



MEDIATION AND CULTURE:

How different cultural backgrounds can affect the way people negotiate and resolve disputes.

“Mediation is a tool that helps to ‘bridge the gap’ between differences, and this requires knowing and respecting the culture of people that you meet.” by Alessandra Sgubini

Introduction by Alessandra Sgubini and Rachel Simon

During the transition from an Italian Attorney to an American Mediator, I have had to overcome the onerous challenges of starting a mediation firm within a different culture and legal system. One of the most significant challenges for businesses operation in an international arena is that of culture and communication. The single most important thing learned throughout my experience is that in order to build a communication “bridge” one must understand and respect the culture and communication styles of the other party.

The globalization of commerce has facilitated new ways of doing business and developing commercial relationships that are not connected geographically to a specific country. International commerce has created a link between people from very different cultures and backgrounds, which can be both very productive and an impediment, especially since a cultural misunderstanding can cause a negotiation to fail or a business relationship to end. Often, when a dispute arises, the difficulty of resolving it in accordance with both parties’ cultural and legal standards leads to a search for a more efficient way to reconcile the differences. The secret to solve any business dispute is communication. While this might seem like a simple task, there are always outside influences that will impact that communication. Occasionally, we need the help of a third person who is an expert in the process. Under many legal systems lies a tool that is essential, fast and efficient to resolve disputes. That tool is Mediation.

Mediation is a voluntary and confidential process where a neutral third party meets with the disputants and helps to open lines of communication so that the parties can arrive at a mutually agreeable, fair, and workable resolution. A typical mediation session settles the case within one eight-hour session, saving the parties both time and money. This is in contrast with arbitration and litigation, which are often very stressful processes and not supporting the business paradigm, because they can last years and cost the parties inordinate legal fees. Both arbitration and litigation inevitably end in a win-lose situation where a binding decision is made by an arbitrator or judge. With mediation, on the other hand, decisions are typically win-win and made by the parties.

However, in order for mediation to be successful, it is important for the mediator to understand how parties communicate. When carrying on an international mediation or even a domestic mediation with diverse parties, a mediator must take the cultural differences between the parties into consideration. Mediation is not based on legal premises, but on communication, and can thus be applied virtually anywhere in the world when communicative and cultural barriers are broken down. Communication methods vary from country to country, depending on the historical development, legal systems,



and ethnic and cultural background of each area. The key to make mediation successful globally is to understand the cultural effect on both business negotiation and communication techniques.

While both promising and frustrating, my experience of being a professional in a foreign country while accommodating cultural differences into the mediation process has inspired me to contact colleagues from around the globe to bring some insight into the importance of culture in dispute resolution. The following is a compilation of my own experiences and the experiences of my colleagues.

USA *by Scott Norman*

As part of a country rich in cultural diversity, many Americans associate themselves not only with the more generic “American” culture but part of the culture of their forbearers. This cultural diversity coupled with the United States’ capitalist system has sometimes led to a society that is more acutely aware or accommodating to the needs of other cultures at the bargaining table. Often, over the course of international business transactions, the American culture finds it necessary to be malleable in order to produce the most economically favorable outcome.

Nonetheless, some characteristics are common of American culture. Pragmatism is the predominant characteristic of American business culture. Business relationships are nurtured by their potential for profitability and trust is often found in the terms of a binding contract. Trust, or lack thereof, profoundly influences American negotiation practices. American businesspersons prefer a straightforward dialog where needs and concerns are addressed somewhat candidly. Through a position of strength and openness each side works to make concessions until a mutually beneficial agreement can be reached. This willingness to make concessions is motivated by pragmatism—the willingness to avoid unnecessary time and expense.

Though some form of alternative dispute resolution, such as mediation and arbitration are the predominant form of dispute settlement, the legal traditional system is still considered, by most, to be the preferred and predominant method. However, due to the potential time and expense of litigation, mediation as a dispute resolution mechanism has become a firmly established alternative to litigation in the business and legal communities. The United States’ reputation for being too litigious, while not entirely unfounded, might slowly be deteriorating as successful applications of alternative dispute resolution methods are increasingly acknowledged.

As companies and universities continue to offer training the practice of mediation is becoming institutionalized. It is no longer an alternative to litigation, but characterized as the first step in resolving a dispute after, of course, unsuccessful negotiation attempts by the parties themselves. The use of mediation as an alternative to litigation will only increase as its concrete results and successes are publicized. Perhaps, more persuasively, is to demonstrate how mediation can affect something the “global” culture understands—



the bottom line. Mediation also has the added benefit of perhaps salvaging business relationships that will almost certainly be ruined through litigation.

