The Changing Landscape of ADR in Latin America and the U.S. Influence: A Primer for Inside and Outside Counsel

March 31, 2017
11:00 A.M. – 12:15 P.M

Moderator

Hon. Cristina Pereyra-Alvarez (Ret.), JAMS mediator and arbitrator

Panelists

Lic. Mario Bucaro
Managing Partner
Central Law, Guatemala City, Guatemala.

Mélida N. Hodgson
Partner
FoleyHoag, New York City, NY.
The Changing Landscape of ADR in Latin America: A Primer for Inside and Outside Counsel

HNBA Corporate Counsel Conference | March 31st at 11:00 AM | Miami, Florida

The use of arbitration and mediation is growing explosively in some Latin American markets, but languishing in others. New laws, new trade treaties and growing foreign investment join together with clogged court systems and often unpredictable outcomes to create greater demand for mediation and arbitration in certain countries. This panel will address the documented growth of ADR in Latin America as well as factors that pose a challenge to the development of ADR throughout the region. The panel will also comment on how the changing political climate in the U.S. may impact litigation and the use of ADR in Latin America.

Panel Lineup

Moderator: Hon. Cristina Pereyra-Alvarez (Ret.), JAMS mediator and arbitrator

Panelist 1: Mario Bucaro, Managing partner, Diaz Duran & Asociados, Guatemala City, Guatemala.

Panelist 2: Mélidea N. Hodgson, Partner, FoleyHoag, New York City, NY.

Panelist 3: Angelika Hunnefeld, Shareholder, Greenberg Traurig, Miami, FL.

Panelist 4: Juan Carlos Varela, Managing partner, Littler Mendelson, Caracas, Venezuela.

Program Overview

I. Regional Developments of ADR in Latin America & Caribbean
   A. Central America
   B. Mexico
   C. South America - Colombia, Venezuela
   D. The Caribbean

II. Selecting the Right Mediator/Arbitrator

III. Preparing the Client for ADR

IV. Cultural Considerations

IV. The New Political Climate
Cristina Pereyra-Alvarez, retired Judge 11th Judicial Circuit, joins the JAMS panel after an exemplary career as a lawyer, judge, and legal journalist. Mrs. Pereyra-Alvarez’s extensive knowledge of the law and rich cultural background positions her to serve as an effective and informed mediator and arbitrator. Born in Tampa, Florida, Mrs. Pereyra-Alvarez grew up in Mexico where she earned her first law degree from Universidad Anahuac in Mexico City. Upon returning to the United States, she earned a second law degree from the University of Miami School of Law. After a distinguished career as an assistant public defender in the 11th Judicial Circuit, Mrs. Pereyra-Alvarez became a Miami-Dade County Court Judge in the 11th Judicial Circuit. In 2005, she was appointed as a Circuit Court Judge by former Governor Jeb Bush.

In 2007, Mrs. Pereyra-Alvarez retired from the bench to preside on the first national Spanish language court reality program “Veredicto Final” (Final Verdict). In 2011, she became Univision’s in-house legal correspondent. Mrs. Pereyra-Alvarez is fluent in Spanish. Download her biography in Spanish.

**ADR Experience and Qualifications**

While on the bench, Mrs. Pereyra-Alvarez presided over a wide range of cases covering a variety of practice areas including: banking, business/commercial, civil rights, class action/mass tort, construction, education/schools, employment, family law, healthcare, insurance, personal injury/torts, and real property. She successfully assisted parties in reaching a resolution that officially disposed of a number of cases and eliminated the need for trial. The cases including numerous complex matters that raised the following issues:

- **Business/Commercial**: Breach of contract and indebtedness, civil forfeitures, commercial foreclosures, corporate and business governance, declaratory judgments, discovery disputes, fraud, indemnification and contribution, injunctive relief, partnerships/joint ventures, premises liability, replevin, shareholder disputes, trade names, unfair/deceptive business practices
- **Employment**: Breach of employment contracts, class actions, defamation, discrimination (including race, gender, age, disability, religion, national origin, or sexual orientation), employee benefits and executive compensation, employment contract disputes, employment counseling, employment-related torts, ERISA litigation, Fair Labor Standards Act, international labor and employment, non-compete agreements, retaliation, sexual harassment, wage and hour claims (including class actions), whistleblower, and wrongful termination
- **Entertainment**: First Amendment including defamation (libel and slander), personality rights and privacy rights, production, post-production, trade union issues, cases involving Screen Actors Guild (SAG), talent agreements, producer agreements, and synchronization rights. Music industry negotiation and general intellectual property issues. Sports law including labor, antitrust, contracts, drug testing, and torts (issues including defamation and privacy rights). TV & radio including broadcast licensing and regulatory issues, mechanical licenses
- **Family Law**: Alimony, spousal and child support, marriage and domestic partner dissolution, relocation, validity of pre- or post-nuptial agreements, capacity issues, child custody, visitation and parenting coordination, characterization of property, attorneys’ fees and costs, annulment, division of property, assets and benefits, business valuations, marital settlement agreements, breach of fiduciary duty claims, valuation and disposition of family-owned businesses
- **Insurance**: First-party claims, insurance coverage, employment, construction, resolution, coverage disputes, healthcare coverage, auto, homeowners, health, disability, environmental and toxic tort claims, construction defects, personal injury, personal injury protection (PIP)
- **Personal Injury/Torts**: Wrongful death actions, Fabre issues, libel/slander, aviation, motor vehicle and watercraft negligence, negligent security, medical malpractice, premises liability, product liability, punitive damages, sexual abuse, slip and fall, treble damages, change of venue
- **Real Property**: Residential and commercial claims, leases, purchases and sales, commercial and residential mortgage foreclosures, commission claims, condemnation, condominium, deposit returns, homeowner associations, landlord-tenant disputes, land use
against all odds. We highly recommend to all the lawyers in our Firm to consider using Judge Pereyra-Alvarez and JAMS (Miami) whenever practicable."

Case Manager
Lisa Balkin
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Honors, Memberships, and Professional Activities
- Joint Voluntary Bar Associations Appreciation Award, 1998
- Florida Association for Women Lawyers Distinguished Service Award, 1994
- Board of Directors, United Way, Miami Chapter, 2014
- Member, Eleventh Judicial Circuit Speaker Bureau, 2004-2009
- Member, Florida Supreme Court’s Strategic Planning Committee on Long Range Planning for the State Court System and Task Force on Judicial Branch Planning, 2004-2007
- Member, Conference of Circuit Court Judges, 2005-2007
- Chair, Florida Supreme Court Interpreter Certification Board, 2007
- At the request of the U.S. State Department to prepare and deliver the materials for a series of lectures and assist Guatemalan Judiciary in Guatemala City with launching first appearance hearings in criminal cases, 2006
- Member, Conference of County Court Judges, 1999-2005
  - Vice-Chair, Small Claims Committee
  - Member, Education Committee
  - Member, Conference Committee
  - Member, Civil Rules Committee
- Faculty, College of Advanced Judicial Studies, 2005-2009
- Faculty, Conference of County Court Judges, 2005
- Faculty, DUI Adjudication Lab, 2002-2005
- Panelist, FACDL yearly informal discussion between members of the Judiciary and members of Miami Chapter of FACDL, 2002-2005
- Member, Judicial Council Ad Hoc Work Group on Privacy and Access to the Courts, 2003
- Member, Court Technology Advisory Committee, 2003
- Representative of the Judicial Management Council at the Conference of the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts, 2003
- Director, Florida Association for Women Lawyers, 1994-1996
- Director, Cuban-American Bar Association, 1993-1998 (Treasurer 1996)

Background and Education
- In-House Legal Correspondent, Univision, 2011
- Presided on the first national Spanish language courtroom reality program “Veredicto Final” (Final Verdict), 2007
- Nominated by the Third District Court of Appeal Nominating Commission for the position of Third District Court of Appeal Judge, September 2004 & April 2007
- Judge, Miami-Dade Circuit Court, 2005-2007
- Judge, Miami-Dade County Court, 11th Judicial Circuit, 1999-2004
- Law Clerk for Judge Mario Goderich, 1988
- J.D., University of Miami School of Law, 1988
- J.D., Universidad Anahuac, Mexico City, 1984
EDUCATION

- Degree in Law from Rafael Landivar University, Guatemala.
- Professional titles of Attorney and Notary by Universidad Rafael Landivar, Guatemala.
- Postgraduate in Private International Law from the University of Salamanca, Spain.
- Postgraduate in International Contracting by the University of Castilla-La Mancha, Spain.
- Master in Business Law and Competitiveness from the University of San Carlos of Guatemala.

PROFESSIONAL EXPERIENCE

- Partner in the law firm Central Law Guatemala.
- In 2008 he was appointed as Managing Partner of the regional firm Central Law, responsible for the administration and expansion of the firm throughout the Central American region and the Caribbean.
- Arbitrator at the Arbitration and Conciliation Center of the Chamber of Commerce of Guatemala.
- Full Professor of the Conflict Resolution and Mediation program at the International Mediation Center
- Full Professor of the Course of Mediation and Resolution of Conflicts in the University San Pablo
- Dean of the Faculty of Law and Justice of the San Pablo University of Guatemala.

**MEMBERSHIPS**

- Member of the Latin American Association of Aeronautical and Space Law -ALADA-
- Member of the International Bar Association
- Active Member of the Association of Lawyers and Notaries of Guatemala - Collegiate No. 7505
- Member of the Association of Evangelical Ministers of Guatemala -AMEG-

**OTHER DUTIES**

- Honorary Consul of Georgia in Guatemala (2014).
- Member of the Board of Directors of Guatemala Próspera
- Regional Director of CBN Club700, for Latin America, the Caribbean and Spain
- Secretary of the Board of Directors of the Chamber of Commerce and Industry of Guatemala.
- Chairman of the Board of Directors of the International Mediation Center -CIM-.
- President of the Board of Directors of the Instituto Georgiano Latinoamericano -IGL-.
- Dean of the Consular Corps accredited by the Guatemala Government.
AREAS OF PRACTICE

- Corporate law
- Private international Law
- Conflict resolution

PUBLICATIONS

- “Violaciones a las Normas de Derecho Internacional Humanitario Cometidas en la Aldea Chacalté, Municipio San Gaspar Chajul, del Departamento Del Quiché de la República de Guatemala”. Tesis de Licenciatura

  Violations of the International Humanitarian Law Norms Committed in the Chacalté Village, San Gaspar Chajul Municipality, of the Department of Quiché of the Republic of Guatemala”. Bachelor Thesis

- “El Notario en la Era Digital”. Publicación que obtuvo el reconocimiento “Notable” por la oficina académica de la Universidad Castilla-La Mancha en España.

  “The Notary in the Digital Age”. Publication that obtained the recognition "Remarkable" by the academic office of the University Castilla-La Mancha in Spain

- “El Incumplimiento de las Obligaciones Contractuales del Portador Aéreo y el Resarcimiento de Daños y Perjuicios”. Tesis de Maestría.

  “The Breach of the Contractor’s Obligations of the Air Carrier and the Remission of Damages”. Master’s Thesis.

LANGUAGES

- Spanish and English.

RECOGNITIONS

- President’s Award for Excellence - Operation Blessings
Recognized in 2015 as one of the Leading Lawyers of the Latin American Region by the prestigious English firm Chambers & Partners.
Mélida Hodgson, partner at the firm’s New York office, practices in the international litigation and arbitration group. Her focus is on investor-State and commercial arbitrations, counseling governments and state-owned entities with respect to international investment protection obligations, as well as World Trade Organization dispute resolution and international trade policy issues. She is also an arbitrator of international trade disputes initiated under Chapter 19 of the NAFTA and was appointed to the list of panelists eligible to hear WTO disputes. Mélida frequently speaks at conferences addressing investment and commercial arbitration issues.

Mélida began her career in private practice before becoming a U.S. government litigator – first at the Department of Justice, where she litigated claims brought by bank shareholders against the U.S., as well as in cases regarding public contracting disputes. Mélida then joined the Office of the United States Trade Representative as an associate general counsel; where she litigated international trade disputes before the WTO; provided counsel in NAFTA Chapter 11 investor-State arbitrations involving the United States, Canada, and México; and defended the United States in Ad Hoc arbitrations under the 1996 Softwood Lumber Agreement between the United States and Canada.

At USTR, Mélida also participated in the revision and negotiation of the new generation of free trade agreement investment protection and procurement provisions, as well as the 2004 U.S. Model BIT. She represented the United States in subsequent free trade agreement negotiations and was the lead lawyer for the first two negotiations under the 2004 U.S. Model. Before initiating her law career, she was a banker at the Chemical Bank (now JP Morgan Chase).

BAR ADMISSIONS
- New York
- District of Columbia

COURT ADMISSIONS
- U.S. District Court for the Southern District of New York
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Western District of New York
- U.S. District Court for the District of Columbia
- U.S. Court of Appeals Federal Circuit
- U.S. Court of Federal Claims
- U.S. Court of International Trade

REPRESENTATIVE EXPERIENCE
- Defending a Latin American country in an ICSID (Additional Facility) investor-State arbitration brought under a bilateral investment treaty, related to export taxes and the termination of a concession contract (Anglo-American PLC).
Defending a Latin American country in an ICSID arbitration regarding an infrastructure project.

Defending a Latin American country in an ICSID arbitration brought by European subsidiaries of an Argentine conglomerate under Luxembourgian and Portuguese bilateral investment treaties, related to the steel industry (Tenaris II).

Defending a Latin American country in an ICSID (Additional Facility) investor-State arbitration brought by a Canadian company under a bilateral investment treaty, related to a concession contract (Crystallex).

Defending a Latin American country in an ICSID (Additional Facility) investor-State arbitration brought by a Canadian gold mining company under a bilateral investment treaty (Gold Reserve).

Representing a Latin American country in an annulment proceeding initiated in France, and enforcement proceedings in Luxembourg and United States (Gold Reserve).

Successful representation of a Latin American State-owned entity in an ICC arbitration brought by a German company, related to a submarine maintenance and repair contract.

Defending a Latin American country in an ICSID (Additional Facility) investor-State arbitration related to gold mining and foreign exchange regulations (Rusoro).

Successful defense of a Latin American country in an ICSID (Additional Facility) investor-State arbitration brought by a Canadian company under a bilateral investment treaty, related to a concession contract (Nova Scotia Power II).

Successful defense of a Latin American country in an ICSID (Additional Facility) investor-State arbitration brought by a Canadian company under a bilateral investment treaty, related to a joint venture and a mining concession contract (Vannessa Ventures).

Successful representation of a Latin American country in a Stockholm Chamber of Commerce investor-State arbitration brought by a European joint venture under a bilateral investment treaty, related to a transportation project.

Successful representation of a Latin American S.O.E. in an ICC arbitration concerning oil exploitation contracts (settled favorably).

Successful defense of a Latin American country in an UNCITRAL investor-State arbitration brought by a Canadian company under a bilateral investment treaty, related to a hydrocarbon sales contract (Nova Scotia Power I).

Defending a Latin American S.O.E. in an ad-hoc arbitration brought by a Canadian company under a bilateral investment treaty, related to a hydrocarbon sales contract.

Advised an Asian trade association with respect to claims under various World Trade Organization agreements.

Advised a multinational infrastructure investor on U.S. foreign investment review rules.

Advised a Southeast Asian country on U.S. bilateral investment treaty provisions.

Participation in successful defense of the United States in a NAFTA Chapter 11 investment arbitration brought by a Canadian company, related to California environmental regulations.

Participation in successful defense of the United States in a NAFTA Chapter 11 investment arbitration brought by a Canadian company, related to U.S. judicial actions.

Participation in successful defense of the United States in a NAFTA Chapter 11 investment arbitration brought by a Canadian company, related to U.S. Buy American laws and a transportation project.
Successful defense of the United States in a WTO arbitration brought by India related to rules of origin on textile and apparel products.

Successful defense of the United States in a WTO arbitration brought by the European Union related to intellectual property rights.

Successful defense of the United States in a WTO arbitration brought by the European Union related to port taxes (matter settled).

Successful representation of the United States in a WTO arbitration related to the Antidumping Agreement.

Representation of the United States in ad hoc arbitrations under the 1996 Softwood Lumber Agreement.

Arbitrator Experience

- Arbitrator, In The Matter of Stainless Steel Sheet and Strip Coils from Mexico (USA-MEX-2008-1904-03).

HONORS & INVOLVEMENT

Honors

- Invited to serve on American Arbitration Association/ICDR’s International Panel of Arbitrators
- Chosen to serve as Arbitrator in NAFTA Chapter 19 Disputes
- Named to Indicative List of WTO Panelists
- Named one of the top 50 Female lawyers focused on Latin America by Latinvex (2016 and 2015) (International Arbitration)
- Named in the Legal 500 Latin America (2014)
- Mentioned in GAR 30 (2016 and 2013) and GAR 100 (2015)
- Guest Professor, Washington College of Law, Investment Arbitration online course, Washington, D.C., Fall 2016
- Adjunct Professor, Washington College of Law, American University, Washington, D.C., “Investor/State Dispute Resolution,” Fall 2009, 2010

Involvement

- Founding Member, Washington Women in International Arbitration
- BASIL Task Force, American Society of International Law
- Member, American Bar Association (ABA):
  - Former Division Chair, Finance Division of International Law
  - Former Chair and Vice-chair, Investment and Development Committee
  - Former Co-chair, International Trade Committee
  - Former Vice-chair, International Arbitration Committee
- Member, Hispanic National Bar Association

PUBLICATIONS
Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia: Procedural Order No 15: Reconsideration under the ICSID Convention: No Award Required,” ICSID Review, 2016


Quoted in LATIN LAWYER, August 6, 2008.

Quoted in INSIDE TRADE regarding a possible bilateral investment treaty between the United States and Brazil, February 15, 2008.

Foley Hoag Alerts and Updates

- Potential Legal Implications Arising from “Brexit” (J uly 29, 2016)

SPEAKING ENGAGEMENTS

- Speaker, New York City Bar Association, Women in International Law, New York, New York, November 14, 2016
- Speaker, American Bar Association Section of International Law, Fall Meeting, Tokyo, Japan, October 21, 2016 “TPP and Investment Protection”
- Speaker, Institute for International and Comparative Law Symposium on Global Markets, Plano, Texas, June 14, 2016, “A conversation about Trade and Investment”
- Speaker, Tenth Latin America Arbitration Conference, Lima, Perú, April 27, 2016, “Temas corrientes en el arbitraje de inversión”
- Speaker, Second GAR Live BI Ts, Washington, DC, April 18, 2016, “Impact of Mega Treaties”
- Speaker, 32nd ICSID/AAA/ICC Joint Colloquium on International Arbitration, Washington, DC, December 1, 2015, “Appellate and Review Mechanisms”
- Speaker, “ICSID at 50: The Evolution of International Investment Treaties and Dispute Resolution” conference (jointly organized by Xi’an Jiaotong University and World Bank’s ICSID), Xi’an, China, November 26, 2015, “Procedural Innovations”
- Speaker, 13th ICC Americas Conference, Miami, Florida, November 3, 2015, “The Law as a Primary Tool”
- Speaker, ABA Section of International Law, Fall Meeting, Montreal, Canada, October 22, 2015, “Evidence in International Arbitration and Implications for Confidentiality”
- Speaker, Hispanic National Bar Association Annual Convention, Boston, Massachusetts, September 4, 2015, “New Developments in International Arbitration”
- Speaker, Ninth Latin America Arbitration Conference, Lima, Perú, April 28, 2015, “La Prueba en el arbitraje: La influencia del Common Law en el proceso arbitral”
- Speaker, Annual Congress of the American Society of International Law, Washington, D.C., April 10, 2015, “Transparency and Due Process in International Economic Law”
- Speaker, 2014 Investor-State Dispute Settlement Seminar, organized by the Korean
Commercial Arbitration Board, the Korean Ministry of Justice, Ministry of Trade, Industry & Energy and the Seoul International Dispute Resolution Center, Seoul, Korea, August 20, 2014, "Necessity and Financial Crisis"


Speaker, Symposium hosted by ABA Section of International Law, ICSID and LCIA, April 23, 2013, “Complex Issues in International Arbitration”


Speaker, Primer Congreso Regional de Arbitraje, Arequipa, Perú, August 28, 2012, “Arbitraje de Infraestructura y Minería”


Speaker, Fifth Latinamerican Congress on Arbitration, Lima, Peru, April 28, 2011, “Arbitrator Challenges” (delivered in Spanish)


Speaker, ICC Young Arbitrators Forum, Washington, D.C., July 20, 2010, “Arbitration with States and State Entities under Contracts and Treaties”

Moderator and Speaker, ABA Section of International Law, Fall Meeting, Miami, FL, October 30, 2009, “Elements of a CAFTA Appellate Mechanism”


Moderator and Speaker, ABA Section of International Law, Fall Meeting, Brussels, Belgium, September 24, 2008, “Foreign Investment Dispute Arbitration.”

Presentations at ABA Section of International Law Spring Meeting, New York, April 2008: (1) Investment Arbitration in Latin America; and (2) Complex Disputes and the World Trade Organization's Dispute Settlement System.

Presentation at the Inter-American Bar Association meeting on establishing and protecting investments in the United States, Miami, Florida, March 8, 2008.
Angelika Hunnefeld is a Board Certified Specialist in International Law by The Florida Bar. She practices in the areas of commercial litigation, international business arbitration and compliance with the Foreign Corrupt Practices Act (FCPA). Angelika is experienced in matters involving multi-jurisdictional issues, enforcement of foreign judgments and enforcement of foreign arbitral awards. She also assists clients with matters relating to issues arising under the anti-bribery and record-keeping provisions of the FCPA. Angelika is fluent in Spanish and proficient in Portuguese and French.

Areas of Concentration

- Commercial litigation
- International business arbitration
- Anti-corruption compliance

Significant Representations

- Assisted major retail client in the implementation of FCPA compliance program in several Latin American countries.
- Represented South American wine producer in contract dispute involving numerous multi-jurisdictional issues.
- Represented Venezuelan construction company in contract dispute and extensive post-judgment proceedings.
- Represented U.S. entities in proceeding to enforce foreign arbitral award.
- Represented multiple world champion boxers in contract disputes, negotiations and litigation.
- Represented foreign aviation company in dispute with foreign government.
- Monitored litigation in foreign jurisdictions for U.S. clients.
- Represented credit card company in complex civil litigation matters.
> Represented construction materials manufacturer in breach of warranty litigation.

