LexisNexis Dispute Resolution
A LexisNexis mini-mag on cultural differences in mediation

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Welcome to this special edition of LexisNexis Dispute Resolution on cross-cultural influences in mediation. LexisNexis are delighted to collaborate on this edition with 4 New Square Chambers to coincide with their event on the impact of cultural differences in mediation ‘Lost in Translation: Cultural Differences in Mediation’ on 19 October 2015.

In this mini-magazine, we provide a flavour of what attendees can expect at the above event, which will centre on a cross-border, cross-cultural mediation scenario conducted by leading counsel at 4 New Square. Murray Rosen QC, Simon Monty QC, Jeffrey Benz, Alex Hall Taylor and Carl Troman from 4 New Square also précis short talks which they will give on some of the issues which arise when different cultural influences affect the mediation process.

The event coincides rather fortuitously with the recent launch by the European Commission of a public consultation on the application of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the Mediation Directive), which will conclude on 11 December 2015. As many of you will recall, the results of the 2014 study ‘Rebooting the Mediation Directive’ demonstrated that although the Mediation Directive has helped advance the mediation ‘discourse’ in Europe, the use of mediation has not increased as significantly as hoped.

While the Mediation Directive, art 5 allowed Member States to introduce mandatory mediation elements, including sanctions, the study noted that the EU tradition of a voluntary approach to mediation has largely prevailed at the legislative level. In their conclusions, the authors of the study note there is evidence that the single regulatory feature likely to produce a significant increase in the use of mediation is the introduction of ‘mandatory mediation elements’ in the legal systems of the member states. Indeed, Italy, the country estimated to have the largest number of mediations annually, has introduced mandatory mediation as a condition precedent to trial in certain categories of cases, and the number of mediations, inevitably, soared. In the UK, there is no mandatory requirement to mediate. Nevertheless, pursuant to the CPR, parties are encouraged by the court to use an ADR procedure (where appropriate) and the court will facilitate the parties’ use of ADR (CPR 1.4(e)), and the English court can penalise a party in costs for unreasonably refusing to mediate.

It is clear that more needs to be done to increase the use of mediation across Europe, which can make the resolution of disputes quicker, cheaper and less acrimonious for the parties involved. In my view, in order to promote greater use of cross-border mediation to resolve disputes, it is important that more attention is given to understanding the cross-cultural influences on mediation processes, and 4 New Square’s event on this subject will no doubt encourage further discussion and debate on this key issue.

My email address is below, please let me know what you think and whether there are any other areas that you’d like us to consider in the next edition.

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Lexis® PSL Dispute Resolution

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4 New Square

4 New Square is a leading set of commercial chambers based in London, but practising around the world. It comprises 83 independent barristers including 26 Queen’s Counsel.

Its members conduct, or advise and advocate in litigation, arbitration and alternative dispute resolution domestically and worldwide. Individually, many have strong reputations in specialist fields including international ventures, insurance and reinsurance, energy, property, professional liability and negligence, construction, engineering, sports and media, disciplinary, regulatory and costs. 4 New Square is dedicated to providing the highest standard of client service and prides itself on being responsive to clients’ needs. Its neutral arbitrators and mediators are available under our new initiative “4 New Square Dispute Solutions”.

To find out more, please visit www.4newsquare.com
An introduction to cross-cultural mediation

Murray Rosen QC, 4 New Square

At the event, Murray Rosen QC will be speaking about the cross-cultural angle in mediation, and and the chambers’ latest innovation, ‘4 New Square Dispute Solutions’.

Murray Rosen QC has been one of the busiest international advocates of the last 20 years, whilst also acting as judge, arbitrator and mediator throughout that time. In 2014 he left Herbert Smith Freehills, where he had established a pioneering advocacy unit in 2005, to resume independent practice. As well as continuing as a strategic adviser and expert on English law and procedure, he now concentrates on “neutral” roles, sitting, among other things, as a deputy High Court Judge in the Chancery Division in London, as a Deemster in the High Court of the Isle of Man, and as an arbitrator (FCI Arb, Member LCIA), mediator (CEDR and ADR Group accredited) and tribunal chairman.

Apart from his extensive experience in cross-jurisdictional commercial disputes and remedies, including joint ventures, natural resources and fraud, he is unusually qualified in culture, media and sports disputes. For example, he has been a chairman on the panels for Sport Resolutions and the Football Disciplinary Commission since each began, and was recently awarded a post-graduate diploma from the Courtauld Institute in History of Art. A legal directory once described him as “tactically flawless ... with a worthy reputation”. He is an arbitrator who also has the skills and knowledge of an experienced judge and a leading advocate who represented governments, agencies and businesses around the world, as well as participating fully as a partner at a foremost international law firm.

What does cross-cultural mean in the mediation context?

All disputes are, in at least one sense, cross-cultural. Even that sentence contains ambiguities and tensions, which require explanation and understanding. The “sense” in which I mean it, is that the parties to a dispute necessarily have different, and apparently conflicting, points of view and outlooks. They each face the same situation, the same difficulty, but from opposing sides. There has been a breakdown in communication. Each comes at the problem with a different perception and a different objective. Being able to express this, confidentially, to a foreigner is as likely as flying to the moon (or in Mr Branson’s case, even less likely).

If the parties come to a trusted “neutral” to help resolve their dispute, they are looking for someone who will cross the boundaries between them, cross and re-cross their differences, in order to tell them the answer (in an arbitration) or to assist them in assessing a possible answer (evaluation) or - and this is today’s topic - to work a process by which they agree on an answer. If their backgrounds and languages are different, that may be all the harder, and certainly more complex, than the run-of-the-mill private dispute resolution. But arbitration and mediation did not only begin in trade associations in which businesses shared much, including their common future. They also proved their worth in cross-border commerce, finding universal principles to bring people back together from distant places, even where they cannot trust their closest friend in confidence.

London has a special role in this. Over the past 400 years or so, it has adapted to successive waves of migration and business, joining together remote enterprises, and maintaining a place as a fulcrum around which productive deals are done, and performed to satisfactory and profitable conclusions. There are today - but there have been many times before - threats to this role - political, social and demographic, as well as economic.

But the one thing London seems safely to maintain is its ability both to absorb and to reach out. And those are qualities at the heart of success in cross-cultural mediations.

Much of it is to do with language and respect. A piece in this morning’s Times caught my eye, when I was tired of the wild animal pictures in The Times and of looking out of the bus at the jams. An Egyptian surgeon has been disciplined for using inappropriate language which he claimed to have learnt by watching the Big Bang Theory, but not to have fully understood as offensive. Of course we can all misunderstand the nuances in foreign languages and even our own. But the trouble really comes when parties are not trying to understand. Much of the psychology of successful mediation involves working on the parties to listen constructively rather than only hear what they want.

For a neutral to achieve this, and much more in mediation, he or she must be positioned within the circle of trust on both sides. That means learning about their cultures, whether a particular national culture, business culture, competition culture or even aesthetic culture. It also means being truly neutral in attitude and in practice. This is what informs our new venture “4 New Square Dispute Solutions”, a group name for those based at 4 New Square who prioritise their work as arbitrators and mediators, and a name not available for those acting as Counsel for clients. This goes further than previously at the Bar towards ensuring that all disputants, from whatever culture, whether at war over a joint venture, a commodities deal or event rights for a world rugby tournament, can trust the neutrality of our arbitrators and mediators.
Notes: An introduction to cross-cultural mediation
The impact of cultural differences on the mediation process

Jeffrey Benz, 4 New Square

At the event, Jeff Benz will be speaking about the impact of cultural differences on the mediation process.

A dispute resolution professional for his 23 years of law practice (as both outside and in-house counsel) in the United States, 4 New Square door tenant Jeff Benz is an accomplished litigator, arbitrator and mediator with worldwide, multi-cultural experience.

