiation where laws and the contract establish the parties' rights and obligations.[67] To Americans, a trustworthy negotiator honors the contract. American business people will commonly say "a deal is a deal—a contract is a contract—I am sorry, but too bad for you if you're stupid enough to sign this contract and did not seek legal advice,"[68] In contrast, Chinese negotiators see a trustworthy negotiator as one that honors changing mutualities.[69] For Chinese negotiatiors, the contract only marks the beginning of a business relationship.[70] After it is signed, the contract must be capable of evolving and adapting to a changing business relationship.[71] For Americans, however, amendments to contracts must be performed in strict accordance with the contract and are often perceived as disturbing the stability of the contract. Overall, for the Chinese, the focus is more on building the business relationship than the laws and contract, and a contract should be flexible and easily modifiable without too many formalities: "Although ancient Chinese law recognized private contracts, application of law to contract disputes was influenced by Confucian ethics, and contract disputes were often resolved in accordance with ethical considerations at the expense of legal principle."[72]

The main evidence of the contract-orientation of business negotiations in the United States is the *Parol Evidence Rule.* This rule forbids the utilization of evidence outside of the written contract in litigation regarding its interpretation.[73] Therefore, "according to traditional contract doctrine,

65. *Id*.

66. *See* Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 29–51 (discussing cross-cultural formation of relationships and rules such as Universalism for American v. Particularism philosophical orientation for Chinese).

67. *Id*.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* Leonhard, *supra* note 32, at 10.

73. ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 545 (4th ed. 2007). *See also* Jody S. Kraus & Robert E. Scott, *Contract Design And The Structure Of Contractual Intent*,

promises made during the negotiations are generally held unenforceable."[74] The rigidity of this doctrine is a source of cultural clashes between American negotiators and their counterparts in international business negotiations.[75] In contrast, as a civil law country, China does not apply the *Parol Evidence Rule*. Like many civil law jurisdictions, external evidence to the written contract may be considered more liberally.

For Americans, as Universalists, the terms of the contract set out the *only* interpretation of the contract. American lawyers are trained to draft clear and concise contracts to better serve the interests of clients and prevent opposing interpretations of contractual terms.[76] For the Chinese, there are several interpretations of a contract, with no single meaning being authoritative.[77]

Gift-giving in Universalist American Culture Versus Relationship-Oriented Particularist Chinese Culture

Chinese culture is marked by the tradition of gift–exchange during the negotiation process. However, gift exchange for Americans is 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 under the U.S. Foreign Corruption Act.[78] Therefore, American negotiators can only offer very small gifts to Chinese government officials or Chinese corporate leaders of state-owned companies. However, gift exchange is a culturally and legally accepted practice in China. Moreover, gift exchange is

84 N.Y.U. L. REV. 1023, 1031 (2009) (analyzing how courts interpret the parol evidence and integration doctrines, the mistake and excuse doctrines, and the law of conditions and waiver in order to avoid adjudicative outcomes that they perceive to be misaligned with the parties' contractual ends).

74. *See, e.g.*, SCOTT & KRAUS, *supra* note 72 (referencing Malahee Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 395 A.2d 222 (1978); McMath v. Ford Motor Co., 259 N.W. 2d 140 (1977)).

75. *See* Leonhard, *supra* note 32.

76. *See* KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING (2d ed. 2008).

77. The Chinese Philosophy of Dualism represented by the Yin-Yang symbol is the ancient Chinese understanding of how things should work: the outer circle represents the holistic "everything," while the black and white shapes within the circle represent the interaction of two energies. TONY FANG, CHINESE BUSINESS NEGOTIATING STYLE 30 (Sage Publications 2000) (explaining the Chinese philosophical principle of dualism through the symbol of Yin and Yan, which represents qualities inherent in all things in the universe. Yin and Yan are both necessary and complementary if universal events are to be created, maintained, and developed in a harmonious way).

78. Foreign Corrupt Practices Act, 15 U.S.C.A § 78dd-1 (West 1998).

expected as part of the natural formation of a contractual relationship. Chinese negotiators view gift–giving as an investment in "social capital."[79]

Dispute Resolution in the United States as a Universalist Legal Culture

On the domestic level, "Americans are notorious litigators, quickly turning to the courts to redress grievances. This combative stance usually results in a 'win or lose' mentality."[80] In practice, American businesspeople will tend to heavily rely on the legal opinions and lawyers' interpretations of the contract as the first step to a contractual dispute resolution. If the legal opinions are favorable, American businesspeople will likely negotiate the dispute by taking a more win-lose approach. On the other hand, if the legal opinions are not too favorable, Americans will feel forced to embrace conciliation and a more win-win approach to the dispute resolution process.

Dispute Resolution in China as a Particularist Legal Culture

Given the preference of Confucian philosophy for non-confrontational dispute resolution methods such as negotiation and mediation,[81] "Asians are notable for going great lengths to seek an amicable settlement."[82] As discussed previously in this article, in the Confucian and Taoist philosophy of law traditions, it is a virtue to seek harmony. For the Chinese, contractual disputes should be solved by adopting a relationship-based approach instead of a rigid, rights-based approach, where lawyers dominate the dispute resolution process. Therefore, the Chinese do not rely on lawyers as heavily as Americans.[83]

79. Yunxia Zhu, Pieter Nel & Ravi Bhat, *A Cross Cultural Study of Communication Strategies for Building Relationships*, 6 INT'L J. OF CROSS CULTURAL MGMT. 319, 321 (2006) (discussing the concept of social capital as an investment in social relations with expected returns in the marketplace).

80. *See* RICHARD SCHAFFER, BEVERLEY EARLE & FILBERTO AGUSTI, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 74 (2005).

81. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1668 (2000) [hereinafter *Ruskola Conceptualizing Corporations in China*] (discussing China's recent Company Law in a broader historical and cultural perspective).

82. SCHAFFER, EARLE & AGUSTI, *supra* note 80, at 85.

83. This may change, as China is now realizing the need to strengthen its legal education and produce more Western-trained Chinese lawyers. Penn Law Journal, Fall 2011, Vol. 46, Number 2, p. 6-7.

Practical Tips for Negotiating Contracts for Chinese Particularist Negotiators

Chinese negotiators should be prepared for "rational," "professional" presentations that push for acquiescence.[84] American negotiators tend to focus on facts—as if they were in a courtroom—using precedents, statistics, sociological data,[85] and expert opinions to persuade Chinese parties. Principled Negotiation (win–win negotiation) teaches American negotiators to always focus on objective criteria.[86] Chinese negotiators should not consider an impersonal, blunt, "get down to business," attitudes as rude.[87] Americans do understand the importance of building relationships, but time constraints often prevent relationships from being developed properly. Americans rely on legal protections such as due diligence and signed detailed contracts. Chinese negotiators should be prepared to have lawyers at the negotiation table and not necessarily to interpret the presence of lawyers as a lack of trust.

84. *See* Hampden-Turner and Trompenaars 7D Model, *supra* note 20, at 159–60 (explaining differences between American Internal Control cultural orientation versus Chinese External Control cultural orientation).

85. *See* FLETCHER & SHEPPARD , *supra* note 54, at 626 (discussing that Louis Brandeis, before he became a Supreme Court Justice, was the first American attorney to include arguments from public policy, economics, and other social sciences in his pleadings).

