

## MEDIATING ACROSS CULTURES

### Some Practical Lessons

As the use of mediation in complex disputes between individuals, organisations and countries grows, so does demand for competence in the intercultural field. Yet few issues today are as hotly contested as culture, both in society and in the dispute resolution field. For mediators, fundamental questions remain:

- Is mediation itself a culturally transferable phenomenon?
- Can mediators really be scrupulously neutral?
- Is culture the same as ethnicity? Is it something more?
- How are individual differences between people from the same cultural group handled, let alone between people of different backgrounds?
- Are models of mediation universally applicable?
- Must mediators adjust their model to suit parties and situations?

This article addresses these and other questions, and suggests some practical ways to take account of culture in the process of negotiation and in the resolution of disputes.

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#### **I. Prologue: A cautionary tale for mediators**

The dispute in question involved a couple who migrated to Australia 40 years ago, hardworking people who had attained the middle-class dream of educating their children, buying a house and saving for their old age.

It was not only about their separation and divorce, but also their two adult children from whom they were estranged. The children had fallen into dispute with one another, each claiming the other was treated better than they were, so money and future financial dealings were soon in issue. Worst of all, the children refused to allow their elderly parents to see their grandchildren until all outstanding financial matters were settled.

Some of the most respected mediators and lawyers in the city had done their best to assist the parties in what had become a bitter, public family dispute.

The mediators and lawyers strategised together, to no avail. The dispute seemed intractable, the four parties fixed in their respective positions. Every glimmer of a breakthrough would inevitably be followed by another impasse, engineered either by one of the parents or one or other of their children.

The mediators and lawyers all gave the matter their full attention, watching appalled as the meagre finances of the couple in dispute were whittled away in time and cost.

Just when everyone had given up hope, there was a breakthrough.

A senior figure in their community appeared out of nowhere and summoned the elderly couple to his home. Such is his authority that they did not demur: both went despite the tensions between them.

He called on both of them to put a stop to this damaging matter, and reminded them that there was talk in the community and that they risked bringing their community into disrepute.

He offered his services to bring the family together for a meeting; he offered financial assistance if they needed money to solve outstanding problems. He reminded them that he had helped them in the past and trusted them to repay loans if loans were what they needed.

Overnight, the dispute was over. The elderly couple began to communicate. Although living apart, they began to take care of one another: she left soup on his doorstep when she heard he had taken ill; he called to see if she was all right when he had not seen her for a while taking her morning walk. With this restoration of contact, tension seeped away, and soon they were able to approach the children and their families together and bring about a sensible ending to the damaging elements of the dispute that were about money.

1 The lesson for the mediators – and I was one – is that sometimes culture trumps all, and it is in the name of culture that an outcome can be crafted. Only an insider has the standing, the authority, to embody that culture.

2 The insider is hardly neutral, quite the contrary, yet something shifts when the parties are reminded of the bonds of culture and belonging.

3 The question remains: what is open to the rest of us, those of us who try to maintain neutrality, and who do our best to understand culture and its impact on attitude and behaviour in a conflict situation?

4 Perhaps it is only to bring about willingness to co-operate and a climate of openness and empathy between people in conflict. We do so by having a clear view of our role, and a grasp of some essential tools.

5 This article is essentially a practitioner's compendium of useful learnings and tools, rather than an academic critique, although there are frequent references to the work of leading thinkers in the field. To those it is hoped mediator-readers will add their own, so as to enlarge their range of approaches and techniques.

## II. Introduction

6 How people interact, argue, manage conflict and negotiate – and even whether they are prepared to speak up and describe a conflict and what lies behind it – is as diverse as the settings in which the talk takes place and the people doing the talking. Taking account of that diversity is one thing: understanding its impact on interactions and the potential for collaboration is quite another.

7 Marc Thomas,<sup>1</sup> a French academic, writes:

As human beings, we are constantly in search of an equilibrium between our identity and our relationship with those we encounter, and those encounters confront us with the wrenching awareness of our differences as well as reassurance that we have similarities. That instability, that tension can be constructive or destructive, depending on context and the extent to which we are prepared and supported as we take risks.

Viewed in that light, the intercultural can be seen as the lived experience of all that is strange. It changes us and our view of the world. It makes strangers of us all – hardly a comfortable place to find ourselves.

All individuals and groups draw their identity from multiple cultural sources – if only we become aware of them. This tangle of sources of belongings can, if we permit it, lead to the possibility of multiple levels of affinity between people and groups, depending on the stakes and the context.

The goal of multi- or pluricultural policy has been an idealistic one: an attempt to live together with minimal friction, to work together

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1 Marc Thomas, *Acquérir une compétence interculturelle* (translated by Joanna Kalowski) Université de Nancy 2 (October 2000).

despite our differences, to create a functional whole despite the disparity of the parts.

All of this requires individuals to transcend, not abandon, their own cultural systems, so that conflict and disagreements are seen not as threats but as challenges. Viewed that way, communication and interaction are not so much hampered by difference but can add a new dimension to the very idea of 'different'.

Intercultural experience is not just a phenomenon of national cultures and of ethnicity, but exists also at the level of generational, social, professional, philosophical, religious, political and economic differences. The promise of intercultural effectiveness is precisely to enlarge the capacity to engage and be effective at many levels of diversity.

Members of a heterogeneous group can proceed constructively together in a satisfactorily intercultural way if they can agree on a three-level framework:

1. To question and make adjustments as doubts and tensions arise;
2. To analyse similarities and differences in both co-operation and conflict;
3. To stand back and analyse communication to identify what created conflict and cooperation (meta-communication).

The goal of this framework is to foster mutual recognition, and to continually create the conditions for working together, on the understanding that the intercultural is learned by experience, and is circular and iterative:

Trial → Observation → Analysis → Conceptualisation →

This process leads to trialling new approaches, and group members become active learners, ultimately producing the very competencies they need.

Intercultural learning results from being constantly confronted with other points of view, with the reactions of people living the same experience in the same moment, yet interpreting it differently. Conscious acceptance of undeniably different points of view is precisely what makes this learning intercultural.

Three indispensable conditions underpin the development of intercultural competence:

- Empathy
- Preparedness to work on differences and conflicts
- The will to co-operate

8 This article also explores the tools available to us when working cross-culturally. We must always remember that, as mediators, we remain outsiders who lack the authority to impose change and so must strive to make parties feel secure enough to express themselves in difficult and often hostile circumstances so that they can be empowered to make the changes they need.

### III. Culture: Towards a more nuanced understanding

9 Mediators are often trained to believe that it is the process, scrupulously managed and applied, which will take parties from conflict to settlement, whoever they might be. Experienced mediators look beyond process and techniques in the search for ways to manage the dynamics of conflict resolution.

