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Your Search:	Joan Stearns Johnsen
Date/Time of Request:	Monday, July 18, 2011 11:57 Central
Client Identifier:	TWEN-CLIENT
Database:	WINDRLSI
Citation Text:	30 WINDRLSI 193
Lines:	1248
Documents:	1
Images:	0

Windsor Review of Legal and Social Issues
March, 2011

Special Topic: Perspective on ADR/Mediation

*193 Alternative “Deal” Resolution: The Facilitated Negotiation of Transactions

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ABSTRACT

This article considers the potential role of Deal Mediation, where Third Party Neutrals add value to the negotiation of transactions just as they contribute to litigation settlements. Regardless of whether the objective is to resolve a litigation matter, establish an employment relationship, or to form a complex multi-national joint venture; a deal is at stake. The issues that most often lead to an impasse in any negotiations usually include personal dynamics, conflicting negotiation styles, unrealistic expectations, and miscommunication. An experienced neutral is uniquely positioned to help the parties resolve these issues and build relationships, regardless of the subject matter of the negotiation. The objective of all negotiations is either to reach agreement or to determine that no agreement is possible. Transactional lawyers and other agents can use Third Party Neutrals to accomplish these objectives more efficiently. This author explores the option of utilizing neutrals to facilitate the negotiation of problematic transactions, and discusses the ways in which Deal Mediation compares to Alternative Dispute Resolution Mediation and can produce similar results. It also addresses the most common objections to the use of Third Party Neutrals in transactional practice.

*194 I. INTRODUCTION

Imagine you represent an American pharmaceutical company (“APC”) in their negotiations with a Chinese drug company (“CDC”) that has developed a promising new drug for the treatment of diabetes. The market share could exceed three billion dollars. APC's most lucrative patent is about to expire, and APC needs the joint venture with CDC to survive. CDC has been trying to break into the US market without success for years. Unbeknownst to APC, CDC also depends on the joint venture. They need an infusion of capital as well as an international market presence to establish goodwill.

The issues to be negotiated include: royalties and equity investments; contingencies for failure to obtain government approvals; patent and ancillary rights; exclusivity of distribution; non-compete agreements; revenue targets; quality assurances; and an arbitration clause.

In addition to the apparent language barrier, the chief negotiators on both sides have serious problems dealing with one another. APC's chief negotiator is direct, aggressive, and unapologetic. The Chinese negotiator is indirect and polite. He does not show emotion or say “no.” Instead, he suggests that “we will think about it” or “we will see.” [FN1] His favorite tactic is to try to extend negotiations well beyond official deadlines to gain an

advantage. He will even reopen negotiations on a previously settled issue. [FN2] These tactics serve to infuriate APC. Consequently, the deal is in serious danger of falling apart for reasons unrelated to its merits.

This deal could be saved, however, if the parties employed the services of a Deal Mediator. Deal Mediation, or Facilitation, is the application of Alternative Dispute Resolution ("ADR") principles to the negotiation of any transaction or other agreement (such as joint ventures, licensing contracts, employment agreements, mergers and acquisitions). [FN3] Essentially, it is the use of a Third Party Neutral to assist ***195** with the negotiation of a transaction or contract at its inception. [FN4] Deal Mediation is analogous to other common forms of dispute resolution, particularly the use of a Third Party Neutral to assist litigators in negotiating a settlement. Since the settlement is in essence a deal, Deal Mediation represents the natural application of the principles of dispute resolution mediation to transactions. [FN5]

In precisely the way a Third Party Neutral assists litigators in reaching agreement, Deal Mediators can add tremendous value in facilitating the negotiation of any deal or transaction at its inception. United States diplomats have served as "honest brokers" mediating conflicts between disputing nations. In the early 1970s, the term "shuttle diplomacy" was used to describe former Secretary of State Henry Kissenger's technique of traveling from country to country to caucus privately and face to face with the leaders of Egypt, Syria, and Israel. [FN6] In 1995, former Ambassador Richard Holbrooke served as a neutral and facilitated the negotiation of the "Dayton Agreement on Bosnia-Herzegovina" of 1995 ending the war in that region. [FN7] Acceptance is, however, admittedly slow in coming. Although awareness has grown, especially among academics and those who practice in the field of Alternative Dispute Resolution, [FN8] transactional lawyers are still reluctant to formally embrace the concept.

Even ADR itself initially encountered tremendous resistance. In 1976, Chief Justice Warren Burger invited Harvard Professor Frank EA Sander to present a paper at the Pound Conference on "The Causes of Popular Dissatisfaction with the ***196** Administration of Justice." [FN9] Professor Sander was asked to address the alarming increase in litigation and the resulting impact on the courts' dockets. At the Conference Professor Sander delivered his address "Varieties of Dispute Processing." [FN10] Citing Professor John Barton of Stanford's 1995 prediction that by 2010 the federal appellate docket would exceed one million cases a year, [FN11] Professor Sandor explored options for reducing the volume of litigation. Among his suggestions was a "Multi-Door" system of dispute resolution. [FN12] Professor Sander suggested that there should be an alternative to the single door to the courthouse. Rather, he imagined a courthouse with multiple doors which would afford disputants alternative means of dispute resolution. Among the options envisioned by Professor Sander were mediation, arbitration, fact finding, and ombudsmen. [FN13] Although it has taken over thirty years, it is now clear that there is more than a single means of resolving disputes. Today, litigators and their clients appreciate the value that a Third Party Neutral adds to the resolution of a dispute. [FN14] Lawyers negotiating transactions or deals can also derive tremendous benefit from this approach. It is an obvious application of what is widely referred to as facilitated negotiation. [FN15] L. Michael Hager goes so far as to suggest that it is "a no brainer." [FN16]

This article will examine the emerging area of Deal Mediation or Deal Facilitation. While Professor Peppet has focused on the value that a mediator can bring to the price discovery function of a deal, [FN17] there are other ways in which Deal Mediators can enhance the work of parties and agents in the negotiation of transactions. The article therefore seeks to further existing literature in this area by highlighting additional advantages associated with the use of Deal Mediation. Part II will explore the particular set of skills and the psychological principles that enhance the value a neutral brings to negotiations. Part III will explore how Deal Mediation is particularly beneficial in a multi-national context. Part IV discusses how basic ADR principles can be translated

seamlessly into the context of transactions in support of ***197** Deal Mediation. Before concluding, this article will also address objections raised to the use of Deal Mediation.

II. SKILLS OF DEAL MEDIATORS

The role of the Deal Mediator is analogous to that of the mediator in traditional dispute resolution. [FN18] In both situations, the objective is to determine whether a deal is possible. Deal Mediators employ the same techniques in settlement negotiations including: separating the people from the problem; focusing on interests rather than positions; "expanding the pie" and option generating; and relying on objective criteria. [FN19] These techniques work well in all negotiations, including transactions. The Third Party Neutral brings his or her expertise in negotiation theory to the table, adding value to the deal negotiation process.