86. *See* FISHER & URY, *supra* note 63, at 107–28 (discussing the Negotiation Jujitsu theory focusing on win-win negotiation strategies). I will argue that a wise negotiator should learn Mixed Martial Arts (MMA) Negotiation instead and move away from Negotiation Jujitsu when possible. As a practicing corporate lawyer and professor of Negotiation and Dispute Resolution, I strongly believe that applying Negotiation Jujitsu to the negotiation process is a strategic necessity but does not always prepare negotiators to negotiate effectively in the real world. Competitive and adversarial behaviours too often dominate negotiations in the real world. Therefore, MMA Negotiation can be a superior style of fighting/negotiating by accepting this logic: MMA wisely mixes and blends martial art disciplines which allow a more holistic, flexible and situational approach to fighting/negotiating. The 'traditional' school of Principled Negotiation from the Harvard Negotiation Project only teaches Negotiation Jujitsu. My school of MMA Negotiation will train negotiators and lawyers to improve in all negotiation styles (i.e. not just integrative (win-win) and relational negotiations like for Negotiation Jujitsu, but also for competitive or adversarial negotiations). An in-depth discussion of my MMA Negotiation theory is beyond the scope of this article and is discussed in Garrick Apollon, MMA Negotiation, 17 University of Denver Sports and Entertainment Law Journal. (Forthcoming December 2013).

87. *See* Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 103–04 (explaining differences between American Specific-oriented cultural orientation versus Chinese Diffuse-Oriented cultural orientation).

Practical Tips for Negotiating Contracts for American Universalist Negotiators

American negotiators should be prepared for personal "meandering" or "irrelevancies" that do not seem to be going anywhere.[88] Chinese negotiators aim to evaluate the personal worth and character of their counterparts.[89] For the Chinese, the subjective aspects of deal-making are always carefully considered. For instance, foreknowledge[90] of the counterpart negotiators and their organization is often viewed by the Chinese as a superior protection to formal due diligence and the signature of detailed contracts. Chinese negotiators may interpret American negotiators' heavy reliance on lawyers as a lack of trust.[91] When negotiating in China, American negotiators should carefully consider extra-legal, relational methods of risk management.[92]

Practical Tips for American Contract Drafters

Americans should build informal networks and create private understandings with their Chinese counterparts.[93] They should also consider drafting contracts that will be flexible and that can be altered more

88. *Id*.

89. *See* Hampden-Turner Trompenaars 7D Model, *supra* note 20.

90. *See* Barkai, *supra* note 19 at 439 (discussing Sun Tzu's theory of foreknowledge; the importance of information process and related communications capability for war strategy. For sun Tzu, this foreknowledge cannot be elicited from spirits; it cannot be obtained from experience, or by any deductive calculation. Knowledge of the enemy's dispositions can only be obtained from other men. Knowledge of the spirit world is to be obtained by divination; information in natural sciences may be sought by inductive reasoning; the laws of the universe can be verified by mathematical calculation; but the dispositions of the enemy are ascertainable through spies and spies alone). *See also* FANG, *supra* note 77, at 162 (discussing the importance of information gathering and espionage in Chinese negotiating style influenced by Sun Tzu's theories).

91. Western laws can be used as instruments of domination and colonialism. This explains the strong political desire of the early Chinese Communist revolution to wipe out any Western legal influence and traditions. 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 healthy society is relatively recent and a radical change in China. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 292–93 (Oxford University Press 3d ed. 1998).

92. Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 49–50 (explaining differences between American Universalist cultural orientation versus Chinese Particularist cultural orientation).

93. *Id*.

informally. For instance, flexibility can be attained by giving power to an Agreement Management Committee (i.e. representatives from both parties monitoring the performance of the contract) to make insignificant modifications to the contract by mutual consent and in writing. Such clauses are often utilized in financing infrastructure agreements. This allows the contract to evolve with the relationship.[94] Americans should therefore be mindful that altering the relationship is likely to result in modifications of the contract, and be intentional in their actions.[95] Americans should pull levers privately.[96] Changes should not always be made publicly or drafted in the contract in order to avoid "loss of face." Understand that for Chinese parties, fairness does not always reside in the contract. Chinese businesspeople will often seek fairness by treating all cases on their special merits.[97]

Practical Tips for Chinese Contract Drafters

Chinese drafters should strive for consistency, sequence, uniformity, and precision of the clauses in the contract. Include formal ways to change the rights and obligations of the parties. This is usually done by inserting an amending clause, such as "This Agreement can only be amended in writing by the Parties."

Chinese businesspeople should agree to make changes to the contract in an accountable and transparent manner and in accordance with the terms of the contract.[98] For Americans, fairness is embedded in the contract: a contract ensures that all parties are treated in a transparent, consistent, and agreed-upon manner. If a contract is considered to be unfair, an American party will readily dispute the contract via litigation or arbitration.

Second Dimension: Chinese Diffuseness versus American Specificity (The Range of Involvement During Negotiations):

The "Yin and Yang" symbol below illustrates the Chinese diffuseness behind modern Chinese contract law based on the ancient philosophy of Taoism.

94. *Id*.
95. *Id*. at 99.
96. *Id*.
97. *Id*. This reflects a preference for "natural justice" over formal, universal justice.
98. *Id*.

This symbol is one of the best-known East Asian symbols in North America and illustrates the philosophical principle of Dualism.[99] It defines the way polar opposites or outwardly contrary forces are interconnected and interdependent in the Natural Way.[100] Opposites thus only exist in relation to each other.[101] The Chinese historical and cultural perception of flexibility, vagueness, and diffuseness as major strengths of their contract law can be attributed to the Taoist principle of "the strength of weakness."[102]

Communication for Americans is Specific Versus Diffused for Chinese Negotiators

Communication for Americans is low context,[103] meaning it is usually direct, to-the-point, and purposeful.[104] For Americans contract negotiation is often inspired by trial advocacy and dependent on a structured process. On the other hand, communication for Chinese is high context,[105] meaning it may be indirect, circuitous, diplomatic, and seemingly "aimless."[106]

Chinese negotiators must also understand that American common law merges substance and procedure.[107] This means that American lawyers are

99. *See* FANG, *supra* note 77, at 30. Fang defines the Chinese philosophical principle of dualism in the symbol of Yin and Yan. *Id*. This symbol represents qualities inherent in all things in the universe. *Id*. Yin and Yan are both necessary and complementary if universal events are to be created, maintained and developed in a harmonious way. *Id*.

100. *Id*.

101. *Id*.

102. John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L. L. 329, 372 (2006).

103. *See generally* EDWARD HALL, THE SILENT LANGUAGE (1959); EDWARD T. HALL, THE HIDDEN DIMENSION (1966) (describing Edward T. Hall's influential concept of High/Low Context Communication).

104. *Id*. (Americans negotiators are usually precise, blunt, definitive, and transparent.)

105. *Id*.

106. *Id*.

107. *See* FLETCHER & SHEPPARD, *supra* note 54, at 19.

trained to put the case in its procedural context.[108] American lawyers read cases to know precisely how the legal question was posed to the judges, how the matter got to court, and what the judges had to decide.[109] The early common law relied on the writ system, which required specific categorization of claims.[110] Now, even though this particular procedure has long since been abolished, these common law principles are alive and well in contemporary American legal practice.[111] American lawyers must still be precise in their pleadings and selection of the appropriate remedy.[112] Therefore, the Chinese must understand that Anglo-American law is dependent on clarity and specificity.