**Professional and Community Involvement**

> Chair, International Law Committee of the Federal Bar Association, International Law Section
> Member, International Chamber of Commerce Institute of World Business Law
> Member, International Bar Association
> Member, Arbitral Women
> Member, The Florida Bar International Law Section Arbitrators’ Committee
> Member, American Bar Association
> Member, Board of Trustees, Patricia and Phillip Frost Museum of Science, 2014-2016
> Co-Chair, The Florida Bar, International Law Section, Women in International Law Committee, 2013-2015
> Director, American Nicaraguan Foundation, 2003-2014
> Director, Nicaraguan American Bar Association, Inc., 1996-2000
> Member, Dade County Bar Association
> Member, National Association of Women Lawyers (NAWL)

**Articles, Publications & Lectures**

> Panelist, "Foreign Corruption Practices Act: Where is Enforcement Heading and Where Has It Been?" 2015 HNBA Annual Convention, Boston, MA, September 4, 2015
> Featured, "Legal Stronghold," *South Florida Executive Magazine,* June/July 2014

**Education**

J.D., *magna cum laude*, University of Miami School of Law, 1995
Order of the Coif
Dean's List All Semesters
Executive Editor, Inter-American Law Review
B.S., summa cum laude, Florida International University, 1992

Languages
- Spanish, Fluent
- French, Conversational
- Portuguese, Conversational

Admitted to Practice
- Florida
- Nevada
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. District Court for the District of Nevada
- U.S. District Court for the Middle District of Florida
- U.S. District Court for the Northern District of Florida
- U.S. District Court for the Southern District of Florida
Juan Carlos Varela
Office Managing Shareholder
Av. Sanatorio del Avila
Complejo Ciudad Center, Torre B, Piso 2
main: +58 212.610.5450
direct: (305) 400-7503
fax: +58 212.610.5479
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Wells Fargo Center
333 SE Second Avenue, Suite 2700
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main: (305) 400-7500
direct: (305) 400-7503
fax: (305) 603-2552
jcvarela@littler.com

Focus Areas
International Employment Law

Overview
Juan Carlos Varela is an international attorney licensed and admitted to practice before the courts in Venezuela and Colombia. He focuses his practice on representing and advising global clients on matters throughout Latin America and the Caribbean, involving:

- Labor and employment law
- Executives' and workers' compensation
- Employment taxes
- Labor litigation matters
- Alternative dispute resolution
- Labor arbitration
- Labor audits

Juan Carlos is the office managing shareholder of Littler Mendelson's Venezuela offices in Caracas and Valencia, and he also works out of the Miami office. He co-chairs the firm's Latin America practice and supports the interests of clients throughout the entire Latin America region. He is actively involved in the firm's International Employment Practice Group and also serves on the firm's board of directors.

Juan Carlos is a labor law professor at the Universidad Católica Andrés Bello. He has written numerous articles on labor-related issues and is regarded as one of the best labor lawyers in Venezuela.

*Not licensed to practice law in Florida*
Recognition

- Named, Leading Lawyer in Venezuela, Legal 500 Latin America, 2015-2016
- Named, Latin America’s Top 100 Lawyers, Latinvex, 2016

Education

LL.M., University of Miami, 2011
LL.M., University of Illinois, 1995, summa cum laude
J.D., Universidad Católica Andrés Bello, VZ, 1992, cum laude

Bar Admissions

Venezuela
Colombia

Courts

Supreme Tribunal of Justice of Venezuela
Supreme Court of Justice of Colombia

Languages

Spanish
English
Portuguese

Publications & Press

Best Lawyers® Recognizes Littler Mexico and Venezuela Attorneys
Littler Press Release
December 12, 2016

Pensions & Retirement Plans 2016
Getting the Deal Through
May 1, 2016
Latin America's Top 100 Lawyers
*Latinvex*
January 13, 2016

Littler Attorneys Recognized in Best Lawyers Mexico© and Best Lawyers Venezuela©
*Littler Press Release*
October 21, 2015

Approach to Employment and Labour Issues Must Suit Jurisdiction, Say Panellists
*Latin Lawyer*
September 14, 2015

Littler Attorneys Included in Best Lawyers in Mexico, Venezuela and Colombia© 2015 Editions
*Littler Press Release*
October 6, 2014

HR Americas: Trends, tips and discussion on managing talent in the Americas
*WorldCity*
November 16, 2013

Littler Earns Top Rankings From U.S. News and Best Lawyers
*Littler Press Release*
November 5, 2013

Venezuela: Useful online resources on employment law
*XpertHR*
November 2013

Brazil's New Anti-Corruption Law: What Every Multinational Employer Should Know
*Littler Insight*
August 22, 2013

Nueva Ley Contra la Corrupción de Brasil: Todo lo que un Empleador Multinacional Debe Saber
*Littler Insight*
August 22, 2013

Colombia Adopta Normas Sobre la Protección de Datos Personales
*Littler Insight*
July 29, 2013
Colombia Adopts Regulations to Implement its Data Protection Laws
*Littler Insight*
July 29, 2013

Venezuela Employers Beware: New Regulations Establish Additional Wage and Hour Requirements
*Littler Insight*
May 24, 2013

Alerta a los Empleadores Venezolanos: Nuevo Reglamento Establece Requisitos Adicionales a la Jornada Laboral y Días de Descanso
*Littler Insight*
May 24, 2013

The 2012 Global Employer: Highlights of Littler's Fifth Annual Global Employer Institute
*Littler Report*
February 21, 2013

Outsourcing in Latin America
*Latin American Law & Business Report*
July 1, 2012

The 2011 Global Employer: Highlights of Littler's Fourth Annual Global Employer Institute
*Littler Report*
February 15, 2012

Reforma Parcial del Reglamento de la Ley de Alimentación para los Trabajadores y Trabajadoras
*Littler Insight*
July 18, 2011

Littler Mendelson Opens First International Office in Venezuela
*Littler Press Release*
October 18, 2010

**Speaking Engagements**

Inaugural Europe Conference - Germany
Berlin
November 10, 2016

Mandatory Transitory Labor Regime in Venezuela
August 22, 2016
Régimen Laboral Transitorio y Obligatorio en Venezuela
August 22, 2016

The Art of Global Restructuring and Global Workforce Integration
May 5, 2016

Brazil: Country Outlook for 2016
February 26, 2016

Venezuela Labor Outlook 2016
Boleita, Caracas
February 24, 2016

Perspectivas Laborales 2016 - Venezuela
Boleita, Caracas
February 24, 2016

Latin America HR Challenges and Solutions
Latin America Employee Relations Group, Miami, FL
February 25-26, 2016

Venezuela: Country Outlook for 2016
January 28, 2016

Littler Global Primera Conferencia en México y Monterrey
W Ciudad de MéxicoCalle Campos Elíseos 252, Miguel Hidalgo, Polanco, 11560 México, Distrito Federal
November 11, 2015

Littler Global Mexico Conference
W Mexico CityCalle Campos Elíseos 252, Miguel Hidalgo, Polanco, 11560 Mexico City, D.F., Mexico
November 11, 2015

Littler Global Primera Conferencia en México y Monterrey
NH Collection MonterreyAv. José Vasconcelos 402, Valle de Santa Engracia, 66268 San Pedro Garza García, NL, México
November 10, 2015

Littler Global Mexico Conference
NH Collection MonterreyAv Jose Vasconcelos 402, Valle de Santa Engracia, 66268 San Pedro Garza García, NL, Mexico
November 10, 2015
Littler Global Colombia Conference
Bogotá
September 10, 2015

Labor Update
Boleita, Caracas
May 27, 2015

Latin America Labor & Employment Law Update
April 29, 2015

Labor Market and Global Mobility
Rio de Janeiro, Brazil
February 27, 2015

Perspectivas Laborales 2015
Boleita, Caracas
February 24, 2015

Labor & Employment Issues: Three Things an Employer Should Master for Success in Latin America
Miami, FL
November 13, 2014

Hiring and firing: Save your multinational millions by taking precautions and avoiding “rookie” mistakes
Miami, FL
November 7, 2014

Compliance and Liability Fundamentals
Association of Corporate Counsel, South Florida Chapter
May 2, 2014

Critical Changes to the Labor Landscape in Latin America and the Implications for U.S. Employers
Dallas, TX
April 4, 2013

Employment Agreements, Restrictive Covenants, and Trade Secrets: A Review for Multinational Employers
March 28, 2013

Critical Changes to Mexico and Venezuela’s Labor Landscape and the Implications for U.S. Employers
Houston, TX
January 29, 2013
Out & About: LGBT Issues and the Globally Mobile Workforce
Littler Mendelson, Washington D.C.
November 9, 2012

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Littler Mendelson, Washington D.C.
November 8, 2012

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Nueva Ley del Trabajo en Venezuela
Boleita, Caracas
July 17, 2012

New Labor Law In Venezuela
Boleita, Caracas
June 29, 2012

Doing Business South of the Border
Littler Mendelson, Scottsdale, AZ
May 10, 2012

Books & Book Chapters

THE CHANGING LANDSCAPE OF ADR IN LATIN AMERICA: A PRIMER FOR INSIDE AND OUTSIDE COUNSEL
PRESENTED BY:

• **Moderator:** Hon. Cristina Pereyra-Alvarez (Ret.), JAMS mediator and arbitrator

• **Panelist 1:** Mario Bucaro, Managing partner, Diaz Duran & Asociados, Guatemala City, Guatemala.

• **Panelist 2:** Mélida N. Hodgson, Partner, FoleyHoag, New York City, NY.

• **Panelist 3:** Angelica Hunnefeld, Shareholder, Greenberg Traurig, Miami, FL.

• **Panelist 4:** Juan Carlos Varela, Managing partner, Littler Mendelson, Caracas, Venezuela.
OVERVIEW

I. Regional Developments of ADR in Latin America & Caribbean
   A. Central America
   B. Mexico
   C. South America - Colombia, Venezuela
   D. The Caribbean

II. Selecting the Right Mediator/Arbitrator

III. Preparing the Client for ADR

IV. Cultural Considerations

V. The New Political Climate
REGIONAL DEVELOPMENTS IN ADR

- Central America
- Mexico
- South America - Colombia, Venezuela
- The Caribbean
REGIONAL DEVELOPMENTS IN ADR

• What are the challenges to the development of ADR in Latin America and the Caribbean?
  • Perceptual and decision-making biases in civil law v. common law countries
  • Legal influences
  • Cultural roadblocks

• What types of disputes are ripe for mediation and arbitration in Latin America?
SELECTING THE RIGHT MEDIATOR OR ARBITRATOR

• Where to start?
  • Provider + institutional lists
  • Client and colleague recommendations

• Language capabilities/fluency

• How important is location/venue?

• Ad hoc vs. institutional mediation and arbitration

• The importance of institutional arbitration rules (JAMS, ICC, LCIA, ICDR, HKIAC, SIAC)
PREPARING A CLIENT FOR ADR

• Review the processes in detail – mediation; arbitration

• In a mediation, make sure the mediator briefs both parties on the structure and unpredictable flow of a mediation
  • e.g., just because a mediator spends more time caucusing with one party doesn’t mean the mediator is favoring that party

• Importance of a pre-mediation call with the mediator
  • Confidential submissions
  • Communicate to the mediator - who are the key stakeholders and decision-makers
  • Define who should attend the mediation; and, who should not
  • Is an apology necessary (not an admission of guilt)
CULTURAL CONSIDERATIONS

• The importance of understanding culture in a conflict resolution setting is of significant importance
  • Do your homework – understand the party’s cultural, economic and personal background
  • Speaking the language of the client (and opposing client)
  • Non-verbal cues
  • Empathy
  • Aggression
  • Understanding cultural nuances within a single country or city can also be important
CULTURAL CONSIDERATIONS

- Respectfulness leads to results
- Setting up the room
- The importance of a neutral setting
- Take your time
- The perceived effort of trying to understand a different culture is often impactful
THE NEW POLITICAL CLIMATE

• How will the new political climate in the US impact litigation in Latin America
• Withdrawal from trade treaties?
• Will these changes impact what types of disputes are ripe for mediation and arbitration?
QUESTIONS & THANK YOU!
1. ¿La mediación funciona para todo tipo de conflicto?
Sí. Salvo lo que por ley no puede ser libremente negociado (e.g. obligación de dar alimentos, derechos de trabajadores, cuestiones ilícitas, etc.) todos los conflictos son susceptibles a resolverse por un proceso de mediación. En cuanto a la mediación comercial en concreto, ésta resuelve conflictos mercantiles, civiles, y de industrias tan diversas como la construcción, la energía o el entretenimiento, por mencionar algunas.

2. ¿Cuánto tiempo dura la mediación?
Además del tiempo de preparación para la mediación (algunas llamadas o reuniones cortas, según sea necesario) un proceso de mediación dura por lo general un día. Extraordinariamente una mediación se prolonga hasta dos o tres días y prácticamente nunca más que eso.

3. ¿Cuánto cuesta una mediación?
La mediación se destaca por su bajo costo. Como cualquier otro procedimiento legal, el costo varía dependiendo de variables como la complejidad de la disputa, el número de partes involucradas, el mediador seleccionado y la sede de la mediación. El costo incluye los honorarios del mediador y algunos gastos administrativos o de viáticos, si fueran necesarios. Normalmente los montos se dividen por igual entre las partes del conflicto y para referencia, en asuntos de tamaño y complejidad promedio, el monto oscila por lo general entre los $3,000 y los $9,000 dólares. Los costos de una mediación son muy inferiores al costo de otros mecanismos de resolución de conflictos tradicionales, además de que son completamente predecibles.

4. ¿La mediación funciona para el sistema jurídico y el perfil cultural de América Latina?
Sí. Así como el sistema de derecho civil en América Latina, por poner un ejemplo, es resultado de influencias francesas, germánicas o latinas, la mediación se ha consolidado en diferentes países con independencia de la estructura de su sistema jurídico o perfil cultural. En latinoamérica existen múltiples historias en que la mediación se ha consolidado con éxito en el pasado reciente. No hay elementos para pensar que la mediación comercial no encontraría también lugar para enriquecer nuestro sistema. Al respecto dos reflexiones: 1) La mediación no es sino un proceso de negociación facilitada por un tercero, y en una sociedad colectivista y con lazos sociales estrechos como la de la mayoría de los países latinoamericanos, la negociación es un suceso cotidiano; 2) La mediación funciona por nuestra condición humana que busca la solución práctica y pacífica de los conflictos y no es privativa de una cultura, raza u origen étnico.

5. ¿En mediación voy a exhibir argumentos de mi estrategia legal?
No necesariamente. Si bien la apertura, transparencia y honestidad son virtudes recomendables en una mediación, también es cierto que las partes pueden no revelar aquellos detalles que prefieran mantener confidenciales. El proceso de mediación incluye sesiones privadas entre el mediador o mediadora con cada parte y ellas y sus abogados tendrán la libertad de confiar al mediador toda o parte de su estrategia y, junto con el mediador, decidir qué conviene revelar a la otra parte. Toda mediación procede bajo los más altos estándares éticos y con el único objetivo de obtener mejores resultados en el proceso de negociación para ambas partes.
6. ¿La información confidencial de mis clientes se pone en riesgo?
No. Además de lo dicho anteriormente y de la existencia de leyes que protegen la confidencialidad de la mediación (varían según el país y la materia), las partes y el mediador firman un convenio de confidencialidad al inicio del proceso en el que acuerdan mantener la confidencialidad de la información conocida dentro del proceso. Asimismo, si las partes llegaran a un acuerdo que ponga fin a la controversia, el propio convenio redactado en la mayoría de las ocasiones con ayuda de los abogados de las partes, podrá incluir provisiones de confidencialidad y sanciones a quienes la incumpla.

7. ¿Se puede volver a un juicio o arbitraje si la mediación no termina completamente con la controversia?
Sí. Aunque el proceso de la mediación generalmente ofrece una alta probabilidad de resolver el conflicto, las partes mantienen sus derechos de acudir a instancias judiciales o arbitrales. La mediación puede intentarse antes del litigio, durante el desahogo del mismo o inclusive después de emitida una sentencia o laudo y no implica en ninguno de los casos una renuncia a su derecho de acudir al procedimiento litigioso correspondiente. Además, en algunos casos es posible resolver parte del conflicto con una mediación y llevar solo los elementos no resueltos a un juicio o arbitraje.

8. ¿Proponer o intentar la mediación pone en riesgo la fortaleza de la postura de mi cliente y la percepción frente a la contraparte?
La mediación no implica rendirse ni traicionar la defensa de su cliente. Por el contrario, proponer o intentar la mediación, como lo atestiguan los que la han experimentado, es una astuta estrategia que permite explorar la posibilidad de resolución para beneficiar los intereses de las partes buscando soluciones creativas y haciendo más eficiente el uso de recursos de las empresas.

9. ¿Qué pasa si la otra parte no cumple el convenio?
Según datos estadísticos, más del 90% de los convenios alcanzados en una mediación son cumplidos de manera voluntaria. Para el pequeño pero no despreciable porcentaje de convenios incumplidos, hay distintas formas de facilitar su ejecución. Puede ser con apego a lo dispuesto por las legislaciones locales de mediación (existentes en algunas entidades federativas) o bien elaborando un convenio en forma de transacción previsto por los códigos civiles, con elementos como firmas ante la presencia de un fedatario público. Igualmente, si existe ya un procedimiento judicial o arbitral iniciado, las partes podrán utilizar mecanismos disponibles en la ley para llegar a una transacción o convenio judicial o elevar el acuerdo a la forma de laudo arbitral según corresponda.

10. Si ya intentamos negociar entre las partes, y/o entre los abogados y no logramos llegar a un arreglo, ¿La mediación vale la pena?
Sí, definitivamente. El valor de la mediación cae precisamente en encontrar opciones que muy difícilmente se pueden lograr en una negociación directa. Entre otras cosas, las emociones, la protección de reputaciones y las percepciones individuales y colectivas que se generan en una negociación directa en contexto de conflicto usualmente ocasionan un espiral de encono que limita las posibilidades de alcanzar acuerdos. En cambio, en una mediación el mediador o mediadora ayudan a las partes –juntas o por separado – a identificar con neutralidad y objetividad las necesidades e intereses de cada una para conectarlas con los satisfactores correspondientes. En concreto las posibilidades de resolución por la vía de mediación son contundentemente mayores que las de un proceso de negociación.

Source: JAMS Global Practice
Mexico Reaches an Important Milestone in Mediation

Commentary by
Fernando Navarro

In early 2015, the Mexican presidency assigned the Centro de Investigacion y Docencia Economicas, a public research and education institution, to lead the Dialogues for Everyday Justice. Its purpose is to study, engage the participation of different stakeholders and ultimately generate a diagnosis to improve access to justice and the resolution of common and everyday conflicts.

This effort resulted in a package of reforms presented by President Enrique Peña Nieto in April, which will be known as a seminal event in Mexico’s legislative history. These reforms attempt to reorient the justice system toward an approach that promotes the resolution of the conflicts in a more practical and satisfactory way. These reforms attempt to address a wide range of disputes including civil, commercial, labor, family and other minor conflicts like neighborhood or school disputes. The package also seeks to homogenize the quality and characteristics of justice administration services all across Mexico.

The Everyday Justice package includes 12 initiatives to alteralia improve the public registries, trigger an improvement in the regulatory framework, standardize and restructure the labor justice, civil and family procedures as well as increase access to alternative dispute resolution. Two of the initiatives appear to be crucial for the development of mediation in Mexico.

CONSTITUTIONAL ADR

As part of the initiatives, the president presented one that opens the door for the creation of a general alternative dispute resolution law, or LGMASC for its acronym in Spanish. For decades, Mexico’s different states have utilized varying forms of ADR. There have been differences in the form, scope and rules that regulate the practice and usage of ADR depending on the particular circumstances and driving forces behind each of those state laws, resulting in a heterogeneous and unequal map.

Beyond the black letter of the law, mediation has played a growing but not yet significant role in the Mexican legal scene. In spite of certain focused efforts, mediation remains to be a scarcely utilized resource by individuals, companies and lawyers as a dispute resolution tool.

The formal purpose of the constitutional reform, as per the president’s own statements, is to grant Congress the authority to issue the LGMASC. From the text of the initiative, the final purposes of such reform are to promote use and access
to ADR in a uniform way across the country, to implement procedures in public institutions allowing the growth of the use of mediation without the need for jurisdictional procedures and to create a standardized training for those public servants in charge of the use and practice of ADR.

Judging by the text of the initiative, in addition to what is possible to pick up from the different testimonials and news media reports on the matter, topics to be covered by the LGMASC in relation with mediation are the criteria to train and requirements for certifying mediators, requirements for referring cases to mediation and the effects of the agreement resulting from a mediation.

**WHAT’S NEXT?**

Congress will vote and approve the reform to Article 73 of the Federal Constitution to include the possibility of issuing the LGMASC and afterward it shall issue the LGMASC within 180 days following the initiative.

In addition to the LGMASC, the president’s package includes a decree that seeks to trigger the use of conciliation, or mediation, for disputes between the public administration or public companies and the private sector through the publication of certain guidelines that aim to facilitate the conciliation process while protecting the state’s goods and the public servants’ liability. Since the purpose of this decree is to guide the executive branch’s own institutions and activities, its effects are already in play without further legislative work needed.

The referred guidelines open the door to an increasing number of mediations or reconciliations both under the public or private umbrella, always respecting the procedure approved by such decree and as long as the agreement resulting from the mediation process does not breach certain fundamental or confidential principles listed therein.

This is a very important milestone for dispute resolution in Mexico.

A large majority of the commercial legal disputes in Mexico involve at least one public or governmental component: either a dispute involving one of the two largest companies, state-owned like Pemex petroleum company or the CFE electric power utility, or one of the federal ministries in charge of public works, project financing, government procurement and so on.

Even when some laws and statutes provide for some sort of ADR, in practice there are few occasions when it actually happens. It’s typically due to the lack of security for the officials and lack of familiarity with the procedures on both sides of the table.

With these guidelines, the government and state-owned company officials will hopefully prioritize the use of mediation to avoid a larger cost and create policies that allow them to settle when convenient or aim to mitigate a financial or commercial risk without risking their own liability. It will also hopefully allow for the development and promotion of training programs for users to gain more confidence when using conciliation or mediation.

From every standpoint, the coming months signify a massive transformation in the Mexican legal environment and notably a serious and solid step forward for the use of mediation both in the public and private sectors. It is crucial that all the stakeholders be aware and attentive of the evolution of the implementation of the initiatives and that the legislators do a good job on its development.

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BY RANDALL CHoy

I am an avid, though not a particularly distinguished, tennis player, and had the good fortune of playing on a team to represent Northern California in the USTA National Championships in Tucson, Ariz. Sixteen teams from all over the country each represented their sections, distilled down from the 6,000 teams that started the season, all with high hopes of making it to “The Nationals.” What struck me most about the event was that every other team, except the team from San Francisco, was basically homogenous in its makeup of team members, at least in terms of ethnicity.

As one might surmise, most of the teams were comprised of Caucasian players from all over the country, but some teams were all Filipino, Taiwanese or all Hispanic. The team from San Francisco however, was a “rainbow coalition” of African-American, Vietnamese, Chinese, Persian, Lebanese, Indian (Southeast Asian), and Caucasian. To throw in even more variety, we also had straight and openly gay players. Fortunately there wasn’t a hint of discrimination at the event, but we were quite the talk of the event because of our diversity.

While we are very lucky to be on the West Coast and have this diversity, it also introduces many challenges on occasion, when attempting to successfully mediate or arbitrate cases. The signals sent and received, both verbal and non-verbal, can be subtle, yet significant.

