“Yes we can,” a positive orientation toward humans’ abilities to solve problems consensually, captures mediation’s approach to dispute resolving and deal-making. Best understood as assisted and enhanced negotiation, mediation permits confidential talking that is directed toward constructive communication. Practiced for centuries, and found in most of the world’s cultures, mediation provides a simple, relatively procedure-free process allowing people to negotiate in the presence, and with the assistance, of third persons. Mediators help participants better understand each other, frame problems in ways that transcend partisan perceptions, explore independent and shared interests, and develop solutions that promote mutual

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1 See, e.g., Dwight Golann & Jay Folberg, Mediation: The Roles of Advocate and Neutral 95 (2006) (mediation is “a process of assisted negotiation in which a neutral person helps people reach agreement”); Carrie J. Menkel-Meadow, Lela Porter Love, Andrea Kupfer Schneider, & Jean M. Sternlight, Dispute Resolution: Beyond the Adversarial Model 266 (2005) (mediation is “a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship”); E. Wendy Trachte-Huber & Stephen K. Huber, Mediation and Negotiation: Reaching Agreement in Law and Business 281 (2d ed. 2007) (mediation is “facilitated negotiation, assisted negotiation, and moderated negotiation”).

2 Virtually all societies have created third party intervention to help resolve disputes consensually. See, e.g., David W. Augsburger, Conflict Mediation Across Cultures: Pathways and Patterns 191 (1992) (the experience of mediation is universal); John Paul Lederach, Preparing for Peace: Conflict Transformation Across Cultures 93 (1995) (mediation has universal facets and performs multiple functions in all cultures); Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 20 (2d ed. 1996) (mediation has a long and varied history in almost all of the world’s cultures”).

3 See Eileen Carroll & Karl J. Mackie, International Mediation: The Art of Business Diplomacy 3-4 (2d ed. 2006) (hereafter International Mediation) (mediation has an ancient history but is still relatively new as a practical, professional dispute resolution approach); Global Trends in Mediation 1 (Nadia Alexander ed., 2d ed. 1006); (mediation is new in its emergence in the legal and commercial dispute resolution arena and old in its timeless universality).
gain. Unlike arbitrators and judges, mediators do not make binding decisions. Instead, they help participants develop agreements, and stimulate disputants to make better, often more mutually rewarding solutions. Mediation often produces outcomes that exceed the narrower, win-lose legal remedies with which arbitrators and judges work.

For these and other reasons, many commercial lawyers and scholars encourage extensive use of mediation to resolve private transborder commercial disputes. Transborder litigation of private commercial disputes adds enormous difficulties, complexities, and inefficiencies to resolving disputes flexibly, quickly, and inexpensively; the objectives most businesses value.

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5 Carrie J. Menkel-Meadow, et al., supra note 1, at 267 (self-determination by the parties is a “central feature of mediation” and makes it “fundamentally different from adjudication” where power to determine outcomes is given to a judge or arbitrator).
6 Id. at 270 (mediators help parties craft proposals that respond to and satisfy at least some of every participant’s needs).
7 Id. at 270. For example, mediation of commercial disputes can encourage parties to “agree that they will enter into future contracts that take account of past wrong and offer profit for all, instead of the more conventional money damages.” Id. They can include potentially valuable agreements to communicate in certain ways, write reference letters, apologize, and refrain from specified conduct, remedial avenues typically not available in arbitration or litigation. Id, at 170-71.
10 Walter G. Gans, supra note 8, at 52.
Faced with these daunting realities, lawyers and business decision-makers usually turn elsewhere to resolve differences that cannot be resolved by private negotiation. The dispute resolution option they choose most frequently is arbitration, the adjudicatory alternative which, like litigation, relies on outsiders to decide. Arbitration has emerged as the preferred dispute resolution method in contemporary transborder border disputes even as its use has diminished in domestic American commercial disagreements.

This article investigates reasons why businesses do not use mediation more frequently to resolve private transborder commercial disputes. After analyzing common barriers to selecting mediation within and between private businesses in transborder contexts, the article suggests several approaches that can help disputants overcome these obstacles.

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11 No data was found indicating the number of private transborder commercial disputes that are successfully negotiated by either the business personnel involved alone or in tandem with their in-house or externally retained counsel. Research and experience suggests that negotiation is the most common process used to resolve disputes in the United States. Data suggests that lawsuits are filed in just over 10% of the disputes involving individuals and more than $1,000, meaning 90% of these situations are resolved without formal invocation of the judicial process. David M. Trubek, et al. The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 86 (1983). A recent survey of litigation in the United States federal courts showed that the percentage of cases going to trial have dropped sharply in the past forty years despite substantial increases in many other relevant factors including the number of lawyers, the number of lawsuits filed, and the amount of published legal authority. John Lande, ‘The Vanishing Trial’ Report: An Alternative View of the Data, 10 Dispute Resolution Magazine 19 (2004). This Report showed that the civil trial rate in federal courts dropped steadily from 11.5% of filed cases going to trial in 1962 to 1.8% in 2002. Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts (2004), available online at http://www.abanet.org/litigation/vanishingtrial. Most of these filed disputes that do not reach trial are settled through negotiation and mediation, or abandoned. See Don Peters, Forever Jung: Psychological Type Theory, The Myers-Briggs Type Indicator and Learning Negotiation, 42 Drake L. Rev. 1, 2 fn.2 (1993); Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating 341 (1990); Rex R. Perschbacher, Regulating Lawyers’ Negotiations, 27 Ariz. L. Rev. 75 n.2 (1985).

12 See, e.g., John W. Cooley and Steven Lubet, Arbitration Advocacy 4 (1997); Kimberlee K. Kovach, supra note 4, at 7; Christopher W. Moore, supra note 2, at 9; Andrew Sagaratz, Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going To Court, 13 Ohio St. J. on Disp. Resol. 675, 692 (1998).

13 See, e.g., Harold I. Abramson, supra note 8, at 323; Steven K. Anderson, supra note 8 at 56; Alexandra Bowen, supra note 8, at 60; Walter G. Gans, supra note 8, at 54.

A. Common Barriers to Mediating Private Transborder Disputes

Deciding which dispute resolution process to use is one of the most important steps in resolving transborder conflicts efficiently and effectively. This decision is typically made by business executives in consultation with their in-house and external lawyers. Persons acting in all of these roles confront, often unknowingly, common cognitive and cultural barriers that impede them from considering, recommending, and using mediation as an important step toward resolving disputes, and doing this before ceding outcome control to arbitrators. These barriers undoubtedly contribute to failures to use mediation in transborder disputes in which it is arguably appropriate. This article analyzes the most important of these barriers and then suggests ways to overcome them.

1. Cognitive barriers

Although business executives and lawyers undoubtedly believe that their decisions regarding which dispute resolution process to use are reasoned, objective, and rational, substantial evidence suggests their beliefs are not necessarily accurate. Psychologists demonstrate that many cognitive, social, and emotional forces frequently distort rational decision-making. Persons making complex decisions, such as considering and pursuing resolution methods, frequently use intuitive approaches and mental shortcuts to reduce the

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complexity and effort involved in reasoning about and deciding these questions. These intuitive approaches and mental shortcuts involve automatic, subconscious processes that are difficult to counter. They manifest the Paleolithic minds of humans in today’s post-modern age. They also exercise substantial influence if, as scholars contend, human thought is primarily unconscious, and that most human thinking occurs outside conscious awareness and control.