American Negotiation Process and Ethics is Specific-Oriented

For Americans, principles and consistent moral standards that govern both parties are essential to contract formation.[113] Phrases like "this is the rule," "this is the law," and "nothing personal—this is business," are frequently heard in negotiations. The negotiation process may even be treated as a game to be played and won. Consequently, some legal scholars argue that the American concepts of fairness and reasonableness are overshadowed by an emphasis on "playing by the rules of the game," like a sport.[114]

Chinese Negotiation Process and Ethics is Diffuse-Oriented

The highly situational morality and ethics of Chinese negotiators' orientation is based on the person and context.[115] In China, morality depends on the nature and importance of the relationship with others.[116]

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108. *Id*.

109. *Id*.

110. *See id*.

111. *Id*. at 21.

112. *Id*.

113. *See* Hampden-Turner and Trompenaars 7D Model, *supra* note 20, at 103 (explaining differences between American Specific cultural orientation versus Chinese Diffuse cultural orientation).

114. *See* FLETCHER & SHEPPARD, *supra* note 54, at 63 (explaining that the emphasis on the word fairness derives on the importance of procedural regularity in common law but that analogies from competitive sports pervade the idiomatic of this word.).

115. Hampden-Turner Trompenaars 7D Model, *supra* note 99.

116. *Id*.

Third Dimension: American Achievement-Oriented Versus Chinese Ascription-Oriented Society (How Status is Accorded During Negotiations):

In the United States, as an egalitarian society, the titles of the negotiators are only used when they are relevant. American negotiators and lawyers are low power distance-oriented.[117] In China, the titles of the negotiators are used extensively, particularly at the negotiation table to clarify a person's status in the organization.[118] China is a high power distance-oriented society.[119] "Confucius and Confucian thought upheld the class distinctions that had stratified traditional Chinese society and the concept of the 'superior man' and the 'low people,' deeming them a reflection of the natural hierarchical order."[120]

Leadership Effectiveness in the U.S. is Determined on Achievements Versus Ascription in China

For Americans, respect within an organization's hierarchy is largely based on job performance. Similarly, leadership is often based on merit and achievements.[121] This means leadership-effectiveness perception is achievement based or recognition based.[122] Therefore, the lead negotiator for the American side will try to establish his or her status by proving competencies and skills at the negotiation table. This also means that—following the delegation and agency rules of the organization—the chief negotiator might not necessarily hold a senior position. Negotiators are frequently selected on the basis of their competence.[123] For example, the Chinese have to be ready to deal with a young, highly qualified woman with superior skills. American senior negotiators/managers vary in age, ethnicity, and gender and have typically shown proficiency in specific jobs. This means that Chinese negotiators also have to be prepared to negotiate with Americans of various descent and background, including African-Americans, Hispanic-Americans, and Asian-

117. THE HOFSTEDE CENTRE, http://www.geert-hofstede.com/hofstede_dimensions.php?culture1=95&culture2=18#compare (last visited Apr. 9, 2013) (comparing empirical data of the cultures of China and the United States, and showing that China is more power distance oriented).

118. *Id*. (showing the Chinese power distance orientation).

119. *Id*.

120. Patricia Blazey & Gisele Kapterian, *Traditional Chinese Law*, *in* THE CHINESE COMMERCIAL LEGAL SYSTEM 19, 31 (Patricia Blazey & Kay-Wah Chan eds., 2008).

121. *See* TROMPENAARS & HAMPDEN-TURNER, *supra* note 20, at 121 ("Most senior managers [in achievement-oriented cultures] are of varying age and gender and have shown proficiency in specific jobs."). *Id*.

122. *See id*. ("Respect for superior in hierarchy [in achievement-oriented cultures] is based on how effectively his or her job is performed and how adequate their knowledge.").

123. *See id*. at 111–12.

Americans. The internal diversity of the United States might also change the cross-cultural dynamics of the negotiation process.

In contrast, for Chinese negotiators, respect for superiors within an organization's hierarchy is seen as a measure of commitment to the organization and its mission. In China, followers' perception of their leaders is strongly based on their interpersonal behaviors and traits.[124] In ascription-oriented or inference-based negotiation processes, Chinese chief negotiators will tend to be senior and lead paternalistically; Chinese subordinates are generally intimidated by senior executives and unwilling to voice their dissent.[125] Paternalistic rule is favored over a more participatory, democratic negotiation process.[126] Therefore, brainstorming at the negotiation table might not work in a Sino-American negotiation context unless appropriately adapted.[127] Most Chinese senior managers are Chinese males, advanced or middle-aged, and qualified by their background. Chinese teams will tend to be larger (because a Chinese collectivist leader is considered more important with an entourage).[128]

Practical Tips for Chinese Negotiators

Make sure your negotiation team is supported by sufficient data.[129] Lawyers, technical advisers, and persons with knowledge on the topic will likely be persuasive in convincing the other company that the project, jointly pursued, will work.[130] Respect the knowledge, status, and contractual mandate of your American counterparts even if you think they are young or suspect they are short of influence back home. As long as the person is a legally authorized agent, you

124. Leadership in China is more ascription based or inference based than in America, where leadership is more frequently competence based. Jun Yan & James G. Hunt, *A Cross Cultural Perspective on Perceived Leadership Effectiveness*, 5 INT'L J. CROSS CULTURAL MGMT. 49, 51–56 (2005) (discussing a theoretical model to explain how societal/cultural settings may influence the leadership-perception process of the followers and the way they perceive leadership effectiveness to be achieved).

125. *See id*.

126. *See id*., at 54–56.

127. *See* FISHER & URY, *supra* note 63, at 61 (suggesting brainstorming to invent options for mutual gain. This strategy might work in an intercultural context but the negotiation's participants will have to be selected and the environment will have to be adapted carefully on the basis of cultural preferences.).

128. *See* TROMPENAARS & HAMPDEN-TURNER, *supra* note 20, at 68 ("Conducting business when surrounded by helpers means that this person has high status in his or her company.").

129. *See id*. at 49.

130. *See id*. at 68. The negotiation process for Americans is technical and fact oriented, so the input of neutral experts are likely to be highly persuasive. *Id*.

should respect them. However, you may ask questions on the limits of the mandate of the American negotiator. Chinese negotiators should not underestimate the need their American counterparts feel to do better or do more than is expected. Americans like to be challenged. Americans also admire competitive and entrepreneurial spirit.

Practical Tips for American Negotiators

Use the title that reflects how competent you are as an individual, and which reflects your degree of influence in your organization and society.[131] Make sure your negotiation team has enough older, senior position holders to impress upon the Chinese company that you consider the formation of the contract and relationship as important for your organization.[132] Respect the status and influence of your Chinese counterparts, even if you suspect they are short of technical or legal knowledge. Do not underestimate the need of your Chinese counterparts to make their ascriptions come true.[133] To challenge is to subvert; do not try to "show up" the other negotiators.[134] Remember the concept of face is fundamental in China; if you pose a question to a Chinese negotiator that he or she is unable to precisely answer, this may inadvertently create a crisis of face.[135]

Practical Tips When Drafting the Contract for Chinese

MBO[136] and pay-for-performance clauses are very effective methods to ensure contractual performance for Americans.[137] However, Americans should understand that MBO and pay-for-performance are less effective incentives than

131. *Id*. at 121.

132. *Id*.

133. *Id*.

134. *Id*.

135. For 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 STUD. OF MGMT. & ORGS. 73–96 (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% of Spaniards and 78% 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% of Swedish and 18% of Americans disagree with this statement and think that a manager or negotiator should be a facilitator or problem solver).

136. Management by Objectives (MBO) is a process of defining objectives within an organization so that management and employees agree to the objectives and understand what they need to do in the organization.

137. Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 68–69 (theorizing differences between American achievement-oriented cultural orientation versus Chinese ascription-oriented cultural orientation).

direct and informal rewards (outside of the contract) to their Chinese counterparts.[138] For Chinese, the terms and conditions of the contract are decided and challenged by people with higher authority—a process that is very personal and must be done diplomatically.[139] For Americans, the terms and conditions of the contract are decided and challenged between the parties on basis of financial, technical, legal, and functional grounds—a job which may be done by any competent individual and is typically viewed as being nothing personal.[140]

Fourth Dimension: Chinese Collectivism Versus American Individualism (The Group Versus the Individual):

China is a collectivist society.[141] As a result, use of the word I is avoided and negotiation is conducted in a larger team.[142] A Chinese lead negotiator needs to conduct negotiations while surrounded by followers, because the size of a leader's team is representative of their status.[143] In contrast, Americans use the word I liberally.[144] Negotiations are typically conducted between small teams. In the US, conducting negotiations alone or with very few people (e.g. one vice-president with a lawyer) means that these negotiators are respected by their organization. However, all seasoned negotiators know that when it comes to negotiation, there is always strength in numbers.[145]

Chinese Collectivist Negotiators Valued Relationship-building and Face-to-face Communications

Westerners should remember that the modernization of China does not mean the abandonment of its cultural values and traditions.[146] Although China allows contract formations through new technologies, this does not necessarily

138. *See* HAMPDEN-TURNER TROMPENAARS *supra* note 20.
139. *See id*.
140. *See id*.
141. *See id*.
142. *See id*.
143. *See id*.
144. *See i*d.
145. *See* Hofstede's Five Cultural Dimensions, *supra* note 25.
146. *See* SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (Simon and Shuster Paperbacks 2003).

mean that the Chinese welcome e-contract negotiations[147] as a means to save time and costs. On the contrary, modern Chinese businesspeople and lawyers still very much prefer face-to-face negotiations and interpersonal relationships. Also, Americans need to understand that high-context negotiators[148] like the Chinese view the formation of contracts in a holistic manner. Therefore, the contract negotiation process is conceived as synergic interrelation of the pre-contractual phase (contract negotiations), contractual phase (contractual execution and management phase) and post-contractual phase (post-contractual management phase). On the other hand, Americans tend to view these phases more sequentially.

As a collectivist, a Chinese negotiator sees himself/herself in more collective terms of interconnections with their own organization and with the other side.[149] Therefore, accountability for the Chinese is based in team efforts, and the lead negotiator is responsible for consulting the group (horizontal collectivism).[150] Conversely, American negotiators are taught to be independent and always have a strong BATNA.[151] This means that American negotiators are encouraged to develop alternatives outside of the contractual relationship should negotiations fail. Therefore, American negotiators do not usually see themselves as dependent on their Chinese counterparts in the pre-contractual phase until a written contract is signed. Accountability for the American negotiating team is based on the lead negotiator's responsibility to quarterback the negotiation process (vertical individualism).[152] Therefore, vertical individualism means that American organizations will seek out outstanding performers, heroes, and champions for leading negotiation teams.[153] American

147. E-negotiation simply means negotiating contract via Internet (emails, Skype, etc). *See* Matthew Parker, *Bridging Cultural And Technological Divides: The Role Of Culture In Email Negotiations Between American And Chinese Negotiators*, HARV. NEGOT. L. REV. (Nov. 7, 2011), *available at* http://www.hnlr.org/2011/11/bridging-cultural-and-technological-divides-the-role-of-culture-in-email-negotiations-between-american-and-chinese-negotiators/ (last visited May 2, 2013).

148. Edward T. Hall's influential concept of high-/low-context communication; *see* EDWARD HALL, THE SILENT LANGUAGE (1959) and EDWARD HALL, THE HIDDEN DIMENSION (1966); *see also* Zhu, Nel & Bhat, *supra* note 79, at 334 (2006).

149. *See* HAMPDEN-TURNER TROMPENAARS, *supra* note 20.

150. *See* Yan & Hunt, *Cross-Cultural Leadership*, *supra* note 124, at 54–55. (discussing how horizontal collectivists like the Chinese are more likely to have a strong allegiance to the interests of the immediate group (family) while vertical collectivists like the Japanese may be more concerned about the entire organization).

151. *See* FISHER & URY, *supra* note 63, at 104 (discussing the concept of the Best Alternative to a Negotiated Agreement as the basis of power in negotiation, The authors explain that the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching an agreement.); *see also* Yan &Hunt, *supra* note 124, at 54 (discussing how American vertical individualism is associated with a strong desire and enjoyment of competition at work and a strong emphasis on superior performance and winning).

152. *See id*.

153. *See id*.

organizations may also allow individuals to take their own initiatives so long as they are accountable for their decisions. For instance, under the agency rule in Anglo-American common law, if negotiators exceed their mandate (by acting *ultra vires*), they can be held personally liable.[154]

Chinese negotiators will take a longer time to build a relationship in the negotiation or pre-contractual phase. Chinese negotiators will try to bring attention to the morale and cohesiveness of the contract *vis-à-vis* the business relationship.[155] The aim for American negotiators is to reach a deal quickly, build a strong and detailed contract, and form a good working relationship with the other party. The relationship exists within the "four corners of the contract".[156] Chinese negotiators can only make tentative agreements and may withdraw from an undertaking after consulting with superiors. Therefore, the formation of the contract can be long, but the implementation is expedited by this thorough preparation and relationship development. In the United States, and in most individualist cultures, the formation of the contract is rapid, implementation may be difficult, and adjustments may be required since limited time was taken to build a relationship.[157]

American business culture is profit-centric and oriented to short timeframes[158] Chinese collectivist society has "converted the anti-mercantile attitude of orthodox Confucianism and its general ideological hostility to profit-seeking"[159] into a more long-term and market-oriented management orientation.[160] The goal is not necessarily to maximize profits in the short-term, but to make sustainable gains for the future.[161] American corporations might prefer to adopt this managerial philosophy but are pressured by individual shareholders to get quick high returns on investments.[162]

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154. JOHN E. MOYE, THE LAW OF BUSINESS ORGANIZATIONS 1–9 (6th ed. 2009) (discussing the legal concept of agency in a business organization).

155. *See* HAMPDEN-TURNER TROMPENAARS, *supra* note 23.

156. *See* Leonhard, *supra* note 32, at 2.

157. *See* HAMPDEN-TURNER & TROMPENAARS, *supra* note 23, at 68 (discussing the difference between individualism and communitarianism and how Individualist negotiators may often make a quick deal and spend less time on the formation of the contract. On the other hand, the aim of Collectivist negotiators is generally is to build lasting relationships. As a result, they will readily spend more time negotiating a contract).

158. *See* HOFSTEDE, HOFSTEDE & MINKOV, *supra* note 25, at 262 (discussing China and the United States (as well as other countries) and showing that China is more long-term oriented).

159. Ruskola, *Conceptualizing Corporations in China*, *supra* note 81, at 1607.

160. HOFSTEDE, HOFSTEDE & MINKOV, *supra* note 25, at 262.

161. *Id*.

162. *See id*. at 263.