Jeff is a CEDR Accredited Mediator and is an active mediator in Los Angeles and elsewhere in the United States and Europe, where he mediates sports, media, entertainment (film, television, and new media), music, technology, telecommunications, and commercial disputes. Jeff has mediated more than 50 cases, nearly every one of which settled.

Jeff is also an arbitrator with the major institutions around the world, including LCIA, ICC, ICDR, CIE Tac, HKIAC, BAC, and CAS, as well as with the Rugby Football Union, and he is a Fellow of the Chartered Institute of Arbitrators. Jeff has served as arbitrator in over 250 cases around the world.

Jeff also teaches mediation and arbitration at the industry leading Straus Institute at Pepperdine University School of Law, where he is an adjunct professor, and he has taught mediation and arbitration to foreign lawyers and judges as part of European Bank for Reconstruction and Development and USAID funded projects in Moldova and Jordan. Jeff regularly writes on the subjects of mediation and arbitration.

How important is advocacy in mediation?

Cultural differences can be based on the more obvious elements of nationality, race, religion, language, geography, or ethnicity, but those differences may also emanate from more subtle differences, including differences arising from gender, industry, professional perspectives of decision makers, economic background, and similar factors. These differences can affect not only how we communicate and how we negotiate, but they also effect how we hear the other side and process what we hear.

A mediator, mediation advocate, and party in mediation would be remiss to not consider these perspectives in the crucible of the mediation process on the way to finding resolution. Failure to acknowledge and account for these elements of difference can create blind spots and be fatal to the process of mediation, or negotiation for that matter.

Not surprisingly, these issues are not limited to family law disputes or more personal disputes, but instead can show themselves with devastating economic effect in substantial commercial disputes. Mediators, advocates, and parties must be attuned to these cultural aspects, give them credence and credibility and acknowledge them in the decision process, and account for them in any solutions, if mediation of a dispute is to succeed.

There are fundamental techniques for drawing out cultural issues, recognizing and addressing them, and ensuring that everyone in the mediation process is attuned to any cultural issues, whether they are open, obvious, and square in your face or lurking in the background.

Speaking from the personal perspective of an American working in Her Majesty’s realm, and thereby experiencing important but not necessarily so obvious cultural distinctions, despite a common language and shared national organs, Jeff will discuss these elements in detail and suggest a framework for approaching them, with a dash of humour mixed in.
Notes: The impact of cultural differences on the mediation process
The importance of mediation advocacy

Simon Monty QC, 4 New Square

At the event, Simon Monty QC will be speaking about the important role played by advocacy in the mediation process.

How not to approach advocacy in mediation

Here are some top tips on how to ensure the mediation fails through poor advocacy:

- Be adversarial – don’t listen, just showboat
- Ensure your client sees what an aggressively combative advocate you are
- Overcomplicate things with legal conundrums
- Never put yourself in the other side’s shoes
- Attack the person rather than the issues
- They are unreasonable, so I will be too
- Let personal animosity get in the way of your client’s needs
- Why can’t you see what I can see? Increased demands on the day
- The best way to show lack of good faith
- Put the other side in an impossible position
- Never – ever – say you’re sorry
- Why bother to break down the barriers of mistrust?
- Ignore the weather report – you’re not being realistic
- Don’t listen to the words, or the way in which things are said
- Don’t give an inch
- Leave no stone unturned and no argument unmade
- The best way to be obstinate and unreasonable
- Independent advice – who needs it?
- There is no basis whatsoever for the other side’s position
- This is an open and shut case
- Just cut to the chase – what’s your best offer?
- How best to devalue and disrespect the client
- Should counsel be there at all?
- Am I just there to show off and hold the client’s hand, or have I something of value to add?

Simon, who also sits as a Civil Recorder and a Deputy High Court Judge (Chancery Division), has been a qualified mediator since 2009, and has mediated disputes concerning professional indemnity and insurance claims and commercial contract disputes, many of which are multi-party cases, often of very substantial value.

Simon is a clear, effective, patient and hard-working mediator, committed to parties reaching their own decisions, allowing parties to participate fully in the process, and suggesting creative and productive options to encourage settlement. Simon’s approach is always to have a solid and detailed grasp of the issues in the dispute, and to understand the parties’ positions, with a view to narrowing issues (in advance where possible) and reaching a mutually acceptable agreement.

How important is advocacy in mediation?

Mediations succeed – or fail – for all sorts of reasons, one of which can be the wrong approach to mediation advocacy. The importance of advocacy in mediation should not be underestimated.

Considering how best to present your client’s position in the particular circumstances of the mediation should form a key part of a lawyer’s preparations. While there are many ways to get this right for your client, getting it wrong can compromise the success of the entire process.
Notes: The importance of mediation advocacy
Mediation approaches and the influence of cultural differences

Alex Hall Taylor, 4 New Square

At the event, Alex Hall Taylor will be speaking about different approaches to mediation and the influence of cultural differences.

Alex has recently become a CEDR accredited mediator and now conducts mediations alongside his busy commercial litigation practice. He mediates disputes principally falling within his core areas of litigation experience namely, general commercial, chancery commercial, financial, professional liability, company, partnership, shareholder, civil fraud and insurance disputes. He has been ranked for many years as a leading junior with particular expertise in chancery commercial, banking and financial services, civil fraud, and professional liability.

What are the usual mediation approaches and how to cultural differences influence the process?

Mediation is familiar to many cultures, and mediation approaches and expectations tend in part to vary according to the mediator’s historical place in that culture or society. Most litigators and mediators are familiar with the principal possible “modern” western mediation approaches: from passive through facilitative, on to evaluative and, at the furthest extreme, perhaps dictatorial. Most (but not all) professional mediators shy away from that most interventionist approach, from imposing their own views or solutions. Indeed CEDR trains mediators to adopt the more passive, neutral and, at most, a facilitative reality testing approach. But is that what parties really want, and are there different expectations in different cultures? Do cultural differences require the adoption of different approaches?

The principal divide between passive/facilitative and evaluative/opinionated approaches is even reflected in the ranking of tier 1 mediators in Chambers & Partners: between those on one side recognised as “stable, sensible, calm”, “building trust”, “good at smoothing ruffled feathers”, “charming and trustworthy” and those on the other described as “holding up a mirror”, “technically forensic”, getting “stuck into the legal issues” or able to “beat people up if they’re going down the wrong line”. Both appear to be valued in the mediation marketplace.

Most people have some cultural or historical awareness of a mediator role. At the beginning of the 20th century the German sociologist, Georg Simmel, identified the mediator as ubiquitous across all cultures, and mediators actively involved in and directly concerned with the interests of all parties (insider mediators) who would usually be family members, community elders or leaders, industry or union leaders or managers. Throughout history insider mediators and mediation have had and today continue to have a major role in many cultures: P’shara in Judaism, Sulh (settlement) and Musalaha (reconciliation) rituals in Arab-Islamic culture, or the recognition of intrinsic human interconnectedness in the African dispute resolution concept of Ubuntu. Insider mediators are perceived to be “on everyone’s side” and directly invested in the outcome through being a participant in the relevant community. As a result they are able to take a more interventionist, “tribal elder” or “wise counsel” approach: to encourage particular solutions that may surface from their knowledge of community history and personal experience and then to impose a solution through established respect and trust. They may in fact, and acceptably, be quite biased by wider community interests.

Outsider mediators tend to originate from a “Western” model (although their reach is now more widespread), and to be trained professionals; they are perceived to be “on no-one’s side” and to have no personal interest in the outcome (save for reaching one acceptable to the parties). They have to build trust, respect and understanding through perception, neutrality, fact gathering, reality testing and the exploration of the parties’ aims and needs. To the extent they express any personal views of the dispute it must come from direct industry or legal knowledge and experience if it is successfully to resonate with and impact on the parties.

