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ABSTRACT

This Article examines cognitive and cultural barriers creating the relatively infrequent use of mediation to resolve private, transborder commercial disputes in the Americas. It begins by analyzing the challenges presented by transborder commercial litigation. It then presents and supports the claim that international arbitration, the most frequently used transborder commercial dispute resolution method, suffers from many of litigation's disadvantages including excessive expense and delay, loss of outcome control, damaging or ending rather than preserving and improving commercial relationships, and using legalistic, rights-based perspectives that obscure business interest-based solutions.

This Article next examines several cognitive biases that impair rational decision making regarding dispute resolution method selection in transborder commercial disagreements. Analyzing selective and partisan perception, egocentric and optimistic overconfidence biases, and fixed pie and win-lose assumptions, the Article integrates empirical research and anecdotal data to support the claim that these cognitive biases encourage arbitration and discourage mediation. This Article also analyzes ways that American business and legal culture

encourages cognitive biases, which leads disputants toward adjudication and away from mediation, and how other cultural differences generate misunderstandings that contribute to the frequent choice to arbitrate rather than mediate private transborder commercial disputes.

This Article then suggests several strategies for overcoming these cognitive and cultural biases and analyzes how these proposals mirror techniques mediators commonly use to help disputants negotiate effectively. The Article concludes by explaining the currently minimal role in consensual dispute resolution played by formal trade regimes in the Americas and suggests how these provisions could encourage mediation and the effective outcomes this process often produces.

TABLE OF CONTENTS

I. INTRODUCTION

The phrase "Let's talk" captures mediation's approach to dispute resolution and deal making. Best understood as assisted and enhanced negotiation,[1] mediation permits confidential discussion

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1. *See, e.g.*, DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 95 (2006) ("Mediation is a process of assisted negotiation in

directed toward constructive communication.[2] Practiced for centuries and found in most of the world's cultures,[3] mediation provides a simple, relatively flexible process that allows people to talk and negotiate in the presence, and with the assistance, of third persons.[4] Mediators help participants better understand each other, frame problems in ways that transcend partisan perceptions, explore independent and shared interests, and develop solutions that promote mutual gain.[5] Unlike arbitrators and judges, mediators do not make binding decisions.[6] Instead, they help participants develop solutions and stimulate disputants to make better and more mutually rewarding agreements.[7] Mediation often produces outcomes that exceed the narrower, win-lose legal remedies available with arbitrators and judges.[8]

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which a neutral person helps people reach agreement."); CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 266 (2005) (characterizing mediation as a "a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship"); E. WENDY TRACHTE-HUBER & STEPHEN K. HUBER, MEDIATION AND NEGOTIATION: REACHING AGREEMENT IN LAW AND BUSINESS 281 (2d ed. 2007) (characterizing mediation as "facilitated negotiation, assisted negotiation, and moderated negotiation").

2. GOLANN & FOLBERG, *supra* note 1, at 95–96.

3. Virtually all societies have created third-party intervention to help resolve disputes consensually. *See, e.g.*, DAVID W. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS 191 (1992) (noting that the experience of mediation is universal); JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES 93 (1995) (remarking that mediation has universal facets and performs multiple functions in all cultures); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 19–21 (2d ed. 1996) (noting that mediation has a long and varied history in almost all of the world's cultures).

4. *See* EILEEN CARROLL & KARL J. MACKIE, INTERNATIONAL MEDIATION: THE ART OF BUSINESS DIPLOMACY 3–4 (2d ed. 2006) [hereinafter INTERNATIONAL MEDIATION] (remarking that mediation has an ancient history but is still relatively new as a practical, professional dispute resolution approach); GLOBAL TRENDS IN MEDIATION 1 (Nadia Alexander ed., 2d ed. 2006) (noting the recent emergence of mediation in the legal and commercial dispute resolution arena despite its timeless universality).

5. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 27 (3d ed. 2004); MENKEL-MEADOW ET AL., *supra* note 1, at 266–67.

6. MENKEL-MEADOW ET AL., *supra* note 1, at 267 (stating that 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).

7. *Id.* at 270 (noting that mediators help parties craft proposals that respond to and satisfy at least some of every participant's needs).

8. *Id.* 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 270–71.

For these and other reasons, many commercial lawyers and scholars encourage more extensive use of mediation to resolve private transborder commercial disputes.[9] 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.[10] Businesses make substantial investments to create these commercial associations and then often experience the uncertainties that interdependent relationships inevitably produce.[11] Commercial expansion across national boundaries brings conflict as economic and political circumstances change, personality tensions emerge and sharpen, and differing contractual interpretations and other performance related perceptions arise.[12] Disagreements over responsibilities, obligations, performances, and entitlements commonly result.[13]

Efficient methods to resolve transborder disagreements contribute substantially to the growth and success of international

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9. *See, e.g.*, Harold I. Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 ILSA J. INT'L & COMP. L. 323, 327 (1998); Stephen K. Anderson, *Mediation and the North American Free Trade Agreement*, 55 DISP. RESOL. J. 56, 60 (2000); Alexandra Bowen, *The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships*, 60 DISP. RESOL. J. 59, 60 (2005); Walter G. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, 52 DISP. RESOL. J. 50, 52–54 (1997). As two international commercial mediators noted: "In its combination of flexibility alongside a degree of disciplined form, mediation is especially suited to the diversity—cultural, managerial, technical—of global business traffic. It renews time honoured ancient processes of community tribal adjustment at a 21st Century level." INTERNATIONAL MEDIATION, *supra* note 4, at 7. Rather than relying on exhorting parties, settlement, or hinting at what adjudicators will do, contemporary mediation draws on emerging knowledge about negotiation, group dynamics, and decision making. *Id.*

10. Gans, *supra* note 9, at 51. Transnational business involves six primary categories: joint ventures, licensing agreements, subcontracts, management contracts, turn key projects, and financial arrangements. Andrew Sagaratz, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. DISP. RESOL. 675, 675 n.1 (1998).

11. George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective from North America*, 5 ANN. SURV. INT'L & COMP. L. 13, 16 (1999); Eric Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation*, 15 B.U. INT'L L.J. 175, 175 (1997).

12. INTERNATIONAL MEDIATION, *supra* note 4, at 4; Abramson, *supra* note 9, at 324.

13. *See, e.g.*, INTERNATIONAL MEDIATION, *supra* note 4, at 4; Green, *supra* note 11, at 175–76; *see also* Gans, *supra* note 9, at 52 (commenting that negotiations creating transborder commercial relationships and documents reflecting them are unlikely to foresee "the myriad areas of possible conflict and disagreement"). Joint ventures, in particular, tend to have short lives. More than 50% of joint ventures end within five years, and most terminate within ten years. Abramson, *supra* note 9, at 324.

trade.[14] Risks stemming from different cultural practices, expectations, and behaviors compound in transborder commercial relationships, and they make appropriate conflict resolution processes essential.[15] Workable systems of transborder dispute resolution are required for resolving private problems and protecting commercial legal rights.[16] The limited nonviolent dispute resolution menu of avoidance, consensual agreements, and letting outsiders decide through adjudication, litigation, or arbitration[17] has produced an odd result where transborder commercial disputes are frequently resolved through arbitration, while litigation and meditation are seldom used.

No mysteries surround why companies involved in private transborder commercial disputes avoid litigation. Transborder litigation of private commercial disputes adds difficulties, complexities, and inefficiencies to the process,[18] while most businesses value flexible, quick, and inexpensive resolutions.[19] The absence of a regional judicial system in the Americas with power to adjudicate private commercial disputes means that some disputants

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14. Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183, 1187 (2004); Sagaratz, *supra* note 10, at 675.

15. COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 319 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST].

16. *Id.* Dispute resolution systems impact the security of business investments. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 7 (1996). The global economy requires dispute resolution systems that match the flexibility and responsiveness needed for transborder business. INTERNATIONAL MEDIATION, *supra* note 4, at 12. Like U.S. corporations, Latin American businesses are looking for better dispute resolution mechanisms to enhance their growth in the globalized market. Horacio Falcao & Francisco J. Sanchez, *Mediation: An Emerging ADR Mechanism in Latin America*, *in* INTERNATIONAL ARBITRATION IN LATIN AMERICA 415, 424 (Nigel Blackaby et al. eds., 2002) [hereinafter *Mediation in Latin America*].

17. These three nonviolent human dispute resolution options appear to exist in all cultures. 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). It is apparent that business managers the world over do not like conflicts. INTERNATIONAL MEDIATION, *supra* note 4, at 4. Faced with disputes, managers often experience a fight-or-flight reaction and choose either to worsen the situation with other parties by legalized fighting—i.e., adjudication—or to flee the problem by avoiding it and doing nothing. *Id.* at 4–5.

18. 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 (4th ed. 2003); Carbonneau, *supra* note 14, at 1188. Mercosul, the Southern Common Market, has numerous implementing protocols containing procedures designed to reduce the difficulties, complexities, and inefficiencies of transnational litigation among companies based in participating countries. Nadia de Araujo, *Dispute Resolution in MERCOSUL: The Protocol of Las Leñas 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.

