Can We Talk?

Don Peters, University of Florida
“Let’s talk” captures mediation’s approach to dispute resolving and deal-making. Best understood as assisted and enhanced negotiation, mediation permits confidential talking that is directed toward constructive communication. Practiced for centuries, and found in most of the world’s cultures, mediation provides a simple, relatively procedure-free process allowing people to talk and negotiate in the presence, and with the assistance, of third persons. Mediators help participants better understand each other, frame problems in ways that transcend only partisan perceptions, explore independent and shared interests, and develop solutions that promote mutual gain. Unlike arbitrators and judges, mediators do not make binding decisions. Instead, they
help participants develop solutions, and stimulate disputants to make better, often more mutually rewarding agreements. Mediation often produces outcomes that exceed the narrower, win-lose legal remedies with which arbitrators and judges work.

For these and other reasons, many commercial lawyers and scholars encourage more extensive use of mediation to resolve private transborder commercial disputes. Successful businesses increasingly expand beyond national boundaries and create transnational networks of customers, distributors, and suppliers. Many of the resulting transactions generate ongoing commercial relationships such as alliances, joint ventures, and other collaborative arrangements. Businesses make substantial investments to create these commercial associations and then often experience the uncertainties that interdependent relationships inevitably produce. Commercial expansion across national boundaries brings conflicts as economic and political circumstances

---

5 Carrie J. Menkel-Meadow, et al., supra note 1, at 267 (self-determination by the parties is a “central feature of mediation” and makes it “fundamentally different from adjudication” where power to determine outcomes is given to a judge or arbitrator).
6 Id. at 270 (mediators help parties craft proposals that respond to and satisfy at least some of every participant’s needs).
7 Id. at 270. For example, mediation of commercial disputes can encourage parties to “agree that they will enter into future contracts that take account of past wrong and offer profit for all, instead of the more conventional money damages.” Id. They can include potentially valuable agreements to communicate in certain ways, write reference letters, apologize, and refrain from specified conduct, remedial avenues typically not available in arbitration or litigation. Id. at 170-71.
change, personality tensions emerge and sharpen, and differing contractual interpretations and other performance related perceptions arise.\textsuperscript{11} Disagreements over responsibilities, obligations, performances, and entitlements, commonly result.\textsuperscript{12}

Methods to resolve transborder disagreements efficiently contribute substantially to the growth and success of international trade.\textsuperscript{13} Risks stemming from different cultural practices, expectations, and behaviors compound in cross-border commercial relationships, and they make appropriate conflict resolving processes essential.\textsuperscript{14} Providing mechanisms for resolving private problems and protecting commercial legal rights cannot occur without workable systems of transborder dispute resolution.\textsuperscript{15} Humans’ limited non-violent dispute resolving menu of avoiding, seeking consensual agreements, and letting outsiders decide through adjudicating by litigating or arbitrating\textsuperscript{16} has produced the odd result for transborder commercial disputing that while litigation is seldom used, arbitration is used frequently, and mediation rarely occurs.

\textsuperscript{11} Harold I. Abramson, supra note 8, at 324; International Mediation, supra note 3, at 4.
\textsuperscript{12} See, e.g., Walter G. Gans, supra note 8, at 51; Eric Green, supra note 10, at 175-76; International Mediation, supra note 3, at 4. Negotiations creating transborder commercial relationships and documents reflecting them are unlikely to foresee “the myriad areas of possible conflict and disagreement.” Walter G. Gans, supra at 52. Joint ventures, in particular, tend to have short lives. More than fifty percent of joint ventures end within five years, and most terminate within ten years. Harold I. Abramson, supra note 8, at 324.
\textsuperscript{13} See Thomas E. Carbonneau, Diversity or Cacophony?: New Sources of Norms in International Law Symposium: Arbitral Law-Making, 25 Mich. J. Int’l L. 1183, 1187 (2004); Andrew Sagaratz, supra note 9, at 675..
\textsuperscript{16} These three non-violent human dispute resolution options appear to exist in all cultures. See P.H. Gulliver, Disputes and Negotiations: A Cross-Cultural Perspective 1 (1970); Karl A. Slaikeu, When Push Comes To Shove: A Practical Guide to Mediating Disputes 16 (1996). A globally evident fact of disputing is that business managers do not like conflicts. International Mediation, supra note 3, at 4. Faced with disputes, managers often experience a fight or flight reaction, and choose either to worsen the situation with other parties by adjudicating using legalized fighting, or seek to flee the problem by avoiding it and doing nothing. Id. at 4-5.
No mysteries surround why companies disputing private transborder commercial differences generally avoid litigation. Transborder litigation of private commercial disputes adds enormous difficulties, complexities, and inefficiencies\textsuperscript{17} to resolving disputes flexibly, quickly, and inexpensively; the objectives most businesses value.\textsuperscript{18} The absence of a regional judicial system in the Americas with transborder power to adjudicate private commercial disputes means that some disputants will have to litigate under another country’s legal and procedural rules.\textsuperscript{19} Doing this creates enormous opportunities for lawyers to quarrel about whether courts selected have judicial power over disputes and non-resident disputants.\textsuperscript{20}

Once jurisdictional issues are resolved initially, lawyers turn their argumentative talents to quarreling about what substantive law should be applied,\textsuperscript{21} and how evidence can be identified and gathered before and presented at trial.\textsuperscript{22} Private transborder litigation occurring in the United States, for example, presents enormous challenges for non-US litigants, requiring them to comprehend and manipulate fifty separate sets of state civil procedure rules, the additional

\textsuperscript{17} Thomas E. Carbonneau, supra note 13, at 1188; see generally, George A. Bermann, Transnational Litigation in a Nutshell (2003); Richard H. Kreindler, Transnational Litigation: A Basic Primer (1998); Russell J. Weintraub, International Litigation and Arbitration: Practice and Planning (4\textsuperscript{th} ed. 2003). MERCOSUL, the common market of the south, has numerous implementing protocols containing procedures designed to reduce the difficulties, complexities, and inefficiencies of transnational litigation among companies based in participating countries. See Nadia de Araujo, Dispute Resolution in MERCOSUL: The Protocol of Las Lenas and the Case Law of the Brazilian Supreme Court, 32 U. Miami Inter-Am. L. Rev 25, 40 (2001). Unfortunately, many procedural gaps remain and create challenges, uncertainties, and complications. Id. at 40-50.

\textsuperscript{18} Walter G. Gans, supra note 8, at 52

\textsuperscript{19} See, e.g., L. Richard Freese, Jr. & Robert Spagnola, New Challenges in International Commercial Disputes: ADR Under Nafta, 26 Colo. Law. 61 (1997); Eric. D. Green, supra note10, at 175:

\textsuperscript{20} Thomas E. Carbonneau, supra note 13, at 1188-89. Doing this often brings numerous, difficult problems resulting from separate law suits involving the same parties and issues starting and proceeding in different countries. Id.

\textsuperscript{21} Id. Although not involving the Americas, Professor Carbonneau noted that if Bill Murray’s fading actor character from California had been involved with an auto accident while in Tokoyo to film Suntory Whiskey commercials, he would have been lost in substantive legal uncertainties as well as in translation. Id. at 1189. In contrast, disputants in arbitration can choose what law applies by contract, and one survey shows that they do this in 82% of International Chamber of Commerce arbitrations. More Self-Administration Seen in International Arbitration, 15 Alternatives to the High Cost of Litigation 37, 38 (March 1997).

\textsuperscript{22} Thomas E. Carbonneau, supra note 13, at 1190.
overlay of federal rules, and the impact of local rules in both state and federal trial courts. Substantial differences in trial procedures among adversarial and inquisitorial systems create more complexities stemming from different roles for judges and experts, methods of establishing records, values accorded oral testimony, and appellate options. Parties fear “home town justice” from xenophobic tribunals and worry about judicial independence and impartiality. After running this gauntlet, business disputants and their lawyers face substantial challenges enforcing foreign court judgments that often replay initial jurisdictional problems. These time-consuming and expensive aspects of commercial litigating flow directly from the fact that dispute-creating events, transactions, and differences crossed national borders.

Faced with these daunting realities, lawyers and business decision-makers usually turn elsewhere to resolve differences that cannot be resolved by private negotiation. The dispute

---

23 See id; L. Richard Freese Jr. & Robert Spagnola, supra note 19, at 61. Non-US trained lawyers and business litigants in typical business cases entangled in the U.S. judicial system must face “depositions, lengthy pretrial periods, . . . . extensive personal time commitment by the disputants and others, lengthy ‘factual’ investigations in a search for the ‘truth,’ obtuse evidentiary rules, over-reliance on experts, volatility of jury trials, and common law reliance on precedents.” Id. at 62
24 Thomas E. Carbonneau, supra note 13, at 1191.
25 Commercial Arbitration At Its Best, supra note 14, at 320. According to commentators, most Latin American judicial systems “are simply not responsive to their economies’ fast growing needs and evolving business cultures.” Mediation in Latin America, supra note 15, at 424. Many judicial systems in Latin America are rife with systematic corruption stemming from low compensation, weak monitoring systems, and other factors. Thomas J. Moyer & Emily Stoudt Haynes, Mediation as a Catalyst for Judicial Reform in Latin America, 18 Ohio St. J. on Disp. Resol. 619, 637 (2003).
26 Thomas E. Carbonneau, supra note 13, at 1193-94.
27 Id. at 1188. The judiciaries in most Latin American countries confront tremendous docket overloads, and a single case may take over a decade to resolve. Mediation in Latin America, supra note 16, at 425. Professor Carbonneau provided this apt summary of transborder commercial litigation: “It portrays the law at its theoretical best and at its practical worst. The ethic of pragmatism succumbs to sectarianism. The utility of litigation is corroded by the antics of forum-shopping. After the remedial strategies have been exhausted, judgments are likely to conflict and to be rendered ineffective. The variability of national legal systems and the quest to find litigious advantage confound the functionality of the process. Further the amounts of time and money expended to reach an inconclusive outcome is likely to have been enormous.” Carbonneau, supra at 1188.
28 No data was found indicating the number of private transborder commercial disputes that are successfully negotiated by either the business personnel involved alone or in tandem with their in-house or externally retained lawyers. Research and experience suggests that negotiation is the most common process used to resolve disputes in the United States. Data suggests that lawsuits are filed in just over 10% of the disputes involving individuals and more than $1,000, meaning 90% of these situations are resolved without formal invocation of the judicial process. David M. Trubek, et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 86 (1983). A recent survey of litigation in the United States federal courts showed that the percentage of cases going to trial have dropped sharply
resolution option they choose most frequently is arbitration, the adjudicatory alternative which, like litigation, relies on outsiders to decide.29

Arbitration has emerged as the preferred dispute resolution method in contemporary transborder border disputes30 even as its use has diminished in domestic American commercial disagreements.31 International commercial arbitration seeks to provide fair and neutral forums to assess and decide transborder commercial disputes.32 Compared to private transborder commercial dispute litigation, arbitration may be faster and less expensive; require less personal involvement by business personnel; afford participant control over selecting the arbitrator or arbitral panel; and involve less discovery and appellate review.33
As an adjudicative remedy, however, arbitration presents many of litigation’s disadvantages. Unless it produces a settlement while unfolding, arbitration generates winners and losers. Despite attempts to use decision-making processes that respect ongoing business associations, and often-criticized tendencies arbitrators display to render compromise decisions, arbitration more often ends rather than repairs commercial relationships. Losers usually do not want to do further business with companies which defeat them in adjudicatory battles.

Arbitrating also presents general adjudication disadvantages including sacrificing outcome control by delegating it to external decision-makers. Arbitrating focuses resolution on

34 A high percentage of claims submitted to arbitration are settled before hearings. Commercial Arbitration At Its Best, supra note 14, at 321. Facilitating settlement is usually peripheral to arbitral adjudication but arbitrators typically inquire about and encourage negotiated agreements. Id. at 28.


37 See L. Richard Freese, Jr. & Robert Spagnola, supra note 19, at 62 (perception is that arbitrators frequently split the difference in their awards) Stephen B. Goldberg, et al., supra note 36, at 210 (noting that many argue the parties’ power to choose arbitrators encourages compromise decisions “to avoid antagonizing” disputants “that they hope will select them” again); David B. Lipsky & Ronald L. Seeber, The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations 26 (1998) (hereafter Appropriate Corporate Dispute Resolution) (many believe arbitrators consider the positions the parties articulate and then make awards that split the difference between them). About half of 606 companies surveyed said that when they did not use arbitration it was because it resulted in compromise outcomes. Id.


39 See, e.g., Harold I. Abramson, supra note 8 at 325; Julie Barker, supra note 39, at 7; Alexandra Bowen, supra note 8, at 63; George W. Coombe, supra note10, at 25. International Mediation, supra note 3, at 6. The most frequently identified reason for choosing mediation, listed by 82% of 606 Fortune 1000 American companies surveyed, was that “it allows the parties to resolve the disputes themselves.” Appropriate Corporate Dispute Resolution, supra note 37, at 18. Another survey revealed 81% of 254 American corporate general counsel or persons in equivalent positions chose mediation because it allows parties to resolve disputes themselves. American Arbitration Association, Dispute-Wise Management: Improving Economic and Non-economic Outcomes in Managing Business Conflicts 19 (2006) (hereafter Dispute-Wise Conflict Management).
backward looking facts, evidence, and arguments asserting and defending legal rights rather than on present and future development of beneficial business solutions.\(^{40}\) It adopts formal, legalistic frames that require the expertise of lawyers, and often diverts time, money, and energy to ancillary procedural quarrels.\(^{41}\) Unlike litigation, arbitration seldom produces outcomes that establish precedent or articulate influential business policy.\(^{42}\)

In addition, arbitrating is often neither less expensive nor faster than transborder litigation.\(^{43}\) Absent custom-designed arbitration processes tailored to specific disputant needs and dispute characteristics,\(^{44}\) substantial time and money is often spent selecting arbitrators\(^{45}\) and

\(^{40}\) Walter G. Gans, supra note 8, at 53; Walter Eric D. Green, supra note 10, at 178. Adjudication seeks legal solutions based on entitlements and rights, and emphasizes the roles lawyer play, often excluding others with “commercial, technical, or people expertise.” International Mediation, supra note 3, at 6; see note 7 supra and accompanying text.

\(^{41}\) George W. Coombe, supra note 10, at 25; see Stephen J. Burton, Combining Conciliation with Arbitration of International Commercial Disputes, 18 Hastings Int’l & Comp. L. rev. 637 (1997) (suggesting that zealous, opportunistic litigation practices are increasingly supplanting courtly manners in international commercial arbitration); Yves Dezalay & Bryant Garth, Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes, 29 Law. & soc. Rev. 27, 29 (1995) (arbitration has become more formal and increasingly like U.S.-style litigation as it has become more successful and institutionalized).

\(^{42}\) Appropriate Corporate Dispute Resolution, supra note 37, at 25 (litigation preferred when companies want court decision to set precedent or important principles are involved); see Screening Device Determines ADR Suitability, 15 Alternatives to the High Cost of Litigation 7, 9 (January 1997).

\(^{43}\) Commercial Arbitration At Its Best, supra note 14, at 321; Inside the Corporation: Involving Business Managers in ADR, 16 Alternatives to the High Cost of Litigation, 151, 159 (November 1998) (hereafter Involving Business Managers). One lawyer summarized the structural problems with arbitration in its current form as “too slow, cumbersome, and expensive. It has allowed itself to be cluttered with the paraphernalia of due process, which is at once the glory and the bane of the Anglo-Saxon judicial system.” Id. According to the counsel from a large energy company, “arbitration is proving as burdensome as litigation. The opposition can use arbitration to elongate the process. It can take over six months to simply agree on an arbitration panel. You can be constantly running back to arbitrators for decisions on discovery.” Appropriate Corporate Dispute Resolution, supra note 37, at 25. Another in-house counsel commented that “arbitration includes the worst characteristics of litigation without the benefits.” Id. Concerns also exist that arbitral tribunals are so focused on future appointments and post award attacks that they are reluctant not to exhaust procedures to the fullest extent regardless of delays and costs. Thomas W. Walde, supra note 38, at 2.

\(^{44}\) See Commercial Arbitration At Its Best, supra note 14, at 43 (parties encouraged custom drafting to meet specific needs of contracting parties); Kathleen M. Scanlon, Drafter’s Deskbook: Dispute Resolution Clauses 1.13 (parties can address their concerns when drafting contract clauses because arbitration usually a creature of contract).