ITALY *by Alessandra Sgubini and Stefano Cardinale*

Over the centuries, the Italian peninsula has been influenced by Roman, Greek and Arabic cultures. The presence of well-established and respected traditions has made Italy one of the most conservative and traditionalist countries in Europe.

While the majority of European business relationships and legal systems continue to evolve, Italy remains crystallized in a secluded environment where traditions, such as nobility and family prestige, have not changed throughout the years. Reliability and relationship building are fundamental business practices in Italy. Business people favor personal relationships with their associates prior to doing business with them. Thus, both for the large corporation and the small business, referrals are very important in the Italian market. Moreover, credibility and social reputation when dealing with Italian businesses are decisive factors for successful negotiations. Generally, business people in Italy prefer to negotiate and maintain a business relationship with an executive or manager of a firm.

Elegance and appearance are important considerations in Italian culture. More so than in many other countries an attractive, well-dressed individual is considered more reliable.

Italians prefer to take their time negotiating and be familiar with who they're talking to. Indeed, being in a rush to sign an agreement will lead to unfulfilled expectations. For example, during a business lunch it is important to begin with relaxed conversation; giving your partner the opportunity of enjoying lunch before you get to the subject you're interested in. In addition, perceptions of time can change depending upon whether business is being conducted with people from the south or north of the Italian peninsula. Southerners generally have a much more relaxed perception of time than those in the north.

In part, due to the influence of these stagnant traditions, a new tool for fast and efficient conflict resolution, such as mediation, has yet to gain wide acceptance despite its increasing prevalence throughout the international community. In many instances, mediation escapes the understanding of Italian lawyers and businesses. Sometimes, mediation may be mistakenly confused with conciliation, which is a statutorily recognized process of dispute resolution in specified types of disputes.

Over the last few years Italian business people have started to realize that the commonly accepted culture of "I win, you lose" is slowing down the judicial system; causing many businesses to lose money and time in long and expensive trials that, for a majority, end without the complete satisfaction of a "winner." Thus, the Italian business community is slowly starting to join other European countries in searching for an efficient alternative to



trial and arbitration. Small, medium-sized and large Italian companies are beginning to turn their attention to mediation as their first choice when confronted with a dispute.

Indeed, it appears that the concept of mediation has set in a new era in business in motion for Italians, as well as in other European common law countries and civil law countries, where commercial enterprises respond to legislative reform in corporate law. New legislative activity reflects the increasingly prominent role mediation will play in resolving future commercial disputes in Italy. The Italian legislature recently approved the use of mediation and conciliation in commercial disputes. In addition, two new bills (n.222 and 223/2004) prescribe standards for companies that wish to register as providers of mediation or conciliation services. Mediation services will now be included in the public registry with the Ministry of Justice. Still other legislative bills recognize mediation as a profession and set forth the range of fees that can be charged for mediation services.

SWITZERLAND *by Michel Schmidt*

Switzerland has tried for years to be present in the world negotiation scene offering its perceived neutrality and geographical position as an advantage over other countries. Many conferences and negotiations take place in Switzerland on a regular basis, especially in Geneva, where many international organizations are headquartered. The Swiss community is eclectic, and cities like Geneva or Zurich are considered international cities composed of cultures from around the world. Switzerland has four different national languages included in its Federal Constitution.

The Swiss mentalities can vary according to the different part of Switzerland. The Swiss Germans appear colder and are less amenable to change. However, they are also more precise, motivated and disciplined. Conversely, Swiss Romans are generally perceived as being more fun loving, enjoying life, and contesting authority. Finally, the Swiss Italians are generally considered friendlier, more trusting and generous. These differences can be observed during terms of military service, which is mandatory in Switzerland. Swiss Germans, on one hand, are considered more serious and motivated, and are generally preferred for their discipline and respect. Swiss Romans and Swiss Italians, on the other hand get along with each other more, due to their complimentary open communication styles.

Mediation is already used in Switzerland at the cantonal level and is also currently being considered in Federal legislation. Some cantonal constitutions request the governments to encourage private mediation. Geneva for instance, having already included mediation in its criminal procedure law, became the first Swiss canton to include mediation in its civil law in 2004. The main fields of development concern family and labour laws. A Swiss association of judges for mediation and conciliation had also been created to promote these techniques.



MALTA by *Herman S.J. Zandt*

Malta offers a clear mixture of the very best that history brought this Mediterranean pebble over the centuries. Even the Maltese economic environment shows diverse traits of different origins, most prominently the British-like traditional and conservative

approach to conducting business, combined with high levels of timekeeping and reliability. The country's central and historically strategic location in a more easy-going Mediterranean region causes business meetings to be less formal as well, combined with a large focus on the individual.