All cognitive and behavioral activity regarding choosing and implementing a dispute resolution process starts with perception of details and meanings in situations and contexts, and basing reasoning and decisions on conclusions derived from these perceptions. As a way to manage the overwhelming stimuli their brains receive, humans perceive selectively by noticing and emphasizing some things and ignoring others. Access to different information and past

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21 Richard Birke & Craig R. Fox, supra note 18, at 3-4. These approaches and short cuts do not result from arbitrary or random action choices but rather reflect hard-wired mental predispositions. Robert Adler, supra note 19, at 687-89.
22 Douglas H. Yarn & Gregory Todd Jones, In Our Bones (Or Brains): Behavioral Biology, in The Negotiator’s Fieldbook, supra note 73, at 283, 284. These intuitive biases and mental short cuts are “so deeply engrained that they undoubtedly have an evolutionary basis.” Robert S. Adler, supra note 19, at 692. Human behavior, at its most fundamental level, is a biological phenomenon. Douglas H. Yarn & Gregory Todd Jones, supra at 284. This means that “ultimately, all theories about human behavior are theories about the brain—an organ operating on physical principles that receives stimuli, makes computations, and directs behavioral outputs. Far from being an all-purpose computer or blank slate, the brain has been shaped over millions of years by evolutionary forces producing a species-typical brain that produces species-typical behavioral outputs in response to various stimuli.” Id. Professors Yarn and Jones argue that “behavior that seems irrational in a present environment may be perfectly rational when considered in the context of” a physical and social environment when the challenges primarily were food choice, predator avoidance, and mate selection. Id.
23 Wendell Jones and Scott H. Hughes, Complexity, Conflict Resolution, and How the Mind Works, 20 Conflict Res. Q 485, 487 (2003) (arguing that discoveries in the past 30 years in physics, microbiology, the neurosciences, cognitive psychology, and linguistics have profound implications for how humans create reality from our sensory experiences should view interaction and conflict).
24 Id. These scholars argue that as humans perceive and respond, their minds are “constantly making and remaking neural connections. Sensorimotor experiences generate and stimulate neural structures that interact and respond in complex ways with” human brains and all their subsystems. Id. They then conclude that no disembodied logic exists that humans can exercise separate from the embedded neural activities of their brains. Id
25 See Don Peters, supra note 11, at 13.
27 Id. at 344. As humans proceed through life, the amount of information in terms of sights, sounds, facts, and feelings available in single encounter encounters is so overwhelming that they necessarily notice some things and ignore others. Douglas Stone, Bruce Patton, & Sheila Heen, Difficult Conversations: How to Discuss What Matters
experiences strongly influences this selective perception. This human tendency means that business persons from different parts of the same organization often see dispute contexts, situations, and objectives differently, and these differences may influence discussions and decisions about how to resolve transborder disagreements. In addition, inside and outside counsel also perceive these same dispute contexts and situations selectively and differently.

Adding disputing and conflicting dynamics also influences how humans perceive, and move biasing affects from merely selective to partisan. As disputes emerge and grow, emotions escalate. Many, if not most, transborder business disputes engender strong emotions.

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30 See Sheila Heen & Douglas Stone, supra note 26, at 344 (noting that “in any organization, where you sit determines what you sit determines what you see”).

31 See Inside the Corporation: Involving Business Managers in ADR, 16 Alternatives to the High Costs of Litigation, 151, 156 (November 1998) (hereafter Involving Business Managers). Turf problems are common in large business organizations where managers involved in the dispute often don’t want someone looking over their shoulders, telling them what to do, or examining what happened to see if a mistake had been made.” Id.

32 See Craig A. McEwen, supra note 16, at 7-8, 27. The long-term relationships inside counsel have with their clients allow them to think broadly about dispute management policies, and lessen concerns about malpractice exposure for recommending settlement before acquiring total information. Id. at 27. Outside lawyers, on the other hand, are often engaged on case-by-case arrangements and this encourages them to focus on specific disputes and urge caution regarding settlements. Id.


35 Sheila Heen & Douglas Stone, supra note 26, at 345. Disputing usually triggers emotions, and they affect brain perceptual processing by creating chemicals like adrenaline, cortisol, dopamine, serotonin, norepinephrine, and oxytocin. Id.; Stephen Johnson, Mind Wide Open: Your Brain and the Neuroscience of Everyday Life 150-57 (2004). When strong emotions are in play, perception is slowed, subtleties and specifics are missed, and the memories retained are much cruder and contain less complexity and specificity. Sheila Heen & Douglas Stone, supra at 345.
within the companies involved.36 When a critical mass of strong emotions such as
disappointment, distrust, frustration and anger emerge, companies typically reach consider
dispute resolution options.37

Humans generally find it extremely hard to distance themselves from their idiosyncratic
roles sufficiently to view the disputes in which they are involved objectively.38 Partisan
perception encourages humans to accept their beliefs and analyses as accurate,39 seek out
information that supports these views, recall this data, and revise memories to fit their
preferences.40 Partisan perception also influences humans not to look for disconfirming data
and to discount and diminish it if encountered.41 Consequently, much less perceptual time and
effort is spent seeking information that supports other perspectives,42 and the likely interests of
other disputants.43

36 See David A. Hoffman, Paradoxes of Mediation 167, 172, in Bringing Peace Into the Room (Daniel Bowling &
37 Inside the Law Firm: Dealing With Financial Disincentive to ADR, 17 Alternatives to the High Costs of
Litigation 43, 45 (March, 1999) (hereafter Dealing With Financial Disincentives) (arguing business litigation is
often “driven by emotional, as opposed to economic, factors” and generally “does not occur until a certain ‘critical
mass’ of emotional content is achieved).
38 Richard Birke & Craig R. Fox, supra note 18, at 14; Lyle A. Brenner et al., On the Evaluation of One-Sided
Evidence, 9 J. Behav. Decision-making 59 (1996).
39 This tendency of humans to assume their views are necessarily reasonable, objective, and correct has been called
naïve realism. Keith G. Allred, Relationship Dynamics in Disputes: Replacing Contention With Cooperation, in
The Handbook of Dispute Resolution 83, 84 (Michael L. Moffitt and Robert C. Bordone eds., 2005 (hereafter
Dispute Resolution Handbook). This separate cognitive bias has three aspects: (1) typically assuming we are
reasonable and objective when confronting a problem or question; (2) assuming that anyone looking at the same data
would draw the same conclusions we do; and (3) suspecting unreasonableness or harmful motives when others reach
different conclusions from the same data. Id.
40 Sticky Defaults, supra note 17 at 98; Roger Fisher et al., supra note 33, at 22.
41 Id. Humans do this because their “brains work hard to tell simple stories consistent with what” they already
‘know,’ and for protection from “the discomfort of ill-fitting data hanging around” their memory banks. Sheila
Heen and Douglas Stone, supra note 26, at 346-47.
42 Sticky Defaults, supra note 17, at 98; see Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive
Perspective, in Barriers to Conflict Resolution 44, 47 (Kenneth Arrow et al. eds. 1995).
43 See Roger Fisher, et al, supra note 33, at 22-28; Roger Fisher, William Ury, & Bruce Patton, Getting to Yes:
Negotiating Agreement Without Giving In 51 (2d ed. 1991) (hereafter Getting to Yes).
These biased selective and partisan perceptions cause decision-makers to develop and suffer influences from common cognitive biases of egocentrism and optimistic overconfidence.\textsuperscript{44} Egocentrism describes the frequent tendency humans demonstrate to bias their perceptions and predictions in self-serving ways\textsuperscript{45} that reflect their pre-existing beliefs.\textsuperscript{46} Once humans select interpretations viewed as beneficial, they then typically gather and organize information to justify these choices.\textsuperscript{47}

Related to this bias is the common tendency of decision-makers to act overconfidently about their judgments and predictions.\textsuperscript{48} Studies of decision-making by professionals in many occupations consistently show tendencies to make unrealistically optimistic or overconfident forecasts regarding future outcomes.\textsuperscript{49} For example, American lawyers routinely display optimistic overconfidence.\textsuperscript{50} One study found that on average American lawyers rated themselves in the 80\textsuperscript{th} percentile or higher on their ability to predict case outcomes.\textsuperscript{51} Dispute resolution decision-makers may similarly overconfidently evaluate their chances of winning transborder commercial dispute arbitrations.\textsuperscript{52} These biases toward inaccurately assessing and