\(^{45}\) See Stephen B. Goldberg, et al., supra note 35, at 210 (arguing parties may focus so much on selecting arbitrators they hope will favor their positions that they do not take advantage of opportunities to select decision-makers with expertise).
wrangling about information gathering.46 For example, several transborder investment arbitrations, conducted pursuant to both NAFTA and bilateral investment treaties, required four years to conclude and cost millions of US dollars.47

International commercial lawyers tend to view arbitration the way attorneys view courts for domestic disputes.48 Consequently, businesses typically do not choose arbitration in international settings because it is faster, less expensive, or more private than litigation.49 They choose arbitration because they see no real litigation alternative. 50 As a result, arbitration has become the primary method businesses use to resolve transborder commercial disputes.51 The general number of mediations in private transborder disputes is low compared to the number of arbitrations.

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

46See Commercial Arbitration at its Best, supra note 14, at 349-56. Conflicting rulings have resulted on the question of whether an American statute authorizing U.S. courts to issue orders to produce documents or testimony from U.S. participants in international arbitrations. Id. at 349. Disputes about depositions and document requests are common. See id. at 350-51. 47 Stephen J. Burton, supra note 41, at 637; Thomas W. Walde, supra note 38, at 2. International arbitration’s expense can be considerable, particularly when U.S.-style litigation techniques are engrafted. Thomas E. Carbonneau, The Exercise of Contract Freedom in the Making of Arbitration Agreements, 36 Vand. J. Transnat’l L. 1189, 1208 (2003). A domestic commercial disputes subjected to arbitration under a contract clause took 7 years, cost $100 million, and ultimately settled at a mediation. Richard Reuben, The Lawyer Turns Peacemaker, 82 A.B.A.J. 54, 58 (1996). 48 Harold I. Abramson, supra note 8, at 325; L. Richard Freese, Jr. & Robert Spagnola, supra note 19, at 62. 49 Carrie J. Menkel-Meadow, et al., supra note 1, at 458. 50 Id. Large American law firms often consider international commercial arbitration as simply a kind of litigation in a different forum. Yves Dezelay & Bryant Garth, supra note 41, at 56. They consider procedural attacks and discovery maneuvers as weapons to deploy in conflicts that will inevitably end in negotiated outcomes before final hearings. Id. 51 See, e.g., Steven K. Anderson, supra note 8, at 58 (arbitration is chosen method of dispute resolution in international commercial disputes); Julie Barker, supra note 38, at 6 (same); Walter G. Gans, supra note 7, at 42 (arbitration preferred ADR method).
talk,” this article responds yes we can, and concludes by proposing two critical conversations commercial clients should have with their lawyers and each other.

A. Common Barriers to Mediating Private Transborder Disputes

Although disputes between businesses engaged in transborder collaborations are inevitable, efficient and fair resolution of these conflicts regrettably is not. Adjudication remains the primary choice despite escalating costs of arbitrating and litigating. In addition, agreements produced in negotiations that inevitably result from choosing adjudication are influenced by predictions of potential outcomes, and are typically sub-optimal because they fail to realize all gains actually available in these disputes.

Mandatory, court-connected mediation in the United States and the United Kingdom has increased the use of and familiarity with impartial third-party assisted negotiation in domestic commercial disputes. Research shows that lawyers who have participated in a mediation value

---

52 See notes 10-12 supra and accompanying text.
54 The costs of arbitrating transborder disputes are often very high. Walter G. Gans, supra note 8, at 54 (administered arbitration costs traditionally high); Tomas W. Walde, supra note 38, at 1-2 (arbitral adjudication is generally very costly, and massive cost overruns are the rule rather than the exception); see notes 44-48 supra and accompanying text. So are the costs of litigating. See, e.g., Curtis H. Barnette, The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective, 53 Antitrust L.J. 277, 277-78 (1984); Craig A. McEwen, Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation, 14 Ohio St. J. on Disp. Resol. 1, 7 (1998); The Corporate Counsel Section of the N.Y. State Bar Ass’n, Legal Development: Report on Cost Effective Management of Corporate Litigation, 59 Alb. L. Rev. 263, 265 (1995). One very large corporation’s internal study reported a nine-fold increase in legal costs over ten years while another reported a ten-fold escalation. Craig A. McEwen, supra at 7.
55 Craig A. McEwen, supra note 54, at 7.
57 See Penny Brooker and Anthony Lavers, Mediation Outcomes: Lawyers’ Experience with Commercial and Construction Mediation in the United Kingdom, 5 Pepp. Disp. Resol. L.J. 161, 172 (2005); Deborah Hensler, Our Courts, Ourselves: How the ADR Movement is Re-shaping Our Legal System, 108 Penn. St. L. Rev. 165, 185 (2003); It has been estimated that half of American state courts and nearly all Federal District Courts sponsor mediation programs. Deborah Hensler, supra at 185. Similar directions and encouragement of using mediation exist in Argentina, Australia, Canada, France, Greece, Hong Kong, Israel, New Zealand, Poland, Uganda, and Singapore. International Mediation, supra note 3, at 11.
it more than those who have not experienced the process, and business managers and executives are likely to respond similarly. Perhaps unfortunately, no regional judicial body has power to create and administer mandatory mediation systems for transborder commercial disputes.

The absence of judicial power to mandate mediation leaves choosing a dispute resolution process in transborder commercial disputes to affirmative decisions made by disputants to use it. These decisions may be made pre-dispute and reflected in dispute resolution contract clauses in documents creating transborder transactions. Most private transborder commercial arbitrations, as well as most domestic arbitrations, are created by such contract clauses. These decisions, negotiations, and agreements regarding which dispute resolution processes to use may also be made after disputes arise.

---

57 Don Peters, To Sue is Human; To Settle Divine: Intercultural Collaborations to Expand the Use of Mediation in Costa Rica, 17 Fla. J. Int’l Law 9, 12 (2005) (hereafter Mediation in Costa Rica); see Richard C. Reuben, supra note 47, at 54; Nancy A. Welsh, The Place of Court-Connected Mediation in a Democratic Justice System, 5 Cardozo J. Conflict Resol. 117, 142 (2004); see Bobbie McAdoo et al., What Do Empirical Studies Tell Us About Court Mediation?, 9 Disp. Resol. Mag. 8 (2003); Richard C. Reuben, supra note 47, at 57. In Latin America, successful personal experience with mediations themselves or by trusted colleagues provides the most convincing reason to use mediation. Mediation in Latin America, supra note 16, at 429. Florida lawyers representing individual and company clients in non-criminal matters over the last 20 years in Florida have experienced court-ordered mediation when disputes arise and litigation results. This exposure and experience has helped many of these lawyers forget that they once held skeptical views about mediation because they now know how it can be a valuable tool for negotiating and problem-solving. Mediation in Costa Rica, supra at 12.

58 Without experiencing successful mediation, executives and managers are skeptical of how it enhances and assists negotiation. International Mediation, supra note 3, at 114-15. Those who have experienced mediation in transborder commercial disputes, however, “attest to its effective across a diverse range of international conflicts.” Id. at 8.

59 See Kathleen M. Scanlon, supra note 44, at 1.13; Survey Says International Arbitration Is Satisfying, 18 Alternatives, 183 (July/August 2000).

60 See, e.g., Maurits Barendrecht and Berend R. de Vries, Fitting the Forum to the Fuss With Sticky Defaults: Failure in the Market for Dispute Resolution Services, 7 Cardozo J. Conflict Resol. 83, 90 (2005) (hereafter Sticky Defaults) (89% of business respondents in survey conducted by American Arbitration Association said they arbitrated because it was contractually required); Kathleen M. Scanlon, supra note 44, at 1.13 (arbitration usually occurs pursuant to a predispute contract clause).

61 Sticky Defaults, supra note 60, at 88.
Deciding which dispute resolution process to use is one of the most important steps in resolving transborder conflicts efficiently and effectively. This decision is typically made by business executives in consultation with their in-house and external lawyers. Persons acting in all of these roles confront, often unknowingly, common cognitive and cultural barriers that impede them from considering, recommending, and using mediation as an important step toward resolving disputes before ceding outcome control to arbitrators. These barriers undoubtedly contribute to failures to use mediation in transborder disputes in which it is arguably appropriate. This article analyzes the most important of these barriers and then suggests ways to overcome them.

1. Cognitive barriers

Although business executives and lawyers undoubtedly believe that their decisions regarding which dispute resolution process to use are reasoned, objective, and rational, substantial evidence suggests their beliefs are not necessarily accurate. Psychologists demonstrate that many cognitive, social, and emotional forces frequently distort rational decision-making. Persons making complex decisions, such as considering and pursuing resolution methods, frequently use intuitive approaches and mental shortcuts to reduce the complexity and effort involved in reasoning about and deciding these questions. These intuitive approaches and mental shortcuts involve automatic, subconscious processes that are difficult to

---

63 See Craig A. McEwen, supra note 54, at 7-8.
64 See Sticky Defaults, supra note 60, at 83.
counter. They manifest the Paleolithic human mind in today’s post-modern age. They also exercise substantial influence if, as scholars contend, human thought is primarily unconscious, and that most human thinking occurs outside conscious awareness and control.

Many cognitive barriers interact and combine to create a powerful win-lose bias and zero-sum dispute resolution mindset for both business persons and their lawyers. The mental shortcuts feeding this bias include selective and partisan perception, egocentrism, optimistic overconfidence, and fixed pie assumptions. This article analyzes each.

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

---

68 Richard Birke & Craig R. Fox, supra note 65, at 3-4.  
69 Douglas H. Yarn & Gregory Todd Jones, In Our Bones (Or Brains): Behavioral Biology, in The Negotiator’s Fieldbook, supra note 73, at 283, 284. These intuitive biases and mental short cuts are “so deeply engrained that they undoubtedly have an evolutionary basis.” Robert S. Adler, supra note 66, at 692. Human behavior, at its most fundamental level, is a biological phenomenon. Douglas H. Yarn & Gregory Todd Jones, supra at 284. This means that “ultimately, all theories about human behavior are theories about the brain—an organ operating on physical principles that receives stimuli, makes computations, and directs behavioral outputs. Far from being an all-purpose computer or blank slate, the brain has been shaped over millions of years by evolutionary forces producing a species-typical brain that produces species-typical behavioral outputs in response to various stimuli.” Id. Professors Yarn and Jones argue that “behavior that seems irrational in a present environment may be perfectly rational when considered in the context of” a physical and social environment when the challenges primarily were food choice, predator avoidance, and mate selection. Id.  
70 Wendell Jones and Scott H. Hughes, Complexity, Conflict Resolution, and How the Mind Works, 20 Conflict Res. Q 485, 487 (2003) (arguing that discoveries in the past 20-30 years in physics, microbiology, the neurosciences, cognitive psychology, and linguistics have profound implications for how humans create reality from our sensory experiences should view interaction and conflict).  
71 Id. These scholars argue that as humans perceive and respond, their minds are “constantly making and remaking neural connections. Sensorimotor experiences generate and stimulate neural structures that interact and respond in complex ways with human brains and all their subsystems.” Id. They then conclude that no disembodied logic exists that humans can exercise separate from the embedded neural activities of their brains. Id  
74 Id. at 344. As humans proceed through life, the amount of information in terms of sights, sounds, facts, and feelings available in single encounters is so overwhelming that they necessarily notice some things and ignore others. Douglas Stone, Bruce Patton, & Sheila Heen, Difficult Conversations: How to Discuss What Matters Most
to different information and past experiences strongly influences and biases this selective perception. This human tendency means that business persons from different parts of the same organization often see dispute contexts, situations, and objectives differently, and these differences may influence discussions and decisions about how to resolve transborder disagreements. In addition, inside lawyers employed by companies and outside attorneys retained for specific matters also perceive these same dispute contexts and situations selectively and differently.

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

---

31 (paperback ed., 1991). User illusion describes the cognitive bias resulting from the common beliefs humans hold that they perceive everything in situations but in fact notice only a very small slice of available information, often as little as one percent of the stimulus field. Sheila Heen & Douglas Stone, supra note 73, at 344; Tor Norretranders & Jonathan Sydenham, The User Illusion: Cutting Consciousness Down to Size 277 (1991); Leigh Thompson, The Mind and Heart of the Negotiator 192 (2005).

75 Sheila Heen & Douglas Stone, supra note 73, at 344. Separate businesses obviously have access to different information with presumably each knowing its own strengths, challenges, constraints, finances better than the data it has about other companies with whom it collaborates and potentially conflicts. See Douglas Stone et al., supra note 74, at 33.


77 See Sheila Heen & Douglas Stone, supra note 73, at 344 (noting that “in any organization, where you sit determines what you see”).

78 See Involving Business Managers, supra note 43, at 156. Turf problems are common in large business organizations where managers involved in the dispute often don’t want someone looking over their shoulders, telling them what to do, or examining what happened to see if a mistake had been made.” Id.

79 See Craig A. McEwen, supra note 54, at 7-8, 27. The long-term relationships inside counsel have with their clients allow them to think broadly about dispute management policies, and lessen concerns about malpractice exposure for recommending settlement before acquiring total information. Id. at 27. Outside lawyers, on the other hand, are often engaged on case-by-case arrangements and this encourages them to focus on specific disputes and urge caution regarding settlements. Id.


82 Sheila Heen & Douglas Stone, supra note 73, at 345. Disputing usually triggers emotions, and they affect brain perceptual processing by creating chemicals like adrenaline, cortisol, dopamine, serotonin, norepinephrine, and oxytocin. Id.; Stephen Johnson, Mind Wide Open: Your Brain and the Neuroscience of Everyday Life 150-57 (2004). When strong emotions are in play, perception is slowed, subtleties and specifics are missed, and the
engender strong emotions within people in the companies involved.\textsuperscript{83} When a critical mass of strong emotions such as disappointment, distrust, frustration, and anger emerge, companies typically start considering dispute resolution options.\textsuperscript{84}

Humans generally find it extremely hard to distance themselves from their idiosyncratic roles sufficiently to view the disputes in which they are involved objectively.\textsuperscript{85} Partisan perception encourages humans to accept their beliefs and analyses as accurate,\textsuperscript{86} seek out information that supports these views, recall this but not other data, and revise memories to fit their perspectives.\textsuperscript{87} Partisan perception also influences humans not to look for disconfirming data and to discount and diminish it when encountering it.\textsuperscript{88} Consequently, much less perceptual time and effort is spent seeking information that supports other perspectives\textsuperscript{89} and the likely interests of other disputants.\textsuperscript{90}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{83} See David A. Hoffman, Paradoxes of Mediation 167, 172, in Bringing Peace Into the Room (Daniel Bowling & David A. Hoffman eds. 2003).
  \item \textsuperscript{84} Inside the Law Firm: Dealing With Financial Disincentive to ADR, 17 Alternatives to the High Cost of Litigation 43, 45 (March, 1999) (hereafter Dealing With Financial Disincentives) (arguing business litigation is often “driven by emotional, as opposed to economic, factors” and generally “does not occur until a certain ‘critical mass’ of emotional content is achieved).\textsuperscript{83}
  \item \textsuperscript{85} Richard Birke & Craig R. Fox, supra note 65, at 14; Lyle A. Brenner et al., On the Evaluation of One-Sided Evidence, 9 J. Behav. Decision-making 59 (1996).
  \item \textsuperscript{86} This tendency of humans to assume their views are necessarily reasonable, objective, and correct has been called naïve realism. Keith G. Allred, Relationship Dynamics in Disputes: Replacing Contention With Cooperation, in The Handbook of Dispute Resolution 83, 84 (Michael L. Moffitt and Robert C. Bordone eds., 2005) (hereafter Dispute Resolution Handbook). This separate cognitive bias has three aspects: (1) typically assuming we are reasonable and objective when confronting a problem or question; (2) assuming that anyone looking at the same data would draw the same conclusions we do; and (3) suspecting unreasonableness or harmful motives when others reach different conclusions from the same data. Id.
  \item \textsuperscript{87} Sticky Defaults, supra note 60 at 98; Roger Fisher et al., supra note 80, at 22.
  \item \textsuperscript{88} Id. Humans do this because their “brains work hard to tell simple stories consistent with what” they already ‘know,’ and for protection from “the discomfort of ill-fitting data hanging around” their memory banks. Sheila Heen and Douglas Stone, supra note 73, at 346-47.
  \item \textsuperscript{89} Sticky Defaults, supra note 60, at 98; see Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive Perspective, in Barriers to Conflict Resolution 44, 47 (Kenneth Arrow et al. eds. 1995).
  \item \textsuperscript{90} See Roger Fisher, et al, supra note 86, at 22-28; Roger Fisher, William Ury, & Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In 51 (2d ed. 1991) (hereafter Getting to Yes).
\end{itemize}
\end{footnotesize}
Biased selective and partisan perceptions then cause decision-makers to develop and suffer influences from common cognitive biases of egocentrism and optimistic overconfidence.\textsuperscript{91} Egocentrism describes the frequent tendency humans demonstrate to bias their perceptions and predictions in self-serving ways\textsuperscript{92} that reflect their pre-existing beliefs.\textsuperscript{93} Once humans select interpretations they view as beneficial, they typically gather and organize information to justify these choices.\textsuperscript{94}

