

How might culture impact on communication and negotiation during commercial mediation?

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Introduction – What is culture?

There are probably more definitions of what culture is than there are varieties of cultures which permeate modern society. Nevertheless, there are certain inherent aspects of culture which are constant. CARLA² defines culture as ‘shared patterns of behaviors and interactions, cognitive constructs, and affective understanding that are learned through a process of socialization’ which ‘identify the members of a cultural group while also distinguishing those of another group’. In essence, culture is those shared behaviours which influence our social interactions, learning and understanding within a social group which distinguishes them from other groups. Hofstede³ succinctly defined culture as ‘the collective programming of the mind which distinguishes the members of one category of people from another’.

Culture is a group construct which influences the mind, the thinking patterns which determine how we speak, what we hear and how we act: in short, the ways in which we communicate. Storti⁴ states that ‘communication is one of the most common of all human behaviours’. It is important to understand what we mean by ‘communication’. Adler⁵ and Gibson⁶ separately both define communication as an ‘exchange of meaning’. It is a complex, multi-layered process, dependent upon the perception of the recipient as well as the intent of the donor. It involves the interpretation of what is said, how it is said and the accompanying framework of body language in which it is set.

Mediation

It is useful to consider the contrast of cultures within the context of mediation: a process in which a neutral person, the mediator, seeks to assist disputing parties reach a mutually-acceptable resolution of the matters in dispute. Thus, where the parties are of different cultures, it is clear that this will inform their thinking patterns, communication expressions and behaviours. It will influence what they value and what their expectations might be. This is particularly important in times of high stress, such as a

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2 Centre for Advanced Learning on Language Acquisition (CARLA), University of Minneapolis. At <www.carla.umn.edu/culture/definitions/html> at 12 October 2012.

3 Hofstede Geert. *National Cultures and Corporate Cultures* (1984). In: LA Samovar and R.E. Porter (Eds.) *Communication Between Cultures*.

4 Craig Storti, *The Art of Crossing Cultures*, (1999) at page 87.

5 Nancy J Adler, Allison Gundersen, *International Dimensions of Organisational Behaviour* (1999) at page 68.

6 Robert Gibson, *Intercultural Business communication: An introduction to the theory and practice of intercultural business communication for teachers, language trainers, and business people* (2002) at page 18.

commercial business dispute, where corporate survival or reputations might be at stake. Culture sets the framework for communication, and perhaps expectations, across the wide range of transactions and interactions: what a party might hear, understand or not understand, and their expectations of outcomes. Within the context of mediated dispute resolution, understanding the impact of culture on communication and negotiation is the key to allowing the parties to resolve the dispute on mutually-acceptable terms.

Culture – the East–West divide

There are several factors which influence our perceptions and understandings of cultures. Much has been written on the differences between Eastern and Western cultures. There is a tendency in much of the literature to equate Eastern culture to Chinese culture, and to presume that it is the same for cultures such as Japanese, Korean, Taiwanese or perhaps Vietnamese. These distinctions might be broadly correct, but it needs to be borne in mind that within these two broad definitions there are distinctive differences. Macduff points out, citing Cogan, that within French culture there is a marked preference for a high-context Eastern model, with elliptical references, and selection of the right moment, for comment.⁷ In societies such as in Singapore it is not uncommon to find Western-educated familial Chinese executives, imbued with a *mélange* of both Eastern and Western cultures. Although modern structured mediative processes are essentially a Western construct,⁸ mediation has long been a part of Eastern culture.⁹

Eastern, high-context cultures

Cultural distinctions

There are distinct differences between Eastern cultures, but they have a common root in Confucian values and traditions and, perhaps to a lesser extent, in Daoist and Buddhist traditions. Dryburgh notes that ‘the Confucian canon in China did much to shape the mental landscape of the ruling classes ... demonstrated proper and improper behaviour’.¹⁰ Chinese culture in particular is shaped by the core values of Confucianism: the importance and value of the family, education, and public service,¹¹ within a framework of established hierarchical and personal relationships (*guānxi*).¹² Hence in Chinese business culture the key focus is on the development of personal relationships or mutual obligations.

Chinese culture using Edward T. Hall’s¹³ constructs is a high-context culture which reflects its genesis in the Confucian focus on family. Accordingly, in a familial context communication may involve covert and implicit messages with much non-verbal communication, reflecting strong people bonds. Non-verbal

7 Ian Macduff, ‘*Contradiction and Conflict: High and low- Context Communication in Mediation*’ (unpublished work), citing Charles Cogan, *French Negotiating Behaviour: Dealing with La Grande Nation*, (2003) Washington DC, USIP.