The chief difference in negotiating a deal as opposed to a litigation settlement agreement is that deal-making is less distributive. [FN20] Even though there may be other ancillary issues to resolve, the greatest hurdle in negotiating the settlement of a commercial dispute rests in finding a mutually acceptable dollar amount. [FN21] Transactions are not purely distributive. Rather, they contain multi-layered complex issues and interests of varying importance. [FN22] The best alternative to a negotiated litigation settlement agreement ("BATNA") [FN23] is tied to the expected results in court. [FN24] In Deal Facilitation for a transaction, by contrast, the BATNA, or alternative to closing the deal, is walking away entirely. [FN25] Further, unlike in the settlement of a lawsuit, relationships are not ending, but merely beginning. [FN26]

Nevertheless, these differences actually mitigate in favour of the use of a Third Party Neutral in transactions even more so than in litigation settlements, given associated distributive concerns. The Neutral Deal Facilitator or Deal Mediator helps parties navigate complex negotiations.

*198 NEUTRALITY OF THE THIRD PARTY FACILITATOR

A Third Party Neutral can add value in negotiating any type of contract. A neutral can facilitate these negotiations even though the interested parties are represented by skilled counsel or other representatives whose role in a negotiation is comparable to that of a litigator in a settlement negotiation.

Currently, in most transactions, the parties and their agents negotiate directly to hammer out the terms of a deal. [FN27] This is true regardless of its complexity. Large multi-party and multi-national negotiations are handled by in-house counsel or with the advice of respective agents. These agents are usually consultants, advisors, or brokers. [FN28] Lawyers and investment bankers also routinely serve this function.

The compensation regime established removes any objective neutrality held by these agents. Instead, each agent works solely to further the interest of their own client. For example, a lawyer may be paid an hourly rate, [FN29] but an agent is often paid a percentage of the deal or a success fee. [FN30] In fact, investment bankers may not be compensated at all should the deal fail to close. [FN31] In addition to the monetary aspects of the success of the deal, an agent has a business interest in satisfying the needs of the client. An unhappy client is likely to retain another agent for future business dealings. Therefore, agents have a personal interest in the deal -- a stake in the outcome. They generally lack neutrality and consequently objectivity.

Certain agents are, nonetheless, particularly skilled in negotiation theory and technique. They may even employ interest based, cooperative negotiation techniques and understand how to deal strategically with various ne-

gotiation styles. This type of agent occasionally serves as an unofficial “mediator” to the deal. They have the skills to keep the process moving forward and avoid the dangers of rmscommunication and impasse. Even in cases where agents possess exceptional skills, however, they cannot serve two masters ethically or psychologically. The agent may act with apparent neutrality, but this is not actually the case. [FN32] By contrast, a neutral not only has the requisite skill set, but can apply these techniques in an evenhanded manner to serve the interests of the deal rather than those of any interested party. This makes a Third Party Neutral preferable to the most skilled agent.

***199** As someone acting on behalf of a party-in-interest, an agent will also be subject to the same psychological influences as his or her principal. [FN33] Certain psychological factors would have an impact on the agent's ability to evaluate proposals and counterproposals. [FN34] These factors include self-serving bias, the endowment effect, or overconfidence. [FN35] Some commentators have gone further in suggesting that other factors could impair the agent's effectiveness in persuading their counterparty; [FN36] such as principles of reactive devaluation, construal biases, and fundamental attribution error. [FN37]

Deal Mediators have no stake in the outcome. They are selected with the agreement of all parties. These parties also compensate the mediator equally. Generally, compensation is derived based on the deal, or some other formula unrelated to actual success. Unlike an investment banker, the neutral is not engaged by, nor do they participate in the size or success of the deal on behalf of a particular party. In direct contrast to an agent, the neutral has a duty of loyalty and fair dealing that applies to all parties. [FN38]

***200** As neutrals, Deal Mediators are better positioned to avoid the psychological factors that influence interested parties. [FN39] They seek objectivity that the parties directly involved lack. [FN40] The neutral has no incentive to obtain any specific terms that would benefit any particular party over another. For this reason, the Deal Mediator is more likely to enjoy the trust of all parties. As such, the Deal Mediator is in a position to test the practicality of proposals or positions. The neutral would also be able to make their own proposals without being subjected to heightened scrutiny and mistrust. [FN41]

As a neutral with no stake in the outcome, the Deal Mediator can evaluate and communicate proposals with impartiality and objectivity. They therefore facilitate communication, build relationships, provide a reality check, identify submerged interests, assist in option generating, and manage expectations without favoring one side over another. The neutral enjoys the trust and confidence of all.

VALUE IN BUILDING RELATIONSHIPS DURING TRANSACTIONS

Another way in which a Third Party Neutral can add tremendous value to the negotiation of a transaction is through relationship building. Deal Mediation takes place as the relationship between the parties is being formed. In dispute resolution, only occasionally is it important to salvage the relationship between the parties. Especially in commercial dispute resolution, preserving relationships is rarely a priority. Neutrals can use their skills in facilitating communication and help to build relationships that can be advantageous during the negotiation of a merger, joint venture, or employment contract.

For example, Deal Mediators were able to repair a damaged relationship and hurt feelings to make a critical difference in the 2007 contract negotiation of Yankee baseball player, Alex Rodriguez. *The New York Times* reported that negotiations had broken down between the player and owner, George Steinbrenner. Rodriguez's agent, Scott Boras, had taken a tough negotiating stance that alienated Steinbrenner. Two Goldman Sachs

bankers who were known by Steinbrenner and Rodriguez acted as intermediaries, with no stake in the outcome, to successfully close the deal. [FN42]

The stalemate arose after Boras demanded that the Yankees begin discussions with an offer of $350 million, but this was rejected. Thereafter, a baseball announcer reported that Rodriguez was going to exercise the opt-out provision of his contract ***201** and become a free agent. [FN43] However, Steinbrenner had stated that he would not negotiate with Rodriguez were he to exercise this option.

There were perceived insults on both sides. Parties did not believe their opponents were interested in maintaining their existing relationship. This perception was, however, inaccurate as the underlying interests of both parties were in alignment. Rodriguez was born in New York and his wife preferred to remain in the city. Steinbrenner wanted to keep Rodriguez since he was on the verge of breaking a home run record.

Rodriguez reached out to famed investor Warren Buffett who suggested that Rodriguez contact the Managing Directors of Goldman Sachs, John Mallory and Gerald Cardinale. Mallory and Cardinale were neutrals, because they had ties to both Rodriguez and the Yankees and could be perceived as favoring neither. It was noted that "Mallory, who became friends with Rodriguez when he lived in Miami, put him in touch with Cardinale, a Goldman managing director who also served on the board of the Yankees sports network." [FN44] It was in the interest of Rodriquez and Steinbrenner to agree on a new contract, yet they took inconsistent positions. In the end, the Third Party Neutrals were able to work past these disagreements to neutralize personal conflicts and hard feelings. This culminated in Rodriguez signing a ten year $275 million contract with the Yankees.