The common tendency of decision-makers to act overconfidently about their judgments and predictions derives from egocentric biases.\textsuperscript{95} Studies of decision-making by professionals in many occupations consistently show tendencies to make unrealistically optimistic or overconfident forecasts regarding future outcomes.\textsuperscript{96} American lawyers routinely display optimistic overconfidence.\textsuperscript{97} One study found that on average American lawyers rated themselves in the 80\textsuperscript{th} percentile or higher on their abilities to predict litigation outcomes.\textsuperscript{98} Dispute resolution decision-makers may similarly overconfidently evaluate their chances of winning transborder commercial dispute arbitrations.\textsuperscript{99} These biases toward inaccurately

\textsuperscript{91} Sticky Defaults, supra note 60 at 98.
\textsuperscript{92} Max H. Bazerman & Katie Shonk, The Decision Perspective to Negotiation, in Dispute Resolution Handbook 52, 55; Richard Birke & Craig R. Fox, supra note 71, at 14.
\textsuperscript{93} Russell Korobkin & Chris Guthrie, The Negotiator’s Fieldbook, supra note 73, at 354. A related positive illusion bias frequently accompanies optimistic overconfidence. It is the tendency to overestimate abilities to control outcomes that are determined by outside factors. Richard Birke & Craig R. Fox, supra note 65 at 16-17. Another related bias flows from tendencies to hold overly positive views of one’s attributes, abilities, and competencies. Id. Most persons see themselves as more intelligent and fair minded than average. Id. Research shows that most negotiators perceive themselves as “more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than counterparts.” Id. at 18. See Roderick M. Kramer et al., Self-Enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood, 56 Org. Behav. & Human Decision Processes 10 (1993).
\textsuperscript{94} Max H. Bazerman & Katie Shonk, supra note 92, at 55.
\textsuperscript{95} Id. at 56
\textsuperscript{96} Id. at 57; see Max Bazerman, Judgment in Managerial Decision Making (2005); Richard Birke & Craig Fox, supra note 71, at 18
\textsuperscript{98} Id. For example, students who failed to reach agreement negotiating a simulated dispute, and then asked to estimate the odds that a final offer arbitrator would choose their proposal, showed the average individual estimates of winning this 50-50 outcome was 68%. Max Bazerman & Katie Shonk, supra note 92, at 55-56.
\textsuperscript{99} Id. at 57.
assessing and predicting future adjudicatory outcomes can lead business representatives and their lawyers to choose arbitration as the best process for realizing their optimistically overconfident projections.\textsuperscript{100}

The tendency to view the resolution of disputes as invariably involving dividing limited resources\textsuperscript{101} supplies a final cognitive barrier generating a pervasive win-lose, zero sum bias in favor of adjudication and against mediation. Often called the fixed pie bias, this mental short cut adopts and relies on unconscious assumptions that the subjects comprising legally framed disputes, typically monetary payments or production and performance concerns, are limited,\textsuperscript{102} and that all disputants value all aspects of all of them equally.\textsuperscript{103} This bias generates beliefs that all disputants’ interests are always diametrically opposed.\textsuperscript{104} These beliefs usually result in views that one disputant’s side’s gain is invariably another disputant’s loss.\textsuperscript{105}

All of these common cognitive biases are experienced by business persons and lawyers, and they create a powerful and pervasive zero-sum, win-lose bias.\textsuperscript{106} This mindset frames all dispute resolution activity as exclusively or primarily requiring individual gain maximizing

\textsuperscript{100}See Sticky Defaults, supra note 60 at 99; Richard Birke & Craig R. Fox, supra note 65, at 15; Max Bazerman & Katie Shonk, supra note 92 at 57.
\textsuperscript{101}See, e.g., Max Bazerman & Katie Shonk, supra note 98, at 54; Richard Birke & Craig R. Fox, supra note 71, at 30; Leigh Thompson and Janice Nadler, Judgmental Biases in Conflict Resolution and How To Overcome Them, in The Handbook of Conflict Resolution, 213, 216-17 (Morton Deutsch and Peter T. Coleman, eds. 2000).
\textsuperscript{102}Id. One study showed that more than two-thirds of participating negotiators assumed the items negotiated were limited even though this was not the case. Leigh Thomson & Jancie Nadler, supra at 217.
\textsuperscript{103}See Robert M. Bastress & Joseph D. Harbaugh, supra note 28, at 377-78 (arguing humans tend to assume that parties want the same things and possess the same values).
\textsuperscript{104}Richard Birke & Craig R. Fox, supra note 65, at 30; see Max H. Bazerman & Margaret A. Neale, Hueristics in Negotiation: Limitations to Effective Dispute Resolution, in Negotiating in Organizations 51 (Max H. Bazerman & Roy J. Lewicki eds. 1983). From an interest perspective, this bias creates views that all interests are conflicting, and that neither independent nor shared interests exist.
\textsuperscript{105}Leigh Thompson & Janice Nadler, supra note 102, at 217.
\textsuperscript{106}Robert Mnookin, et al., supra note 66, at 168. These scholars offer this apt summary of the prevalence of this mindset: “Lawyers and clients too often assume that legal negotiations are purely distributive activities. ‘Our interests are opposed to theirs; what one side wins, the other side loses.’ This zero-sum mindset is powerful and pervasive. Lawyers often report that legal negotiating is, by definition, strategic hard bargaining. Although they acknowledge that sometimes value-creating moves are possible, particularly in deal-making, they assume that value creation is merely icing on the cake which still has been sliced up through a distributive struggle. Clients frequently share this view and expect their lawyers to behave accordingly.” Id.
thinking and behavior. Scholars investigating how professionals develop competence suggest that the most common set of behavior patterns displayed by practitioners in law, business, public administration, and industrial management direct actions toward striving to win and seeking to avoid losing.\textsuperscript{107} Prior vivid experiences with purely distributive competitive experiences, such as athletic activities, university admissions, and many organizational promotion systems, contribute to this mindset.\textsuperscript{108} So do economic theories and business models that advance winning and avoiding losing as primary, often exclusive, beliefs and objectives.\textsuperscript{109}

American lawyers approach dispute resolution with this win-lose mindset.\textsuperscript{110} A survey of 2,000 Arizona and Colorado lawyers showed pervasive use of win-lose assumptions when they negotiated.\textsuperscript{111} A New Jersey study of 515 lawyers and 55 judges revealed that about 70\% of the cases in which they participated were negotiated using actions based on win-lose thinking derived from fixed pie cognitive assumptions.\textsuperscript{112} A study of how the public and lawyers view

\begin{thebibliography}{99}
\bibitem{108} Max Bazerman & Katie Shonk, supra note 92, at 54.
\bibitem{109} See Alfie Kohn, No Contest: The Case Against Competition 70 (Rev. ed. 1986). This win-lose bias breeds substantial psychological resistance to mediation’s use. See Catherine Cronin-Harris, Mainstreaming Corporate Use of ADR, 59 Albany L. Rev. 847, 861 (1996); Marguerite Millhauser, ADR as a Process of Change, 6 Alternatives to the High Costs of Litigation 190, (November 1988).
\bibitem{111} Donald G. Gifford, Legal Negotiations: Theory and Applications 29, n.6 (1989); Don Peters, supra note 117, at 28 n.1. Professor Gerald Williams conducted this study, and it showed that 67\% of the lawyers surveyed reported that they primarily sought to maximize gain when they negotiated. Gerald R. Williams, Legal Negotiation and Settlement 15-40 (1983).
\bibitem{112} Milton Heumann & Jonathan M. Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want,: 12 Ohio St. J. on Disp. Resol. 253, 255 (1997). Sixty percent of the respondents in this survey believed that non zero-sum based dispute resolution actions should have been used more often. Id.
\end{thebibliography}
lawyers suggests that adversarial behavior flowing from a win-lose mindset is highly ranked by both audiences.\textsuperscript{113}

Research also shows that dispute resolvers typically manifest fixed pie bias at the beginning of most resolution-oriented interactions,\textsuperscript{114} and that they often resist disconfirming information.\textsuperscript{115} This leads many lawyers to transfer their win-lose bias-based negotiation habits to mediations.\textsuperscript{116} American business executives complain about their lawyers’ use of counterproductive, excessively adversarial behaviors that interfere with exploring business interests and finding suitable solutions in mediations.\textsuperscript{117}

The cumulative influence of these cognitive biases affect the decisions business representatives and their lawyers make when they confront a serious transborder dispute that

\textsuperscript{113} See Marvin W. Mindes & Alan C. Acock, Trickster, Hero, Helper: A Report on the Lawyer Image, 1982 Am. B. Found. Res. J. 177, 191-92. The hero image, described as aggressive and competitive, was the image valued most by lawyers and the public. Id. at 180, 181. Lawyers chose “competitive” as the adjective most applicable to attorneys while by public selected it as the second most applicable term. Id. at 191-92. Dispute resolution scholars contend that perspectives embedded in the adversary of litigation practiced in America and given extensive emphasis in American legal education pervade the lives of American lawyers. E.g., Leonard L. Riskin, Mediation and Layers, 43 Ohio St. L.J. 29, 30 (1982). American legal education strongly emphasizes adversary, adjudicatory processes and thinking while other countries in the Americas, such as Mexico, do not. Steven K. Anderson, supra note 8, at 59. These attitudes, orientations, and experiences create a standard philosophic map for American lawyers containing core assumptions that disputants are adversaries in win-lose contests and that all disputes should be resolved through third party application of legal rules. Leonard L. Riskin, supra at 43-44. Research suggests that win-lose dispute resolution mind set begins much earlier for Americans than in law or business school.


\textsuperscript{114} Richard Birke & Craig R. Fox, supra note 65, at 30-31; see Leigh Thompsoon and Terri DeHarport, Social Judgment, Feedback, and Interpersonal Learning in Negotiation, 58 Organizational Behav. & Hum. Decision Processes 327 (1994).


\textsuperscript{117} Business Mediation from All Points of View, 24 Alternatives to the High Costs of Mediation 101 (June 2006) (business mediations suffer from lawyers “who focus primarily on positions and don’t truly understand what developing the underlying interests means’’); see note 346 infra.
cannot be resolved by private negotiation. The frequent choice to arbitrate rather than mediate these disputes probably results from applying a win-lose mind set and its supporting cognitive biases to assess, reason, and choose to use of the adjudication process that best avoids the problems of transational litigation. Most American lawyers, and probably many attorneys in other countries, see adjudication as the fall-back option if negotiations fail, and staying with the traditional or status quo strongly influences many decisions.

Disputants often avoid changing a method that they have used in the past even when new approaches might prove more beneficial. Latin American business persons and lawyers share these tendencies to prefer traditional, adjudicatory approaches to resolving disputes. This produces wariness and resistance to change, and makes mediation a hard “sell” despite its advantages over adjudication in many situations.

When combined with adjudication’s tendency to conflate all client interests into monetary units, these cognitive and cultural biases often influence lawyers to narrowly frame mediation as “an euphemism for accepting less money.” Lawyers and business

---

118 See Sticky Defaults, supra note 60, at 84, 110-11.
119 See notes 29-30 supra and accompanying text.
120 See note 33 supra and accompanying text.
121 See Sticky Defaults, supra note 60, at 111.
123 Stephen K. Anderson, supra note 8, at 58; see Alexandra Bowen, supra note 8, at 60 (arguing humans tend to fear unknowns and see arbitration as easier because it delegates decision-making to external experts). These psychological tendencies include: “fear of the unknown, fear of making a mistake, fear of failure, and fear of being judged. . . . Margueritte Millhauser, supra note 109, at 190. Millhauser further argues that: “for many, one of the attractions of the law and lawsuits is the orderliness of procedure---the myriad of rules and regulations that govern every move.” Id. Emphasizing that the hallmarks of mediation are “more flexibility and less structure,” Millhauser argues that for those who are more rule-bound, mediation “can be a nightmare.” Id.
124 Mediation in Latin America, supra note 15, at 428.
125 Id.
126 Richard Birke, supra note 97, at 215. This adjudicatory frame converts all tangible and intangible client needs into dollars and cents and turns resolution “into distributive tugs of war” even when doing this disserves clients. Id.
127 Frames are perceptions disputants hold about conflicts, and how issues in them should be presented and resolved. Marcia Caton Campbell and Jayne Seminare Dockerty, What’s In A Frame, in The Negotiator’s Fieldbook, supra
persons often excessively fear that mediating lessens chances to maximize gain.\textsuperscript{129} They also associate mediating with a strong likelihood of having to make concessions.\textsuperscript{130}

This zero-sum, fixed pie framing of mediation triggers another common and powerful cognitive bias, loss aversion.\textsuperscript{131} This cognitive bias inclines decision-makers to attribute more weight to potential losses than to possible gains when they make decisions.\textsuperscript{132} Gains and losses are assessed in relation to a reference point,\textsuperscript{133} which is usually arbitral adjudication in transborder commercial disputes.\textsuperscript{134} In addition, research consistently demonstrates the way options are framed in terms of losses or gains can substantially affect resulting decisions.\textsuperscript{135} Even when opportunities and risks are identical, perceiving options as gains makes decision-makers more like to accept them, while seeing alternatives as losses makes rejection more likely.\textsuperscript{136}

When lawyers and business persons frame dispute resolution method choice by comparing winning arbitral adjudication against making concessions and not maximizing

\textsuperscript{128} Consumers and ADR, 15 Alternatives to the High Costs of Litigation 62 (April 1997).
\textsuperscript{129} See Christopher Moore, supra note 2, at 82; Mediation in Costa Rica, supra note 57, at 11.
\textsuperscript{130} Sticky Defaults, supra note 60, at 100; see Appropriate Corporate Dispute Resolution, supra note 37, at 26 (widely recognized that using mediation tends to result in compromise settlements).
\textsuperscript{131} Id. at 99-100.
\textsuperscript{132} See, e.g., Daniel Kahneman & Amos Tversky, Conflict Resolution: A Cognitive Perspective, in Barriers to Conflict Resolution 44, 54 (Kenneth Arrow et al. eds., 1995); Robert H. Mnookin, et al., supra note 72, at 161; Sticky Defaults, supra note 66, at 99.
\textsuperscript{134} See Sticky Defaults, supra note 60, at 99 (arguing the current option serves as the reference point to which options are compared).
\textsuperscript{136} Id. Mediators have long known that settlements are more likely when they emphasize gains including closure, achieving certainty, and avoiding additional costs than when they emphasize loss stemming from movements from initially articulated positions. Robert H. Mnookin, et al., supra note 66, at 163.
economic gains possible from successful legal claims, mediation is seldom selected.\textsuperscript{137} Research also suggests that decision-makers will usually take more risks to avoid losses.\textsuperscript{138} This bias can affect all disputants who choose to seek winning at arbitration to avoid any loss, even though continuing the dispute by arbitrating risks economic harm that often far exceeds concessions needed to mediate successfully.\textsuperscript{139}

The power of this win-lose bias on business decision making regarding resolving commercial disputes can be seen in how infrequently mediation is chosen instead of litigation or arbitration in domestic contexts.\textsuperscript{140} For example, in Europe the voluntary use of mediation typically occurs in less than 2\% of disputes ultimately brought before courts.\textsuperscript{141} Studies in the United Kingdom showed slight use of mediation in construction and family matters before mandatory mediation was adopted.\textsuperscript{142} A survey of mediation use in Los Angeles showed that it was used voluntarily in approximately 1\% of disputes brought to courts.\textsuperscript{143}

American businesses are generally well informed about the drawbacks of litigation and frequently have the resources to choose dispute resolution options that avoid it.\textsuperscript{144} They are

\begin{footnotesize}
\begin{enumerate}
\item See Sticky Defaults, supra note 60, at 100.
\item See Robert H. Mnookin, supra note 53, at 244.
\item See Sticky Defaults, supra note 60, at 92.
\item Id. at 90.
\item Penny Brooker and Anthony Lavers, supra note 56, at 167. Less than 4 percent used mediation in construction disputes and only 5\% used it in family matters. Id.
\item See Elizabeth Rolph et al., Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles, 1999 J. Disp. Resol. 277, 285. A survey of 446 Minnesota lawyers showed that before a mandatory mediation provision was enacted, 47\% never or rarely used mediation as compared to 13\% who used it often. Barbara McAdoo & Nancy Welsh, Does ADR Really Have A Place on the Lawyer’s Philosophical Map, 18 Ham. J. Public L. & Policy 376, 385 (1997). American mediation programs that depend upon voluntary participation usually attracted relatively few participants even when offered at low or no cost. Mediation in Costa Rica, supra note 62, at 10; see Rosselle L. Wissler, The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts, 33 Willamette L. Rev. 565, 570 (1997).
\item See Sticky Defaults, supra note 60, at 90.
\end{enumerate}
\end{footnotesize}
repeat players in the American litigation system, and file four times as many lawsuits as human clients do. Although lack of information about mediation is often argued as a reason for its relatively infrequent use, research shows that American business persons and lawyers generally know about mediation. A survey of corporate lawyers working for 606 of the 1,000 largest U.S.-based companies showed that nearly all reported some experience with mediation.