8 Modern structured mediation started in California about 30 years ago whereas it has been practised in China for over 5,000 years.

9 See Goh Joon Seng, *Mediation in Singapore: the Law and Practice* (2006) Asian Law Association. At <www.aseanlawassociation.org/docs/w4_sing2.pdf> 16th October 2012.

10 Marjorie Dryburgh, *Foundations of Chinese Identity*, in Xiaowei Zang (Ed.) *Understanding Chinese Society* (2011) at page 12.

11 *Ibid.*

12 Mandarin Chinese: ‘connection’.

13 Edward T. Hall, *Beyond Culture* (1976).

communication is a vital element of communication, allowing comprehension where there is ambiguity or a lack of understanding of verbal messages; non-verbal communication may provide the real message which is intended to be delivered. High-context cultures like those of the East rely heavily on non-verbal messages delivered through gestures, posture, the use of silence, spatial relationships and emotional expressions. Nodding one's head in assent – a common Western gesture – may mean nothing or imply dissent in the East, thus it is important to use one's eyes as well as one's ears to understand the messages being conveyed. McFadden¹⁴ notes that only 7% of the content of spoken words cause a reaction, and 38% of the pitch, tone or pace of the delivery cause a reaction, but 55% of recipients will be influenced by the body language: the gestures and appearance of the person delivering the message, essentially categorising the nature of the message itself.

Familial relationships

High-context cultures have a commitment to long-term relationships, reserved inward reactions and personal acceptance of failure. Their sense of time is polychronic: it is open and flexible, wherein the process is more important than the outcome and the journey more important than the destination. For example, within a high-context culture, a business contract reflects the familial nature of the cultural basis: it is based on mutual understanding wherein it is not necessary to write everything down as trust is a vital component of the relationship and the contract itself is like a memorandum of understanding, capable of future change as circumstances might dictate.¹⁵ Thus, in a high-context culture, what is not said is often as significant as what is said, as there is a fundamental reliance on trust and relationship as key drivers in any contractual engagement.

Face

Face is an important part of high-context Eastern cultures. It is defined in many ways. Novinger describes it as 'the value or standing of a person in the eyes of others ... that relates to pride or self-respect'.¹⁶ It reflects status or standing within a relationship and is an essential part of any communication or negotiation. An insult (whether intentional or unintentional), a loss of temper, an intemperate expression or a sign of impatience can be devastating to a negotiation. There is an implicit loss of face from insult or anger and the recipient's standing in their community may be lowered. Face has no direct counterpart in Western cultures but is a significant part of Eastern cultures. Giving and maintaining face may thus be vital to any successful outcome in communication or negotiation with the East. Loss of face may build an impregnable barrier to further reasoning or concession. In communication and negotiation it is essential to minimise any loss of face.

Deference

Deference in Eastern cultures derives from familial piety and the existence of a high-power distance demanding respect. Age also requires respect, and an older person will be accorded deference due to

14 Danny McFadden, *CEDR Mediation Notes* (2012) Presentation to SMU LLM October 2012

15 John Hooker, *Cultural Differences in Business Communication* (2008), at page 2; at <www.ba.gsia.cmu.edu/jnh/businesscommunication.pdf> at 10 October 2012.

16 Tracy Novinger, *Intercultural Communication*, (2001) University of Texas Press, at page 84.

their age and implied experience. Seeking to avoid embarrassing superiors or elders is essential. Deference is also shown by way of posture and greetings. The Japanese *meishi* (business card) ceremony is a universal basis for deference and acknowledgement: the donor offers his card with both hands for the recipient to receive, the recipient then acknowledges its receipt and reads it, usually with positive comment on the implied titular success of the donor. A junior individual offers his card at a lower level to that of their senior. Within the context of mediation deference is important to avoid unnecessary offence and costs nothing but a little pride. Understanding and giving recognition and deference to positional authority may yield inestimable benefit in moving to agreement.