Learning of Rodriguez's interest in remaining a Yankee mattered to Steinbrenner, who noted publicly that Rodriguez had accepted less money than he would have made as a free agent. Steinbrenner went on to say "[t]rust me, he would have gotten probably more. He is making a sacrifice to be a Yankee, there's no question ... He showed what was really in his heart and what he really wanted." [FN45] Both parties got what they wanted. Absent the intervention of the trusted neutrals, neither side would have been able to overcome the hurt feelings that interfered with their business relationship. [FN46]

Another pertinent example of the role of a Third Party Neutral is provided in Jeswald Salacuse's article, "Mediation in International Business", which considered a negotiation between Matsushita Electric Industrial Company of Japan and MCA, the entertainment conglomerate. [FN47] The parties engaged Michael Ovitz, a Hollywood powerbroker, to assist them in the acquisition of MCA by Matsushita in 1991. Although Ovitz was engaged by Matsushita, he acted as more of a neutral and "at one point in the discussions, he moved constantly between the Japanese team of executives in one suite of offices in New York City and the MCA team in another ***202** building", a process which one observer likened to shuttling back in forth in a political crisis. [FN48]

Ovitz intentionally kept the parties apart as a means of avoiding conflict due to the significant cultural differences and contrasts in negotiation style. The American businessmen were direct negotiators. The Japanese tended to rely on consensus building. Rather than try to help the parties navigate their differences, Ovitz chose to focus on closing the deal. However, he was unsuccessful. While the parties reached agreement on a number of significant points, neither could agree on price.

At this point, Matsushita and MCA jointly engaged the former US Trade Represenative and Ambassador to the Soviet Union, Robert Strauss. Strauss was brought in because he would be respected by all parties. In his neutral position, Strauss was able to understand the needs and interests of both sides and eventually help the parties reach an agreement.

Although the deal was closed, there were ongoing issues. Professor Salacuse posits in his article whether Ovitz's failure to address the issue of relationship building ultimately contributed to the failure of the merger:

> One may ask whether Ovitz' strategy of keeping the two sides apart during negotiations so that they did not come to know one another contributed to this unfortunate result. It prevented the two sides from truly understanding the vast gulf which separated them and therefore from realizing the enormity and perhaps impossibility of the task of merging two such different organizations into a single coordinated and profitable enterprise. [FN49]

The Deal Mediator or Third Party Neutral can help not only close the deal, but also to keep the deal together, and work through problems that may arise during the continuing relationship. It would be particularly beneficial to have the same neutral that assisted in putting the deal together, in the first place, to help resolve subsequent conflicts. Through the use of relationship building; communication; facilitation; and creative option generating, the Third Party Neutral can help the parties avoid the necessity of a lawsuit to resolve problems in a joint venture; employment relationship; or other type of ongoing relationship.

In transactions, the relationship between the interested parties is paramount. A Third Party Neutral can assist parties in building these relationships as they enter into any agreement. This may involve engaging in specially selected exercises, managing communication and cultural differences, or encouraging the parties to "break bread." [FN50] Without a working relationship involving mutual respect and trust, it is ***203** unlikely that the parties will consummate a deal between them. [FN51] If a deal is reached without a strong relationship being fostered, the longer-term business venture may suffer. [FN52] Given his or her ability to assist the parties in establishing a good working relationship, the Deal Mediator can add tremendous value to the deal.

VALUE OF NEGOTIATION COACHING: MANAGING CONFLICTING NEGOTIATION STYLES

Another common problem is conflicting negotiating styles. While this may arise from cultural differences in international negotiations, it is common in all negotiations. Among the most common negotiation styles are: competitive or positional bargainers; soft bargainers; and cooperative or interest based negotiators. [FN53]

Competitive negotiators usually adopt an aggressive, confrontational posture. They tend to focus on the size and the patterns of concessions they are able to elicit from the other side. [FN54] By contrast, soft bargainers have little regard for the ritual of negotiation. They also use a style known as Boulwareism. [FN55] They seek to "cut to the chase," and avoid a protracted auction (i.e. the price discovery function of back and forth exchanges of offers and demands). [FN56] They make what they consider to be a fair ***204** and reasonable offer as their first, last, and final offer with the expectation that the other side will accept it as lair and reasonable. [FN57] The party on the receiving end of a soft negotiator's offer rarely recognizes even the most reasonable offer as acceptable, because they find the process unfair and the result imposed upon them rather than bargained for. [FN58] A third type of negotiator is the cooperative or interest based negotiator. This is the style of negotiation most often taught today, and the one espoused in the well-known publication, *Getting to Yes*. [FN59] It is based on the principles of separating the people from the problem; focusing on interests rather than positions; relying on objective criteria; and creative option generating. [FN60] Many still resist this style of negotiation based on the mistaken belief that cooperative negotiation is synonymous with weakness or concession. [FN61]

Sometimes these styles match up, but can clash in other instances. The neutral will coach the competitive bargainer to rely on objective criteria as a powerful alternative to positional bargaining. This provides an alternative to screaming the loudest for the longest. Some negotiators may be too "thin skinned" and quick to take of-

fense. The neutral can deliver offers in a manner that diminishes the impact, and coach the soft negotiators on appropriate re-anchoring [FN62] and countering. [FN63]

Where a client wants to control the approach to negotiation, it can be a problem when the other side is unwilling to "comply." With difficult dynamics a Third Party Neutral is uniquely positioned to protect this type of client from themselves. The neutral can run interference to prevent a potentially explosive negotiation style from derailing the process. [FN64]

An additional advantage to employing a Third Party Neutral is that each party can take more extreme positions and engage in vigorous price discovery negotiation ***205** with the knowledge that she or he will provide objective feedback, [FN65] engage in negotiation coaching, [FN66] and counsel a party on how a particular proposal will likely be received. This allows the party to "test the waters" with demands that may initially be perceived as too extreme by the other side.

The neutral will also have the skill to present these demands and offers in a manner that will manage negative and possibly explosive reactions from the other side. The neutral can soften the message when communicating a particularly inflammatory proposal, and keep the parties at the table. She or he serves as a "backstop", permitting the safe exploration of extreme positions while moving the entire negotiation forward.

III. DEAL MEDIATION IN COMPLEX INTERNATIONAL TRANSACTIONS

Although a mediator can add value in any situation, complex negotiations have the most to benefit from the presence of a neutral. The neutral can be selected because they not only enjoy the trust of all the parties, but also possess a particular expertise. The Deal Mediator is best positioned to have the perspective, understanding, and skills necessary to assist the parties in problematic situations.

VALUE ADDED IN CROSS-CULTURAL NEGOTIATIONS

Many deals today involve cross-border negotiations. [FN67] Approximately thirty-six of the world's top fifty industrial corporations have their headquarters located outside of the United States. [FN68] Advancements in communication, transportation, and information technology have made our world increasingly smaller and more interdependent. Economic globalization is only just beginning. [FN69]

There are many reasons direct negotiation of cross-border agreements fail. Often these reasons have nothing to do with whether the joint venture, merger, or licensing agreement would be beneficial to all parties. [FN70] Complexities that may impede agreement in meritorious deals are the dynamics of the individuals involved in the negotiation, miscommunication, misunderstandings as to positions and interests, complex terms, constituencies, and multiple parties. These complexities are even ***206** more common in the international context where meaningful communication is frustrated by language barriers and cultural conflicts. [FN71]

In any negotiation the focus of a neutral will include facilitating communication, managing difficult dynamics, and navigating delicate cultural differences. Even when parties are from the same country and speak the same language, there are often issues below the surface that result in misunderstandings. In cross-cultural negotiations, these issues are exacerbated. Helping parties avoid these language and cultural disconnects is a value that the neutral facilitator can bring to the table.