English mediators tend to be professional and outsiders. Therefore, to be successful in mediating mixed cultural disputes they need to be aware of different cultural expectations as to the role they should play and approach they should take.

This understanding cannot be limited simply to an understanding that race or religious background or nationality may give rise to different cultural expectations of the mediator role. It must extend to a broader understanding of differences in approach to the analysis and resolution of disputes, and to verbal and non-verbal communication.

Thus in some cultures (such as Germanic and Scandinavian) disputes may be analysed and resolved on a detailed, issue by issue, logical, scientific or sequential approach. In others (such as Arabic or Indian cultures) a more global, holistic, intuitive, informal or impressionistic approach may be preferred. Where these cultures meet in dispute or mediation such wide differences in approach may lead to misunderstanding, frustration and a lack of resolution. The mediator may have to communicate differently with each party, and to manage the interaction and communication between them to ensure that it is an effective rather than a disruptive interface.

Similarly some cultures are expressive, emotional, passionate, interventionist and active in their verbal and non-verbal communications. This may lead them not to listen quietly but to interrupt, to argue, to be “physical”, to display anger or frustration, all as indicators of being engaged in the process of discussion and resolution. Other cultures prefer a respectful, courteous, non-expressive, unemotional approach as a clear indicator that something is being listened to and taken in on a serious and considered basis. Both are demonstrating their participation in the process through their cultural norms, but communicating in that way, each might interpret the other as discourteous, uninterested, and uninvolved in seeking resolution when nothing might be further from the truth.

This short note cannot do justice to the complexity of these issues but does, I hope, indicate why cultural differences can be so important to determining or adjusting mediation approach.
Notes: Mediation approaches and the influence of cultural differences
Cross-cultural issues in the scenario—things to look out for

Before the mediation begins, Carl Troman will discuss some of the key issues to look out for as the session plays out.

Matters to look out for

1. The known cultural background of each actor:
   a. Charan the self-made Indian who lives for a lot of the time in Houston. He has wealth and an art collection and is also a philanthropist.
   b. Du Villandrey the elderly man living in Switzerland having made connections with the wealthy from all over the world.
   c. Goldberg the senior representative of the family descended from persecuted Austrian Jews.
   d. The lawyer for Goldberg and the family who is based in New York with a specialism in looted art.

2. The known cultural background of each actor:
   a. Charan: where was he educated, how old is he and in what circles does he now move?
   b. Du Villandrey: what is his nationality and in what circumstances did he grow up?
   c. Goldberg and the family: what are their nationalities, where do they live, in what work are they engaged and do they share a cultural identity?
   d. Who is the lawyer, how did he come to be where he is and what are his priorities?

3. How culture will impact upon the mediation process:
   a. How will Goldberg and his lawyer relate to Charan against whom they have made a claim? There is shared culture in terms of residence in America and knowledge of the art world between the lawyer and Charan. Is there any shared culture between Charan and Goldberg? How will their contrasting cultural background impact upon the way they see the dispute and how it should be resolved.
   b. From what cultural perspective will Charan and du Villandrey see matters in relation to the dispute between them? Will their different cultures affect how they see who is to blame for the situation?
   c. To what extent will their cultures enable Goldberg, his lawyer and du Villandry to deal with each other directly rather than focusing only upon their positions with regard to Charan?

4. Cultural matters more generally:
   a. The impact of the holocaust upon the various actors.
   b. Differing or similar religious sentiments and their implications.
   c. Attitudes towards responsibility, respect, trust, money, art, publicity and history.

Carl Troman joined chambers in 2003 and practices in the core areas of chambers’ work particularly professional liability, commercial and chancery litigation and insurance. Carl is recommended as a leading junior in the field of professional negligence in the Legal 500 and has been described as “able to handle complex instructions often with multiple issues which he distils quickly and well”, “outstanding”, “exceptional”, “very thorough and accurate” and a “budding star”. Carl is also ranked by Chambers & Partners 2015 - “he just makes any situation easier. He is also thorough and prompt.” “He is my first choice for property-related professional negligence, as he always provides common-sense advice. He also looks at things from a different angle and puts forward a refreshing view.”

Carl is a formally accredited mediator and has extensive experience acting in mediations in a broad spectrum of cases. Carl is regularly instructed in mediations involving two or three parties and has also acted in a very complex mediation involving some six different parties.

Recent mediations include:

- A claim against structural engineers and geotechnical experts arising out of a substantial property development.
- A claim against an insurance broker in relation to specialist commercial property.
- A breach of warranty of authority claim against a solicitor.
- A claim against an architect in relation to design and supervision.
- A claim arising out of flood damage.
- A claim against the vendor of property with a related claim against a solicitor in respect of conveyancing work.
- A claim against an accountant and a solicitor with regard to tax structuring advice.

http://www.4newsquare.com/barristers/66/Cold-Troman
Notes: Cross-cultural issues in the scenario—things to look out for
The mediation scenario

At the event, counsel from 4 New Square will perform a mock mediation based on the following scenario to explore some of the cross-cultural issues that may arise during mediations, particularly those with cross-border elements.

Mr Charan

Neraj Charan is an Indian industrialist. He inherited his father’s languishing steel company in India, which he expanded, employing the latest technology and building the company into the largest steel and manufacturing industry in Asia. He has since built the company into a world leader in many fields and countries, including supplying equipment to the oil and gas industry, creating a personal fortune in his own business lifetime in excess of US$15 billion along the way. He has many homes around the world, in India, Europe, the Far East, Australia and the United States. He spends a large proportion of his time in Houston, where many of his principal customers in the oil and gas industry are based. In recent years he has diversified his interests into art and philanthropy, donating more than US$100m to charities fighting poverty, and building the “Charan Wing” of the Museum of Fine Arts in Houston at a cost of over US$200m. He also built a substantial and valuable private fine art collection (with a collective value now exceeding US$1 billion), at least half of which is loaned to the Museum at any given time.

Jean-Luc du Villandrey and the Renoir

In 2012 a contact of Mr Charan’s in the art world put him in touch with Jean-Luc du Villandrey, the most exclusive fine art dealer in Geneva, Switzerland (where Mr Charan also owns a home and has deposited a substantial proportion of his liquid wealth). Jean-Luc was by then very elderly and winding down his business, but had in the past run a small but elite business and often been chosen to broker transactions in the highest quality art to world class museums and private collections, including royal families, heads of state, and ultra-high net worth individuals. Jean-Luc had been approached by an intermediary acting as agent for an unidentified private collector in Argentina who claimed to hold a thought to be lost work by Pierre-Auguste Renoir (“the Painting”).

On hearing about it Mr Charan immediately expressed an interest in the Painting, encouraging Jean-Luc to find out what he could about its provenance and likely price. Jean-Luc flew to Argentina and met the intermediary who refused to reveal who he was acting for but arranged for Jean-Luc to see the Painting. Jean-Luc was immediately convinced the Painting was genuine, and a Renoir of great significance and value. The agent indicated that the owner was looking for US$50 million for the Painting. Jean-Luc related his viewing back to Mr Charan and, without revealing the price suggested by the agent, proposed a purchase price of US$60 million to him. Jean-Luc expressed the view to Mr Charan that, at auction in a competitive sale, the Painting would quite likely sell for well in excess of US$100 million.

At Mr Charan’s encouragement Jean-Luc carried out research into the Painting’s provenance, but both he and the agents he engaged could not find any trace of the Painting since about 1930. Prior to that it had been owned by various wealthy European families, and had last been heard of in 1930 when it was sold at auction in Paris to a family in Austria. Jean-Luc made enquiries of the Art Loss Register, the Lost Art Internet Database and Interpol’s works of art database but none of them had a record of the Painting or of any live claim to it. The owner’s agent represented to Jean-Luc that the owner was a descendant of the family known to have purchased the Painting in Paris.