10 The intercultural dynamic requires such a search. In the preface to his book, *The Dynamics of Conflict Resolution*,<sup>2</sup> Bernie Mayer writes:

What makes a successful peacemaker or conflict resolver is not a set of processes, methodologies, or tactics; it is a way of thinking, a set of values, an array of analytical and interpersonal skills, and a clear focus.

With this as a starting point, mediating in an intercultural setting challenges mediators to move beyond stereotypes and strive to understand not merely the issue that has brought parties to the table but also something of the people at the table. Mediators may well have been chosen for their experience in various fields of law and business, but what do they know of people and culture?

11 Intercultural mediation is an opportunity to expand the understanding of self and other, and to be fully engaged in the role of mediator both personally and professionally. They bring whatever professional experience they have gained, whatever life has taught them, to the moment in which parties need guidance to untangle the “what” from the “how”, and fact from assumption.

#### A. Cross-cultural versus intercultural

12 Across the English-speaking world, the words “intercultural” and “cross-cultural” are often used interchangeably. However, sophisticated mediators can benefit from making some finer distinctions:<sup>3</sup>

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2 Bernard Mayer, *The Dynamics of Conflict Resolution* (Jossey Bass, 2000) Preface at p ix.

3 Mary Kalantzis & Bill Cope, *Culture, the Fifth Competency* (1999).

The intercultural is best defined as *contact between people of different backgrounds where one enters the other's society for a time-defined stay, for a defined purpose.*

[The cross-cultural, on the other hand, defines] *an interaction between people of different backgrounds living in long-term, open-ended contact with one another in the same society, where that society's policy is multiculturalism, bi-culturalism or equality.*

[emphasis added]

For the purposes of mediation, these definitions matter.

13 They allow mediators to consider in advance whether the parties to a dispute are foreign nationals whose major contact has been commercial and who have come together in a particular place to attempt settlement. This scenario typifies the intercultural commercial dispute between companies whose representatives live and operate in different countries. It is an intercultural mediation in the truest sense.

14 While the corporate and business environment are unifiers, familiar to people even from very different countries, once a dispute breaks out mediators can expect language and cultural assumptions, values and differences to play a role in exacerbating the conflict, or at the very least to affect the flow of communication and understanding between the parties even where they are speaking the same language.

15 Certainly language is an issue if one party is a native speaker and the other speaks it only as a second language. Well beyond language, the parties' assumptions and expectations are worth examining in order to ensure that there is a shared understanding of the problems, issues, options and elements of agreement as they emerge. This is an iterative process and in an intercultural mediation, wise mediators check regularly. How and when to do this is a matter for the individual mediator.

16 Intercultural mediation presents complexities and challenges, but they differ in nature from the challenges facing parties and the mediator in a cross-cultural setting where parties are citizens of the same society, and have the same rights and responsibilities.

17 As the societies in which mediators operate become ever more diverse and multicultural, it is likely that while the parties to a dispute might all be citizens, they will be from different backgrounds and perhaps also different countries of birth. Those backgrounds bring with them sets of assumptions which may not be shared, and the rise of a dispute may well cause those assumptions and approaches to complicate the issues and affect communication between the parties.

18 The difference between the two is that the first, the intercultural, is a better-known phenomenon: everyone has travelled and had advice along the lines of “when in Rome”, a list of things to do and avoid which will supposedly keep them out of trouble. The problem this presents is that there is a tendency to apply the same principle to the cross-cultural setting, which is more nuanced, more complex and where power relations are highly likely to play a role.

19 Even if it were possible in the intercultural situation to find reliable (and not stereotyped) information about different countries’ values, assumptions and approaches, it would be risky to apply it to individuals in dispute. Having said that, the author acknowledges that very occasionally, it can prove a useful starting point.

20 The parties’ perceptions of one another affect the cross-cultural setting differently from the intercultural. If they are all speakers of the same language and citizens of the same country, parties expect their personal worldview to be shared, and will be at best surprised and at worst shocked and dismayed if it is not.

21 Cross-cultural mediation also differs at the level of rights and power, particularly where change is under discussion, as it so often is. Where parties meet as equals, as citizens of the same state, but assert strongly differing views on what should happen in particular circumstances, those who have traditionally been more powerful can resent assumptions of equality and seek to “educate” the others and impose their time-honoured views. Whether the parties are contributors to a workplace, a neighbourhood, a company or the task of nation-building in a democratic society, their views on ways to tackle a problem merit equal consideration, even if certain positions are later discarded in favour of an outcome that parties can all agree to.

22 In the cross-cultural situation, finding reliable information is next to impossible. This is because cultural adaptation takes place along a continuum, and it can be extremely difficult to work out to what extent, for instance, an overseas-born party has adapted to the society of which they are a citizen, and therefore to what extent attitudes and values encountered in a mediation are personality-based, cultural, or a mix of the two. Parties themselves are often unable to tell because adaptation to the host culture is unconscious and imperceptible, and it is not until a person returns “home” to their country of origin that they realise how much they have changed. In this context, change means the unwitting abandonment of certain behaviours or beliefs, or the adoption of elements of the new culture, often without conscious awareness.

23 Grief can accompany the abandonment of key cultural behaviours if the process of “letting go” has been conscious, and

resentment can flare if such people are treated as if they were still “traditional” (that is, not of this society) especially when they keenly feel they have given up so much of value to them in order to fit into the new society.

### Case study 1

A Sikh doctor who had been practising medicine in the same hospital in Australia for a decade made the painful decision to cut his own hair short and stop wearing a turban when he and his wife decided things would be easier for their young son if the boy did not have to wear a turban at school.

Sometime later, in a mediation between the doctor and colleagues over rostering and “collegiate relations”, the doctor discovered his colleagues did not remember he was a Sikh, nor that he had ever worn a turban. He was deeply offended, and said so.

“Why?” they asked, incredulous, “Aren’t you one of us?”

The doctor turned to them and explained how painful his decision to remove his turban had been. Having never had to make a similar decision, his colleagues simply did not understand “what all the fuss is about”.

It was left to the mediator to find a way to describe the situation from both perspectives. The mediator stated simply that it seemed the doctor’s gesture had been a conscious move *towards* his colleagues and *towards* the society he lived in, but now that his hair was no different from anyone else’s, his “gift” was invisible, except to him.

This statement enabled his colleagues to see things differently and to acknowledge his gesture. It also allowed the doctor to forgive them for seeing him only through the prism of the majority culture.

## B. *Using cultural frameworks*

24 Multiple frameworks exist for working across cultures, and mediators are well advised to read widely and select one or more that suit their purposes.

25 Among the most useful, provided it is properly understood and applied, is Geert Hofstede’s *Dimensions of National Culture*.<sup>4</sup> Its utility

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4 Geert Hofstede & Gert Jan Hofstede, *Cultures and Organizations: Software of the Mind* (McGraw-Hill, 2nd Ed, 2005). See also Hofstede Insights, “The 6 Dimensions (cont’d on the next page)

resides in the fact that it has been frequently replicated and can be widely applied. Like all models, it has its imperfections, but it remains a source of valuable information for mediators.