Personal acknowledgement is an important pillar under common negotiation processes; high attention and sufficient time is generally given to issues not directly related to the business matter, e.g. place of residence, social circle and (if foreign) country of origin.

Corporate interactions in Malta are largely based on established relationships, not in the least supported by the relatively large amount of family-run enterprises existing. Maintaining and, where possible, improving these relationships is a key factor for current and future business success. New market entrants – both local and foreign – can be taught patience when attempting to establish fruitful relationships; once established, it proves long lasting.

Maltese businesspeople are assertive negotiators, who clearly know what they want and with a strong will to excel. A wide international orientation is combined with a strong ability to make and take the best out of any emerging business opportunity.

The importance of maintaining and improving business relationships has proven to be the foundation under which corporate negotiations and disputes are handled. Upon dispute emergence, a significant number of efforts are undertaken to avoid escalation. These attempts are directly targeted at the dispute partner(s), most commonly through face-to-face negotiations as is facilitated by the small distances on Malta.

Still, nearly every unresolved dispute is referred to a third party, instructed by a disputant to act on his behalf. Disputes with stakeholders external to the organization (e.g. suppliers or customers) are transferred to a qualified third party external to the organization, i.e. someone who has no direct relationship with any of the disputants and who is licensed or certified to execute activities that would lead to a final resolution of the dispute, such as a mediator, arbitrator or lawyer. Disagreements with internal stakeholders are preferably handled by a third party internal to the organization (e.g. a general manager, HR manager or colleague).

Despite several implementation attempts since 1998, mediation in Malta is still in its embryonic stage. It is only since December 2004 that the Mediation Act (Ch. 474) was enacted, followed by the set up of a governmental Mediation Centre as a central point of



reference. Current activities, initiated on a governmental level, are primarily focused on increasing mediation awareness.

Familiarity and personal experience with corporate mediation is low: just a mere 4% of the business community formally or informally attempted mediation to help resolving an emerged dispute. Nonetheless, voluntary mediation out of Court is perceived as highly effective and more successful than traditional litigation or arbitration.

Expected key benefits of the countrywide usage of corporate mediation in Malta would entail a significant shortening of the dispute life cycle and a positive contribution to the long-term value of resolution attempts, in particular due to highly relationship-based interactions. The main challenge is to overcome an apparent deeply rooted and mutual mistrust amongst Maltese disputants who are to maximally exploit their personal empowerment obtained. The real value of mediation is still to be discovered.

SPAIN *by Paco Gimenez-Salinas and Stefano Cardinale*

In Spain, due to its cultural diversity, there are many models of behavior during negotiations. Historically, Spain has been made up by the union of many different peoples. Each one of these different groups has its own personality and history, which involves a different way of negotiating.

The two areas in Spain which have a more open economy and a foreign oriented market are Catalonia and the Basque Country. In these two autonomous communities the “Latin character” of the Spanish people has been overwhelmed by a stronger “European personality”, or, by a more moderated and individualist character.

The Spanish people have a strong need of a human relationship as a base for good business alliances, contracts and agreements.

The paths and difficulties to reach such a relationship change depending on the area of the country being examined. For example, it is commonly said that the “Gallegos” (Spanish people from the north west area of the peninsula) “don’t trust anything or anybody,” while on the other hand, the Latin character of the people from the south makes it easier to establish a personal relationship.

In addition to these territorial differences, Spain has also suffered deep and intense historical and social changes in the past twenty years that have affected the whole country. During Franco’s dictatorship, Spanish society was organized in a strict structured and hierarchical way producing very autocratic conflict resolution methods. The culture of “win-lose” was spreading around and becoming a common way of thinking. The difficult political compromises that were carried on during the transition to a democratic society are the most important example of a multi party negotiation in recent Spanish history. Collective consensus followed by the treaty to get in the European Union changed from a classical unilateral style to a more open one based on dialogue and



agreement. This scenario opened the door for new conflict resolution methods, such as mediation, because it carries on the culture of “we-win” against the one of “win-lose”.

This result is that Spanish people now accept new cultures of negotiations brought by foreigners without renouncing their traditions.

The Spanish are intuitive, spontaneous, and able to create a good relationship with the party with whom they negotiate and are able to understand correctly the messages that the other party sends to them. Sometimes, however they cannot adapt themselves to the other party’s negotiating style and they don’t have much of a strategy. It’s important not to misunderstand this way of creating a personal relationship with the lack of respect for formalities, which could strain business relationship.

South American business people perceive the Spanish style of negotiation as very aggressive and direct. However, more direct cultures (e.g. the Anglo-Saxon) consider the Spanish to be very indirect and lacking respect for certain formalities like time and punctuality.