This article is not, by any means, intended to be a comprehensive discussion on how to approach the complex topic of cultural sensitivity. It is however, meant to raise awareness of the role of culture in successfully litigating, mediating and arbitrating cases involving the vast cultural diversity found on the West Coast, as part of the greater Pacific Rim.

Taking sides

Fast forward to a meeting that I participated in a few years ago, where both sides had “lawyered up,” and in attendance were young associates, forensic accountants, personal representatives, and the parties themselves. Both clients were Asian, and the other side “took the floor,” wanting to present their side first. My client glanced at me, and I knew she was annoyed by the presumptuousness, but it was also unspoken that it was to our advantage to let them go first. We would learn more by listening than by talking.

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What the other lawyer could have done was offer to let us go first, whereupon we would have politely declined, and both sides would then have achieved their preliminary objectives. In any event, the other side then proceeded to put on a “dog and pony show,” during the entirety of which my forensic accountant and I listened politely, nodding occasionally to show that we understood their position. At the end of the 30-minute presentation, the attorney closed his binder, and asked if we had any questions. We did not so the three of us shook our heads, “no.” The other attorney then, looking rather smug, thrust a small sheaf of documents across the table at us, and said, “Since that’s the case, I’ve prepared the documents to settle this case, so sign and we can be done with this mess.”

Let’s take a moment to analyze what happened here. In Western culture, perhaps absolutely nothing occurred out of the normal realm of negotiation strategy. In this particular case however, a myriad of faux pas were committed. The other side started out by aggressively taking the floor, something that is probably taught as good strategy in some cases. “Take the floor,” “own the courtroom,” “take control of the agenda.” All good western approaches to meetings held all over the country, if not the world. As pointed out earlier though, these approaches are not necessarily the approach that will lead to the greatest receptiveness in certain situations and cultures.

What else happened? Complete misreading of her presentation was received by one side of the table. Politely nodding our heads meant that we understood what was being presented, not that we were accepting the position posited by the presentation. When we politely declined to sign the proffered settlement agreement, agreeing only to take the presentation under calm deliberation and provide a response, the other side was livid. They had assumed as the presentation was going along, that the polite nodding of heads was tacit agreement with their position, and therefore they had won. Wrong.

**Tips for cross-cultural mediations**

In mediating cases, with cross-cultural effects, and indeed all mediations, it is important to:

- Do your homework. Know your party’s cultural, economic and personal background.
- Determine the level of hostility, anger and resentment, which are not part of the law, but clearly part of the process. Do this by engaging the parties at the outset.
- Determine the real goal (Chinese: *mudi*) of the parties. If it is monetary compensation, that is easy: but it often takes a little digging to get a bottom line.
- As all good mediators do, listen carefully and watch for clues that may not be immediately obvious, and be sensitive to different cultural values.

Lastly, one could assume a rather minor detail, yet was one which could have major ramifications, was the flippant act of tossing the settlement documents across the table to my clients to sign. In most Pacific Rim countries, that would be construed as disrespectful. Even if the documents were ultimately to be signed because they represented a fair resolution of the issues, that act could disrupt the entire process, and at best, delay it until the insult was attenuated by time. A mediator’s nightmare for sure, to have settlement at hand, only to have it delayed by an unintended failure of etiquette.

### Using aggression

Aggression is part of our American culture, especially for lawyers. It is not surprising that Asian cultures also express and encourage aggressive tactics. However, aggression is expressed in many different ways, and many cultures. Some Pacific Rim cultures tend to be less outwardly expressive of aggression. Traditional Asian martial arts is particularly illustrative of this issue. Though some forms are outwardly aggressive, like Kenpo and Tai Kwan Do, others are counter-punching or even outwardly passive, such as Wing Chun or Tai Chi.

Litigation can be very similar to martial arts. Who throws the first punch? Is your strength in attacking, defending or counter-punching? Psychologically, how do you best get information about your opponents? As a mediator, this same information is important to get both sides of the table to engage in meaningful dialogue. Perhaps even more important is to know each side’s propensities to prevent unnecessary friction which can obstruct resolution, or delay it.

The different cultural approaches to aggression arise frequently. I was recently asked about receptivity of Asian parties to mediation, and told that while mediation was almost non-existent, arbitration was steadily gaining acceptance as ADR. I was then asked why I thought that was. Upon reflection, I think my answer was correct. Nearly 40 years of practicing law and mediation has shown that most cultures still adhere to the adversarial mode of dispute resolution. Someone is right, someone is wrong. Mediation is more often, a middle ground. Mediation is allowing the parties to honestly and openly discuss the issues. I think mediations are not successful because the parties are led kicking and screaming to the bargaining table. It is often hard to have forthright conversations without a lot of confidence and trust-building first, something not easily done in one session.

### Chinatown no longer homogeneous

By a rather late introduction, I am Chinese by ethnicity, a fourth generation San Franciscan, born and raised. How then, am I any more qualified to speak about diversity than any other mediator? Take a stroll down San Francisco’s Chinatown, and to the uninitiated, it looks very similar to what one might expect – upwardly gabled roofs, painted in garishly flamboyant colors, reds and greens predominating. There are still souvenir shops, roast ducks and roast pork strips hanging from racks, prominently displayed in shop windows; tea and herb...
shops are still numerous. Yet the Chinatown the tourists see today is vastly different from the Chinatown of 50 to 60 years ago – the point being, the people of Chinatown, the population is vastly different. For one thing, it is actually far more diverse than one would expect, and lumping the population into the group “Chinese” would be stereotyping at its worst.

Rolling the clock backwards about 65 years however, for the first 100 years the Chinese population was far more homogeneous. One could, with some validity, make certain assumptions about the Chinese people they were dealing with. I make two brief points here: One, I am more “Chinese” than one would expect of a fourth generation ethnic Chinese because my parents grew up in a culturally Chinese environment, since Chinatown in America was a static copy of China as the first immigrants knew it when they left China.

**Get to know the other side**

The first step in evaluating your opponent, client or party is to do a little homework and determine the most likely scenario. What country, what region, what era and what family background did they come from? As a mediator, I often hear people complain that the first hour or so in mediation doesn’t seem to target the issues. On the contrary, as I get to know the parties by getting to know who they are, where they come from, that is exactly the information that helps me successfully mediate a case. And this is true even if the culture that I am learning about is outside of California, or outside of my admittedly urban sensibilities.

I do have a little advantage being ethnically Chinese, particularly because I speak Cantonese relatively fluently and was very interested in Asian-American History. I know that immigration until 1965 was predominately from the Sze Yup Provinces in China, an area that was predominately poor, uneducated and subject to certain stereotypes. As I hope you noticed, I have just fallen into the trap of stereotyping. I too, have to constantly remind myself not to fall into assumptions, pejorative or otherwise. Dealing with Chinese parties who came to America later than 1965, (and that group is getting more and more prominent), can be difficult based on where they are from. Taiwanese think differently than Mainlanders, who think differently than their countrymen from the South, let alone Tibetans or Mongolians. Not only is Thai culture vastly different from Lao, Cambodian, Japanese, Singaporean, or South East Asian culture, but even within each country sometimes dramatic regional differences exist.

**Do some research, show respect**

Of course, no mediator can expect to have expertise in all cultures, but the internet is amazingly helpful in doing a little homework, laying the foundation for at least letting the parties know that the neutral cares enough to want to learn about a certain culture. Working with Chinese parties, I still have a lot to learn. For example, mediating a case involving the equivalent of the Chinese Chamber of Commerce, and its various constituent parts, I did some research that enabled me to show the parties that I was familiar with their various boards, which Chinese villages they represented, and the area’s election process. That credibility enabled me to get started quickly with the issues they were trying to resolve. As mediators and advocates, tap into your resources in the community who can give you the “lay of the land,” politically and culturally.

In the opposite kind of situation, where I had no knowledge of a particular culture, instead I spent the first hour listening to a party from Iran, and learned about the issues of Persian ethnicity, and the difficulties of being assimilated in the U.S. coming from a Middle Eastern country with a certain population that doesn’t fit into the mold of an Arab culture. I know a former superior court judge who is not Asian, but is a highly successful mediator. For his cases involving Chinese parties however, he makes a point of bringing out a little notebook with some Chinese phrases that he has memorized. His pronunciation is horrible. However, it is clear that he is respectful, always is interested in learning, loves people, loves his job, and is truly interested in helping to resolve the problem. Needless to say, he is not only popular, but extremely successful in mediating cases.

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A Clause Worth Fighting For: Tips for Drafting an Effective Arbitration Agreement

Commentary by Angelika Hunnefeld and Ricardo A. Gonzalez, Daily Business Review

November 17, 2016

There is no such thing as a "standard" arbitration clause. Each deal is different and client objectives vary from one transaction to the next. Accordingly, counsel should carefully consider the potential disputes that may arise in a particular transaction and tailor the terms of an arbitration clause to each client's needs and business objectives. While it is not possible to draft a one-size-fits-all arbitration clause, it is possible to identify key terms to consider and incorporate in most arbitration agreements, including the following:

• Governing law: Defines the potential claims, defenses and relief available. In international transactions, counsel should consider whether the foreign law includes protectionist statutes or limitation of remedies.

• Seat of arbitration, or legal place: May impact enforcement of the award depending on available levels of review and average time required for completing the review process in the courts of the "seat."

• Scope of arbitral discretion: Defines the authority conferred on the arbitrators and should be clearly described to minimize the risk of litigation over arbitrability and/or potential challenges to an award.

• Arbitration rules: Provide the structure and procedure for the arbitration. It is generally advisable to incorporate the rules of a reputable institution — i.e., the American Arbitration Association's International Centre for Dispute Resolution, or ICDR, the International Chamber of Commerce, or ICC — rather than having no defined rules. The institution's rules become part of the arbitration agreement and help promote orderly proceedings.

• Discovery: Since discovery is generally limited in arbitration, it is important to consider the potential need for discovery in each case and incorporate specific language in the arbitration clause to secure the availability of discovery.

• Foreign languages: If a substantial amount of evidence or testimony is available in more than one language, it may be advisable to conduct the arbitration, and require the arbitrator to be fluent, in those languages.

• Attorney fees: The right to attorney fees should be clearly defined in the arbitration clause to eliminate potential disputes at the time of initial enforcement or in post-arbitration proceedings.

• Confidentiality: Specific confidentiality requirements should be clearly described in the arbitration clause as the arbitration rules adopted by the parties may not provide the necessary or desired
A Clause Worth Fighting For Tips for Drafting an Effective Arbitration Agreement | Daily Business Review

Hypothetical

While this is not an exhaustive list, it highlights several key terms that can have a material impact on the conduct of the arbitration and the outcome of the dispute.

Consider the hypothetical example of Company A, a U.S. corporation, alleging that Company B converted $10 million in a fraudulent investment deal. The converted funds are in Company B's bank account in Louisiana. The parties agreed to arbitration, but the clause only provides that the seat of arbitration will be London and that "any dispute between the parties will be arbitrated." Company A intends to file an arbitration claim but fears that Company B will dissipate the funds as soon as the claim is filed.

Had the parties opted for an institutional instead of an ad hoc arbitration, before one of the leading arbitral bodies, such as the ICC or ICDR, Company A could apply to the arbitral tribunal or an emergency arbitrator for interim relief to prevent Company B from dissipating the funds during the pendency of the arbitration. Instead, Company A will likely need to apply for a freezing order in a court in London, the seat of the arbitration. Additionally, because the arbitration clause does not specify a governing law, the law of the seat will likely govern the procedural aspects of the proceeding, and there may be protracted litigation over applicable substantive law.

Thus, although the funds are located in the United States, Company A will have to travel to England, appear before an English court and make the requisite showing under English law to obtain a worldwide freezing order, or WFO. Even if the English court grants the WFO, Company A will need to obtain another order from the English court permitting enforcement of the WFO in a foreign jurisdiction, and then file an action in federal district court in Louisiana to freeze the funds in Company B's account.

As illustrated, the circumstances of each transaction require the evaluation and selection of specific terms in an arbitration clause. These decisions may have far-reaching implications on the conduct of the arbitration and the outcome of the dispute. By giving careful consideration to key terms of an arbitration clause and adapting them to a particular transaction at the outset, counsel can minimize litigation risk and expense as well as the uncertainty that a court, arbitrator or body of law will "fill in the gaps" in a potentially disadvantageous way.

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Mediation As An International Arbitration Tool

Law360, New York (June 8, 2015, 10:27 AM ET) --

Can mediation work as an alternative dispute resolution tool in international arbitration disputes? Imagine a case with five parties from four countries, with documents written in six languages and the law controlling the case is from two countries and is written in three languages. Obviously, these logistics create issues unto themselves before you get to the facts and the law of the case. The fact situation was real, and it created an arbitration that was intellectually challenging and legally complex.

Sometimes the parties and their attorneys are reluctant to engage in mediation because they do not understand mediation practice. This reluctance can be based on several prejudices and misconceptions; however, many cultures use some form of mediation based upon tradition and experience. Tribal cultures are more open to mediation than some that have more legalized systems of law. They possess more awareness of the process and practical skills used in mediation to obtain the desired resolution of a conflict. Developed civil law systems may be less receptive to the process, but it is used with great success in Africa, the Middle East and Asia where varying forms of mediation have been practiced for centuries.

Sometimes parties are reluctant to spend the money necessary for a multiday mediation and to pay the fees for their attorneys and a mediator to prepare for and attend the session. Yet the cost of a mediated settlement pales in comparison with the cost of a full-blown international arbitration. Many attorneys, especially those with limited experience with the process, are reluctant to relinquish control of their client and the process to a third party for various reasons. The potential resolution of a case with large fees involved may not appeal to some clients, but sophisticated global corporations see the process as a way to save money, to arrive at business solutions to disputes, and to continue to do business with the opposing party.

The logistics of an international mediation, like an arbitration, may be both time-consuming and expensive. The parties must agree upon the location, the language(s), the use of interpreters, when necessary, the agreed-upon version of the documents and the session dates which are dependent upon the schedules of incredibly busy international business leaders and political figures. However, these logistical issues are easily solved when the parties and their respective attorneys desire resolution of the dispute.

When all the issues surrounding the preparation to mediate have been resolved, the parties must then agree on what their goals are for the process. Do they wish to limit the issues to be resolved? Will they
assure the presence of the key players at the negotiating table with authority to settle and a clear understanding of the process?

It is recommended that the parties and their attorneys meet with the mediator in person, if possible, to discuss the case, their goals and any important facts necessary for the mediator to understand all of the underlying issues as well as those being openly discussed. It is essential for the parties to understand the confidential nature of the process, to be candid and to trust the mediator and the process. Hopefully, trust was a key element to the selection of the mediator along with the competence of the individual. Also, the parties need to allow adequate time for the process to evolve. The international aspect of the dispute makes it necessary to anticipate that more time needs to be allotted for resolution to occur. At least three days are generally necessary for a complex international matter to be resolved.

Timing is an important but often overlooked aspect of the process. The fact that the agreement in dispute may call for mediation or conciliation before the parties are allowed to arbitrate does not necessarily dictate a rush to sit down. It is possible to proceed along parallel tracks toward resolution if the parties agree. Many times, mediation will resolve several of the underlying or collateral issues and thus narrow the scope of the arbitration. Once it appears mediation has failed, the real question is: “When is never really never?” Often, one or more of the parties will want to reconvene after they have tested the resolve of their opponent(s). When that event occurs, it may be much easier for the mediator to reopen the door to a resumed mediation than for either party to raise the proposal.

Enforcement is always a topic for discussion in a mediated settlement agreement. The question of where to enforce an award or a mediated settlement agreement, should a party renge on its agreement, is always present. The presence of binding treaties and how to enforce the agreement require consideration. The use of business leverage and political leverage also deserve analysis as part of the process. Political leverage can be a very tricky proposition to use and to define. Local and national politics can create last minute changes in bargaining positions along national cultures and unexpected events, including natural catastrophes. Political risk can change dramatically in our present, unstable world. However, when flexibility and patience are shown by all parties, their attorneys and the mediator, last minute developments need not derail the settlement of a case.

Finally, the best friend of a good mediation and ultimate resolution is total confidentiality, which is often missing in international mediations either because of the rules governing the process or because of the skills of the selected mediator. It is impossible to overstate the importance and necessity of the confidentiality of the process. Success rates rise dramatically where it is part of the process. While many impediments to the mediation of international arbitration disputes may exist, it is still the best way to resolve differences economically and efficiently. After two weeks of hearings and four days of mediation, the case discussed above settled with a business resolution that worked for the parties.

—By Hugh Hackney, JAMS

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Ethics In International Arbitration

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The need for ethical rules in arbitration has been the subject of extensive debate.[1] Counsel in international arbitrations are not regulated by an international bar; their individual national bar association establishes their code of conduct. A lawyer from a civil law country may have significantly different obligations concerning preservation of evidence than a lawyer practicing in a common law jurisdiction. Even among common law jurisdictions, the differences in preparing witnesses for cross-examination may be significant. Furthermore, counsel in international arbitration “may be subject to diverse and potentially conflicting bodies of domestic rules and norms. The range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative’s home jurisdiction, the arbitral seat, and the place where hearings physically take place.”[2]

If counsel are bound only by their respective individual bar standards, international arbitration constitutes an “ethical no-man’s land.”[3] Unequal standards “may undermine the fundamental fairness and integrity of international arbitral proceedings,”[4] and could encourage clients to choose lawyers from a jurisdiction with “lower” standards.

Although the debate about possible solutions is now a staple of arbitration colloquia, as early as 1992 Professor Jan Paulsson[5] suggested standards of conduct for counsel in international arbitration. Following on from Cyrus Benson’s[6] call in 2009 for transparency in arbitration and his proposed checklist of ethical obligations to follow in international arbitration, Doak Bishop and Margrete Stevens[7] outlined a comprehensive code of ethics in their keynote address at the 2010 ICCA Congress in Rio de Janeiro.

In 2013, the International Bar Association (IBA) adopted its “Guidelines on Party Representation in International Arbitration.”[8]

The IBA guidelines, according to the preamble, “are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. They are also not intended to vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies.” Parties to an international arbitration case may agree to exclude or include the application of the guidelines, or may carve out certain provisions of the guidelines or add provisions. The idea, therefore, is not to impinge on international arbitration’s procedural flexibility; rather, it is to assist the parties by providing them a tool to resolve a
potential conflict of rules governing the professional conduct of counsel.

It is difficult to see experienced arbitration practitioners from any jurisdiction having genuine concerns about the individual provisions of the guidelines. However, since application of the guidelines is effectively voluntary and depends upon agreement by both sides, and since a few provisions may be viewed as controversial even in experienced arbitration quarters, it is not yet clear whether the guidelines will become a standard feature of international arbitration in the way that the 2010 IBA "Rules on the Taking of Evidence in International Arbitration" have clearly been established as part of arbitral “best practice.” Still, even if the guidelines themselves are not typically adopted, they have already been very influential in keeping the ethics debate at the forefront of discussions regarding improvement of arbitral procedures and in prompting a number of major arbitral institutions to adopt professional conduct rules as part of their arbitration rules.

In summary, the IBA guidelines address the following issues:

**Party Representation**

Guidelines 4-6 recommend that party representatives identify themselves at their earliest opportunity and that a party discloses to the tribunal changes in representation in a timely fashion. Furthermore, the guidelines state that once an arbitral tribunal has been constituted, a counsel “should” not agree to represent a party when there is a relationship between the counsel and an arbitrator from which a conflict of interest may arise. In the event that the counsel nonetheless decides to represent the party, the arbitral tribunal must adopt “measures appropriate to safeguard the integrity of the proceeding,” including the exclusion of the new party representative from participating in all or part of the arbitral proceedings.” This power conferred upon the tribunal is a matter of greater controversy.

Party representatives should not engage in any ex parte communications unless one of the three exceptions listed in guideline 8 applies:

1. Communications between counsel and a party-nominated arbitrator to determine the potential nominee’s expertise, experience, availability and potential conflict of interest;
2. Communications between counsel and party-nominated arbitrator concerning the selection of the chairman of the tribunal;
3. If all parties agree, communications between counsel and chairman of the tribunal to determine the chairman’s expertise, experience, availability and potential conflict of interest.

Guideline 8 clarifies that these communications may contain a “general description of the dispute,” counsels “should not seek the views” of the prospective arbitrator/chairman.

**Submissions to the Tribunal**

Guidelines 9-11 concern submissions to the tribunal made as party representative’s submission or as witness/expert evidence. The guidelines state that a “party representative” should not make a “knowingly false submission of fact” to the tribunal. If the party representative learns later that false submissions of fact were made, the party representative should disclose this, taking into account issues of confidentiality and privilege. A crucial element to underline here is that the obligation to tell the truth
is “confined” to statement of facts.

Moreover, a party representative should not knowingly submit witness or expert evidence that is “false.” Again, in case of a subsequent discovery of the falsity of witness or expert evidence, party representatives should disclose such falsity to the tribunal taking into account issues of confidentiality or privilege. In particular, in these circumstances, party representatives “may:” 1) advise the witness or the expert to testify truthfully; 2) deter the witness or the expert from submitting false evidence and urge correction of it; 3) correct or withdraw false evidence; 4) withdraw as party representative, if necessary.

**Document Production**

Guidelines 12-17 deal with document production and the need to preserve documents, “so far as reasonably possible.” The party representative should explain to her client the necessity of production and the consequences of failing to produce; the party representative should also assist the client to ensure that a reasonable search of the relevant documents is undertaken, and that all non-privileged documents are produced. A party representative should not suppress or conceal documents or advise a party to do so. Although counsel from some legal cultures may be reluctant to accept the application of the document production guidelines, they should nonetheless appreciate that they are not in a national court proceedings and that acting in an international arbitration carries responsibilities that may not be a routine part of their litigation practice.

**Witnesses and Experts**

The IBA guidelines clarify that when counsel deal with a witness or expert, the counsel must identify themselves and the party they represent and the reasons for which the information is sought. Counsel should also clarify that the witness has the right to inform and/or instruct her own counsel.

Counsel may assist drafting witness statements and expert reports, but should ensure that the witness statement reflects the witness’s own account of the facts, and the expert report contains the expert’s own analysis and opinion. Counsel may discuss and prepare witnesses’ and experts’ prospective testimonies. Counsel should not encourage a witness to give false evidence.

The IBA guidelines set out potential sanctions for counsel misconduct. A counsel may be admonished; the tribunal may draw appropriate inferences in assessing the evidence and take into account the breach when the tribunal apportions costs. The tribunal may also take any other appropriate measure to preserve the integrity and fairness of the proceeding. The imposition of sanctions must take into account the enforceability of the award, the rights of the parties, the gravity of the breach and the impact on the proceeding, the good faith of the party representative, privilege, confidentiality and knowledge of the party represented by the counsel breaching the guidelines.

As noted above, certain principles adopted in the IBA guidelines have been incorporated in the arbitration rules of some major international arbitral institutions.