(1) *Hofstede's 6D model*

26 The six dimensions of culture Hofstede identified were:

(a) **Power distance (PDI)**. Defined as the extent to which the less powerful members of society accept that power is distributed unequally, for example, whether to use titles and surnames or given names at a first meeting).

(b) **Individualism (IDV) and its counterpart, collectivism**. Defined as the extent to which people in a given society believe that you look after yourself and your immediate family. This is to be contrasted with collectivism which can be defined as the extent to which people see themselves as belonging to groups (family, clan or organisation) which take care of them in return for loyalty, for example, explaining to one party planning to send a single representative and its legal adviser to a mediation why the other side will be represented by three or more persons or sometimes even a whole clan group.

(c) **Masculinity (MAS) and its counterpart, femininity (or Tough versus Tender)**. Defined as the extent to which the dominant values in a society are achievement and success. This is to be contrasted with femininity, defined as the extent to which dominant values are about quality of life and caring for others.

The combination of IDV and MAS is interesting in this regard and frequently emerges in commercial mediations and negotiations; one side is concerned for the future of a committed workforce, the other with shareholder value.

While this may at first appear to be a fundamental clash of approaches and values, the issues can be portrayed by the mediator as interrelated. The parties stand to benefit if the mediator is able to frame the discussions (the agenda, if one is being used) so that the two issues are given due consideration and equal weight.

In the world of Tough *versus* Tender, while the subject on the Tender side may be of retaining a skilled and committed workforce, it need not detract from the other's focus on

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of National Culture" <https://www.hofstede-insights.com/models/national-culture> (accessed May 2019).

ensuring shareholder value. It may simply come down to a question of scheduling: which issue should be tackled first, and what questions should the mediator ask about its impact on the other topic.

(d) **Uncertainty Avoidance (“UAI”).** Defined as the extent to which people feel threatened by ambiguity and uncertainty and try to avoid such situations by creating rules to be followed in those situations. High uncertainty avoidance cultures appear rule-bound and inflexible compared to low uncertainty avoidance cultures (“That’s not the way we go about things, and it would be disastrous if we didn’t have regard to protocol/expectations/public reaction” *versus* “Why wait? Let’s just do it”). Even walking into a cocktail party as a guest and introducing yourself to people without waiting for your hosts to take you around could give unintended offence, and is a function of whether one is low or high on the UAI.

(e) **Long-term orientation (LTO) and its counterpart, short-term orientation.** Defined as the extent to which a society favours a future-oriented perspective rather than a conventional historical or short-term perspective. In this context, international intercultural disputes are often complicated by Western parties’ preference for final and binding agreements while others insist future generations cannot be bound because the future is not foreseeable.

(f) **Indulgence and its counterpart, restraint.** Defined as the extent to which a society allows or suppresses gratification of basic and natural human drives related to enjoying life and having fun. Cultures high on indulgence focus more on individual happiness and well-being prioritising leisure time and personal control. Cultures high on restraint believe that such gratification needs to be curbed and regulated by strict norms.

27 When using this framework, it is useful to remember a number of points. First, Hofstede does not set out to apply the dimensions to or describe individuals. Individuals’ behaviours are influenced by multiple factors such as gender, personality, age and life experience. However, the dimensions often prove helpful as a guide to what may be creating blocks and hesitation in an intercultural or cross-cultural mediation and provide mediators with a lead as to how they might intervene and what they might say to overcome a problem.

28 Secondly, in all societies there are both elements of all six dimensions, but one predominates. As all societies are in flux, no single aspect of any of these dimensions is fixed for all time. Indeed, mediators

will recognise in one culture behaviours and attitudes that once characterised their own, particularly where gendered behaviour and gender relations are concerned.

29 Thirdly, conflict within groups will often arise from currents related to changes in one dimension that a sub-group in that society is seeking to promote. Intergenerational conflict is one such example: freedom to experiment with lifestyles and relationships *versus* respect for one's elders, the community and its standards and expectations.

30 Finally, conflict between international corporations may exacerbate tensions around dominant orientations and dimensions which the mediator will need skills to address and normalise.

31 Hofstede also identifies four unasked questions which influence cross- and intercultural dialogue. They are:

- How personal should I be?
- How direct should I be?
- How do I get a turn to speak here?
- How are good relations made and kept here?

The way these questions are answered is influenced by a number of factors of which culture is but one. Personality, gender, life experiences and social status all play a part, but children of any culture unconsciously know the answers in their own cultural setting by about the age of eight.

32 If, for instance, one party's expectation is for strict turn-taking and the other feels it natural to speak whenever they want to comment, it will not be long before an intercultural mediation is adversely affected. The party who thinks its representatives are behaving appropriately by hanging back will be offended by the other's failure to do so.

### (2) *International Mediation Institute – Intercultural framework*

33 The International Mediation Institute<sup>5</sup> ("IMI") developed a framework for accrediting intercultural mediators and identified certain "cultural focus areas" ("CFAs") intended to assist mediators in identifying the contexts in which cultural issues are likely to emerge. Each focus area has a subset of topics intended to lead mediators to

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5 International Mediation Institute, "Criteria for QAP Intercultural Certification" <http://www.imimmediation.org/intercultural-certification-criteria> (accessed May 2019).

consider in advance how to accommodate parties if their approaches in a given area turn out to be markedly different.

34 Some examples of CFAs are:

- (a) communication style (formal-informal; direct-indirect);
- (b) mindset towards conflict (risk-taking; high-low; relationship-task orientation);
- (c) nature of the process itself (the roles parties and mediators expect to play; the need for predictability or social protocols);
- (d) time orientation (polychronic-monochronic);
- (e) decision-making (general-specific); and
- (f) relationship *versus* task orientation.

35 One of key aspects to being able to apply cultural frameworks is self-awareness. Self-awareness has come to be viewed as the essential prerequisite for intercultural mediators, and is identified as a key criterion of intercultural success in these terms.

36 Self-awareness is the ability to:<sup>6</sup>

- (a) recognise one's own cultural influences and their possible effect on the mediation;
- (b) recognise participants' culturally shaped perspectives of behaviours or events;
- (c) understand and appreciate participants' similar and different cultural perspectives, and possible imbalances between them;
- (d) manage ambiguities and mistakes that may emerge in intercultural situations and settings;
- (e) use the mediator's understandings of these differences and similarities to create a workable environment for all participants, including an environment that optimises communication;
- (f) adjust one's own communication style to the styles of participants from other cultures, the goal being to help

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6 International Mediation Institute, "Criteria for QAP Intercultural Certification" <<http://www.imimmediation.org/intercultural-certification-criteria>> (accessed May 2019).

participants communicate optimally with each other, including establishing suitable processes to facilitate communication;

(g) prepare for a mediation by identifying possible cultural patterns and preferences likely to be relevant to particular mediations; and to design appropriate processes and prepare for a range of possible interventions; and

(h) detect whether, when and how cultural considerations may be impacting on the mediation process as it progresses, including capacity to adapt the process accordingly and design appropriate interventions that also encompass any settlement and compliance phases and requirements.