American Contract Law is Based on Individualism

American contract law is notorious in comparative law as being strongly influenced by the economic theory of liberalism and freedom of contract based on individual rights. First, the enforcement of contracts in the United States protects the freedom of the individual and safeguards self-determination.[163] In other words, the United States allow the individual:

> [T]o construct his own lifestyle; this involves freedom of belief and opinion, freedom to own property [(these rights are elevated the status of constitutional rights in the United States)], and freedom to choose his career. Freedom of contract as well. Whether or not to enter an exchange relationship must in principle be a matter for him to decide on, in agreement with the partner of his choice.[164]

Second, and alternatively, enforcement of contracts in the United States may be seen as a utilitarian tool.[165] If the legal system's function is to satisfy people's needs in view of the shortage of resources in our world, as Utilitarians believe, then enforcing contractual agreements is an efficient means to achieve this end.[166]

Chinese Contract Law is Based on Collectivism

Freedom of contract in Chinese law is limited. The Chinese law approach to contracts is more collectivist and based on obligations.[167] Chinese law has always been more focused on individual obligations toward the collective rather than on individual rights.[168] Americans may best understand this by considering President John F. Kennedy's inaugural challenge: "Don't ask what your country can do for you. Ask instead what you can do for your country." In this famous speech, President Kennedy was encouraging Americans to think in a more collectivist manner. The historical emphasis on individual obligations in China comes from the ancient Confucian philosophy of law and is reinforced by Marxist traditions.[169]

The Confucian philosophy of contract law was patriarchal and collectivist in nature and mainly focused on obligations without specifying rights similar to

163. ZWEIGERT & KÖTZ, *supra* note 91, at 325.

164. *Id*.

165. *Id*. at 326.

166. *Id*.

167. MO ZHANG, CHINESE CONTRACT LAW: THEORY AND PRACTICE 26–27 (2006).

168. *See* Leonhard, *supra* note 30, at 7 (comparing and contrasting United States individualistic norms with the Chinese collectivist norms).

169. HOFSTEDE, HOFSTEDE & MINKOV, *supra* note 25, at 64 (explaining the historical influence of Confucianism and how Mao Zedong tried to wipe out Confucianism, but maintained strong Confucian elements during his rule).

the American equalitarian and individualistic society.[170] Under Chinese Marxist traditions "[f]reedom, individual freedom in particular, used to be labeled as bourgeois ideology or philosophy in China because it was criticized to serve the sole purpose of promoting individualism."[171]

In sum, the American and Chinese legal traditions view freedom in fundamentally different ways.[172] In the United States, freedom is inherent: people have significant autonomy until and unless the government lawfully imposes restrictions.[173] In China, people have freedom only when it is granted by the government.[174] Therefore, the concept of freedom of contract in China includes a series of limitations on the rights of the parties to contract: limitations on party autonomy; legal compliance requirements; state plan mandates, which must be respected; administrative supervision and government approval; and other special requirements.[175]

Pre-contractual Liability in the United States is Extremely Limited

Generally, promises made during pre-contract negotiations are unenforceable.[176] These considerations are based on economic liberalism.[177] Anglo-American contract law is based on the concept of *pacta sunt servanda*.[178] According to traditional contract doctrine, pre-contractual promises made during negotiations are usually held to be unenforceable unless the parties have indicated intent to be bound. [179] A recent study demonstrated that American courts denied finding pre-contractual liability in eighty-seven percent of the cases studied, whether on promissory estoppel, quantum meruit, or negligent misrepresentation.[180] The entire history of Anglo-American contract law is based on the parties' negotiations, which made it plain that any promise or agreement at that time was conditional upon the signing of a written contract.[181]

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170. ZHANG, *supra* note 167, at 26–27.
171. *Id*. at 54.
172. *See id*. at 55.
173. *See id*.
174. *Id*.
175. *Id*. at 51–67.
176. SCOTT & KRAUS, *supra* note 72, at 281–82.
177. *See id*. at 296.
178. Latin for "agreements must be kept."
179. SCOTT & KRAUS, *supra* note 72, at 281.
180. *See id*. at 173.
181. *See id*.

Pre-Contractual Liability in China Contract Law is Generally Accepted

First, the fact that a party may be held accountable for promises made during the formation of the contract can certainly be linked to the classical conception of ancient Confucian customs that view contractual agreements in a particularistic, collectivist, and relationship-based manner. Second, Chinese contract law explicitly includes pre-contractual liability as an important part of the contract law system to ensure fairness and good faith.[182] While the unconscionability defense in American contract law is difficult to successfully plead, Chinese courts regularly engage in "gap-filling."[183] This means that the courts have great interpretative discretion and power to interpret the fairness of the contract on a case-by-case basis.[184] This looks like a nightmare for many American attorneys.[185] Therefore, bad faith, lack of fair dealing, inequality of bargaining power, and unfair standard agreements imposed during the negotiation phase are all taken into consideration by the Chinese courts when they examine the contract and contract formation process.[186]

The Individualistic the American Contract Law Theory of Efficient Breach is Influential

The theory of the "efficient breach," developed by Richard Allen Posner, posits that there is nothing morally or ethically wrong in breaching a contractual promise so long as compensation is provided.[187] This contract theory encourages voluntary breaches of contract by a party who concludes that they would incur greater economic loss by performing under the contract than by simply paying damages.[188] Therefore, the popular belief that American businesspeople will always work within the "four corners of the contract"[189] may not be true in every case.[190] Civil law is adverse to the American contract law theory of Efficient Breach[191] and Chinese contract law is based on civil law

182. ZHANG, *supra* note 167, at 85. This is common among civil law traditions.

183. Matheson, *supra* note 102, at 351.

184. *Id*.

185. *Id*.

186. *Id*. at 348–55.

187. Savita H., *Efficient Breach – Not a Moral or Ethical Obligation*, WEST REFERENCE ATTORNEY BLOG (Nov. 23, 2011), http://westreferenceattorneys.com/2011/11/efficient-breach-not-a-moral-or-ethical-obligation/.

188. Tripti Sinha, *The Efficient Breach of Contract: An Aspect*, GLOBAL ECONOMY ISSUE, http://www.globalrp.org/the-efficient-breach-of-contract-an-aspect.html (last visited May 2, 2013).

189. Leonhard, *supra* note 32, at 2.

190. *Id*. at 18–19.

191. ZHANG, *supra* note 167, at 200.

(mainly German civil law).[192] Therefore, under Chinese law, complete and adequate performance of the contract is expected.[193]

In Chinese society, a contractual promise is viewed as an ethical and moral commitment.[194] Under the ancient Confucian philosophy of law, the enforcement of contracts was viewed as a civic or collective responsibility. Moreover, "the punishment in ancient China for breach of contract or violations was harsh, and mostly was punitive as provided in penal law."[195] Therefore, the Efficient Breach contract theory conflicts with traditional Chinese cultural values. American parties who choose to breach contracts with their Chinese counterparts as a means of saving money may benefit in the short term, but will certainly pay the reputational cost in the long term if they decide to continue to do business in China.

On personality tests, Chinese negotiators usually score as more introverted. A Chinese negotiator may have a harder time showing his real personality and thoughts at the negotiation table. Therefore, American negotiators should strive to create the right atmosphere to facilitate communication. On personality tests, American negotiators usually score as more extroverted. Chinese negotiators are usually able to discover the real personality and thoughts of American negotiators at the negotiating table.[196] Social activities such as business lunches are preferred during negotiations. It is more time-consuming to go out for fine dinners, *dîners gastronomiques* (like the French, Chinese are known to be epicureans) and other social activities are usually reserved to celebrate the signing of the contract.