The 2014 LCIA rules, for example, have added a provision concerning party representation. LCIA Article 18 provides, inter alia, that once the arbitral tribunal is constituted, any changes to the party representatives shall be notified promptly, and the arbitral tribunal has to approve such a change. The arbitral tribunal may withhold approval if the change would affect the composition of the tribunal or the enforceability of the award on the grounds of a possible conflict. The tribunal will decide whether to approve the change by considering the following factors: (a) a party has the right to choose its own
counsel, (b) the stage of the arbitration, and (c) the likely wasted costs or loss resulting from such a change. A violation of this provision may result in the following sanctions against the legal representative: a written reprimand, or a written caution as to future conduct in the proceeding or any other measures necessary for the tribunal to act fairly and impartially and to avoid unnecessary delays. The parties must ensure that their legal representatives act in accordance with the conduct guidelines contained in the annex to the LCIA rules.

The annex to the 2014 LCIA rules clarifies that Article 18 does not intend to derogate from the arbitration agreement or undermine any legal representative’s primary duty of loyalty to the party she represents. The annex also does not derogate from any mandatory laws or rules of laws or professional standards of conduct applicable to the legal representative.

Moreover, the annex also states that the legal representative 1) should not engage in activities aimed to obstruct the arbitration or jeopardize the finality of the award; 2) should not knowingly make false statements to the tribunal of the LCIA; 3) should not knowingly procure or assist in the preparation or rely on false evidence; 4) should not knowingly assist or conceal a document to be produced to the tribunal; and 5) should not engage in ex parte communications with any member of the tribunal. Any ex parte contact should be disclosed to all the parties and all the members of the tribunal and the LCIA registrar.

AAA and the AAA’s International Centre for Dispute Resolution have to date only issued a general statement regarding standards of conduct for parties and representatives, but AAA-ICDR are expected in the very near future to adopt a professional conduct code as part of their arbitration rules. At present, the general statement of standards require parties and their counsel to treat the individuals involved in proceedings in a courteous, respectful and civil manner, avoid any form of unlawful discrimination or engage in harassing, threatening or intimidating conduct toward AAA employees or the arbitrators. The standards also require that the witnesses and the parties adopt appropriate conduct during the proceeding, and all parties are required to refrain from using inappropriate language. The sanction for failure to adhere to these standards is that the institutions may decline to further administer a particular case.

It seems clear from the above that the soundest way to avoid arbitration from being an “ethical no-man’s land” is to encourage parties and their counsel to adopt the IBA guidelines in individual cases and, for example, to incorporate the guidelines in the initial procedural order in the arbitration. The professional conduct standards adopted by the LCIA in its new rules are also an example that should be followed by other institutions in order to protect the integrity and fairness of arbitral proceedings. In addition to streamlining time and cost of proceedings, participants in the arbitral process have a responsibility to ensure that counsel are following a reasonably uniform set of professional conduct standards.

—By Monique Sasson, JAMS

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[9] Party representatives are defined in the IBA Guidelines as “any person, including a Party’s employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar.”

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IT TAKES TWO TO TANGO, AND TO MEDIATE: LEGAL CULTURAL AND OTHER FACTORS INFLUENCING UNITED STATES AND LATIN AMERICAN LAWYERS’ RELUCTANCE TO MEDIATE COMMERCIAL DISPUTES

(will be published in volume 9 Richmond Journal of Global Law and Business, issue 4, in October, 2010)

Don Peters*

I. INTRODUCTION

Commercial relationships create substantial economic activity through licensing, distributor, supplier, joint venture, and other transactional arrangements. Changes in economic, market, and other circumstances occur after these relationships begin, however, and often produce differing performance related perceptions and contractual interpretations. These differences may generate disagreements regarding responsibilities, obligations, performances, and entitlements that may escalate into commercial disputes. Because such commercial disputes are increasing, choosing how to confront and resolve them supplies important tasks for lawyers and their commercial clients in the United States and Latin America.

Lawyers and their commercial clients assess a limited menu of dispute resolution options when they make important decisions regarding how to proceed resolving commercial disagreements. Non-violent dispute resolution options include avoiding conflict, seeking consensual agreement with other participants through negotiation or mediation, and adjudicating by using arbitration or litigation to let outsiders decide. Although found in most of the world’s cultures and practiced for centuries, mediation is the least used option in this menu.

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2 Recent political and economic changes have created a rapid increase in the volume of commercial disputes in Latin American countries. Horacio Falcao & Francisco J. Sanchez, Mediation: An Emerging ADR Mechanism in Latin America, in International Arbitration in Latin America 415, 425 (Nigel Blackaby et al, eds., 2002 (Hereinafter Mediation in Latin America). A survey of 180 in-house lawyers at the largest multinational companies in France, Germany, Italy, the Netherlands, and England showed 38% concluding that the volume of disputes had increased in the last three years. Survey Reveals Trends in Europe on International Disputes, 64 Disp. Resol. J. 5, 5 (2008).

While avoidance may be the most commonly used dispute resolution option around the world, lawyers and their business clients seldom select it for handling significant commercial disputes. Negotiation is used far more frequently, and it is typically conducted by company representatives before involving lawyers or by in-house counsel before hiring outside attorneys. Now widely viewed as identical to conciliation, mediation offers an enhanced negotiation approach to resolving commercial disputes.

Mediation enhances negotiation by allowing lawyers and business persons to converse with the assistance of non-dispute involved mediators who encourage constructive communication and interaction. Mediators help negotiators frame conversations in ways that counter selective and partisan perceptions, exploit shared and independent interests, and investigate resolutions that promote mutual gain. Unlike judges and arbitrators, mediators do not decide issues or enter judgments. Instead, mediators use confidential sessions to generate more and better information that often helps participants create agreements that accomplish more than is allowed by the narrow, win-lose remedies available in adjudication. Combating biased perceptions and distorted judgments, mediators help participants craft resolutions that allow all disputants to satisfy some of their interests. Mediation also allows businesses to control outcomes themselves and avoid the risks, delays and additional costs that adjudicating brings.

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5 The core concept of mediation in most Latin American countries, derived from the U.S., views mediation as third-party assisted negotiation. Mediation in Latin America, supra note 2, at 416. Some Latin American countries use different words to describe this process and define it differently, often labeling it conciliation. Id. at 416, 420-21. The United Nations Commission on International Trade Law (UNCITRAL) for International Commercial Conciliation defines conciliation as “a process, whether referred to by the expression conciliation, mediation, or an expression of similar import, whereby parties request a third person or persons . . . to assist them in their attempt to reach an amicable settlement of their dispute.” Jernej Sekolec & Michael B. Getty, The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation, 2003 J. Disp. Resol. 175.

6 Mediation is best understood as assisted and enhanced negotiation. See, e.g., Dwight Golann & Jay Folberg, Mediation: The Roles of Advocate and Neutral 95 (2006); Carrie J. Menkel-Meadow, et al., Dispute Resolution: Beyond the Adversarial Model 266 (2005); E. Wendy Trachte-Huber & Stephen K. Huber, Mediation and Negotiation: Reaching Agreement in Law and Business 281 (2d ed. 2007). Mediators help solve a primary problem in human communication which is the illusion that it occurs when persons talk. This clarification and translation is important because “people see the world from their own vantage point, and they frequently confuse their perceptions with reality. Routinely, they fail to interpret what you say in the way you intend and do not mean what you understand them to say.” Roger Fisher, et al., Getting to Yes: Negotiating Agreements Without Giving In 19 (2d ed. 1991).

7 Kimberlee K. Kovach, Mediation: Principles and Practice 27 (3d ed., 2004); Menkel-Meadow et al., supra note 6, at 266-67.

8 Menkel-Meadow et al., supra note 6 at 270-71. Common agreements resulting from mediated commercial disputes include future contracts that take account of past wrongs, offer mutual profits, specify or prohibit specific future conduct, and include provisions for valued items such as reference letters and apologies. Id.

9 Id. at 270. They can encourage parties to agree to future contract provisions that rectify past problems and offer profit for all as opposed to the conventional money damage remedies adjudication provides. Id.

10 A sample of 606 US Fortune 1000 companies showed that 82.9% thought that mediation allowed disputants to control their own destinies by resolving disputes themselves. David B. Lipsey & Ronald L. Seeber, The Appropriate
Despite these and other advantages, adjudication, through either litigation or arbitration, remains the dispute resolution option selected most often in the United States and Latin America after non-mediated negotiation fails to resolve commercial disputes.

Lawyers in both the United States and Latin American countries play important roles in making decisions regarding how their commercial clients approach resolving disputes. Lawyers’ help clients understand and analyze dispute resolution options, usually an important initial step in making these decisions. Because of mediation’s relative newness to the legal dispute arena, lawyers often serve as the primary source of information for their commercial clients about the existence and benefits of this option. Attorneys’ explanations and recommendations significantly influence the dispute resolution method used. U.S. lawyers often rely on their adjudication-influenced habitual ways of perceiving and acting while recommending and taking primary responsibility for the means used to pursue their clients’ commercial dispute resolution objectives.

Most U.S. lawyers learn about mediation through experience or their legal education. Research demonstrates that lawyers who participate in mediation value mediating more than those who have not experienced it. Experience with mediation is the primary reason U.S. lawyers recommend that their commercial clients use it. In Latin America, personal experiences with mediation or reports by trusted colleagues provide the most convincing reason to use this dispute resolution option.

This article surveys current contexts in which commercial mediation occurs in the United States and Latin American countries. After summarizing data assessing awareness by commercial actors of important differences between commercial mediation and adjudication, it analyzes the relatively infrequent use of mediation despite significant knowledge of its potential advantages. Exploring this discrepancy and focusing on lawyers, it next examines factors that influence U.S. and Latin American lawyers when they converse with commercial clients regarding selecting a dispute resolution. Analyzing similarities arising from universal decision-
making biases and shared legal cultural traditions, and differences flowing from common law and civil legal system influences, this article argues that all strongly influence U.S. and Latin American lawyers toward adjudicating. All also explain why mediation is not used more to resolve commercial disputes.

II. USES AND ADVANTAGES OF COMMERCIAL MEDIATION

Mediating commercial disputes before adjudication begins may occur voluntarily after disagreements arise or pursuant to contract provisions specifying use of mediation that are negotiated when forming commercial relationships. Contracts specifying mediation first allow a stepped approach where companies agree to explore business-oriented solutions not constrained by legal frameworks initially, and to postpone adjudication until after this effort occurs. Research suggests that agreeing to mediate disputes after they arise seldom happens. Even when one lawyer and commercial client understand the potential gains disputants can achieve by mediating, their counterparts frequently do not share this assessment. Although mediating pursuant to contract agreements made when commercial relationships are established occurs more often, it still happens less frequently than its advantages warrant.

Commercial disputes that generate litigation also are often referred or ordered to mediation under court-connected programs common in the United States and many other countries. Mediating legal disputes already in litigation grew rapidly in the U.S., Australia, 

21 See Can We Talk, supra note 19, at 1300.
23 Price Waterhouse Coopers, Comparative Study of Resolution Procedures in Germany-Summary, www.pwc.com/de/dai (2005) (last visited Feb 16, 2010) (hereafter German Dispute Resolution Procedures) (survey of 158 companies in Germany found that litigation is the procedure most frequently used and is perceived to be the least beneficial in many respects, and recommending wide-spread use of dispute resolution clauses in contracts); see Nancy H. Rogers & Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 Ohio St. J. on Disp. Resol. 831 841 (1998) (finding that three companies who had signed a pledge to mediate before adjudicating did not increase their use of mediation.
Canada, England and other common law countries in the 1980s and 1990s. Civil law countries started adapting and adopting these approaches later.\textsuperscript{25} For example, the European Parliament approved a directive in 2008 that strongly encourages mediating cross-border commercial disputes.\textsuperscript{26} Although several Latin American countries started viewing mediation as a viable option for lawsuits in the 1990s,\textsuperscript{27} with the exception of Argentina, none have adopted broad court-connected or judge-mandated use of this process.\textsuperscript{28}

The United States is the most litigious country in the world.\textsuperscript{29} Because U.S. companies file four times as many lawsuits as individuals do,\textsuperscript{30} they are repeat players in the U.S. litigation system. Consequently, executives and managers at most large US companies know the advantages and disadvantages of resolving commercial disputes by litigating.

Surveys of U.S. business men and women show significant awareness of the drawbacks of litigation,\textsuperscript{31} and the potential advantages that mediating has as compared to adjudicating commercial disputes. U.S. executives and managers are more likely to suggest using mediation than other clients.\textsuperscript{32} Many U.S. executives and managers see mediation as a better way to find outcomes that connect directly to business interests because unlike adjudicating, mediating proceeds without applying law-based frames regarding legal rights, defenses, and remedies.\textsuperscript{33} Interests reflect the underlying needs and motivations disputants possess, and they often differ significantly from the frameworks legal claims and remedies embody.\textsuperscript{34} Most commercial

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\item have developed court-mandated or –referred mediation programs. Hensler, supra at 185. The state of Florida, for example, authorizes its courts to order “all or any portion” of a contested lawsuit to mediation before a trial date is set. Fla. Stat. 44.011 (2009). This encompasses all commercial law suits filed in Florida courts.
\item Mediation in Latin America, supra note 2, at 415.
\item In 1995 Argentina enacted a law mandating mediation before any lawsuit, excepting family matters, could reach trial. James M. Cooper, Latin America in the Twenty-First Century: Access to Justice, 30 Cal. W. Int’l L.J. 429, 433 (2000). From April 1996 through April 1997, 69.43% of 29,986 commercial disputes in litigation that were mediated reached agreement. Id. Chile requires a form of mandatory mediation [called conciliation] in consumer protection matters, Sekolec & Getty, supra note 5, at 178. Columbia, Ecuador, and Peru also have mediation or conciliation laws. Id; Mediation in Latin America, supra at 417.
\item Craig A. McEwen, Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation, 14 Ohio St. J. on Disp. Resol. 1, 26 (1998); Carmel Sileo & David Ratcliff, Straight Talk About Torts, Trial, July 2006, at 44.
\item Wisselle, supra note 13, at 204.
\item See Gans, supra note 1, at 53; F. Peter Phillips, How Conflict Resolution Emerged within the Commercial Sector, 25 Alternatives to High Costs Litig. 3, 6 (2007).
\end{itemize}
disputes, for example, have multiple variables, and companies commonly have complex interest sets that interact with these factors in ways that are often individual to each entity.  

Commercial disputes encompass business, relational, and procedural factors as well as economic concerns. Common shared company interests in commercial disputes include saving time and money, preserving relationships, and creating satisfactory, durable, and confidential outcomes. Mediation more fully honors these business interests by encouraging looking forward to assess future commercial opportunities rather than emphasizing looking backward, as adjudication does, to determine legal consequences arising from past events. Companies usually care more about solving problems quickly to enhance continued business opportunities than they value winning debates about law applications and establishing new legal doctrines or statutory interpretations.

Developing, creating, and maintaining commercial connections between businesses that are important to long term economic growth takes time and money. U.S. business persons believe that mediation helps resolve disputes while preserving these important relationships better than adjudication does. Mediation helps participants turn disputes into deals by renegotiating contracts to resolve specific problems that permit resuming strengthened commercial relationships, as well as by creating velvet divorces that liquidate associations amicably. In contrast, adjudication more often ends rather than repairs commercial relationships. Adjudication typically assigns blame, produces win-lose outcomes, terminates relationships contentiously, and creates disincentives for companies to do future business together.

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37 See id [companies listing these factors as reasons for using mediation).
38 Philips, supra note 33, at 6.
40 Eighty percent of the business executives acknowledged that mediation helps preserve important commercial relationships. Lande, supra note 12, at 176. Fifty-nine percent of business persons in another study said that mediation preserves business relationships better than adjudication, Appropriate Corporate Dispute Resolution, supra note 10, at 37; and fifty-six percent said the same thing in another study. Dispute-Wise Business Management, supra note 36, at 19.
41 International Mediation, supra note 4, at 12-18. For example, many intellectual property disputes begin as rights claims but are resolved as negotiated licensing arrangements. Id.
42 Id.
U.S. business men and women believe that mediation produces outcomes in less time than adjudication requires.\textsuperscript{44} Eight of ten of executives and managers surveyed concluded that mediation saves time over litigation.\textsuperscript{45} U.S. business personnel know that mediating avoids the delays caused by litigation’s pleading and evidence assembling processes, and the collateral and costly skirmishes these procedures often generate. Arbitration similarly diverts company time, money, and energy to ancillary legal battles and procedural quarrels.\textsuperscript{46} Assuming appropriate company decision-makers willing to negotiate attend, mediations can resolve complex disputes in days rather than months or years.\textsuperscript{47} In Latin America, mediation’s use of business relevant information allows it to be “fast,” not “slow” as occurs in commercial litigation.\textsuperscript{48}

Because time is usually a substantial component of expense, U.S. business persons believe that mediation is less expensive than adjudication. Ninety percent conclude that mediation saves money as compared to litigation.\textsuperscript{49} Surveying sixty-nine U.S. companies, seventy-one percent reported cost savings when comparing mediation to litigation costs.\textsuperscript{50} Another study at one large American corporation showed that mediation settling costs were one-third less than litigation expenses.\textsuperscript{51}

U.S. business men and women typically rate mediation above arbitration on all of these business interest measures. For example, arbitration’s use of formal, legalistic frames obscures recognition and exploration of business interest-based outcomes by focusing on backward looking facts, evidence, and arguments needed to assert and defend legal rights.\textsuperscript{52} U.S. executives believe that mediation preserves commercial relationships better than arbitration.

\textsuperscript{44} Can We Talk, supra note 19, at 1285-86.
\textsuperscript{45} See Dispute-Wise Business Management, supra note 36, at 19 (84% believe mediation saves time as compared to litigation); Appropriate Dispute Resolution, supra note 10, at 17 (80.1% believe mediation saves time as compared to litigation).
\textsuperscript{46} George W. Combe, Jr., The Resolution of Transnational Commercial Disputes: A Perspective from North America, 5 Ann Surv. Int’l & Comp. L. 13, 25 (1999); Can We Talk, supra note 19, at 1259.
\textsuperscript{47} The London based Centre for Effective Dispute Resolution reports the average length of its cross border commercial mediations is two days. International Mediation, supra note 4, at 29. A Scandinavian supplier and an Asian producer chose a three-day mediation rather than an arbitration that the disputes privately estimated would take one to two years to conclude. Id. at 6.
\textsuperscript{48} Mediation in Latin America, supra note 2, at 419. Many Latin American countries suffer from slow, bureaucratic, and inefficient judicial systems. Id. at 425.
\textsuperscript{49} Dispute-Wise Business Management, supra note 36, at 40 (91%); see Appropriate Corporate Dispute Resolution, supra note 10, at 17 (89.2%).
\textsuperscript{50} Catherine Cronin-Harris & Peter H. Kaskell, How ADR Finds a Home in Corporate Law Departments, 15 Alternatives to High Cost Litig. 158, 159 (1997).
\textsuperscript{52} Can We Talk, supra note 19, at 1259; Eric Green, International Commercial Dispute Resolution: Courts, Arbitration, and Mediation, 15 B.U. Int’l L.J. 175, 177-78 (1997).
Although arbitration usually has time and cost advantages over litigation, U.S. business men and women view mediation superior to arbitration in saving time and resolving commercial disputes quicker. Similarly, U.S. business men and women believe that mediation is less expensive than arbitration. They also express more confidence in mediators than arbitrators.

U.S. business men and women who have experienced mediation of commercial disputes report satisfaction with the process and the results of their interactions. Eighty-four percent of U.S. executives also agreed that mediation was appropriate in half or more of their commercial disputes that they were presently litigating. Only sixteen percent of these executives indicated that mediation was appropriate in less than half of the commercial disputes they were litigating.

Evidence suggests that civil legal system-based companies concur. Eighty-four percent of French companies surveyed expressed satisfaction with mediation. All twenty-five Italian companies who responded to another survey thought that their companies could benefit from mediating commercial disputes.

Despite these favorable attitudes toward and experiences with commercial mediation, businesses do not mediate disputes very often. Although some companies successfully use a systemic approach to conflict that requires mediating before adjudicating, a survey of six
hundred U.S. companies showed only nineteen percent mediated frequently. Another survey of two hundred fifty companies showed that sixteen percent do not use mediation at all, twenty-five percent rarely use it, and thirty-five percent use it only occasionally.

Similar data exists in civil law countries. One hundred fifty-eight German companies surveyed showed that mediation was generally perceived as beneficial yet used rarely to resolve commercial disputes. A survey of seventy French companies showed only thirty-nine percent mediate commercial disputes. Twenty-five Italian companies believed mediation is beneficial yet forty percent never used it to resolve commercial disputes. Consistent with these results, adjudication provides the most frequently used commercial dispute resolution process in the United States, Europe, and Latin America; litigation for domestic disputes and arbitration for cross border conflicts.

The primary constraint on broader mediation use is self-inflicted because this discrepancy largely results from resistance to using mediation that lawyers display. The unwillingness of dispute counterparts is a principal reason companies do not use mediation and was identified as a barrier by three-quarters of six hundred U.S. corporations surveyed. Although some of this resistance undoubtedly results from dictates to adjudicate made by executives and managers, research disclosed no data regarding how often choices to adjudicate a commercial dispute are made after a full comparison with mediation’s advantages and disadvantages.