#### IV. Working across cultures

37 Mediation itself requires professional and personal training and development. Mediating across cultures requires no less development, and quite possibly more, yet it does not often feature prominently in mainstream mediation training.

38 There are many approaches to operating across cultures, including the ethnic-specific and its opposite, the broad cultural approach. Neither provides the perfect answer, although each offers insights. Other approaches developed to provide awareness of culture are the psychological/interpersonal; linguistic, socio-historical and normative-legal.

39 The ethnic-specific approach emphasises differences at the expense of similarities between groups. In describing cultural groups in these terms, it can descend into stereotyping: the Dutch are clean; Singaporeans are all studious; Australians will bet on a raindrop rolling down a windowpane; Americans talk too much; Germans are rigid, *etc.*

40 Over recent years, there has been a decline in cross-cultural training of this kind. It typically featured panels of members representing diverse ethnic backgrounds, each claiming to tell participants about their group's particular cultural beliefs, attitudes, taboos and behaviours.

41 Even allowing for the possibility that a single individual could give voice to the range of attitudes and beliefs that make up different cultures, the role of other key influences such as class and education level is overlooked in this approach.

42 Given the complexity of working with individuals in a dispute setting, this approach has limited value, since forces other than culture

are operating on individuals to make them behave as they do: personality, gender, life experience, age and social status, for instance, can all play a part in shaping an individual's ways of manifesting his or her culture.

43 It is no use studying the “exotic other” and ending up with a series of stereotypes. To understand others, mediators must come to understand the way culture works on themselves as individuals. They need to be conscious of the impact their beliefs and behaviours have on the parties and the process – another aspect of self-awareness. Absent such knowledge, mediators can unintentionally side with the party whose culture most resembles their own, and so alienate the other.

44 The broad cultural approach of Paul Pedersen<sup>7</sup> is far more useful. It sets out first to define what a cultural perspective aims to achieve:

The cultural perspective seeks to provide a framework for understanding the complex diversity of a plural society while identifying bridges of shared concern which bind culturally different persons to one another.

It also provides clues as to why behaviour can be so baffling:

Similar behaviours can have different meanings and different behaviours can have the same meaning.

Behaviour is not data until and unless the cultural assumptions underlying it are properly understood.

Pedersen's search for a way of understanding the gap between expectations and behaviour is particularly useful when applied to mediating across cultures. He demonstrates how “obvious differences in behaviour across cultures are typically overemphasised while the more difficult to discover similarities in expectation are overlooked or underemphasised”.

45 This is a useful tool for mediators working in an intercultural setting: find out what parties expect, and make no assumptions about the meaning behind what they do. Presume nothing, question everything.

46 If mediators assume the model they have chosen or been taught to use is culturally neutral and approach every matter the same way, they risk seriously skewing both the process and the outcome. While the

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7 Paul Pedersen, *Culture-centred Counselling Interventions: Striving for Accuracy* (SAGE Publishing, 1997).

parties may reach an outcome, it is likely to fall far short of what might have been achieved. Many mediations result in deals over the presenting issues but do nothing to address the underlying issues, nor do they contribute to building cross-cultural understanding between the parties.

47 If mediation is to realise its potential to bring about such understanding, it must be flexible, and its flexibility resides in mediators' preparedness to let go of dogma and attachment to a single model, whatever that model might be.

48 Models of mediation in which there can be no private sessions deprive mediators of a way of preserving the dignity (face) of parties; so do models which downplay the importance of the pre-mediation or preparation stage. Equally problematic from a cultural standpoint are models of mediation in which the parties never meet, and the mediator shuttles endlessly between them until a deal is reached.

49 Mediators must be free to use all available processes and techniques and perhaps also free to invent others as the situation requires if the sensitivities of the cross-cultural exchange are to be deftly managed.

#### **A. *Seven issues for mediators working across cultures***

50 Whether mediation and other consensual dispute resolution processes have the potential to be cross-culturally viable depends almost entirely on the skills of mediators, who can unwittingly favour one party if they are not cross-culturally competent. Viewed in this light, mediator neutrality is not confined merely to a commitment to equitable process and disinterest in the outcome: the balance of power in a given dispute may be dramatically altered unless mediators struggle to remain cross-culturally vigilant.

51 Mediators working with parties from diverse cultural backgrounds must have the ability to identify the cultural perspectives of the parties, the impact of those perspectives on the nature of the dispute, on parties' reactions to aspects of conflict, and on the settlement options parties believe are open to them.

52 Once issues on which cross-cultural forces are acting have been identified, a mediator will ensure they are addressed in a process of validation and legitimisation, an integral part of the overall search for resolution.

53 Unlocking the cross-cultural potential and viability of mediation depends on the mediator being aware of and addressing seven issues.

- (1) *Potential to assist in identifying the shared goals (shared intent) that may underlie the different behaviours that gave rise to conflict or are impeding its resolution.*

54 This requires mediator to be comfortable with the expression of emotion, and the wide range of ways it is expressed. Parties' frustration, irritation or anger may assist the mediator in coming to grips with the gap between intent and outcome. When neither side can accept the other's worldview, one or both may seem intransigent and angry.

55 The cross-culturally effective mediator will suggest they explain why. In so doing, they may discover what each is inferring from the behaviour of the other. Only then can the impact of their behaviour on each other be understood cross-culturally. It frequently emerges that they have shared goals, despite the fact that they are displaying behaviours that the other regards as unrelated to those goals.

- (2) *Potential to confront the impact of both the mediator's and the parties' belief and value systems on conflict*

56 This requires mediators to recognise their own cultural encapsulation and therefore their tendency to project their own experience as generalisations. For example:

"I find this silly" does not equal "This is silly."

"The society has been just to me" does not make this "a just society".

- (3) *Potential to create an inclusive framework*

57 This depends upon mediators' flexibility in adjusting process to deal with difficulties affecting parties. Mediators can use process choice to test assumptions. The most obvious example is calling a private session to check if a party is as shy or inarticulate as he or she appears in joint session. If the person speaks more freely in private, mediators need to be aware that the person may not be silent by choice, but silenced by the framework created by the mediation, by problems with the mediator or with other parties. This is precisely why the "no private session" rule in some models of mediation creates difficulties cross-culturally.

(4) *Assumption that mediators' neutrality is a given*

58 Mediators must be particularly vigilant where the mediator and one of the parties are from similar cultural backgrounds. If the mediator or that party suggests resort to time-honoured practices, perceptions of bias may result. Cross-cultural relevance and the potential to balance power both depend upon the mediator's ability to check all procedural steps for their tendency to produce relative advantage and disadvantage.

