# Cross border construction dispute mediation

Chris Lenz[1]

**Abstract**

Cross-border mediation involves diverse cultures. Mediators are not trained about their characteristics. This research paper considers an hypothetical practical cross-border mediation involving participants from Germany, Australia and the United Kingdom.

Firstly, consideration is given to the prominent issue regarding some legal issues associated with cross-border mediation. Secondly, the more important consideration of cultural characteristics of the different participants in the mediation, including the mediator are considered in some detail.

By using the hypothetical scenario, the characteristics of, and likely responses of the various participants are put forward to demonstrate how a mediator may take these into account in successfully mediating.

## Introduction

This research paper embodies a cultural theme throughout which is considered important for mediation, about which mediators are not given much training. An hypothetical set of facts are used to provide context for an analysis of some transnational[2] legal issues surrounding mediation. It then considers some of the cross-cultural issues in mediation.

The reason for the focus on culture in this paper is that it drives human behaviour at an individual, group and national level, and it is not an aspect covered in mediation training in Australia. Given that mediation sets out to resolve conflict between two or more parties or groups, an analysis of this aspect may inform mediators to study this vitally important topic.

The hypotheticals are divided into two scenarios.

(a) *First scenario* - the German lawyers are analysing the law surrounding cross border mediation in Germany strategically for a mediation agreement;

(b) *Second scenario* - a conflict has arisen between the parties, and the appointed mediator should consider cross cultural issues in her approach to the mediation.

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[1] Chris Lenz BSc(Eng) LLB (Hons) MBA LLM.

[2] Nadja Alexander, *International and Comparative Mediation: Legal Perspectives, Global Trends in Dispute Resolution* (Wolters Kluwer, 2009)21, 22.

**Background facts**

**First Scenario**

A *Mittelstand* German tunnel boring machine company (*Bohrer*) from Düsseldorf, is tendering for work with an Australian construction company (*Digger*), to supply and operate 2 tunnel boring machines (**TBM**) for a proposed new cross-rail tunnel in Brisbane.

In addition, Bohrer expects to carry out further projects in Australia, because several other tunnels are planned during the next 30 years. Whilst it has an enviable reputation worldwide, it needs to develop relationships with the contractors who are likely to carry out the construction of these tunnels.

Digger is well established in Australia and started in Queensland by 2 entrepreneurial Australian engineers. However, it has been recently taken over by a large British construction company (*Imperial*) in a hostile takeover in which there were court proceedings. This angered the founders, Bruce and Dave, who grew the company from scratch. They have agreed to build this cross-rail tunnel, as their last job before they retire, and they must report back to Imperial's board in London.

Digger's solicitors advise that the head contract with the Queensland Government only requires the subcontract to be made in Queensland. Digger intends remaining in the Australian marketplace, and needs TBM's for some of the large future projects.

Bohrer had problems with two previous tunnel projects in the USA in which it never recovered any money. Its witnesses had to travel from all over the world to give evidence in the USA, which cost Bohrer dearly in lost productivity and personnel who left the company. Bohrer's senior personnel for this project will be those who had worked in the USA.

Bohrer also recently had an unpleasant experience with mediation in Germany where a Judge conciliated a dispute it had with a Munich supplier. It felt that it had been pushed around by the judge (*Güterichter*) who was a Bavarian, and the result angered the family shareholders.

To not repeat those bitter experiences, Bohrer wants a mediation agreement in the contract, to reduce business disruption and maintain good relations with Digger. They have asked their German lawyers to consider whether mediation could be used, and still comply with German law.

**Second Scenario**

During the construction of the first tunnel under the Brisbane River, it drilled into very soft and saturated marine clays which had a significant adverse impact upon the productivity of the TBM machines, and markedly increased costs. When Bohrer lodged a claim for its increased costs, Digger disputed the claim which triggered mediation.

The appointed mediator, Elizabeth, who is an Australian professionally qualified engineer and practicing lawyer and NMAS accredited mediator needs to consider:

(a) the influence of any cultural differences on how the parties and she herself will conduct themselves in the forthcoming mediation; and

(b) the attendance of Imperial as the new owner of Digger in the mediation.

## Research issues

### First Scenario

There are chapters in Hopt[3] providing an up-to-date comparative Law perspective about the principles and regulation of mediation in Germany (*Tochtermann*) and in Australia (*Magnus*). However, they did not deal with some of the underlying German cultural issues, which Alexander grappled with in 1999.