Considerable evidence suggests that this comparison does not happen frequently in the United States. Adjudicating is often the only dispute resolution alternative identified and

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63 Appropriate Corporate Dispute Resolution, supra note 10, at 10.
64 Dispute-Wise Business Management, supra note 36, at 17.
65 German Dispute Resolution Procedures, supra note 23.
66 French Executives’ ADR perceptions, supra note 60, at 13.
67 De Palo & Harley, supra note 61, at 473.
68 Gold, supra note 29, at 302 (litigation is the “default American dispute resolution process); See Appropriate Corporate Dispute Resolution, supra note 10 at 10 (small percentage of U.S. companies use mediation frequently); Dispute-Wise Business Management, supra note 36, at 17 (76% of U.S. companies use mediation occasionally, rarely, or not at all).
69 De Palo & Harley, supra note 61, at 473; German Dispute Resolution Procedures, supra note 23 (Litigation is the procedure most frequently used to resolve commercial disputes and is perceived to be least beneficial in most respects).
70 Mediation in Latin America, supra note 2, at 428-29.
71 See notes 68, 69 supra.
72 Can We Talk, supra note 19, at 1261.
73 International Mediation, supra note 4, at 114 (the greatest constraint on mediation usage is self-imposed resulting from the fact that managers and lawyers often resist entering the process).
74 Appropriate Corporate Dispute Resolution, supra note 10, at 26.
analyzed by U.S. lawyers.\textsuperscript{75} One survey showed that counsel had not mentioned mediation as an option in seventy commercial lawsuits proceeding that year.\textsuperscript{76} A survey of twenty-three hundred Ohio lawyers showed that only fourteen percent regularly recommended mediation to their clients.\textsuperscript{77} Several studies showed that large percentages of U.S. lawyers rarely use mediation.\textsuperscript{78} These surveys also show that less than seventeen percent reported using mediation often, usually, or always.\textsuperscript{79}

Minimal use of commercial mediation also occurs in civil law countries. Local bar associations in Latin American countries express skepticism toward mediation.\textsuperscript{80} Although a close fit between Latin American culture and mediation exists, mediating has not been an easy sell in these countries despite its advantages over adjudication.\textsuperscript{81} Three years after Poland introduced mediation to its Civil Procedure Code, Polish lawyers demonstrate reluctance to mediate commercial disputes.\textsuperscript{82} Legislative activity in Italy has not generated a substantial commitment to use mediation in the Italian legal community.\textsuperscript{83} Sixty-eight percent of Italian companies surveyed reported that lawyers did not encourage them to consider mediation as an alternative to adjudication.\textsuperscript{84}

Commercial disputants report frequent use of adjudication even when the benefits of using mediation are apparent.\textsuperscript{85} A detailed analysis of six large U.S. corporations disclosed failure to increase use of mediation even though business principals supported expanded use.\textsuperscript{86} A general counsel for one of these companies said that he could not think of an initiative he had more difficulty selling than mediating commercial disputes because lawyers “were generally so resistant.”\textsuperscript{87}

This article analyzes this resistance found in both common law U.S. lawyers and civil law system Latin American lawyers. This analysis argues that biases flowing from the way human brains perceive and make decisions substantially influence this resistance. It also contends that

\textsuperscript{75} Can We Talk, supra note 19, at 1294.
\textsuperscript{76} CPR Institute for Dispute Resolution Spring Meeting—June 1996, 14 Alternatives to High Cost Litig. 98 (1996).
\textsuperscript{77} Wisselle, supra note 13, at 221. (59% said they sometimes recommended mediation and 27% said they never recommended mediating).
\textsuperscript{78} Id. at 211 (most attorneys who had used mediation reported using it in 25% or less of their cases).
\textsuperscript{79} Id.
\textsuperscript{80} Mediation in Latin America, supra note 2, at 427.
\textsuperscript{81} Id. at 428.
\textsuperscript{82} Don Peters & Ewa Gmurzynska, Yes We Can: Overcoming Barriers to Mediating Private Commercial Disputes, 7 Warsaw University L. Rev. 122, 126-27 (2008).
\textsuperscript{83} De Palo & Harley, supra note 61, at 473.
\textsuperscript{84} How Business Conflict Resolution Is Being Practiced in China and Europe, 23 Alternatives to High Cost Litig. 148, 149 (2007) (68% of Italian companies said they did not use mediation more often because their counsel did not identify it as an option).
\textsuperscript{85} Lipsky & Seeber, supra note 22, at 145.
\textsuperscript{86} Rogers & McEwen, supra note 23, at 841.
\textsuperscript{87} Id. at 841-42.
shared legal cultural factors resulting from similarities in how law is used to resolve disputes in adjudication and how lawyers are educated significantly explain this resistance. This article then examines factors which combine to reduce the influence that differences in how common law and civil system lawyers practice might otherwise have when helping clients decide how to approach resolving commercial disputes. It concludes by presenting reasons why carefully assessing mediation as a pre-adjudication option helps lawyers counter perceptual, decision-making, and legal cultural biases while allowing commercial clients to avoid the risks and substantial transaction costs inherent in adjudicating disputes.

III. PERCEPTUAL AND DECISION-MAKING BIASES INFLUENCING BOTH COMMON LAW AND CIVIL SYSTEM LAWYERS

All decision-making and behavioral activity involved in identifying, explaining, recommending, and implementing commercial dispute resolution options, like all human choice and action, starts with perception. Humans perceive through their sensory receptors of sight, sound, touch, smell, and taste. Meanings derived from these perceptions influence decisions, predictions, and actions. Recent scientific research demonstrates that humans form these meanings largely as the result of emotional reactions, and they may or may not then subject these responses to conscious, cognitive reflection, review, and adjustment.

Contemporary science has demonstrated that human decisions result from interactions between different brain networks, many of which produce emotion. Wide agreement now exists that human brains essentially use two different decision-making methods: a conscious, logical, slow process of thinking through perceptions and alternatives; and a quicker, emotion based system that operates largely below the surface of consciousness. Although the conscious cognitive brain gets virtually all of the attention in decision-making theory and literature, most of what humans think and do is really driven by their emotions. Many, if not most, human decisions and actions are either made or strongly influenced by these quick, effortless, emotional brain reactions.

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92 Leher, supra note 90, at 26-27.
Although lawyers believe that their analyses, predictions, and decisions are rational, substantial evidence suggests that these beliefs are not accurate. Many identifiable emotional and cultural factors frequently distort rational decision-making. Many occur as the result of how rapid, below conscious emotional brain systems perceive, interpret, and respond to information. Many others occur as the result of neural shortcuts used when working with complex decisions such as those involved in identifying, explaining, and evaluating commercial dispute resolution methods. Humans are more likely to use emotion brain-based perception and neural shortcuts when making decisions confronting uncertain situations, and commercial disputes, at least initially, generally generate substantial uncertainty.

Occurring rapidly and largely below conscious awareness, emotion-based decision-making influences are difficult to detect and counter. Although these systems frequently work well, they occasionally misfire for specific, consistent reasons. These misfires often create biased, ineffective, non-optimal decisions and actions. Many of these common decision-making biases occur frequently when resolving disputes, and several influence choosing resolution options. They often interact and combine to influence decisions to adjudicate rather than mediate commercial disputes.

Human decision-making begins with initial perception. To manage the overwhelming external stimuli that human brains confront, people perceive selectively in potentially biased ways by noticing and emphasizing some aspects of events and situations while ignoring others. Human perceptual experiences differ. Everyone selects, evaluates, and organizes external stimuli in unique ways so persons often interpret the same event, situation, or context differently. Perception is influenced by what humans have learned and experienced in their

97 Lehrer, supra note 90, at 76.
98 Birke & Fox, supra note 94, at 3-4.
99 Gladwell, supra note 91, at 15.
100 See generally Can We Talk, supra note 19, at 1263-75.
101 Sheila Heen & Douglas Stone, Perceptions and Stories, in Negotiator’s Fieldbook, supra note 96, at 343, 345-47. An ensemble of alerting, orienting, and executive brain networks collaborate during perception. Winifred Gallagher, Rapt Attention and the Focused Life 8 (2009). They attune people to what’s going on in their outer and inner worlds, using a basic mechanism that selects some aspects of perception and suppressing the rest. Id. at 8-9. Human brains select a thin slice of what is going on, represents or depicts it, stores it, and then makes this part of perceivers’ reality. Id.
102 Gold, supra note 29, at 293. Business persons from different parts of the same organization often see dispute contexts and situations differently. Heen & Stone, supra note 101, at 344 (in any organization, were you sit influences what you see).
environments and their past. People construct reality on foundations of what they pay attention to and how they use their expectations, interests, and experiences to construe meanings.

Selective perception reflects human tendencies to perceive in self-serving ways. Human brains work hard to tell simple stories consistent with what they know to protect themselves from ill-fitting data. People typically assume they are objective and reasonable when confronting problems. Applying false consensus bias, humans also assume that others looking at the same data would draw the same conclusions, and they often erroneously attribute unreasonable or harmful motives to others who reach different interpretations.

When differences arise, humans inaccurately believe that they have perceived all important data, and they attend to information that justifies their perspectives while ignoring other stimuli. This selective perceptual process mirrors adjudication which encourages limited information assessment by requiring asserting and substantiating claims that travel on some but not all potentially useful data present in complex situations. Adjudication also assumes that this legally relevant data is all that matters for resolving commercial disputes.

Selective perception contributes to self-serving, biased attribution. Attribution theory analyzes how humans attribute causal meaning to behavior. In order to achieve a sense of control in their lives, people routinely seek to perceive causes that explain their behaviors and the


105 Max Bazerman & Katie Shonk, The Decision Perspective to Negotiation, in Dispute Resolution Handbook, supra note 35, at 52, 55; Birke & Fox, supra note 94, at 14; Korobkin & Guthrie, supra note 96, at 354.

106 Heen & Stone, supra note 101, at 346-47.

107 Keith G. Allred, Relationship Dynamics in Disputes: Replacing Contention with Cooperation, in Dispute Resolution Handbook, supra note 35, at 83-84.

108 Melissa Janis, Perceptual Errors in Mediation, 56 Disp. Resol. J. 50, 51 (2001). Humans overestimate the degree to which others share their perspectives. Sternlight & Robbennolt, supra note 104, at 464. False consensus bias describes human tendencies to assume that their perceptions, attitudes, behaviors, and lifestyle preferences are the measures of normality and correctness. Janis, supra at 51.

109 Allred, supra note 107, at 83-84. This is a form of attribution bias discussed later. See notes 115-118 infra and accompanying text.

110 Heen and Stone, supra note 101, at 344. Called user illusion, humans typically believe they perceive everything important in situations but in fact brains take in only small slices of available information, and often as little 1% of a stimulus field. Id.

111 Russell Korobkin, Psychological Biases that Become Mediation Impediments Can Be Overcome with Interventions that Minimize Blockages, 24 Alternatives to High Cost Litig. 67, 69 (2006).
actions of those with whom they interact. Determining the causes of events lets people predict future occurrences. People categorize behavioral causes as internal, resulting from a person’s individual characteristics, or external or situational, stemming from things outside the actor’s control.

Biased attribution stems from human tendencies to attribute another’s actions to internal characteristics while perceiving that their own behaviors result from external factors. Humans tend to prefer simple to more complex causal explanations and are more likely to assign responsibility to others when they judge behavioral causes are internal and controllable. When disputes escalate, biased attribution assumes others’ difficult, problematic, or harmful behavior came from their negative characteristics. Humans easily perceive harmful intent by others from negative impacts and consequences their actions cause while simultaneously explaining their own similar behaviors as resulting from contextual factors beyond their control. Biased attributions frequently increase disputants’ anger levels beyond what is objectively justified, encourage them to retaliate, and influence them to adjudicate to punish counterparts.

Biased human perception, attribution, and decision-making risks multiply when disputing dynamics transform perception from selective to partisan. Partisan, contentious business cultures exist, and they create disagreements, escalate them into disputes, and erect barriers to considering mediating before adjudicating. Many, if not most, commercial disputes engender intense emotional and partisan feelings in the people involved. Disputes generate strong emotions reflecting anger, distrust, and interests in self-preservation that influence dispute resolution process selection. Powerful feelings of suspicion, betrayal, and disrespect often influence desires for achieving vindication, using professional advocates, and punishing dispute

112 Janis, supra note 108, at 51.
113 Id.
114 Id.
115 Korobkin, supra note 111, at 70.
116 Sternlight & Robennolt, supra note 104, at 461.
118 Id. at 46-48. The negative causal attributions often generate judgments of responsibility and blame. Sternlight & Robennolt, supra note 104, at 461-62.
119 Korobkin, supra note 111 at 70.
121 McEwen, supra note 30, at 55. “Tough guy” cultures and “macho management” influence adversarial position-taking that generate as well as exacerbate disputes. International Mediation, supra note 4, at 115.
123 See Can We Talk, supra note 19, at 1275-76. Demonstrating the reality that commercial disputes are usually personal conflicts in disguise, commercial lawyers frequently confront managers and executives who think they have been wronged and consequently dig in their heels. McEwen, supra note 30, at 10. In addition, employees who have made decisions generating disputes want management support and fear undermined if mediation threatens outcomes that do not fully vindicate their actions. Appropriate Corporate Dispute Resolution, supra note 10, at 34.
counterparts. All of these emotions influence choosing to adjudicate commercial disputes to achieve vindication by winning and inflicting harm.

Partisan emotions slow perceptions, mask subtleties, discount specifics, and produce crude, less complex decisions. They often generate feelings of threat, risk, and danger that stimulate powerful yet primitive emotional brain-based fight or flight responses. This powerful Paleolithic instinct generates preferences for legalized fighting by adjudicating.

Partisan perception hardens commitments to beliefs and further narrows information gathering. It reinforces tendencies to seek only information supporting existing views, to ignore or discount disconfirming data, and to resist changing perspectives when confronted by discrepancies. In extreme forms, partisan perception reactively devalues what disputing counterparts say and do. These narrowing effects of partisan emotions actively discourage seeking to learn or remember the perspectives and interests of others, encourage either-or adjudicatory thinking, and hinder both-and approaches that mediation encourages.

Sharing a professional tradition of intense commitment to their client’s cause, U.S. common law and Latin American civil system lawyers risk reinforcing partisan emotions when discussing commercial dispute resolution options with angry, distrustful, and threatened clients. Sometimes U.S. lawyers intentionally stoke their clients’ emotional fires to encourage adjudicatory choice. More often, lawyers remain neutral initially but personally experience partisan perception after adjudication is selected and produces quarrels and skirmishes. These

124 Heen & Stone, supra note 101, at 345.
125 See Douglas H. Yarn & Gregory Todd Jones, In our Bones (Or Brains): Behavioral Biology, in The Negotiator’s Fieldbook 283, 284-85 (Andrea Kupfer Schneider & Christopher Honeyman eds. (2006)(hereafter Negotiator’s Fieldbook) (competitive behavior is understandable from a biological perspective because enhances chances of survivability in a prehistoric world of scarce resources). Human behavior at its most fundamental level is about the brain’s receiving stimuli, making computations based thereon, and directing actions. Id.
126 International Mediation, supra note 4, at 4-5 (noting that managers around the world do not like conflicts and often experience flight-or-fight reactions, and choose to worsen situations by legalized fighting, or adjudication, or to flee problems by ignoring them and doing nothing).
127 Barendrect & DeVries, supra note 31, at 98; Fisher, et al., supra note 34, at 22.
128 Deepak Malhotra & Max H. Bazerman, Negotiation Genius: How To Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond 110-11.(2007).
129 Barendrect & DeVries, supra note 31at 98; Fisher, et al., supra note 34 at 22-28; Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive Perspective, in Barriers to Conflict Resolution 44, 47 (Kenneth Arrow et al. eds. 1995).
130 See Difficult Conversations, supra note 117, at 39-40 (recommending accepting different perceptions, working to understand them, and once mutual understanding is achieved, finding effective ways to manage disagreements and solve problems).
131 See Daniel Goleman, Social Intelligence: The New Science of Human Relationships 14-16 (suggesting that the field of social neuroscience reveals that all human interactions have emotional subtexts that are contagious and often transfer automatically from one to the other) (2006); Daniel L. Shapiro, Untapped Power: Emotions in Negotiation, in Negotiator’s Fieldbook, supra note 96, at 263, 265 (arguing that humans are in a state of perpetual emotion and constantly experience affective states).
132 See Mnookin, et al., supra note 95, at 167.
preliminary adjudicatory battles often influence U.S. lawyers to transfer partisan adjudicatory thinking and acting to mediating in ways that substantially interfere with exploring business interests and non-legal solutions.133

Incomplete and distorted selective and partisan perception breeds additional biases resulting from egocentrism-based optimistic overconfidence.134 Overconfidence leads humans to discount small probabilities, distort unattractive consequences, and assume luck runs in their favor.135 These egocentric tendencies also encourage humans to bias predictions in self-serving ways that reflect preexisting beliefs.136

Professionals in many occupations tend to make unrealistically overconfident or optimistic forecasts regarding future outcomes.137 This frequently happens when professionals estimate outcome probabilities that depend upon a series of events.138 Adjudication frequently requires prevailing on multiple legal issues and factual questions.139 Consequently, many biased predictions by lawyers involve overconfidently forecasting adjudication outcomes.

Predicting future adjudication outcomes substantially influences commercial dispute method choice and biased overconfident, unrealistic forecasts commonly occur. U.S. lawyers routinely demonstrate optimistic overconfidence.140 U.S. lawyers in one study rated themselves in the 80th percentage or higher of all lawyers on their abilities to predict litigation outcomes.141 Biased, inaccurate future outcome predictions often influence lawyers to recommend adjudication, and their clients frequently follow this advice based primarily on these forecasts.142

133 Business Mediation: From All Points of View, 24 Alternatives to High Cost Litig. 101, 101 (2006); Can We Talk, supra note 19, at 1270.
134 Barendrecht & deVries, supra note 31, at 98. Humans typically underestimate time needed to complete tasks, overestimate how much they will enjoy jobs and vacations, and mispredict the chances marriages will end in divorce. Sternlight & Robennolt, supra note 104, at 469.
136 Bazerman & Shonk, supra note 105, at 55; Birke & Fox, supra note 94, at 14; Korobkin & Guthrie, supra note 96, at 254.
137 Bazerman & Shonk, supra note 105, at 57; Birke & Fox, supra note 94, at 18. For example, expert financial analysts tend to overestimate earnings. Sternlight & Robbenrot, supra note 104, at 469.
139 If a litigant must prevail on four contested points to win a case, such as two legal issues and two factual questions, and the likelihood of winning on each is 50%, this party’s overall chance of winning is only 12.5%. Id. See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases 3, 11. 4 (Daniel Kahneman et al eds., 1982).
141 Id. One experiment showed that dividing subjects into plaintiff and defendant groups and presenting them with identical evidence produced a median plaintiff estimate of success at 75% while a median defense estimate was 55%. Howard Raiffa, The Art and Science of Negotiation 75 (1982).
142 Berendrect & de Vries, supra note 31, at 99; Birke & Fox, supra note 94, at 15; Bazerman & Shonk, supra note 104, at 57.
Commitments to adjudicate often harden when commercial clients independently reach equally optimistically overconfident predictions that amplify and reinforce their lawyers’ biased forecasts.\textsuperscript{143}

The narrowed perception influenced by selective perception combined with and intensified by partisan emotions creates assumptions that what disputants’ value in disputes is limited and diametrically opposed.\textsuperscript{144} Called fixed pie and zero sum biases, these assumptions reflect human tendencies to assume that persons always want only the same things, and that they value these dispute elements identically. Applying these beliefs means that one disputant’s gain is inevitably another participant’s loss.\textsuperscript{145} Law’s tendency in both common and civil law traditions to measure rights and remedies in monetary terms reinforces these assumptions. These biased assumptions influence U.S. common law and Latin civil law attorneys to recommend adjudication because it conflates all commercial interests into either-or claims where winners get everything while losers receive nothing.

Distorted selective and partisan perception, fixed pie and zero sum biases, and optimistic overconfidence often combine to activate a powerful, emotion-based mental habit, loss aversion.\textsuperscript{146} Loss aversion motivates humans to escape anything that feels like loss. People are more motivated to avoid losses than to achieve gains.\textsuperscript{147} This powerful mental habit often shapes human decisions\textsuperscript{148} by influencing choices and actions that attribute more weight to avoiding loss than achieving gain.\textsuperscript{149} Loss aversion is an innate emotional flaw in human brains, and everyone who experiences emotion is vulnerable to its affects.\textsuperscript{150}

Humans assess losses or gains in relation to anchoring reference points that they assume are neutral.\textsuperscript{151} Adjudication outcome predictions provide the anchoring references usually used in choosing dispute resolution options for commercial disputes. Anchoring and framing choices this way requires comparing optimistically overconfident adjudication forecasts of winning against uncertain mediation outcomes which frequently require reframing or retreating from

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\item \textsuperscript{143}Sternlight, supra note 138, at 327. Psychologists have noticed a group think dynamic that occurs and heightens commitment to biased decisions. Gary Mendelsohn, Lawyers as Negotiators, I Harv. Negotiation L. Rev. 139, 146-48 (1996).
\item \textsuperscript{144}Malhorta & Bazerman, supra note 128, at 108-12; Bazerman & Shonk, supra note 105, at 54; Birke & Fox, supra note 94, at 30
\item \textsuperscript{145}Leigh Thompson & Janice Nadler, Judgmental Biases in Conflict Resolution and How to Overcome Them, in the Handbook of Conflict Resolution 213,216-17 (Morton Deutsch & Peter T. Coleman, eds. 2000).
\item \textsuperscript{146}Leher, supra note 90, at 77.
\item \textsuperscript{147}Malhorta & Bazerman, supra note 128, at 160. People will work harder to avoid losing money than they will to gain the same amount. Gallagher, supra note 101, at 32.
\item \textsuperscript{148}Id.
\item \textsuperscript{149}Id; Mnookin et al., supra note 95, at 161.
\item \textsuperscript{150}Leher, supra note 90, at 81.
\item \textsuperscript{151}Mnookin et al., supra note 95, at 161; see Amos Tversky & Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 Science 453, 456 (1981).
\end{itemize}
these biased litigation or arbitration predictions. This comparison explains why lawyers fear that mediating lessens chances to maximize gain.\textsuperscript{152} It explains why attorneys often associate mediation with making concessions.\textsuperscript{153} It also explains why many lawyers believe mediating is a “euphemism for taking less money.”\textsuperscript{154}

All of these predictable emotional brain-based responses and inaccurate mental shortcuts are commonly experienced by U.S. and Latin American lawyers when discussing dispute resolution methods with their commercial clients. They frequently interact and combine to produce a powerful and pervasive win-lose mindset.\textsuperscript{155} Based on these assumptions, this mindset produces actions that frame all dispute resolution activities as exclusively or primarily requiring gain-maximizing actions.