\textsuperscript{44} Sticky Defaults, supra note 17, at 98.
\textsuperscript{45} Max H. Bazerman & Katie Shonk, The Decision Perspective to Negotiation, in Dispute Resolution Handbook 52, 55; Richard Birke & Craig R. Fox, supra note 18, at 14.
\textsuperscript{46} Russell Korobkin & Chris Guthrie, The Negotiator’s Fieldbook, supra note 20, at 354. A related positive illusion bias frequently accompanies optimistic overconfidence. It is the tendency to overestimate abilities to control outcomes that are determined by outside factors. Richard Birke & Craig R. Fox, supra note 18, at 16-17. Another related bias flows from tendencies to hold overly positive views of one’s attributes, abilities, and competencies. Id. Most persons see themselves as more intelligent and fair minded than average. Id. Research shows that most negotiators perceive themselves as “more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than counterparts.” Id. at 18. See Roderick M. Kramer et al., Self-Enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood, 56 Org. Behav. & Human Decision Processes 10 (1993).
\textsuperscript{47} Max H. Bazerman & Katie Shonk, supra note 45, at 55.
\textsuperscript{48} Id. at 56
\textsuperscript{49} Id. at 57; see Max Bazerman, Judgment in Managerial Decision Making [needs jump cite](2005); Richard Birke & Craig Fox, supra note 71, at 18
\textsuperscript{50} Richard Birke, Settlement Psychology: When Decision-Making Processes Fail, 18 Alternatives to the High Cost of Litigation 212, 214 (2000).
\textsuperscript{51} Id. For example, students who failed to reach agreement negotiating a simulated dispute, and then asked to estimate the odds that a final offer arbitrator would choose their proposal, showed the average individual estimates of winning this 50-50 outcome was 68%. Max Bazerman & Katie Shonk, supra note 45, at 55-56.
\textsuperscript{52} Id. at 57.
predicting future adjudicatory outcomes can lead business representatives and their lawyers to choose arbitration as the best process for realizing their optimistically overconfident projections.53

A final cognitive barrier that generates a potentially pervasive win-lose, zero sum bias in favor of adjudication and against mediation is the tendency to view the resolutions of disputes as invariably involving dividing limited resources.54 Often called the fixed pie bias, this mental short cut adopts and relies on unconscious assumptions that the subjects comprising legally framed disputes, typically monetary payments, production and performance concerns, or time issues, are limited,55 and that all disputants value all aspects of all of them equally.56 This bias generates beliefs that all disputants’ interests are always diametrically opposed.57 These beliefs usually result in views that one disputant’s side’s gain is invariably another disputant’s loss.58

All of these common cognitive biases are experienced by business persons and lawyers representing them, and they create a powerful and pervasive zero-sum, win-lose bias.59 This mindset frames all dispute resolution activity as exclusively or primarily requiring individual

53 See Sticky Defaults, supra note 17 at 99; Richard Birke & Craig R. Fox, supra note 18, at 15; Max Bazerman & Katie Shonk, supra note 45 at 57.
54 See, e.g., Max Bazerman & Katie Shonk, supra note 45, at 54; Richard Birke & Craig R. Fox, supra note 18, at 30; Leigh Thompson and Janice Nadler, Judgmental Biases in Conflict Resolution and How To Overcome Them, in The Handbook of Conflict Resolution, 213, 216-17 (Morton Deutsch and Peter T. Coleman, eds. 2000).
55 Id. One study showed that more than two-thirds of participating negotiators assumed the items negotiated were limited even though this was not the case. Leigh Thomson & Jancie Nadler, supra note 54, at 217.
56 See Robert M. Bastress & Joseph D. Harbaugh, supra note 11, at 377-78 (arguing humans tend to assume that parties want the same things and possess the same values).
57 Richard Birke & Craig R. Fox, supra note 18, at 30; see Max H. Bazerman & Margaret A. Neale, Hueristics in Neogitation: Limitations to Effective Dispute Resolution, in Negotiatiing in Organizations 51 (Max H. Bazerman & Roy J. Lewicki eds. 1983). From an interest perspective, this bias creates views that all interests are conflicting, and that neither independent nor shared interests exist.
58 Leigh Thompson & Janice Nadler, supra note 54, at 217.
59 Robert Mnookin, et al., supra note 19, at 168. These scholars offer this apt summary of the prevalence of this mindset: “Lawyers and clients too often assume that legal negotiations are purely distributive activities. ‘Our interests are opposed to theirs; what one side wins, the other side loses.’ This zero-sum mindset is powerful and pervasive. Lawyers often report that legal negotiating is, by definition, strategic hard bargaining. Although they acknowledge that sometimes value-creating moves are possible, particularly in deal-making-they assume that value creation is merely icing on the cake which still has been sliced up through a distributive struggle. Clients frequently share this view and expect their lawyers to behave accordingly.” Id.
gain maximizing thinking and behavior. Scholars investigating how professionals develop competence suggest that the most common set of behavior patterns displayed by practitioners in law, business, public administration, and industrial management direct actions toward striving to win and seeking to avoid losing. Prior vivid experiences with purely distributive competitive experiences, such as athletic activities and events, university admissions, and many organizational promotion systems, contribute to this mindset. So do economic theories and business models that advance winning and avoiding losing as primary, often exclusive, beliefs and objectives.

American lawyers to frame dispute resolution with this win-lose mindset. A survey of 2,000 Arizona and Colorado lawyers showed pervasive use of win-lose assumptions when they negotiated. A New Jersey study of 515 lawyers and 55 judges revealed that about 70% of the cases in which they participated were negotiated using actions based on win-lose thinking derived from fixed pie cognitive assumptions.

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61 Max Bazerman & Katie Shonk, supra note 45, at 54.
64 Donald G. Gifford, Legal Negotiations: Theory and Applications 29, n.6 (1989); Don Peters, supra note 11, at 28 n.1. Professor Gerald Williams conducted this study, and it showed that 67% of the lawyers surveyed reported that they primarily sought to maximize gain when they negotiated. Gerald R. Williams, Legal Negotiation and Settlement 15-40 (1983).
65 Milton Heumann & Jonathan M. Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want;” 12 Ohio St. J. On Disp. Resol. 253, 255 (1997). Sixty percent of the respondents in this survey believed that non zero-sum based dispute resolution actions should have been used more often. Id.
Research also shows that dispute resolvers typically manifest fixed pie bias at the beginning of most resolution-oriented interactions, and that they often resist disconfirming information. This leads many lawyers to transfer their win-lose bias-based negotiation habits to mediations. American business executives complain about their lawyers’ use of adversarial behaviors that interfere with exploring business interests and finding suitable solutions in mediations.

The cumulative influence of these cognitive biases affect the decisions business representatives and their lawyers make when they confront a serious transborder dispute that cannot be resolved by private negotiation. The frequent choice to arbitrate rather than mediate these disputes probably results from applying a win-lose mind set and its supporting biases to assess, reason, and choose to use of the adjudication process that best avoids the problems of transational litigation. Most American lawyers, and probably many attorneys in other

69 Business Mediation from All Points of View, 24 Alternatives to the High Costs of Mediation 101 (June 2006) (business mediations suffer from lawyers “who focus primarily on positions and don’t truly understand what developing the underlying interests means”); see note 191 infra.
70 See Sticky Defaults, supra note 17, at 84, 110-11.
71 See notes 11-12, 16 supra and accompanying text.
72 See notes 11-12 supra and accompanying text.
countries, see adjudication as the fall-back option if negotiations fail, and staying with the traditional or status quo strongly influences many decisions.

When combined with adjudication’s tendency to conflate all client interests into monetary units these cognitive and cultural biases often influence lawyers to narrowly frame mediation as “an euphemism for accepting less money.” Lawyers and business persons often excessively fear that mediating lessens chances to maximize gain. They also associate mediating with a strong likelihood of having to make concessions.

This zero-sum, fixed pie framing of mediation triggers another common and powerful cognitive bias, loss aversion. This bias inclines decision-makers to attribute more weight to potential losses than to possible gains when making decisions. Gains and losses are assessed in

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73 See Sticky Defaults, supra note 17, at 111. Disputants often avoid changing a method that they have used in the past even when new approaches might prove more beneficial. Stephen K. Anderson, supra note 8, at 58; see Alexandra Bowen, supra note 8, at 60 (arguing humans tend to fear unknowns and see arbitration as easier because it delegates decision-making to external experts). Latin American business persons and their lawyers share these tendencies to prefer traditional, adjudicatory approaches to resolving disputes. Horacio Falcao & Francisco J. Sanchez, Mediation---An Emerging ADR Mechanism in Latin America 415, 428, in International Arbitration in Latin America [Nigel Blackaby et al. eds. 2002) (hereafter Mediation in Latin America). This produces wariness and resistance to change, and makes mediation a hard “sell” despite its advantages over adjudication in many situations. Id.


75 Richard Birke, supra note 50, at 215. This adjudicatory frame converts all tangible and intangible client needs into dollars and cents and turns resolution “into distributive tugs of war” even when doing this disserves clients. Id.