### Mediation definition

Tochtermann says the German mediation definition was adopted from the USA, now enacted in section 1(1) of the *Mediationgesetz* as a, '*Confidential and structured procedure*, in which *parties voluntarily and on their own responsibility try to achieve an amicable resolution of their conflict with the support of one or more mediators*.'

Magnus[4] explains there is no statutory definition of *mediation* in Australia. Boulle[5] had difficulty defining *mediation*. However, Australia has a voluntary National Mediator Accreditation System (**NMAS**) and the NMAS Standards 2.1[6] state:

> *'A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.'*

Whilst this NMAS definition does not describe any particular metamodel[7], Practice Standard provides:

> *'The mediator has no advisory or determinative role in regard to the content of the matter being mediated or its outcome.'*[8] *However, 'If a mediator, upon request, uses a 'blended process' model, such as evaluative mediation or conciliation, this process must be the subject of clear consent normally through a mediation or similar agreement.'*[9]

Both countries therefore, have a similar concept and definition of mediation.

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[3] Klaus J Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford Scholarship Online, 2013).

[4] Ulrich Magnus, *Mediation in Australia: Development and Oroblems, Mediation: Principles and Regulation in Comparative Perspective* (Oxford Scholarship Online, 2013).

[5] Lawrence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) 13-30.

[6] Mediator Standards Board, *National Mediator Accreditation Standards: Practice Standards* (March 2012) <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf> Practice Standard No 2.

[7] Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97.

[8] Mediator Standards Board, above n 6, Practice Standard No 10.

[9] Ibid 10(5).

**Germany**

Alexander (1999) developed an hypotheses of six factors preventing the adoption of mediation in Germany[10], which she contrasted with Australia. These included:

(a) the German legal tradition which focused on people's rights, including the right to the justice system[11] (Hypothesis 1);

(b) the efficiency of the German justice system[12] (Hypothesis 6); and

(c) the legal profession's tradition considering what was permissible and not permissible.[13] The stereotype of the German abiding by *die Regeln*, springs to mind.

This analysis suggested several practical and cultural differences between mediation in Australia and Germany.

**Mediation location and agreement**

Bohrer's management has already decided that any mediation should be conducted in Brisbane, because that is where the project is situated, and the subcontract must be made in Queensland. Whilst the choice of law issue is open, Bohrer does not want to complicate the negotiations with this issue. Its lawyers therefore need to consider the legal position of cross-border mediation in Germany, to ensure that the Brisbane mediation complies with German law.

This raises the issue of Bohrer's lawyers possibly having a bias in favour of the status quo relying on Germany's Justice System, because they are part of a professional group, and every group creates culture.[14] Gert J Hofstede says, 'People have cognitive biases about themselves and about the groups to which they belong.[15]'

Furthermore, they may have a cultural bias, because the *Mediationgesetz* 2008/52/EC[16] is relatively new. Germany's Hofstede's Uncertainty Avoidance of 65[17] (which Hofstede says is at the high end), compared to Australia's 51, suggests that culturally the lawyers (who anecdotally are a risk-averse profession in any event), may be anxious about the uncertainty associated with mediation in another country. However, with private law mediation in Germany in its infancy and therefore also uncertain, the lawyers (influenced by Kant, Hegel

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[10] Nadja Alexander, *Wirtschaftsmediation in Theorie und Praxis*, Reihe II: Rechtwissenschaft Series II (Peter Lang, 1999) 7.

[11] Ibid 8.

[12] Ibid 11.

[13] Ibid 9.

[14] Gert Jan Hofstede, 'Culture's causes: the next challenge' (2015) 22(4) *Cross Cultural Management* 545, 549.

[15] Ibid 547.

[16] Peter Tochtermann, *Mediation in Germany: The German Mediation Act-Alternative Dispute Resolution at the Crossroads, Mediation: Principles and Regulation in Comparative Perspective* (Oxford Scholarship Online, 2013).

[17] Geert Hofstede, *Geert Hofstede: Research* <https://geert-hofstede.com/research.html> 2.

and Fichte[18]) may avoid any inductive approaches, and advise their clients against mediation anywhere.

This recommendation is unlikely to be accepted by Bohrer, and they are obliged to advise Bohrer about the benefits of ADR[19] citing sections 1(3) of the BORA[20]. However, Tochtermann said that it was doubtful that this would alter the attitude of lawyers to mediation[21]. This is possibly another example of culture raising its head again. The lawyers will be at any mediation.