19. Gans, *supra* note 9, at 52.

must litigate under a foreign country's legal and procedural rules.[20] This creates enormous opportunities for lawyers to quarrel over whether the courts selected have jurisdiction over disputes and nonresident disputants.[21]

Once jurisdictional issues are resolved, lawyers turn their argumentative talents to quarreling over what substantive law should be applied[22] and how evidence can be identified, gathered, and presented at trial.[23] Private transborder litigation in the United States, for example, presents enormous challenges for non-U.S. litigants, because it requires them to comprehend and manipulate fifty separate sets of state civil procedure rules, the additional overlay of federal rules, and the impact of local rules in both state and federal trial courts.[24] 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.[25] Parties fear "home town justice" from xenophobic tribunals and worry about judicial independence and impartiality.[26] After running this gauntlet, business disputants and their lawyers face substantial challenges in enforcing foreign judgments, often replaying

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20. L. Richard Freese, Jr. & Robert Spagnola, *New Challenges in International Commercial Disputes: ADR Under NAFTA*, COLO. LAW., Sept. 1997, at 61, 62–63; Green, *supra* note 11, at 175.

21. Carbonneau, *supra* note 14, at 1188–89. This often brings numerous, difficult problems resulting from separate lawsuits involving the same parties and issues starting and proceeding in different countries. *Id.*

22. *Id.* at 1189–90. Although not involving the Americas, Professor Carbonneau noted that if the fading actor from California played by Bill Murray in *Lost in Translation* had been involved in an auto accident while in Tokyo 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. Jean-Francois Bourque, *More Self-Administration Seen in International Arbitration,* 15 ALTERNATIVES TO HIGH COST LITIG. 37, 38 (1997).

23. Carbonneau, *supra* note 14, at 1190.

24. *Id.*; Freese & Spagnola, *supra* note 20, at 61. Non-U.S.-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.

25. Carbonneau, *supra* note 14, at 1191.

26. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, 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 16, 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 Stewart Haynes, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 637–38 (2003).

initial jurisdictional disputes.[27] These time-consuming and expensive aspects of commercial litigation flow directly from the fact that dispute-creating events, transactions, and differences cross state borders.[28]

Faced with these daunting realities, lawyers and business decision makers usually turn elsewhere to resolve differences that cannot be resolved through private negotiation.[29] The dispute resolution option most frequently chosen is arbitration—the adjudicatory alternative that, like litigation, relies on outsiders to decide.[30]

Arbitration has emerged as the preferred dispute resolution method in contemporary transborder border disputes,[31] even though

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27. Carbonneau, *supra* note 14, at 1193–94.

28. *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* note 14, at 1188.

29. 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 outside lawyers. Research and experience suggest 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 U.S. federal courts showed that the percentage of cases going to trial has dropped sharply in the past forty years, despite substantial increases in the number of lawyers, the number of lawsuits filed, and the amount of published legal authority. John Lande, *"The Vanishing Trial" Report: An Alternative View of the Data*, 10 DISP. RESOL. MAG. 19, 19 (2004). This Report showed that the civil trial rate in federal courts dropped steadily from 11.5% of filed cases going to trial in 1962 to 1.8% in 2002. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004). Most of the filed disputes that do not reach trial are settled through negotiation and mediation, or abandoned. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING 341 (1990); Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75, 75 n.2 (1985); Don Peters, *Forever Jung: Psychological Type Theory, The Myers-Briggs Type Indicator and Learning Negotiation*, 32 DRAKE L. REV. 1, 2 n.2 (1993).

30. JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY 4 (1997); KOVACH, *supra* note 5, at 7; MOORE, *supra* note 3, at 7; Sagaratz, *supra* note 10, at 692.

31. Abramson, *supra* note 9, at 325; Anderson, *supra* note 9, at 58; Bowen, *supra* note 9, at 60; Gans, *supra* note 9, at 54.

its use has diminished in U.S. domestic commercial disagreements.[32] International commercial arbitration seeks to provide a fair and neutral forum to assess and decide transborder commercial disputes.[33] Compared to private transborder litigation, arbitration may be faster and less expensive, require less involvement by business personnel, afford participants control over the selection of the arbitrator or arbitral panel, and involve less discovery and appellate review.[34]

As an adjudicative remedy, however, arbitration shares many of litigation's disadvantages. Unless it produces a settlement while unfolding,[35] arbitration generates winners and losers.[36] Despite attempts to use decision making processes that respect ongoing business associations[37] and arbitrators' oft-criticized tendency to render compromise decisions,[38] arbitration more often ends—rather

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32. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 5 (noting survey of in-house counsel and outside lawyers they employ reflected a marked preference for mediation over arbitration); David Lipsky & Ronald Seeber, *In Search of Control: The Corporate Embrace of ADR*, 10 U. PA. J. LAB. & EMP. L. 133, 140 (1998) (noting that support of arbitration among corporations is not as strong as support for mediation); Thomas C. Waechter, *Survey Says: Litigants Like What They See in Mediation*, 22 ALTERNATIVES TO HIGH COST LITIG. 93, 93 (2004) (reporting a survey of thirty-two nationally known, experienced trial attorneys that showed an overwhelming preference for mediation over other processes, and few liking arbitration). A January 2007 survey of organizations showed mediation is the top choice of corporate counsel and law firms. *CPR Meeting Survey Finds Mediation Is Top ADR Choice*, 25 ALTERNATIVES TO HIGH COST LITIG. 98, 98 (2007).

33. *See* Carbonneau, *supra* note 14, at 1195; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 320.

34. Freese & Spagnola, *supra* note 20, at 62.

35. A high percentage of claims submitted to arbitration are settled before hearings. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 321. Facilitating settlement is usually peripheral to arbitral adjudication, but arbitrators typically inquire about and encourage negotiated agreements. *Id.* at 28.

36. Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will It Work?*, 26 N.M. L. REV. 57, 59 (1996); *see also* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 210 (4th ed. 2003)

37. William S. Fiske, *Should Small and Medium-Size American Businesses "Going Global" Use International Commercial Arbitration?*, 18 TRANSNAT'L LAW 455, 462 (2005).

38. *See* 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) [hereinafter APPROPRIATE CORPORATE DISPUTE RESOLUTION] (observing that many believe arbitrators consider the positions the parties articulate and then make awards that split the difference between them); Freese & Spagnola, *supra* note 20, at 62 (noting the perception that arbitrators frequently split the difference in their awards). About half of 606 companies surveyed said that when they did not use arbitration, it was because it resulted in compromise outcomes. APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* at 26.

than repairs—commercial relationships.[39] Losers usually do not want to do further business with companies that defeat them in adjudicatory battles.

Arbitration also presents general adjudication disadvantages, including sacrificing outcome control by delegating it to external decision makers.[40] Resolution by arbitration focuses on backward-looking facts, evidence, and arguments asserting and defending legal rights rather than on present and future development of beneficial business solutions.[41] It adopts formal, legalistic frames that require the expertise of lawyers, and it often diverts time, money, and energy to ancillary procedural quarrels.[42] Unlike litigation, arbitration

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39. Julie Barker, *International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 7 (1996) (noting that adjudication lays blame on one of the parties instead of finding face-saving ways out of disputes); *see also* INTERNATIONAL MEDIATION, *supra* note 4, at 34 (Arbitration tends to "drive a wedge between parties." It undermines effective interparty communication, generates self-protectionism and escalating arguments, and focuses information exchange on "historic evidence."); Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedure: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 12 (2006); Thomas W. Walde, *Pro-Active Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Resolution*, TRANSNAT'L DISP. MGMT., May 2004, *available at* http://www.transnational-dispute-management.com/samples/freearticles/tv1-2article 101b.htm (noting that parties generally seek to continue international commercial relationships even after disputes).

40. *See, e.g.*, INTERNATIONAL MEDIATION, *supra* note 4, at 6; Abramson, *supra* note 9, at 325; Barker, *supra* note 39, at 7; Bowen, *supra* note 9, at 63; Coombe, *supra* note 11, at 25. The most frequently identified reason for choosing mediation, listed by 82% of 606 Fortune 1000 U.S. companies surveyed, was that "it allows the parties to resolve the disputes themselves." APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 18. Another survey revealed 81% of 254 U.S. corporate general counsel, or persons in equivalent positions, chose mediation because it allows parties to resolve disputes themselves. AMERICAN ARBITRATION ASSOCIATION, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 19 (2006) [hereinafter DISPUTE-WISE CONFLICT MANAGEMENT].

41. Gans, *supra* note 9, at 53; Green, *supra* note 11, at 177–78. Adjudication seeks legal solutions based on entitlements and rights and emphasizes the roles lawyers play, often excluding others with "commercial, technical, or people expertise." INTERNATIONAL MEDIATION, *supra* note 4, at 6; *see also supra* note 8 and accompanying text.

42. Coombe, *supra* note 11, at 25; *see also* Stephen J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. 637, 637 (1995) (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'Y REV. 27, 29 (1995) (noting that arbitration has become more formal and increasingly like U.S.-style litigation as it has become more successful and institutionalized).

seldom produces outcomes that establish precedent or articulate influential business policy.[43]

In addition, oftentimes arbitration is neither less expensive nor faster than litigation.[44] Absent custom-designed arbitration processes tailored to specific disputant needs and dispute characteristics,[45] substantial time and money is often spent selecting arbitrators[46] and wrangling about information gathering.[47] For example, several transborder investment arbitrations conducted pursuant to NAFTA and bilateral investment treaties required four years to conclude and cost millions of U.S. dollars.[48]

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43. APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 25 (noting that companies prefer litigation when they want a court decision to set precedent or there are important principles are involved); *see also* Robert L. King, *Screening Device Determines ADR Suitability*, 15 ALTERNATIVES TO HIGH COST LITIG. 7, 9 (1997) (including considerations of precedent and policy-making in a checklist for determining ADR suitability).

44. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 320–21; Panel Discussion, *Inside the Corporation: Involving Business Managers in ADR*, 16 ALTERNATIVES TO HIGH COST LITIG. 151, 159 (1998) [hereinafter *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, "[a]rbitration is proving to be just 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 38, at 25. Another in-house counsel commented that "[a]rbitration oftentimes includes the worst characteristics of litigation without any of the benefits." *Id.* Concerns also exist that arbitral tribunals are so focused on future appointments and post-award attacks that they often exhaust procedures to the fullest extent regardless of delays and costs. Walde, *supra* note 39, at 2.

45. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 43 (encouraging contracting parties to custom draft in order to meet specific needs); KATHLEEN M. SCANLON, DRAFTER'S DESKBOOK: DISPUTE RESOLUTION CLAUSES 1.13 (noting that parties can address their concerns when drafting contract clauses because arbitration is usually a creature of contract).

46. *See* GOLDBERG ET AL., *supra* note 36, at 210 (arguing that 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).

47. COMMERCIAL ARBITRATION AT ITS BEST, supra note 15, at 349–56. Conflicting rulings have resulted on the question of the validity of a 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. *Id.* at 350–51.

48. Burton, *supra* note 42, at 637; Walde, *supra* note 39, 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 dispute subjected to arbitration under a contract clause took seven years, cost $100 million, and ultimately settled at mediation. Richard Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54, 58–59 (1996).

International commercial lawyers tend to view arbitration the way attorneys view courts for domestic disputes.[49] Consequently, businesses typically do not choose arbitration in international settings because it is faster, less expensive, or more private than litigation.[50] They choose arbitration because they see no real litigation alternative.[51] As a result, arbitration has become the primary method that businesses use to resolve transborder commercial disputes.[52] The 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 to help disputants overcome these obstacles. To the question "Can we talk?" this Article responds "Yes, we can" and concludes by proposing two critical conversations commercial clients should have with their lawyers and with each other.

II. COMMON BARRIERS TO MEDIATING PRIVATE TRANSBORDER DISPUTES

Although disputes between businesses engaged in transborder collaborations are inevitable,[53] efficient and fair resolution of these conflicts, regrettably, is not.[54] Adjudication remains the primary dispute resolution choice, despite the escalating costs of arbitration and litigation.[55] In addition, settlements negotiated during

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49. Abramson, *supra* note 9, at 325; Freese & Spagnola, *supra* note 20, at 62.

50. MENKEL-MEADOW ET AL., *supra* note 1, at 458.

51. *Id.* Large U.S. law firms often consider international commercial arbitration as simply a kind of litigation in a different forum. Dezalay & Garth, *supra* note 42, 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.*

52. *See, e.g.*, Anderson, *supra* note 9, at 58 (noting that arbitration is a chosen method of dispute resolution in international commercial disputes); Barker, *supra* note 39, at 6 (same); Gans, *supra* note 9, at 54 (noting that arbitration is the preferred ADR method).

53. *See supra* notes 10–12 and accompanying text.

54. Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 235 (1993).

55. The costs of arbitrating transborder disputes are often very high. *See* Gans, *supra* note 9, at 54 (noting that administered arbitration costs are traditionally high); Walde, *supra* note 39, at 1–2 (observing that arbitral adjudication is generally very costly, and massive cost overruns are the rule rather than the exception); *see also supra* notes 45–49 and accompanying text. So are the costs of litigation. *See, e.g.*, Curtis H. Barnette, *The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective*, 53 ANTITRUST 277, 278 (1984); Craig A. McEwen, *Managing*

adjudication are influenced by predictions of potential outcomes and are typically suboptimal because they fail to realize all gains actually available in these disputes.[56]

Court-mandated 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.[57] Research shows that lawyers who have participated in a mediation value it more than those who have not experienced the process,[58] and business managers and executives are likely to respond similarly.[59] Perhaps unfortunately, no regional judicial body has the power to create and administer mandatory mediation systems for transborder commercial disputes.

The absence of judicial power to mandate mediation leaves the choice of a dispute resolution process in transborder commercial disputes to affirmative decisions by disputants. These decisions may be made prior to initiation of the dispute through dispute resolution contract clauses in documents creating transborder transactions.

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. McEwen, *supra* at 7.

56. *See* Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's Value-Added for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 8 (1996).

57. Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 PEPP. DISP. RESOL. L.J. 162, 172 (2005); Deborah Hensler, *Our Courts, Ourselves: How the ADR Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 185–87 (2003). It has been estimated that half of U.S. state courts and nearly all federal district courts sponsor mediation programs. Hensler, *supra* at 185. Similar directions and encouragement of mediation exist in Argentina, Australia, Canada, France, Greece, Hong Kong, Israel, New Zealand, Poland, Uganda, and Singapore. INTERNATIONAL MEDIATION, *supra* note 4, at 11.

58. 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) [hereinafter *Mediation in Costa Rica*]; Reuben, *supra* note 48, at 57; Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 142 (2004). 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 civil matters over the last twenty 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.

59. Without experiencing successful mediation, executives and managers are skeptical of how it enhances and assists negotiation. INTERNATIONAL MEDIATION, *supra* note 4, at 114–15. Those who have experienced mediation in transborder commercial disputes, however, "attest to its effectiveness across a diverse range of international conflicts." *Id.* at 8.

Most private transborder commercial arbitrations,[60] as well as most domestic arbitrations,[61] are created by such contract clauses. These decisions, negotiations, and agreements regarding the dispute resolution processes to be used may also be made after disputes arise.[62]

Deciding which dispute resolution process to use is one of the most important steps in resolving transborder conflicts efficiently and effectively.[63] This decision is typically made by business executives in consultation with their in-house and outside counsel.[64] Persons acting in all of these roles confront, often unknowingly, common cognitive and cultural barriers that impede them from considering, recommending, and using mediation to resolve 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.[65] The next Part of this Article analyzes the most important of these barriers and then suggests ways to overcome them.

A. *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.[66] Psychologists demonstrate that many cognitive, social, and emotional forces frequently distort rational decision making.[67] Persons making

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60. SCANLON, *supra* note 45, at 1.13; *Survey Says International Arbitration Is Satisfying*, 19 ALTERNATIVES TO HIGH COST LITIG.183, 183 (2001).

61. *See, e.g.*, SCANLON, *supra* note 45, at 1.13 (noting that arbitration usually occurs pursuant to a pre-dispute contract clause); Maurits Barendrecht & 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) [hereinafter *Sticky Defaults*] (noting that 89% of business respondents in survey conducted by American Arbitration Association said they arbitrated because it was contractually required).

62. *See Sticky Defaults*, *supra* note 61, at 88 ("Choosing an appropriate way to resolve a dispute can be done *ex ante* in a contract. The parties can also choose *ex post*, once they find themselves in an actual dispute.").

63. Sander & Rozdeiczer, *supra* note 39, at 4.

64. McEwen, *supra* note 55, at 7–8.

65. *See Sticky Defaults*, *supra* note 61, at 83 (noting the psychological and cognitive barriers to dispute resolution).

66. Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 1–2 (1999). *See generally* DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

67. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 156 (2000). These forces result from predictable, hard-wired mental predispositions. Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 689 (2005).

complex decisions, such as considering and pursuing dispute resolution methods, frequently use intuitive approaches and mental shortcuts to reduce the complexity and effort involved in reasoning about these questions.[68] These intuitive approaches and mental shortcuts involve automatic, unconscious processes that are difficult to counter.[69] They manifest the Paleolithic human mind in today's postmodern age.[70] They also exercise substantial influence if, as scholars contend, human thought is primarily unconscious[71] and most human thinking occurs outside of conscious awareness and control.[72]

Many cognitive barriers interact and combine to create a powerful win-lose bias and zero-sum dispute resolution mindset for both businesspersons and their lawyers. The mental shortcuts feeding this bias include selective and partisan perception, egocentrism, optimistic overconfidence, and fixed-pie assumptions.[73]

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68. Adler, *supra* note 67, at 690–91; Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, *in* THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 351, 351 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) [hereinafter THE NEGOTIATOR'S FIELDBOOK].

69. Birke & Fox, *supra* note 66, at 3–4.

70. Douglas H. Yarn & Gregory Todd Jones, *In Our Bones (Or Brains): Behavioral Biology*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 68, at 283, 284. These intuitive biases and mental shortcuts are "so deeply engrained that they undoubtedly have an evolutionary basis." Adler, *supra* note 67, at 692. Human behavior, at its most fundamental level, is a biological phenomenon. Yarn & Jones, *supra*, at 284.

> [U]ltimately, 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.*

71. Wendell Jones & Scott H. Hughes, *Complexity, Conflict Resolution, and How the Mind Works*, 20 CONFLICT RESOL. Q. 485, 487 (2003) (arguing that discoveries in the past twenty to thirty years in physics, microbiology, the neurosciences, cognitive psychology, and linguistics have profound implications for how humans create reality from our sensory experiences and view interaction and conflict).

72. *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.* at 488. They then conclude that no disembodied logic exists that humans can exercise separately from the embedded neural activities of their brains. *Id.*

73. Max H. Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 52, 53 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (hereinafter DISPUTE RESOLUTION HANDBOOK).

All cognitive and behavioral activity regarding choosing and implementing a dispute resolution process starts with perception of details and meanings in situations and contexts,[74] and bases its reasoning, predictions, and decisions on conclusions derived from these perceptions.[75] As a way to manage the overwhelming stimuli the brain receives, humans perceive selectively and in potentially biased ways by noticing and emphasizing some things, while ignoring others.[76] Access to different information[77] and past experiences strongly influence and bias this selective perception.[78] This human tendency means that businesspersons from different parts of the same organization often see dispute contexts, situations, and objectives differently,[79] and these different perceptions may influence discussions and decisions about how to resolve transborder disagreements.[80] In addition, in-house lawyers employed by companies perceive these dispute contexts and situations selectively and differently than outside attorneys retained for specific matters.[81]

The dynamics of conflict and dispute also influence human perception, and these forces transform the effects of bias from merely

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74. Peters, *supra* note 29, at 13.