76 Frames are perceptions disputants hold about conflicts, and how issues in them should be presented and resolved. Marcia Caton Campbell and Jayne Seminare Dockerty, What’s In A Frame, in The Negotiator’s Fieldbook, supra note 73, at 36. Frames profoundly influence participant’s strategizing and behavior. Id. They influence dispute resolution process choice and experiences within it. See Howard Gadlin, Andrea Kupfer Schneider, & Christopher Honeyman, The Road to Hell is Paved with Metaphors, in The Negotiator’s Fieldbook, supra note 73, at 29.

77 Consumers and ADR, 15 Alternatives to the High Costs of Litigation 62 (April 1997).


80 Sticky Defaults, supra note 17, at 99-100.

81 See, e.g., Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive Perspective, in Barriers to Conflict Resolution 44, 54 (Kenneth Arrow et al. eds., 1995); Robert H. Mnookin, et al., supra note 19, at 161; Sticky Defaults, supra note 17, at 99.
relation to a reference point, which is usually arbitral adjudication in transborder commercial disputes. In addition, research consistently demonstrates the way options are framed in terms of losses or gains can substantially affect resulting decisions. Perceiving options as gains makes decision-makers more likely to accept them while seeing alternatives as losses makes rejection more likely, even when the opportunities and risks are identical.

When lawyers and business persons frame the choice of dispute resolution method by comparing the option of winning arbitral adjudication against making concessions and not maximizing economic gains possible from successful legal claims, mediation is seldom selected. Research also suggests that decision-makers will usually take more risks to avoid losses. This bias can affect all disputants as they choose to seek to win at arbitration to avoid any loss, even though continuing the dispute by arbitrating risks economic loss that often far exceeds concessions needed to mediate successfully.

2. Cultural Barriers

Decisions to mediate transborder disputes usually involve business persons and lawyers from different cultures, and often from different legal systems. Different cultures and their dynamic, growing, interrelated set of processes involving shared mental perceptions about what

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83 See Sticky Defaults, supra note 17, at 99 (arguing the current option serves as the reference point to which options are compared).
85 Id. Mediators have long known that settlements are more likely when they emphasize gains including closure, achieving certainty, and avoiding additional costs than when they emphasize loss. Robert H. Mnookin, et al., supra note 19, at 163.
86 See Sticky Defaults, supra note 17, at 100.
87 Russell Korobkin & Chris Guthrie, supra note 20, at 357 (decision-makers more likely to prefer riskier choices if hold any chance of avoiding losses); Robert H. Mnookin, et al., supra note 19, at 61 (“people are risk-seeking concerning losses if there is some chance, however small, of evading any loss).
89 See Alexandra Bowen, supra note 8, at 60-61.
is appropriate in human interaction\textsuperscript{90} present additional barriers to mediating transborder commercial disputes. These shared perceptions contain categories and implicit rules that persons use to interpret events, behaviors, and communications.\textsuperscript{91} They also influence attitudes, action habits, and behavioral norms regarding how disputes are perceived, expressed, managed, and resolved.\textsuperscript{92}

Commonly encountered cultural differences stem primarily from fundamental distinctions between emphasizing individual or collective values and preferring to communicate directly or indirectly.\textsuperscript{93} Most wealthy western countries, for example, have individualistic and direct communicating traditions while most Latin American countries possess collectivistic and indirect communicating tendencies.\textsuperscript{94} These fundamentally different orientations create common misunderstandings regarding win-lose or win-win orientations, formality or informality, time sensitivity, risk-taking, top down- or consensus-based team organization, and emphasizing contracts or relationships.\textsuperscript{95} These and other cultural differences create gaps between what persons using one set of cultural assumptions intend by actions and the meanings others using

\textsuperscript{90} See, e.g., David Augsburger, supra note 2, at 25; Raymond Cohen, Negotiating Across Cultures: International Communication in an Interdependent World 14-15 (rev. ed. 1997); Michelle LeBaron, Bridging Cultural Conflicts 4 (2003).

\textsuperscript{91} See Paul R. Kimmel, Culture and Conflict 455, in The Handbook of Conflict Resolution: Theory and Practice 453, 455 (Morton Deutsch and Peter T. Coleman, eds., 2000); Michelle LeBaron, supra note 144, at 10; Don Peters, “It Felt Like He Was In My Skin:” Intercultural Learning about Mediation in Haiti, 2 Rutgers Conflict resolution Journal, Issue 2, Spring 2004, \url{http://www.pegasus.rutgers.edu/~rcli/} [need to add last checked date](hereafter Mediation in Haiti).

\textsuperscript{92} See David Augsburger, supra note 2, at 22; Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyers, 9 Clinical L. Rev. 33, 40 (2001); Mediation in Haiti, supra note 199, at 17-18.

\textsuperscript{93} Mediation in Haiti, supra note 91, at 21; see Jeanne M. Brett, et al., Culture and Joint Gains in Negotiation, 8 Neg. J. 61 (1998); Geert Hofstede, Culture’s Consequences 14-15 (1980).

\textsuperscript{94} Mediation in Latin America, supra note 15, at 435; Walter A. Wright, supra note 35, at 64-66.

different shared mental precepts attribute to these behaviors. They also create enormous challenges to resolving disputes consensually through negotiation and mediation.

B. Yes We Can Overcome Cognitive and Cultural Barriers to Mediating

Choosing which dispute resolution process or processes is most appropriate for a particular conflict presents important, challenging decisions. Persons making these decisions in private transborder commercial disputes usually include representatives of the businesses involved and their lawyers, both attorneys employed generally by the companies and those retained specifically for assistance with particular disputes. The cognitive biases and cultural patterns of all of these participants often must be identified and overcome in order to consider the option of mediating disputes fully. Shared biases within such decision-making groups often influence constraining group assumptions and conventional ways of acting.

1. Overcoming Cognitive Barriers

The common cognitive and other cultural barriers analyzed earlier may influence all participants to neither consider nor fully assess mediation as an alternative or prelude to arbitrating. Overcoming these cognitive and cultural barriers starts with lawyers and business persons accepting ownership of them, and the likelihood that they will influence perceptions,

96 Alexandra Bowen, supra note 8, at 60.
97 See David W. Augsburger, supra note 2, at 25; Alexandra Bowen, supra note 8, at 60-61. Not understanding potential cultural differences raises grave risks that negotiators and mediators will miss important verbal and non-verbal cues, misinterpret speech and behavior, misread meanings, and confuse primary and secondary issues.
98 See Frank E.A. Sander & Lukasz Rozdeiczer, supra note 15, at 1. A leading dispute resolution scholar noted “Trying to decide what kind of case belongs in which forum remains one of the most interesting and understudied questions.” Carrie Menkel-Meadow, What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR, 44 UCLA L. Rev. 1613, 1617 (1997).
99 Involving Business Managers in ADR, supra note 31, at 155. Resistance to mediating often comes when lawyers or business people need to prove points, or are not fully familiar with the process, or experience cultural tendencies pushing against it. Id. If one, or all, parties prefer adversarial, position-based arbitral adjudication, “there can easily be a dance of delay, isolation, escalation of conflict, and mutual damage to the point where the costs become disproportionate to the business value” of claims. International Mediation, supra note 3, at 115.
100 See Roger Fisher et al., supra note 33, at 72-73. Group assumptions frequently generate extensive self-censorship and inhibit sharing new ideas. Id. at 73.
predictions, and analysis during conversations about what dispute resolution method to use.\textsuperscript{101} Awareness of these engrained, pervasive influences may help decision-makers avoid their harmful influences and predictable errors resulting from them.\textsuperscript{102} Developing self-awareness through enhancing abilities to monitor and control one’s own thoughts and emotions helps lawyers and business persons understand and deal effectively with their predictable and understandable “non-rational impulses and error-prone tendencies.”\textsuperscript{103} It helps them identify situations in which they need to consciously override or use compensatory actions to avoid these tendencies and mental shortcuts.\textsuperscript{104}

Although challenging to do, egocentric biases stemming from selective and partisan perception can be mitigated by explicitly listing adverse consequences, drawbacks, and weaknesses of all options, perspectives, and objectives under consideration.\textsuperscript{105} Disputants should adopt a devil’s advocate perspective to find and assess all countervailing considerations to inclinations to view merits in ways that unconsciously tilt favorably to their preferences.\textsuperscript{106} Given the subtlety and intractability of egocentric biases, however, playing devil’s advocate with oneself is seldom sufficient.\textsuperscript{107} Appointing a group member to advocate other views honestly and bluntly helps offset these natural biases,\textsuperscript{108} and the number of people involved in