Investigations of how professionals develop competence suggest that the most frequent actions displayed by lawyers, business men and women, public administrators, and industrial managers flow from this mindset and demonstrate striving to win and seeking not to lose.\textsuperscript{156} Economic theories and business models that advance winning and avoiding losing as primary, often exclusive, objectives reinforce this mindset.\textsuperscript{157} So do general cultural practices such as organizational promotion systems and athletic activities.\textsuperscript{158}

This win-lose mindset produces substantial resistance to using mediation.\textsuperscript{159} U.S. lawyers usually approach dispute resolution with this win-lose mindset,\textsuperscript{160} use it during resulting interactions,\textsuperscript{161} and resist disconfirming information.\textsuperscript{162} Surveys show pervasive use of win-lose mindset assumptions and actions by U.S. lawyers negotiating and settling disputes.\textsuperscript{163}

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\textsuperscript{153} Appropriate Corporate Dispute Resolution, supra note 10, at 26; Berendrect & deVries, supra note 31, at 83.
\textsuperscript{154} Arbitration/Mediation/Settlement/Other Forms of ADR, 15 Alternatives to High Cost Litig. 59, 62 (1997).
\textsuperscript{155} Mnookin, et al., supra note 95, at 168. “A mindset is a way of making sense of the world” based on “relevant knowledge and belief structures, congruent ways of thinking,” and “specific situational cues.” Barbara O’Brien & Daphna Oyserman, It’s Not Just What You Think, But Also How You Think About It: The Effect of Situationally Primed Mindsets on Legal Judgments and Decision-Making, 92 Marquette L. Rev. 149, 151 (2008); see notes 173-79 infra and accompanying text.
\textsuperscript{157} Alfie Kohn, No Contest: The Case Against Competition 70 (1986).
\textsuperscript{158} Bazerman & Shonk, supra note 105, at 54.
\textsuperscript{159} Catherine Cronin-Harris, Mainstreaming Corporate Use of ADR, 59 Albany L. Rev. 847, 861 (1996); Marguerite Millhauser, ADR as a Process of Change, 6 Alternatives to High Cost Litig. 190, 190 (1988).
\textsuperscript{161} Birke & Fox, supra note 94, at 30-31; Leigh Thompson & Terri DeHarport, Social Judgment, Feedback, and Interpersonal Learning in Negotiation, 58 Organizational Behav. & Hum. Decision Processes 327 (1994).
\end{flushleft}
Any one of these biased emotion brain-based perceptual processes and decision-making short cuts is sufficient to influence U.S. and Latin American lawyers to recommend adjudication to resolve commercial disputes than cannot be resolved by non-mediated negotiation. These processes and short cuts interact and combine, however, to produce a powerful cumulative influence toward adjudication and away from mediation. Consequently, most US lawyers and probably many Latin American attorneys perceive adjudication as the fallback option to use if non-mediated negotiations fail without awareness that this view sacrifices advantages that mediating brings in many situations.164

IV. LEGAL CULTURAL INFLUENCES

Moving from universal, hard-wired emotional-brain and neural short cut-based biases, culture, defined as shared beliefs, values, expectations, and behavioral norms within groups and professions,165 also influences perception. Humans store perceptions in the form of beliefs and values which work in combination to form cultural patterns.166 These learned beliefs guide cognitive brain activity and influence decisions.167 Beliefs form the basis of values which supply learned but largely unwritten, often unconscious, rules for making choices regarding which actions are appropriate.168

162 Birke & Fox, supra note 94, at 31.
164 Berendrect & deVries, supra note 31, at 111.
165 Can We Talk, supra note 19, at 1275; Gold, supra note 29, at 292-93; see Melanie Lewis, Systems Design Means Process Precision, but Emphasizes Culture, Value, and Results, 25 Alternatives to High Cost Litig. 116, 117 (2007). Significant civil legal system differences exist which make common law understandings of the term “legal profession” problematic. Richard L. Abel, Lawyers in the Civil World, in Lawyers in Society: The Civil Law World, 1, 4-5 (Richard L. Abel & Philip S.C. Lewis eds. (1988) (hereafter The Civil Law World). Although lawyers in private practice comprise the core of a common law county’s legal profession, other categories of law graduates in civil law countries, such as the magistracy and civil servants, typically predominate numerically and historically. Id. at 4. Civil law systems also typically include as legal occupations groups not counted in common law legal professions including notaries everywhere, police chiefs in Brazil and Norway, and process servers in France. Id. at 4-5. For comparative purposes, this essay analyzes only those members of civil law legal systems who engage in private practice, using an inaccurate assumption that they constitute the legal profession in these countries.
166 Gold, supra note 29, at 293. 167 Id. at 293-94. 168 Id. at 294.
Professions possess an abstract knowledge base along with shared norms and educational experiences that derive from and reinforce their core knowledge.\textsuperscript{169} Even though they stem from different traditions regarding law’s source and development,\textsuperscript{170} U.S. and Latin American legal professions use law as their shared knowledge base. They also share norms and educational experiences linked to law, legal doctrines, and procedural rules. While no US or Latin American lawyer always behaves in precisely the same ways,\textsuperscript{171} most share tendencies that are revealed in their actions.\textsuperscript{172} Reflecting legal cultural influences, these tendencies flow from both similarities and differences in common law and civil law systems, and both more often encourage adjudication than mediation of commercial disputes.

A. Influences from Legal Cultural Similarities

U.S. common law and Latin civil system lawyers share a professional legal culture that strongly emphasizes using law and its rights and remedies as the framework for resolving disputes peacefully through adjudication. This framework generates tendencies in U.S. lawyers to unquestionably assume that disputes should be resolved by applying legal rules to fact situations embedded in disputes.\textsuperscript{173}

Latin American lawyers share this assumption. A commercial representative discussing mediation in Latin America noted that his company’s main problem is lawyers,\textsuperscript{174} explaining that “attorneys don’t think the way other people think.”\textsuperscript{175} Venezuelan lawyers surveyed

\textsuperscript{169} Nancy A. Welsh, Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically, 2008 J. Dispute Resol. 45, 51.
\textsuperscript{170} See Philip Gentry, Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Legal Education, 17 Clinical L. Rev. 131, 136 (2008). The civil law tradition arises from the articulation of rules by an absolute monarch while the common law tradition arises from constraint of a monarch’s powers. See id. at 137. This may encourage lawyers trained in the civil law tradition to seek authorization before acting while common law attorneys may tend to take initiatives unless legal rules prohibit them.
\textsuperscript{171} For example, many U.S. lawyers have been instrumental in starting and developing mediation friendly approaches to law practice including therapeutic jurisprudence, which encourages laws and practices that have beneficial effects, and collaborative law, which encourages lawyers to agree to represent clients only in negotiations and mediations in an effort to avoid the harmful effects of threatening and using litigation. Leonard L. Riskin, The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients, 7 Harv. Negotiation L. Rev. 1, 19-20 (2002) (hereafter Contemplative Lawyer).
\textsuperscript{175} Id.
preferred adjudicating to resolve commercial disputes.\textsuperscript{176} An examination of what Chilean lawyers do listed advocating or defending legal positions before courts or administrative bodies as their most important role.\textsuperscript{177} Civil lawyers view themselves primarily as advocates in adjudication.\textsuperscript{178} Historically, this strong attachment to defining their role as adjudicatory advocacy has constrained expanding their activities as counselors and allowed competitive, legal-related occupations to perform much of this activity.\textsuperscript{179}

Sharing this strong legal cultural tradition influences selective perception by U.S. and Latin American lawyers. Lawyers practicing in both systems tend to perceive through law-based, rights-oriented lenses.\textsuperscript{180} U.S. lawyers are more likely than the general population to gather information using general standards and rules.\textsuperscript{181} Applicable law and the facts necessary to prove or avoid rights and remedies claims powerfully influences lawyers when gathering and giving information during client conversations.\textsuperscript{182} Lawyers anchor their analysis to perceiving potential adjudicatory application of legal doctrines, standards, and rules.\textsuperscript{183} Latin American lawyers routinely display similar selective perceptual tendencies. A Chilean scholar summarized the most important law practice habits, skills, and abilities for Chilean lawyers as identifying relevant facts in situations and linking them to appropriate legal sources.\textsuperscript{184}

Basing perception on law and legal rules helps U.S. and Latin American lawyers translate complex, multi-factor situations into manageable frames for adjudicatory resolution.\textsuperscript{185} While valuable, this perceptual process is selective because it necessarily abstracts and reduces complexity.\textsuperscript{186} Using this selective perception to assess commercial disputes and options for resolving them, lawyers identify legally authorized causes of actions, legal and factual elements which substantiate or refute these rights claims and defenses, key proof issues, important witnesses, essential documents, and monetary damage items.\textsuperscript{187} This selective perception usually

\textsuperscript{176} Manuel Gomez, Dispute Resolution in Venezuela, Newsletter of the Gould Center for Conflict Resolution Programs 5 (Spring 2004).
\textsuperscript{178} The Civil Law World, supra note 164, at 23.
\textsuperscript{179} Id. at 27.
\textsuperscript{180} Guthrie, supra note 172, at 160. These learned basic knowledge structures, or schemas, define expectations about how to practice law, interview clients, and resolve commercial disputes. Sternlight & Robbennolt, supra note 104, at 451-52. They focus information gathering and facilitate lawyers’ abilities to form legal inferences and make case analysis assessments quickly. Id.
\textsuperscript{181} Welsh, supra note 169, at 50.
\textsuperscript{182}David A. Binder, et al., Lawyers as Counselors: A Client-Centered Approach 145-57 (1991) (describing how lawyers should use potentially applicable law to guide information gathering during interviews).
\textsuperscript{183} Welsh, supra note 169, at 51.
\textsuperscript{184} Wilson, supra note 177 , at 575-76.
\textsuperscript{185} Guthrie, supra note 172 , at 158.
\textsuperscript{186} Id. at 158.
\textsuperscript{187} Id. at 174-75; Contemplative Lawyer, supra note 171, at 16.
excludes business interest-based factors, relational issues, and non-monetary considerations.\textsuperscript{188}

It also typically ignores reorienting parties to each other, satisfying emotional interests, and responding to yearnings for respect, affinity, and autonomy.\textsuperscript{189}

Other legal cultural traditions influence choosing adjudication over mediation. For example, U.S. and Latin American lawyers share legal cultural influences that emphasize traditional, conservative options and do not easily embrace change.\textsuperscript{190} Given mediation’s newness in commercial and litigation contexts, these tendencies may encourage reliance on adjudication.\textsuperscript{191} A human tendency to rely on familiar, traditional approaches is a status quo bias,\textsuperscript{192} and its influence is heightened by legal culture in both common law and civil legal systems.

Creating resistance to mediating commercial disputes despite its advantages over adjudication in many situations, Latin American lawyers frequently demonstrate wariness of new approaches and resistance to change traditional methods.\textsuperscript{193} Fearing surprises, many prefer familiar approaches to new ones.\textsuperscript{194} In addition, reliance on the importance of external, authority figures, such as judges or arbitrators, constitutes a significant aspect of civilian legal culture.\textsuperscript{195}

Designed to promote orderly societies, both common and civil law systems have evolved formal adjudication approaches and created rules to structure dispute resolution within them.\textsuperscript{196} These orderly structures and formal rules attract U.S. and Latin American lawyers to adjudicating commercial disputes.\textsuperscript{197} Although lawyers play different roles in common and civil law adjudicatory systems, the structures in all approaches for obtaining third party decisions and rules regarding what they may and may not do are clear and usually linear. They are imposed by legislation and judicial rules.\textsuperscript{198}

\textsuperscript{188} See Contemplative lawyer, supra note 171, at 16.
\textsuperscript{189} Guthrie, supra note 172, at 164, 174-75.
\textsuperscript{190} Id. at 178 (arguing that lawyers are viewed by themselves and by others as conservative, risk averse, tradition-bound, and wedded to legalistic range of dispute resolving strategies).
\textsuperscript{191} Florida lawyers did not embrace mediation easily and advise their clients to use it readily when courts began ordering it broadly across their non-criminal dockets in 1987. Mediation in Costa Rica, supra note 152, at 11. Lawyers also are not as likely as other professions to engage “in divergent thinking during which a variety of potential solutions are generated before any are critically evaluated.” Guthrie, supra note 172, at 178.
\textsuperscript{192} See Gentry, supra note 170, at 149.
\textsuperscript{193} Scott Dodson, The Challenge of Comparative Civil Procedure, 60 Alabama L. Rev. 133, 150 (2008) (all nations create procedural systems seeking “fair, orderly, expedient, cost-effective” administration of litigation).
\textsuperscript{194} Lipsky & Seeber, supra note 22, at 145-46. The lack of clear legal rules was listed by 28% of 606 respondents as a barrier to the use of commercial mediation. Id. at 149. A general counsel for a U.S. public utility described this influence stating: “Cost isn’t the issue—it’s the lack of rules. Litigation may be expensive, but it does have rules.” Id. at 146.
\textsuperscript{195} See Mediation in Latin America, supra note 2, at 419.
Mediation, however, offers an inherently variable, non-linear process aimed at facilitating a complex, multi-layered negotiation between lawyers and commercial clients. It typically follows no legislatively or judicially proscribed procedures.\footnote{199 Id.} Mediation uses informal norms, avoids rigid structural rules, anticipates ambiguities, tolerates differences, and encourages non-linear outcomes.\footnote{200 Gold, supra note 29, at 314; Millhauser, supra note 159, at 190.} As a result, mediations are structurally flexible and differ significantly from the formality usually present in U.S. and Latin American judicial systems.\footnote{201 Mediation in Latin America, supra note 2, at 419.} Mediation’s informal, flexible, less structured approach often clashes with the order- and rule-seeking legal cultural influences U.S. and Latin American lawyers encounter.\footnote{202 See Millhauser, supra note 159, at 190 ((arguing that mediation’s flexibility and minimal structure can be a “nightmare” for those who are more rule bound).}

U.S. and Latin American lawyers also share legal education experiences that emphasize learning law, legal rules, and adjudicatory contexts far more than developing interest-based negotiation and problem solving behavioral skills. Despite different approaches to developing and learning law and legal rules,\footnote{203 Gentry, supra note 170, at 136; Wilson, supra note 177, at 137-39.} most legal educational efforts in both systems primarily, and sometimes exclusively, require learning doctrines, principles, and rules. In US common law-based educational experiences, most of this learning occurs in adjudicatory contexts involving interactive classroom discussions deconstructing written opinions written by appellate courts reviewing trial litigation.\footnote{204 See Roy Stuckey, et al., Best Practices for Legal Education: A Vision and a Road Map 132, 141 (2007)(hereafter Best Practices) (arguing American legal education should reduce its often near-exclusive reliance of the case and so-called Socratic method); William M. Sullivan, et al., Educating Lawyers: Preparation for the Profession of Law 76 (2007) (reviewing data suggesting that case-dialogue teaching is “not seen by recent law graduates as particularly helpful in enabling them to move from school to professional practice”).} Latin American civil law educational systems often confront large class enrollments and usually emphasize lecture approaches focused on code provisions and authorized academic commentaries.\footnote{205 Gentry, supra note 170, at 139-41 (noting that interactive methods are often used in newer, private universities which have smaller class sizes); Monica Pinto, Developments in Latin American Legal Education, 21 Penn. St. Int’l L. Rev. 61, 62 (2002) (Latin American law schools generally follow the European model of large lecture-based classes).} Courses reviewing how judicial adjudication systems work are often required in both systems. This curricular emphasis communicates explicit and implicit messages about dispute resolution that students assimilate, believe, and follow when they practice. Consequently, these similar educational efforts send strong cultural messages that adjudicating should resolve commercial disputes because this applies code or common law legal principles.

Although no comparable data was found regarding Latin American attorneys, U.S. lawyers bring personality tendencies that enhance acceptance of the messages to approach
persons and problems in abstract, analytical ways that their legal education promotes. Ninety percent of U.S. lawyers are left brain dominant which indicates an analytical orientation. Brain researchers often use lawyers when they seek to measure an occupational group that is analytical in its preferred modes of perceiving, deciding, and acting. Use of the Myers-Briggs Type Indicator, an assessment instrument that measures preferences for exercising aspects of perception and judgment, shows that U.S. lawyers are far more likely to make decisions analytically, objectively, and impersonally than the general American population. These tendencies further reinforce win-lose biases and inclinations to recommend adjudication as the logical way to use impersonal, objective actions to win disputes.

The dramatic lack of opportunities provided by U.S. and Latin American legal education to learn skills and values beyond the analytical tasks involved in applying code and other legal principles constitutes another cultural similarity. Nine percent of total instructional time in U.S. law schools is devoted to instruction and practice opportunities in interest-based negotiating, mediation practice and advocacy, interviewing, counseling, and clinics where students serve actual clients with real problems. Ninety-one percent is devoted to learning law, adjudicatory procedures, and rule-based advocacy skills. Elective courses teaching adjudication, primarily litigation, skills and values, comprise the largest number of professional skills offered by U.S. law schools, and are elected by a majority of U.S. law students. This instruction, along with the extensive interactive coverage of appellate opinions in most of the remaining curriculum, ensures that U.S. law students receive ample education in how to argue, persuade, and apply legal rules in adjudicatory situations.

Although virtually all U.S. law schools now offer at least one course teaching interest-based negotiation or mediation or both, these elective courses necessarily limit enrollment to permit valuable performance-based learning approaches. Remarkably resistant to fundamental

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206 Guthrie, supra note 171, at 156.
207 Id. One U.S. lawyer-mediator described legal education as a process where the left brain circles around the right brain and then eats it. David A. Hoffman, Paradoxes of Mediation, Disp. Resol. Magazine 23 (Fall 2002). Up to a point, there is some truth to the popular generalization that a human brain features an analytical, verbal left hemisphere and an intuitive, creative right hemisphere. Gallagher, supra note 101, at 71. Recent neuroscience research, however, suggests that difficult tasks require involvement of both hemispheres and distinctions must be drawn between where within hemispheres activities relating to particular functions occur. Id.
208 Id.
210 See Peters, supra note 88, at 52.
212 Id. at 257-58.
213 Id. at 240 (an estimated 58% of U.S. law students enroll in litigation skills courses).
215 Welsh, supra note 169, at 49.
change. U.S. law schools generally do not provide adequate opportunities for their students to learn and practice skilled actions in these non-adjudicative tasks. Despite recommendations from recent, prominent examinations of U.S. legal education for more curricular attention to these tasks, on average, seventy-three percent of U.S. law students receive no learning opportunities in courses emphasizing the skills and values needed to negotiate or represent clients in mediation effectively.

Even though repeated studies show that practicing success correlates more with relationship skills than it does with substantive legal knowledge, U.S. law students receive little or no instruction in identifying and responding to human emotions effectively, essential tasks in negotiating, mediating, interviewing, and helping clients make difficult decisions. Studies showing that U.S. lawyers and law students possess relatively underdeveloped emotional and interpersonal capacities and demonstrate low interest in emotions and others’ feelings magnify the significance of this curricular failure. U.S. lawyers and law students need training and practice in how to listen, empathize, and navigate through strong emotional moments effectively because they are unlikely to bring well-developed skills at listening actively, attending to verbal and non-verbal cues, and perceiving emotional expressions to their educational and practicing experiences.

216 Guthrie, supra note 172, at 184.
217 Finding an imbalance in U.S. legal education concerning instruction in skills need to practice in law offices as well as before and in litigation, the MacCrate Report recommended that law schools develop or expand learning opportunities in these areas. MacCrate Report, supra note 211, at 332. A more recent review of U.S. legal education recommends that U.S. law schools should strive to develop competent abilities to resolve legal problems effectively and responsibly, and that this includes attending and responding to emotions skillfully. Best Practices, supra note 204, at 60-61.
219 Joseph B. Stulberg et al., Creating and Certifying the Professional Mediator—Education and Credentialing 28 Am J. of Trial Advocacy 75, 78 (2004). This percentage may be declining as the number of negotiation and mediation courses continues to grow. 223 negotiation, mediation, interviewing, and counseling courses were listed in the latest survey of more than 200 ABA accredited law schools. http://adr.uoregon.edu/aba/classearch.php [last visited February 15, 2010]. In addition, 50 ADR survey courses and 40 mediation clinics were listed. Id. Surprisingly, early research suggests that having taken a negotiation or mediation course in law school is not a statistically significant factor predicting a lawyer’s inclination to use mediation to resolve disputes. See Wissler, supra note 13, at 224.
220 Welsh, supra note 169, at 56.
221 Roger Fisher & Daniel Shapiro, Beyond Reason: Using Emotions As You Negotiate (2005) (arguing that human emotions are always present during negotiations and describing how positive feelings enhance interest-based negotiating and negative emotions impede it).
222 Welsh, supra note 169, at 53 (arguing lawyers are unlikely to deal with clients and counterparts whose emotions need to be heard, understood, acknowledged, and explored).
223 Guthrie, supra note 172, at 164; Welsh, supra note 169, at 50.
224 Guthrie, supra note 172, at 164; Menkel-Meadow, supra note 214, at 36.
Most Latin American law schools systems devote an even smaller percentage of their educational resources in this direction. Extensive reliance on top-down, non-interactive lecture approaches create beliefs that experiential learning through role plays, simulations, and supervised actual practice are not important or serious components of legal education.\(^{225}\) In part because Latin American countries usually offer law as a first degree, ensure their curriculums provide general liberal arts backgrounds initially, and don’t emphasize preparing students to practice law because large percentages do not intend to do so, professional skills courses and clinics are generally not offered.\(^{226}\) Clinics exist in some Latin American countries,\(^{227}\) and are well established in Chile.\(^{228}\) Although instruction in interest-based negotiation, interviewing, and counseling occurs in classroom components of these clinics,\(^{229}\) few separate courses providing learning opportunities in these non-adjudicatory approaches exist in Latin American legal education.\(^{230}\)

This shared educational deficiency contributes to U.S. and Latin American lawyers’ resistance to mediate commercial disputes. While mediating involves using knowledge of applicable laws and adjudicatory procedures to analyze cases and predict outcomes, mediation also requires skilled performance of many other, different tasks including emotional awareness and responsiveness. Many, if not most, U.S. and Latin American lawyers find that representing clients before and during mediation effectively challenges them to perform entirely different tasks than they use when adjudicating.\(^{231}\) Many have had little experience, education, or practice in performing these tasks skillfully.\(^{232}\) Many find it difficult to adapt their analytic and win-lose action tendencies to advocate for agreements rather than victories.\(^{233}\) This often produces counterproductive mediation actions that ignore or respond ineffectively to emotions, jealously


\(^{226}\) Drumbel, supra note 1, at 1079-80; but see Pinto, supra note 205, at 65 (explaining that the University of Buenos Aires School of Law offers a first cycle of law study designed to provide learning and teaching activities promoting “reasoning, legal reading, critical analysis for a legal standpoint as well as an understanding of other perspectives such as finding a solution or [achieving] an alternative dispute resolution method”).

\(^{227}\) Id. at 1080.

\(^{228}\) Wilson, supra note 177, at 336-56.

\(^{229}\) Id. at 541, 547, 566-67.

\(^{230}\) See Drumbel, supra note 1, at 1103 (recommending curricular approaches in both the US and Latin American countries to approaches and attitudes of civil and common law negotiation and mediation).

\(^{231}\) Int’l Inst. For Conflict Prevention & Resolution, How Business Conflict Resolution Is Being Practiced in China and Europe, 23 Alternatives to High Cost Litig. 148, 149 (2005) (quoting a British barrister who noted that for years he had been paid to disagree and suddenly he’s expected to help clients and counterparts agree).

\(^{232}\) Legal, Commercial, and Cultural Obstacles to Mediation Within Europe, 23 Alternatives to High Cost Litig. 98, 99 (2005) (Italian lawyers do not consider negotiation as something to be learned and are trained in litigation, not negotiation, practices).