Fifth Dimension: American Neutral Culture Versus Chinese Affective Culture (The Range of Emotions Expressed During Negotiations and Invested Towards the Contract Formation):

Americans try to not always reveal what they are really thinking or feeling and maintain poker faces if possible. However, Americans admire charismatic negotiators and leaders for their ability to express their real feelings in a non-

192. *Id*. at 199 (noting that full performance is a core principle of Chinese contract law).

193. *Id*. at 200.

194. *Id*. at 199–200

195. *Id*. at 27. *See also* FANG, *supra* note 77, at 111 ("The Confucian message is clear: law does not eradicate problems; people's behavior can be influenced effectively only by a set of self-regulating moral mechanisms, for example, by li (ritual propriety, etiquette, etc.) and by instilling "a sense of shame" into people's minds.").

196. *See* Hofstede's Five Cultural Dimensions, *supra* note 25; *See also* HALL, *supra* note 101) (discussing how manners and behaviors often speak more plainly than words).

threatening and compelling manner that resonates.[197] Chinese tend to only reveal their thoughts and feelings in a very private setting or via non-verbal language. In public, at the negotiation table or in formal settings, there is great emphasis on saving face.[198] Unlike Americans who view business as impersonal and neutral, Chinese negotiators view business as personal and effective. Chinese may (accidentally) reveal tension in face and posture. For Americans, transparency is expressed through the rights and obligations of the contract. American lawyers put great emphasis on inserting strong representations and warranties clauses in the contract. In contrast, for Chinese negotiators, transparency and expressiveness are expressed through the business relationship. Without a good relationship, it may be hard for Americans to read the mind of a Chinese negotiator. In East Asia, social activities, traditional food, and alcohol play a significant role in facilitating interpersonal relationships and the expression of emotions.[199]

In East Asia, social activities, traditional food, and alcohol play a significant role in facilitating interpersonal relationships and the expression of emotions.[200]

For Chinese, bottling up emotions causes them to occasionally explode. However, emotions are subject to self-regulation because of the concept of face,[201] but are expressed with less inhibition when a strong relationship is

197. NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 224 (Thomson eds., 4th ed. 2002) (discussing how Americans value charismatic leaders and identify business and political leaders such as Lee Iacocca, former CEO of Chrysler Corporation, and Bill Clinton, former president of the United States, as charismatic).

198. The concept of Face involves the tendency to avoid embarrassing situations no matter what the costs are. This means that an East Asian will be more willing to bend or hide the truth in order to save face, will lie to save face, will not willingly admit that they are wrong, and will not bring others into potentially embarrassing situations. This can be said to be an extension of a deeper difference—shame tends to be more important than guilt in many East Asian societies. That is, rather than be concerned with things like "to be real or staying true to yourself," and self-honesty, which are internal, and are motivated by a concern for one's own feelings of guilt, an Asian will often worry more about how his actions will be seen by others. In other words, the consequences of getting caught are worse than the action. Moreover, even an innocent act that appears wrong is to be avoided. *See* FANG, *supra* note 77, at 143–51 (discussing the influence of concept of face for Chinese business negotiating style).

199. HAMPDEN-TURNER & TROMPENAARS, *supra* 20, at 80–81 (theorizing that East Asian negotiators are more neutral and do not always reveal what they are thinking or feeling). On the other hand, Americans are more affective and more readily reveal thoughts and feelings. As a result it is common wisdom that social and entertainment for experienced negotiators may facilitate the communication process between neutral and affective negotiators. *Id.*

200. Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 80–81 (theorizing that East Asian negotiators are more neutral and do not always reveal what they are thinking or feeling. On the other hand, Americans are more affective and more readily reveal thoughts and feelings. As a result it is common wisdom that social and entertainment for experienced negotiators may facilitate the communication process between neutral and affective negotiators).

201. Hofstede's Five Cultural Dimensions, *supra* note 25, at 110, 118, 255 and 391 (discussing the importance of concept of face in Chinese culture).

formed. For Chinese, self-possessed conduct is admired. American negotiators are also encouraged to manage their emotions efficiently—to be cool and emotionally intelligent.[202] Americans also like humor that eases the negotiation climate.

Physical contact, gesturing, strong facial expressions, or outbursts of emotions are usually not the accepted as social norm in China. However, contrary to popular American beliefs, this does not mean that the Chinese are cold negotiators. As relationship-oriented negotiators, the Chinese are in fact very sensitive or affective, and put great importance on the concepts of face,[203] reciprocity, and respect.[204]

In the United States, negotiation statements can often be read emotionally, but are more theatrical in a Hollywood inspired style. The advocacy skills of American negotiators are often influenced by the jury trial. For instance, "the jury system shapes the law that is taught in American law schools."[205] In other words, perceptions and emotions play a greater role in the jury system. However in China, negotiation statements at the negotiation table are made in a more ceremonial and neutral manner and are rarely theatrical or dramatic. Chinese should understand that despite the "Hollywood influence," stereotypical Americans appearing on the Oprah Winfrey Show or other television programs showing overly emotional Americans are not good examples of how real Americans advocate.

202. *See* ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 3–115 (2005) (discussing the importance of efficiently managing emotions during the negotiation process).

203. FANG, *supra* note 77, at 143–51 (discussing the influence of concept of face for Chinese business negotiating style).

204. *Id*. at 143–48 (explaining that losing face, in the Chinese tradition can dramatically be compared to losing one's eyes, nose, and mouth. Theorizing that the concept of face is embedded in the Confucian notions of shame and social harmony).

205. FLETCHER & SHEPPARD, *supra* note 54, at 6 (explaining that the importance of the jury is a hallmark of U.S. law, distinguishing American common law not only from civilian but even from other English common law jurisdictions. Predicting their decisions is an important factor in counseling clients not only in preparing for trial but also in assessing potential liability. The task of persuading a jury usually composed of "laymen" required different advocacy skills than persuading a judge. Perceptions and emotions usually play a greater role and as a result theatrical lawyers can be advantaged).

Sixth Dimension: Time Management: A) Chinese Past-Oriented Culture Versus American Future-Oriented Culture:

International negotiators should respect the culture, history, tradition, and cultural heritage of those they negotiate with and always avoid ethnocentrism. Although Anglo-American common law is based on history and precedents, American lawyers and negotiators need to understand that they place more emphasis on more future-oriented legal values such as freedom of contract, autonomy, liberal individualism, and future opportunity.[206] Americans need to determine whether the terms and conditions of the contract are in compliance with Chinese culture and traditions: the parties should ensure to draft a contract adapted to their cross-cultural difference in order to build synergy.[207] Chinese negotiators adopt a more holistic perspective and focus on long-term viewpoints as a mechanism to preserve traditions and past order.[208]

Sixth Dimension: Time Management: B) American Negotiators are Sequential Versis Chinese Negotiators are Symchronic:

For American negotiators, time invested in the contract formation process is sizable and measurable.[209] Time is money. In contrast, for Chinese, negotiators time invested in the negotiation process means time invested in their social capital.[210] For Americans, the parties must agree to very specific deadlines. Usually, time is of the essence in the contract because of Just In Time (JIT) industrial system.[211] Americans always try to abide by the fixed timelines inserted in the contract. Time is of the essence and all deadlines in the contract must be strictly respected; any tolerance of delays shall not be interpreted as

206. Leonhard, *supra* note 33, at 2.

207. *Id*.

208. Hofstede's Five Cultural Dimensions, *supra* note 25, at 274–75 (explaining the key differences between short-term and long-term orientation).

209. Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 143–44 (theorizing differences between American Sequential cultural time orientation versus Chinese Synchronic cultural time orientation).