\textsuperscript{101} See Robert S. Adler, supra note 19, at 690-91; Richard Birke & Craig R. Fox, supra note 18, at 3-4, 19;
\textsuperscript{102} Robert S. Adler, supra note 19, at 690-91.
\textsuperscript{103} Id. at 691. As Professor John Hammond and colleagues argue: “[t]he best protection against all psychological traps is awareness. Forewarned is forearmed. Even if you can’t eradicate the distortions engrained in the way your mind works, you can build tests and disciplines into your decision-making process that can uncover and counter errors in thinking before they become errors in judgment.” John Hammond, et al., Smart Choices: A Practical Guide to Making Better Decisions 214-15 (1999).
\textsuperscript{104} Richard Birke & Craig R. Fox, supra note 18, at 4.
\textsuperscript{105} See id. at 19; Linda Babcock et al., Creating Convergence: Debiasing Biased Litigants, 22 Law and Soc. Inq. 913 (1997).
\textsuperscript{106} This requires using a technique which originated in the middle ages where candidates for sainthood were represented before the papal court by two spokesmen: the advocatus dei who made the case for canonization, and the advocatus diabolic, who advanced all conceivable arguments against canonizing the candidate. Richard S. Adler, supra note 19, at 765. Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
conversations between lawyers and business persons facilitates using this approach. Noting adverse consequences, drawbacks, and weaknesses in writing also counters tendencies to diminish or dismiss them under the pulls of partisan perception and optimistic overconfidence.⁷⁰⁹

Optimistic overconfidence biases may be mitigated by carefully evaluating the adverse consequences, drawbacks, and weaknesses identified, and by seeking outsider perspectives.⁷¹⁰ Gaining outside perspectives includes seeking evaluation data from similar situations rather than basing predictions entirely on plans and scenarios derived solely from inside disputes.⁷¹¹ It also includes seeking to observe and analyze situations from different points of view.⁷¹² Reversing roles often identifies the concerns, issues, and objectives other dispute participants possess.⁷¹³ Seeking to identify the probable perspectives of third parties, either arbitrators or mediators, who may ultimately hear the predictably differing contentions also counteracts optimistic overconfidence.⁷¹⁴

Looking at the business interests involved in situations combats fixed pie and zero sum biases.⁷¹⁵ Interests are the needs or motivations that disputants possess,⁷¹⁶ and in business disputes they typically encompass multiple concerns regarding economic, relational, substantive and procedural factors. Usually businesses have interests that include getting resolutions that

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⁷⁰⁹ This is why mediators will often write important, disconfirming data on white boards or flip charts in caucus rooms so that the information remains visible and is less easily discounted even when they are not present in the room. See generally David Binder, Paul Bergman, Susan C. Price & Paul R. Tremblay, Lawyers as Counselors: A Client-Centered Approach 320-21 (2d ed. 1004) (recommending making written charts of options advantages and disadvantages to help clients make satisfactory decisions). In an international commercial mediation, drawing the dispute on a flip chart to demonstrate overlapping business interests brought insight and breakthrough to one of the disputants. International Mediation, supra note 3, at 20

⁷¹⁰ Richard Birke & Craig R. Fox, supra note185, at 19.


⁷¹² Roger Fisher et al., supra note 33, at 32.

⁷¹³ Id. at 33-35.

⁷¹⁴ Id. at 32.

⁷¹⁵ Richard Birke and Craig R. Fox, supra note 18, at 31.

save time and money, preserving relationships, and creating outcomes that are satisfactory, durable, and confidential. Most disputes have multiple variables, and disputants typically possess complex interest sets which interact, often differently, with these numerous factors. Adopting adjudication’s win-lose focus directed primarily at money obscures opportunities to reach resolutions which satisfy multiple interests and allocate value more flexibly that winner-take all.

Perhaps ironically, all of these suggestions apply mediation principles and replicate actions mediators typically use to help negotiators move past cognitive biases to mutually acceptable agreements. Mediators, for example, often try to de-bias parties by explaining these common cognitive patterns and encouraging participants to mitigate them and reassess their views with more objectivity. Asking lawyers to assume they lost their adjudication and explain the reasons arbitrators articulated to support contrary awards combats these biases effectively. Mediators also frequently inquire about broader contexts than particular controversies to make disputes seem less unique.

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117 See, e.g., American Arbitration Association, Dispute-Wise Management: Improving Economic and Non-economic Outcomes in Managing Business Conflicts 19 (2006) (hereafter Dispute-Wise Conflict Management) (reasons companies use mediation); Appropriate Corporate Dispute Resolution, supra note 37, at 17 (same); see note 9 supra and accompanying text.

118 Michael L. Moffit, Disputes as Opportunities to Create Value, in Dispute Resolution Handbook, supra note 86, at 173, 176.

119 Richard Birke, supra note 50 at 215-16.

120 See Dwight Golann & Jay Folberg, supra note 1, at 203-10 (describing how mediators help disputants overcome cognitive forces affecting their abilities to assess the merits of cases); Robert H. Mnookin, supra note 88, at 248 (arguing mediators can help parties overcome cognitive barriers).

121 Russell Korobkin, Psychological Biases that Become Mediation Impediments Can Be Overcome with Interventions that Minimize Blockages, 24 Alternatives to the High Costs of Litigation 67, 68 (April 2006). Substantial evidence suggests that this seldom accomplishes much because people tend to “optimistically overconfident about their ability to avoid suffering from the optimistic overconfidence bias.” Id.

122 See id. at 69. This generates specific explanations for undesirable outcomes, increases the plausibility of these reasons, and can reduce optimistic overconfidence. Id. Studies show that persons believe an outcome is more likely to occur if they explain why a might because of a phenomenon called the explanation bias. Id, see Craig A. Anderson et al., Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information, 39 J. Personality & Soc. Psychol. 1037, 1047 (1980).

123 Dwight Golann & Jay Folberg, supra note 1, at 205 (noting that to combat optimistic overconfidence mediators often seek to distance participants from claims by asking to place it a group of similar ones and inquiring broadly
Mediators provide outside perspectives that challenge egocentric biases. They ask direct questions raising weaknesses in legal claims, and occasionally share hypothetical claim evaluations, to encourage disputants and their lawyers to abandon optimistic overconfidence.

Mediators also usually encourage negotiators to consider the weaknesses of their claims objectively when evaluating agreement options that emerge. Executives may accept as more objective perspectives voiced by mediators that suggest relative fault, and where their companies’ contributions to disputes might be deemed significant in later adjudications.

about the group, or other approaches to make particular disputes seem less unique). Mediation tends to develop much more comprehensive information and insight. Thomas W. Walde, Pro-Active Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Resolution 3 (2003). Unlike arbitrators who wait for evidence and argument presented to them in formalized ways, mediators ask questions and penetrate deeply into disputants’ organizations, cultures, values, and concerns. Id. 

International Mediation, supra note 3, at 23. Neutral, impartial mediators are not distracted by substantive issues that concern parties, and they escape the political and group decision-making dynamics that burden disputants. Id. at 31. Mediators can typically win trust and respect quicker from disputants because they are outside the partisan fray. Id. at 30. This enables mediators to ask challenging questions without generating the defensiveness that partisanship generates, check agreement alternatives firmly and fully, and apply more leverage to encourage flexibility and movement. Id.

125 Penny Brooker & Anthony Lavers, Mediation Outcomes: Lawyers’ Experiences with Commercial and Construction mediation in the United Kingdom, 5 Pepp. Disp. Resol. L. J. 161, 200-01 (2005). Russell Korobkin, supra note 121, at 69. Direct questions regarding weaknesses, and hypothetical claim evaluations and outcome predictions, usually temper lawyer overconfidence, stimulating them to at least consider possibilities that they have misestimated. Id. Controversy rages in the United States over whether it is appropriate for mediators to share hypothetical or actual claim evaluations or outcome predictions. The current ideological struggle treats facilitation and evaluation as separate mediating models. See Samuel J. Imperati, Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation, 33 Willamette L. Rev. 703, 705 (1997). Scholars define facilitation as proper or correct mediation, see James J. Alfini, Trashing, Bashing, and Hashing It Out: Is This the End of Good Mediation?, 19 Fla. St. U. L. Rev. 41 (1991), and evaluation as improper or incorrect mediation. See John Lande, Stop Bickering! A Call for Collaboration, 16 Alternatives to the High Cost of Litigation 1, 11 (Jan. 1998). This debate obscures the fact that most commercial mediators routinely use actions that fall into both categories, Don Peters, Oiling Rusty Wheels: A Small Claims mediation Narrative, 50 Fla. L. Rev. 761, 835 n.163 (1998), and that “direct evaluation often is necessary to overcoming the overconfidence bias.” Russel Korobkin, supra at 69. Some American mediation rules prohibit mediators from predicting how judges will decide pending adjudications. E.g. Fla. R. Cert- & Ct-Appointed Mediation 10.370(c) (2007).