Understanding emotional and personality dynamics is important in all negotiations, especially cross-cultural ones. [FN72] Once the personal issues are identified, they can be addressed and diffused. The mediator will seek to understand who the principals are, and to understand what they mean in using certain words. Is someone merely posturing, or is that person really likely to walk away? How much trust exists and how well are the parties communicating? How does one side perceive the tactics of the other? Parties will act contrary to their own best self-interest to the extent they believe they are not being heard or are not being treated fairly. [FN73]

In any negotiation, the first step is to understand the parties. The next step is to make sure that who they are is not an impediment to what they want. A Third Party Neutral can be quite helpful in separating what a party says from their actual meaning. [FN74] It is not unusual for intended messages to be misunderstood by the listener. [FN75] Emotions can cloud the ability to send a message and receive it clearly. In a negotiation, the misperception of frustration as anger is not uncommon. [FN76] The Third Party Neutral can explain not only the terms of the agreement, but also the underlying rationale. This will serve to diffuse any personality conflicts that would shift focus away from the pertinent issues in the negotiation. To succeed, negotiators should emphasize problem solving rather than become distracted by personal dynamics or emotion. [FN77] All negotiations, regardless of the complexity or dollar amount, are ***207** personal transactions engaged in by individuals. [FN78] The neutral can break through language and cultural barriers to identify actual interpersonal issues.

The most obvious problems in international negotiations are caused by language barriers. Translation is not a straightforward issue [FN79] as nuance and context can easily be lost. [FN80] Ideally, the Third Party Neutral would be selected because of his or her facility with the languages spoken by all parties. However, even if the mediator is not fluent in all of the relevant languages, he or she should nevertheless be sensitive to the issues and capable of avoiding misunderstandings arising from working with translators. [FN81]

Culture clashes add an additional layer of complexity. [FN82] Differences be can obvious, such as with handshakes or acceptable business attire, but they may also be more subtle. For example, there are “low” and “high” context cultures. [FN83] This terminology refers to the extent to which the meaning of communication comes from the surrounding context, as opposed to what is said directly. [FN84] The “low” cultures tend to be more direct. [FN85] People in these cultures speak their mind and get to the point. [FN86] “High” context cultures tend to be more indirect. They rely on context and a shared basis of experience for their communication. [FN87] Often, those from “high” context cultures do not need words to accompany a message, “the meaning of a communication is already ‘programmed’ into the receiver of the message.” [FN88] These sorts of cultural differences influence the style in which business points are likely to be communicated. Conflicts of communication style can produce unintended results such as personal affronts, which can derail the negotiation of an otherwise mutually beneficial business deal. One side may perceive the other side as disrespectful or rude when they are merely adhering to the accepted norms of their particular culture. These sorts of cultural differences can be particularly problematic in the business context.

***208** In Mexico, for example, building relationships is a necessary element in business negotiations. [FN89] The natural tendency of an American negotiator to be more direct and dispense with matters unrelated to the deal at hand may be perceived as aggressive and rude resulting in distrust. [FN90] The Americans tend to view the Mexican negotiators as lacking professionalism. [FN91] The Deal Mediator would advise and assist the parties so they can avoid these sorts of misperceptions.

A Deal Mediator that is skilled in negotiating international disputes will understand the cultural differences and guide both sides through this potential tension. Deal Mediators advise the parties on the relevant cultural

norms and can assist in translating style, custom, and language to facilitate communication. In the course of a negotiation, there are many conflicts that, although not directly attributable to the merits of the deal, could lead to an impasse and prevent a deal from being reached. [FN92] Some of these issues are illustrated in two examples given by L. Michael Hager and Robert Pritchard, which discuss the value added by the presence of a Third Party Neutral in complex, multi-party, multi-cultural negotiations. [FN93] Hager and Pritchard refer to an international joint venture between a Canadian company and a Japanese company. These companies were interested in investing jointly in New Zealand. Although the parties were able to agree on terms, cultural differences threatened to unravel the deal. The Japanese negotiating team needed the consensus of its internal finance department. However, the finance department could not give its approval until specific expenditures had been approved in the annual budget. This problem was exacerbated by the fact that it would have been an enormous breach of propriety to inform the Canadians of the source of the delays which prevented them from closing on the deal. These delays and lack of explanation from the Japanese company created a feeling of mistrust on the part of the Canadians who began to issue ultimatums. These ultimatums served to exacerbate the situation for the Japanese, whose culture required the building of internal consensus and prevented them from disclosing the precise nature of the problems.

The parties engaged a Third Party Neutral from New Zealand. The Japanese negotiators were able to confide in this individual. With this knowledge, the neutral was able to fashion a creative option that allowed the Japanese team to proceed. The deal closed and the joint venture was started successfully. The Canadian team never learned of the real obstacle and the Japanese team saved “face.” In the end, the Third Party Neutral was able to navigate these cultural disconnects and resolve the deadlock in negotiations.

A Deal Facilitator is selected by the parties based on a particular set of skills or experience. In international negotiation, the neutral may be selected because, in ***209** addition to mediation skills and subject matter expertise, they also speak the requisite languages and understands various cultures. Overall, a Third Party Neutral can add tremendous value in cross-border deal negotiations.

MANAGING MULTI-PARTY, MULTI-ISSUE, COMPLEX NEGOTIATIONS

In most mediations involving commercial disputes, the negotiation is “distributive”, meaning that the single most important issue is money. [FN94] With transactions, however, there are usually more issues to be considered. The appeal of the presence of a Third Party Neutral is the ability to manage complex multi-issue negotiations. The neutral can help both sides identify their respective underlying interests and opportunities for agreement. [FN95]

Parties may not be aware of their own submerged interests and those of their opponent. They may require guidance to determine the order of priority of these interests. The mediator can also assist both sides in identifying their needs and brainstorm solutions. [FN96] This exercise may therefore reveal opportunities for mutual gain. [FN97] Failure to reach agreement on terms can result from a failure to understand not only what a party offers or demands, but what the party would ultimately be willing to accept. Often parties fail to thoroughly explore their own true reservation point or that of their opponent. [FN98] Option generating presents an opportunity to be creative. A neutral can safely help the parties identify integrative options that can satisfy the interests of both sides with minimal cost. Sometimes there are ways to change the dialogue and “expand the pie”, bringing value to both sides of the negotiation. [FN99]

The second transaction described by Hager and Pritchard in their analysis provides a useful example of the

role of the Deal Mediator in multi-party, complex transactions. This involved the negotiation of a major power generation project. On the merits, the deal benefitted all concerned. A private sector consortium wanted to build, operate, and transfer ("BOT") a gas-fired power generator. The host country would pay the expenses and supply the natural gas. The private consortium would transfer the generator back to the host country after a guaranteed return had been ***210** realized. Everyone stood to gain, yet the negotiation stalled and looked like it would fail.