Mr Charan asked Jean-Luc for assurances as to provenance, and Jean-Luc said all he felt that he could to assure him, while drawing attention to the fact that no real provenance had been discovered since 1930, that the identity of the owner was unclear (although the agent had apparent authority to sell), that the painting was genuine and should be free from claims given the lost art register checks carried out. On that basis Mr Charan agreed to buy the Painting and paid US$60 million to Jean-Luc.
for it. Through Mr Charan’s concern for privacy the contract between
them contained an arbitration clause to cover any dispute between them,
the seat of which was to be Geneva, under Swiss law. Jean-Luc secured
the Painting for US$50 million, paid expenses totalling US$500,000
connected with the sale and kept the remaining US$9.5 million as his
commission on the sale, the largest he had ever achieved. He then
immediately shut down his art dealership and retired.

Mr Charan took possession of the Painting and immediately loaned it to the
Museum of Fine Art in Houston which trumpeted its arrival with a special
advertised exhibition of Renoir’s work, several of which were owned by Mr
Charan, and of which the Painting was the centrepiece.

The discovery and the claim

The exhibition was visited by a partner of a New York law firm specialising
in restitution claims for looted art who was surprised by the lack of any
stated clear provenance to the Painting. On return to New York the partner
checked the Central Registry of Information of Looted Cultural Property
1933-1945 and found that the Painting was listed as one looted by a Nazi
German general from a prominent Austrian Jewish family in Vienna, prior to
their deportation to the concentration camps. The Painting disappeared
and was not heard of again after the war. The registration of the Painting
had been made in the late 1980s by a surviving relative who had found
reference to the purchase and disappearance of the Painting in family
papers that had been smuggled out immediately prior to World War II.

Having traced further 30 further distant descendants of the original family
the New York lawyer threatened the Museum and Mr Charan with a court
claim in New York by the family members (“the New York Claimants”) for
recovery of the Painting or damages to reflect its current value, estimated
by a New York art expert at US$150 million, and in any event damages for a
substantial sum for each claimant to reflect the distress caused to the New
York Claimants by the manner in which the Painting had been bought and
publicly displayed by Mr Charan. The lawyers arranged for considerable
press coverage of the threatened claim, and the Painting was removed
from show at the Museum under a further press storm. The New York
Claimants commenced their claim in New York and served Mr Charan on
the doorstep to his Manhattan apartment with accompanying TV coverage
to his great embarrassment.

Mr Charan engaged his own formidable legal team, and in turn commenced
an arbitration claim against Jean-Luc in Geneva seeking an indemnity for
the claim against him and damages to reflect the damage to his reputation
(in business, in the art world, and as a philanthropist) arising from the
association with Nazi looted art.

The background to the mediation

At this relatively early stage of proceedings the parties have agreed to a
3-way mediation between the New York Claimants, Mr Charan and Jean-
Luc. They have chosen a mediator with considerable experience in the art
world.

The New York Claimants are represented by their lawyer, the partner who
first discovered the history of the painting and one senior representative
of the family.

Mr Charan has chosen to represent himself.

Jean-Luc has also chosen to represent himself.
The “neutral” in private dispute resolution – seven pillars of wisdom

Murray Rosen QC

The psychological factors which so influence disputants can act as forces for war or for peace. From the perspective of a lawyer taking part in the attempt to find a solution, these factors can also be expressed forensically, under seven related headings – if you like, Seven Pillars of Wisdom on this subject.

First, equality of power: parties do not come quickly to a rational compromise if they are under evident disadvantage. Instead they enter into ‘David v Goliath’ mode, with a propensity to flex and demonstrate their own muscle.

Secondly, close communication: whether with arbitrator or mediator or evaluator, the better the mutual understanding between a party and the neutral, the more the party is being listened to, the more he will strive to be reasonable and constructive.

Third, fairness of process: humans are ‘hard-wired’ to seek and project their subjective sense of what is fair. In an unfair environment, they will struggle and lash out; in a manifestly fair forum, they will want to achieve the common aim – fair resolution.

Fourth, competent representation: the neutral cannot impose resolution unilaterally. The parties need to co-operate through their advisers and spokespeople. For his part, the neutral has to acknowledge and respect their roles.

Fifth, consistency: if any consensually-based process is to provide reassurance, it has to proceed in a measured and secure way. Basic rules have to be laid down as to how participants conduct themselves, There is nothing so fatal to communality than moving the goalposts.

Sixth, ethical behavior: the authority of any dispute solver, the seduction of a proposed solution and the persuasive power of good dispute management all lie in helping all parties to recognise the ethical imperatives.

Seventh, the eradication of any bias: authority lies in independence, trust and balance. All these pillars support the truly ‘neutral’ in private dispute resolution. Even in a binding determination process such as arbitration, there should be umpteen opportunities for the parties to settle if they are fully engaged in the pros and cons of doing so.

It is on the basis of these principles that we are launching 4 New Square Dispute Solutions as the platform for the arbitrators and mediators based at 4 New Square. The factors briefly summarized all demand that those offering themselves for neutral work are more than circumspect in their association with other, adversarial activities in chambers. We believe that a separate banner, a business distinctly separated from party representation, best serves to keep the pillars upright, and is the way forward for arbitrators and mediators.
Mediating in a multi-cultural world

Jefrrey Benz

“People are disturbed not by things, but by the view they take of them.” —Epictetus

Culture, if considered in a mediation or negotiation, can be the key to success. On the other hand, culture, if ignored or treated without its proper respect, can be the proverbial hill upon which resolution dies. Everyone involved in the process needs to consider culture, even at the fundamental level of considering culture as the lens through which we see differences in others, if the process is to yield satisfactory results.

This article endeavors to cover the basics for addressing cultural issues in resolving disputes, but this is but a mere introduction to the often-very complex and specific issues that are presented in a multi-cultural dispute resolution process. It would behoove the reader to use this article as a stepping off point for considering very specific review of cultural issues that might be presented in any particular case. Dealing with Chinese parties, for example, is very different from dealing with Japanese, English, or American parties, and it behooves the participants to have some grasp of the cultural issues in such cases beyond the specific legal issues.

Defining Culture

Cultural differences can be based on the more obvious elements of nationality, race, religion, language, geography, or ethnicity, but those differences may also emanate from more subtle differences, including differences arising from gender, industry, professional perspectives of decision makers, economic background, and similar factors. These differences can affect not only how we communicate and how we negotiate, but they also affect how we hear the other side and process what we hear.

In undertaking our review of this topic, we can consider formal definitions of culture similar to the following:

“Culture refers to the socially transmitted values, beliefs and symbols that are more or less shared by members of a social group.” Kevin Avruch, Culture as Context

“Culture is a common system of knowledge and experiences that result in a set of rules or standards; these rules and standards in turn result in behavior and beliefs that the group considers acceptable.” Pat K. Chew, The Pervasiveness of Culture in Conflict

“Culture can be seen as a set of understandings, interpretations, and expectations regarding our environment. On that basis, it is possible to see all conflict as cross-cultural.” Kenneth Cloke, Mediating Dangerously

Not to get caught up in the formal definitions, but to endeavor to distill their essence and put it simply, “culture” refers to a group or community that shares common experiences that shape the way they perceive the world. It includes groups one is born into, such as those based on gender, race or national origin. It also includes groups we later join, like those based on professions, industries, or class.

In many ways, culture transcends every negotiation and mediation even if it does not involve foreign languages, people who appear different than you, different passports, or different religions.

Some writers believe that culture does not matter in a dispute, that all conflict is personal and individual. While you can compensate for a variety of different approaches, perhaps with a checklist for negotiating with certain groups, ultimately, so this perspective goes, individual approaches and views are what matters and culture does not. This practitioner disagrees with this approach, borne of years in the trenches of a multi-cultural society in Southern California and in the increasingly diverse melting pot that is London and having done business across Asia.

Culture can, and often does, frame all and it should be considered with due respect and embraced for its often paramount importance in any effort to resolve differences between people.