75. Sheila Heen & Douglas Stone, *Perceptions and Stories*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 68, at 343, 345–47.

76. *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 ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 31 (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 1% of the stimulus field. Heen & Stone, *supra* note 75, 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).

77. Heen & Stone, *supra* note 75, at 344. Separate businesses obviously have access to different information, with each presumably knowing its own strengths, challenges, constraints, and finances better than it knows other companies with whom it collaborates and potentially conflicts. STONE ET AL., *supra* note 76, at 33.

78. Heen & Stone, *supra* note 75, at 344. Insights from memory research suggest "what has happened to us in the past determines what we take out of daily encounters in life." DANIEL L. SCHACTER, SEARCHING FOR MEMORY: THE BRAIN, THE MIND, AND THE PAST 3 (1996).

79. *See* Heen & Stone, *supra* note 75, at 344 ("[I]n any organization, where you sit determines what you see.").

80. *See Involving Business Managers*, *supra* note 44, at 156 (observing that 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).

81. McEwen, *supra* note 55, 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 full information. *Id.* 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.*

selective to partisan.[82] As disputes emerge and grow,[83] emotions intensify and escalate.[84] Many, if not most, transborder business disputes engender strong emotions in the parties involved.[85] When a critical mass of strong emotions such as disappointment, distrust, frustration, and anger emerge, companies typically start considering dispute resolution options.[86]

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

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82. ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 21–31 (1994).

83. Leonard Greenhalgh, *Managing Conflict*, *in* NEGOTIATION: READINGS, EXERCISES, AND CASES 7, 9 (Roy J. Lewicki et al. eds., 2d ed. 1993).

84. *See* Heen & Stone, *supra* note 75, at 345 (noting that disputes trigger emotions, which affect the brain's perceptual processing by creating chemicals like adrenaline, cortisol, dopamine, serotonin, norepinephrine, and oxytocin); *see also* STEPHEN JOHNSON, MIND WIDE OPEN: YOUR BRAIN AND THE NEUROSCIENCE OF EVERYDAY LIFE 150–57 (2004). When strong emotions are in play, perception is slowed, subtleties and specifics are missed, and the memories retained are much cruder and contain less complexity and specificity. Heen & Stone, *supra* note 75, at 345.

85. *See* David A. Hoffman, *Paradoxes of Mediation*, *in* BRINGING PEACE INTO THE ROOM 167, 172 (Daniel Bowling & David A. Hoffman eds., 2003).

86. *Inside the Law Firm: Dealing With Financial Disincentive to ADR*, 17 ALTERNATIVES TO HIGH COST LITIG. 43, 45 (1999) [hereinafter *Dealing With Financial Disincentives to ADR*] (arguing that 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").

87. Birke & Fox, *supra* note 66, at 14; Lyle A. Brenner et al., *On the Evaluation of One-Sided Evidence*, 9 J. BEHAV. DECISION-MAKING 59, 59 (1996).

88. 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* DISPUTE RESOLUTION HANDBOOK, *supra* note 73, at 83, 84. 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.*

89. *Sticky Defaults*, *supra* note 61, at 98; FISHER ET AL., *supra* note 82, at 22.

90. *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. Heen & Stone, *supra* note 75, at 346–47.

that supports other perspectives[91] and the interests of other disputants.[92]

Biased selective and partisan perceptions then cause decision makers to develop and suffer from the common cognitive biases of egocentrism and optimistic overconfidence.[93] Egocentrism describes the tendency of humans to bias their perceptions and predictions in self-serving ways[94] that reflect their preexisting beliefs.[95] Once humans select interpretations they view as beneficial, they typically gather and organize information to justify these choices.[96]

The common tendency of decision makers to act overconfidently derives from egocentric biases.[97] Studies of decision making by professionals in many occupations consistently show tendencies to make unrealistically optimistic or overconfident forecasts regarding future outcomes.[98] U.S. lawyers routinely display optimistic overconfidence.[99] One study found that, on average, U.S. lawyers rated themselves in the eightieth percentile or higher on their abilities to predict litigation outcomes.[100] Dispute resolution decision makers may be similarly optimistically overconfident in evaluating their chances of winning transborder commercial dispute arbitrations.[101] These biases toward inaccurately assessing and predicting future adjudicatory outcomes can lead business

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91. *Sticky Defaults*, *supra* note 61, at 98; Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, *in* BARRIERS TO CONFLICT RESOLUTION 44, 47 (Kenneth Arrow et al. eds., 1995).

92. FISHER ET AL., *supra* note 82, at 22–28; ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 51 (2d ed. 1991) [hereinafter GETTING TO YES].

93. *Sticky Defaults*, *supra* note 61, at 98.

94. Bazerman & Shonk, *supra* note 73, at 52, 55; Birke & Fox, *supra* note 66, at 14.

95. Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 68, at 354. A related positive illusion bias frequently accompanies overconfidence. It is the tendency to overestimate abilities to control outcomes that are determined by outside factors. Birke & Fox, *supra* note 66, 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 also* 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).

96. Bazerman & Shonk, *supra* note 73, at 55.

97. *Id.* at 56

98. *Id.* at 57; Birke & Fox, *supra* note 66, at 18.

99. Richard Birke, *Settlement Psychology: When Decision-Making Processes Fail*, 18 ALTERNATIVES TO HIGH COST LITIG. 212, 214 (2000).

100. *Id.* For example, when students who failed to reach agreement negotiating a simulated dispute were then asked to estimate the odds that an arbitrator would choose their proposal, the average estimate was 68%. Bazerman & Shonk, *supra* note 73, at 55–56.

101. *Id.* at 57.

representatives and their lawyers to choose arbitration as the best process for realizing their overconfident projections.[102]

The tendency to view the resolution of disputes as involving the division of limited resources[103] 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 shortcut relies on unconscious assumptions that the subjects comprising legally framed disputes—monetary payments or production and performance concerns—are limited,[104] and that all disputants value them equally.[105] This bias generates the belief that disputants' interests are always diametrically opposed.[106] This belief usually results in the view that one disputant's gain is invariably another disputant's loss.[107]

These common cognitive biases are all experienced by businesspersons and lawyers, and they create a powerful and pervasive zero-sum, win-lose bias.[108] This mindset frames all dispute resolution activity as exclusively or primarily requiring individual, gain-maximizing thinking and behavior. Scholars investigating how professionals develop competence suggest that the most common set of behavior patterns displayed by practitioners in law, business, public administration, and industrial management reflects actions

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102. *Sticky Defaults*, *supra* note 61, at 99; Birke & Fox, *supra* note 66, at 15; Bazerman & Shonk, *supra* note 73, at 57.

103. Bazerman & Shonk, *supra* note 73, at 54; Birke & Fox, *supra* note 66, at 30; Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, *in* THE HANDBOOK OF CONFLICT RESOLUTION, 213, 216–17 (Morton Deutsch & Peter T. Coleman, eds. 2000).

104. Thompson & Nadler, *supra* note 103, at 216–17. One study showed that more than two-thirds of participating negotiators assumed the items negotiated were limited, even though this was not the case. Thomson & Nadler, *supra* note 103, at 217.

105. *See* BASTRESS & HARBAUGH, *supra* note 29, at 377–78 (arguing humans tend to assume that parties want the same things and possess the same values).

106. Birke & Fox, *supra* note 66, at 30. From an interest perspective, this bias creates views that all interests are conflicting, and that neither independent nor shared interests exist. Max H. Bazerman & Margaret A. Neale, *Heuristics in Negotiation: Limitations to Effective Dispute Resolution*, *in* NEGOTIATING IN ORGANIZATIONS 51 (Max H. Bazerman & Roy J. Lewicki eds., 1983).

107. Thompson & Nadler, *supra* note 103, at 217.

108. MNOOKIN ET AL., *supra* note 67, 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 be sliced up through a distributive struggle. Clients frequently share this view and expect their lawyers to behave accordingly.

Id.

directed toward striving to win and seeking to avoid losing.[109] Prior vivid experiences with purely distributive competitive experiences, such as athletic activities, university admissions, and many organizational promotion systems, contribute to this mindset;[110] so do economic theories and business models that advance winning and avoiding losing as primary, often exclusive, objectives.[111]

U.S. lawyers approach dispute resolution with this win-lose mindset.[112] A survey of two thousand Arizona and Colorado lawyers showed pervasive use of win-lose assumptions in negotiations.[113] A New Jersey study of 515 lawyers and 55 judges revealed that about 70% of cases in which they participated were negotiated using actions based on win-lose thinking derived from fixed-pie cognitive assumptions.[114] A study of how both the public and lawyers view lawyers suggests that adversarial behavior flowing from a win-lose mindset is highly ranked by both audiences.[115]

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109. CHRIS ARGYRIS & DONALD A. SCHÖN, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS 63–84 (1974); DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 256–59 (1987); Lee Bolman, *Learning and Lawyering: An Approach to Education for Legal Practice*, *in* ADVANCES IN EXPERIENTIAL SOCIAL PROCESS 111, 119–20 (Cary L. Cooper & Clayton P. Alderfer eds., 1978).