The negotiations involved many complex issues. The host country had three separate ministries: finance; petroleum; and power, all with competing interests and needs. [FN100] The foreign consortium included the electricity utility, a construction company, plant supplier, equity investors, and banks-- as well as all of the representatives and lawyers. [FN101] There were at least twenty people and no consistent representation. The complex logistics, as well as miscommunication and misunderstandings, threatened the deal in spite of its inherent merits. [FN102] Misunderstandings devolved into mistrust and the negotiations reached an impasse. [FN103] Hager and Pritchard notes:

> Then, one of the bankers proposed that the parties should bring in an intermediary in a last-ditch attempt to break the negotiating stalemate. The banker knew a lawyer with extensive experience in putting together major international projects who had worked in countries with different cultural traditions, different legal systems and different ways of doing business. The lawyer also had some ADR experience, having mediated large-scale contract disputes. The lawyer was recommended by the banker because he was considered to be cross-culturally sensitive and ethical. If such a person could win the confidence and trust of all of the parties, he could possibly mediate a bankable deal ... Using his ADR skills, the deal mediator assisted the officials of the three ministries to develop a consensus on a "whole of government" position. He also progressively built up the confidence and trust of all parties. By getting the parties talking realistically again, the stalemate was broken and issues were systematically resolved. Eventually a final agreement was brokered which was satisfactory to all parties. [FN104]

Absent the intervention of the Deal Mediator, it is unlikely that the parties would have overcame these problems, and as a result missed out on a valuable opportunity. The problems in this example were not with the deal, nor were they caused by some inadequacy on the part of the parties or their representatives. The problems were the result of the complexity of the deal. Fortunately, the parties recognized this and sought the assistance of a Deal Mediator.

***211 IV. COMPARISON WITH ALTERNATIVE DISPUTE RESOLUTION**

Using a neutral to facilitate negotiation has been successful. However, change is difficult and takes time. There was enormous initial resistance to the use of a neutral among litigators. It has taken more than thirty years to reach a point of widespread acceptance. Yet, even in the litigation context, there is still more work to be done to fully integrate mediation into the culture of all practice and geographic areas. Although the concept of Deal Mediation is self-evident to those who practice in the area, transactional lawyers also remain skeptical.

OBJECTIONS TO DEAL MEDIATION

Although informally practiced for decades, the concept of Deal Mediation or Deal Facilitation has only been discussed for the past decade. [FN105] Not surprisingly, investment bankers and transactional lawyers are raising objections to deal mediation that are very similar to those initially raised by litigators in opposition to alternative dispute resolution methods such as mediation. Many litigators initially believed that they should continue

to conduct negotiations the way they always had. In other words, “if it ain't broke, why fix it?” Transactional lawyers appear to be raising the same objections to using neutrals to facilitate the negotiation of deals. Even the terminology seems to be a basis for resisting the use of neutrals to facilitate negotiations. Clearly, not all deals will benefit from the use of neutrals. However, just as there are lawsuits that are more difficult to settle directly and benefit from the presence of a mediator, some transactional negotiations could be helped where a neutral is engaged by the parties.

Much can be learned in the transactional context by studying the difficult path mediation faced prior to acceptance in the ADR context. When the concept was introduced, it was met with enormous resistance. [FN106] Litigators who had traditionally settled cases through the use of direct negotiation protested that there was no need to utilize Third Party Neutrals. Why, it was thought, would clients need to pay someone to help them to do what their litigators have always done? However, the use of mediation proved to have a major impact on the numbers of cases resolved prior to litigation. [FN107] Litigators discovered that the use of a Third Party Neutral or mediator did help them reach lasting agreement in their negotiations. [FN108] The objections most ***212** often interposed included the concern that mediation would add to the cost of litigation. [FN109] It was argued that mediation would only delay the process since it would add an additional step. [FN110] In fact, the increase in mediation saves time and money. [FN111] By analogy, transactional lawyers could similarly benefit from the savings in time, money, and certainty that a neutral would bring to the negotiation.

A submerged, but no less important objection, and major impediment to the acceptance of mediation was the belief that mediation would hurt business in terms of billable hours and diminished value added. [FN112] Litigators feared their own importance to clients would suffer in the mediation context since they would no longer be needed. This concern proved to be unfounded as litigators learned the techniques of working with mediators to achieve settlements that better addressed clients' needs and interests. [FN113] Litigators need to advocate in the mediation context to assure the best result for their clients. After all, you don't get what you deserve, you get what you negotiate. [FN114] Similarly, transactional lawyers would continue to represent their clients in transactions: neutrals do not take the place of these representatives, and these objections would prove to be unfounded.

It is undisputed that settling a case will result in fewer billable hours than litigation. Mediation promotes more settlements, creative solutions, and client participation, and thereby improves client satisfaction. [FN115] This is achieved with tremendous cost savings for the client. With mediation, as opposed to either litigation or direct negotiation, clients play an enhanced role and retain ownership of the result; this lead to a higher degree of satisfaction with the outcome than with litigation. [FN116] While settling cases short of litigation do result in a loss of revenue in particular cases, the higher degree of client satisfaction ultimately leads to an increase in repeat business as well as referrals. [FN117] In transactions, the higher degree of certainty, as well as better and more efficient results, would similarly enhance client satisfaction and ultimately lead to more business.

***213** ADR has been integrated into the litigation culture. Now the lawyers still protesting are those who fail to utilize mediation. [FN118] Many lawyers have found that the benefits far outweigh any disadvantages, and mediation continues to grow in popularity in the litigation context. [FN119] The value added by the presence of the Third Party Neutral is appreciated in managing the personalities involved, the different negotiating styles, as well as varying expectations. Since the objections interposed by transaction lawyers mirror those of litigators, it seems reasonable to conclude that transaction lawyers will also learn the value that Third Party Neutrals can bring to the negotiation of deals.

BENEFITS OF ADR APPLICABLE TO TRANSACTIONAL PRACTICE

Deal Mediation involves a Third Party Neutral acceptable to all sides with no stake in the outcome. This use of a neutral would increase the likelihood of the success of the negotiation; in other words, he or she increases the likelihood of a consummating a deal. Anecdotally, as much as 50 percent of all investment banking deals fail for reasons that have nothing to do with the merits. It should follow that the use of a Third Party Neutral would result in a higher percentage of deals closing. Clients expend considerable time and money engaging in due diligence and the legal process associated with pursuing a major deal. [FN120] These resources are lost when positive results are not achieved. A higher percentage of closed deals would have a direct impact on the bottom line of the client. Greater certainty and better negotiation results would lead to tremendous savings.

The field of alternative dispute resolution continues to grow as is evidenced by developments in the United States. The *Civil Justice Reform Act* passed in 1990, for example, encouraged federal district courts to develop ADR programs. [FN121] In 1998, Congress passed the Alternative Dispute Resolution Act which formally authorized of the use of ADR in civil and administrative proceedings. [FN122] Similarly, a Federal Judicial Center (FJC) report revealed the widespread acceptance of mediation. [FN123] It has taken over thirty-five years for ADR to become accepted. Not surprisingly, there is resistance to the introduction of a different way of engaging in transactional practice. Most change, even beneficial change, requires new attitudes. This takes time. Just as it did with ADR, it will take time for transactional lawyers to embrace ***214** the use of a Third Party Neutral to assist in the negotiation of transactions. However, it appears this practice will become part of the culture in transactions in the future. At that point transaction lawyers will see the benefits, litigators now accept as self-evident, in the use of a Third Party Neutral to facilitate negotiations.