It would be useful for them to use Alexander's *Content of Mediation Laws*[22] framework[23] because it provides an objective mechanism to view a regulatory mix under various categories, which may reduce the influence of small-group bias. Whilst the framework is shown below, it has not been overly populated by analysis, because only certain aspects need consideration.

The essential issue is whether a mediation agreement for cross-border mediation contravenes German law, and given that the EU Directive expressly deals with cross border mediation, which the *Mediationgestez* enacted, there is no contravention. Tochtermann says that the parties are free to select any mediator, and Elizabeth is obliged by section 3(5) of the *Mediationgestez*, if requested, to inform about her professional background, training and expertise.

**Germany**

| | **A**<br>**Marketplace / private contract** | **B**<br>**Institutional / industry regulation** | **C**<br>**Court regulation** | **D**<br>**Case law / General legal principles** | **E**<br>**Legislation** |
|---|---|---|---|---|---|
| 1.Triggering | In agreement – If not individually negotiated – subject to sections 305 of the *Burgerliches Gesetzbuch* – unfavourable | | | | |

[18] Ibid.

[19] Tochtermann, above n 16, 534.

[20] *Berufsordnung fur Rechtsanwalte*.

[21] Ibid, 534.

[22] Nadja Alexander, *Harmonisation and Diversity in the Private International Law of Mediation, Mediation: Principles and Regulation in Comparative Perspectiv*e (Oxford Scholarship Online, 2013) 21.

[23] Nadja Alexander, 'Mediation and the Art of Regulation' (2008) 8(1) *QUT Law & Justice Journal* 1.

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|---|---|---|---|---|---|
| | contract terms.[24] | | | | |
| 2. Process | Not binding and Elizabeth cannot make a decision.[25] | | | | Specifically avoids a code for the mediation procedure.[26] Elizabeth may caucus if they consent.[27] However, she is not a Güterichter, so may not be able to evaluate, but it is unclear.[28] |
| 3. Accreditation and practice standards | | | | | *Mediationgesetz* sections 9-13[29] provides requirements, and Elizabeth would fit within these with her qualifications. |
| 4. Rights and obligations | In agreement | | | | s4 *Mediationgesetz* Confidentiality for mediator and parties |

*The Mediation Regulation Mix: Nadja Alexander (Real conflict coaching) 2015*

[24] Tochtermann, above n 16, 538.

[25] Ibid, citing P. Tochtermann, *Die Unabhängigkeit und Unparteilichkeit des Mediators*, 126.

[26] European e-Justice Portal, *European e-Justice Portal: Germany*, 2.

[27] Tochtermann, above n 16, 553.

[28] Ibid.

[29] *(Zivilrechts-Mediations-Gesetz - ZivMediatG)*

*StF: BGBl. I Nr. 29/2003 (NR: GP XXII RV 24 AB 47 S. 12. BR: AB 6780 S. 696.)*

The upshot of this analysis is that from the German law perspective:

(a) cross border mediation is allowed;
(b) the mediation agreement needs to be specifically negotiated, which would happen in any event;
(c) Elizabeth would need to satisfy the sections 9-13 *Mediationgesetz* mediator qualification requirements;
(d) Elizabeth should be asked to provide her qualifications and experience, to satisfy the lawyers;
(e) Elizabeth and the parties are bound by confidentiality; and
(f) Elizabeth can use her own mediation model, but it is not clear whether she can be evaluative.

The author did not analyse whether the advent of the EU Directive[30] and the *Mediationgesetz* 2008/52/EC[31] had positively responded to Alexander's concerns. This could have demonstrated that a notoriously difficult cultural change[32] may have occurred at the shallow organisational level[33] of the lawyers and the legal system over 17 years. Further discussion about culture will take place, when Elizabeth considers the forthcoming mediation.

**Mediator's conduct and model**

Whilst this will be considered below, NMAS Standard 10 requires Elizabeth to seek consent of the parties if she decides that being evaluative, at least at some stage, is preferable. Lenz has postulated in construction disputes that this is not without risk[34] depending on the timing of that decision to become evaluative.

**Second scenario - Cultural differences**

The analysis will focus on culture, which influences communication[35], and communication in mediation is its lifeblood. Moore[36] identifies that communication plays a vital role in conflict, and may be a cause, contributing factor, or both to its escalation, de-escalation, or resolution (author's underlining).