\(^{233}\) See James C. Freund, Bridging Troubled Waters: Negotiating Disputes, Litig., Winter 1986, at 43-44 (arguing that searching for agreements is “a hard road to travel without running the risk of being see as a softy who is reluctant to fight and ready to give away the store”); Sternlight, supra note 138 at 223-24 (suggesting that lawyers’ “cognitive characteristics do not necessarily suit them well to engage in problem-solving ” negotiation).
guard information against even confidential disclosure in private sessions, seek to maximize gain exclusively, resist broadening issues and perspectives, and criticize excessively. 234

B. Influences from Legal Cultural Differences

Moving from legal cultural similarities to differences, identifying factors that influence lawyers’ resistance to mediate commercial disputes gets harder for several reasons. Latin American civil systems differ in many respects from European235 and Asian counterparts,236 and variations exist within individual Latin American countries.237 Moreover, how common and civil system attorneys practice differently outside adjudication contexts has received little research attention,238 and their attitudes and actions regarding recommending mediating commercial disputes has received virtually none. This is partially explained by mediation’s recent arrival in civil law countries generally and in Latin America particularly.239

The absence of comparative research also stems from the fact that many common and civil law differences flow from variations in how law is created, understood, and applied. These differences have little influence on mediating which pursues outcomes independent of law and legal doctrines. For example, common law lawyers allegedly approach law application challenges pragmatically, seek ways to work around legal rules, and develop innovative, alternative arguments for accomplishing client objectives in the face of apparent legal obstacles.240 Civil lawyers, on the other hand, allegedly approach law application challenges theoretically, focus on finding code-based answers, and struggle to find creative, alternative arguments that circumvent apparent legal roadblocks.241 Legal arguments in civil system courts allegedly tend toward broad assertions that do not focus on key evidential and other details while common law court arguments tend to exploit specific facts and testimonial excerpts.242 Mediating, however, does not involve applying law and making legal arguments. Even if these

234 Menkel-Meadow, supra note 214, at 427; Sternlight, supra note 138, at 324.
235 Gentry, supra note 170, at 134.
237 Leonard L. Cavise, The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate, 55 Wayne L. Rev. 785, 795 (2007) (“the inquisitorial model as adapted to the various Latin systems retained the fundamental European characteristics but with a number of culturally or politically dictated modifications in each Latin American national system”); Gentry, supra note 170, at 144 (public interest litigation or cause lawyering does not exist in Mexico yet is found in Argentina, Brazil, and Columbia); Drumbel, supra note 1, at 1063 (Unlike many other Latin American countries, Mexico has several important codifications in the private sphere).
239 Alexander, supra note 238, at 339.
240 See id. at 356.
241 See id.
242 Cavise, supra note 237, at 810.
broad stereotypes have any validity, they exert virtually no influence on the widespread resistance to mediating commercial disputes displayed by both common law and civil system lawyers.

Although many identifiable practicing differences exist between how common and civil law system lawyers act in adjudication, the influence of these differences on resistance to mediating diminishes because mediation usually requires few tasks that attorneys perform while adjudicating. Lawyers typically perform fewer activities in inquisitorial civil law systems where judges control adjudication from beginning to end. Judges, not lawyers, decide what evidence is necessary, what documents should be presented, what lay and expert witnesses need to be examined, whether oral testimony is needed or written submissions suffice, and they conduct oral examinations subject to supplementation by attorneys. U.S. lawyers, in contrast, decide what witnesses to call and evidence to introduce, base proof extensively on oral testimony that they adduce either before or at trial, determine whether to retain and use expert witnesses, participate in jury selection, and engage in extensive pre-trial and trial motion advocacy.

Efforts underway in many Latin American countries to move their criminal law trial procedure from civil system inquisitorial to common law accusatory have generated substantial resistance and reluctance among many lawyers. These changes, however, may not quickly affect non-criminal adjudicatory systems used in commercial dispute resolution. Moreover, pre-trial discovery of testimony, documents, and other physical evidence seldom exists in civil law countries while it comprises a major component of U.S. common law adjudication.

Mediation removes formal persuasive arguments directed toward decision-makers from the resolution process and avoids extensive use of documents, evidentiary presentations, and examinations of lay and expert witnesses. Although systemic limits on actions lawyers perform in civil system adjudication might lessen resistance to mediation for civil lawyers, they do not appear to have this impact. No evidence suggests that mediation attracts civil system lawyers as a way to escape their more limited adjudicative roles as compared to those performed by common law attorneys. Nor does evidence suggest that U.S. common law attorneys’ fact-oriented, client and witness-based litigation experiences influence them to prefer mediating over adjudicating commercial disputes.

244 Gentry, supra note 170, at 142.
245 Id. at 142.
246 Cavise, supra note 237, at 787.
Economic considerations significantly influence lawyer resistance to mediating. Some U.S. lawyers fear that mediating brings economic harm. Helping clients resolve commercial disputes provides profitable activity for U.S. and Latin American lawyers who are not full-time employees of the companies involved. Absent disputes which facilitate charging outcome percentages as contingent fees, most U.S. lawyers bill their commercial clients by the hour for dispute resolution work.

Adjudicating requires tasks emphasized by lawyers’ experience and education. In the U.S. common law system these tasks often include time consuming and lucrative pre-trial discovery, pre-trial motion advocacy and defense, lay and expert witness preparation and examination, and evidence gathering, preparation, and presentation. U.S. executives complain that hourly fee billing approaches create disincentives for lawyers’ to mediate. Many also suggest that this supplies a significant reason why more commercial disputes are not mediated.

A recent U.S. study suggests that mediating frequently reduces the amount of time lawsuits take to resolve. Evaluating fifteen thousand non-criminal, non-commercial lawsuits handled by Assistant U.S. Attorneys showed that using mediation saved an average of eighty-eight lawyer hours per case. Although mediation often appears to reduce hours spent by saving time, law firm revenues for helping commercial clients resolve disputes through mediating do not necessarily have to diminish as a result. Using ADR (alternative dispute resolution) by mediating, usually ADR’s most effective form, does not need to connote an alarming drop in revenue for attorneys. Lawyers can and should bill for time spent performing the important tasks involved in helping clients prepare for and participate in mediation.

247 Twenty-five percent of lawyers agreed that increasing mediation would decrease their personal compensation while 51% disagreed. Lande, supra note 12, at 179-80. Economists recognize that lawyers who are paid by the hour have short term interests in prolonging disputes even if longer term interests in retaining future business or gaining referrals from clients point the other way. Sternlight, supra note 138, at 320.


249 Most often one third of amounts settled before beginning litigation and 40% afterwards. E.g., Fla. Rule Professional Conduct 4-1.5 (setting these amounts as the upper limits of what meets the required standards that fees must be reasonable).

250 Can We Talk, supra note 19 at 1296.

251 See Stewart Levin, Breaking Down Costs: What are You Losing by Not Using ADR, 19 Alternatives to High cost Litig. 235 (2001). In 2000 an estimated $400 billion in litigation costs were incurred in the more than 22 million cases that were filed in the U.S. Id.

252 McEwen, supra note 30, at 11 (quoting general counsel who believes hourly billing is blocks early, inexpensive settlements and encourages lawyers to do things slowly).


255 Can We Talk, supra note 19, at 1298.
achieving timely, effective, high quality outcomes in fixed price, retainer, and hourly billing contexts.256

Similar economic concerns influence civil system lawyers even though they may not depend as much on hourly billing.257 Latin American attorneys express concerns that mediation brings economic disincentives and that adjudicating pays but mediating does not.258 An EU mediator noted that the primary challenge to implementing the EU cross-border mediation directive is to make mediating financially attractive for lawyers, not clients.259 Fear of lost income from more mediation and less litigation has generated lawyer resistance in Denmark260 and Scotland, a mixed civil and common law country.261 An instinct to preserve their dominant roles in dispute resolution and avoid losing income from helping clients resolve commercial disputes probably explains lawyer resistance to greater use of mediation in Italy.262 When designing mediation systems, legislators and judges must avoid creating direct economic disincentives to mediating commercial disputes.263

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257 See Richard L. Abel, Comparative Sociology of Legal Professions 80, 110, in Lawyers in Society: Comparative Theories, Richard L. Abel & Philip S. Lewis, eds., 1989) (noting that mandatory fees are fixed by state in all matters in Germany, advisory fee schedules are set by the state in Italy, and advisory fee schedules are established by the legal profession in Norway, Brazil, France, Spain, and Japan).

258 Commercial Mediation in Latin America, supra note 174. The increased lawyer activity needed to gather information preparing for mediation that requires consent to succeed fully both stretches civil system lawyers to perform tasks they are not accustomed to and creates risks that their clients might not understand why they need to pay for this work.

259 EU Backs Cross-Border Mediation, supra note 26, at 122-23.


262 De Palo & Harley, supra note 61, at 476. The Italian fee structure, which is based primarily on the number of briefs and hearings, is a further incentive to not use mediation. Giuseppe De Palo & Luigi Cominelli, Mediation in Italy: Waiting for the Big Bang?, in Global Mediation Trends, supra note 25, at 259, 262.

263 For example, Germany used a system where legal costs insurance paid for adjudication but not mediation fees leaving this expense entirely on clients and discouraging them and their lawyers from mediating. Alexander, supra note 237, at 357. Lawyer-mediators in a German mandatory mediation project complained about low reimbursement they received under statutory rates, nothing they could not afford to spend more than 60 minutes even though agreements would have been much more likely with a longer time period. Nadja Alexander et al., Mediation in Germany: The Long and Winding Road, Global Mediation Trends, supra note 25, at 223, 247. Similarly, Poland’s court connected mediation scheme limits mediator compensation to an amount that discourages mediation of significant commercial disputes that necessarily require more than a few hours. See Sylwester Pieckowski, Using Mediation in Poland to Resolve Civil Disputes: A Short Assessment of Mediation Usage from 2005-2008, 64 Dispute Resolution Magazine 84 (2009).
Demonstrating that legal system differences do not affect resistance to mediating, these economic concerns influence lawyers in both systems even though adjudicatory risks frequently differ in each. Risks of large negative outcomes in civil system adjudication are usually not as strong as they are in U.S. courts. The absence of juries removes much of the frightening, risky unpredictability that exists in U.S. common law litigation. Predicting outcomes from a single, legally trained decision-maker is usually easier than predicting what a group of non-legally sophisticated people will do. Damages in civil law system adjudication are generally lower than similar awards in civil adjudication. Transactional costs are usually smaller in civil countries because of less pre-trial civil discovery costs and other attorney fee expenditures. A civil system tradition requiring losing parties to pay prevailing litigant’s legal fees also often deters excessive transactional costs.

As this analysis demonstrates, legal cultural differences between U.S. common and Latin American civil lawyers exert slight influence on attorneys’ resistance to mediate commercial cases found in both systems. These legal cultural differences apply primarily to adjudication, particularly litigation. Substantial differences in litigating procedures between common law adversarial and civil system inquisitorial traditions generate complications stemming from different attorney, expert, and judicial roles, varying methods of presenting evidence, and contrasting values accorded to oral testimony and previous judicial decisions. These differences help explain why many cross border controversies involving disputants from common and civil law systems select arbitration rather than litigation. Mediation’s different assumptions, goals, and processes, however, transcend different legal systems and the legal cultural variations they generate. Its potential advantages warrant more consideration that lawyers in both systems often give it, and this article concludes by analyzing how attorneys can ensure that this assessment occurs in all commercial disputes.

V. CONCLUSION: IDENTIFY, EXPLAIN, AND ASSESS MEDIATING IN EARLY STAGES OF COMMERCIAL DISPUTES

This large menu of emotional-brain and neural short-cut biases, combined with powerful legal cultural influences largely unaffected by common and civil law system differences, explains why U.S. and Latin American lawyers resist mediating commercial disputes. This article concludes with reasons why more identifying, explaining, and assessing the option of

264 Dodson, supra note 196, at 141 (civil law countries have not had juries in non-criminal matters for centuries).
265 See id. at 146 (few countries permit the same individualized focus and wide variation that U.S. damage verdicts allow and most civil law countries prohibit punitive damages while U.S. law continues to permit).
266 Christine Cervenak, et al., Leaping the Bar: Overcoming Legal Opposition to ADR in the Developing World, 4 Disp. Resol. Mag. 6 (1998) (Legal cultural factors whether arising out of civil law or common law systems, as well as fears of negative pocketbook effects, often predispose lawyers to oppose mediation).
267 Can We Talk, supra note 19, at 1256.
268 Id. at 1255-58.
269 Global Trends in Mediation, supra note 25, at 2; see Cervenak, et al, supra note 266, at 6.
mediating than typically occurs makes sense. Doing this helps commercial lawyers and clients counter all of the biases and cultural influences previously described. It ensures that lawyers and their clients use their brain’s prefrontal cortex to subject this important decision to slow, conscious deliberation.\(^{270}\) It also helps manage escalating dispute resolution budgets, and often produces faster, more business interest-centered outcomes.

Overcoming mediation resistance begins with identifying that mediating exists as an optional method for resolving commercial disputes. Because of long-standing traditions to view adjudication as simply what is done when participants cannot negotiate commercial disputes successfully, this initial step of consciously making a decision about mediating often disappears.\(^{271}\) Lawyers, executives and managers assume that they have no other choice than to adjudicate.\(^{272}\) Failing to appreciate fully the ways mediating differs from and is superior to unaided face-to-face negotiation,\(^{273}\) they assume that disputes cannot resolve consensually because they have already tried to negotiate them without success. They also often fail to grasp how mediating creates opportunities to achieve many different goals and provides process and procedural tools not offered by adjudication.\(^{274}\)

The next step requires lawyers to question these assumptions and restrain their automatic, habitual desires to adjudicate commercial disputes. As this article demonstrates, doing this is neither easy nor common. Lawyers in both systems enjoy monopoly status as persons generally permitted to represent human and entity clients in lawsuits and arbitrations.\(^{275}\) People like to sell to their strengths and adjudicating allows lawyers to market their primary product lines of knowledge of legal rules, rights, remedies and defenses and abilities to apply this expertise persuading external decision-makers. Adjudication emphasizes issue-oriented dispute resolution which focuses on legal rule connections and applications.\(^{276}\)

U.S. lawyers enjoy feeling in control and central to the action.\(^{277}\) As compared to clients, adjudicating lets lawyers exercise control, play dominant roles, and remain central to the

\(^{270}\) Leher, supra note 90, at 243-50 (proposing five general guidelines to improve decision-making).
\(^{271}\) European Commercial Mediation, supra note 256, at 11.
\(^{272}\) Id.
\(^{273}\) Id. These advantages include using confidential caucuses to gather more and better information combating selective perception; defusing strong emotions breaking through partisan perceptions; countering optimistic overconfidence by enhancing realistic forecasts of adjudicatory outcomes enabling better comparisons of them and negotiation proposals; expanding discussion agendas to include business interests muting fixed pie and zero sum assumptions; and helping disputants assess shared interests in controlling resolutions, avoiding loss risks, and saving further transactional costs as ways to confront win-lose biases.
\(^{274}\) Wayne Brazil Hosting Mediations as a Representative of the System of Civil Justice, 22 Ohio St. J. on Disp. Resol. 227, 258.
\(^{275}\) See Abel, supra note 257, at 106.
\(^{277}\) Guthrie, supra note 172, at 160 n.84; Welsh, supra note 168, at 51.
endeavor until external decision-makers act. Lawyers usually prefer leading to following, and adjudicating requires them to lead as they plead claims and defenses, assemble evidence, and present arguments. Clients usually defer to their lawyer’s knowledge and expertise in these realms and focusing interactions on lawyers’ expertise lessens attorneys’ needs to share agendas with their clients.

Lawyers, like all humans, feel most comfortable doing what they know best and resist performing actions that present more challenge and produce less comfort. Change is never easy and it often generates fears of making mistakes and receiving negative judgments. Lawyers must ensure that they do not reject mediation because it changes resolution process dynamics and gives them less control, centrality, leadership, and opportunity to display legal knowledge-based advocacy. Lawyers must also resist inclinations to avoid mediation because it puts them outside their comfort zone by requiring actions that acknowledge and respond to the complicated, interactive emotional dynamics that arise during dispute resolution.

Mediation reduces lawyer control by substituting a less formal consensual process where clients attend and have opportunities to participate substantially, for more rule-bound adjudication approaches where clients often are not present, do not participate unless testifying, and transfer decision-making to judges, arbitrators, or juries. Mediating anticipates larger roles for clients than they play in adjudicating. Mediating typically requires clients to attend, and provides several opportunities for them to talk and listen in joint sessions when all disputants meet together, and in confidential meetings conducted outside the presence of all or some other participants. Mediating gives commercial clients opportunities to hear counterparts’ perspectives directly without distortion from their lawyers, interact directly with counterparts, and make informed comparisons between best mediation options and likely adjudication outcomes.

278 Sternlight, supra note 138, at 339-45.
279 Can We Talk, supra note 19, at 1296.
280 For example, U.S. legal ethical standards divide decision-making authority for the means client objectives are pursued. Model Rules of Prof’l Conduct R. 1.2(a) (2002). Clients are expected normally to “defer to the special knowledge and skill” of their lawyers, “particularly with respect to technical, legal, and technical matters.” Comment 2. Many attorneys interpret this to encompass the decisions needed to manage adjudication.
281 Guthrie, supra note 172 at 166
282 Robert C. Bordone et al., The Next Thirty Years: Directions and Challenges, in Dispute Resolution Handbook, supra note 35, at 507, 511.
283 Marguerite Millhauser, supra note 159, at 190.
284 See Ryan, supra note 276 at 213; notes 308-16 infra and accompanying text.
285 See Gentry, supra note 170, at 142 (quoting Dutch lawyers who say that in typical civil suits in the Netherlands it is thought to be too expensive to have clients testify so absent significant disagreements, attorneys prepare and submit written summaries of client and witness statements).
286 Sternlight, supra note 138, at 339.
While lawyers typically play central, often leading, roles in the managed discourse that comprises effective mediating, their actions occur in the presence of and in collaboration with representatives of their commercial clients and their counterparts. For example, their analysis of case strengths, weaknesses, and outcome forecasts are typically discussed confidentially yet in their client’s presence. Because this presents risks of surfacing evidence gathering and evaluation errors, it often encourages more preparation by lawyers than face-to-face negotiations generate. In addition, mediation lessens lawyer’s law-based expertise by integrating consideration of non-monetary and other interests outside legal frames, de-emphasizing determinations about applicable law, and seeking outcomes parties can live with considering costs, benefits, and risks. Mediating generates information for making cost-benefit assessments that commercial clients typically make in other facets of their business operations. Finally, mediating challenges lawyers to navigate emotional dynamics skillfully, managing themselves in the midst of emotional stress while conducting effective professional interactions with others who are often strongly influenced by emotions.

Discussing mediation as a pre-adjudication option counters brain-based and cultural biases and helps lawyers approach the challenging tasks that mediating encompasses. Demonstrating that dispute contexts contain more solution-relevant information than legal analysis identifies, mediating combats selective perception. For example, determining whether to mediate requires identifying and assessing whether significant actual or potential commercial relationships or other business interests exist. Doing this encourages evaluating the importance clients place on publicity, confidentiality, and obtaining relief that adjudication cannot provide such as apologies, modified relations, expedited compliances, licensing agreements, equipment sharing arrangements, barter arrangements, bid invitations, and future references. Doing this also emulates efforts mediators make to shift focus from the parties and their inclinations to maximize gain against each other to solving together the commercial problems disputes present.

Mediating combats fixed pie and zero sum biases by expanding resolution agendas to include these and other types of business and non-monetary interests. Unlike similarly-valued adjudicatory options producing win-lose, everything one gains others lose outcomes; commercial

287 Riskin & Welsh, supra note 14, at 875 (noting lawyers tend to dominate discussions during court-connected mediations of ordinary non-criminal, non-family disputes in the United States).
289 See Alexander, supra note 238, at 356-57.
291 Ryan, supra note 276, at 210.
292 Screening Device Determines ADR Suitability, 15 Alternatives to High Cost Litig. 7 (1997) (hereafter Suitability Screening Device).
293 Id. at 8.
294 Mediation in Latin America, supra note 2, at 418.
actors probably value business and non-monetary interests differently, and prioritize them in non-identical ways.\textsuperscript{295} These differently valued and prioritized possibilities generate value-creating agreement opportunities by trading relatively lesser for relatively more valued options.\textsuperscript{296} Mediating also provides opportunities to broaden understandings of how counterparts view disputes, business interests, potential trades, and the impacts that these perspectives have on monetary remedies that are or might be asserted in adjudication.\textsuperscript{297}

Many commercial disputes present situations where considerations external to the monetary claims framed by adjudication primarily drive decisions.\textsuperscript{298} Even when assessing just win-lose outcomes on legal claims involving money damages, however, mediating helps lawyers and their commercial clients realize that they lack perfect information upon which to base their case analyses and outcome forecasts.\textsuperscript{299} Effective lawyers understand that they do not know or understand everything relevant to analyzing and forecasting adjudication outcomes.\textsuperscript{300} They also know that selective and partisan perception lessens their analytic objectivity and increases risks of biased predictions.\textsuperscript{301} Mediating creates balanced opportunities for commercial disputants and their lawyers to speak to and learn from each other privately about factors on which case analyses and outcome forecasts are based with assurance that what they say and do will not appear in court testimony or the media.\textsuperscript{302}

An additional layer of confidential caucusing allows private meetings with mediators and frequently generates information that would never appear in adjudication but which often proves crucial to resolutions.\textsuperscript{303} Confidential caucuses overcome major resolution barriers that flow from strategic approaches to communication generated by adjudicating.\textsuperscript{304} Arising from win-

\begin{attribution}
\textsuperscript{295} Expanding resolution agendas to include these specific types of commercial interests encourage trading, the most common approach to creating value in mediation. Don Peters, When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal, 2007 J. Disp. Resol. 119, 134-35, 137.
\textsuperscript{296} Id.
\textsuperscript{297} An analysis of many years of surveys regarding court-connected mediation in the United States Federal Court for the Northern District of California showed that 62% of lawyers believed mediation had helped parties indentify their underlying interests, needs, and priorities beyond their legal positions. Brazil, supra note 274, at 253.
\textsuperscript{298} Id. at 233 Mediating allows disputants to learn that they are better off if they focus virtually all solution-seeking activities on underlying interests, non-monetary values, and longer-range visions. Id.
\textsuperscript{299} Sternlight, supra note 138, at 299. This may challenge some Latin American lawyers who may not have much experience in their litigation systems with developing information regarding their counterparts’ case. See Cavise, supra note 236, at 806.
\textsuperscript{300} Brazil, supra note 273, at 232.
\textsuperscript{301} Id.
\textsuperscript{302} European Commercial Mediation in Europe, supra note 256, at 14. This privacy protection is typically outlined in agreements to mediate and reinforced by legal rules supporting the confidentiality of mediation generally. Id.
\textsuperscript{303} Id. In a survey of federal mediation in the Northern District of California, thirty-one percent of litigators reported that mediation explored resolutions beyond that which courts could order, and thirty-eight percent said that mediation had clarified, narrowed, or eliminated issues. Brazil, supra note 274, at 253.
\textsuperscript{304} Sternlight, supra note 138, at 335-36. In the California federal district court study, 21 percent of litigants and 22% of their lawyers reported that they had bridged a communication gape during the mediation. Brazil, supra note 273 at 252.
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lose and loss aversion biases, commercial disputants are reluctant to disclose private information not known to counterparts in order to maximize their gain, increase their leverage, and avoid creating potential leverage against them. With permission, and after disputants have had opportunities to share their perspectives, concerns, and analyses, mediators frequently use this hoarded but often agreement-useful information in indirect, disguised ways by offering hypothetical possibilities or making suggestions.

These enhanced communication channels that are possible in mediation but not in adjudication help commercial decision-makers move their understanding beyond selective perception by becoming more familiar with and realistic regarding dispute facts, case analyses, and outcome forecasts. They help commercial disputants avoid negotiation errors stemming from missing or misunderstanding important facts, legal rules, possible agreement terms, and adjudicatory outcome components.