V. CONCLUSION

There are numerous advantages to parties in using a Deal Mediator. When deals are negotiated with the assistance of a neutral, negotiations are more likely to succeed and result in stronger long-term relationships. As with a lawsuit, the presence of a neutral keeps the parties focused on objectives and helps to avoid personal distractions. The ability to identify key interests will result in more creative options in reaching deals. The use of objective criteria is a rational way to negotiate. The Third Party Neutral is in the best position to manage these aspects of the deal to keep things moving forward, especially where a relationship is just beginning.

It is always in the interest of counsel to provide clients with the desired results as efficiently and economically as possible. As with litigation, Third Party Neutrals can be extremely effective. [FN124] Deal Mediation enables transactional lawyers to provide their clients with the advantages alternative dispute resolution has afforded litigators: the result is, in popular negotiation terminology, a “win/win” situation. Third Party Neutrals can increase client satisfaction by improving the results of their negotiations. For those already engaged in the ADR field, expanding to deal mediation merely transports previously accepted principles. Understandably, change is not always easy, even when that change is for the better. As with many new concepts, “first it is rejected, next it is ridiculed, and finally it is accepted as being self-evident.” [FN125] Deal Mediation is a concept that may take time, but should eventually follow the path successfully forged by ADR.

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[FN1]. Urs Martin Lauchli, "Cross-Cultural Negotiations With A Special Focus on ADR with the Chinese" (2000) 26 WMLR 1045 at 1070.

[FN2]. *Ibid* at 1071. See also Patricia Pattison & Daniel Herron. "The Mountains are High and the Emperor is Far Away: Sanctily of Contract in China" (2003) 40 Am Bus LJ 459 at 460. See generally. John Chu. "The Art of War and East Asian Negotiating Styles" (2002) 10 Williamette J Int'l L & Disp Resol 161.

[FN3]. See L Michael Hager & Robert Pritchard, "Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets" (1999) 14 ICSID Rev Foreign Investment LJ 1, online: <http://www.dundee.ac.uk/cepmlp/journal/html/vol6/article6-12.html> [Hager & Pritchard, "Durable Agreements"]; Manon A Schonewille & Kenneth H Fox, "Moving Beyond 'Just' a Deal, a Bad Deal or No Deal" in Arnold Ingen-Housz, ed, *ADR in Business: Practice and Issues across Countries and Cultures* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2010) (discussing that the term "mediation" is used because the deal-facilitators are neutral third parties applying mediation principles to assist interested parties).

[FN4]. Generally, the concept of Deal Mediation or Deal Facilitation means the use of a Third Party Neutral who assist the principals in the negotiation prior to the consummation of the deal. The neutral could be brought in at any stage in the negotiation. This concept is not specifically about resolving disputes arising from the deal. There is, however, an additional advantage of this process which is that the neutral who assisted with the initial negotiation could be brought in to assist with any conflicts related to an business ongoing relationship.

[FN5]. Scott R Peppet, "Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?" (2004) 19 Ohio St J Disp Resol 283 at 288-289.

[FN6]. Former Secretary of State Henry Kissinger virtually invented the concept of "shuttle diplomacy" following the Yom Kippur War in 1973, when he was essentially going from caucus to caucus- literally "shuttling" between Cairo, Tel Aviv and Damascus, see Russell Crandall, "Book Review: A Tangled Web: The Making of Foreign Policy in the Nixon Presidency" (1999) 23 Fletcher F World Aff 259 at 262; Harold Hongju Koh, "On American Exceptionalism" (2003) 55 Stan L Rev 1479 at 1490, n. 39.

[FN7]. See generally, Richard Holbrooke, *To End A War* (Random House, May 1999).

[FN8]. See e.g. Peppet, *supra* note 5, who identified the possible benefits of a mediator in the context of transactions.

[FN9]. "Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice" (1976) 70 FRD 79.

[FN10]. Frank Sander, "Varieties of Dispute Processing" (1976) 70 FRD 111 [Sander, "Varieties of Dispute Resolution"].

[FN11]. J Barton, "Behind the Legal Explosion" (1975) 24 Stan L Rev 567.

[FN12]. Sander, "Varieties of Dispute Processing", *supra* note 10 at 112.

[FN13]. *Ibid* at 113.

[FN14]. Frank Sander, "The Future of ADR" (2000) J Disp Resol 3 at 3-4 [Sander, "The Future of ADR"].

[FN15]. Facilitated negotiation is the concept of employing a third party neutral or mediator who assists the parties or facilitates the negotiation.

[FN16]. See L Michael Hager, "An Introduction to Deal Mediation", American Bar Association (ABA) Teleconference (6 February 2008), online: <http:// www.imimediation.org/michael-hager-article>. Hager and Pritchard first wrote about the concept of applying ADR principles to transactions in a 1999 article, see "Durable Agreements", *supra* note 3.

[FN17]. Peppet, *supra* note 5 at 284-286.

[FN18]. See Hager, *supra* note 16.

[FN19]. Roger Fisher, William Ury & Bruce Patton, eds, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed (London: Penguin Books, 1991) at 15.

[FN20]. See Peppet, *supra* note 5 at 296-297.

[FN21]. See Joel Waldfogel, "Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation" (1998) 41 JL & Econ 451 at 457-466, 471-474 (providing evidence in support of divergent expectations theory).

[FN22]. See Peppet, *supra* note 5 at 296.

[FN23]. Fisher, Ury & Patton, *supra* note 19 at 100-101.

[FN24]. Russell Korobkin, "A Positive Theory of Legal Negotiation" (2000) 88 Geo L J 1789 at 1794-1798.

[FN25]. Hager & Pritchard, "Durable Agreements", *supra* note 3.

[FN26]. See Phyllis E Bernard, "The Lawyer's Mind: Why a Twenty-First Century Legal Practice Will Not Thrive Using Nineteenth Century Thinking (With Thanks to George Lakoff)" (2010) 25 Ohio St J Disp Resol 165 (discussing that the "deal" is the relationship between the two parties, and not what is written on paper at the conclusion of the negotiation at 187).

[FN27]. See Peppet, *supra* note 5 at 289-290.

[FN28]. Jeswald W Salacuse, "Mediation in International Business", online: The Fletcher School of Law and Diplomacy, Tufts University <http:// fletcher.tufts.edu/faculty/salacuse/pubs/mediation.html>.

[FN29]. See Sander, *supra* note 10 at 6.

[FN30]. See Charles B Craver, *Effective Legal Negotiation and Settlement*, 6th ed (Newark: Matthew Bender & Company Inc, 2009) at 8 (discussing how money may influence an attorney's interest in settling, specifically if they are operating on a contingent fee basis and have bills coming due).

[FN31]. Dennis J Doucette, "Creating New Strategies for M&A Clients in a Challenging Market" 2010 WL 543729 (Aspatore) at 4.

[FN32]. See Phyllis E Bernard, *supra* note 26 (stating that attorneys, though "wise" may not think in a manner

that is “value neutral” at 173).

