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Culture sensitive international mediation

Using mediation in business between EU and China trade disputes

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Arbitration has been a default way of resolving dispute due to the strong development and credibility to the legal tradition. Mediation is gaining momentum, especially thanks to the Singapore Convention on Mediation (2019).
While arbitration is the trust on a developed legal system, mediation is a trust on the other person, resolving through cooperation and the expectation of rebuilding trust.
In fact, mediation is more like an attitude, which has a long history of being adopted by the eastern / Chinese culture (Alfred Chan).

Chinese writing has over 50,000 characters and most of its origins date back to the second millennium B.C.. It is a cultural context, in which the number of characters is overwhelming, but it is an effective vehicle for the preservation of cultural tradition, because it actually transmits historically very old images and concepts through time.

Western languages, on the other hand, have always been based on a limited number of graphic-phonetic symbols, generally no more than 30, which can be combined almost indefinitely around conceptual entities. This allows a strong and continuous semantic renewal, but at the same time drastically reduces the possibility of reconstructing 'ancient' concepts.

All these differences affect the culture of a people and are affected by it.

When you deal with other people, there are two basic principles to be respected:

- **BE YOURSELF**; "*Do not belong to anyone else, if you can belong to yourself*" ("*Alterius non sit qui suus esse potest*" Αἴσωπος, Greek poet VII / VI century B.C.);

- **RECIPROCITY** or "*Do not do to others what you would not like them do to you*".

Confucius: *"Tsze-Kung asked, "Is there one word with which to act in accordance throughout a lifetime?" The Master said, "Is not reciprocity such a word? What you do not want done to yourself, do not do to others."*

Furthermore it is also necessary to take account of the "culture" of the people you are dealing with. Culture as the set of customs, language, traditions, values, religious principles, lifestyle, cuisine, art, "roots" they have received (very often unknowingly) from the society, the community or the group they belong to. All very important matters in mediation, where communication and empathy are basic elements.

Scholars underline the differences between individualistic and collectivistic cultures.

In individualistic societies (in the present times, mainly Western countries, based on the values of democracy) "*all human beings are born free and equal in dignity and rights*" (Universal Declaration of Human Rights, art. 1, 1948); therefore the single person is very important and freedom, self-expression, personal achievements, protection of the rights of the individual in front of the authority are guaranteed values. Competition is stimulated and the conflicts that follow are handled according to the same rules for everyone.

Collectivistic societies, on the contrary, underline the importance of the community (family, clan, caste), the value of long-term relationship maintenance (*guanxi* 关系 , heritage of the Confucian practice), strong sense of duty. The social organization is rigid, to prevent internal conflicts; the interests of the community prevail over those of the individual; controversies should be avoided

because they would undermine the harmony of the community.

If they occur, they are not handled with written rules and formal documents but through non-verbal and little contradictory management, compromise, respecting the principles of tradition and group authority; so the individual can also step back, provided the group's respectability and harmony are preserved.

While Western operators aim at the precision of the agreements, to their written editorial, the Easterners give greater value to the words, to the mutual trust; so often they are vague and, if the counterpart insists on pointing out, they may feel they are not believed (and the request of a written agreement could be considered as an outrage). As a result, they may not reach the agreement. In addition, a response such as "*I will think*" to a Westerner may mean that negotiations can be resumed, for an Easterner instead, who belongs to a culture that avoids confrontation, may be equal to a flat no.

All these features can be summarized as follows:

	East	West
Approach	indirect	direct
	collaborative	confidential
	win-win	win-lose
Decision making	consensual	individual
	relation focus	text focus
	bottom-up	top-down
Goals	long-term	short-term
	trust relation	legal contract
	pie expansion	pie division. [1]

Culture is not unchangeable. Even if slowly, it is evolving with the times. Therefore it is not enough to know the past but it is necessary to keep up with the present (example – Dole & Gabbana marketing campaign in China in 2018)

"*Cultural differences may not be the actual source of a dispute, but these differences sometimes play a crucial role in the outcome of mediation. A mediator, who is aware of these subtleties and is sensitive enough to act accordingly, is most likely to succeed in helping parties, with different cultural backgrounds, achieve a satisfying resolution to their dispute*". A perceived dominant or inferior culture could have a great influence on a party's feeling and behaviour during the mediation proceeding; such a feeling could be due to skin colour, religion, language, accent, gender or sexual representation and also self-worth, status, position or/and political culture dimension (country with a strong democracy or authoritarian regime).