110. Bazerman & Shonk, *supra* note 73, at 54.

111. ALFIE KOHN, NO CONTEST: THE CASE AGAINST COMPETITION 70 (1986). This win-lose bias breeds substantial psychological resistance to mediation's use. 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 HIGH COST LITIG. 190, 190 (1988).

112. Available data suggests that a substantial majority of U.S. lawyers approach negotiation from a win-lose mindset derived from its underlying biases. BASTRESS & HARBAUGH, *supra* note 29, at 374; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 764–75 (1984); Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 914 (1996).

113. DONALD G. GIFFORD, LEGAL NEGOTIATIONS: THEORY AND APPLICATIONS 29 n.6 (1989); Peters, *supra* note 29, at 28 n.1. Professor Gerald Williams conducted a study in which 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).

114. 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 techniques should have been used more often. *Id.*

115. *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 the public selected it as the second most applicable term. *Id.* at 191–92. Dispute resolution scholars contend that perspectives embedded in the adversarial style of litigation practiced in the United States and given extensive emphasis in U.S. legal education pervade the lives of U.S. lawyers. *E.g.*, Leonard L.

Research also shows that dispute resolvers typically manifest fixed-pie bias at the beginning of most resolution-oriented interactions,[116] and that they often resist disconfirming information.[117] This leads many lawyers to transfer their win-lose-biased negotiation habits to mediations.[118] U.S. business executives complain about their lawyers' use of counterproductive, excessively adversarial behaviors that interfere with exploring business interests and finding suitable solutions in mediations.[119]

The cumulative influence of these cognitive biases affects the decisions that business representatives and their lawyers make when they confront a serious transborder dispute that cannot be resolved by private negotiation.[120] The frequent choice to arbitrate rather than mediate these disputes[121] probably results from applying a win-lose mindset and its supporting cognitive biases to assess, reason, and choose the adjudication process that best avoids the problems of

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Riskin, *Mediation and Layers*, 43 OHIO ST. L.J. 29, 30 (1982). U.S. legal education strongly emphasizes adversarial adjudicatory processes and thinking, while other countries in the Americas, such as Mexico, do not. Anderson, *supra* note 9, at 59. These attitudes, orientations, and experiences create a standard philosophic map for U.S. lawyers that contains core assumptions that disputants are adversaries in win-lose contests and that all disputes should be resolved through third-party application of legal rules. Riskin, *supra* at 43–44. Research suggests that the win-lose dispute resolution mindset begins much earlier for U.S. residents than in law or business school. Psychological students reveal that, given options of cooperating for mutual gain or competing generating no gain, U.S. children prefer to compete. John J. Dieffenbach, *Psychology, Society, and the Development of Adversarial Posture*, 7 OHIO ST. J. ON DISP. RESOL. 261, 265–74 (1992).

116. Birke & Fox, *supra* note 66, at 30–31; Leigh Thomspon & Terri DeHarpport, *Social Judgment, Feedback, and Interpersonal Learning in Negotiation*, 58 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 327 (1994).

117. Birke & Fox, *supra* note 66, at 31; *see also* Leigh Thompson & Dennis Hrebec, *Lose-Lose Agreements in Interdependent Decision-Making*, 120 PSYCHOL. BULL. 396, 407 (1996) ("There is always the thorny problem of verification in the presence of incomplete information . . . .").

118. *See* Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation*, *in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 119, 137–38 (Phyliss Bernard & Bryant Garth eds., 2002) (noting that mediators report encountering, particularly in caucuses, the same win-lose, adversarial behaviors that occur in nonmediated negotiations); Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 138 [hereinafter *Attorney Truthfulness*] (observing that many counterproductive mediation behaviors "flow from a frame of reference most lawyers use resulting from their immersion in an adversary system"); Stephen P. Younger, *Effective Representation of Corporate Clients in Mediation*, 59 ALBANY L. REV. 951, 959 (1996) (noting that little is gained from lawyers treating mediation as requiring "hard-nosed bargaining and adversarial posturing").

119. *Business Mediation, from All Points of View*, 24 ALTERNATIVES TO HIGH COST LITIG. 101, 101 (2006) (stating that business mediations suffer from lawyers "who focus primarily on positions and don't truly understand what developing the underlying interests means"); *see also infra* note 351 and accompanying text.

120. *Sticky Defaults*, *supra* note 61, at 84, 110–11.

121. *See* notes 31–33 *supra* and accompanying text.

transnational litigation.[122] Most U.S. lawyers, and probably many attorneys in other countries, see adjudication as the fallback option if negotiations fail,[123] and maintaining the status quo strongly influences many decisions.[124]

Disputants often avoid changing a method they have used in the past even when new approaches might prove more beneficial.[125] Latin American businesspersons and lawyers share these tendencies to prefer traditional, adjudicatory approaches to dispute resolution.[126] This produces wariness and resistance to change, and makes mediation a hard sell despite its advantages over adjudication in many situations.[127]

When combined with adjudication's tendency to conflate all client interests into monetary units,[128] these cognitive and cultural biases often influence lawyers to narrowly frame[129] mediation as "a euphemism for taking less money."[130] Lawyers and businesspersons often excessively fear that mediation lessens the chance to maximize

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122. *See* note 34 *supra* and accompanying text.

123. *Sticky Defaults*, *supra* note 61, at 111.

124. *Id.* at 93. Scholars have described human tendencies to rely on familiar, traditional, existing practices as a "status quo bias." Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1585 (1998) [hereinafter *Inertia and Preference in Contract Negotiation*].

125. Anderson, *supra* note 9, at 58; *see also* Bowen, *supra* note 9, at 60 (arguing that 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." Millhauser, *supra* note 111, 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.*

126, *Mediation in Latin America*, *supra* note 16, at 428.

127. *Id.*

128. Birke, *supra* note 99, 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.*

129. Frames are perceptions disputants hold about conflicts and how issues in them should be presented and resolved. Marcia Caton Campbell & Jayne Seminare Docherty, *What's in a Frame*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 68, at 36. Frames profoundly influence a participant's strategic thinking and behavior. *Id.* They influence dispute resolution process choice and experiences within it. *See* Howard Gadlin et al., *The Road to Hell is Paved with Metaphors*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 68, at 29.

130. *Arbitration/Mediation/Settlement/Other Forms of ADR*, 15 ALTERNATIVES TO HIGH COST LITIG. 59, 62 (1997).

gain.[131] They also associate mediation with a strong likelihood of having to make concessions.[132]

This zero-sum, fixed-pie framing of mediation triggers another common and powerful cognitive bias: loss aversion.[133] This cognitive bias inclines decision makers to attribute more weight to potential losses than to possible gains.[134] Gains and losses are assessed in relation to a reference point,[135] which is usually the expected outcome of arbitral adjudication in transborder commercial disputes.[136] In addition, research consistently demonstrates that the framing of options in terms of losses or gains can substantially affect resulting decisions.[137] Even when opportunities and risks are identical, perceiving options as gains makes decision makers more likely to accept them, while viewing options as losses makes rejection more likely.[138]

When lawyers and businesspersons frame the dispute resolution method choice by comparing a victory in adjudication against concessions in mediation, mediation is seldom selected.[139] Research also suggests that decision makers will usually take more risks to avoid losses.[140] This bias can affect all disputants who choose to seek a victory in arbitration to avoid any amount of loss, even though continuing the dispute in arbitration risks economic harm that often far exceeds concessions likely to result from mediation.[141]

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131. MOORE, *supra* note 3, at 82; *Mediation in Costa Rica*, *supra* note 58, at 11.

132. *Sticky Defaults*, *supra* note 61, at 100; *see also* APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 26 (noting the widely recognized view that using mediation tends to result in compromise agreements).

133. *Sticky Defaults*, *supra* note 61, at 99–100.

134. MNOOKIN ET AL., *supra* note 67, at 161; Kahneman & Tversky, *supra* note 91, at 44, 54; *Sticky Defaults*, *supra* note 61, at 99.

135. MNOOKIN ET AL., *supra* note 67, at 161; *see also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 456 (1981) ("Outcomes are commonly perceived as positive or negative in relation to a reference outcome that is judged neutral.").

136. *See Sticky Defaults*, *supra* note 61, at 99 (arguing the current option serves as the reference point to which options are compared).

137. MNOOKIN ET AL., *supra* note 67, at 162; *see also* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEXAS L. REV. 77, 96 (1997) (predicting "that disputants would be more likely to favor the certainty of settlement over the risk of trial if the settlement is coded as a gain, rather than a loss . . . .").

138. *See* MNOOKIN ET AL., *supra* note 67, at 163 (noting that 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).

139. *Sticky Defaults*, *supra* note 61, at 100.

140. *See* MNOOKIN ET AL., *supra* note 67, at 161 ("People are . . . risk-seeking concerning losses if there is some chance, however small, of evading any loss."); Korobkin & Guthrie, *supra* note 95, at 357 (observing that decision makers more likely to prefer riskier choices if they hold any chance of avoiding losses).

141. Mnookin, *supra* note 54, at 244.

The power of this win-lose bias can be seen in how infrequently mediation is chosen over litigation and arbitration in domestic contexts.[142] For example, in Europe the voluntary use of mediation typically occurs in less than 2% of disputes ultimately brought before courts.[143] Studies in the United Kingdom showed slight use of mediation in construction and family matters before mandatory mediation was adopted.[144] A survey in Los Angeles showed that mediation was used voluntarily in approximately 1% of all disputes.[145]

U.S. businesses are generally well-informed about the drawbacks of litigation and frequently have the resources to choose dispute resolution options that avoid it.[146] They are repeat players in the U.S. litigation system[147] and file four times as many lawsuits as individual clients do.[148] Although the lack of information about mediation is often argued as a reason for its relatively infrequent use,[149] research shows that U.S. businesses and lawyers generally have information about mediation.[150] 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.[151]

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,

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142. *Sticky Defaults*, *supra* note 61, at 92.