Spanish culture tends to find proximity between parties and a good human and personal relationship before going further with business. When facing a legal dispute, a dispute resolution method that eventually seeks the maintenance of relationships is essential. That is why mediation can be the perfect dispute resolution method in the Spanish market.

Latin cultures are influenced by a high emotional character of individuals. This is a very important issue when facing a legal dispute because many disputes normally get worse depending on emotional issues. That’s why mediation, facilitated by a professionally trained mediator who can neutralize emotions among the parties, can be the perfect method to solve successfully this kind of dispute.

The actual Spanish model is based on dialogue and compromise where mediation will be psychologically welcomed by companies and individuals. The most adequate type of mediation for the Spanish market is “facilitative mediation”, where the mediator doesn’t even suggest a possible outcome for the case carried on.

In general, mediation as the structured dispute negotiation is playing an increasing role in Spain. Not only is the government promoting this ADR tool (Catalonia and Valencia have their own Family Mediation Act of 2001 which provides the right of certain people to get free mediation), but also private institutions as universities (at present time Barcelona has three Master Programs in mediation running), foundations, and mediation associations are promoting mediation in specialized fields such as company disputes, disputes in the health industry, school’s mediation, intercultural mediation, family mediation, etc.

The current state of Spanish society is at an ideal stage for the introduction and implementation of mediation for social, normative, and institutional purposes.



BRAZIL by *Guilherme Peres Potenza*

Brazilians are known for being warm and friendly people in personal life and in business relations. Unfortunately, such conduct may create an informal negotiation environment that may not please negotiators from other cultures. Many business people characterize the way Brazilians negotiate as somewhat informal.

Nonetheless, some other values come in place when they are negotiating. Regarding these values, Brazilians ranked honesty, trustworthiness and ethics as being essential during the

negotiation process. Transparency and punctuality are also important factors in order to show a party is acting in good faith and is trustworthy. Finally, it is important to build a business relationship before starting a negotiation, this way the parties will try to communicate to each other the image of an honest, trustworthy and ethical person, able to duly carry on a successful negotiation.

As a result of the different attitudes, perceptions and negotiation styles, it is inevitable that conflicts will arise during the negotiation process. Therefore, Brazilians usually solve these conflicts by talking, re-negotiating and sometimes with attorneys' interference. Only when extremely necessary, will parties file a complaint. The Judiciary branch is really the last option among Brazilians because they find the Judiciary untrustworthy and plagued by bureaucratic inefficiency. This lack of trust in the Judiciary Branch leads Brazilians to be open to methods of alternative dispute resolution.

Many entities, public and private, are developing projects in efforts to increase awareness of alternative methods to resolve their conflicts without judicial involvement. One, sponsored by the Inter-American Development Bank, stimulated the creation of many mediation and arbitration chambers and trained people to spread these new concepts to, among other places, universities, offices, and labor unions. In addition, the Sao Paulo State Judiciary Branch has successfully utilized both mediation and conciliation, resulting in the creation of more mediation and conciliation chambers in all State courts. The success of both programs has demonstrated to Brazilians that there is an alternative to litigation that works. In addition, the Senate is currently reviewing proposed legislation concerning mediation and the role it has to play in the court system as an alternative to litigation.

There are already successful reports of business matters being solved with the help of mediation. However many business people remain apprehensive about using mediation, even though some contracts are being executed with obligatory arbitration and mediation clauses. Demand for mediation will increase as parties are increasingly becoming contractually obligated to settle their disputes through mediation and arbitration, assisting to the assimilation of mediation as a tool for dispute resolution.



CONCLUSION

In order to succeed internationally, businesses must understand the communication and negotiation techniques of each culture they conduct business in. Not only is culture an important factor in business, but also in a legal context because a cultural misunderstanding can create a dispute or cause a negotiation to fail.

Mediation has emerged as perhaps the most predominant ADR process because it offers parties the opportunity to develop settlements that are practical, economical, and durable. Even though businesses are open to the idea of mediation, they are at the stage where they need further education on the process. Once they are familiar with the concept, they can apply it in their own business to serve the interests of the companies they represent, using it as a resources to develop business and generate revenue.

For my belief in the importance of culture in the international business arena and in the future development of mediation as a worldwide dispute resolution tool, I've dedicated my efforts and my knowledge to the education of international and domestic businesses about the culture of "we both win"; that's how Bridge Mediation was born and that's why I decided to ask my colleagues from all over the world to tell about their personal experience about their home country cultural issues and characteristics, in order to give an overview of the importance of cultural differences when negotiating in modern business society.

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