210. Zhu, Nel & Bhat, *supra* note 79, at 321 (discussing the concept of social capital as an investment in social relations with expected returns in the marketplace. In the context of this article social capital means investing time and money in building relationships and social network).

211. Just In Time (JIT) is a management production strategy that strives to improve a business return on investment by reducing in-process inventory and associated carrying costs. JIT is Japanese inspired and is also referred to as the Toyota Production System. Therefore, following JIT deadlines in the contract has become fundamental. American corporations such as Wal-Mart now used this production strategy.

acceptance. Usually, Americans will insert a waiver clause[212] in the contract, in case they tolerate or show indulgence for a breach to a timeline.

For Chinese, contract deadlines are approximate and subject to change in the context of a good business relationship.[213] For Americans, a noncompliance with the contractual obligation is severe and there is a strong preference for not amending the agreement. An amendment to the contract is formally handled in the United States. Each amendment is numbered. After many amendments, the lawyers may want to draft an entirely new contract to avoid confusion. On the other hand, for Chinese there is a strong preference for following up where relationships lead and contract amendments should be considered natural and normal. For Chinese preserving the relationship is more important than the compliance to the contract. After all, for Chinese and more relationship-oriented cultures a contract is just a piece of paper.[214]

Finally, as synchronic negotiators, time is more flexible for Chinese.[215] They tend to do more than one activity at a time and think in a circular manner.[216] In other words, Chinese tend to negotiate in a holistic manner (see the "bigger picture").[217] In contrast, as sequential negotiators, Americans prefer only do one activity at a time and like to negotiate article-by-article a contract.[218]

Seventh Dimension: American Inner-Directed Versus Chinese Outer-Directed

American negotiators tend to often have a dominating attitude bordering on overly aggressive towards environment.[219] Americans tend to embrace the

212. Example of a Waiver provision in a contract:

A Party may waive any of its rights under this Agreement only in writing, and any tolerance or indulgence demonstrated by the Party will not constitute a waiver.

213. Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 143–44 (theorizing differences between American Sequential cultural time orientation versus Chinese Synchronic cultural time orientation).

214. *Id*. at 149–50, (explaining that for Americans placing primary importance on task accomplishment and using contracts are often the goal of business dealings. On the other hand, cultural groups like Chinese emphasizing on relationships; a paper document that cannot adapt to changing circumstances and goals is not a good contract. The role of the contract varies from one culture to another).

215. Hampden-Turner Trompenaars 7D Model, *supra* note 20.

216. *Id*.

217. *Id*.

218. *Id*.

219. *Id*. at 159–60 (theorizing differences between American Internal Control cultural orientation versus Chinese External Control cultural orientation).

Protestant saying, "help yourself and God will help you."[220] Protestantism also had great influence on the development of common law in the United States.[221] On the other hand, Chinese negotiators are often influenced by Taoist philosophy of Natural Way[222] to invite to harmony and avoid conflict. This means they have a more flexible attitude and are often more willing to compromise and keep the harmony than those in the United States.[223] In the United States, business culture is viewed as competitive and confrontational.[224] This means ability to be confrontational and manage conflict and resistance is often interpreted as being strong and having convictions.[225] In contrast, ancient Chinese values of professing harmony and openness means that a person is wise and they have human decency and sensibility.[226] Understanding ancient Chinese values as the foundations of the Chinese culture is important because since the Cultural Revolution (late 1970), China has been undergoing tremendous changes.[227] The Chinese society is developing so fast that data acquired yesterday may be outdated tomorrow.[228] As noted by Fang, "the changing feature of Chinese society results in the fact that things can hardly be fully planned at the operational level".[229] As a result, adaptability and pragmatism are required to succeed in China.

In the United States, the focus is inner. This means on yourself, your function, your own group, and your own organization.[230] In China, the focus is more outer-directed; this means the focus is on the other party, whether the other party is a customer, partner, or colleague. Chinese do not feel discomfort like Americans when the environment seems "out of control" or not changeable.[231]

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220. Yan and Hunt, *supra* note 124.

221. HARNOLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 18–19 (Harvard University Press, 1983) (discussing the influence of Protestant revolution on Western and American legal traditions).

222. Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor is Far Away: Sanctity of Contract Law in China*, 40 AM. BUS. L. J. 480 (2003).

223. *Id*.

224. Hampden-Turner Trompenaars 7D Model, *supra* note 20. at 159–160 (theorizing differences between American Internal Control cultural orientation versus Chinese External Control cultural orientation). *See also* Hofstede's Five Cultural Dimensions, *supra* note 25, at 140 (theorizing that United States is a masculine business society where competition is viewed as fundamental for productivity).

225. *Id*.

226. *Id*.

227. FANG, *supra* note 84, at 96 (explaining the impact of rapid change in the China on negotiations).

228. *Id*.

229. *Id*.

230. *Id*.

231. *Id*. at 159–60 (theorizing differences between American Internal Control cultural orientation versus Chinese External Control cultural orientation).

Chinese feel comfort with waves, shifts, and cycles if these are in accordance with the "Natural Way."[232]

Practical Tips for Negotiations between Inner-directed Americans and Outer-directed Chinese

For Americans playing "hard ball" is legitimate to test the resilience of an opponent.[233] For Chinese, diplomacy, softness, persistence, politeness, and patience will get rewards.[234] Chinese should make sure that tangible contractual goals are clearly linked to tangible rewards (a contractual relationship is solely based on consideration). Gratuitous promises should not be expected and are usually not enforceable in American contract law.[235] A contract should try to reinforce the current business relationship and facilitate the work of the parties. Chinese negotiators need to understand that contract negotiation for Americans are based on management-by-objectives, which means the contract works if the contracting parties are genuinely committed to directing themselves towards fulfilling the terms and conditions of the contract. On the other hand, Americans need to understand that for Chinese contract negotiation is based on management-by-environments, which means the contract works if the contracting parties are genuinely committed to adapting themselves to fit external demands such as shifting business environments and relationships.[236] The challenge in practice is to find the right balance between American management-by-objectives and orientation versus Chinese management-by-environments.

IV. A FEW PIECES OF ADVICE FOR PRACTICAL CONTRACT DRAFTING

As a practicing international business lawyer, I offer practical drafting advice to improve Sino-American contract formation.

232. Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 159–60 (theorizing differences between American Internal Control cultural orientation versus Chinese External Control cultural orientation).

233. *Id*.

234. *Id*.

235. ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 128 (2007) (discussing bargain versus gifts).

236. Hampden-Turner Trompenaars 7D Model, *supra* note 20, at 159–60 (theorizing differences between American Internal Control cultural orientation versus Chinese External Control cultural orientation).

Importance of the Preamble

The preamble is used by the mediator, judge, or arbitrator in case of litigation for the interpretation of international business contracts (the recital clauses are supposed to put the meaning or essence of the contract into words). The preamble is like the story of the agreement. For some lawyers including myself, the preamble is the soul of the contract. A preamble is not supposed to contain contractual rights or obligations—just fundamental facts and contextual information that lead to the formation of the contract between the parties. Therefore, the preamble in international business contracts can be used to explicitly stipulate the importance of the relationship between the contracting parties. As an illustration, the preamble of the North American Free Trade Agreement ("NAFTA")[237] between Canada, the United States, and Mexico clearly stipulates the importance of a strong relationship between parties:

> PREAMBLE NAFTA
> The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:
> STRENGTHEN the special bonds of friendship and cooperation among their nations;
> CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;

Finally, since preambles are not usually considered part of the entire agreement in common law, Canadian or American lawyers often underestimate the importance of the recitals to express the desire of their client to build the foundations of a fair, efficient, and durable contractual relationship. As discussed, the Chinese are more relationship-oriented and such recitals could therefore start the contract on positive note.