Elements of Culture to Consider

Scholars who study culture tend to define it as having many difficult angles or perspectives. Some of the most important angles or perspectives, in a generic sense, include the following:

- Universalism v. Particularism — Universalism emphasizes rules that apply to a universe of people, while Particularism emphasizes exceptions and particular cases. The U.S. is one of the most universalist of societies (7 out of 46); Japan is one of the most particularist (40 out of 46).

- Specificity v. Diffusion — Specificity here emphasizes precision, analysis, and “getting to the point,” while Diffuseness looks to wholes and to the larger context. The U.S. is singularly the most specific country in the group (1 of 46); Japan is one of the most diffuse (43 of 46).

- Status: Achieved v. Ascribed – The “status” dimension asks whether “cultures regard status as achieved by one’s record of success or is status ascribed to persons for other reasons?” The U.S. is the most achieved (1 of 20); Japan is more ascriptive (16 of 20).

- Inner v. Outer Direction — The “direction” dimension asks, “Are cultures inner directed – that is, motivated or driven from within – or outer directed – that is, adjusting themselves to the flow of external events?” The U.S. is the most inner-directed (1 of 20); Japan is relatively more outer directed (11 of 20).

- Sequential v. Synchronous time — The “time” dimension asks whether societies “regard time as sequential or seriatim, a passing of line of increments, or is time synchronous, key conjunctions of events, expertly timed? The U.S. is relatively sequential (3 of 23); Japan is more synchronous (13 of 23).

- Individualism/Communitarianism — Individualism emphasizes the individual, while Communitarianism stresses the family, organization, community, or nation in which that individual has membership. The U.S. is on the most individualist countries (36 out of 39), whereas Japan is one of the most communitarian (5 of 39).


Geert Hofstede posits four other dimensions of culture that mediators should familiarize themselves with:

- Power Distance – The extent to which less powerful members of society accept that power is distributed unequally (use of titles v. given names at first meetings, etc.)
• Masculinity v Femininity (or tough v tender) – Masculinity is about the extent to which the society values achievement and success rather than the femininity of the values of quality of life and caring for others.

• Uncertainty Avoidance – The extent to which people feel threatened by ambiguity and uncertainty. High uncertainty avoidance cultures are rule bound and appear inflexible to low context avoidance cultures.

• Long-term Orientation v. Short Term Orientation – The extent to which a society values a future-oriented perspective rather than a historical or short term perspective. Western societies’ preference for long-term binding contracts reflects this.

Geert Hofstede, Cultures Consequences (2001).

Another aspect of assessing culture, and one of the most significant, analyzes the Monochronic versus the Polychronic. This element relates to the use of time (and space) as frames of organization. The monochronic approach emphasizes “schedules, segmentation, and promptness,” while the polychronic approach is “characterized by several things happening at once.” Monochronic persons tend to do things one at a time, have a high need for closure for one task before moving to the next, and think in “terms of linear-sequential, time-ordered patterns.” In contrast, those with a polychronic orientation “attempt to do a number of things simultaneously,” and think in holistic pattern, in terms of pictures or configurations. They stress “involvement of people and completion of transactions rather than adherence to preset schedules.” The U.S., British, German, Swiss, and Scandinavian cultures are relatively monochronic, while Latin American, African, Middle Eastern, and Southern European societies are polychronic. Charles M. Hapden-Turner & Fons Trompenaars, Building Cross-Cultural Competence (2000).

In addition, notions of high context versus low context can be considered. This aspect addresses the amount of information contained in the context (or setting) rather than in the transmitted message itself. High context communications feature preprogrammed information that is in the receiver and in the setting, with only minimal information in the transmitted message. “Factors such as gesture, posture, tone of voice, and the social status of the speaker and the social setting of the interaction are used to interpret spoken words.” Low context communications are the reverse. Most of the information must be in the transmitted message in order to make up for what is missing in the context (both internal and external). In high context cultures, there is an expectation of shared knowledge, the information is implicit, and the communication is less direct. In contrast, “in a low context culture . . . information is explicit; procedures are explained, and expectations are discussed,” and a literal, direct style of communication is used. With respect to nationalities, the United States, Germany, Switzerland and other Northern European countries are considered to be low context, in contrast to the high context seen in cultures like Japan, Arabian and Mediterranean countries. Edward T. Hall, Beyond Culture (1989). Mediators need to be sensitive to their own style as high or low context and to keep in mind that when they seek to speed things up, high context communicators can often feel time pressured.

Watch out for gender differences always! Evidence suggests that the experience and meaning of conflict may also be different based on gender. There are also beliefs in gender-linked behavior that may be well founded in research. For example, among mediators, women viewed their goal to be an understanding of parties and their differences, whereas men saw their goal to be the development of an agreement. Men believed they should be neutral, whereas women believed they should facilitate balance between conflicting parties. Loraleigh Keashly, Gender and Conflict: What Does Psychological Research Tell Us?, In The Conflict and Culture Reader, Pat K. Chew, ed., New York University Press, 2001, pp. 95–6.

Similarly, there are culture-based perceptual differences between East and West, suggested by the following passage:

“The Western assumption that working for peace is always a good thing might be questionable in other cultural contexts.”

“Western Conflict Resolution relies heavily on the assumption that pain is bad and pleasure or comfort is good. It is accepted as obvious that the suffering, physical or other wise, associated with conflict is one of the main inconveniences that conflict resolution practitioners try to eliminate.”

“The focus of Western conflict resolution theorists on the suffering generated by conflict rather than on the justice or morality of the cause may not strike a resonant philosophical chord in other cultures. To the contrary, suffering itself in many cultures . . . including pre-modern Western culture, enjoys a fairly high valuation as a means for moral or spiritual purification or a necessary divinely-ordained component of life.”


This is not just theoretical mumbo jumbo. These frameworks provide fundamental practical and real dimensions for mediators, negotiators, and others involved in the process of dispute resolution to consider to accomplish success, however that is defined for their clients.

Techniques for Ensuring Culture has its Place in Mediation and Negotiation

The normal litany of mediator tools that of course should be used in any mediation, including mediations involving other cultural aspects, such as reframing issues into neutral terms, focusing on party interests rather than individuals, active listening, eliciting information, acknowledging various issues including feelings, suffering, and legal effects, identifying values and needs, and summarizing key issues and proposals before moving ahead are or should be well ensconced, and well-practiced, in the basic toolkit of every mediator. But unique care should be taken in cross-cultural mediations to consider certain aspects.
People more prominent than me have suggested techniques for bridging cross-cultural gaps. For example, noted US mediator Ken Cloke has suggested the following:

- Serve food or drink
- Ask each person to say what they expect of you and the mediation process, or who they think you are, and how they define your role.
- Ask each side to identify ground rules they need to feel respected, communicate effectively, and resolve their problems.
- Elicit a prioritization of conflicts from each side. Compare similarities and differences.
- Ask each side to list words that describe the other’s culture, and next to this list, words that describe their own culture. Exchange lists and ask them to respond. Or do the same with ideas such as “time” or “anger” in relations and conflict.
- Ask parties to rank all the available options from war to surrender, and explore the reasons for choosing mediation.
- Ask parties to describe (pantomime, role play, draw, etc.) how conflicts are resolved in their culture. Who do they go to for help? What roles are played by third parties? How do they mediate? Then jointly design the mediation process.
- Establish common points of reference or values by asking each side to indicate their goals for the relationship or process.
- Invite each side to suggest someone within their culture who may be willing to co-mediate, and work with them to build consensus on a model for the process.
- Ask questions like: “What does that mean to you?” or “What does ‘fairness’ mean to you?”
- Acknowledge and model respect for cultural differences.
- Ask each person to say one thing they are proud of about their culture, and explain why.
- Ask them to say the three most important things they have learned in their lives and explain why.
- Ask them to bring cultural artifacts, such as poems, music, or photographs, and to share their stories.
- Ask each side to identify a common stereotype of their culture, how it feels, and explain why.
- Describe your own culture, list the stereotypes you know of, and explain why they are inaccurate.
- Ask what rituals are used in each culture to end conflict, such as shaking hands, then jointly design a ritual for closure and forgiveness.