(5) *Potential for parties to tell their story their way*

59 This depends upon the mediators' ability to act as facilitator and encourage rather than manage communication by the imposition of rigid rules such as:

I must hear from X. Please don't speak yet, and don't interrupt.  
I'll come to you in a minute.

In international mediation, the language used may not be the mother tongue of all the parties. A sense of autonomy is essential if those using their second or even third language are to mobilise their passive language (language they are often unaware they possess) and maximise communication with other parties. It is the mediator who must model the respect necessary to maintain all parties' autonomy within the mediation setting.

(6) *Potential to fit mediation to parties of different class as well as cultural backgrounds.*

60 It has been asserted, albeit anecdotally, that mediation favours middle-class, educated parties. This assertion is accompanied by the assumption that the more powerful in society are more self-determining (self-actualising), while those relatively less powerful are more dependent on authority, hence the greater applicability of mediation to middle-class, educated professionals.

61 Evidence for this proposition is flimsy. It is more likely that mediation favours middle-class, educated parties because mediators are traditionally middle-class and educated, and unconsciously favour people of similar backgrounds by virtue of having a deeper insight into their worldview than that of other parties, and because mediators use or adopt the language and social signals of the class of people with whom they themselves are associated.

62 It may even be the case that certain of the mediator's standard (unexamined) interventions, however inappropriate in this context, may seem acceptable to the middle-class party who believes power to be

largely beneficent, and less so to a party who may have good reason to fear or mistrust authority, and may therefore object, thus appearing difficult or obstructive to the settlement process.

63 In such circumstances, the choice of intervention by the mediator – and even the choice of not intervening at key points – may well cause no detriment to either side, yet fail subtly to advantage the better educated, middle-class party.

64 Working across cultures, mediators must resist “auto-pilot” interventions, and retain a consciousness such that if asked why they selected a particular framing or intervention, they could answer by reference to this mediation, not to mediation in general. It is essential, too, that mediators use language which is as accessible as possible, that mediators expand their comfort with a wide range of communication styles, and acknowledge their own preference for those which they are most familiar and comfortable.

(7) *Potential to free people from or imprison them in cultural mode*

65 This depends on mediators’ understanding that culture is only one of many determinants of the parties’ behavioural choices. If mediators have a broad view of culture, they are less likely to attribute the behaviours and reactions of a party solely or primarily to culture and are therefore less likely to trigger a retreat into cultural mode.

66 For example, if all you see in the woman before you is her hijab, and you persist in addressing her primarily or solely as a Muslim, you risk missing the fact that she may be the family’s sole breadwinner, and that her concerns are far more economic than cultural. This is discussed in more detail below.<sup>8</sup>

## V. The mediator’s toolkit

67 Being aware now of these seven issues, the author will explore some insights and interventions that can enhance a mediator’s toolkit.

### A. *Understanding and utilising saliences*

68 The seventh issue talks about the potential to free people from or to imprison them in cultural mode. In this context, understanding saliences is vital.

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8 See paras 68–78 below.

## Case study 2

A recently arrived refugee family presented at a hospital with a very difficult problem. Their young daughter had been raped in a refugee camp, and had been referred to this specialist unit because she was showing signs of listlessness that her doctor feared might be related either to depression or to HIV infection.

The parents attended the hospital clinic with their daughter and spoke through an interpreter. The specialist was concerned they were not speaking freely, and the team began to research the family's culture in an effort to understand them better.

The father, in particular, was hard to reach, and the inevitable conclusion of the team was that he was causing the mother and the daughter to remain silent.

The team decided to try something different, and asked the family whether they spoke languages other than the one most closely associated with their home country. It turned out they did, so a new interpreter was called, and suddenly the family spoke far more freely.

It quickly became clear that they had been afraid to voice "non-traditional" views in the presence of a speaker of their small group, fearing they might lose face or be shunned within their community if details of the situation became known.

Far from being hamstrung by traditional views of women and virtue, the father simply wanted to protect his daughter, assist her to get well, and ensure she could avail herself of all the opportunities her new country offered her.

He even went so far as to say that in his home country, some fathers would be forced to abandon or kill a daughter who had been raped. He, on the contrary, wanted his daughter to thrive, and wanted her experience to be treated with the greatest care and confidentiality.

"Here I am free from those old views," he said. "I can be a new man, and my daughter can be a new woman."

How self-defeating it would have been to see this family, these individuals, only in the light of their culture of origin.

69 We are all many people in one. Those many parts of a person's self can be referred to as saliences, and will rise (become salient) or fall, depending upon the situation in which people find themselves.

70 Deciding which salience to address in a particular person should be a conscious process for mediators. It involves thinking

through the many points of contact available at this moment. For example:

- Is it appropriate to address the female party in this mediation as a woman or as a businessperson?
- Should the indigenous man be addressed as an indigenous person or as a potential partner in a mining venture?
- Is the Muslim woman just a Muslim or is she to be regarded and addressed as the breadwinner in the family, with all that entails for her personally and professionally?

If all the mediator sees is the Muslim woman's headscarf, the mediation will freeze her into her Muslim salience. The more other aspects of her presence are ignored, the more she retreats into the one being addressed.

71 If people are addressed only according to the most obvious salience – their gender, their ethnic origin – the opportunity to connect at other levels is lost.

72 The notion of saliences also provides a way of identifying aspects of the other person which are in play in a decision-making situation, but which may be invisible to an onlooker and inaccessible to people themselves for a variety of reasons, of which anxiety in a conflict situation is among the most usual. When people say they were not thinking straight, they mean their own reserves of ideas were diminished by conflict and anxiety.

73 It is unhelpful to freeze parties psychologically into a single role and all too easy to fall into this trap when dealing with members of a community or representatives of a group.

74 It is, however, highly likely that in order to make a decision or resolve a conflict, they will need to mobilise other aspects of themselves – what Bernard Mayer terms their humanity – to transcend the present situation.

75 To understand the concept of saliences, let us take, for example, the mediator's saliences. The uppermost role or salience is of course the mediator. Behind this lie many others, in no particular order:

- present profession;
- woman/man;
- parent/sister/daughter/wife/brother/son/husband;

- citizen;
- neighbour;
- ethnicity or religion;
- sporting interests;
- former professional roles.

Once people are stuck in a single salience (“angry parent” or “disgruntled business partner”), their anger and attachment to that role can intensify. Persisting in addressing them via that salience merely intensifies emotion and the tendency to remain stuck.

76 Engaging with another salience in that same person assists them to remember that they are not merely an angry parent or a disgruntled business partner, but a great many other things.

77 Mediators enable them to expand their repertoire of behaviours by reminding them of these other aspects of the self by speaking to those saliences. Once this transition takes place (often imperceptibly), parties can expand the choices they perceive, and can step into a more rational frame of mind than the one that accompanies “angry parent” or “disgruntled business partner”.