Elizabeth needs to be aware of the cultural differences between Germans, Australians, British, and small groups, as well as herself, to plan and implement a successful mediation process. The reason for considering the British aspect is that Bruce and Dave have endured a messy takeover by *Imperial,* such that their short-term cultural Australian orientation, is likely to be exacerbated by their painful experience.

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[30] *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*.

[31] Tochtermann, above n 16.

[32] Hofstede, above n 17, 548.

[33] Ibid 556.

[34] Chris Lenz, 'Is evaluative mediation the preferred model for construction law disputes?' (2015) 31 *Building and Construction Law Journal* 134.

[35] Carley H Dodd, *Dynamics of Intercultural Communication* (McGraw Hill, 5th ed, 1998).

[36] Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey Bass, 4th ed, 2014) 143.

Elizabeth is likely to be considering the facilitative model because of her training, and the NMAS requirements.

Barkai[37] used the definition of culture as '*the total accumulation of an identifiable group's beliefs, norms, activities, institutions and communications patterns.*' Dodd explained culture's influence on communication, which is so important in mediation, and it is useful for Elizabeth to appreciate that culture:

(a) teaches significant rules, rituals and procedures;

(b) reinforces values; and

(c) teaches relationship with others – roles and expectations.[38]

Cohen, a negotiator, advised that a one sentence definition of *culture* could only mislead, and he suggested that it had three key aspects:

(a) a quality not of individuals, but of a society of which individuals are a part;

(b) acquired; and

(c) unique.[39]

Barkai[40] and Lee[41] both considered the issue of culture in the mediation process. Barkai was considering the issue from the mediator's point of view, whereas Lee was considering it from the perspective of the appropriate mediation framework. Both are important for Elizabeth.

Both authors referred to *Hofstede's Cultural Dimensions*, so they are important to use. Hofstede's on-line charts were also very easy to use, but the anomaly about Germany long-term orientation (**LTO**) discovered below, means that caution must be applied in their use. Hofstede's research has been followed up in their *Software of the Mind* (2005),[42] which goes beyond countries to organisations as well. In this text, values are described[43] to include:

(a) evil v good;

(b) forbidden v permitted;

(c) decent v indecent;

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[37] J Barkai, 'What's a Cross Cultural Mediator to do? A low-context solution for a high–context problem' (2008) 10 *Cardozo Journal of Conflict Resolution* 43, 45.

[38] Dodd, above n 35.

[39] Raymond Cohen, *Negotiating across cultures* (United States Institute of Peace Press, 2004) 11.

[40] Barkai, above n 37.

[41] J Lee, 'Culture and its importance in Mediation' in Danny McFadden and George Lim (ed), *Mediation in Singapore: A Practical Guide* (Sweet & Maxwell, 2015).

[42] Geert Hofstede and Gert Jan Hofstede, *Cultures and Organisations: Software of the Mind* (McGraw-Hill, 2nd ed, 2005).

[43] Ibid 8.

(d) moral v immoral;

(e) unnatural v natural;

(f) abnormal v normal;

(g) paradoxical v logical; and

(h) irrational v rational.

Deep culture, acquired in infancy, cannot be changed since it resides in unconscious shared values,[44] but it is appreciated that national 'deep culture' is not the only driver of parties' behaviour. However, the core of culture is formed by values, which are acquired early in life, after which a person absorbs symbols, recognises heroes and adopts rituals (all known as practices), which surround those values.[45] The later-acquired aspects of culture can be changed.[46]

**Barkai**

Barkai referred to Hofstede's updated text and relied on Edward Hall, regarding high and low – context communication[47] for the mediator's mediation framework. Hall's book considers American culture extensively, so a comparison is made between Hofstede's Australian and USA culture, to see if one can directly apply Hall's culture theories to Australia. As can be seen below, Australia and America's characteristics are closely aligned, with only slight differences. Accordingly, it can be expected that Australia would also be considered a low-context communication culture.

Barkai stated that high and low-context communication differences were probably the single most important cultural difference in many cross-cultural mediations.[48] He explained that in low-context cultures, people communicate directly and explicitly and rely on verbal communication, as opposed to non-verbal communication to express themselves (high context).[49]

He referred *to Cohen who* explained the low context communication style of the USA as, *'A can-do, problem-solving spirit, assuming give-and-take, and influenced by Anglo-Saxon legal habits'*.[50] Cohen[51] also suggested that these were characteristics of a universal paradigm of rational negotiations.