I would suggest that some of these elements are at the extreme end of what you might do in a cross-cultural mediation arising in the commercial context, for example suggesting pantomimes or exhibiting descriptions of what makes them proud of their culture, might not lead to repeat business, while others are more practical, such as asking each person to describe the mediation process and what they believe it is about, or determining early on the rituals needed to culturally end a conflict.

I have some of my own basic, practical concepts for cross-cultural mediations I would recommend as follows, but bear in mind that the delicate process of assisted negotiation that is the promise of mediation is unique and in many ways personal to the style of every mediator and the nature of the dispute and the parties, so a one size fits all approach will likely not work, but here are my top 10:

1. Determine language issues early and account and prepare for them. Insist on the use of interpreters if anyone important to decision making needs one, and familiarize yourself with the rules governing interpreter conduct and ethics. Be certain you account for the additional time interpreters will require. In this regard, be sure to avoid legal jargon, slang, and technical words to simplify the proceedings for the interpreter and the parties, and consider using visual aids as necessary to get your point across. In addition, be sure you know who the real decision maker is, or at least do not assume who it is, because some cultures do not make this apparent in any Western manner.

2. Familiarize yourself as the mediator or advocate/negotiator with basic understanding of the cultures that will be in the mediation milieu. Google is a wonderful tool for learning quickly about fundamental cultural issues. Understand the importance of saving face in some Asian cultures when compared to the importance of apology in others, or the notions of more linear negotiation styles contradistinshished from styles that keep open many issues until the end, and adapt.

3. Restate often. Constantly clarify what you are hearing from someone by simply summarizing and repeating it. Interpretation issues aside, do not assume that what you are saying is being understood. Constantly test it. But be sure to allow for the additional time required for this process.

4. Reframe issues to endeavor to bring issues closer to closure and to avoid or minimize entrenched or emotional positions seen through the view of culture-laden lenses.

5. Listen carefully, now more than ever. While the parties may have issues understanding you, you want to be sure that you understand the parties. Restating assists in this process, but also be sensitive to more subtle cues in what the parties are saying that might suggest a unique cultural approach to a problem that might form the basis for resolution later. Do not be blinded by your own cultural bias. Never assume.

6. Find ways to bridge any cultural differences by getting both parties to validate the concerns of the other and then use these validations to cement progress during the mediation, while bringing the parties to closure. Confirm with the other side that their opponent has validated their concern and get permission to do so. In other words, keep the communication open, positive, and confirming, in terms that are understood by the cultural aspects of all individuals involved, as the discussion hopefully heads toward resolution.

7. Be patient and open to new approaches or perspectives, including procedural variation, the parties might bring to you that you might not have otherwise considered. And be humble while you are at it so the parties are willing to open up to you despite any perceived cultural barriers!

8. And if, despite the impediments caused by different cultures endeavoring to communicate, you are fortunate enough to be approaching success in resolving the dispute, be sure that the terms of any agreement are expressed in terms every party can understand, that the terms are actually understood (do not just rely on the typical representation in settlement agreements that parties had access to counsel and could have had them explain it), and be prepared to pause or halt the negotiations to allow time for every party to gain appropriate understanding. This same principle applies to every proposal going back and forth between the parties. As mediator it is incumbent on you to protect the mediation process, and as a negotiator it is important your expressions of deal making are appropriately understood.

9. I would also consider a reframing of Ken Cloke’s suggestion of serving food or drink to be specific to culture issues that have distinct food or drink elements. Often in complex cases I will suggest to the parties that we get together the night before the mediation over dinner to endeavor to break bread in that time–honored human tradition that endeavors to bring some informality to the dispute (obviously, this should be done on a case by case basis as it is not good for anyone to have the mediation
1. Fail at dinner before it even gets off the ground!, but having a meal before the mediation where the parties and the mediator can interact informally at a place that brings the food-based element of culture to the fore, later to be offset by the choice of lunch service in the mediation or negotiation offices the next day, can do wonders for bringing people together.

2. Know or get the answers to Hofstede’s four basic questions: How personal should I be? How direct should I be? How does one get a turn to speak in the conversation? How are good relations made and kept here? In other words, but culturally astute and sensitive.

Conclusion

A mediator, mediation advocate, and a party in mediation would be remiss to not consider cultural perspectives in the crucible of the mediation process on the way to finding resolution. Failure to acknowledge and account for these elements of difference can create blind spots and be fatal to the process of mediation, or negotiation for that matter. Not surprisingly, these issues are not limited to family law disputes or more personal disputes, but instead can show themselves with devastating economic effect in substantial commercial disputes. Mediators, advocates, and parties must be attuned to these cultural aspects, give them credence and credibility and acknowledge them in the decision process, and account for them in any solutions, if mediation of a dispute is to succeed. There are fundamental techniques for drawing out cultural issues, recognizing them and addressing, and ensuring that everyone in the mediation process is attuned to any cultural issues, whether they are open, obvious, and square in your face or lurking in the background.

Jeff Benz is a busy mediator and arbitrator with an international practice in Los Angeles, London, and Asia, and that spans many industries. Jeff is a door tenant at 4 New Square, a chamber of barristers in Lincoln’s Inn in London, and is a CEDR Accredited Mediator and a Fellow of both the Chartered Institute of Arbitrators and the College of Commercial Arbitrators. A successful commercial litigator (admitted in California, New York, Colorado, and Hawaii) and in house counsel, Jeff has a fully-rounded approach to the law that includes having been lawyer and client in addition to serving as a neutral dispute resolver across more than 22 year of practice. Jeff teaches ADR at the Straus Institute at Pepperdine University in Malibu and at ISDE in Madrid, and has taught as part of international rule of law projects on ADR funded by the European Bank for Reconstruction and Development and USAID. Jeff is also a sought after speaker on ADR having spoken at conferences around the world on the subject. Jeff has BA and MBA degrees from the University of Michigan and a JD degree from the University of Texas.

While this article is focused on mediation and negotiation as ADR tools, some of these same principles would apply in the context of arbitration and litigation.
Costs sanctions for refusal to mediate

Barry Fletcher, Head of the Lexis®PSL Dispute Resolution Group

This Practice Note addresses the court’s powers to encourage parties to resolve their disputes through mediation. The leading case is *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920 which established the principles to be applied by the court in deciding whether to impose costs sanctions. We also look at how the courts have applied those principles since *Halsey* and when the courts have sanctions parties in costs.

Links in red indicate where subscribers to Lexis®PSL Dispute Resolution can find further guidance

While under English law the court cannot force parties to settle their differences outside the courtroom, it can certainly impose costs sanctions on those who unreasonably refuse to consider other methods of resolving their disputes.

**CPR**

The CPR contains a number of measures designed to encourage parties to consider ADR. See Practice Note: ADR and the CPR. Where the parties do not accede to this encouragement the court can look at their behaviour retrospectively when assessing who should pay what; it will consider whether or not they should have attempted ADR earlier or at all, and had they done so, whether the dispute would have been settled earlier and at lower cost.

The starting point is CPR 44.4(3)(a):

‘The court will also have regard to the conduct of all the parties, including in particular…

(i) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.’

The courts have interpreted this to include any efforts at resolving the dispute through ADR.

Note: on 6 April 2015, the new Practice Direction Pre-Action Conduct and Protocols came into force. Paragraph 11 includes a new warning that ignoring an offer to mediate/refusing to mediate may be regarded as unreasonable and attract a costs sanction:

‘If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party’s silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.’