[FN33]. Nancy Welsh, “Perceptions of Fairness in Negotiation” (2004) 87 Marq L Rev 753 at 753. See also Russell Korobkin, “Psychological Impediments to Mediation Success: Theory and Practice” (2006) 21 Ohio St J Disp Resol 281 at 290-291 [Korobkin, “Psychological Impediments”].

[FN34]. Richard Birke, “Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications” (2010) 25 Ohio St J Disp Resol 477 at para 491-93 (discussing evaluation and persuasion as psychological categories in which lawyers engage when preparing for settlement).

[FN35]. Linda Babcock & George Loewenstein, “Explaining Bargaining Impasse: The Role of Self-Serving Bias” (1997) 11 J Econ Persp 109 (defining self-serving bias as when one “conflatefs] what is fair with what benefits oneself” at 110); Richard Birke & Craig R Fox, “Psychological Principles in Negotiating Civil Settlements” (1999) 4 Harv Negot L Rev 1 at 19 (defining optimistic overconfidence as the phenomenon where people make unrealistically optimistic predictions regarding their future outcomes); Russell Korobkin, ‘The Endowment Effect and Legal Analysis” (2003) 97 Nw UL Rev 1227 at 1228 (defining the endowment effect as when people place greater value on goods they own).

[FN36]. Birke, *supra* note 34 at 512-516.

[FN37]. Russell Korobkin & Chris Guthrie, “Psychological Barriers to Litigation Settlement: An Experimental Approach” (1994) 93 Mich L Rev 107 (explaining that reactive devaluation can be implicated when addressing settlement rates since “[p]eople do not like to do things their adversaries want them to do. Therefore, a settlement offer that a litigant would evaluate favorably in the abstract or when suggested by an ally or neutral third party is more likely to be met with disfavor when proposed by the adversary” at 110); Birke, *supra* note 28 (defining construal biases as when “people think that others hold more extreme views than they do, and are unwilling to accept that others are generally moderates in partisan situation” at 497); Robert S Adler, “Rawed Thinking: Addressing Decision Biases in Negotiation” (2005) 20 Ohio St J Disp Resol 685 at 721 (defining fundamental attribution error as drawing conclusions about an individual's character without considering other plausible explanations for their conduct).

[FN38]. Arthur A Chaykin, “Mediator Liability: A New Role for Fiduciary Duties” (1984) 53 U Cin L Rev 731 at 744.

[FN39]. Sara Cobb & Janet Rifkin, “Practice and Paradox: Deconstructing Neutrality in Mediation” (1991) 16 Law & Soc Inquiry 35 at 43.

[FN40]. Evan M Rock. “Mindfulness Mediation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice” (2006) 6 Cardozo J Contlict Resol 347 at 348.

[FN41]. *Ibid* at 347-348.

[FN42]. Jack Curry & Tyler Kepner. “For Rodriguez and Yankees. It's All but Over”, *The New York Times* (29 October 2007) online: <http://www.nytimes.com>; Tyler Kepner & Murray Chass, “Alex Rodriguez Talks to Yankees Without Agent”. *The New York Times* (15 November 2007) online: <http://www.nytimes.com>; Harvey Araton. “A Most Valuable Performance”, *The New York Times* (20 November 2007) online: <http://www.nytimes.com>.

[FN43]. Curry & Kepner, *ibid.*

[FN44]. Danielle Sessa, "Buffet Told Rodriguez to Call Yankees on Contract, Person Says", *Bloomberg News* (18 November 2007) online: <http:// www.bloomberg.com/apps/news7pid=newsarchive&sid=aTBTZJ6IkcFo&refer=home>.

[FN45]. "Report: A-Rod, Yankees agree on outline of $275 million, 10-year Contract", *Associated Press* (16 November 2007) online: ESPN Sports <http:// sports.espn.go.com/mlb/news/story?id=3112799>.

[FN46]. Curry & Kepner, *supra* note 42; Kepner & Chass, *supra* note 42; Araton, *supra* note 42.

[FN47]. Salacuse, *supra* note 28.

[FN48]. *Ibid.*

[FN49]. *Ibid.*

[FN50]. Schonewille & Fox, *supra* note 3 at 98-99.

[FN51]. See Craver, *supra* note 30 (discussing how the most successful negotiators are ones who "behave in an honest and ethical manner, are perceptive readers of opponent cues, are analytical, realistic, and convincing, and observe the customs and courtesies of the bar" at 12).

[FN52]. See Schonewille & Fox, *supra* note 3 at 84 (discussing how commercial negotiations may end with incomplete or non-preferential outcomes caused by factors such as impediments between parties, cognitive barriers, and miscommunication between negotiators); Bernard, *supra* note 26 (discussing how an attorney orchestrates a meeting to confirm "perceptions, successes and concerns" even if the deal appears sound, because an incident could still arise at 188).

[FN53]. Positional bargaining is defined as a method in which the "negotiators stake out bargaining positions. Negotiation consists of one or more moves and countermoves in which the parties may grant concessions to the other party and seek agreement by the reciprocal exchange of positions until an agreement is reached or the matter is resolved in some other way", see Milton Heumann & Jonathan Hyman, "Negotiation Methods and Litigation Settlement Methods in New Jersey: 'You Can't Always Get What You Want"' (1997) 12 Ohio St J Disp Resol 253 at 254. Soft bargainers are "likely to overmatch and concede early without exploring the full range of options", see Christine Rack, "Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study" (1999) 20 Hamline J Pub L & Pol'y 211 at 221. Cooperative bargainers focus on interests as opposed to positions, and try to "see the situation as the other side sees it", see Robert J Condlin, "Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role" (1992) 51 Md L Rev 1 at 23.

[FN54]. Heumann & Hyman, *ibid* at 254.

[FN55]. Ed Garvey, "Foreword to The Scope of the Labor Exemption in Professional Sports: A Perspective on Collective Bargaining in the NFL" (1989) Duke LJ 328 at n 37.

[FN56]. Charles Craver, "Active Legal Negotiation and Settlement" (1983) ALI-ABA Course of Study Materials. See also Donald G Gifford, "A Context Based Theory of Strategy Selection in Legal Negotiation" (1985) 46 OHSLJ 41 ("[o]bviously, however, concessions are generally an inevitable part of the negotiating process. Con-

cessions made by a negotiator build an expectation of reciprocity and lead to further concessions" at 49).

[FN57]. Gifford, *ibid* at n 75.

[FN58]. *Ibid.*

[FN59]. Fisher, Ury & Patton, *supra* note 19.

[FN60]. Condlin, *supra* note 53 at 23.

[FN61]. See Craver, *supra* note 30 (stating that through the practice and teaching of legal negotiating, cooperative/problem-solving negotiators have never been less effective than competitive negotiators, despite the notion that one must be "'uncooperative, selfish, manipulative ... and abrasive" at 11).

[FN62]. See *ibid* (addressing how individuals often "lock" themselves into principled positions without considering alternatives, and how a mediator can enable an individual to re-evaluate underlying interests and proposals being offered at 301).

[FN63]. Kaleena Scamman, "Note: ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist-Label Relationship" (2008) 10 Cardozo J Disp Res 269 at 304, n 164.