78 The appeal to a wider range of saliences is critical cross-culturally.

### **Case study 3**

In a mediation between an indigenous community and a mining company negotiating for permission to mine on community land, the breakthrough came when the company representatives began speaking to the community representatives as “joint venturers”, rather than members of an underprivileged minority.

### **Case study 4**

In a complex matter involving Muslim and Christian members of a local community, the parties were negotiating the conversion of a disused local church into a mosque. Little was achieved while the parties spoke to one another as Muslims and Christians. In so doing, they remained frozen at the level of their differences, increasing frustration for both. When mediators persist with this, they unintentionally frustrate the possibility that there are similarities that could bridge the differences.

In the case of these negotiations, the parties were neighbours, and the Christians had relatives long buried in the church cemetery. This struck a chord with the Muslim parties, and discussion turned to preservation of that site and access to the former parish church by local parishioners. As neighbours, they were also able to negotiate successfully about parking and traffic concerns.

It is at other levels of salience that parties are likely to make useful contact, and begin to speak meaningfully about shared hopes, fears – and agreement.

### **B.      *Communication: The power of acknowledgement***

79      The power of acknowledgement cannot be overstated. If it is normally important, in cross-cultural contexts, it is critical. Early in a negotiation, parties do not yet understand one another and cling to their previous beliefs and impressions of the other. As a result, they cannot be expected to acknowledge, so it falls to mediators to provide the acknowledgement the parties are unable to give one another.

80      At the heart of both conflict and its resolution is acknowledgment. Failure to acknowledge wrongdoing and hurt feelings engenders conflict; acknowledgement, however belated, helps to resolve it.

81      Thinking back over many apparently intractable situations where parties had tried everything to avert a dispute, mediators and negotiators can all identify the moment when there was a shift.

82      It is instructive to think about that moment, to think about what happened to bring about change: what was said or done, what the parties did which suddenly altered the climate and broke through the fog of circular discussions and put them on course to settle and resolve.

83      On almost every occasion, acknowledgment played a part.

84      In commercial disputes, it might have been a party or lawyer saying, however grudgingly, that things might have been different “if only you’d disclosed this earlier” or “if only we’d been shown this document”. In other kinds of disputes, the language might vary but the point is the same. Parties’ internal monologue goes something like this:

In order for me to let go the dispute, and join with you in finding another way to bring an end to this situation, *there is something you have to do or say which you haven’t done or said yet ... something I can claim I didn’t know. Then I can move on.*

Once the seeds of acknowledgment are planted, parties can say that they would have acted differently had they but known certain facts. Whatever the case, new information is a pretext for acknowledging something, and for moving on. And movement is central to successful negotiation.

85 Parties, mediators and advisers all know quite early in a dispute what options for resolution exist. It is not through a failure of imagination that the parties have not settled yet: quite the contrary. Most often the answer is staring everyone in the face – and mediators who think they have “discovered” the outcome are sadly mistaken. Everyone knows roughly what shape the settlement might take: the problem is overcoming the obstacles that have prevented the parties from getting there themselves. Those obstacles are frequently about feelings – of resentment, anger, disappointment, even outrage. The businesswoman whose line of credit has been inexplicably stopped by her bank is indignant, and wants it restored. Restoration of the status quo is the goal and resentment is the obstacle that has limited communication to threats and descriptions of the impact of the bank’s actions, most often written by her representatives in uncompromising terms, and threatening legal action.

86 If the end of all interventions is to bring about resolution, it is acknowledgement mediators need to pursue and model. Acknowledgement is an end in itself, because it opens the way to a quality of discussion not possible while disruptive feelings are in the air.

87 The ambivalence of parties in dispute is not new to us: anger and blame coupled with a yearning to return to the status quo, even where business relationships have broken down. The desire for the restoration of connection underpins such ambivalence, and achieving this is sometimes possible if mediators are prepared to acknowledge what parties are indirectly expressing.

88 Success in cross- and intercultural terms may well reside in mediators’ skills in assisting the people caught up in conflict “to transcend, not abandon, their own cultural systems, so that conflict and disagreements are seen not as threats but as challenges.”<sup>9</sup>

89 In this context, providing acknowledgement may well prove to be at least as useful as having an understanding of the content of the issues in dispute.

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9 Marc Thomas, *Acquérir une compétence interculturelle* (translated by Joanna Kalowski) Université de Nancy 2 (October 2000).

### C. *Communication: High and low context*

90 The last of the IMI CFAs mentioned earlier was relationship *versus* task orientation.<sup>10</sup> There are stark differences between people who get straight down to business and those who need time to get a sense for the other party before deepening the conversation or revealing key facts and concerns.

99 This difference appears to be closely related to whether people are “high” or “low” context communicators, according to the work of Edward Hall.<sup>11</sup> His contribution to the field was to categorise cultures as being either low or high context in communication terms, or comparatively higher or lower than another.

91 In low context cultures, the circumstances of an event warrant little attention, and the focus in communication is on objective facts conveyed. Surrounding circumstances are filtered out. The Angles, Saxons, Jutes and Danes (to use their ancient names) are all more or less low context communicators, so they will tend to be lower context than, for instance, speakers of Latin languages, for example, Spanish, French and Italian.

92 It is important to note that even in low-context communication settings, women tend to be higher context communicators than men, and English speakers would all be aware of the difference in style (context) between Australian, American and British speakers of the English language.

93 In high context cultures, surrounding circumstances play a key role in interpreting data. Factors such as gesture, posture, tone of voice, and the social status of the speaker and the social setting of the interaction are used to interpret spoken words. For that reason alone, high context communicators are more relationship- than task-focused, and need time to understand the nature and role of a speaker before getting down to the business of exchanging information and negotiating.

94 For native speakers of certain languages, of which English is one, it can be puzzling to understand why a potential trade negotiation, for instance, something which is regarded as purely business, begins with what they are likely to dismiss as small talk. In high context cultures, it is in fact relational talk designed to get the measure of the other so as to ensure discussions go smoothly.

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10 See para 34(f) above.

11 Edward Hall, *The Silent Language* (Garden City, New York: Doubleday, 1959).

95 It is instructive to examine what high and low context communicators think of one another, and to recognise the scope for irritation and conflict arising out of two very different communication styles. Low context communicators think of themselves as open, direct, frank and sincere, and see high context communicators as time wasters, verbose, indirect and hard to fathom.

96 On the other hand, high context communicators think of themselves as polite, cautious and respectful, have a preference for illustrating what they are saying with story and metaphor, and see low context communicators as rude, abrupt, insensitive, overly direct and even insulting.

97 Since such differences are exacerbated in a dispute, this is fertile ground for misunderstanding. Mediators can work to bridge otherwise intractable miscommunication if they accurately diagnose the stylistic differences and are able to reframe what parties say, and occasionally even explain why they are saying it.