Practical tip: the decision whether or not to mediate should be kept under review during proceedings. Further, where a client refuses to enter into a form of ADR, practitioners should be mindful of making an attempt to forward reasonable settlement proposals in order to resolve the matter or to protect their client’s costs position.
In Bradley v Heslin [2014] EWHC 3267 (Ch), [2014] All ER (D) 185 (Oct), a case concerning a neighbour dispute, Norris J, whilst not imposing a cost sanction for refusal to mediate, observed:

‘I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to re-solve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.’ (Bradley, per Norris J, paras 22-26)

Leading authorities

The first case to impose costs sanctions against a successful party for refusing to mediate was Dunnett v Railtrack [2002] EWCA Civ 303, [2002] 2 All ER 850. The defendant had refused the unsuccessful claimant’s offers to attempt resolve the dispute through ADR. The defendant refused on the basis that such a process would involve an offer to pay over and above what it had already offered and this it was not prepared to do. Despite the defendant’s victory on appeal, the court departed from the usual order that the loser pays the winner’s costs and made no order as to costs; the defendant had failed to comply with the overriding objective and had also not acted reasonably in turning down the claimant’s suggestion of mediation. In fact, in this case, the claimant may well have accepted an apology by way of settlement.

The leading decision on costs penalties being imposed on parties who refuse to mediate is that of the Court of Appeal in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 4 All ER 920. Dyson LJ stated:

‘In deciding whether a party has acted unreasonably in refusing ADR, these considerations should be borne in mind. But we accept the submission made by the Law Society that mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case. We do not, therefore, accept the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case.’

The court set out six (non-exhaustive) factors that may be relevant in determining whether or not a party has unreasonably refused ADR:

- **nature of the dispute**—some cases are intrinsically unsuitable for ADR:
  - where there are issues of law or construction where a binding precedent would be useful
  - cases involving issues important to those in a particular trade or market
  - where there are allegations of fraud
  - where there are allegations of commercially disreputable conduct
  - injunctive relief is necessary

- **merits of the case**—the fact that a party reasonably believes that he or she has a strong case is relevant to the question as to whether or not he or she has acted reasonably in refusing ADR; the test is objective

- **other settlement methods have been attempted**—although it should be borne in mind that mediation often succeeds where other attempts at settlement have failed

- **costs of the mediation would be disproportionately high**—this is particularly pertinent in relation to more modest claims

- **delay**—especially if the suggestion is made late in the day and the mediation would delay the trial

- **whether the mediation had a reasonable prospect of success**—this must be viewed objectively

The court also made the point that the obligation to consider ADR in all suitable cases included those against public bodies.

As Dyson LJ stated in Halsey, it is for the unsuccessful party to show that the successful party unreasonably refused to agree to mediate/use ADR.

The approach of the court since Halsey

The first case to impose costs sanctions against a successful party for refusing to mediate was Dunnett v Railtrack [2002] EWCA Civ 303, [2002] 2 All ER 850. The defendant had refused the unsuccessful claimant’s offers to attempt resolve the dispute through ADR. The defendant refused on the basis that such a process would involve an offer to pay over and above what it had already offered and this it was not prepared to do. Despite the defendant’s victory on appeal, the court departed from the usual order that the loser pays the winner’s costs and made no order as to costs; the defendant had failed to comply with the overriding objective and had

The following cases involved the court imposing a costs penalty. The most recent cases are listed first.

There has been little in the way of gloss on these principles in judgments handed down since Halsey. The courts have simply been applying the Halsey factors albeit that the Court of Appeal’s decision in PGF II SA is worthy of note in its support and extension of some of the principles in Halsey. In summary, the courts are now more likely to use costs sanctions against parties who refuse to mediate.

The key decisions are discussed in the tables on the following pages.

To find out more, or to have a free trial, see lexisnexis.co.uk/4NS/PSL
The following cases did involve a costs penalty

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<td>Laporte &amp; Anor v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB); [2015] All ER (D) 232 (Feb)</td>
<td>The claimants lost their action against the police for assault and battery, false imprisonment and malicious prosecution (amongst other matters), but asserted that there should be no order for costs because the defendant refused to engage in ADR. The defendant sought an award of costs assessed on an indemnity basis. The High Court (Turner J) considered each of the Halsey factors in turn while specifically recognising that this was not to be approached as a mechanistic exercise and that the factors are not to be regarded as being exhaustive in any given case. The judge concluded that the defendant failed, without adequate (or adequately articulated) justification to engage in ADR which had a reasonable prospect of success, which would have an impact on the exercise of the court’s discretion on costs. Nevertheless, the court looked at the matter in the round and considered the claimants’ criticisms of the defendant’s failure to respond to the letter before action and of flaws and inaccuracies in the defendant’s costs schedules. In relation to the failings in respect of the costs schedules, the court decided that this would not have an influence on the discretion in this case. In relation to the defendant’s failure to conform to the preaction protocol by failing to respond to the letter before action, on the facts this in and of itself would not have justified ‘any substantive costs consequences’. However, the judge considered that this proved symptomatic of the defendant’s sustained inability to prioritise the progress of the case (including in relation to dealing with ADR), with the defendant ‘[stumbling] past ADR on the way to the hearing rather than engaging with it with proportionate commitment and focus’, which the court took into account in its costs discretion. The result: the defendant was awarded 2/3 of costs to be assessed on the standard basis. Note: the judge endorsed the approach of the Court of Appeal in PGF II SA (see below)</td>
<td>For a detailed analysis of PGF II see: Bill Wood QC on unreasonable refusal to mediate (PGF II) and TCC departs from general Part 36 cost consequences (PGF II SA v OMFS), 2 February 2012</td>
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<td>PGF II SA v OMFS [2013] EWCA Civ 1288</td>
<td>The failure of a party to mediate was one of the reasons that led to both the TCC and the Court of Appeal departing from the general Part 36 costs consequence when deciding to make no order as to costs in PGF II. The court dismissed arguments put forward by the defendant as reasons why it did not mediate in this dispute and highlighted some practical considerations for practitioners involved with parties who do not wish to mediate. Of particular note is that the Court of Appeal was prepared ‘firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds’.</td>
<td>For a detailed analysis of this case see Late agreement to mediation may attract adverse costs (News, 22 January 2008)</td>
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<td>PGF II SA v OMFS [2012] EWHC 83 (TCC), paras 44-45</td>
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<td>James Carleton Seventh Earl of Malmsebury v Strutt and Parker [2008] EWHC 424 (QB); [2008] All ER (D) 257 (Mar)</td>
<td>It is not enough simply to agree to mediation (where it would be reasonable to do so), parties must also conduct the process sensibly, or they risk costs consequences.</td>
<td>For a detailed analysis of this case see</td>
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There might be exceptional circumstances in which a successful party was penalised in costs for delaying in agreeing to mediate where it could be shown that an earlier mediation would have been successful.