126 Russell Korobkin, supra note 121, at 68; Dwight Golann & Jay Folberg, supra note 1, at 204; Don Peters, supra note 125, at 807-08 n.76 (1998). This is often done by asking questions confidentially in caucuses about the strengths of counterpart’s claims, exploring topics which usually parallel their weaknesses. Some studies “have successfully reduced optimistic overconfidence by asking experimental subjects to list weaknesses associated with their position.” Russell Korobkin, supra at 68-69. This may have lesser effect on lawyers who are aware counterparts will make countering arguments and have often identified these contentions in advance. Id at 69. Trial lawyers surveyed listed attorneys’ failures to view claims and positions reasonably and convince clients of their cases’ weaknesses as primary factors in unsuccessful mediations. Thomas C. Waechter, supra note 14, at 99.

127 John Lande, Relationships Drive Support for Mediation, 15 Alternatives to the High Costs of Litigation 95, 96 (July/August 1997). Mediation provides a form “where senior executives can hear the issues set out by both their own team and the other side.” International Mediation, supra note 3, at 23. One disputant in an international
Mediators explore disputants’ alternatives to a mediated agreement fully,\textsuperscript{128} and the transactional costs associated with these options.\textsuperscript{129} As alternatives to a mediated agreement are usually adjudicative in disputes involving lawyer participation, these discussions encompass all the expenses of arbitrating including direct,\textsuperscript{130} productivity,\textsuperscript{131} continuity,\textsuperscript{132} and emotional\textsuperscript{133} costs. Reducing transaction costs often creates value in resolving disputes.\textsuperscript{134}

The direct costs of international arbitration are often significant and sometimes wind up exceeding the actual amounts gained.\textsuperscript{135} Most American business persons and their lawyers mediation mentioned that he was unsure how strong his claim was and “wanted to hear it debated in an information setting.” Id. at 24. Business clients often complain that their lawyers do not discuss weaknesses in their claims and instead emphasize only the strong points. Stephen Younger, supra note 116, at 957.\textsuperscript{128} Karl A. Slaikue, When Push Comes To Shove: A Practical Guide to Mediating Disputes 32 (1996) (suggesting good mediators want to know what disputants will likely do if they don’t resolve their disputes in mediation). These alternatives provide standards against which to measure solutions proposed in mediation. Id. Identifying and discussing these alternatives to negotiated agreements ensure that participants do proper risk analysis. International Mediation, supra note 3, at 22.\textsuperscript{129} Arbitrating and litigating present direct and indirect costs. International Mediation, supra note 3, at 35. These costs should be multiplied by a 1.5 factor in international disputes. Id. at 36. Many companies mask the financial impact of these costs as operating expenses under corporate accounting practices. Id. Outside counsel fees, while often substantial, may be the tip of the iceberg because “they don’t reflect hours spend by company personnel managing the legal work, or emotional and other non-financial costs. ADR as Public Policy, 23 Alternatives to the High Costs of Litigation, 99, 100 (June 2005).\textsuperscript{130} Direct costs include the fees of lawyers, experts, other professionals, and arbitration system fees. See Stewart Levin, Breaking Down Costs: What You Are Losing by Not Using ADR, 19 Alternatives to the High Costs of Litigation 248 (November 2001). Regarding litigation, it was estimated that in 2000 more than 22 million cases were filed in American courts at a cost of almost $400 billion. Id.\textsuperscript{131} Productivity costs include the value of the lost time, and the related opportunity expenses, of those who are involved in dispute resolving and who would otherwise be producing. Id. It is estimated that business executives in the United States spend more than 20% of their time in litigation and other dispute resolution related activities. Id.\textsuperscript{132} Continuity costs include the loss of continuing business relationships and the impacts on business community and reputation factors that they embody. Id. at 248.\textsuperscript{133} Emotional costs include the psychological pains accompanying dealing with and continuously confronting strong emotions that often distracts from business persons’ ability to focus on doing their work effectively. Id. at 248.\textsuperscript{134} See Robert H. Mnookin, et al., supra note 19, at 119 (arguing resolving disputes is not a purely distributive activities and participants and their lawyers have opportunities to make process decisions that promote resolution at lower cost); Michael L. Moffitt, supra note 118, at 177 (contending unresolved disputes are expensive, and so are many aspects of dispute resolution, so disputants should choose carefully the process to use).\textsuperscript{135} See Appropriate Corporate Dispute Resolution, supra note 79, at 20 (some report that transaction costs of settling disputes subjected to adjudication) are often two to three times the amounts of settlement themselves). These questions occasionally surface situations where business persons have not recognized their shared interests in minimizing arbitrating costs and fees when their lawyers have not so advised them. See Robert H. Mnookin, supra note 88, at 248.
believe that mediating is less expensive than arbitrating.136 American business persons also believe that mediating generally takes less time than arbitrating,137 and time is usually a component of expense.138

Similarly, commercial mediators invariably inquire about the business and other interests that disputants possess.139 Often held in caucuses, these conversations explore the core of what concerns disputants, and what motivates them most strongly.140 These conversations demonstrate that more is usually at stake than the dollar claims generated by adjudicatory win-lose remedies.141 They further demonstrate that value-creating opportunities usually lie beneath

136 See, e.g., Analyzing Company ADR System Practices, 22 Alternatives to the High Costs of Litigation 47 (April 2004) (survey at Johnson & Johnson showed mediation settling costs were a third less than litigating); Appropriate Corporate Dispute Resolution, supra note 37, at 17 (comparing both processes to litigation, 89.2% think mediating saves money, 68.6% think arbitration does); Dispute Wise Conflict Management, supra note 117, at 19 (comparing both process to litigation, 91% think mediating saves money, 71% think arbitrating does). A survey of 69 companies showed 71% report cost savings when comparing mediation to litigation costs; and 44% reported cost savings comparing arbitration to litigation. How ADR Finds a Home in Corporate Legal Problems, 15 Alternatives to the High Costs of Litigation 158, 159 (December 1997). A 2007 survey of 126 in-house and outside lawyers showed the top reason they preferred mediation was its cost savings. CPR Meeting Survey Finds Mediation is Top ADR Choice, supra note 14, at 98.

137 See Appropriate Corporate Dispute Resolution, supra note 79, at 17 (as compared to litigation, 80.1% use mediation to save time while 68.5% use arbitration to save time); Dispute-Wise Conflict Management, supra note 117, at 19 (compared to litigation, 84% use mediation to save time while 73% use arbitration to save time); John Lande, Getting the Faith: Why Business Lawyers and Executives Believe in Mediation, 5 Harv-Negot. L. Rev. 137, 184 (2000) (74-75% think mediation resolves matters within appropriate time and appropriate costs). A random sample of Indiana lawyers believe that mediation significantly reduced time needed to conclude non-family cases. Morris L. Medley & James A. Schellenberg, Attitudes of Attorneys Toward Mediation, 12 Mediation Q. 185, 190 (1994). In Latin America, mediation’s informality allows it to be “fast and effective” and not be “as slow and expensive” as litigation. Mediation in Latin America, supra note 16, at 419. A Scandinavian supplier and an Asian producer opted for a three day mediation in London rather than an arbitration the disputants separately estimated would take 1 to 2 years and cost over a million pounds each. International Mediation, supra note 3, at 6

138 The London-based Centre for Effective Dispute Resolution reports the average length of its transborder commercial mediations is two days. International Mediation, supra note 3, at xiii. Commercial mediations often create a momentum toward and expectation of agreement. Id. at 29. Transborder mediations confront and help resolve problems of distance between disputants. Id. The mediator’s involvement encourages participants to deal with different cultural senses of time and urgency by introducing quasi-formal, quasi-public dimensions of negotiating. Id.