[FN64]. See Rack, *supra* note 53 (discussing how mediators can "reframe positional arguments into statements of interests, to divert blame, accusations and defense ... and to generally encourage parties" at 215-216).

[FN65]. Hesha Abrams, "The Art of the Deal 'Deal Mediation"' *ABA Teleconference* (6 February 2008), online: <http://www.imimediation.org/hesha-abrams-article-new>.

[FN66]. Lela P Love & Kimberly K Kovach, "ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process" (2000) 2000 J Disp Resol 295 at 303-305.

[FN67]. Bernard, *supra* note 26 at 187.

[FN68]. Julie Barker, "International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans" (1996) 19 Loy LA Int'l & Comp LJ 1 at 3.

[FN69]. See generally Thomas L Friedman, *The World is Flat* (Farrar, Strauss and Giroux, 2005).

[FN70]. Schoneville & Fox, *supra* note 3 at 83.

[FN71]. See Bernard, *supra* note 26 at 180.

[FN72]. See Barker, *supra* note 68 (discussing how mediation in an international setting is beneficial because it can address issues such as "intangible feelings, personal interests, and emotional concerns" that may arise due to parties' interests as opposed to their bargaining positions at 8-9).

[FN73]. Welsh, *supra* note 33 at 753.

[FN74]. See Bernard, *supra* note 26 at 186-86 (stating that value can be created when a lawyer applies ADR

skills to resolve conflicts arising from miscommunications based on corporate and cultural issues).

[FN75]. Cross-cultural miscommunication is one of the leading causes of international negotiation failure, see Barker, *supra* note 68 at 18-19.

[FN76]. *Ibid* (discussing how a mediator develops a procedure that "encourages emotional expression without destructive venting" at 11).

[FN77]. See David P Hoffer, "Decision Analysis as a Mediator's Tool" (1996) 1 Harv Neg Rev 113 at 124 (discussing how parties can become emotionally involved in a case and how a mediator can be used to move the negotiation beyond the emotional issues and toward a resolution).

[FN78]. See Craver, *supra* note 30 (stating that negotiations are influenced by the same "psychological, sociological, and communicational factors that affect all interpersonal transactions" at 5).

[FN79]. See Arthur Rosett, "Critical Reflections on the United Nations Conventions on Contracts for the International Sale of Goods" (1984) 45 Ohio St L J 265 at 301-302.

[FN80]. *Ibid.*

[FN81]. The use of translators does not necessarily remedy all international communication issues, see *ibid*; Eric E Bergsten & Anthony J Miller, "The Remedy of Reduction of Price" (1979) 27 Am J Comp L 255 at 276.

[FN82]. See Julia Ann Gold, "ADR Through A Cultural Lens: How Cultural Values Shape our Disputing Process" (2005) J Disp Resol 289 at 318-20.

[FN83]. *Ibid* at 293.

[FN84]. *Ibid* at 298.

[FN85]. *Ibid.*

[FN86]. *Ibid.*

[FN87]. *Ibid.*

[FN88]. *Ibid.*

[FN89]. Barker, *supra* note 68 at 35.

[FN90]. *Ibid.*

[FN91]. *Ibid* at 36.

[FN92]. See e.g. Fisher, Ury & Patton, *supra* note 19 at 11 (discussing how emotions can interfere with a negotiation).

[FN93]. Hager & Pritchard, "Durable Agreements", *supra* note 3.

[FN94]. Russell Korobkin, "Against Integrative Bargaining" (2008) 58 Case W Res 1323 at 1324-1325.

[FN95]. See Craver, *supra* note 30 at 300-301.

[FN96]. Harold Abrahmson, "Problem Solving Advocacy in Mediations: A Model of Client Representation" (2005)10 Harv Neg L Rev 103 at 110; Korobkin, "Psychological Impediments", *supra* note 27 at 295-297.

[FN97]. See Alex Grzybowski et al, "Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses" (2010) 22 Pac McGeorge Global Bus & Dev LJ 139 at 143. See generally, Jeremy Richler, "From Both Sides of the Table: The Art of Balancing Negotiation" (2006) 21 Windsor Rev Legal Soc Issues 11 at 14-15 (discussing how framing exercises can introduce beneficial options).

[FN98]. See Fisher, Ury & Patton, *supra* note 19 at 101-103 (addressing how parties may pick a bottom line which can prevent them from inventing a more acceptable alternative).

[FN99]. *Ibid.*

[FN100]. Hager & Pritchard, "Durable Agreements", *supra* note 3.

[FN101]. *Ibid.*

[FN102]. *Ibid.*

[FN103]. *Ibid.*

[FN104]. *Ibid.*

[FN105]. *Ibid.*

[FN106]. Lisa Blomgren Bingham et al, "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes" (2009) 24 Ohio St J Disp Resol 225 at 234-35.

[FN107]. Less than 1.8 percent of cases result in trials, see Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 J Empirical Legal Stud 459 [Galanter, "Vanishing Trial"]. See Hoffer, *supra* note 77 at 114.

[FN108]. A study of civil cases handled by the US Department of Justice from 1995-1998 revealed that 65 percent of cases settled when ADR was used while 29 percent of cases settled when ADR was not used, see "Study Shows ADR Helps Settle Cases, Save Time and Money" *American Arbitration Association* (21 July 2008), online: <http://www.adr.org/sp.asp?id=34835> [AAA].

[FN109]. Marc Galanter, "Worlds of Deals: Using Negotiation to Teach About Legal Process" (1984) 34 J Legal Educ 268.

[FN110]. *Ibid.*

[FN111]. Bingham et al. *supra* note 106 at 252.

[FN112]. Peppet, *supra* note 5 at 323-324.

[FN113]. Craver, *supra* note 30.

[FN114]. Chester Karrass, *In Business as in Life, You Don't Get What You Deserve, You Get What You Negotiate* (Stanford Street Press, 1996).

[FN115]. See Sander "The Future of ADR", *supra* note 14 at 9 (discussing how if an attorney earns a reputation as an effective negotiator, they will be used more).

[FN116]. *Ibid* at 6.

[FN117]. See *ibid.*

[FN118]. David A Hoffman, "Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR" (2008) J Disp Resol 11 at 17.

[FN119]. See Galanter, "The Vanishing Trial", *supra* note 107, at 514 (discussing the decline of trials due to the development of ADR); Michael Moffitt, "Islands Vitatims, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)" (2010) 25 Ohio St J Disp Resol 25 at 31 (discussing the increase in law schools providing ADR courses to students).

[FN120]. Hoffer, *supra* note 77 at 114.

[FN121]. Thomas J Stipanowich, "ADR and the 'The Vanishing Trial"': The Growth and Impact of 'Alternative Dispute Resolution"' (2004) 1 J Empirical Legal Stud 843 at 849.

[FN122]. *Ibid.*

[FN123]. *Ibid* at 853.

[FN124]. See Sander. "The Future of ADR"', *supra* note 14 ("the most experienced lawyers say, '[b]eing able to settle client problems effectively is really a boon to business"' at 6).

[FN125]. Arthur Schopenhauer cited in Melanie A Farmer, "Brain Researcher Defies Conventional Wisdom on Estrogen". *Research Columbia News* (9 April 2010) online: Columbia University <http://news.columbia.edu/research/1983>.
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