Importance of Training and Development Clause

The main strategy for American companies entering Chinese markets is joint venture. This has also been the preferred market entry for the Chinese government to ensure the access of new western technologies and know-how for Chinese state-owned companies. Since China opened its doors to foreign trade, the policy of the Chinese government has been simple: I will give you access to my large emerging economy, but in exchange, I want your technology and know-how. Thus, joint ventures are only successful if the synergic complementary forces of the parties are fully leveraged and well managed.[238] International joint ventures are often marked by a severe lack of cross-cultural

237. NAFTA Secretariat, preamble of NAFTA Agreement: http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=120 (last visited May 2, 2013).

238. Adler International Organizational Behavior, *supra* note 206 at 105–33 (discussing the organizational cultural risks and strategies to creating cultural synergy in organizations).

and organizational understanding among parties involved. Despite all their purported benefits, joint ventures are risky and highly unstable.[239] Various performance measures have been applied to joint ventures, with results showing a consistently high rate of failure.[240] The dissolution rate is reported to be about 50%.[241] This failure rate closely mirrors the divorce rate in the Unites States. Not surprisingly, joint venture contracts are often analogically compared in legal literature to marriage contracts, as the marriage of the spouses to a common goal. Therefore, a simple practical recommendation for American and Chinese parties involved in joint venture contracts is to act like married couples and see a counselor or marriage therapist. American and Chinese parties can mitigate cultural risks by inserting a mandatory three-day training and development program—or more days if necessary—to nurture their mutual cross-cultural understanding. The clause could read as follows:

Training and Development Clause

> The Parties agree shall enter into a three-day training on cross-cultural understanding that will be provided by Trompenaars and Hampden-Turner's firm. The Parties shall pay equally the costs for these desired training services and to bear their own costs of participating in this training. The cross-cultural course referred to and contemplated by this Article shall be:
>
> (a) at the location elected by the Parties;
> (b) for the following participants (list and names of the participants); and
> (c) in the form and content as proposed by Trompenaars and Hampden-Turner in consultation with the Parties.

Dispute Resolution Clause

In the United States, all international commercial disputes are usually solved by ADR methods: negotiation, mediation, or arbitration. A survey of more than 530 corporations in the Fortune 1,000 category showed that 90% viewed ADR as a critical cost-control technique. More than half (54%) said cost pressures directly affected their decision to use ADR.[242] Users said that

239. Seung Ho Park & Gerardo R. Ungson, *The Effect of National Culture, Organizational Complementarity, and Economic Motivation on Joint Venture Dissolution*, 40 ACAD. OF MGMT J. 279, 279 (1997).

240. *Id*.

241. *Id*.

242. Darryl Geddes, *Survey: Corporations Now Widely Use Dispute Resolution Over Litigation*, THE CORNELL CHRONICLE, June 19, 1997, http://www.news.cornell.edu/chronicle/97/6.19.97/dispute_resolution.html (last visited Nov. 13th 2011).

ADR provided better outcomes than litigation (66%), and preserved confidentially and good business relationships (59%).[243] Consequently, the parties to a Sino-American contract should always attempt to resolve disputes arising out of the contract by recourse to the dispute resolution methods identified in the following sequence:

1) Negotiations in good faith between the CEOs[244];

2) Non-binding mediation[245]; and

3) Binding arbitration.

Inserting such a clause demonstrates the parties' mutual desire to preserve a fair and durable business relationship. This kind of wording in a dispute resolution clause also demonstrates the willingness of American parties to respect the cultural preference of Chinese parties to resolve conflicts through cooperation, collaboration, and maintained harmony. As a last resort, all experienced international businessmen and lawyers know that arbitration should always be utilized instead of litigation in court. [246]

As two final points, first and foremost, arbitration should be preferred not because of the New York convention, but because the Chinese legal system is

243. *Id*.

244. *See* Hofstede Official Web Site, *supra* note 125 (negotiation between CEOs in the event of a legal dispute complies with the concept high Power Distance in China following Hofstede's Five Cultural Dimensions. This means in China usually only the highest authority (i.e. COE) figure makes important decision).

245. It is also important for the parties involved in the negotiation of Sino-American contracts to consider using a transactional mediator intervening in the pre-contractual phase of the contract formation as a strategic counsel and cultural facilitator to create a more durable and effective contract. Transactional mediation is a relatively new field of alternative dispute resolution since mediation is usually utilized after the signing of the contract or when a dispute arises. A transactional mediator aims to intervene pre-emptively to help the parties and to prevent disputes from arising. *See* Scott Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283, 283–304 (2004). *See also*Garrick Apollon, Cross Cultural Deal Mediation As a New ADR Method for International Business Transactions, 20 L. & Bus. Rev. Am. (Forthcoming Apr. 2014).

246. *Bloomberg Law Reports, Asia pacific* (2009), http://mwe.com/info/pubs/BLR_1109.pdf (last visited May 2, 2013) (discussing that arbitration 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. In 1986, the People's Republic of China ratified the New York Convention. Over the more than twenty years that have transpired since China ratified the treaty, Chinese companies have become regular participants in proceedings before the International Chamber of Commerce, the Stockholm Chamber of Commerce, the Hong Kong International Arbitration Centre and similar international arbitral bodies).

experiencing serious corruption problems.[247] Second, it is important to stress the practical importance of always trying to resolve disputes by the use of negotiation or mediation. Even though China is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (New York Convention), American businessmen need to realize that other issues such as corruption and local government enforcement issues make the New York Convention moot in many instances.[248]

V. CONCLUSION

In conclusion, forming Sino-American contracts presents significant challenges. The American and Chinese cultural practices of negotiation, dispute resolution, and contract formation are diametrically opposed in many aspects. However, this comparative analysis also highlights many similarities and points of convergence. Globalization continues to bring these two distant cultures and superpowers together in an unprecedented manner. As a result, American and Chinese businessmen have become more interdependent. This interdependence requires more vigilance in negotiating and formulating equitable contracts across the two cultures.[249] Some argue that American contract law, negotiation, and dispute resolution practices in their current forms are inadequate in the age of globalization.[250] However, others argue that the Chinese legal system is also in desperate need of reform.[251] Whichever practices ultimately prevail, the skilled negotiator or lawyer must view adaptation to the cultural context of each negotiation, not as an exercise of compromising sensitivity, but rather as a choice of strategic necessity.[252] Finally, this article demonstrates the advantages for international business negotiators and lawyers to *créolize* the management of the formation of their contractual relationships. There is no doubt that comparative law and comparative management theories demonstrate that incorporating ideas and practices of other cultures with regard to negotiation, dispute resolution, and contract formation can help develop more efficient and durable cross-cultural contracts and business relationships.[253]

247. Matheson, *supra* note 102, at 381.

248. *Id*. at 379.

249. Leonhard, *supra* note 32, at 36.

250. *Id*.

251. ZWEIGERT & KÖTZ, *supra* note 91, at 294.

252. GREENE, *supra* note 8, at 169.

253. Zhenzhong Ma, *Chinese Conflict Management Styles and Negotiations Behaviours: An Empirical Approach*, 7 INT'L J. OF CROSS CULTURAL MGMT. 101, 102–14 (2007).