98 Hall's definitions still galvanise readers and are of great value to mediators working across cultures. Where one group anticipates facts and filters out anything "irrelevant" (think of lawyers' comments in this context) and the other supplies endless detail to illustrate their grasp of a topic and their personal importance, conflict can arise merely from the exasperation each party feels faced with the other's style and approach.

99 More emphasis is placed on parties' communication style than on mediators', and mediators are at an advantage when they understand how they themselves come across when communicating with parties. They may unknowingly be adding to the difficulties of high context parties by speaking very directly, asking direct questions and expecting direct answers (hallmarks of a low context style) without a full appreciation that it is up to them to adjust their communication style to facilitate optimal information exchange between the parties.

100 Similarly, if mediators are high context communicators but unaware of the fact, they may irritate and frustrate low context parties by appearing to draw the process out, allowing too much time for certain elements of the mediation process and letting "unclear" (indirect) communication – metaphors, stories and hints – pile up until the low context communicators in the room feel uneasy and uncertain of precisely what is being said. Unable to "read between the lines" and temperamentally unprepared to do so, low context communicators can feel they are being disadvantaged by the capacity of the other party to engage with the mediator.

101 If mediators intervene to speed up the process, high context communicators can begin to feel pressured by time or by overly direct communication, and may fall silent or withdraw altogether; this would ultimately be unhelpful to both sides and certainly to reaching settlement.

102 Once mediators realise the mismatch in styles is to some extent the result of low or high culture style, they can intervene to manage it. Whether they do so in joint or in private session, it is up to them to make what is happening explicit: to name the reactions and normalise the discomfort parties may be feeling.

#### **D. Cultural logic and cognition**

103 Whenever parties negotiate across cultures, especially in mediation, one of the key tasks of the mediator (or the negotiators) is to move into a rational frame of mind, beyond the emotion of the conflict itself, whether hinted at or expressed.

104 Mediators manage this in the early stages of the process by acknowledging parties' statements and assertions – without agreeing with them – so as to demonstrate that at this table, at least, they are understood and their issues are recognised, however divergent they might be. In pursuit of this goal, mediators reframe, summarise and paraphrase, and most models of mediation emphasise the utility of this phase.

105 Avruch writes eloquently on cognition and culture. He draws attention to the fact that culturally transmitted solutions to life's problems exert significant influence on the thinking of individuals, and while they may cling to those solutions as "right" or "good", the propositions themselves may bring them into conflict with people whose culture proposes entirely different solutions.

106 This thesis fits neatly with Thomas' view of the need for transcendence of cultural systems.

107 The trick, therefore, is to see cultural "logic" not as logical or illogical, true or false – which people in conflict assert as they vehemently disagree with one another – but as "fuzzy logic" on both sides. The propositions themselves are neither; they are "rubbery".<sup>12</sup>

Fuzzy logic deals with propositions that are more or less true or false.  
... It is a logic for dealing with uncertainties. This is a much better way

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12 Kevin Avruch, *Culture and Conflict Resolution* (USIP Press, 2004) at p 36.

for thinking about the relationship between culture and cognition, or of culture as the way we solve problems and reason our way through the world, if only because the world regularly presents us with new problems to solve, with propositions that are not unambiguously true or false – with uncertainty.

Landing in uncertain territory ironically unites the parties. Both harbour a sense that things ought to work out their way, but deep down they know the other party thinks the same thing – and they cannot both be right. So finding an accommodation between their worldviews, propositions, ideas and proposed solutions is the task that each one faces.

108 Here, mediators can be of significant assistance. They can go behind propositions and proposals to ask “why so”. Whether this is done in joint or private sessions, by reason of preserving the parties’ dignity or face, is up to the mediator. But however it is achieved, parties to a dispute with cross-cultural implications may themselves never have been challenged to question the received wisdom of their cultural worldview. They may in fact be in significant disagreement with elements of it, or have acted against it in the past, but they may not wish to admit to this in front of the other party.

109 The task before them is to overcome conflict as Pruitt and Kim define it as a “perceived divergence of interest, or a belief that parties’ current aspirations cannot be achieved simultaneously”.<sup>13</sup>

110 Once both parties recognise this belief is shared, they share the need to find another way, and realise that in order to succeed themselves, they have no option but to work with the others with whom they are in dispute.

111 To sensitise themselves to this, mediators can ask themselves whether parties are acting according to a sense of the value of:

- well-defined roles within social hierarchies;
- relative formality/informality;
- equality in relationships;
- individual freedom, control, independence or restrictions on them;
- directness in communication/conflict situations;

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13 Dean Pruitt, Sung Hee Kim & Jeffrey Rubin, *Social Conflict: Escalation, Stalemate and Settlement* (McGraw-Hill, 2004) at p 5.

- submissiveness in interactions with authorities;
- hinting at rather than asserting views;
- shame, honour;
- long- or short-term view of a situation;
- reciprocity, reciprocal gestures.

### **E. *Using intentional language***

#### **Case study 5**

Many years ago, while visiting an Aboriginal community in Queensland, Australia, as a member of the Native Title Tribunal, a number of the members of the community and I arrived on their land on the back of a truck with two inside seats and an open tray, not an unusual way of travelling in that part of the world. The truck slowed at a locked gate, so I hopped off, opened the gate and, when the truck had driven through, closed the gate again and hopped back on.

Later that evening, I heard that some of the older members of the community were displeased with me and were planning to abort the mediation meeting planned for the next day and call for another Tribunal member to replace me. Surprised and shocked, I decided to go and sit with the women elders to see if the matter could be cleared up.

I began by saying that I understood I had given offence, and wondered why. Silence. After a while, one of the elders said to me, “You know, you’re a guest here, but that’s not how you behaved.” I was more baffled than ever, and said so.

She went on, “You opened the gate to the only piece of land on the planet we can call our own, and instead of waiting for us to welcome you to our land, you got out and opened the gate to us.”

Moved as well as amazed, I found myself saying, “When I did that, I intended only courtesy and respect. (It will be obvious to readers that I felt it wrong to allow someone frail and elderly to get off the truck and open the gate while I sat idly by.)

This exchange opened the way to a conversation I have referred to many times since, all around the world. It is worth analysing here, because it yields such useful cross-cultural insights. Pedersen’s insights, already cited, clearly demonstrate what was happening: “Behaviour is not data until the cultural assumptions underlying it are explained and understood” and

“Different behaviours can have the same meaning and similar behaviours can have different meanings.”

Put simply, whatever my intention, opening the gate was read as arrogance and discourtesy by the community who were my hosts.

As the conversation progressed, I was suddenly aware of the fact that the bridge to understanding had been crossed when I had been able to explain my intention in holding open the gate.

On that day I learned the importance of knowing the intentions that lie behind actions, beginning with one's own, and being able to voice them. Once I explained what I meant by my gesture, they understood and forgave me, and what had happened became a talking point for us all. We learned a great deal about one another that day. It is a lesson I have never forgotten.