143. *Id.* at 90.

144. *See* Brooker & Lavers, *supra* note 57, at 167 (noting that fewer than 4% of litigants used mediation in construction disputes, and only 5% used it in family matters).

145. 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, while 13% used it often. Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map*, 18 HAM. J. PUB. L. & POL. 376, 385 (1997). U.S. 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 58, at 10; Rosselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLIAMETTE L. REV. 565, 570 (1997).

146. *Sticky Defaults*, *supra* note 61, at 90.

147. McEwen, *supra* note 55, at 26; Nancy H. Rogers & 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 (1998); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–104 (1975).

148. Carmel Sileo & David Ratcliff, *Straight Talk About Torts*, TRIAL, July 2006, at 44.

149. *See* Anderson, *supra* note 9, at 58 (opining that the ignorance of mediation among NAFTA countries is primary reason process not used more frequently).

150. *Sticky Defaults*, *supra* note 61, at 90.

151. Lipsky & Seeber, *supra* note 32, at 137.

and 73% were satisfied with the results.[152] In addition, 81% of outside lawyers, 73% of inside counsel, and 84% of executives agreed that mediation was appropriate in half or more than half of business disputes currently being litigated.[153] 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 currently being litigated.[154]

Despite these supportive attitudes toward mediation, U.S. businesses do not use mediation very often.[155] A 2006 study by the American Arbitration Association showed that only 7% of companies surveyed use mediation very frequently, and 17% use it frequently.[156] This study also reported that 35% use mediation occasionally, 25% use the process rarely, and 16% do not use it all.[157]

A comprehensive survey of six large U.S. corporations showed several instances where these companies failed to increase their use of mediation[158] even though business principals supported increased use, their lawyers favored it, and general counsel encouraged it.[159] Specific directives from general counsel in two of the companies to use mediation more frequently failed.[160] Four companies pursued several educational programs about mediation, but this had no noticeable effect on its use in two of these corporations.[161] One general counsel commented that he "[could not] think of an initiative

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152. John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 176 (2000).

153. *Id.* at 172–74.

154. *Id.*

155. APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 10 ("Only 19 percent of those who had used mediation reported using it frequently or very frequently."). The reality of U.S. corporate experience with ADR "is one of significant breadth but little depth." *Id.*

156. DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 17; *Sticky Defaults*, *supra* note 61, at 90.

157. DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 17.

158. Rogers & McEwen, *supra* note 147, at 841.

159. *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 U.S. corporate leadership. F. Peter Phillips, *How Conflict Resolution Emerged Within the Commercial Sector*, 25 ALTERNATIVES TO HIGH COSTS LITIG. 3, 6 (2007). This pledge simply stated that the signer would 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 had 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.

160. Rogers & McEwen, *supra* note 147, at 841–42.

161. *Id.*

that was harder to sell" because "[l]awyers generally were resistant."[162]

B. *Cultural Barriers*

A decision to mediate a commercial dispute typically involves businesspersons and their legal counsel, both outside and inside.[163] Culture supplies a frequently used analytical metaphor for examining belief patterns, shared expectations, and behavioral norms of individuals and groups acting within organizations.[164] 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 while erecting barriers to efficient resolution.[165] Company lawyers note that their "business people think that they are right all the time."[166] Key individuals in companies often get personally and emotionally invested in disputes in ways that influence selection of resolution methods.[167] Corporate lawyers explain that angry businesspersons with strong emotions often dictate the choice of adjudication, even though this is not the

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162. *Id.* (internal quotation marks omitted). British litigators have had difficulty making a transition to mediation from their traditional advocacy roles. Int'l Inst. for Conflict Prevention & Resolution, *How Business Conflict Resolution Is Being Practiced in China and Europe*, 23 ALTERNATIVES TO HIGH COSTS LITIG. 148, 149 (2005). One British litigator remarked that "for years and years [litigators] have been paid to disagree, and suddenly we're being expected to be paid to agree." *Id.*

163. Lande, *supra* note 152, at 218.

164. *See* Melanie Lewis, *Systems Design Means Process Precision, but Emphasizes Culture, Value, and Results*, 25 ALTERNATIVES TO HIGH COSTS LITIG. 116, 117 (2007) (noting that improving businesses' conflict resolution approaches requires improving company culture); *see also* CALVIN MORRILL, THE EXECUTIVE WAY: CONFLICT MANAGEMENT IN CORPORATIONS (1995); Catherine Cronin-Harris & Peter H. Kaskell, *How ADR Finds a Home in Corporate Law Departments*, 15 ALTERNATIVES TO HIGH COSTS LITIG. 158 (1997).

165. McEwen, *supra* note 55, at 9. Tough guy cultures in company departments often generate disputes that create adjudication. *Id.* at 10. "Macho" management is a common source of adversarial position taking that causes disputes and encourages adjudication. INTERNATIONAL MEDIATION, *supra* note 4, at 115.

166. McEwen, *supra* note 55, at 10.

167. *Id.* One general counsel noted this happens "[e]specially when there is emotion, if they think they've 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.

most effective method of dispute resolution.[168] Lawyers handling business disputes deal extensively with company politics.[169] Although the cognitive biases examined earlier heavily influence the judgments underlying these competitive perspectives, they are often reinforced by organizational expectations and norms.[170]

The professional culture of U.S. 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.[171] With emphasis on thoroughness and gathering all possible data to best predict adjudicatory outcomes,[172] conventional legal wisdom holds that serious settlement discussions should be postponed until the maximum available information is obtained.[173] Many business lawyers believe that clients cannot settle until they know all the facts.[174] Given their litigation orientation, many outside lawyers do not feel comfortable analyzing settlement possibilities until they have fully prepared for trial.[175]

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168. *Id.* Middle managers often make decisions that generate interbusiness disputes, want these judgments supported by top management, and feel undermined if mediation results in outcomes that do not fully vindicate their actions. APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 24. A large pharmaceutical company lawyer reported that the company chose not to use mediation, which might have saved millions of dollars in litigation costs, because middle managers believed such a policy would undercut their authority. *Id.* This evidence supports the maxim that commercial disputes are usually personal disputes in disguise.

169. McEwen, *supra* note 55, at 10. Corporate political issues include how performances are evaluated if cases settle and do not provide objective win-lose adjudicatory measures, and whether suggesting mediation is perceived as signaling weakness. Cronin-Harris, *supra* note 111, at 861.

170. Two international mediators suggest that "the greatest constraint on mediation usage is self-imposed, the fact that managers and lawyers often resist entering the process." INTERNATIONAL MEDIATION, *supra* note 4, at 114. The survey of 606 Fortune 1000 companies revealed that a lack of interest from senior management often caused businesses not to choose mediation. APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 26. This was the fourth most common barrier to mediation use, listed by 28.6% of respondents. *Id.*

171. *See* McEwen, *supra* note 55, at 12; Rogers & McEwen, *supra* note 147, at 842.

172. *See* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 306–07, 358–63 (2d ed. 2004) (arguing that counseling tasks include helping clients assess likelihood that specific adjudicatory consequences will occur).

173. INTERNATIONAL MEDIATION, *supra* note 4, at 115; McEwen, *supra* note 55, at 12; Rogers & McEwen, *supra* note 147, at 842. This delay usually occurs until lawyers find sufficient information bolstering their case and they have confidence that their clients will not concede too much when negotiating. INTERNATIONAL MEDIATION, *supra* note 4, at 115.

174. McEwen, *supra* note 55, at 12.

175. *Dealing with Financial Disincentives to ADR*, *supra* note 86, at 46.

This cultural orientation encourages lawyers to weigh formal information discovery procedures—available only in adjudication—heavily when recommending dispute resolution methods.[176] U.S. civil litigation generally permits broad document discovery, including discovery of electronic communications, and extensive opportunities to secure pretrial witness testimony, even from persons disputants do not intend to use as witnesses.[177] Driven by a commitment to do high-quality, careful work,[178] U.S. commercial lawyers emphasize the risks run if formal discovery is not pursued.[179] Selling a mediation initiative to resistant attorneys requires changing the dispute-based culture of the legal profession.[180]

Decisions to mediate transborder disputes usually involve businesspersons and lawyers from different cultures, and often from different legal systems.[181] Cultural differences—reflecting dynamic, growing, interrelated, and shared mental perceptions about what is appropriate in human interaction[182]—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.[183] They influence

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176. McEwen, *supra* note 55, at 12. Gaining access to these remedies supplies another impetus for 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 U.S. litigation. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 349. Depositions are rare and other discovery procedures are usually limited to those allowed by arbitral rules, party agreements, or arbitrators' decisions. *Id.* at 351.

177. Phillips, *supra* note 159, at 5.

178. McEwen, *supra* note 55, at 13.

179. *Id.* at 12. Business lawyers describe discovery's importance in U.S. legal culture and suggest its use will never diminish because lawyers don't want to feel disadvantaged dealing with opponents. *Id.*

180. APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 25 (noting that changing the ways businesses and their lawyers approach dispute resolution requires changing the culture of handling disputes); INTERNATIONAL MEDIATION, *supra* note 4, at 10 (noting that 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 US to go to mediation . . . [because t]here is a psychological inhibition about going to a third party rather than court—it's the problem of 'if I can't resolve it, no one can' philosophy." INTERNATIONAL MEDIATION, *supra* note 4, at 114.