Differences in culture also influence the use of **hybrid mediation proceedings** : should the mediator and the arbitrator be the same person or they have to be different professionals? In some countries mediation and arbitration can be managed by the same person.

This question is of growing global significance in the management of conflict and in April 2016 the College of Commercial Arbitrators, the International Mediation Institute and the Straus Institute for Dispute resolution – Pepperdine Law School started a **joint international task force on "mixed mode" dispute resolution**, to explore the interplay among mediation, evaluation and arbitration in commercial cases.

"The Task Force has been charged with examining and seeking to develop model standards and

[1] Stefano Schembri, "*East meets West*", 2016

criteria for ways of combining different dispute resolution processes that may involve the interplay between public or private adjudicative systems (e.g., litigation, arbitration, or adjudication) with non-adjudicative methods that involve the use of a neutral (e.g., conciliation or mediation), whether in parallel, sequentially or as integrated processes, … .

"Practically speaking, this means exploring and investigating mixed mode practices from various cultural and legal standpoints, including information about current experience, best practices, and, where appropriate, the development of protocols to guide future implementation of mixed mode processes by neutrals more broadly ….. "What is the proper protocol for arbitrators or institutions to follow when parties ask them to convert a settlement agreement into an arbitration award? What other issues arise in enforcing mediated settlement?

"In what ways, if any, might NON-ADJUTICATIVE NEUTRALS AND ADJUDICATIVE NEUTRALS APPROPRIATELY COMMUNICATE in the course of working together on resolving a particular dispute, whether in a sequential, parallel or integrated manner?" [2]

Confidentiality is a crucial element of mediation.

If the two procedures are handled by the same person, conflicting parties are unlikely to "open up" to the neutral, at least in confidential meetings. They will be afraid that what they say may later be used against them in the arbitration.

Therefore, according to my opinion, mediator and arbitrator must be two different professionals in hybrid proceedings and communication between them could undermine the fair result of the proceeding.

A cultural problem may arise from the legal tradition. The primary method of managing international commercial disputes has been (and still is) arbitration, thanks to *The New York Convention*, 1958.

The main reasons for the success were the confidentiality and flexibility of arbitration, the underlying nature of the arbitration proceeding (inherent in the training and activity of lawyers) and the enforceability of the arbitration awards. A procedure managed by lawyers, who, when they shift to mediation, very often resort to adversarial technique.

On August 2019 the Singapore Convention on Mediation was signed whose main innovation is the enforceability of international commercial mediation agreements. The Singapore Convention on Mediation received strong support from many countries; nevertheless, there are many concerns and criticisms (understandable, given the complexity of the subject), among which the likely *"lawyerization of mediation*" ! [3]

Thus, among the cultural aspects (problems) to be taken into account, there is also the professional attitude of lawyers.

The Singapore Convention on Mediation, on August 2019, was undersigned by forty-six countries, including three of the largest economies in the world, The United States of America, China and India.

At May 25, 2021 the Convention has been ratified by 53 countries and ratified by 6. It entered into force at September 12, 2020. [4]

China in recent years adopted domestic rules consistent with the Convention. The Belt and Road

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[2] International Task Force on Mixed Mode Dispute Resolution, "*Inaugural Summit*", in Imimediation.org 23.9.2016 https://www.imimediation.org/wp-content/uploads/2017/11/Mixed_Mode_Pepperdine_Summit_Written_Summary_April_27_2017.pdf

[3] Jacqueline M. Nolan-Haley, "*Mediation: the new arbitration*", Harvard Negotiation Law Review, 2010 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713928

Harald Sippel, *Singapore Convention: game on or game over for mediation?*, in Linkedin 5.8.2019, https://www.linkedin.com/pulse/singapore-convention-game-over-mediation-harald-sippel/

[4] Uncitral, United Nations Convention on International Settlement Agreements Resulting from Mediation, Status https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

Initiative will further promote the use of the diversified dispute resolution mechanism by Chinese courts. PRC is therefore likely to ratify the Convention before very long.

The European Union took an active role in the preparatory work, but did not undersigned the convention; its absence was likely due to practical problems. The EU is a group of countries, sometimes strongly proud of their identity and independence, whose governments' political and legal agendas had been taken over by the crises brought on by Brexit and the Covid-19 pandemic.