112 When people talk at the level of intention, they are able to say, “That's not what I intended.” On many occasions understanding and even forgiveness follow when parties can freely explain their intentions. Such statements are often more powerful than an apology made without a true understanding of the nature of the unintended offence.

113 An essential component of self-awareness, of self-knowledge, is to know why you are saying what you have chosen to say at any given moment, and to be prepared to open it to scrutiny, making explicit what is usually implicit. Modelling this behaviour enables parties to do the same, and certainly to ask one another what they mean by what they say.

114 This alone can transform suspicion into understanding, and can prevent parties from wrongly projecting on to others what they might mean by certain words, had they said them. If mediators are not alert to this, what often follows is negative attribution, typically by one party to the cultural or ethnic background of the other.

#### ***F. Avoiding unwitting validation***

115 One of the key tenets about mediation is the neutrality of the mediator. It is therefore important for the mediator not to unwittingly validate something through his or her behaviour such that parties might interpret this as being a loss of neutrality. This unwitting validation can take many forms.

116 It can arise as frustration expressed by the mediator when a mediation is apparently going well and then, suddenly, there is impasse. Mediators have been known to ask a party why they rejected a “perfectly

good” or “reasonable” offer. What is “good” or “reasonable” is a value judgment made by mediators based on their worldview, and is a rough translation of the notion that “if I were in your shoes, I’d think this was a good offer”.

117 So in intercultural or cross-cultural mediations, mediators must be on guard against using value-laden language. To do so and inquire, possibly in a private session, why the offer was not accepted – or better still, was not acceptable – is to learn that a rejected offer, if restructured, could well become acceptable. *That restructuring may need to incorporate key sensitivities of a cultural nature which only the party who rejected it can explain*, and which the mediator cannot possibly be expected to know.

118 A rejected offer to apologise in private may prove acceptable if it were to be made in public or *vice versa*.

### Case study 6

A mining company was about to begin negotiations with an Indigenous community, the holders or claimants of native title to the land under discussion. The miners came to the preliminary conference with a figure in mind equating to percentage royalty payments, and made it clear that they wanted to put that offer right away. The preliminary meeting gave me as mediator the opportunity to ask why were not prepared to wait till later in the process to make their offer. They said they wanted to do so in order to demonstrate good faith at the outset.

I asked them to consider how their early offer could be construed by the other party, and discovered that they had given it little thought. It had not entered their heads that the gesture could, in their terms, be misinterpreted. They had simply proceeded on the assumption that if this gesture were made to *them*, they would consider it a demonstration of good faith, since as far as they were concerned, the heart of the issue was money. In some ways, they were correct! There is often no hard right or wrong in matters of this kind, simply different interpretations of the same phenomenon.

The discussion that followed gave them a chance to consider other possibilities, including the possibility that they might unintentionally give offence by implying that the Indigenous party saw the land merely as a commodity, in exactly the way the mining company did, and was prepared to trade it away for money. (It is widely known in Australia that Indigenous communities have sacred duties to the land, of which they regard themselves as stewards, not owners.)

Once this was factored into a discussion of what to offer and when, the negotiators recognised that it might be best to drop their insistence on making an early offer because it might not be able to be made again if it was misinterpreted at the outset. In cross-cultural mediation terms, the risk is precisely that if an offer is not made in context, it can fail. That context is the information exchange with which a sound mediation process opens, one which enables parties to sound one another out – quite literally to see the whites of one another’s eyes.

As it turned out, the key issue for the Indigenous party was the restoration and rehabilitation of the land post-exploration or post mining. Hearing this enabled the mining company representatives to demonstrate good faith by assuring the community that land remediation could be factored into any land use agreement, at which point discussion of payment opened up quite naturally, and was concluded to the great satisfaction of both.

The very sum that might well have caused deep and unintended offence early was very nearly the sum upon which the matter settled. What changed was context and mutual understanding.

### **G. *Power and process adjustments***

119 While mediators regularly find themselves under pressure to adjust the process, and while process adjustments and creative use of process is key to success, it can be an insidious tool of more powerful parties to maintain power.

120 It is a truism that while the powerful identify as individuals, those who are less powerful identify as groups. It is in the cross- and intercultural setting that this is thrown into stark relief.

121 Of course, mediators must be free to use all available processes and techniques and perhaps also free to invent others as the situation requires if the sensitivities of the cross-cultural exchange are to be deftly managed. The difficulty lies in knowing whether applying them will benefit all parties, or work to the advantage of one.

122 Central to the cross-cultural effectiveness of the process is not only the responsiveness of mediators to one party’s needs, but their capacity to negotiate adjustments with the party who does not require them, or who has not requested them.

123 In this setting, the party who regards a particular adjustment as unnecessary often asks the mediator who benefits from it, subtly or not-so-subtly alleging bias.

124 If mediators instead ask what detriment would flow from making the change, it is often revealed that neither party is actually disadvantaged. (It goes without saying that if one party is disadvantaged, the issue must be dealt with before the mediation can continue.)

125 To ask both parties if they are going to be disadvantaged by a change assists the mediator to resist calls for process adjustments typically made by more powerful parties.

126 It is they who often assert the view that since this is all about money, it would be best to dispense with the long (and in their view unnecessary) opening session, save time, and get down to business. “We have an offer to put to them, and the sooner we know whether it’s acceptable, the better things between us will be.”

127 Frequently, the response of powerful parties to the “what detriment” question is an acknowledgement of no detriment except a loss of time.

128 As for the less powerful party – often representatives of a group – asking them what detriment they perceive if the mediation were to proceed directly to financial negotiations is instructive. They often identify the fact that there is much the other side doesn’t know and which they are keen to tell. This is their one chance to tell it, much as injured workers want to talk about the impact on them and their families of the injury.

129 Once this information is out in the open, it is highly likely to assist the negotiations. The party who wants to shut down discussion might actually benefit from understanding why the figure to be negotiated will depend on an understanding of certain facts.

130 When mediators persist with the “who will suffer” rather than the “who stands to gain” proposition, parties often end by acknowledging there is “nothing to lose” in allowing the process to unfold, with the possible exception of time, which can now be recast as “worth investing”, not “squandering”, if it increases mutual understanding and the chance of a durable outcome: an excellent reframe – and ideally it is the parties who arrive at it themselves.

## VI. Epilogue

131 In an increasing cross- and intercultural world, it is difficult to deny the impact of and need to deal with culture. And this requires resources, frameworks and tools that go beyond traditional mediation training. Everything is now grist to the mediator's mill: psychology, philosophy, linguistics, literature, neuroscience, just to name a few.

132 All learnings shed light on what is happening as diverse groups of people grapple with their problems and conflicts, the pain of loss, the triumph of success, the struggle to fit in, and the task of knowing what is worth giving up in return for the promised gains.

133 In a complex world, the work of the mediator is never done, but the contributions made to cross- and intercultural understanding are worth striving for.

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