Another study of non-lawyer business executives, inside counsel, and outside lawyers showed that 76% of the respondents who had personal experience with mediation were satisfied with the process, and 73% were satisfied with the results. In addition, 81% of outside lawyers, 73% of inside counsel, and 84% of executives agreed that mediation was appropriate in business disputes currently subjected to lawsuits in half or more than half the time. Only 16% of executives, 19% of outside lawyers, and 27% of inside counsel indicated that mediation was appropriate in less than half of the commercial disputes subjected to litigation.

Despite these supportive attitudes toward mediation, American businesses are not using mediation very often. A 2006 study done by the American Arbitration Association showed that only 7% of companies surveyed use mediation very frequently, and 17% of the companies

---

145 Craig A. McEwen, supra note 54, at 26; Nancy H. Rogers and Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 Ohio St. J. on Disp. Resol. 831, 839; see Marc Galanter, Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change, 9 L. and Soc’y Rev. 95, 97-104 (1975).
146 Carmel Sileo & David Ratcliff, Straight Talk About Torts, 42 Trial 42, 44 (July 2006).
147 See Stephen K. Anderson, supra note 8, at 58 (ignorance of mediation among NAFTA countries is primary reason process not used more frequently).
148 See Sticky Defaults, supra note 60, at 90.
149 David B. Lipsky and Ronald L. Seeber, supra note 31, at 136.
151 Id. at 172-74.
152 Id.
153 Appropriate Corporate Dispute Resolution, supra note 37, at 10. The reality of American corporate experience with mediation “is one of significant breadth but little depth.” Id.
analyzed use it frequently. This study also reported that 37% use mediation occasionally, 25% use the process rarely, and 16% do not use it all.

A comprehensive survey of six large national American corporations showed several instances where these companies failed to increase their use of mediation. This occurred even though business principals supported increased use, their lawyers favored it, and general counsel encouraged more frequent mediating. Specific directives from general counsel in two of the companies to use mediation more failed. Four companies pursued several educational programs about mediation and this had no noticeable effect on its use in two of these corporations. One general counsel surveyed commented that he “could not think of an initiative that was harder to sell” because “lawyers were generally resistant.”

2. Cultural Barriers

A decision to mediate a commercial dispute typically involves business persons and their legal counsel, both outside and perhaps inside. Culture supplies a frequently used analytic metaphor for examining belief patterns, shared expectations, and behavioral norms of individuals

154 Dispute-Wise Conflict Management, supra note 39, at 17; Sticky Defaults, supra note 60, at 90.
155 Dispute-Wise Management, supra note 39, at 17.
156 Nancy H. Rogers and Craig A. McEwen, supra note 145, at 841.
157 Id. Although five of these corporations had signed a Center for Public Resources Pledge to use mediation before resorting to adjudication, mediation use in three of these companies remained at similar levels to the one organization that did not sign the pledge. Starting in the mid-1980s, the Center for Public Resources [now the CPR Institute], has encouraged and distributed a pledge to American corporate leadership. F. Peter Phipps, How Conflict Resolution Emerged Within The Commercial Sector, 25 Alternatives to the High Costs of Litigation 3, 6 (January 2007). This pledge simply said that the signer would at least consider using ADR in any dispute with another company who had also signed the statement. Id. at 6-7. As of the beginning of 2007, this pledge has been “signed by or on behalf of 4,000 corporations, representing in economic influence more than two-thirds of the gross national product.” Id. at 7; see Pledges Encourage ADR Use, Cost Savings, 15 Alternatives to the High Costs of Litigating 88 (June 1997).
158 Nancy H. Rogers & Craig A. McEwen, supra note 145, at 141-42.
159 Id.
160 Id. British litigators have had difficulty making a transition to mediation from their traditional advocacy roles. How Business Conflict Resolution is being Practiced in Europe, 23 Alternatives to the High Costs of Litigation 148, 149 (October 2005). One British litigator remarked that “for years and years [litigators] have been paid to disagree and suddenly we are being expected to be paid to agree.” Id.
161 See John Lande, supra note 150, at 218.
and groups acting within organizations. \footnote{See Melanie Lewis, Systems Design Means Process Precision, but Emphasizes Culture, Value, and Results, 25 Alternatives to the High Costs of Litigation 116, 117 (July/August 2007) (improving businesses’ conflict resolution approaches requires improving company culture); see generally Catherine Cronin-Harris & Peter H. Kaskell, How ADR Finds a Home in Corporate Law Departments, 15 Alternatives to the High Costs of Litigation 158 (December 1997); Calvin Morrill, The Executive Way: Conflict Management in Corporations (1995).} Using this perspective suggests that barriers to the use of mediation arise from both business and legal cultures in America.

Contentious, competitive business cultures exist, and they generate disputes initially and erect barriers to efficient resolution. \footnote{Craig A. McEwen, supra note 54, at 10. “Macho” management is a common source of adversarial position-taking which causes disputes and influences choosing adjudication to win them. International Mediation, supra note 3, at 115.} Key individuals in companies often get personally and emotionally invested in disputes in ways that influence selection of resolution methods. \footnote{Craig A. McEwen, supra note 54, at 9.} Corporate lawyers explain that angry business people and strong emotions often dictate choosing adjudication even though this is not the most effective choice. \footnote{Craig A. McEwen, supra note 54, at 9.} Lawyers handling business disputes deal extensively with company politics. \footnote{Id. One general counsel noted this happens “especially when there is emotion, if they think they have been wronged. We’ve had our share of experience with executives digging their heels in.” Id. Another business lawyer in this study noted: “The most difficult thing for us here is to get managers to cool off and back down. It’s the lawyers that emphasize the need to settle. The lawyers are pragmatists. So we pursue what is most reasonable and fastest. The lawyers try to separate the emotional issues, the egos involved, and the facts of the case. The lawyers would like the facts to prevail but often emotion takes over.” Id.} Although the cognitive biases examined earlier heavily influence the judgments underlying these scrappy, competitive perspectives, they often get reinforced by organizational expectations and norms. \footnote{Two international mediators suggest that “the greatest constraint on mediation usage is that managers and lawyers often resist entering the process.” International Mediation, supra note 3, at 114. The survey of 606 Fortune 1000 companies revealed that no desire from senior management often caused businesses not to choose mediation.}
The professional culture of American lawyers also erects barriers to recommending and using mediation to resolve transborder disputes in ways that transcend the cognitive biases of partisan perception, fixed pie assumptions, and win-lose thinking. Professional expectations regarding the extent of information needed before counseling clients about resolution options, for example, often inhibit recommending mediation. Emphasizing thoroughness by gathering all possible data to best predict adjudicatory outcomes, conventional law practice wisdom argues for postponing serious settlement discussions until maximum available information is obtained. Many business lawyers believe that clients cannot settle until they know all facts. Given their litigation orientation, many outside lawyers do not feel comfortable analyzing settlement until they have fully prepared for trial.

This cultural orientation encourages lawyers to weigh formal information discovery procedures, available only in adjudication, heavily when recommending dispute resolution methods. American civil litigation generally permits broad document discovery, including electronic communications, and extensive abilities to secure pre-trial witness testimony even from persons disputants do not intend to use as witnesses. Driven by commitment to do high

Appropriate Corporate Dispute Resolution, supra note 37, at 26. This was the fourth most common barrier to mediation use, listed by 28.6% of respondents. Id. See Craig A. McEwen, supra note 54, at 12; Nancy H. Rodgers & Craig A. McEwen, supra note 145, at 842.


170 See Craig A. McEwen, supra note 54, at 12; Nancy H. Rodgers and Craig A. McEwen, supra note 145, at 842; International Mediation, supra note 3, at 115. This delay usually occurs until sufficient information bolstering their case is found, and they have confidence that their clients will not concede too much when negotiating. International Mediation, supra at 115.

171 Craig A. McEwen, supra note 54, at 12; Dealing With Financial Disincentives, supra note 84, at 46.

172 Craig A. McEwen, supra note 54, at 12. Gaining access to these remedies supplies another impetus on lawyers to counsel adjudication even though access to these tools in arbitration may be eliminated or limited by contract clauses or rules of administering organizations. Generally discovery in international commercial arbitration is more limited than the expansive discovery allowed in American litigation. Commercial Arbitration At Its Best, supra note 14, at 349. Depositions are rare and other discovery procedures are usually limited to those allowed by arbitral rules, party agreements, or arbitrator’s decisions. Id. at 350.

173 F. Peter Phillips, supra note 157, at 5.
quality, careful work. American commercial lawyers emphasize risks run if formal discovery is not pursued. Selling a mediation initiative to resistant attorneys requires changing the disputing culture of lawyers.

Decisions to mediate transborder disputes usually involve business persons and lawyers from different cultures, and often from different legal systems. Cultural differences, reflecting dynamic, growing, interrelated, and shared mental perceptions about what is appropriate in human interaction, present additional barriers to mediating transborder commercial disputes. These shared perceptions contain categories and implicit rules that persons use to interpret events, behaviors, and communications. They influence attitudes, action habits, and behavioral norms regarding how disputes are perceived, expressed, managed, and resolved.

Commonly encountered cultural differences stem primarily from fundamental distinctions between emphasizing individual or collective values and preferring to communicate directly or indirectly. Most wealthy western countries, for example, have individualistic and

---

176 Craig A. McEwen, supra note 54, at 13.
177 Craig A. McEwen, supra note 54, at 12. Business lawyers describe discovery’s importance in American legal culture and suggest its use will never diminish because lawyers don’t want to feel disadvantaged dealing with opponents. Id.
178 Appropriate Corporate Dispute Resolution, supra note 37, at (changing the ways businesses and their lawyers approach dispute resolution requires changing cultures); International Mediation, supra note 3, at 10 (culture change needed to add mediation to lawyers’ dispute resolution tool kit). As one general counsel put it, “It’s still a cultural challenge outside the U.S. to go to mediation . . . [because] there is a psychological inhibition about going to a third party rather than court---it’s the problem of ‘if I can’t solve it, no one can philosophy.” International Mediation, supra note 3, at 114.
179 See Alexandra Bowen, supra note 8, at 60-61.
182 See David Augsburger, supra note 2, at 22; Susan Bryant, The Five Habits: Building Cross-Cultural Competence in Lawyers, 9 Clinical L. Rev. 33, 40 (2001); Mediation in Haiti, supra note 199, at 17-18.
183 Mediation in Haiti, supra note 181, at 21; see Jeanne M. Brett, et al., Culture and Joint Gains in Negotiation, 8 Neg. J. 61 (1998); Geert Hofstede, Culture’s Consequences 14-15 (1980).
direct communicating traditions while most Latin American countries possess collectivistic and indirect communicating tendencies. These fundamentally different orientations create common misunderstandings regarding win-lose or win-win orientations, emphasizing contracts or relationships, formality or informality, time sensitivity, risk-taking, and top down- or consensus-based team organization. These and other cultural differences create gaps between what persons using one set of cultural assumptions intend by actions and the meanings others using different shared mental precepts attribute to these behaviors.

These differences create enormous challenges to resolving disputes consensually through negotiation and mediation. One example illustrating the complexity of intercultural interaction concerns challenges arising from different understandings of what mediating actually involves, and whether it is the same as or different from conciliating. Confusion exists

184 Mediation in Latin America, supra note 15, at 435; Walter A. Wright, supra note 35, at 64-66.
186 Alexandra Bowen, supra note 8, at 60.
187 See David W. Augsburger, supra note 2, at 25; Alexandra Bowen, supra note 8, at 60-61. Not understanding potential cultural differences raises grave risks that negotiators and mediators will miss important verbal and non-verbal cues, misinterpret speech and behavior, misread meanings, and confuse primary and secondary issues. Mediation in Haiti, supra note 199, at 18.
188 The term intercultural connotes interpersonal interactions with persons from cultures other than their own. Kenneth Cushner & Richard W. Brislin, Intercultural Interactions: A Practical Guide ix (2d ed. 1996). These interactions are also often called cross-cultural. Id.
189 No international consensus exists regarding what mediation is and how it works. Walter Wright, supra note 35, at 59. Latin American countries, for example, use different words to describe mediation and define it in different ways. Mediation in Latin America, supra note 15, at 446. These differences stem from diverse historical evolutions, different international influences, and varied roles their legal institutions have played. Walter Wright, supra at 59; see Mediation in Costa Rica, supra note 57 at 23 (describing a lively discussion which emerged at a Conference in San Jose, Costa Rica regarding whether mediation and conciliation are different words for the same process or significantly different processes).
regarding whether mediation and conciliation are different words for the same process, or
significantly different processes.\textsuperscript{190}

Many commentators contend that although conciliation is how mediation is common
known internationally, the terms are essentially synonymous.\textsuperscript{191} The United Nations
Commission on International Trade Law [UNCITRAL] for International Commercial
Conciliation says as much when it defines “conciliation” as “a process, whether referred to by
the expression conciliation, mediation, or an expression of similar import, whereby parties
request a third person or persons (“the conciliator”) to assist them in their attempt to reach an
amicable settlement of their dispute.”\textsuperscript{192} Despite deriving mediation’s core concepts from the
United States,\textsuperscript{193} the process is called conciliation in most Latin American countries.\textsuperscript{194}

\textsuperscript{190} Global Trends in Mediation, supra note 3, at 3; Mediation in Costa Rica, supra note 57, at 23; International
Mediation, supra note 3, at 116. Some lawyers and scholars contend that these are different processes. One
empirical study suggested that Costa Rican lawyers may view mediation and conciliation as separate processes.
L. J. 31, 44 n.8 (1996). An April 1995 CID-GALLUP survey indicated that 38% of the lawyers surveyed accepted
conciliation as an alternative dispute resolution method and 31% accepted mediation. Id. International trade legal
traditions and the World Trade Organization [WTO], “distinguish them by defining them differently.” See Alan
Scott Rau and Edward F. Sherman, Tradition and Innovation in International Arbitration Procedure, 30 Tex. Int’l L.
J. 89, 105 n.89 (1995). Mediation, as defined by the World Trade Organization, involves impartial persons who help
parties resolve disputes. Hansel T. Pham., Developing Countries and the WTO: The Need for More Mediation in
the DSU, 9 Harv. Negot. L. Rev. 331, 366 (2004). The WTO then defines conciliation as involving impartial
persons who undertake independent investigations and suggest resolutions. Id; see Global Trends in Mediation,
supra note 3, at 2. This distinction posits that mediation creates a primarily facilitative role for neutrals while
conciliation generates an evaluate role that approaches non-binding arbitration. Other scholars define mediation and
conciliation in directly opposite ways by reversing the degree of third party involvement attributed to each. Rau &
Sherman, supra at 105 n.89. They argue that mediation is primarily evaluative and conciliation is primarily
facilitative, contending that mediators not only facilitate but also make their own recommendations so mediation is
conciliation plus evaluation. See, e.g., Lord Wilberforce, Resolving International Commerical disputes: The
Alternatives, in UNCITRAL Arbitration Model in Canada 7, 7 (Robert K. Patterson & Bonita J. Thompson eds.,
1987); Lord Donaldson, Alternative Dispute Resolution, 58 Arbitration 102, 102 (1992); Rau & Sherman, supra at
105 n.89.

\textsuperscript{191} Jernej Sekolec & Michael B. Getty, The UMA and the UNCITRAL Model Rule: An Emerging Consensus on
Mediation and Conciliation, 2003 Disp Resol. 175, 175.