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[44] Hofstede, above n 17, 548.

[45] Hofstede, above n 17, 7.

[46] Hofstede, above n 17, 556.

[47] Edward T Hall, *Beyond culture* (Anchor Books, 1977).

[48] Barkai, above n 37, 56.

[49] Ibid 56.

[50] Ibid 57.

[51] Cohen, above n 38, 216.

Fortunately for Elizabeth, none of the parties fall within a collectivist high-context culture, so negotiations are expected to be blunt and direct, i.e. low-context.

Elizabeth, as an Australian, engineer and lawyer is also likely to be a low-context communicator. Fortunately for her, all parties are also likely to be low context, being from the Western world. However, there are likely to be high-context communications taking place within the mediation between Bruce and Dave, Bohrer's personnel and Imperial's Board members, which will not be shared with the other groups, because they are 'outsiders'[52] relative to one another.

Some of these high-context communications may be difficult for her to follow. However, Elizabeth is in an unusual position of being both and engineer and lawyer, so she may communicate with the parties' lawyers and engineers in a high context fashion, because she could be considered by the other engineers and lawyers (separately) to be a professional insider.

High-context communication may assist the process in certain respects, but may alienate those not within that *insider* group, during the mediation, if used at the wrong time in front of another *outsider* group. She should therefore confine high-context communication to meeting privately with the parties, or with their respective engineers jointly, or lawyers jointly, to explore settlement options.

Hofstede's Dimensions of German and Australian culture[53] are not at opposite ends of the continuum. However, Barkai's Hofstede's chart on page 79[54] for the long-term orientation, showed Germany with 31, whilst in the author's research, it had increased to 83! This is considered an anomaly, because deep culture (national culture) only changes over generations.[55] The comparison between Germany and the UK, as well as Australia and the UK, and Australia and the USA are also displayed below.

Elizabeth may use the national cultures when initially considering her mediation approach, particularly regarding intake, but it should not be the only or prevailing culture to consider, but rather the starting point to her planning and conducting the mediation.

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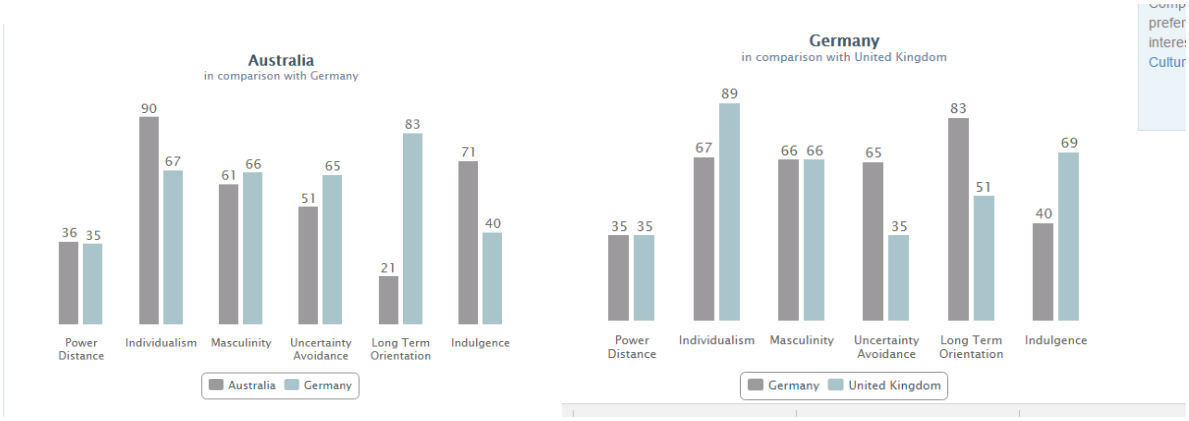
[52] Barkai, above n 37, 57.