Western, low-context cultures

Just as Eastern cultures derive much of their roots from Confucianism, Western cultures derive their bases in the Judaeo-Christian ethic. Western low-context cultures include most cultures with Western European roots: most of Europe, the United States and Australia. Western cultures leave little to be unsaid and the 'spoken word carries most of the meaning'.¹⁷ Within most Western cultures negotiations are undertaken much as a game, where winning is the major objective; hence, attitudes can be confrontational. This is the antithesis of the relationship-driven, low-content style of the East. High-context cultures may eschew detailed forms of contract, as being antithetical to an implicit familial trust; low-context Western cultures, imbued with the Judaeo-Christian ethic, seek detailed express forms of contracts which have their roots embedded within the ethic itself. Many forms of contractual agreement and torts stem from the biblical Old Testament, such as the Decalogue.¹⁸ Western contracts are inflexible, containing express terms and considerations such as 'time is of the essence' which reflects a linear commutative concept of time.

Whereas Eastern cultures utilise deductive reasoning and will go from a general proposition to a specific view derived from the general, Western culture is based on induction and reasoning travels from the specific to the general. This distinction causes Western cultures to analyse and decompose generalities into their component parts, rather than the reverse, integrative approach of the East. In negotiation Western cultures tend to be direct, confident and decisive, and aware of their rights. Negotiations are often driven by sole individuals seeking to win for themselves; in contrast with the Eastern cultures, where consensus is important and deliberation may take time to reach a consensus. What is said is of great consequence and there is often little subtlety in the message delivery, with open body language directly conveying emotions. Messages are clearly and succinctly delivered in a confident assertive manner, with little left to interpretation from non-verbal metaphors.

17 Craig Storti, *The Art of Crossing Cultures*, (1999) at page 92.

18 The Decalogue is the Ten Commandments: an express contract. See also for example: Exodus Chapters 21, and 22, which outline express forms of contract for freeing slaves, and debtor-creditor relations. A more detailed reference on this is: Richard H. Hiers, *Ancient Laws, Yet Strangely Modern: Biblical Contract and tort Jurisprudence*, (2011) University of Detroit Mercy Law Review, Vol 88.473, at page 473 et seq.

The impact of cultural differences on communication and negotiation in mediation

Current mediation is a staged process and successive stages can be used to examine the influence of these two dominant cultures within the mediation process itself. These stages may be considered to be preparation, opening, exploration, bargaining and conclusion.¹⁹

Preparation

During this phase, the mediator will start to develop an understanding of the facts surrounding the matter, analyse the issues and preliminarily determine the parties' strengths and weaknesses. He²⁰ may formulate what he believes will be the arguments submitted by either side. Importantly, in a cross-cultural mediation the mediator will try to determine who the attendees might be and their roles, since ultimately the outcome will rely on their abilities to come to a mutually-acceptable agreement. In light of this, the mediator will also need to consider what style might be adopted in the mediation: that of a facilitator, avoiding comment or opinion but getting the parties through a process of continuous re-evaluation to move to 'yes',²¹ or a transformative approach to bring the parties to agreement. Although planning lacks the dynamic of the mediation itself, it is essential precursor for consideration of available options based on the facts. The mediator will also focus on being able to interpret the anticipated different cultural styles of the parties.

Opening

The opening is critical, as it sets the scene for what follows in terms of gauging the parties' reactions to each other and to the dispute itself. The seating arrangement will be crucial in determining how the parties react. Establishing an appropriate seating arrangement is crucial to ensure that it fosters dialogue and the mediator is able to observe the parties' body languages,²² dress and eye contact, and manner in which they address each other. What they say and the tones and phrases used and their expression of emotions may indicate what they think about each other. By observation, the mediator may establish who the true decision makers are and their level of their authority. The opening is critical in setting the scene.

The mediator will also need to be able to address the contrasting styles of the lawyers. Western-trained lawyers or participants may focus on their rights or on the law and merits of their case, making express demands, perhaps loudly and forcefully.²³ In contrast, Eastern-trained lawyers and their clients may say little or stay silent, perhaps implying suppressed anger. It is vital that the mediator recognises the varying styles of the participants and correctly interprets the underlying emotions. The opening sets the

19 Danny McFadden, *CEDR Mediation Notes* (2012) Presentation to SMU LLM October 2012

20 Whereas I have used 'he' for convenience, it in no way implies a sexist view of mediators as a male preserve.

21 Roger Fisher and William Ury with Bruce Patton, *Getting to Yes* (2011), 3rd Edition.

22 'Body language is a window to the mind', James Borg, *Body Language*, (2011) 2nd Edition, at xxv.