\textsuperscript{192} Id. at 185. Many scholars treat these terms interchangeably by writing about mediation or conciliation in ways
that attribute no meaningful differences resulting from the label used. See, e.g., Rau and Sherman, supra note 190,
at 89 (contending conciliation seems to be a more familiar term in international commercial contexts although “there
can hardly be any substantive significant in the use of one term rather than the other”); Sekoe & Getty, supra note
191, at 175 (arguing that mediation or conciliation fundamentally differs from trial and arbitration because it
e ncourages parties to resolve their differences consensually with the help of third parties rather than using third
parties to decide their disputes); James T. Peter, Med-Arb in International Arbitration, 8 Am. Rev. Int’l Arb. 83, 83
n.1 (1997) (arguing that no distinction between mediation and conciliation exists and that mediation covers all kinds
B. Yes We Can Overcome Cognitive and Cultural Barriers to Mediating

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

1. Overcoming Cognitive Barriers

Overcoming cognitive barriers starts with lawyers and business persons accepting ownership of them, and the likelihood that they will influence perceptions, predictions, and analysis during conversations about what dispute resolution method to use. Awareness of these engrained, pervasive influences helps decision-makers avoid their harmful influences and...
predictable errors resulting from them. Developing self-awareness through enhancing abilities to monitor and reframe thoughts and emotions helps lawyers and business persons understand and deal effectively with their predictable and understandable “non-rational impulses and error-prone tendencies.” It also helps decision-makers identify situations in which they need to consciously override, or use compensatory actions to avoid, these tendencies and mental shortcuts.  

Although challenging to do, egocentric biases stemming from selective and partisan perception can be mitigated by explicitly listing adverse consequences, drawbacks, and weaknesses of all options, perspectives, and objectives under consideration. Disputants should adopt a “devil’s advocate” approach to identify and assess all countervailing considerations to their inclinations to view merits in ways that unconsciously tilt toward their perspectives. Given the subtlety and intractability of egocentric biases, however, playing devil’s advocate alone is seldom sufficient. Appointing a group member to advocate other views honestly and bluntly helps offset natural biases, and the number of people involved in these conversations facilitates using this approach. Noting adverse consequences, drawbacks,

---

199 Robert S. Adler, supra note 66, at 690-91.
201 Richard Birke & Craig R. Fox, supra note 65, at 4.
202 See id. at 19; Linda Babcock et al., Creating Convergence: Debiasing Biased Litigants, 22 Law and Soc. Inq. 913 (1997).
203 This requires using a technique which originated in the middle ages. Richard S. Adler, supra note 66, at 765. Candidates for sainthood were represented before the papal court by two spokesmen: the advocatus dei who made the case for canonization, and the advocatus diabolic, who advanced all conceivable arguments against canonizing the candidate. Id.
204 Id.
205 Id.
and weaknesses in writing also counters tendencies, influenced by partisan perception and optimistic overconfidence, to dismiss or diminish them.\textsuperscript{206} Optimistic overconfidence biases may be mitigated by carefully evaluating the adverse consequences, drawbacks, and weaknesses identified, and by seeking outsider perspectives.\textsuperscript{207} Gaining outsider perspectives includes seeking evaluation data from similar situations rather than basing predictions entirely on scenarios derived solely from inside disputes.\textsuperscript{208} It also includes seeking to observe and analyze situations from different points of view.\textsuperscript{209} Reversing roles often identifies the concerns, issues, and objectives other disputants possess.\textsuperscript{210} Seeking to identify the probable perspectives of third parties, either arbitrators or mediators, who may ultimately hear differing contentions also counters optimistic overconfidence.\textsuperscript{211}

Looking at the business interests involved in situations combats fixed pie and zero sum biases.\textsuperscript{212} Interests are the needs or motivations that disputants possess,\textsuperscript{213} and in business disputes they typically encompass multiple concerns regarding economic, relational, substantive and procedural factors. Usually businesses have interests that include resolutions that save time and money, preserve relationships, and create satisfactory, durable, and confidential outcomes.\textsuperscript{214}

\textsuperscript{206} This is why mediators often write important, disconfirming data on white boards or flip charts in caucus rooms so that the information remains visible and is less easily discounted even when they are not present. See generally David Binder, et al., supra note 170, at 320-21 (recommending making written charts of options advantages and disadvantages to help clients make satisfactory decisions). In an international commercial mediation, drawing the dispute on a flip chart to demonstrate overlapping business interests brought insight and breakthrough to one of the disputants. 

\textsuperscript{207} Richard Birke & Craig R. Fox, supra note 65, at 19.

\textsuperscript{208} Id., see Daniel Kahneman & Dan Lovallo, Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk-Taking, 39 Mgmt. Sci. 17 (1993).

\textsuperscript{209} Roger Fisher et al., supra note 80, at 32.

\textsuperscript{210} Id. at 33-35.

\textsuperscript{211} Id. at 32.

\textsuperscript{212} Richard Birke and Craig R. Fox, supra note 65, at 31.


\textsuperscript{214} See, e.g., Dispute-Wise Conflict Management, supra note 39, at 19 (hereafter Dispute-Wise Business Management)(listing these as reasons companies use mediation); Appropriate Corporate Dispute Resolution, supra note 37, at 17 (same); see note 18 supra and accompanying text.
Most disputes have multiple variables, and disputants typically possess complex interest sets which interact, often differently, with these factors. Adopting adjudication’s win-lose focus directed primarily at money obscures opportunities to reach resolutions which satisfy multiple interests and allocate value more flexibly than winner-take all.

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

---

215 Michael L. Moffit, Disputes as Opportunities to Create Value, in Dispute Resolution Handbook, supra note 86, at 173, 176.
216 Richard Birke, supra note 97, at 215-16.
217 See Dwight Golann & Jay Folberg, supra note 1, at 203-10 (describing how mediators help disputants overcome cognitive forces affecting their abilities to assess the merits of cases); Robert H. Mnookin, supra note 53, at 248 (arguing mediators can help parties overcome cognitive barriers).
218 Russell Korobkin, Psychological Biases that Become Mediation Impediments Can Be Overcome with Interventions that Minimize Blockages, 24 Alternatives to the High Costs of Litigation 67, 68 (April 2006). Substantial evidence suggests that this seldom accomplishes much because people tend to be “optimistically overconfident about their ability to avoid suffering from the optimistic overconfidence bias.” Id.
219 See id. at 69. This generates specific explanations for undesirable outcomes, increases the plausibility of these reasons, and can reduce optimistic overconfidence. Id. Studies show that persons believe an outcome is more likely to occur if they explain why it might be possible because of a phenomenon called the explanation bias. Id, see Craig A. Anderson et al., Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information, 39 J. Personality & Soc. Psychol. 1037, 1047 (1980).
220 Dwight Golann & Jay Folberg, supra note 1, at 205 (noting that to combat optimistic overconfidence mediators often seek to distance participants from claims by asking them to place it a group of similar ones and inquiring broadly about the group, and using other approaches to make particular disputes seem less unique). Mediation tends to develop much more comprehensive information and insight than does arbitration. Thomas W. Walde, supra note 38, at 3. Unlike arbitrators who wait for evidence and argument presented to them in formalized ways, mediators ask questions and penetrate deeply into disputants’ organizations, cultures, values, and concerns. Id.
Mediators provide outside perspectives that challenge egocentric biases. They ask direct questions raising weaknesses in legal claims, and occasionally share hypothetical claim evaluations, to encourage disputants and lawyers to abandon optimistic overconfidence.

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

---

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

222 Penny Brooker & Anthony Lavers, supra note 56, at 200-01. Russell Korobkin, supra note 281, at 69. Direct questions regarding weaknesses, and hypothetical claim evaluations and outcome predictions, usually temper lawyer overconfidence, stimulating them to at least consider possibilities that they have misestimated. Id. Controversy rages in the United States over whether it is appropriate for mediators to share hypothetical or actual claim evaluations or outcome predictions. The current ideological struggle treats facilitation, which does not do this, and evaluation, which does, as separate mediating models. See Samuel J. Imperati, Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation, 33 Williamette L. Rev. 703, 705 (1997). Scholars define facilitation as proper or correct mediation, see James J. Alfini, Trashing, Bashing, and Hasing It Out: Is This the End of Good Mediation?, 19 Fla. St. U. L. Rev. 41 (1991), and evaluation as improper or incorrect mediation. See John Lande, Stop Bickering! A Call for Collaboration, 16 Alternatives to the High Costs of Litigation 1, 11 (Jan. 1998). This debate obscures the fact that most commercial mediators routinely use actions that fall into both categories, Don Peters, Oiling Rusty Wheels: A Small Claims Mediation Narrative, 50 Fla. L. Rev. 761, 835 n.163 (1998), and “direct evaluation often is necessary to overcome overconfidence bias.” Russell Korobkin, supra at 69. Some American mediation rules prohibit mediators from predicting how judges will decide pending adjudications. E.g. Fla. R. Cert- & Ct-Appointed Mediation 10.370(c) (2007).

223 Russell Korobkin, supra note 218, at 68; Dwight Golann & Jay Folberg, supra note 1, at 204; Don Peters, supra note 222, at 807-08 n.76. This is often done by asking questions confidentially in caucuses about the strengths of counterparts’ claims, exploring topics which usually parallel their weaknesses. Some studies “have successfully reduced optimistic overconfidence by asking experimental subjects to list weaknesses associated with their position.” Russell Korobkin, supra at 68-69. This may have lessened effect on lawyers who are aware counterparts will make countering arguments and have often identified these contentions in advance. Id at 69. Trial lawyers surveyed listed attorneys’ failures to view claims and positions reasonably and convince clients of their cases’ weaknesses as primary factors in unsuccessful mediations. Thomas C. Waechter, supra note 31, at 99.

224 John Lande, Relationships Drive Support for Mediation, 15 Alternatives to the High Costs of Litigation 95, 96 (July/August 1997). Mediation provides a forum “where senior executives can hear the issues set out by both their own team and the other side.” International Mediation, supra note 3, at 23. One disputant in an international mediation mentioned that he was unsure how strong his claim was and “wanted to hear it debated in an information setting.” Id. at 24. Business clients often complain that their lawyers do not discuss weaknesses in their claims and instead emphasize only the strong points. Stephen Younger, supra note 116, at 957.
Mediators explore disputants’ alternatives to a mediated agreement fully,\textsuperscript{225} and the transactional costs associated with these options.\textsuperscript{226} As alternatives to a mediated agreement are usually adjudicative in disputes involving lawyer participation, these discussions encompass all the expenses of arbitrating including direct,\textsuperscript{227} productivity,\textsuperscript{228} continuity,\textsuperscript{229} and emotional\textsuperscript{230} costs. Reducing transaction costs often creates value when resolving disputes.\textsuperscript{231} The direct costs of international arbitration are often significant and sometimes wind up exceeding actual amounts gained.\textsuperscript{232} Most American business persons and inside lawyers believe that mediating is less expensive than arbitrating.\textsuperscript{233} American business persons also

\textsuperscript{225} Karl A. Slaiteu, supra note 16, at 32 (suggesting good mediators want to know what disputants will likely do if they don’t resolve their disputes in mediation). These alternatives provide standards against which to measure solutions proposed in mediation. Id. Identifying and discussing these alternatives to negotiated agreements ensure that participants do proper risk analysis. International Mediation, supra note 3, at 22.

\textsuperscript{226} Arbitrating and litigating present direct and indirect costs. International Mediation, supra note 3, at 35. These costs should be multiplied by a 1.5% factor in international disputes. Id. at 36. Many companies mask the financial impact of these costs as operating expenses under corporate accounting practices. Id. Outside counsel fees, while often substantial, may be the tip of the iceberg because “they don’t reflect hours spend by company personnel managing the legal work, or emotional and other non-financial costs. ADR as Public Policy, 23 Alternatives to the High Costs of Litigation, 99, 100 (June 2005).

\textsuperscript{227} Direct costs include the fees of lawyers, experts, other professionals, and arbitration system fees. See Stewart Levin, Breaking Down Costs: What You Are Losing by Not Using ADR, 19 Alternatives to the High Costs of Litigation 248 (November 2001). Regarding litigation, it is estimated that in 2000, more than 22 million cases were filed in American courts at a cost of almost $400 billion. Id.

\textsuperscript{228} Productivity costs include the value of the lost time, and the related opportunity expenses, of those who are involved in dispute resolving would otherwise be producing. Id. It is estimated that business executives in the United States spend more than 20% of their time in litigation and other dispute resolution related activities. Id.

\textsuperscript{229} Continuity costs include the loss of continuing business relationships and the impacts on business community and reputation factors that they embody. Id. at 248.

\textsuperscript{230} Emotional costs include the psychological pains accompanying dealing with and continuously confronting strong emotions that often distract from business persons’ ability to focus on doing their work effectively. Id. at 248.

\textsuperscript{231} See Robert H. Mnookin, et al., supra note 66, at 119 (arguing resolving disputes does not require purely distributive activity, and disputants and lawyers have opportunities to make process decisions that promote resolution at lower cost); Michael L. Moffitt, supra note 215, at 177 (contending unresolved disputes are expensive, and so are many aspects of dispute resolution, so disputants should choose carefully the process to use).

\textsuperscript{232} See Appropriate Corporate Dispute Resolution, supra note 37, at 20 (some report that transaction costs of settling disputes subjected to adjudication are often two to three times the amounts of settlement themselves). These questions occasionally surface situations where business persons have not recognized their shared interests in minimizing arbitrating costs and fees when their lawyers have not so advised them. See Robert H. Mnookin, supra note 53, at 248.

\textsuperscript{233} See, e.g., Analyzing Company ADR System Practices, 22 Alternatives to the High Costs of Litigation 47 (April 2004) (survey at Johnson & Johnson showed mediation settling costs were a third less than litigating); Appropriate Corporate Dispute Resolution, supra note 37, at 17 (comparing both processes to litigation, 89.2% think mediating saves money, 68.6% think arbitration does); Dispute Wise Conflict Management, supra note 39, at 19 (comparing both process to litigation, 91% think mediating saves money, 71% think arbitrating does). A survey of 69
believe that mediating generally takes less time than arbitrating, and time is usually a component of expense.

Similarly, commercial mediators invariably inquire about business and other interests that disputants possess. Often done in caucuses, these conversations explore the core of what concerns disputants, and what motivates them most strongly. These conversations demonstrate that more is usually at stake than the dollar claims generated by adjudicatory win-lose remedies. They further demonstrate that value-creating opportunities usually lie beneath the divergent and conflicting legal positions, justifications, and supporting and attacking arguments lawyers develop and present in adjudicatory contexts.
In addition, the business and other interests in play in commercial disputes frequently bear little relationship to the legal and rights issues framed in adjudicatory processes like arbitration and litigation.\textsuperscript{240} For example, saving time and money and preserving relationships are typically business-oriented solutions that legal remedies adjudicated in arbitration and litigation do not promote.\textsuperscript{241} Once mediators identify interests, they typically explore ideas in confidential caucuses for agreements realizing shared concerns, such as reducing transaction costs and preserving important commercial relationships.

International commercial connections take time and money to develop and maintain.\textsuperscript{242} Research suggests that business persons and their lawyers believe that mediating helps resolve disputes while preserving important commercial relationships.\textsuperscript{243} This frequently shared interest enables mediators to help participants turn disputes into deals by finding ways to solve precise problems presented and resume strengthened commercial relationships.\textsuperscript{244}

\textsuperscript{240} F. Peter Phillips, supra note 157, at 6. Describing the growth of mediation within the commercial sector in the United States, the author contends that adjudicatory solutions look backward to determine the consequences of past events while business interests look forward to assess future opportunities. Id; see notes 7, 40 supra.

\textsuperscript{241} F. Peter Phillips, supra note 157, at 5-6 (quoting a senior General Electric Attorney, “This company makes money producing many things, from light bulbs to jet engines---but it does not make money writing legal briefs in court”). The author also argues that “it might well be that the best solution to a dam builder and a hydroelectric turbine manufacturer would be a change in contract specifications and a promise of future work. But the law does not provide for this business-like solution.” Id; see note 7 supra and accompanying text.

\textsuperscript{242} Thomas W. Walde, supra note 38, at 1 (creating international commercial and investment relationships is an expensive, high-risk and asset-building activity).

\textsuperscript{243} Eighty percent of the business executives, lawyers, and outside attorneys in one study said that mediation helps preserve business relationships. John Lande, supra note 150, at 186. This finding is consistent with other studies that suggest that business persons and their lawyers believe that mediating preserves relationships better than arbitrating does. Appropriate Corporate Dispute Resolution, supra note 37, at 17 (59% choose mediating to preserve relationships, only 41% choose arbitrating for this reason); Dispute-Wise Conflict Management, supra note 39, at 19 (56% choose mediating to preserve relationships, 38% choose mediating for this reason).