All this, despite the 2008 EU Mediation Directive, which allows the enforcement of cross-border mediated settlement agreement through the national courts of EU Member States. Difficult to predict when the EU absence from the Singapore Convention will end. [5]

To date, May 2021, an Italian company, with a subsidiary based in Hong Kong, buys products from a Chinese company; a dispute arises; may the subsidiary of the Italian company resort to the SCM ?

"Currently no. Because EU did not sign and China signed but did not ratified yet. But also it will depend on the legal status of the subsidiary in Hong Kong. Normally it will be considered a separate legal entity from the Italian mother company and for tax purposes treated as a local company.

"However, when China ratifies the convention, provided the subsidiary can comply with the requirement of the convention in regards to being international, then the mediated agreement can be enforced by a Chinese court." (Delcy Lagones de Anglin)

As mentioned above, China in recent years adopted domestic rules consistent with the framework of the SCM. China is therefore likely to ratify the Convention not too far in the future.

To manage effectively the inter-cultural dimensions of a mediation, Dorcas Quek Anderson and Diana Knight propose a pre-mediation interview. This approach would enable the mediator to embrace the parties' cultural complexity and to design the mediation process based on their rich milieu of preferences. [6]

This suggestion reminds the 2010 article, *"Mediation starts from the first phone call".*[7]

Co-mediation could be the best way to handle the proceeding with parties with different cultures: "*Co-mediation offers the parties two communication channels that interact adding value to the cultural knowledge and mediation skills of the single mediator. The participation of a mediator of their own culture makes the parties feel comfortable and at ease, leads them to opening up and trusting the proceedings*".

To be effective, the co-mediators need similar training, deep common knowledge of the proceeding and shared experience. [8]

International commercial mediation is gaining momentum.
"… Cross-cultural disputes are often characterised by parties having different goals, bargaining styles, modes of communication, approaches to time, levels of emotionalism, approaches to problem solving and form of agreements, approaches to settlement authority and views as to risk taking.
"…. Therefore mediation model variants have evolved out of many different cultures with the result that mediation in one country might look entirely different to mediation in another. …, there cannot

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[5] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters: introductory guidance § 19 and 20, art. 2 – Cross-border disputes, art. 5.2 –Recourse to mediation, art. 6 Enforceability of agreements resulting from mediation https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF

[6] Dorcas Quek Anderson and Diana Knight, "*Managing the Inter-Cultural Dimensions of a Mediation Effectively – A Proposed Pre-Mediation Intake Instrumen*t", 2016 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909477

[7] Robin Gise, Jed Melnick, Vivien Shelanski and John Wilkinson, "*Mediation starts from the first phone call*", in Cardozo Journal of Conflict Resolution, 2010,2. *https://cardozojcr.com/vol11no2/463-478.pdf*

[8] Antonietta Marsaglia, "*The cultural factor and universal business practice*", 2018 http://mediationblog.kluwerarbitration.com/2018/10/04/cultural-factor-universal-business-practice/

be any one correct approach to mediation and there is no prescriptive formula for how the process must be delivered.
"The various possible process options are arguably infinite" [9]

How should the mediator deal with all this diversity?
Using the tools of his activity, especially **listening**.
And, overall, through experience.

Nevertheless, in order to reach an agreement, shared methods must be used. But there is still no a universal set of best practices to follow during an international commercial mediation.

The agreement signed on April 28, 2021, by 5 leading mediation providers from different continents, [10] to implement -among others- a

MEDIATION STANDARD PROCEEDING

is of significant relevance.

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[9] Catherine Green, *'Addressing diversity and culture in international mediation'*, NZIAC, 20.9.2019, at https://www.nziac.com/addressing-diversity-and-culture-in-international-mediation-part-four-in-a-series-on-the-singapore-convention/

[10] International Dispute Resolution & Risk Management Institute (IDRRMI), Singapore Internationalm Mediation Institute (SIMI), Asia Mediation Centre (AMC), L'Institut Français de Certification des Médiateurs (IFCM), Instituto de Certificacao e Formacao de Mediadores Lusofonos (ICFML) signed the Alliance for Mediation Standards Memorandum of Understanding on April 28, 2021