139 See Dwight Golann & Jay Folberg, supra note 1, at 154 (arguing good mediators will attempt during caucuses to encourage participants to identify their underlying interests); Lela P. Love, Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreement, in Carrie Menkel Meadow, et al., supra note 1, at 228 (suggesting that interests, as “the underlying and inescapable human motivators that press us into action”, supply one of the building blocks of constructive dialogue).

140 Attorney Truthfulness, supra note 68, at 134.

141 See id; note 7 supra and accompanying text.
the divergent and conflicting legal positions, justifications, and supporting and attacking arguments lawyers develop and present in adjudicatory contexts.\textsuperscript{142}

In addition, the business and other interests in play in commercial disputes frequently bear little relationship to the legal and rights issues framed in adjudicatory processes like arbitration and litigation.\textsuperscript{143} For example, saving time and money and preserving relationships are typically business-oriented solutions that legal remedies adjudicated in arbitration and litigation do not promote.\textsuperscript{144} Once mediators identify interests, they typically explore ideas in confidential caucuses that allow agreements realizing shared concerns, such as reducing transaction costs and preserving important commercial relationships. International commercial connections take time and money to develop and maintain.\textsuperscript{145} Research suggests that business persons and their lawyers believe that mediating helps resolve disputes while preserving important commercial relationships.\textsuperscript{146} This frequently shared interest enables mediators to help

\textsuperscript{142} Id. International commercial mediations typically seek to broaden discussions to include technical, reputational, and cultural concerns that are often obscured by the ways legal claims frame issues. International Mediation, supra note 3, at 24-26.

\textsuperscript{143} F. Peter Phillips, How Conflict Resolution Emerged Within The Commercial Sector, 25 Alternatives to the High Costs of Litigation 3, 6 (January 2007). Describing the growth of mediation within the commercial sector in the United States, the author contends that adjudicatory solutions look backward to determine the consequences of past events while business interests look forward to assess future opportunities. Id; see notes 7, 40 supra.

\textsuperscript{144} F. Peter Phillips, supra note 157, at 5-6 (quoting a senior General Electric Attorney, “This company makes money producing many things, from light bulbs to jet engines---but it does not make money writing legal briefs in court”). The author also argues that “it might well be that the best solution to a dam builder and a hydroelectric turbine manufacturer would be a change in contract specifications and a promise of future work. But the law does not provide for this business-like solution.” Id; see note 7 supra and accompanying text.

\textsuperscript{145} Thomas W. Walde, supra note 123, at 1 (arguing that creating international commercial and investment relationships is expensive and high-risk and an asset-building activity).

\textsuperscript{146} Eighty percent of the business executives, lawyers, and outside attorneys in one study said that mediation helps preserve business relationships. John Lande, supra note 137, at 186. This finding is consistent with other studies that suggest that business persons and their lawyers believe that mediating preserves relationships better than arbitrating does. Appropriate Corporate Dispute Resolution, supra note 79, at 17 (59% choose mediating to preserve relationships, only 41% choose arbitrating for this reason); Dispute-Wise Conflict Management, supra note 117, at 19 (56% choose mediating to preserve relationships, 38% choose mediating for this reason).
participants turn disputes into deals by finding ways to solve the precise problems and resume a strengthened commercial relationship.  

Mediators challenge fixed pie, zero sum bias by testing assumptions that all participants value all aspects of disputes identically. They do this by conducting confidential discussions about how participants assess their interests in terms of which are more and less important. This often generates trading, dispute resolutions most common path to creating value, where disputants exchange that which they value slightly less in return for that which they value slightly more. These explorations of interests and priorities encourage business oriented resolutions such as apologies, bartered services, bid invitations, expedited delivery schedules, future price concessions, joint undertakings, licensing agreements, product discount programs, references, and equipment use. All of these cognitive-bias busting actions are made possible by confidential caucusing which usually generates more information from which solutions can be fashioned.

2. Overcoming Cultural Barriers

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147 Thomas W. Walde, supra note 123 at 3-4; see Penny Brooker & Anthony Lavers, supra note 125, at 198-200 (describing types of new deals and other creative solutions arising from domestic commercial mediations in UK). Although mediation outcomes can be velvet divorces through peaceful liquidation of relationships, often outcomes will reflect re-negotiated contracts to help parties create win-win results. International Mediation, supra note 3, at 121. For example, many international intellectual property disputes begin as rights claims but are resolved as negotiated licensing deals. International Mediation, supra note 3, at 121.


149 Attorney Truthfulness, supra note 68, at 134.

150 Id. at 134-35.


152 See Robert A. Baruch Bush, What Do We Need A Mediator For?: Mediation's Value-Added for Negotiators, 12 Ohio St. J. on Disp. Resol. 1, 13 (1996). Difficult, challenging, troublesome issues where emotions run high or zero-sum bargaining is likely to occur are best raised initially in private sessions or caucuses. Stephen P. Younger, supra note 68, at 959.
Business persons and their lawyers can strive to develop awareness of their cultural biases and adjust their dispute resolving behaviors accordingly.\(^{153}\) Doing this successfully requires reflecting on how one’s culture affects one’s behaviors\(^{154}\) and experiencing other cultures over time\(^{155}\) and in depth.\(^{156}\) Business persons and their lawyers involved in transborder commercial dispute resolution should know about common differences generated by collectivist or individualist orientations and direct or indirect communication preferences.\(^{157}\) Firm grasp of this information should help them move from believing everyone will and should behave like they do to developing comfort seeking openness and learning about values and interests underlying different orientations, preferences, and behaviors.\(^{158}\)

Despite best efforts, skilled negotiators operating under the influences of their cultural traditions often experience bafflement and confusion encountering attitudes and behaviors

\(^{153}\) See Julie Barker, International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Dispute, 19 Loy. L.A. Int’l & Comp. L. J 1, 19-29 (1996); Negotiating and Mediating Across Cultures, 17 Alternatives to the High Costs of Litigation 102 (July/August 1997) (arguing that different cultural processes should not be viewed as impenetrable).

\(^{154}\) Bernard Mayer, The Dynamics of Conflict Resolution: A Practitioner’s Guide 87 (2000) (arguing that articulating the many different cultural norms regarding conflict which influence your behaviors makes it easier to develop awareness of how their practices and patterns might differ from others); see Susan Bryant, supra note 92, at 64-67 (having lawyers consider similarities and differences with their clients helps them see how cultural factors may influence interactions).

\(^{155}\) See John Paul Lederach, supra note 2, at 63 (describing slow, painful process of developing self-awareness regarding the biases in his mediation training programs offered in Central America); Mediation in Haiti, supra note 91, at 76, describing cultural learning occurring in gradual, evolving process spanning four visits to and seventeen workshops in Haiti).

\(^{156}\) Bernard Mayer, supra note 154, at 87 (arguing it’s difficult to acquire knowledge of cultural influences until one has experienced other cultures at deep levels). Encountering behaviors and beliefs divergent from one’s own facilitates recognizing these differences and thinking about how culturally relativistic these action sets probably are. Id.

\(^{157}\) Negotiating and Mediating Across Cultures, supra note 153, at 102; see notes 92-96 supra and accompanying text.

\(^{158}\) Negotiating and Mediating Across Cultures, supra note 153, at 102. Professor Bryant argues that “knowing ourselves as cultural beings is a key to being able to identify when we are using biases and stereotypes, when we are misinterpreting or filling in, and why we are judging people as different. Susan Bryant, supra note 92, at 49 n.56. She also suggests that we should accept that our cultural influences might create “roadblocks to understanding others,” and that as long as we are committed to growth and accept these “blinders that shape our understanding of others, we can feel less frustrated by setbacks and not judge ourselves to harshly. . . .” Id.
flowing from different orientations and preferences. Cultural influences substantially affect how disputants perceive, define, and evaluate the consequences of their alternatives if they do not reach consensual agreements. Identifying, evaluating, and manipulating interests supply the core component of defeating fixed pie bias Cultural influences typically affect how disputants perceive, define, and prioritize their interests as between themselves and others.