Mediating often defuses hostility between disputants and combats the distortions caused by partisan perception and biased attribution. Remembering this may help lawyers manage their discomfort with dealing with the fluid emotional dynamics that mediated negotiations often reveal. Negative, hostile emotions influence behaviors, divert attention from resolution, and damage relationships. Positive emotions promote satisfying substantive interests, enhance relationships, and reduce exploitation fears.

Effective mediators seek to establish and maintain positive emotional climates conducive to constructive communication. They frequently respond to core emotional concerns by expressing appreciation, building affiliation, respecting autonomy, and acknowledging status.

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306 Hoffman, supra note 207, at 25-26. An American Bar Association Section of Dispute Resolution Task Force conducted 10 focus group discussions in 9 U.S. cities and reviewed more than 100 questionnaire responses to compile a Final Report on Improving Mediation Quality. This Report found that 95% of respondents felt it was essential, very important, or important that mediators make suggestions, and 100% welcomed suggestions regarding possible ways to resolve issues. Final Report of ABA Task Force on Improving Mediation Quality 14 (2008) (hereafter Report on Improving Mediation Quality).
307 Suitability Screening Device, supra note 292, at 7.
308 Brazil, supra note 274, at 239. Mediation discourse promotes two simple suggestions offered to help decision-makers: (1) always entertain competing hypotheses, and (2) continually remind yourself of what you don’t know. Leher, supra note 90, at 247.
309 Suitability Screening Device, supra note 292, at 7 (likelihood that mediator could help defuse hostility between disputants or their lawyers or both is a factor suggesting suitability for mediation).
310 Fisher & Shapiro, supra note 221, at 5, 11-12.
311 Id. at 7-8.
312 See Ryan, supra note 275, at 221. Positive emotions facilitate creative problem solving in negotiation and enhance creativity and rapport. Fisher & Shapiro, supra note 221, at 214-15. Good feelings widen perception and helps people think more flexibility, take in situation’s larger implications, think more in terms of relationship, and connect more dots. Gallagher, supra note 101, at 37.
313 Fisher & Shapiro, supra note 221, at 15-21.
They strive to introduce “light where before there was only heat”314 by acknowledging strong emotions that disputants often express.315 This permits participants to express negative emotions, usually in caucus out of the presence of counterparts.316 Discussing topics triggering strong emotions in private sessions allow full expression without alienating counterparts. These conversations counter biased attribution by disentangling impact from intent.317 They also often generate useful information that clarifies interests and aids careful analysis of the costs and benefits of mediation alternatives.

Mediating commercial cases combats optimistic overconfidence because it typically encompasses frank, mutual analysis of alternatives to agreeing consensually. Comparing what emerges as the best terms achievable during mediating with these alternatives supplies a core component of commercial dispute mediation.318 Effective mediators promote the development of greater information regarding mediation alternatives by discussing, usually in caucuses, strengths, weaknesses, gaps, inconsistencies, and vulnerabilities concerning specific dimensions of anticipated mediation options.319

Because commercial dispute resolution usually occurs in the shadow of adjudicatory alternatives, much of this conversation concerns specific information regarding case analyses and outcome forecasts. Typically occurring after disputants have presented their views, concerns, and opinions fully, these conversations often begin with discussions of analytic strengths and bases of favorable predictions.320 Listening carefully, mediators can convert this information to questions to ask counterparts regarding potential vulnerabilities and weaknesses in their legal positions and outcome forecasts.

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314 European Commercial Mediation, supra note 256, at 15.
315 Acknowledging feelings is usually a pre-requisite to problem-solving. Difficult Conversations, supra note 115, at 106. Neutral, non-judgmental statements that communicate that listeners hear and understand emotions supply the most effective way to acknowledge feelings. David Binder, et al., supra note 182, at 52-61. Doing this signals that speakers’ and their emotions matter. Difficult Conversations, supra note 117, at 106.
316 Golann & Folberg, supra note 6, at 195 (sometimes simply allowing disputants to vent their feelings privately is enough to clear the air); Amy L. Lieberman, The A List of Emotions in Mediation: From Anxiety to Agreement, 61 Disp. Resol. J. 46, 48 (2006) (acknowledging strong feels tends to “take some of the juice out of them”).
317 Russell Korobkin, Psychological Impediments to Mediation Success: Theory and Practice, 21 Ohio St. J. on Disp. Resol. 281, 304-08 (2006) (hereafter Psychological Impediments to Mediating) (describing interventions mediations make to help disputants combat attribution errors); see Difficult Conversations, supra note 117, at 44, 53-55 (arguing intentions strongly influence judgments humans make of others, and judges others more harshly if they intended to harm than if they did so for other reasons).
318 Brazil, supra note 274, at 239.
319 Korobkin, supra note 111, at 69.
320 Ninety-five percent of respondents indicated that mediators’ reviewing case strengths and weaknesses is helpful in half or more of the cases they mediated. Report on Improving Mediation Quality, supra note 306, at 14.
Mediators then tactfully phrase and respectfully ask these questions. Responding to these inquiries permits counterparts to learn and assess these contrasting perspectives. Using questions rather than statements allows mediators to encourage lawyers to articulate responses to inquiries about potential gaps, inconsistencies, and problems. This dialogue allows commercial clients to hear pros and cons of adjudicatory analyses and predictions discussed in non-adversarial, information-oriented rather than persuasion-focused, settings. These discussions often help clients understand why and how they need to adjust their views of adjudicatory outcomes and form more realistic expectations regarding settlement possibilities and proposals.

Finally, mediating counters the perceptual and legal cultural, win-lose biases that influence the strategic ways lawyers typically negotiate money-based issues. Most commercial disputes involve at least some negotiating over money and mediators add considerable value by helping participants deal with optimistically overconfident case analyses and the negative emotions that positional bargaining between differing perspectives frequently generates. Mediating dampens the use and effects of ineffective but common negotiating tactics like unwarranted threats, dangerous bluffs, and premature “final offers.”

Money-based negotiating typically involves multiple rounds of offers and responses as participants move through their negotiation ranges. Attempts to maximize gain and avoid loss influence tendencies to start negotiating with extreme demands reflected in high or low ball offers, often considerably above or below adjudication forecasts, and to stop bargaining before reaching their best numbers. Using skilled listening, questioning, and confidential caucusing, mediators help everyone deal with negative emotions generated by biased attributions that perceive evaluation differences as criticism and strategic negotiating actions as disrespect. They also help participants deal with the escalating impatience and frustration that accompanies

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321 Ninety-five percent of respondents reported that mediators’ asking pointed questions that raised issues is helpful in half or more of the cases which they mediated. Id.
322 Korobkin, supra note 111, at 69. Participating in this discourse might challenge Latin American lawyers who are not accustomed to having real control over the presentation and development of investigation and trial of matters. See Cavise, supra note 237, at 790.
324 Brazil, supra note 274, at 232. Gaining clearer understandings of the strengths of each other’s claims often narrows gaps between disputants’ outcome forecasts and encourages settlement. Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 Mich. L. Rev. 107, 128 n.86 (1994).
325 Id. at 233; Little, supra note 305, at 85-109.
326 Freund, supra note 290, at 363.
327 Little, supra note 305, at 25-28; see J. Michael Keating, Mediating in the Dance for Dollars, 14 Alternatives to High Cost Litig. 102, 103 (1996).
328 Little, supra note 305, at 128-29
329 Id. at 30-31.
330 Id. at 86-89.
grudging efforts to move to midpoints between opening proposals. Analyzing and evaluating
close claims is not easy, and mediating helps lawyers avoid false negotiation failures during this
process resulting from guessing incorrectly about what they can achieve, posturing too long,
hiding real top or bottom limits too tenaciously, and concluding further movement cannot be
made without unacceptable face loss.\(^{331}\)

Although disputants’ best numbers usually do not overlap, mediating helps many
commercial disputants find ways to bridge the smaller gaps that usually appear once extensive
negotiating identifies viable ranges.\(^{332}\) Carefully examining estimates regarding all transactional
costs of pursuing adjudicatory alternatives, including attorneys fees, court costs, business
disruption expenses, lost commercial opportunities, time estimates, collection probabilities, and
appellate risks, often helps bridge these gaps.\(^{333}\) So does analyzing shared interests in ending
disputes, avoiding loss risks, and maximizing independent business interests. Mediating helps
commercial clients assess carefully whether adjudicating is really necessary and cost beneficial
to achieve vindication, secure company reputations, reduce the incidence of future similar or
related claims, or obtain decisive legal precedent.\(^{334}\) Even if agreement does not result, mediating
often increases mutual understanding, resolves many issues, and narrows the focus for going
forward with either adjudication or later mediation reconvened with different participants.\(^{335}\)

Globalization, regional economic integration, and increased business activity within the
United States and Latin America amplify needs to resolve commercial disputes with greater
efficiency. Lawyers in these countries need to develop heightened awareness of adjudication
alternatives and the promise they hold to create mutually satisfactory, business interest based
resolutions. Pre- or early-adjudication mediation, while not a panacea, supplies a valuable tool
that enhances efficient commercial dispute resolution when used more often by lawyers and their
business clients.

Mediating builds on to rather than ignores existing lawyer skills needed to analyze fact
situations, discern applicable law, and estimate adjudicatory outcomes.\(^{336}\) Mediating gives
lawyers important roles in helping their commercial clients develop, compare, and then choose
between accepting the best settlement option obtainable or initiating or continuing

\(^{331}\) Brazil, supra note 274, at 239-40.
\(^{332}\) Little, supra note 305, at 190-92. Ninety-eight percent of respondents viewed persistence as an essential, very
important or important quality in mediators and 93% identified patience in the same way. Report on Improving
Mediation Quality, supra note 306, at 17. They expressed “dissatisfaction with mediators who threw in the towel
when negotiations became difficult.” Id.
\(^{333}\) Can We Talk, supra note 19 at 1284-86.
\(^{334}\) Suitability Screening Device, supra note 292, at 8. Obtaining a precedent may not be as important in Latin
American countries where the value of case precedent may be either non-existent or limited. See Cavise, supra note
237, at 794.
\(^{335}\) European Commercial Mediation, supra note 256, at 22.
\(^{336}\) See Guthrie, supra note 172, at 180; Welsh, supra note 169, at 52.
adjudication. Mediating also lets lawyers satisfy human impulses for resolution, healing individuals and organizations, and enabling commerce to function more harmoniously and productively.

Humans are profoundly social beings constantly influencing and being influenced by each other. Small scale activities by a few individuals can generate contagious behaviors that cross a tipping point and produce dramatic, immediate changes in social practices. The tipping point for commercial dispute mediation probably occurs when mediating happens so commonly that it becomes the regular option, the default preference unless particular circumstances suggest otherwise. As this analysis demonstrates, lawyers’ resistance to mediating commercial disputes has not approached such a tipping point. But if more lawyers identified and surmounted the barriers generating their resistance to mediate, use of this beneficial adjudicatory alternative might approach or even cross this tipping point. Shall we mediate, or tango, or both?

We Need More Diversity In Mediation

Law360, New York (March 15, 2013, 12:22 PM ET) -- Imagine two parties locked in a bitter and acrimonious dispute that has gone through six years of hotly contested litigation. Claims of contract and fiduciary breach, unjust enrichment, waste and fraud have been hurled back and forth. At issue are the ownership and control of at least a dozen New York commercial and residential properties valued in the tens of millions of dollars. There have been multiple appearances, depositions, motions, referrals to referees for hearings and the prospect of more of the same, both scheduled and unscheduled, ad infinitum.

The litigants in this case were associated for nearly 40 years and had built up this large real estate enterprise from scratch. Unfortunately, they had a major and seemingly irreparable falling-out. They were now perfectly willing to do legal battle until the last man was left standing. One of the litigants was a Latino immigrant, who felt deeply wronged by his former partner. While he was somewhat fluent in English, he often drifted into Spanish when he fumed with his attorney who was minimally conversant in that language. They were no closer to resolving this case than they had been at its commencement.

It is an axiom of mediation that emotional forces can disrupt communication and produce nonproductive, if not outright irrational, decision-making. Apparently, that was what was happening in this case. Although the broad outlines of the settlement should have been apparent to both sides for a long time, what was missing was the ability of a mediator to get beyond the parties’ and, in particular, the Latino litigant’s huge emotional investment. Luckily, this case recently settled with the assistance of a mediator who was Latino and fluent in Spanish.

What altered the negotiations was that the mediator almost always spoke in Spanish with this litigant and always listened very carefully to what he said and to what he did not say. Indeed, it has been said in the mediation context that “people can’t really listen until they’ve been heard.” It took conversing with this litigant in his primary language, hearing and empathizing with his struggle to come to America, settle here and build this enterprise — and not merely poring over contracts, ledgers, mortgages and deeds — to allow him to feel that he “had been heard.”

At first small talk and then more in depth conversations about extraneous matters such as family, politics, holidays, even Latin cuisine, became critical in gaining the trust necessary for this tough businessman to see the mediator as a truly neutral deal broker who could help resolve this litigation, which involved his life’s work and had completely consumed him. The cultural connection between the mediator and the litigant positively affected the litigant’s confidence that his views were being understood and respected, and this allowed him to eventually agree to a compromise with his former business partner. This settlement, however, would be a rarity in today’s world of alternative dispute resolution because of the scarcity of Latino ADR practitioners in the United States.
Familiarity with cultural nuances, fluency in a language and diverse life experiences can be tremendously beneficial in the resolution of a dispute. A mediator or arbitrator who has these qualities may be much better suited to facilitate the disposition of a case precisely because so much of what drives litigation has to do with hidden agendas and personal idiosyncrasies that a culturally attuned ADR practitioner would be in a much better position to identify, comprehend and address. It has been said that “[a] mediator’s ability to navigate the cultural differences across disputing parties is paramount for success of dispute resolution … cultural competence is an essential skill in a mediator’s tool-kit … . Cultural competence is a central skill a mediator must master.”

Unfortunately, even as the United States becomes more and more diverse, there is a dearth of professional mediators from minority backgrounds.

Anecdotally, the evidence is very strong that among the thousands of mediators and arbitrators selected to resolve disputes every year, it is rare that a minority ADR practitioner is chosen.

Corporations, on the other hand, have long recognized the benefits of diversity in the workplace. Justice Sandra Day O’Connor noted the same when she cited General Motors' amicus brief in her majority opinion in Grutter v. Bollinger for the proposition that, “[T]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s marketplace can only be developed through exposure to widely diverse people, cultural ideas and viewpoints.”

Indeed, a recent report by Forbes Insights based on a survey of 321 executives of large global enterprises with annual revenue of more than $500 million dollars found, among other things, that, “Diversity is a key driver of innovation and is a critical component of being successful on a global scale.” Notably, corporate law departments have significantly outpaced major law firms in the area of diversity. The rate of lawyers of color becoming general counsel is significantly greater than that of minority attorneys achieving partnership in major law firms.

Ironically, although large corporations have seen the value in diversifying their workforces, management and law departments, when these same corporations are considering or actually engage in litigation, their selection of diverse neutrals to mediate these disputes is often hampered by the lack of minority ADR practitioners. Like the lack of women ADR practitioners, this phenomenon is mainly attributable to what has been called both “supply side and demand side obstacles.”

In the United States, most ADR practitioners come from the ranks of the judiciary or the senior levels of law firm practices. Since minorities are underrepresented in both of these forums, a supply-side or “pipeline” problem exists for the development of minority neutrals. Indeed, the diversity picture at New York City law firms, for example, is “stagnating,” which only serves to lessen the potential number of minority neutrals coming through the ADR pipeline in New York City.

Compounding this problem of limited supply is the problem of demand. Neutrals are hired based on the consent of the parties to a dispute. Law firms that retain neutrals tend to hire neutrals with whom they are familiar from prior engagements. Since minority neutrals are few and far between, they are much less likely to have been previously retained. Consequently, the demand for their selection is much less. The same supply-side and demand-side problems tend to exist for women in ADR.

These problems in the development and retention of minority neutrals exist even as the United States population grows more and more diverse. For example, more than half the growth of the total population of the United States between 2000 and 2010 was due to the increase in the Hispanic population, and that population itself grew by 43 percent. The number of Latino ADR practitioners has not kept anywhere near pace with this growth.
We live in an increasingly interconnected global marketplace and United States corporations doing business nationally and internationally could well profit by engaging ADR practitioners who are familiar with these diverse cultures.

Corporations have recognized the value of diversity in their workforces and legal departments. Would they add value to their litigation efforts by selecting minority ADR practitioners? All the evidence tends to point in that direction.

--By Hon. Ariel E. Belen, JAMS

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MEDIATION IN LATIN AMERICA 2002

Diana C. Droulers*

This article gives a brief overview of Mediation in Latin America, and provides basic information of countries in the region. To be able to understand why mediation works as it does in our part of the world, we must first refer to the particular conditions of our legal systems. We are civil law countries where the tendency is to have regulations on everything and the general belief is “if it is not permitted in some sort of law, it may not be done.” This belief has brought upon us formal and rigid laws that are hard to change. As mediation has developed in the world in general, so has it in Latin America. We won’t venture to explain the causes of it’s development, but certainly the fact that our traditional court systems are now inefficient as problem solving institutions for our people is a determining factor.

MEDIATION OR CONCILIATION

Both terms have been used in our countries with the same or different meanings depending on the country. One standard commonly used to differentiate them is that conciliation is the term used when the parties try and find a solution to a problem with a public servant serving as the conciliator, be it a judge or an administrative authority. The same procedure would be called mediation if it takes place with the assistance of a private neutral. Other countries have simply adopted the term conciliation without making the difference as to who acts as the third neutral. Still in others the only term used is mediation. Some countries have Laws that simply don’t make the difference and use both terms as the same.

We have found that it is impossible to make a clear and definite distinction between the terms that would be useful when analyzing the general situation of Mediation in Latin America. The fact that different names are given to what in essence is the same, a third neutral helping the parties reach an agreement, derives in much confusion and so for practical reasons we will refer throughout this article to both without making definite the distinction. There may be as many definitions of both terms as there are authors on the subject. We will include both mediation and conciliation.

JUSTICE ADMINISTRATION AND MEDIATION

The relationship between the system of Justice Administration and Institutional Mediation must be examined depending on their inter-connection:

a) Independent Mediation: Mediation programs that are completely independent of the Courts. They arise from community efforts, promoting the use of mediation instead of the traditional use of litigation. This is where Commercial Mediation tends to take place due to the creation of Mediation and Arbitration Centers in the Chambers of Commerce throughout the Continent.
b) Mediation within the Courts: These are Centers that are dedicated to working with the judges, who refer the cases that they think could be adequately solved in mediation. This is what is called Court Appointed Mediations.

c) Mediation dependent on the Courts: A third neutral is appointed by the court to act as a mediator. Should the parties not reach an agreement, the procedure will continue within the court.

CONSTITUTIONAL REGULATION

Bolivia Constitution of 1967, reformed in 1995, Article 116
Brazil Constitution of 1988, Article 112 and 116
Chile Constitution of 1980, Article 73
Colombia Constitution of 1991, Article 116
Ecuador Constitution of 1998, Article 118
Nicaragua Constitution of 1986, Article 166
Mexico Constitution of 1917, Articles 103 and 107
Paraguay Constitution of 1992, Article
Peru Constitution of 1993, Article 139
Uruguay Constitution of 1966, Article 247, 248 and 249
Venezuela Constitution of 1999, Articles 253 and 258

SPECIAL LAWS

Some countries have regulated mediation and conciliation directly in special Laws, and in some cases even as Laws that regulate arbitration and mediation or conciliation in one legal instrument. Other countries have adapted their procedural laws to include arbitration and mediation. This method seems to have caused less confusion in the sense that there is no doubt as to current legal statutes.

Argentina has the Law 24.573 of Mediation and Conciliation. Bolivia passed the Law of Arbitration and Conciliation (Law 1770) in 1997. Colombia started regulating conciliation and arbitration in the Decree 2279 of 1989, followed by the decree 2651 of 1991 and the Law 23 of that same year. In 1996 Congress approved the Law 270, also referred to as the
Law of Justice Administration. In 1998, it was decided that in an effort to facilitate the use of AMDR, it would be easier to have one legal instrument that condensed the previous Laws and Decrees in chronological order and include only the articles that referred to arbitration and conciliation, so the Law Number 446 was approved. Ecuador has the Law of Arbitration and Mediation of 1997. Guatemala passed the Arbitration Law in 1995 and Panama Decree Law Number 5 of 1999. The National Assembly in Venezuela has the proposed Mediation Law in line for discussion as of July of 2001.

SCOPE OF MEDIATION

Generally speaking, submission of affairs to mediation is limited to certain subjects. Under most Laws, all disputes arising from subjects where the parties are allowed to make settlements could be mediated. This excludes matters concerning public policy, functions of state, and often only if previously allowed by special laws or in court appointed mediations is it possible to settle family or labor disputes.

THE AGREEMENT TO MEDIATE

Mediation, by essence, is a free decision on the parties’ behalf. There are no requirements as to the form of the agreement to mediate. It is a common principle to all our countries that parties may not be forced to mediate, and as a completely voluntary decision the parties may or may not accept to mediate. Agreements to mediate are not binding. In court appointed mediations, and in systems where mediation is mandatory under certain rules, the parties may be forced to be present at a mediation session but not to participate in it and much less to reach an agreement.

ENFORCEABILITY OF MEDIATION AGREEMENTS

By mediation agreement we mean the agreement that is signed by the parties and the mediator at the end of a mediation. The frequent question as to the effects of mediation agreements seems to be if indeed it has the same effects as an arbitration award or a judicial sentence. When promoting the figure, most clients want to know the possibilities of enforcing the agreement. Although enforcing it in the same manner as any other written contract is the trend that has been followed in some countries, others have found that in order to sell mediation there has been the necessity to give the agreement the same characteristics as the arbitration awards. Thus the incorporation of articles regulating this issue in the laws of Bolivia, Chile, Colombia, Ecuador, and Peru. In these the mediation agreements are "Res judicata" (considered a definitive judgment). Mexico does not have rules for enforcement of mediation clauses or resolutions issued by mediators. If the parties agree on a settlement, within the mediation procedure, they can execute a settlement agreement, which will be enforced before Mexican courts.

CONCLUSIONS

Mediation in Latin America has started to be used in many fields. There is obviously an interest of the business community in the development of these new methods. We are continually searching for ways in which to modernize our countries, and a great part of that
is creating the appropriate climate for investors. It is very difficult to sum up the work that is being done in the Latin American countries because although we all speak the same language, we seem to have very different approaches to the same problems.

The use of mandatory mediation has brought more problems than solutions. Many countries were not prepared for the avalanche of mediations, and so did not have the resources, human or material, to comply with the approved Laws. They also found that it went against the basic principal of voluntary mediation and this further confused the users.

The incorporation of mediation meant a cultural change in our way of managing conflict and confrontation. This essentially means a search for pacific solutions that requires the use of methods such as marketing, education, and sensitization, in order to be successful. It is not enough to have laws that promote the use of mediation if we don’t have the right social environment to set them in motion. This includes the constant independent evaluation and interchange of ideas and the possibility of controlling through the proper methods of collecting information that can be processed and confirmed.