23 Note that Roy Lewicki, David Sunders, and Bruce Barry, *Essentials of Negotiation*, (2011) 5th Edition, at page 244 et seq. state that 'although a little understanding of another culture is clearly better than ignorance, it may not be enough to make effective adjustments to their negotiation strategy'. In any event a change of strategy may not bring about a better outcome.

foundation for what is to follow. Recognition of the styles and cultural influences of the parties is essential but it is important that the mediator remains true to his own particular style, maintaining neutrality and transparency.

Exploration phase

This is the critical phase in which the mediator engages in ‘shuttle diplomacy’, holding private meetings with each of the parties separately to establish the fundamentals of each party’s case, seeking them to perhaps disclose their reasons for the dispute. The mediator’s primary objective at this stage is to build trust, hence being aware of the cultural differences and nuances of the parties’ expressions, understanding ‘the language without words’, is essential. Dealing with face within Eastern cultures can be especially important as redressing a perceived slight can be the key to bringing the parties to resolution.

The mediator will need to be aware of the parties’ different concepts of time. Western parties tend to be process-driven, seeking to manage achievement of outcomes against a definitive time schedule. By contrast, Eastern parties’ concepts of time are different and the time taken to reach an outcome is often unimportant in itself. I became acutely aware of this in the early 1980s in a long negotiation for a petrochemical project in Beijing, when I sought to expedite proceedings by stating that I was booked on a flight the next day and would leave unless a conclusion was reached. My counterpart smiled genially and said nothing, since he knew that at that time the Chinese government with which I was negotiating controlled all flights and decided who would gain seats on those flights. Some years later, meeting again after a successful but much longer negotiation, we smiled at my naivety.

The mediator will need to seek to interpret the gap across the cultures, such that he can represent what each is trying to say and what is important with respect to individual issues under consideration. Active listening and an appropriate use of questions will be essential.

Negotiation and bargaining phase

During this phase, the mediator will challenge each parties’ *shibboleths*,²⁴ exploring their strengths and weaknesses, seeking to bridge the gaps, relying on the trust hopefully established during the exploration phase. The mediator’s understanding of what each party is trying to say and what is important is the key to a successful outcome. An understanding of the culture, emotion and negotiating styles and managing the expectations is a key part of the mediator’s strategy. Eastern parties may see ‘haggling’ as a marketplace activity only, whereas Westerners may see it as a triumph. The mediator may need to communicate the differences in cultural norms as a means of bringing the parties closer, perhaps explaining the benefits of an apology in relation to a loss of face (which may be required). Engaging with the parties’ lawyers (especially with Western concepts of rights under law) against settlement of the overall interests is vital. Consideration of long-term relationships could be the key to unlocking the cooperation of Eastern cultural parties.

24 Distinguishing customs or usages of a group perhaps void of meaning.

Conclusion of mediation

'It is not over until the fat lady sings'²⁵ means that until the mediator is able to bring the parties to a final, sustainable, viable, concluding agreement, covering all of the issues and capable of sustaining a future legal challenge, the process is not complete. It is imperative that the agreement is workable and that the parties are satisfied. It is probable that this phase may occur at the end of a very long day and the mediator must ensure, to the extent that he is able, that emotions are kept in check and that gains made in negotiation are not unwound. Monitoring body language will be vital as an Eastern culture party may not verbalise dissent or dissatisfaction. The palpable relief upon signing what will hopefully be a binding and lasting agreement will be evident, with hopefully a few smiles.

Conclusion

Understanding the basis of the cultural differences between East and West is necessary to reach satisfactory and lasting agreements in cross-cultural communication and negotiation, particularly in mediation. The cultural differences may require the mediator to have a 'foot in both camps' in terms of his knowledge and understanding. Earning trust, demonstrating patience and an ability to listen and observe, together with neutrality and cultural knowledge, are essential tools for the mediator to bridge the gap between East and West. The mediator's role to act as a catalyst requires an understanding of cultures, their underpinnings and modes of expression.

Culture is the essence of communication. To understand a culture it is very important to understand the language which defines it and which expresses its nuances and subtleties. Language, above all else, is communication and requires observation and understanding of both verbal and non-verbal messages to reach an understanding of what another might be really saying. Mediation is an arena in which the stark differences between cultures (such as between East and West) are most evident. Recognising these differences is key for communication and, through communication, is valuable when negotiating an agreement. Agreements based on cultural understanding will have a solid foundation, assisting in maintaining their permanence.

25 The expression derives from Wagnerian operas, particularly in the operas of the 'Ring Cycle', where the heroine is usually an amply proportioned soprano who sings the final aria.