\textsuperscript{244} Thomas W. Walde, supra note 38 at 3-4; see Penny Brooker & Anthony Lavers, supra note 56, at 198-200 (describing types of new deals and other creative solutions arising from domestic commercial mediations in UK). Although mediation outcomes can create velvet divorces through peaceful liquidation of relationships, often agreements reflect re-negotiated contracts to help parties create win-win results. International Mediation, supra note 3, at 1218. For example, many international intellectual property disputes begin as rights claims but are resolved as negotiated licensing deals. Id; see note 241 supra.
Mediators challenge fixed pie, zero sum bias by testing assumptions that all participants value all aspects of disputes identically. They do this by conducting confidential discussions about how participants assess their interests in terms of which are more and less important. This generates trading, the most common approach to creating value in dispute resolution, where disputants exchange that which they value slightly less in return for that which they value slightly more. These explorations of interests and priorities encourage business oriented resolutions such as apologies, bartered services, bid invitations, expedited delivery schedules, future price concessions, joint undertakings, licensing agreements, product discount programs, references, and equipment use. All of these cognitive-bias busting actions are made possible by confidential caucusing which generates more information from which solutions can be fashioned.

2. Overcoming Cultural Barriers

Business persons and their lawyers can develop awareness of their cultural biases and adjust their dispute resolving behaviors accordingly. Doing this successfully requires reflecting on how culture affects behaviors and experiencing other cultures over time and in

Human experience and research shows that negotiators seldom value all aspects of issues subjected to negotiation in mediation identically. Robert Bastress & Joseph Harbaugh, supra note 28, at 377, 379-94. Don Peters, supra note 116, at 134. Id. at 134-35. See, e.g., Don Peters, supra note 116, at 137; Stephen Schwartz, The Mediated Settlement: Is It Always Just About the Money? Rarely!, 4 Pepp. Disp. Resol. L.J. 309, 314 (2004); Lawrence M. Watson, Initiating the Settlement Process-Ethical Considerations, in Dispute Resolution Ethics: A Comprehensive Guide 7, 16 (Phyllis Bernard & Brant Garth eds., 2005); Stephen P. Younger, supra note 116, at 956. See Robert A. Baruch Bush, supra note 55, at 13. Difficult, challenging, troublesome issues where emotions run high or zero-sum bargaining is likely to occur are best discussed initially in private sessions or caucuses. Stephen P. Younger, supra note 116, at 959. See Julie Barker, supra note 38, at 19-29; Negotiating and Mediating Across Cultures, 17 Alternatives to the High Costs of Litigation 102 (July/August 1997) (arguing that different cultural processes should not be viewed as impenetrable). Bernard Mayer, The Dynamics of Conflict Resolution: A Practitioner’s Guide 87 (2000) (arguing that articulating the many different cultural norms regarding conflict which influence your behaviors makes it easier to develop awareness of how their practices and patterns might differ from others); see Susan Bryant, supra note 182, at 64-67 (having lawyers consider similarities and differences with their clients helps them see how cultural factors may influence interactions).
Business persons and lawyers involved in transborder commercial dispute resolution should know common differences generated by collectivist or individualist orientations and direct or indirect communication preferences. Firm grasp of this information helps them move from believing everyone should behave like they do to seeking openness and learning about values and interests underlying different orientations, preferences, and behaviors.

Despite best efforts, skilled negotiators operating under the influences of their cultural traditions often experience bafflement and confusion encountering attitudes and behaviors flowing from different orientations. Cultural influences substantially affect how disputants perceive, define, explore, and evaluate consequences of alternatives to not reaching consensual agreements. Identifying, evaluating, and manipulating interests defeats fixed pie bias, and cultural influences affect how disputants perceive, define, and prioritize their needs. Culturally fluent mediators can identify and correct miscommunications that prolong conflicts which could be resolved. Skilled transnational dispute mediators are attuned to subtle

---

252 See John Paul Lederach, supra note 2, at 63 (describing slow, painful process of developing self-awareness regarding the biases in his mediation training programs offered in Central America); Mediation in Haiti, supra note 199, at 76, describing cultural learning occurring in gradual, evolving process spanning four visits to and seventeen workshops in Haiti).

253 Bernard Mayer, supra note 251, at 87 (it is difficult to acquire knowledge of cultural influences until experiencing other cultures at deep levels). Encountering behaviors and beliefs divergent from one’s own facilitates recognizing these differences and thinking about how culturally relativistic common actions are. Id.

254 Negotiating and Mediating Across Cultures, supra note 250, at 102; see notes 183-86 supra and accompanying text.

255 Negotiating and Mediating Across Cultures, supra note 250, at 102. Professor Bryant argues that “knowing ourselves as cultural beings is the key to being able to identify when we are using biases and stereotypes, when we misinterpreting or filling in, and why we are judging people as different. Susan Bryant, supra note 182, at 49 n.56. She also suggests that we should accept that our cultural influences might create “roadblocks to understanding others,” and that as long as we are committed to growth and accept these “blinders that shape our understanding of others, we can feel less frustrated by setbacks and not judge ourselves to harshly...” Id.

256 Harold Abramson, The Culturally Suitable Mediator, in The Negotiator’s Fieldbook, supra note 73, at 591 (hereafter Culturally Suitable Mediator).

257 See Jeanne M. Brett, Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions About Cultural Boundaries 98-103 (2001); Mediation in Haiti, supra note 181, at 36.

258 See notes 236-239 supra and accompanying text. Mediation typically pushes “people to move beyond their own focus on what it is they want to a somewhat deeper consideration of why they want it. Bernard Mayer, supra note 251, at 219.

259 Culturally Suitable Mediator, supra note 256, at 592; Jeanne M. Brett, supra note 257, at 83-89; Mediation in Haiti, supra note 181, at 36.
cultural patterns and nuances\textsuperscript{260} allow them to spot signals suggesting the existence of barriers and misunderstandings.\textsuperscript{261} Once spotted, mediators can make sensitive comments and ask tactful questions to learn what differing expectations and behaviors mean to disputants.\textsuperscript{262} Using this information, mediators can then translate for disputants in caucuses and bridge these barriers.\textsuperscript{263}

Mediating this way also separates genuine culturally-based impasses from strategic ploys,\textsuperscript{264} and provides a forum for resolving barriers that disputants often cannot easily overcome in non-facilitated negotiation.\textsuperscript{265} These barriers are usually significant when they touch elements required to overcome egocentric optimistic overconfidence and fixed pie, win lose biases. Co-meditation teams, with neutrals from each cultural tradition, are often effective.\textsuperscript{266}

C. Yes We Can Talk, and Two Important Conversations We Should Have

\textsuperscript{260} International Mediation, supra note 3, at 17. Scholars recommend learning about relevant cultures and their traditional communication and behavioral patterns before attempting intercultural dispute resolution. See, e.g., Culturally Suitable Mediator, supra note 256, at 592 (mediators should be trained and experienced in helping parties recognize culturally-shared interests and surmount culturally-based impasses); Christopher Honeyman, Have Gavel, Will Travel: Dispute Resolution Innocents Abroad 1, (unpublished paper on file with author, also available as Convenor Newsletter, Vol 2, No. 2, \texttt{www.convenor.com}) (knowledge of relevant cultures is absolutely essential); Jan Jung-Min Sunoo, Some Guidelines for Mediators of Intercultural Disputes, 6 Neg. J. 383, 387 (199.) (mediators should make “every effort to learn about the cultural and social expectations of the persons they will deal with). \textsuperscript{261} Culturally Suitable Mediator, supra note 256, at 591 (disputants from diverse cultures need process that helps them recognize and bridge cultural differences). Mediators should engage with cultural norms as they search for positive ways to communicate with participants. International Mediation, supra note 3, at 17. \textsuperscript{262} International Mediation, supra note 3, at 17; see Susan Bryant, supra note 182, at 29 (recommending checking interpretations in cross-cultural situations); Roger Fisher, et al., supra note 80, at 168 (encouraging negotiators to question their assumptions and check out these questions when appropriate). Mediation allows exploring sensitive cultural issues confidentially in caucuses. International Mediation, supra note 3, at 23. \textsuperscript{263} Culturally Suitable Mediator, supra note 256, at 594 (skilled mediators help parties identify the cultural connections to impasses and find ways to resolve them). Mediators’ neutrality allows them to use their more objective perspectives to identify what is not working between negotiators, and discuss ways to address these problems and find positive paths forward. International Mediation, supra note 3, at 17. \textsuperscript{264} Culturally Suitable Mediator, supra note 256, at 594. (offering an illustration that disputants from other countries may have genuine difficulty bringing everyone needed for their consensus-based decision making process to a mediation, or it may be a limited authority ploy). \textsuperscript{265} Id. at 591. \textsuperscript{266} Alexandra Bowen, supra note 8, at 61. The perception of similarity can help establish trust in the process even though both neutrals may be equally familiar with nuance and patterns in both cultures. Id.
Business representatives and their lawyers should talk about how they wish to resolve disputes.\textsuperscript{267} Doing this before disputes arise makes excellent sense. Research shows that some companies manage disputing systematically, view conflicts as expected rather than unusual occurrences,\textsuperscript{268} and develop and follow resolution policies.\textsuperscript{269} Effective disputing management includes helping lawyers understand business as well as legal issues and using mediation frequently to pursue interest-based negotiating.\textsuperscript{270} Many American corporations have developed such policies and programs, and communicate them to outside counsel to ensure that work is conducted within their parameters.\textsuperscript{271} Companies who favor using mediation when they are initiating or defending parties in disputes are more likely to manage disputing effectively than those who always choose adjudicating first.\textsuperscript{272}

The threshold question of who should decide what dispute resolution approaches to use may receives divergent answers in different cultures. American business and legal cultural traditions suggest that company representatives should ultimately decide this question in consultation with their lawyers. American businessmen and women value exercising

\textsuperscript{267} International Mediation, supra note 3, at 18 (an important first step to using international commercial mediation is explaining and analyzing options with clients).

\textsuperscript{268} See Craig A. McEwen, supra note 54, at 14 (managing disputing when regularly involved in conflicts with customers, suppliers, joint venturers, and competitors is much different from managing individual disputes); Dispute-Wise Conflict Management, supra note 39, at 3 (companies should recognize that winning may be measured by how well overall total economic and non-economic impacts of full array of disputes managed over time). Research also suggests that effective dispute managing companies are more inclined to adopt a portfolio approach to handling cases. Id. at 22.

\textsuperscript{269} Dispute-Wise Conflict Management, supra note 39, at 21 (companies that have established dispute resolving policies are more likely to resolve disputes quicker and at less cost). Doing this allows companies to identify and change tendencies to choose externally imposed outcomes to avoid personal responsibilities. International Mediation, supra note 3, at 116. It also helps businesses change internal economic incentives created by budgeting systems where agreement costs come from involved departments while adjudication costs are borne by the entire company. Craig A. McEwen, supra note 54, at 10-11. These policies typically identify company objectives in dispute resolution as “minimizing risk, cost, time and resources expended, and preserve important business relationships.” Dispute-Wise Business Management, supra note 168, at 4.

\textsuperscript{270} See id. at 5-6; Craig A. McEwen, supra note 57, at 17.

\textsuperscript{271} ADR Counsel Roundtable, 14 Alternatives to the High Costs of Litigating 98 (September 1996). Motorola, for example, requires its in-house lawyers to complete an authorization form when the outside counsel budget in a matter will exceed $50,000. Id. at 99. General Electric includes its requirements in its outside-counsel guidelines. Id. at 98.

\textsuperscript{272} Dispute-Wise Conflict Management, supra note 39, at 21.
autonomy and making final decisions concerning major issues involved in resolving disputes. American legal ethics standards allocate decision-making authority regarding objectives of representation to clients and the means by which goals are pursued to consultation between them and their lawyers.

Some cultural business traditions, in contrast, emphasize giving disputes not settled by intercompany negotiation to outside lawyers to resolve. In these cultural contexts, business people tend to view these situations solely as legal matters to be handled by lawyers without further company involvement. These tendencies may delegate to attorneys the critical question of which processes to use.

If these important conversations occur, they should include either lawyers or business persons identifying and presenting mediation as an option to consider and evaluate. Most American attorneys know about mediation’s existence as an option to adjudication even though

---

273 America demonstrates the prototypical individualistic culture which promotes ideas of the self as “independent, self-directed, and autonomous.” Michelle LeBaron, supra note 180, at 61.


275 ABA Model Rule of Professional Conduct 1.2(a). Comment 2 clarifies this standard for consulting regarding means of accomplishing representational objectives by suggesting: “Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” Id., Cmt 2. These traditions usually generate conversations between clients and their lawyers about options and consequences for resolving individual disputes. American legal education labels this process legal counseling. David Binder et al., supra note 170, at 2-3. These interactions may be strongly influenced by existing business policies for managing dispute resolution. Substantial American research demonstrates the value of viewing dispute resolution as an aspect of business to be managed thoughtfully rather than as individual, ad hoc, case by case series of decisions. See Dispute-Wise Conflict Management, supra note 39, at 3-4; Craig McEwen, supra note 54, at 24; Appropriate Corporate Dispute Resolution, supra note 37, at 22-23; note 79 supra.

276 Walter G. Gans, supra note 8, at 52;

277 Id. This allows short term avoidance of further involvement by business personnel while transferring fighting primarily to lawyers through adjudication. International Mediation, supra note 3, at 5. Fiat’s legal counsel said that its managers believe disputes belong with lawyers, and that getting involved with conflicts complicated enough to need attorneys would not be productive. Legal, Commercial, and Cultural Obstacles to Mediation Within Europe, 23 Alternatives to the High Costs of Litigation 98 (June 2005). Believing they are top negotiators, Fiat managers assume that if they haven’t been able to solve the dispute already, mediation won’t work either. Id.
fundamental misunderstandings about this process often exist.\textsuperscript{278} Research shows that as American businessmen and women become familiar with mediation, their lawyers usually serve as the primary source of information about this possibility.\textsuperscript{279} Lack of familiarity with mediation inhibits willingness to choose it as a dispute resolution method.\textsuperscript{280} Research suggests that client-lawyer conversations regarding making decisions about which dispute resolution process to use frequently occur on a case by case basis rather than as implementations of established policy.\textsuperscript{281} A case by case focus enhances tendencies that decision-makers will emphasize the uniqueness of particular fact patterns and create potentially

\textsuperscript{278} Most American lawyers originally receive their knowledge about mediation by experiencing it. John Lande, supra note 150, at 169-71. Personal experience with mediation supplied the major source of information for about two-thirds of the attorneys and about one-third of the executives. Id. Notwithstanding the existence of court-connected mediation programs in many American states for ten to twenty years, many lawyers fail to differentiate accurately between an adjudicatory process like arbitration, where neutrals decide, and the consensual process of mediation, where neutrals help others negotiate but do not make binding substantive decisions. See Alison Gerencser, Alternative Dispute Resolution Has Morphed into Mediation, Standards of Conduct Must Be Changed, 50 Fla. L. Rev. 843, 846-47 (1998). For example, I once received a call from a lawyer wanting to know where she could arrange “binding mediation.”

\textsuperscript{279} See John Lande, supra note 150, at 169-71.

\textsuperscript{280} Involving Business Managers supra note 43, at 155; see notes 56-58 supra and accompanying text. As one company representative in the survey of 606 Fortune 1000 companies noted, “Not a lot of people are familiar with mediation, and it’s always a battle to get people to agree to it unless they have been through it before.” Appropriate Corporate Dispute Resolution, supra note 37, at 26. Problems may arise concerning knowledge about and understanding of mediation for lawyers and business persons in countries in the Americas where mediation is not well established. Costa Rican lawyers, for example, have expressed concerns about a general lack of awareness of mediation and need to educate judges, attorneys, and companies about the value of this process. Mediation in Costa Rica, supra note 57, at 11. Arbitration is the dispute resolution process best understood by disputants on both sides of the U.S. and Mexican borders. Walter A. Wright, supra note 35, at 57. Mandatory court-connected mediation, the source of most American lawyers’ experience, has been implemented successfully in a few South American countries. Latin American countries started viewing mediation as a viable option in the 1990s. Mediation in Latin America, supra note 62, at 415. Argentina, for example, passed a law in 1995 mandating mediation before any lawsuit, except for family cases, could reach trial. James M. Cooper, Latin America in the Twenty-First Century: Essay: Access to Justice, 30 Cal W. Int’l L.J. 429, 433 (2000). From April, 1996, to April, 1997, 69.43% of 29,986 commercial cases that were mediated reached agreement. Id. Chile has a law requiring a form of mandatory conciliation in consumer protection matters. Jeren Sekolec & Michael B. Getty, supra note 217, at 178. In addition to Argentina and Chile, Columbia, Ecuador, and Peru also have mediation or conciliation laws. Alex Bowen, supra note 8, at 61-62; Mediation in Latin America, supra at 417. Narrower mediation projects have also been implemented in other countries. In Bolivia, for example, a pilot project used one court as a model for mandatory mediation for the rest of the country. Anthony Wanis-St. John, Implementing ADR in Transitioning States: Lessons Learned From Practice, 5 Harv. Negot. L. Rev. 339, 369 (2000)

\textsuperscript{281} Appropriate Corporate Dispute Resolution, supra note 37, at 19 (generally companies make decisions to mediate on a case by case basis).
biased outcome predictions that specific focus often generates. Lawyers need to counter that by exploring a full range of interests beyond those identified earlier. These include suitability of mediation objectives such as assessing whether fundamental principles are at stake, and whether resolution essential information can be obtained by means other than formal discovery. They also include canvassing potential benefits of mediating including how it aids in clarifying issues, overcomes impasse-causing anger and other strong emotions, provides story telling opportunities, realistically checks alternatives to mediated agreements, and confidentially explores possible trades and creative solutions.