181. Bowen, *supra* note 9, at 60–61.

182. *E.g.*, AUGSBURGER, *supra* note 3, at 25; RAYMOND COHEN, NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD 14–15 (1997); MICHELLE LEBARON, BRIDGING CULTURAL CONFLICTS 4 (2003).

183. LEBARON, *supra* note 182, at 10; Paul R. Kimmel, *Culture and Conflict*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, *supra* note 103, at 453, 455; Don Peters, *"It Felt Like He Was in My Skin:" Intercultural Learning About Mediation in Haiti*, 2 RUTGERS CONFLICT RESOL. J. 1–7 (2004), *available at* http://www.pegasus.rutgers.edu/~rclj/ [hereinafter *Mediation in Haiti*].

attitudes, action habits, and behavioral norms regarding how disputes are perceived, expressed, managed, and resolved.[184]

Commonly encountered cultural differences stem primarily from fundamental distinctions between emphasizing individual or collective values, and preferring to communicate directly or indirectly.[185] Most wealthy Western countries, for example, have individualistic traditions of direct communication, while most Latin American countries possess collectivistic traditions and tendencies toward indirect communication.[186] 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.[187] 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.[188]

These differences create enormous challenges to consensual resolution of disputes through negotiation and mediation.[189] One example that illustrates the complexity of cultural[190] interaction concerns challenges arising from different understandings of what mediation actually involves and whether it is the same as or different

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184. AUGSBURGER, *supra* note 3, at 22; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 40 (2001); *Mediation in Haiti*, *supra* note 183, at 17–18.

185. GEERT HOFSTEDE, CULTURE'S CONSEQUENCES 14–15 (1980); Jeanne M. Brett et al., *Culture and Joint Gains in Negotiation*, 8 NEGOT. J. 61, 63–64 (1998); *Mediation in Haiti*, *supra* note 183, at 21.

186. *Mediation in Latin America*, *supra* note 16, at 435; Wright, *supra* note 36, at 64–66.

187. CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES 11 (2000); Ben Chen Goh, *Typical Errors for Westerners*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 68, at 293–300; Jeswald W. Salacuse, *Ten Ways that Culture Affects Negotiating Style: Some Survey Results*, 8 NEGOT. J. 221, 223 (1998). Another classification system for cultural differences identifies thought patterns and belief systems, behavior, relationship patterns and social norms, and corporate, political, and legal system variations. INTERNATIONAL MEDIATION, *supra* note 4, at 15–16.

188. Bowen, *supra* note 9, at 60.

189. *See* AUGSBURGER, *supra* note 3, at 24–25; Bowen, *supra* note 9, at 60–61. Not understanding potential cultural differences raises grave risks that negotiators and mediators will miss important verbal and nonverbal cues, misinterpret speech and behavior, misread meanings, and confuse primary and secondary issues. *Mediation in Haiti*, *supra* note 183, at 18.

190. "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.*

from conciliating.[191] Confusion exists regarding whether mediation and conciliation are different terms for the same process or significantly different processes.[192]

Many commentators contend that although mediation is internationally known as conciliation, the terms are essentially synonymous.[193] The United Nations Commission on International

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191. No international consensus exists regarding what mediation is and how it works. Wright, *supra* note 36, 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 16, at 446. These differences stem from diverse historical evolutions, different international influences, and the varied roles of their legal institutions. Wright, *supra* note 36, at 59; *see also Mediation in Costa Rica*, *supra* note 58, at 23 (describing a lively discussion at a conference in San Jose, Costa Rica, regarding whether mediation and conciliation are different words for the same process or significantly different processes).

192. INTERNATIONAL MEDIATION, *supra* note 4, at 116; GLOBAL TRENDS IN MEDIATION, *supra* note 4, at 3; *Mediation in Costa Rica*, *supra* note 58, at 23. 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. Jurgen Nanne Koberg, *Costa Rican Commercial Arbitration Rules and the U.S. Federal Arbitration Act*, 3 ILSA J. INT'L & COMP. L. 31, 33 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." Alan Scott Rau & 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 also* GLOBAL TRENDS IN MEDIATION, *supra* note 4, at 2. This distinction posits that mediation creates a primarily facilitative role for neutrals while conciliation generates an evaluative role that approaches nonbinding 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 that mediation is conciliation plus evaluation. *E.g.*, Lord Wilberforce, *Resolving International Commercial Disputes: The Alternatives*, *in* UNCITRAL ARBITRATION MODEL IN CANADA 7, 7 (Robert K. Patterson & Bonita J. Thompson eds., 1987); Rau & Sherman, *supra*, at 105 n.89.

193. Jernej Sekolec & Michael B. Getty, *The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175, 175 (arguing that mediation, or conciliation, fundamentally differs from trial and arbitration because it encourages parties to resolve their differences consensually with the help of third parties rather than using third parties to decide their disputes). Many scholars treat these terms interchangeably by writing about mediation or conciliation in ways that attribute no meaningful differences to the label used. *See, e.g.*, 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 of techniques); Rau & Sherman, *supra* note 192, at 105 n.89 (contending conciliation seems to be a more familiar term in international commercial contexts although "there can hardly be any substantive significance in the use of one

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."[194] Despite deriving its core concepts from the U.S. experience of mediation,[195] the process is known as conciliation in most Latin American countries.[196]

III. YES, WE CAN OVERCOME COGNITIVE AND CULTURAL BARRIERS TO MEDIATING

Choosing the appropriate dispute resolution process for a particular conflict presents important, challenging questions.[197] Persons making these decisions in private transborder commercial disputes usually include representatives of the businesses involved and their lawyers, including both in-house and outside counsel. The cognitive biases and cultural patterns of all these participants must be identified and overcome in order to consider mediation fully.[198] Shared biases within such decision-making groups often influence group assumptions and constrain conventional ways of acting.[199]

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term rather than the other"). They claim that both describe a process where third parties without authority to decide issues help disputants negotiate. Erik Langeland, *The Viability of Conciliation in International Dispute Resolution*, DISP. RESOL. J., July 1995, at 34. They contend that perceived differences are negligible, and that efforts to distinguish between mediation and conciliation are "pointless" and demonstrate academic "attempts to dichotomize a continuum." Rau & Sherman, *supra* note 192, at 105 n.89.

194. Sekolec & Getty, *supra* note 193, at 185.

195. *Mediation in Latin America*, *supra* note 16, at 416; *see also* INTERNATIONAL MEDIATION, *supra* note 4, at 116 (arguing mediation is increasingly recognized globally as "a flexible process of professionally assisted, structured negotiations").

196. *Mediation in Latin America*, *supra* note 16, at 421.

197. Sander & Rozdeiczer, *supra* note 39, at 1. A leading dispute resolution scholar noted that "trying to decide what kind of case belongs in which forum remains one of the most interesting and understudied questions." Carrie Menkel-Meadow, *What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1617 (1997).

198. *Involving Business Managers*, *supra* note 44, at 155. Resistance to mediation often comes when lawyers or businesspersons need to prove points, or are not fully familiar with the process, or experience cultural tendencies pushing against it. *Id.* If one, or all, parties prefer adversarial, position-based arbitral adjudication, "there can easily be a dance of delay, isolation, escalation of conflict and mutual damage to the point where the costs become disproportionate to the business value" of claims. INTERNATIONAL MEDIATION, *supra* note 4, at 115.

199. *See* FISHER ET AL., *supra* note 82, at 72–73 (noting that group assumptions frequently generate extensive self-censorship and inhibit sharing new ideas).

A. *Overcoming Cognitive Barriers*

Overcoming cognitive barriers starts with lawyers and businesspersons accepting ownership of them and acknowledging the likelihood that they will influence their perceptions, predictions, and analysis of what dispute resolution method to use.[200] Awareness of these ingrained, pervasive influences helps decision makers avoid their harmful effects.[201] Developing self-awareness by enhancing their abilities to monitor and reframe thoughts and emotions helps lawyers and businesspersons understand and effectively deal with their predictable "non-rational impulses and error-prone tendencies."[202] It also helps decision makers identify situations in which they must consciously override, or take compensatory actions to avoid, these tendencies and mental shortcuts.[203]

Although it is challenging, 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.[204] Disputants should adopt a "devil's advocate" approach to identify and assess all countervailing considerations to their natural biases.[205] Given the subtlety and intractability of egocentric biases, however, playing devil's advocate is seldom sufficient.[206] Appointing a group member to advocate other views honestly and bluntly helps offset natural biases,[207] and greater numbers of people involved in these conversations typically increases the effectiveness of this approach. Noting adverse consequences, drawbacks, and weaknesses in writing also counters tendencies, influenced by partisan perception and

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200. Adler, *supra* note 67, at 690–91; Birke & Fox, *supra* note 66, at 3–4, 19.

201. Adler, *supra* note 67, at 690–91.

202. *Id.* at 691. As some scholars claim:

> The best protection against all psychological traps is awareness. Forewarned is forearmed. Even if you can't eradicate the distortions ingrained in the way your mind works, you can build tests and disciplines into your decision-making process that can uncover and counter errors in thinking before they become errors in judgment.

JOHN HAMMOND ET AL., SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS 214–15 (1999).

203. Birke & Fox, *supra* note 66, at 4.

204. *Id.* at 19; *see also* Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 920 (1997).