Culturally fluent mediators can identify and correct miscommunications that prolong conflicts which could be resolved. Skilled transnational dispute mediators are attuned to subtle cultural patterns and nuances that enable them to spot signals suggesting the existence of these barriers and misunderstandings. Once spotted, mediators can ask make sensitive comments and ask tactful questions in caucuses to discuss and learn what different expectations and behaviors is mean to disputants. Using this information, mediators can then translate these

159 Harold Abramson, The Culturally Suitable Mediator, in The Negotiator’s Fieldbook, supra note 73, at 591 (hereafter Culturally Suitable Mediator).
160 See Jeanne M. Brett, Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions About Cultural Boundaries 98-103 (2001); Mediation in Haiti, supra note 91, at 36.
161 See notes 138-141 supra and accompanying text. Mediation typically pushes “people to move beyond their own focus on what it is they want to a somewhat deeper consideration of why they want it. Bernard Mayer, supra note 154, at 219.
162 Culturally Suitable Mediator, supra note 155, at 592; Jeanne M. Brett, supra note 160 at 83-89; Mediation in Haiti, supra note 91, at 36.
163 International Mediation, supra note 3, at 17. Scholars recommend learning about relevant cultures and their traditional communication and behavioral patterns before attempting intercultural dispute resolution. See, e.g., Culturally Suitable Mediator, supra note 155, at 592 (arguing mediators should be trained and experienced in helping parties recognize culturally-shared interests and surmount culturally-based impasses); Christopher Honeyman, Have Gavel, Will Travel: Dispute Resolution Innocents Abroad 1, (unpublished paper on file with author, also available as Convenor Newsletter, Vol 2, No. 2, www.convenor.com) (knowledge of relevant cultures is absolutely essential); Jan Jung-Min Sunoo, Some Guidelines for Mediators of Intercultural Disputes, 6 Neg. J. 383, 387 (199) (mediators should make “every effort to learn about the cultural and social expectations of the persons they will deal with”).
164 Culturally Suitable Mediator, supra note 155, at 591 (disputants from diverse cultures need process that helps them recognize and bridge cultural differences). Mediators engage with cultural norms as they search for positive ways to communicate with participants. International Mediation, supra note 3, at 17.
165International Mediation, supra note 3, at 17; see Susan Bryant, supra note 92, at 29 (recommending checking interpretations in cross-cultural situations); Roger Fisher, et al., supra note 33 at 168 (encouraging negotiators to question their assumptions and check them when appropriate). Mediation allows exploring sensitive cultural issues confidentially in caucuses. International Mediation, supra note 3, at 23.
situations to disputants privately and build bridges over these barriers.\textsuperscript{166} Mediating this way also separates genuine culturally-based impasses from strategic ploys, \textsuperscript{167} and provides a forum for resolving barriers that disputants often cannot easily overcome in non-facilitated negotiation.\textsuperscript{168} These barriers are usually significant when they touch the elements required to overcome egocentric optimistic overconfidence and fixed pie, win lose biases. Co-mediation teams, with neutrals from each cultural tradition, are often effective.\textsuperscript{169}

Conclusion

Mediation is not, by itself, a panacea for resolving transborder commercial disputes. Mediation is a simply a process tool, and its value ultimately depends on how businesses and their lawyers use it.\textsuperscript{170} When used appropriately\textsuperscript{171} as an opportunity to embrace interest-based negotiating seeking the best outcomes parties are willing to create to avoid the additional time,

\textsuperscript{166} Culturally Suitable Mediator, supra note 155, at 594 (skilled mediators help parties identify the cultural connections to impasses and find ways to resolve them). A mediator’s neutrality allows him or her to use their more objective perspectives to identify what is not working between negotiators, and discuss ways to address these problems to find positive paths forward. International Mediation, supra note 3, at 17.

\textsuperscript{167} Culturally Suitable Mediator, supra note 155, at 594. (giving an example of situations where disputants from other countries may have genuine difficulty bringing everyone needed for their consensus-based decision making process to a mediation, or may be using a limited authority ploy).

\textsuperscript{168} Id. at 591.

\textsuperscript{169} Alexandra Bowen, supra note 8, at 61. The perception of similarity can help establish trust in the process even though both neutrals may be equally familiar with nuance and patterns in both cultures. Id.

\textsuperscript{170} Craig A. McEwen, supra note 16, at 3; see International Mediation, supra note 3, at 7.

\textsuperscript{171} Some express concern that in the international area, parties represented by counsel have frequently used mediation merely for strategic advantage. Commercial Arbitration At Its Best, supra note 14, at 324; see Penny Brooker & Anthony Lavers, supra note 125, at 203-11 (describing inappropriate uses of mediation in UK); Attorney Truthfulness, supra note 123, at 134-37 (estimating attorney lies about interests and priorities in American mediation). All of this stems from adversarial thinking and actions flowing from fixed pie and zero-sum cognitive biases. One survey showed that win-lose thinking strongly influences reasons lawyers give for not choosing mediation, including factors such as fear of disclosing strategy and conveying weakness. CPR Meeting Survey Finds Mediation is Top ADR Choice, supra note 14, at 98.
expense, and uncertainty of arbitrating, mediation often produces relatively quick, inexpensive solutions that honor business needs and concerns.

Regional trade agreements typically neither prohibit nor particularly encourage mediation. NAFTA, for example, does not specifically authorize ADR mechanisms except for inter-country disputes about interpretation and application and investment disputes. NAFTA and CAFTA encourage the use of arbitration and other means of ADR for the settlement of international commercial disputes. Their provisions do not mention mediation specifically except in sections listing processes respective commissions might use after party negotiations fail. By failing to mention mediation more prominently, these trade regimes affirm the prevailing bias for using arbitral adjudication in transborder commercial disputes.

Exposure through trade regimes to countries with well developed mediation systems have helped other nations that have not experienced this development learn the value of assisted negotiation. Adding mediation provisions to international treaties in the Americas can provide a positive influence developing this process in Latin American countries where it is not yet well established. While not mentioning mediation orconciliation specifically, the MERCOSUL

172 See Lawrence M. Watson, supra note 151, at 15 (ultimate goal of mediation is to put parties in position to make the best meaningful choice between accepting best settlement option available and initiating or continuing adjudication).
173 See Walter G. Gans, supra note 8, at 53 (legal remedies are often too draconian; suing someone rarely serves business goals).
175 Stephen K. Anderson, supra note 8, at 59.
176 See NAFTA Chapter 20, Art. 2007 (Commission-Good Offices, Conciliation, and Mediation); CAFTA Chapter 20, Art. 20.5 (same).
177 Stephen K. Anderson, supra note 8, at 58.
178 Mediation in Latin America, supra note 73, at 427. MERCOSUL exposed Brazilian companies to corporations in Argentina who have extensive experience with domestic mediation of commercial disputes. Id. Similarly, Mexican companies can learn from interactions with American corporations through NAFTA. Id. These interactions have also helped mediation organizations form in Brazil and Mexico. Id.
179 See Mediation in Latin America, supra note 73, at 427.
180 A comprehensive analysis of dispute resolution in MERCOSUL concluded that it does not mention mediation orconciliation although private disputants can participate through consultations with MERCOSUL’s trade commission. Nadia de Araujo, supra note 9, at 26, 36.
integration treaties allow aggrieved parties to participate in assisted-negotiation mechanisms before arbitration. 181 Doing this communicates that mediation is a serious option.182 Commentators argue how helpful it would be to have NAFTA, CAFTA, MERCOSUL, and other regional trade bodies suggest stepped dispute resolution that begins with mediation.183

Disputants face substantial cognitive and cultural barriers when they choose an appropriate process to resolve transborder commercial disputes. Adversarial business and legal culture, along with the difficulties many businesses and their lawyers experience changing routines and traditional expectations, combine to generate default resort to adjudication. Tradition rather than purposeful choice appears to produce excessive reliance on arbitration even as mediation has increasingly emerged as a useful commercial dispute resolution process.

This decision to arbitrate rather than mediate, like many others negotiators make, often seems sub-optimal in hindsight.184 This article analyzes several strategies for making the often more optimal choice to mediate before adjudicating. Is arguing that more mediation should occur appropriate, or is this claim, too, the inevitable result of selective and partisan perception and optimistic overconfidence?

181 Mediation in Latin America, supra note 73, at 432; see Arts. 2, 3, and 25 of the Brasilia Protocol, and the Treaty of Asuncion in Art 3, Annex III.
182 Id. The globalization and regionalization of trade law is stimulating new interest in mediation. Global Trends in Mediation, supra note 3, at 6.
183 Stephen K. Anderson, supra note 8, at 60. Further reforms of regional trading bloc procedures to trigger greater use of mediation to meet the needs of international trade are needed. See International Mediation, supra note 3, at 13.
184 See Rober S. Adler, supra note 19, at 774.