Outside lawyers conducting these conversations must balance needs to empathize with angry business persons, demonstrate that they will commit the resources needed to overcome the outrages they have suffered, with full assessment of the transaction costs and other disadvantages of adjudicating first. The cognitive biases discussed earlier and potential conflicting economic interests may tempt lawyers to use the emotions experienced by business

---

282 See Craig A. McEwen, supra note 54, at 13. As one general counsel noted that his company was pro-mediation in theory “but when you get down to specifics, it’s a hard pill to swallow. We haven’t seen many opportunities to use it.” Id. An outside lawyer noted that “the rhetoric by the inside counsel and the advocacy of . . . [mediation] sometimes exceeds what happens when a case comes up;” and when confronting the facts of specific disputes, companies are often ‘tougher on wanting to . . . [adjudicate] than” one might think from reading their policy. ADR Counsel Roundtable, supra note 271, at 99. Commercial conflicts too often generate an automatic “mediation is great in theory but not for this case” response. International Mediation, supra note 3, at 18. See generally notes 79, 281 supra and accompanying text.

283 Kathleen M. Scanlon, supra note 44, at 1.10. Unfamiliar business clients need to understand how mediation’s opportunities to give and receive information confidentially to and from impartial neutrals who will then use it to assist negotiation differs from non-mediated negotiations where no opportunities exist to counter spiraling mistrust exist. See Getting the Company to the ADR Table, 15 Alternatives to the High Costs of Litigation 61 (April 1997).

284 Kathleen M. Scanlon, supra note 44, at 1.10-1.11. Other concerns include: (1) the nature of business relationships making preservation or amicable divorce desirable; (2) assuring executives that settlement receives its best shot before adjudicating; and (3) desires to fully explore creative, non-legal business created solutions. International Mediation, supra note 3, at 22.

285 Dealing with Financial Disincentives, supra note 84, at 45. Outside lawyers understand that they often must provide this type of reassurance to secure engagement for the representation. Id.

286 See notes 226-232 supra and accompanying text.
persons to support choosing adjudication rather than encouraging full consideration of arbitration’s advantages and disadvantages.\textsuperscript{287}

Potential economic concerns may create barriers for outside lawyers to suggest mediation as a transborder commercial dispute resolution option. Adjudicating by arbitrating often is the only alternative identified and discussed in American settings,\textsuperscript{288} and in other traditions where lawyers exercise more decision-making authority.\textsuperscript{289} American corporate personnel complain that their lawyers fail to present mediation as an option.\textsuperscript{290}

\textsuperscript{287} See Robert H. Mnookin, et al., supra note 66, at 167 (noting that attorneys sometimes add fuel to their clients’ emotional fires to encourage adjudicatory choices).

\textsuperscript{288} A survey of 2300 Ohio lawyers showed that attorneys favoring the use of mediation often do not refer even a significant portion of their clients to mediation. Nancy H. Rogers & Craig A McEwen, supra note 145, at 841. Although most Ohio lawyers surveyed favored expanded use of mediation, only 12% regularly recommended the process to their clients. Id.

\textsuperscript{289} When asked why they don’t use mediation more often, 68% of 25 Italian companies surveyed said it was because their outside counsel had not identified it as an option. How Business Conflict Resolution is Practiced in Europe, supra note 160, at 149.

\textsuperscript{290} See ADR Counsel Roundtable, supra note 271, at 98 (in-house counsel describing that in 70 lawsuits in the preceding year, outside counsel had not mentioned mediation as an option). Scholars argue that properly interpreting legal ethics rules obligates American lawyers to counsel clients regarding mediation and other alternatives to adjudication. See, e.g., Carrie Menkel-Meadow, Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution, 28 Fordham Urb. L. J. 979, 981 (2001); Carrie Menkel-Meadow, Ethics and Professionalism in Non-Adversarial Lawyering, 27 Fla. St. L. Rev. 153, 167-68 (1999); Lawrence W. Watson, supra note 248, at 10. Several American states require attorneys to discuss mediation with their clients by ethics rules, court rules, and statutes. Nancy L. Rogers & Craig A. McEwen, supra note 145, at 862. Although no American Bar Association Model Rule of Professional Conduct applies directly, provisions of this code obligate lawyers to offer legal explanations that are reasonably necessary to permit clients to make informed decisions, Rule 1.4(b) of the ABA Model Rules of Professional Conduct, and make reasonable effort to expedite dispute resolution consistent with client interests. See Rule 3.2 of the ABA Model Rules of Professional Conduct (requiring “reasonable efforts to expedite litigation consistent with the interests of the client”). Other scholars contend that these ethical rules, and the growing use of institutionalized, court-connected mediation, impose a duty to counsel clients about mediation as a best practice measure. See, e.g., Robert F. Cochrane, Jr., Professional Rules and ADR: Control of Alternative Dispute Resolution under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards, 28 Ford. Urb. L.J. 895 (2001); Monica L. Warmbrod, Could An Attorney Face Disciplinary Actions or Even Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution, 27 Cumb. L. Rev. 791 (1996-1997); Lawrence W. Watson, supra at 10. The Litigation Section Task Force on Ethical Guidelines for Settlement Negotiations has concluded that lawyers have a duty to promptly advise clients of adjudicatory alternative after retention in a dispute. Lawrence W. Watson, supra at 10. American proponents of client-centered counseling recommend that lawyers provide their clients with reasonable opportunities to consider alternatives that similarly situated clients would likely find pivotal. David A. Binder, et al., supra note 170, at 333. Mediation qualifies as a realistic alternative that most business representatives are likely to find useful to assess, particularly in contexts where these clients have neither knowledge about nor experience with facilitated negotiation. Id. at 284, 333.
American business personnel express concern that their lawyers do not mention or counsel them fully about mediation because they fear that doing so will diminish their income.\(^{291}\)

For American companies, much of the costs in commercial disputing come from paying outside lawyers to handle arbitration or litigation.\(^{292}\) Most American law firms who do this work charge for their services by billing their time at an hourly rate.\(^{293}\) This fee arrangement motivates lawyers to devote the time needed to achieve the best results for clients and is particularly useful when it is not clear initially how much time matters will require.\(^{294}\) On the other hand, hourly billing lessens connections between the benefits of representation to clients and the amounts clients pay.\(^{295}\) This disconnection tempts some lawyers to do more work to earn more fees even if the additional effort is not necessary.\(^{296}\) Research suggests that more than three-fourths of American in-house lawyers feel that hourly billing influences how much time outside lawyers spend on cases and significantly decreases incentives to work efficiently.\(^{297}\)

\(^{291}\) See ADR Counsel Roundtable, supra note 271, at 98.

\(^{292}\) See Yves Dezelay & Bryant Garth, supra note 15, at 51 (commercial disputes represent profitable activity for the almost obligatory use of outside lawyers who serve businesses confronted with the challenges involved in transborder arbitration); Donald Lee Rome, Writing Rules: Eliminate the Boilerplate, and Draft According to the Terms of the Deal, 15 Alternatives to the High Costs of Litigation 159, 160 (December 1997) (litigation, not business, lawyers dominate the arbitration process); see generally Craig A. McEwen, supra note 54, at 8. For example, in 1999 General Electric spent 44% of the company’s total outside legal expenditures on adjudication. Analyzing Company ADR systems Practices, 22 Alternatives to the High Costs of Litigation 47, 48 (April 2004).

\(^{293}\) Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 170 (2000). Commercial disputes are a lucrative market for lawyers. Yves Dezelay & Bryant Garth, supra note 15, at 118. See Robert H. Mnookin, et al., supra note 66, at 93 (arguing that hourly billing is used most often by deal-making attorneys and defense counsel in litigation).

\(^{294}\) Robert H. Mnookin, et al., supra note 66, at 83.

\(^{295}\) Id. at 83-84.

\(^{296}\) Id. at 84; Deborah L. Rhode, supra note 293, at 170 (arguing if lawyers charge by the hour and lack other equally profitable ways to use their time, they have incentives to string out projects as long as possible”). General research, not limited to business representation, on American lawyers’ hourly billing practices is not encouraging. Less than 5% of Americans believe “that they get good value for the price of legal services.” Id.at 168. Auditors have found demonstrable billing fraud in 5 to 10% of reviewed bills, and questionable practices in another 25 to 30% of receipts they analyzed. Id. at 179. Research suggests that 40% of American lawyers confirm that “some of their work is influenced by a desire to bill additional hours.” Id.

Choosing to use an adjudicatory process like arbitration requires hiring lawyers to identify and follow applicable procedures, develop legal theories supporting remedies and defenses that pursue client objectives, draft submissions and responses, gather and present evidence, and create and assert arguments. These are tasks which follow lawyers’ education and experience. Applying the assumption that what one gets paid for strongly influences what one recommends, American business persons assert that hourly billing dis-incentivizes mediation, and creates economic conflicts of interest between them and their lawyers. Some contend that hourly billing practices supply the primary reason mediation is not used more in commercial disputes.

American lawyers dispute these perspectives and contend that while they invariably mention mediation, their clients want full bore adjudication most of the time. They view the

---

298 See Penny Brooker & Anthony Lavers, supra note 56, at 162 (the legal profession in the UK is anxious to maintain its monopoly in dispute resolution work).
299 Lawyers need to perform different tasks and know business interests to help clients mediate transborder commercial disputes effectively. See Catherine Cronin-Harris, supra note 109, at 860-61. Lawyers need to pursue interest-based as well as positional negotiating strategies. Id. Attorneys trained in advocacy using strict rules of procedure often resist using flexible approaches encompassing a wide array of business as well as legal issues and strategic concerns. Id. Mediating also generates more client participation and outcome control, and replaces lawyer-dominated advocacy and zero sum outcomes in adjudication with consensus agreements. Id. at 861.
300 See Craig A. McEwen, supra note 54, at 11. A general counsel in this study stated that “the hourly billing is the villain” blocking efforts to settle early and inexpensively. Id. He claimed that hourly billing makes it in the best interests of lawyers to do things slowly, and asserted that the concept of early settlement “strikes fear throughout the entire body of a private law firm lawyer.” Id.
301 Id. In-house attorneys express disappointment with the apparent reluctance of law firms to put their client’s bottom line ahead of their firm economics. ADR Counsel Roundtable, supra note 271, at 98. A former general counsel at a large company noted that no law firms, as a matter of policy, ask their lawyers to bill as few hours as possible, but rather repeat the “keep the billable hours up” mantra so often that becomes background noise. Dealing With Financial Disincentives to ADR, supra note 84, at 45. Much of this criticism comes from lawyers working inside companies who seek but do not receive support from outside lawyers for their efforts to promote mediation. A general counsel for an American company, for example, noted “It’s always difficult getting attorneys to make a move that they think might lose them some advantage. That may be more the case if you’re dealing with outside attorneys. . . . where you have more of a feeling that you’re making a determination strictly on a legal basis and your duty to vigorously defend your client.” John Lande, supra note 150, at 182.
302 Business Mediation From All Points of View, supra note 117, at 104. A partner at a Philadelphia law firm who heads its ADR group blamed fee issues for limiting mediation use, saying “I think it is the law firms who are not running with this whole idea of mediation.” Id.
303 Dealing with Financial Disincentives to ADR, supra note 84, at 48 (comment of partner and former managing partner of a Philadelphia law firm and former chair of the ABA litigation section). Some lawyers estimate that their
claim that hourly billing practices influences outside lawyers not to mention or recommend mediation is “outrageous.” In one study, 51% of outside counsel agreed that a substantial increase in the proportion of mediated disputes by their firm or a major business client would not affect their personal compensation. This survey also reported that 25% of outside counsel believed that an increase in the percentage of matters using mediation would decrease their personal compensation.

Mediating does not necessarily diminish law firm revenues. Billing for their time spent helping clients prepare for and participate in mediations lessens adverse economic effects. Reframing short-term fee loss as long-term gains from enhanced reputations and increased referral and repeat business also eases concerns about diminished income from increased mediation.

The second important conversation should occur with lawyers representing counterparts concerns creating a contract provision that requires using mediation before resorting to arbitral or

---

304 Dealing with Financial Disincentives to ADRA, supra note 84, at 48. One prominent lawyer stated that “private law firms are not steering from or avoiding recommending ADR because they are trying to accumulate hours.” Id.
305 John Lande, supra note 150, at 179-80. The percentages agreeing with this proposition in this study were much higher for executives, 79%, and inside counsel, 78%. Id. at 180.
306 Id. Almost none of the inside counsel or executives surveyed expressed this concern. Id. Most of the outside counsel expecting a decrease from increased mediation indicated they expected only a small decline in personal compensation. Id.
307 Large commercial mediations will inevitably involve lawyers helping clients prepare for and negotiate at them. Penny Brooker & Anthony Lavers, supra note 56, at 184. Preparation is essential to make international commercial mediation successful. International Mediation, supra note 3, at 117. Lawyers are also needed to help disputants compare agreements options to likely adjudication outcomes. Penny Brooker & Anthony Lavers, supra at 184.
308 See John Lande, supra note 150, at 182-83. As one outside counsel in Professor Lande’s study noted, “If I suggested . . . [mediation] and as a result we settled the case without spending gobs of money on lawyers, I suppose it could have a negative effect on my compensation in the sense that there’s been less legal work generated and so less fees generated and therefore less income. On the other hand, if you get a good result and you have a happy client and the word gets out, long-term maybe that ends up being to your benefit because you’ll have more business coming in because you’ve gotten a good result from the client.” Id. A good way to generate substantial legal business is to have “lots of clients come back to you time and again.” Dealing with Financial Disincentives to ADR, supra note 84, at 48. See Legal, Commercial, and Cultural Obstacles to Mediation Within Europe, supra note 277, at 99 (companies want lawyers looking at long, not short term, and seeking best results especially if it means less litigation).
judicial adjudication. Using a stepped approach of first mediating and, if not successful, then arbitrating, provides opportunities to seek business oriented solutions not constrained by conventional legal frameworks before spending time and money on adversarial, arbitral adjudication. Stepped clauses typically provide that, upon notice of a claim arising from the contract between the parties, authorized representatives agree to mediate in a specified way, using specified neutral[s], within a certain period of time. If mediation fails to resolve the dispute fully, the parties then agree to arbitrate with specifications for time, place, and other

309 Kathleen M. Scanlon, supra note 44, at 1.5. In some ways, this stepped approach parallels the Dispute Settlement Understanding of the World Trade Organization. See Maraia Alejandra Rodriguez Lemmo, Study of Selected International Dispute Resolution Regimes With Analysis of the Decisions of the Court of Justice of the Andean Communities, 19 Ariz. J. Int’l & Comp. L. 863, 864-65 (2002). This process begins with consultations following strict time guidelines and if these negotiations fail, then arbitration occurs. Id. Parties may agree to use other processes like mediation, conciliation, and good offices at any time. Id. at 865. NAFTA and CAFTA provisions also incorporate this approach. See note 351 infra.

310 Giving special attention to the definition of mediation makes sense to mitigate cultural misunderstandings. Harold I. Abramson, supra note 8, at 325; see notes 189-194 supra and accompanying text. It is essential that all participants understand the mediation process and its objectives. International Mediation, supra note 3, at 117. The potential for crippling misunderstandings is probably diminishing as international norms of dispute resolution evolve and more companies and lawyers experience mediation or conciliation as the same assisted negotiation, often facilitative and occasionally evaluative, non-binding process. Harold I. Abramson, supra at 326-26.