For more information, see the analysis: Indemnity costs for refusal to mediate (Garritt-Critchley v Ronnan)
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<td>Northrop Grumman Miss-ion Systems Europe Ltd v BAE Systems (Al Diri-yah C4I) Ltd [2014] EWHC 3148 (TCC); [2014] All ER (D) 66 (Oct)</td>
<td>The judge (Ramsey J) concluded that this was a case suitable for mediation and would likely to have been settled at mediation. The judge advocated mediation even in cases, like this one, where construction of a contract was in dispute. The claimant refused to mediate because it believed it had an ‘irresistible’ case. The judge acknowledged this fact in his judgment, but as he considered the case would likely to have settled at mediation (and thus avoided incurring significant costs), he stated that one party’s refusal to mediate, regardless of strength of case, did not provide a reasonable basis to refuse to mediate when weighed against the efficiency of mediation in resolving a dispute such as this. However, although the claimant’s refusal to mediate was found to be unreasonable, because the claimant had failed to beat an offer to settle made by the defendant, the judge decided that the appropriate order was that no deduction should be made on the defendant’s costs and it should be awarded its costs in full to be assessed on the standard basis.</td>
<td>For a detailed analysis of the case, see: Refusal to mediate can be unreasonable even with an irresistible case</td>
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<td>ADS Aerospace v EMS Global Tracking [2012] EWHC 2904 (TCC); [2013] All ER (D) 235 (Oct)</td>
<td>The TCC held that a defendant who ‘won’ the litigation, the claimant lost on all issues, was entitled to costs assessed on a standard basis. Whilst the claimant had offered to mediate this had come very late in the day and whilst the defendant had rejected it, the defendant had consistently sought to discuss settlement with the claimant through invitations to engage in without prejudice discussions.</td>
<td>For a detailed analysis of this case, see: No costs consequences despite refusal to mediate (ADS Aerospace v EMS Global Tracking)</td>
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<td>Mason v Mills &amp; Reeve [2012] EWCA Civ 498</td>
<td>A defendant refused to mediate or engage in any other ADR procedure. The Court of Appeal overturned the decision of a first instance judge who penalised a successful party on costs for refusing to mediate. The successful defendant had refused to mediate in the case on the grounds that the claim was entirely without merit. The judge at first instance accused the defendant of intransigence as he felt that there was a real possibility that a mediation would have identified weaknesses in both parties’ cases and that it was not unrealistic that a settlement could have been reached. He awarded the successful defendant 50% of its costs. In overturning the judge’s decision on costs, the Court of Appeal expressed concern that the judge had not fully expressed the reasoning for his decision (eg, not explaining what weaknesses he thought mediation could have identified) and held that the defendant’s position in refusing mediation had in fact been vindicated at first instance and on appeal, and was therefore not unreasonable. The Court of Appeal increased the defendant’s costs award to 60%.</td>
<td>For a detailed analysis of this case, see: Court of Appeal acknowledges reasonable refusal to mediate (Mason v Mills &amp; Reeve)</td>
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<td>Beechwood House Publishing T/A Binleys v Guardian Products</td>
<td>A claimant refused to mediate prior to issuing proceedings. It was held that it was reasonable for the claimant to do so and so there would be no costs penalty. It was held that the key to an effective mediation is to conduct it at the right time. At the stage that the defendants suggested mediation the costs were very low and whilst mediation is cost effective there is a cost attached to it. The fundamental issue in that case was disclosure as to the source of information in a database which the defendant refused to provide and which the claimants were entitled to insist on this being an action for infringement of a database right. The claimant's position was that this disclosure was the only real issue between the parties and the parties efforts were best focused on sorting out that issue. Note: this is an interesting judgment from the then Patents County Court and whilst it is a county court its judgments are generally regarded with respect.</td>
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<td>[2012] All ER (D) 43 (Mar), [2012] EWPCC 8</td>
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<td>Board of Trustees of National Museums and Galleries of Merseyside v AEW Architects and Designers [2013] EWHC 3025 (TCC)</td>
<td>This case dealt with a multitude of issues, including engagement with the mediation process. Akenhead J considered the circumstances in which such reluctance would not attract the criticism of the court. The court will look at all the circumstances in determining whether a party should have engaged in the mediation process. In this case, the claimant was a public and charitable organisation which considered that it needed to understand the expert position in relation to the point in issue, which was complex remedial work to steps and terraces of amphitheatres, before entering into mediation. This was an understandable position for such a claimant to take given that any focus of the mediation was likely to be in relation to the remedial work required. The court may also consider whether a reluctance to engage in mediation is due to the other side not engaging in a process of seeking to agree elements of the dispute so as to simplify any negotiations that would need to be undertaking during the mediation itself. It was held that since the claimant did not recover the level of settlement which it had offered, nor did the defendant 'beat' any of the offers which it made at any stage, the issue of a reluctance to settle would not be determinative as to the issue of indemnity costs.</td>
<td>For a detailed analysis of this case, see: Insights for those dealing with interest and costs (The Board of Trustees of the National Museums and Galleries of Merseyside v AEW Architects)</td>
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Lexis® PSL Dispute Resolution: Meet the team

Barry Fletcher
Barry specialises in international arbitration and commercial litigation. He trained and practised at Jones Day before joining Pinsent Masons. At LexisNexis, Barry is Head of the Lexis® PSL Dispute Resolution Group.

In practice, Barry’s work included general commercial, aviation and technology arbitrations pursuant to a range of international arbitral rules and involving UK and international clients. He also has a background in general commercial, civil fraud and IT litigation, including experience before the High Court. While in private practice, Barry worked with a broad range of clients from both the private and public sectors.

In addition to his work for Lexis® PSL, Barry contributes to the LexisNexis Dispute Resolution Blog and New Law Journal on litigation and arbitration matters.

Janna Purdie
Janna is a dispute resolution lawyer with a Masters in Construction Law and Dispute Resolution. During her time in private practice at both Herbert Smith and Dentons she worked on complex international disputes, both litigation and LMAA arbitrations, dealing with technical cross border issues. Janna deals primarily with cross border issues within Lexis® PSL; specifically at the moment Brussels I (recast) but has also been actively involved with the Jackson Reforms. She heads up a LexisNexis costs team which addresses current costs issues facing the profession, was involved in the new J codes consultation and was a contributing author for the Cook on Costs supplement dealing with the Jackson reforms. Janna is a frequent contributor to the legal and professional press, including the New Law Journal and Counsel magazine.

Ruth Pratt
Ruth specialises in general corporate and commercial dispute resolution with particular experience in shareholder disputes, fraud and warranty claims. Ruth trained and qualified at Berwin Leighton Paisner where she remained in practice for ten years. Her work has involved project managing large-scale cases to trial in the chancery and commercial courts. Ruth was actively involved in in-house training with a particular focus on all aspects of evidence gathering and production, including authoring a user-manual on E-disclosure. She is also a contributor to the New Law Journal.

Virginia Jones
Virginia specialises in general domestic and international commercial litigation, arbitration and alternative dispute resolution (ADR). Virginia trained and qualified with Pinsent Masons, where she remained in practice for over two years, before moving to Marriott Harrison where she continued in practice for a further seven years. Virginia has acted in a variety of general commercial disputes covering areas such as intellectual property, fraud, defamation, misrepresentation, breach of contract, debt recovery, breach of restrictive covenants and company and shareholders’ disputes.

Melissa Jones
Melissa specialises in general commercial litigation and alternative dispute resolution. Melissa trained at Jaques & Lewis (now Eversheds) and subsequently practiced at Stephenson Harwood and Herbert Smith (now Herbert Smith Freehills) before moving to BPP Law School to teach on the Legal Practice Course. Melissa has been a professional support lawyer for over 10 years, firstly at Nabarro, where she set up the PSL function, and then at DAC Beachcroft, where she was responsible for drafting current awareness briefings for both lawyers and clients, writing dispute resolution articles for the firm and external publications, providing internal training and assisting with business development.

Hannah Brown
Hannah specialises in general commercial litigation. Hannah trained and qualified at Slaughter and May and latterly worked at Olswang LLP as an associate in the Commercial Litigation team. Hannah’s experience covers both international and domestic litigation across a number of practice areas including general corporate and commercial, banking and finance, insolvency, technology and media. She has represented a variety of clients including FTSE 100 companies and high net worth individuals and has project managed a number of High Court cases. She also has experience of alternative methods of dispute resolution including arbitration. Hannah has contributed to knowledge and content delivery at her previous firms and is now a member of the Lexis® PSL Dispute Resolution team.

Rachel Buchanan
Rachel is the Dispute Resolution blog’s technical editor. Rachel qualified as a dispute resolution solicitor and worked in private practice before joining LexisNexis. In addition to contributing to the Dispute Resolution blog, she also writes content for the Business of Law blog.
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