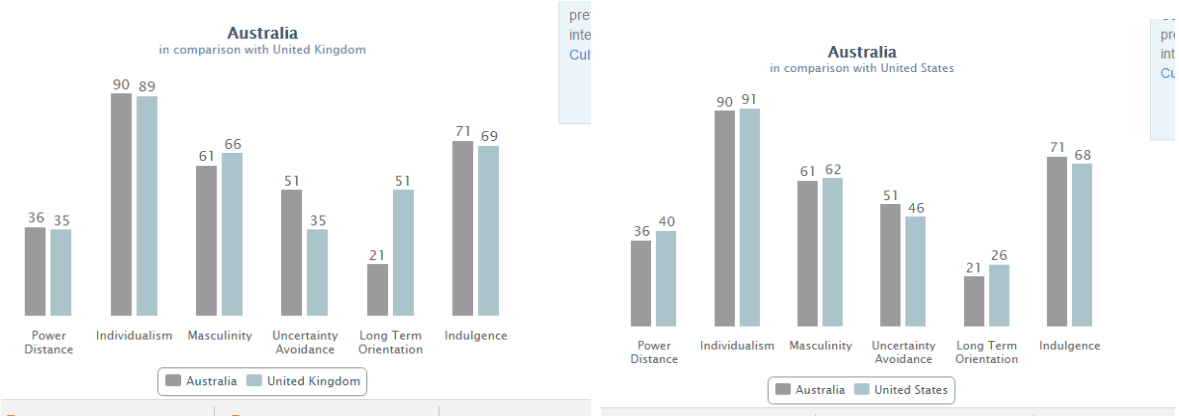
[53] Hofstede, above n 17.

[54] Hofstede, above n 17.

[55] Hofstede, above n 17, 556.




*Hofstede's comparison: https://geert-hofstede.com/australia.html*




*Hofstede's comparison: https://geert-hofstede.com/australia.html*

It is useful to explain Hofstede's descriptions of each of the first five characteristics, and those of Barkai, because Barkai uses it in the context of mediation, which is very useful for this research. Hofstede's updated text deals with intercultural cooperation, rather than mediation:

(a) *power-distance*: 'The extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally'[56] Barkai called it *respect for the leader or elder*;[57]

(b) *individualism*: 'The ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family'.[58] Barkai called it *respect my freedom*;[59]

[56] Hofstede, above n 17, 46.

[57] Barkai, above n 37, 63.

[58] Hofstede, above n 17, 76.

[59] Barkai, above n 37, 67.

(c) *masculinity*: 'Men are supposed to be assertive, tough, and focused on material success'.[60] Barkai called it *win at any costs*;[61]

(d) *uncertainty avoidance*: 'The extent to which the members of a culture feel threatened by ambiguous or unknown situations'.[62] Barkai called it *respect the law;*[63]

(e) *Long term orientation* – 'The fostering of virtues oriented towards future rewards – in particular, perseverance and thrift'.[64] Barkai called it *sacrifice for the future.*[65]

**Power-distance**

Australia, Germany and the UK, have power distance scores of 36, 35 and 35 respectively. All countries therefore have a low respect for a leader. Elizabeth, if she is a self-perceived high-status individual, may need to adjust her mediation strategy. Gert Jan Hofstede referred to Kemper's Status-Power game which captures the dynamics of everyday social life[66].

Kemper explains that *'…everyone plays the status-conferral game, and the danger occurs when the total status claimed by people sooner or later exceeds the status freely given to them.'* He added that, *'We intend to correct the others to confer upon us the status we think we deserve.' To do so, 'this requires a power-move.'*[67]

Elizabeth should not make any power moves to claim status, which could be a temptation in a heated cross-cultural conflict to assert control over the process; but rather wait for it to be conferred on her, as she patiently reframes the respective parties expected aggressive opening statements (see Masculinity below) and explores underlying interests.

**Individualism**

Australia, Germany and the UK scores of 90, 67 and 89 demonstrate complete congruence between the Anglo cultures, with a Germany significantly less. However, Hofstede[68] classifies the Anglo's as highly individualistic and self-reliant, and Germany as truly individualistic. Germany may have perhaps a tinge of collectivism. However, it is unlikely that these characteristics are likely to inhibit any exploration toward settlement in mediation, because all are self-reliant.

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[60] Hofstede, above n 17, 120.

[61] Barkai, above n 37, 72.

[62] Hofstede, above n 17, 167.

[63] Barkai, above n 17, 74.

[64] Hofstede, above n 17, 210.

[65] Barkai, above n 37, 77.

[66] Hofstede, above n 17, 548, citing Theodore Kemper, *Status, Power and Ritual Interaction; A Relational Reading of Durkeim, Goffman and Collins, Ashgate, Farnham* (Routledge, 2011).

[67] Ibid 551.