311 Selecting, adapting, and designating an “off the shelf set of mediation rules” is recommended. Harold I. Abramson, supra note 8, at 326. Doing this permits designing a focused process that serves the needs of parties. Id. Sstarling from scratch requires substantial time, effort, and expense, and many organizations have mechanisms in place that can be easily adapted. Id at 324, 326. These organizations include the American Arbitration Association, the Center for Public Resources, and the Commercial Arbitration and Mediation Center of the Americas. Id at 324. Each provides procedures that provide useful ground rules encompassing selecting mediators, structuring the mediation process, time periods, and confidentiality. Id.; see Kathleen M. Scanlon, supra note 44, at 2.16-2.17.

312 Mediator selection is extremely important because mediators vary substantially in experience, relevant knowledge levels, and preferred approaches. Commercial Arbitration At Its Best, supra note 14, at 15. Agreeing on the mediator or mediators or the precise process in advance avoids the delays that quarrels about these issues can generate. See Harold I. Abramson, supra note 8 at 26. Advance designation of mediators allows using them to help resolve problems when controversies first arise and before they ripen into disputes and conflicts. See Walter G. Gans, supra note 8, at 54. Most organization’s rules include provisions on mediator selection. Kathleen M. Scanlon, supra note 44, at 2.18. CPR, for example, provides that if parties cannot promptly agree on a mediator, they will notify CPR of their need for assistance. Id. Choosing mediators that are trained to deal with cultural differences and use approaches that fit the cultural needs of the parties helps ensure that these barriers to agreement are successfully traversed. Culturally Suitable Mediator, supra note 256, at 392; see notes 260-266 supra and accompanying text.

313 F. Peter Phillips, supra note 157, at 8. Definite time frames accomplish management efficiency objectives, Kathleen M. Scanlon, supra note 44, at 2.17. They also dampen inclinations reluctant parties might have once disputes arise to either avoid mediating or using the process to delay adjudicating unduly. Harold I. Abramson, supra note 8, at 326.
Arranging arbitration as a fall back if not all issues are resolved at mediation provides an adjudication shadow that helps parties act more reasonably when mediating, and gives them alternative outcome predictions to use to measure agreement options.

The difficulty securing agreement to mediate causes many businesses to use adjudication. Contracting for a two stepped dispute resolution approach of first mediating and then arbitrating before disputes arise surmounts significant obstacles stemming from difficulties generating agreements to mediate once conflicts occur. Creating this contract obligation commits companies to mediating, and prevents one disputant from vetoing use of this potentially valuable process even though others want to do so.

American courts generally conclude that pre-dispute agreements to mediate are enforceable. Pre-dispute agreements obligate parties only to sit down together to discuss the

---

314 Kathleen M. Scanlon, supra note 44 at 2.16 (sample two-step mediation and arbitration clause).
315 The Neutral as Case Manager, 22 Alternatives to the High Costs of Litigation 49 (April 2004). If arbitration is the back-up, settlement agreements that result can be incorporated into consent arbitration awards when then can be enforced under the relatively reliable New York Convention. Harold I. Abramson, supra note 8, at 327. Presumably this will also work in Latin America under the Inter-American Convention on Commercial Arbitration which is similar to the New York Convention in many respects. Nadia de Araujo, supra note 17, at 51.
316 Appropriate Corporate Dispute Resolution, supra note 37 at 24-25. The unwillingness of opposing parties to agree to mediate was the principal reason companies did not use mediation, and was identified as a barrier to mediation use by 75.7% of 606 companies surveyed. Id at 26.
317 See, e.g., Harold I. Abramson, supra note 8, at 324 (usually not in the mood to think about dispute resolution creatively when deals go sour); Walter G. Gans, supra note 8, at 54 (suspicion sets in after conflicts arise); F. Peter Phillips, supra note 172, at 8 (few disputants likely to agree to mediate if suggestion is made after disputes arise);
318 Sticky Defaults, supra note 60, at 101 (if one participant has a preference for something other than mediation, such as arbitration, litigation, or delay, it prevails absent a contract obligation or judicial mandate).
319 Kathleen M. Scanlon & Adam Spiewalk, ADR Counsel in a Box, No. 7, at 1 (May 2001); see Semco L.L.C. v. Ellicott Machine Corp. Int'l, 1999 U.S. Dist LEXIS 10710 (E.D. La 1999) (granting preliminary injunction preventing premature invocation of arbitration contrary to contract term requiring mediation first). Specific enforcement and contract breach damages have been allowed. Kathleen M. Scanlon & Adam Spiewalk, supra at 1. In the mid-1990s, members of the Brazilian Supreme Court disagreed about whether agreements to arbitrate future disputes could be specifically enforced. Nadia de Araujo, supra note 17, at 53. One Minister advanced “the dubious theory” that enforcing such clauses violated “the right to access to justice.” Id.
dispute, they do not require them to reach agreement.\textsuperscript{320} Frequently these discussions either resolve some or all of the disputed issues, or allow efficient design of subsequent arbitration.\textsuperscript{321}

Businesses and their lawyers often spend little or no time discussing how they will handle disputes after transborder deals begin.\textsuperscript{322} Several common negotiation dynamics mitigate against negotiating stepped mediation first then arbitration clauses in transborder commercial contracts. These include time pressure and desire to close deals once economic issues, transaction terms, and other relevant conditions are completed.\textsuperscript{323}

Dispute resolution clauses are sometimes called “midnight clauses” because negotiators leave them until then end, and then, late in the evening or early the following morning, simply use boilerplate arbitration language.\textsuperscript{324} Negotiating thoughtful stepped clauses takes time and money.\textsuperscript{325} This may influence some business persons and lawyers to view boilerplate arbitration clauses as default terms and part of a status quo, and trigger a cognitive bias in favor of preferring status quo approaches over alternatives.\textsuperscript{326}

\textsuperscript{320} Commercial Arbitration At Its Best, supra note 14, at 14.
\textsuperscript{321} Id; Stephen P. Younger, supra note 116, at 953; see Julie Barker, supra note 38, at 10; Penny Brooker & Anthony Lavers, supra note 56, at 200. Process design decisions that can result include facilitating information exchange and selecting arbitrators. Id. Pre-adjudication mediation has been described as a risk-free process. Involving Business Managers, supra note 43, at 154.
\textsuperscript{322} Commercial Arbitration At Its Best, supra note 14, at 6; see Walter G. Gans, supra note 8, at 52 (companies rarely consciously think through dispute resolution at time deals are negotiated); F. Peter Phillips, supra note 157, at 8 (too few commercial contracts include stepped clauses).
\textsuperscript{323} Commercial Arbitration At Its Best, supra note 14, at 6. The desire to close deals sometimes mitigates against using stepped dispute resolution clauses because the time it takes to negotiate them delays closure on the deal. Involving Business Managers, supra note 43, at 158.
\textsuperscript{324} F. Peter Phillips, supra note 157, at 8. Dispute resolution clauses are often viewed by lawyers and their clients as boilerplate provisions, and most have been for arbitration. Donald Lee Rome, supra note 292, at 159. Typical dispute resolution clauses are boilerplate constructions that often turn out to be totally unsatisfactory for many businesses and commercial contracts. Id.
\textsuperscript{325} Sticky Defaults, supra note 60, at 93. Using a stepped dispute resolution clause rather than a default, boilerplate arbitration provision involves transaction costs associated with considering additional options, negotiating, and drafting. Id.
\textsuperscript{326} Sticky Defaults, supra note 60, at 93. As one scholar has noted, “because the standard arbitration clause is so simple, straightforward, and well-known,” lawyers and business representatives are reluctant to deviate from it. Thomas E. Carboneau, supra note 47, at 202-03. This bias is partially explained by tendencies to see defaults as entitlements from which it is difficult to depart. Id; see Russell Korobkin, supra note 122, at 84. A related influence is a general preference for inaction over action. Id at 94; see Russell Korobkin, supra note 122, at 1585.
Relationship concerns often inhibit negotiating stepped dispute resolution clauses. Business persons and lawyers completing a deal often experience reluctance to introduce what might be perceived as negative perspectives into discussions with their prospective partners. Business persons and lawyers may also suffer optimistic overconfidence by expecting that no serious, future disputes will arise. Remembering that perfect contracts do not exist, and the best time to realize the benefits of avoiding adjudication in case disputes arise is when deals are made originally, counters this bias. Explicitly discussing that the best time to plan efficient dispute resolution is when parties share forward thinking, optimistic, good will, and high hopes also helps. If reluctance to discuss mediation is encountered, tactfully expressing concerns about this hesitation in light of commitments to do business together often disarms it.

Negotiating agreement to mediate after disputes arise, while possible, is difficult. These requests often confront another cognitive bias, a negative reaction stimulated by the adversarial relationship that now exists because of disputes. Called reactive devaluation, this cognitive bias suggests that evaluations of proposals in dispute resolution change depending on their source. Proposals to try mediation may generate this response, particularly from disputants unfamiliar with neutral assisted negotiation. Unfamiliarity with mediation makes

327 Commercial Arbitration At Its Best, supra note 14, at 6.
328 Id. (new business partners frequently have optimistically overconfident expectations for their relationship); see generally notes 101-106 supra and accompanying text.
329 See F. Peter Phillips, supra note 157, at 8.
330 See Harold I. Abramson, supra note 8, at 324; Walter G. Gans, supra note 8, at 52.
331 Involving Business Managers, supra note 43, at 159.
332 Commercial Arbitration At Its Best, supra note 14, at 17.
333 Parties may devalue a proposal received from by someone perceived as adversary even if they would deem acceptable an identical suggestion or offer if suggested by a neutral or an ally. Robert H. Mnookin, et al., supra note 66, at 165.
334 Id.
335 Sticky Defaults, supra note 60, at 97.
the adversary’s intentions for proposing assisted negotiation harder to discern, and this adds to
tendencies to devalue and reject it.\footnote{Id.}

American business persons and lawyers may encounter additional difficulties proposing
mediation after disputes arise. American processes and procedures are generally disfavored and
feared in many countries of the world.\footnote{See ADR and the 21st Century Law Firm, 16 Alternatives to the High Costs of Litigation 47 (March 1998).} Mediation’s use of neutral-assisted negotiation is used
much more frequently in American domestic disputing than it is used elsewhere in the
Americas,\footnote{Stephen K. Anderson, supra note 8, at 58 (America leads other countries in its frequency of mediation use).} and this makes it easier to perceive this process as “American.”

In addition, many countries in the Americas have resisted efforts to import American
ideas about mediation without change.\footnote{See Mediation in Costa Rica, supra note 57, at 26-27.} Proposals to use mediation coming from Americans
must avoid implying that their domestic approaches to and experiences with this process are the
right ways to think and act.\footnote{See John Paul Lederach, supra note 2, at 38; Mediation in Costa Rica, supra note 57, at 26.} Substantial evidence suggests that American models of conflict
resolution are based on assumptions that do not coincide with the cultural traditions and
behavioral influences of persons in Latin America to whom they are presented.\footnote{John Paul Lederach, supra note 2 at 51; Mediation in Costa Rica, supra note 57, at 26. U.S. mediation models are
not uniformly accepted in Latin America. Walter A. Wright, supra note 35, at 60.} For example,
one of the Chamber of Commerce-initiated commercial mediation centers developed in Boliva
objected to “the Harvard model” of dispute resolution because it did directly transfer to Bolivian
commercial expectations and experiences.\footnote{Anthony Wannis-St John, supra note 280, at 340.} Negotiators facing these and other challenges
might seek the intervention of an independent third party to suggest mediation to all
disputants.\footnote{Commercial Arbitration At Its Best, supra note 14, at 18.} Sometimes arbitrators perform this role.\footnote{Id. Rule 18 of the CPR Arbitration Rules, for example, provides that with parties consent, the arbitration tribunal
may arrange for mediation at any stage of proceedings. Id.}
Conclusion

Mediation is not, by itself, a panacea for resolving transborder commercial disputes. Mediation is a simply a process tool, and its value ultimately depends on how businesses and their lawyers use it.\textsuperscript{345} When used appropriately\textsuperscript{346} as an opportunity to embrace interest-based negotiating seeking the best outcomes parties are willing to create to avoid the additional time, expense, and uncertainty of arbitrating,\textsuperscript{347} mediation often produces relatively quick, inexpensive solutions that honor business needs and concerns.\textsuperscript{348}

Regional trade agreements typically neither prohibit nor particularly encourage mediation. NAFTA, for example, does not specifically authorize ADR mechanisms except for inter-country disputes about interpretation and application, and investment disputes.\textsuperscript{349} NAFTA and CAFTA encourage the use of arbitration and other means of ADR for the settlement of international commercial disputes.\textsuperscript{350} Their provisions do not mention mediation specifically except in sections listing processes respective commissions might use after party negotiations fail.\textsuperscript{351} By failing to mention mediation more prominently, these trade regimes affirm the prevailing bias in favor of arbitral adjudication.\textsuperscript{352}

\begin{itemize}
\item \textsuperscript{345} Craig A. McEwen, supra note 54, at 3; see International Mediation, supra note 3, at 7.
\item \textsuperscript{346} Some express concern that in the international area, parties represented by counsel have frequently used mediation merely for strategic advantage. Commercial Arbitration At Its Best, supra note 14, at 324; see Penny Brooker & Anthony Lavers, supra note 56, at 203-11 (describing inappropriate uses of mediation in UK); Attorney Truthfulness, supra note 123, at 134-37 (estimating attorney lies about interests and priorities in American mediation). All of this stems from adversarial thinking and actions flowing from fixed pie and zero-sum cognitive biases. One survey showed that win-lose thinking strongly influences reasons lawyers give for not choosing mediation, including factors such as fear of disclosing strategy and conveying weakness. CPR Meeting Survey Finds Mediation is Top ADR Choice, supra note 31, at 98.
\item \textsuperscript{347} See Lawrence M. Watson, supra note 248, at 15 (ultimate goal of mediation is to put parties in position to make the best meaningful choice between accepting best settlement option available and initiating or continuing adjudication).
\item \textsuperscript{348} See Walter G. Gans, supra note 8, at 53 (legal remedies are often too draconian; suing someone rarely serves business goals).
\item \textsuperscript{349} L. Richard Freese, Jr., & Robert Spagnola, supra note 19, at 61.
\item \textsuperscript{350} Stephen K. Anderson, supra note 8, at 59.
\item \textsuperscript{351} See NAFTA Chapter 20, Art. 2007 (Commission-Good Offices, Conciliation, and Mediation); CAFTA Chapter 20, Art. 20.5 (same).
\item \textsuperscript{352} Stephen K. Anderson, supra note 8, at 58.
\end{itemize}
Exposure through trade regimes to countries with well-developed mediation systems have helped other nations learn the value of assisted negotiation. Adding mediation provisions to international treaties in the Americas can provide a positive influence developing the process in Latin American countries where it is not yet well established. While not mentioning mediation or conciliation specifically, the MERCOSUL integration treaties allow aggrieved parties to participate in assisted-negotiation mechanisms before arbitration. Doing this communicates that mediation is a serious option. Commentators have noted how helpful it would be to have NAFTA, CAFTA, MERCOSUL, and other regional trade bodies adopt provisions suggesting stepped dispute resolution that begins with mediation.

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

353 Mediation in Latin America, supra note 15, at 427. MERCOSUL exposed Brazilian companies to corporations in Argentina who have extensive experience with domestic mediation of commercial disputes. Id. Similarly, Mexican companies can learn from interactions with American corporations through NAFTA. Id. These interactions have also helped mediation organizations form in Brazil and Mexico. Id.
354 See id. at 427.
355 A comprehensive analysis of dispute resolution in MERCOSUL concluded that it does not mention mediation or conciliation although private disputants can participate through consultations with MERCOSUL’s trade commission. Nadia de Araujo, supra note 17, at 26, 36.
357 Id. The globalization and regionalization of trade law is stimulating new interest in mediation. Global Trends in Mediation, supra note 3, at 6.
358 Stephen K. Anderson, supra note 8, at 60. Further reforms of regional trading bloc procedures to trigger greater use of mediation to meet the needs of international trade are needed. See International Mediation, supra note 3, at 13.
This decision to arbitrate rather than mediate, like many others negotiators make, often seems sub-optimal in hindsight.\textsuperscript{359} This article analyzes several strategies for making the often more optimal choice to mediate before adjudicating. Is arguing that more mediation should occur appropriate, or is this claim, too, the inevitable result of selective and partisan perception and optimistic overconfidence?

\textsuperscript{359} See Rober S. Adler, supra note 66, at 774.