[68] Hofstede, above n 17.

**Masculinity**

Australia, Germany and Britain's scores of 61, 66 and 66 respectively are not significantly different. The lower figure for Australia is somewhat surprising, and Elizabeth may find that the Imperial and Bohrer attendees will be the most aggressive negotiators overall.

From the point of view of mediation, this information is likely to be useful to her, because she will be dealing with masculinity competitors, some perhaps more so. However, she cannot consider these factors in isolation. Bruce and Dave's recent painful experience, and their common 'brotherhood' in being co-founders (insiders), could well prevail over their national culture score to render them the most competitive.

Given that all appear to be highly competitive, Elizabeth may have some initial resistance with the facilitative model, which focuses on the underlying interests of the parties, because of the likely posturing at the intake stage. Nevertheless, she should persist with the model, to find out the underlying interests of the parties, and earn the status necessary (see status above) to influence the parties to reach a negotiated settlement.

**Long-term orientation**

Australia, Germany and the UK have scores of 21, 83 and 51. What may emerge with careful exploration is that Bruce and Dave, as short-term cultural Australians, are likely to have an even more short-term view of the dispute, because they are about to retire. Even if a final payout or a bonus to them from Imperial, may be contingent on a successful outcome for Digger in the mediation, i.e. a low payout to Bohrer; it may be that she will need to focus more on Imperial about their LTO in the future relationship with Bohrer.

Germany and the UK's LTO are both above 50. Leaving aside the anomaly about Germany's strangely high score of 83 compared to previous publications of 31; in her discussions and probing, she should be trying to establish the common ground that not only do their respective national cultures have a long-term view, but their organisational cultures may well be aligned long-term as well. This could allow a focus on future interests, rather than the immediate conflict, to negotiate a satisfactory outcome.

If it is the case, that the latest German score of 83 is not correct, indicating that nationally Bohrer has a score of 31, then she would need to establish whether Bohrer indeed has a long-term view of future work in Australia. If it does not, then it may be that positional bargaining may emerge because Bohrer and Bruce and Dave's short-term interests would be in direct conflict. In this event, it may be necessary for her to mediate the conflict between Imperial and Bruce & Dave separately, to achieve an agreement between them that is not contingent upon the outcome of the success of Bohrer's claim.

**Uncertainty avoidance**

Australia, Germany and the UK have scores of 51, 65 and 35. Uncertainty avoidance has been touched on earlier in relation to the German lawyers. Bohrer should be carefully taken through the mediation process by Elizabeth, possible at an early intake private session, so that they can fully understand how the process works, and what sort of things may be expected when the parties have joint sessions. Interestingly, Australia has a score quite a lot higher than the UK, so time should also be spent by Elizabeth explaining the process to Bruce and Dave, so that they are not confronted with strange surprises during the mediation.

**Lee**

Lee suggested that culture was so deeply ingrained within us by the process of socialisation that we often do not realise how we are affected by it,[69] and we simply swim through it like a fish in water His comment that culture was more than rules, etiquette and custom, which were the outward manifestation of the iceberg beneath,[70] is particularly useful for mediators.

He recognised that thinking about culture in terms of frameworks was more useful, and he referred to Hofstede's cultural dimensions and how they may impact upon mediation. He was considering culture from an Asian perspective and he only looked at Power-distance and Individualism/Collectivism on how people choose to communicate and deal with face concerns.[71]

He considered the facilitative interest based model of mediation, and made a distinction between the functional and operational paradigms of the model. He explained that by separating the two:

(a) the *functional paradigm* of the interest-based model of conflict resolution; and

(b) the *operational paradigm,*

AND then instead of considering the:

(a) behaviours of the primacy of the individual, the individual's priority of interests and direct and open communication (the individualistic, low-context, western behaviours); but rather

(b) the behaviours of the primacy of the social hierarchy, proper conduct and high-context communication to preserve harmony and relationships and saving face (the collectivist, high-context behaviours),

THEN the usefulness of the functional paradigm interest based model could be preserved.

The upshot of this for Elizabeth, is that whatever cultural behaviours she may encounter in the mediation, providing she separates the two paradigms, and allows the behaviours of the parties to flow whichever way they may, she may still sail the interest-based ship between the cultural icebergs, and assist the parties to reach a resolution to their dispute.

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[69] Lee, above n 41, 1.

[70] Ibid 4.

[71] Ibid 7.