205. This requires using a technique which originated in the Middle Ages. Adler, *supra* note 67, 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 diaboli*, who advanced all conceivable arguments against canonizing the candidate. *Id.*

206. *Id.*

207. *Id.*

optimistic overconfidence, to dismiss or diminish those weaknesses.[208]

Overconfidence biases may be mitigated by carefully evaluating the adverse consequences, drawbacks, and weaknesses identified, and by seeking outsider perspectives.[209] Obtaining outsider perspectives includes seeking evaluation data from similar situations rather than basing predictions entirely on scenarios derived solely from inside disputes.[210] It also includes seeking to observe and analyze situations from different points of view.[211] Role reversal often identifies the concerns, issues, and objectives of other disputants.[212] Seeking to identify the probable perspectives of third parties, such as arbitrators or mediators who may ultimately hear both sides of a dispute, also counters overconfidence.[213]

Examining the business interests involved in situations combats fixed-pie and zero-sum biases.[214] Interests are the needs or motivations that disputants possess,[215] and in business disputes they typically encompass economic, relational, substantive, and procedural factors.[216] Business interests usually include resolutions that save time and money, preserve relationships, and create satisfactory, durable, and confidential outcomes.[217] Most disputes have multiple variables, and disputants typically possess complex interest sets that interact with these factors.[218] Adopting adjudication's win-lose focus directed primarily at money obscures opportunities to reach

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208. 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* BINDER ET AL., *supra* note 172, 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. INTERNATIONAL MEDIATION, *supra* note 4, at 20.

209. Birke & Fox, *supra* note 66, at 19.

210. *Id.*; Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk-Taking*, 39 MGMT. SCI. 17, 25 (1993).

211. FISHER ET AL., *supra* note 82, at 32.

212. *Id.* at 33–35.

213. *Id.* at 32.

214. Birke & Fox, *supra* note 66, at 31.

215. GETTING TO YES, *supra* note 92, at 40–50; David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, *in* NEGOTIATION: READINGS, EXERCISES, AND CASES 130–37 (Roy J. Lewicki et al. eds., 2d ed. 1993).

216. *See, e.g.*, DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 19 (listing reasons companies use mediation).

217. *See, e.g.*, *id.* (listing these as reasons companies use mediation); APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 17 (same); *see also supra* note 19 and accompanying text.

218. Michael L. Moffit, *Disputes as Opportunities to Create Value*, *in* THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 73, at 173, 176.

resolutions that satisfy multiple interests and allocate value more flexibly than winner-take-all.[219]

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.[220] Mediators, for example, often try to reduce the effect of bias by explaining common cognitive patterns and encouraging participants to reassess their views with more objectivity.[221] Asking lawyers to assume a loss and then explain why arbitrators might have ruled against them combats these biases.[222] To make disputes seem less unique, mediators also inquire about broader contexts than particular controversies.[223]

Mediators provide outside perspectives that challenge egocentric biases.[224] They ask direct questions that raise weaknesses in legal claims and occasionally share hypothetical claim evaluations to encourage disputants and lawyers to abandon optimistic overconfidence.[225] Mediators also encourage negotiators to consider

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219. Birke, *supra* note 99, at 215–16.

220. *See* GOLANN & FOLBERG, *supra* note 1, at 203–10 (describing how mediators help disputants overcome cognitive forces affecting their abilities to assess the merits of cases); Mnookin, *supra* note 54, at 248 (arguing mediators can help parties overcome cognitive barriers).

221. Russell Korobkin, *Psychological Biases that Become Mediation Impediments Can Be Overcome with Interventions that Minimize Blockages*, 24 ALTERNATIVES TO HIGH COST LITIG. 67, 68 (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.*

222. *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 because of a phenomenon called the explanation bias. *Id.*; 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).

223. GOLANN & 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 in 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. Walde, *supra* note 39, 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.*

224. INTERNATIONAL MEDIATION, *supra* note 4, 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.*

225. Brooker & Lavers, *supra* note 57, at 200–01; Korobkin, *supra* note 221, at 69. Direct questions regarding weaknesses, and hypothetical claim evaluations and

the weaknesses of their claims when evaluating settlement offers that emerge.[226] Executives might accept a mediator's suggestion of relative fault when the contributions of the executives' businesses to the disputes might be deemed significant in later adjudications.[227]

Mediators explore disputants' alternatives to a mediated agreement[228] and the transactional costs associated with these options.[229] Because alternatives to mediation are usually

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outcome predictions, usually temper lawyer overconfidence, stimulating them to at least consider possibilities that they have misestimated. Korobkon, supra note 221, at 69. 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. 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. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of Good Mediation?*, 19 FLA. ST. U. L. REV. 47, 48 (1991). Scholars define evaluation as improper or incorrect mediation. John Lande, *Stop Bickering! A Call for Collaboration*, 16 ALTERNATIVES TO HIGH COST LITIG. 1, 11 (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). "[D]irect evaluation often is necessary to overcome overconfidence bias." Korobkin & Guthrie, *supra* note 68, at 352. Some U.S. mediation rules prohibit mediators from predicting how judges will decide pending adjudications. *E.g.*, FLA. R. CERT. & CT.-APPOINTED MED. 10.370(c), *available at* http://www.mediate.com/articles/floridarules.cfm.

226. GOLANN & FOLBERG, *supra* note 1, at 204; Korobkin, *supra* note 221, at 68; Peters, *supra* note 225, at 807–08 n.76. This is often done by asking questions confidentially in caucuses about the strengths of counterparts' claims, exploring topics that usually parallel their weaknesses. Some studies "have successfully reduced optimistic overconfidence by asking experimental subjects to list weaknesses associated with their position." Korobkin, *supra* note 221, at 68–69. This may have lessened the effect on lawyers who are aware that 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. Waechter, *supra* note 32, at 99.

227. John Lande, *Relationships Drive Support for Mediation*, 15 ALTERNATIVES TO HIGH COST LITIG. 95, 96 (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 4, 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. Younger, *supra* note 118, at 957.

228. *See* SLAIKEU, *supra* note 17, 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 ensures that participants do proper risk analysis. INTERNATIONAL MEDIATION, *supra* note 4, at 22.

229. Arbitration and litigation present direct and indirect costs. INTERNATIONAL MEDIATION, *supra* note 4, at 35. These costs should be multiplied by a factor of 1.5 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

adjudicative, these discussions cover all the expenses of arbitrating, including direct,[230] productivity,[231] continuity,[232] and emotional costs.[233] Reducing transaction costs often creates value in dispute resolution.[234]

The direct costs of international arbitration are often significant and sometimes wind up exceeding actual amounts gained.[235] Most U.S. businesspersons and inside lawyers believe that mediation is less expensive than arbitration.[236] U.S. businesspersons also believe

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fees, while often substantial, may be the tip of the iceberg because "they don't reflect hours spent by company personnel managing the legal work," or emotional and other nonfinancial costs. *Resources and Data: How Mediation Is Practiced in Europe*, 23 ALTERNATIVES TO HIGH COST LITIG. 98, 100 (2005) [hereinafter *How Mediation Is Practiced in Europe*].

230. Direct costs include the fees of lawyers, experts, other professionals, and arbitration system fees. Stewart Levin, *Breaking Down Costs: What You Are Losing by Not Using ADR*, 19 ALTERNATIVES TO HIGH COST LITIG. 235, 235 (2001). Regarding litigation costs, it has been estimated that, in 2000, more than 22 million cases were filed in U.S. courts at a cost of almost $400 billion. *Id.*

231. Productivity costs include the value of lost time, and the related opportunity expenses, of those who are involved in dispute resolution. *Id.* It has been estimated that business executives in the United States spend more than 20% of their time on litigation and other dispute resolution related activities. *Id.*

232. Continuity costs include the loss of business relationships and the impacts on business community and reputation factors that they embody. *Id.* at 248.

233. Emotional costs include the psychological pains that accompany dealing with and continuously confronting strong emotions that often distract from businesspersons' ability to focus on doing their work effectively. *Id.* at 248.

234. *See* MNOOKIN ET AL., *supra* note 67, at 119 (arguing that the resolution of disputes does not require purely distributive activity, and disputants and lawyers have opportunities to make process decisions that promote resolution at lower cost); Moffitt, *supra* note 218, at 177 (contending that unresolved disputes are expensive, and so are many aspects of dispute resolution, so disputants should choose carefully the process to use).

235. *See* APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 20 (noting that 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 businesspersons have not recognized their shared interests in minimizing arbitration costs and fees when their lawyers have not so advised them. Mnookin, *supra* note 54, at 248.

236. *See, e.g.*, APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 17 (comparing both processes to litigation, 89.2% think mediation saves money, and 68.6% think arbitration does); DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 19 (comparing both processes to litigation, 91% think mediation saves money, and 71% think arbitration does); *Analyzing Company ADR System Practices*, 22 ALTERNATIVES TO HIGH COST LITIG. 47, 53 (2004) (referencing a survey at Johnson & Johnson that showed mediation settling costs were one-third less than litigation costs). A survey of 69 companies showed that 71% reported cost savings when comparing mediation to litigation costs, and 44% reported cost savings comparing arbitration to litigation. Catherine Cronin-Harris & Peter H. Kaskell, *How ADR Finds a Home in Corporate Law Departments*, 15 ALTERNATIVES TO HIGH COST LITIG. 158, 159 (1997). A 2007 survey of 126 in-house and outside lawyers showed the top reason they preferred mediation was its cost savings. *CPR Meeting Survey Finds Mediation Is Top ADR Choice*, *supra* note 32, at 98.

that mediation generally takes less time than arbitration,[237] and time is usually a component of expense.[238]

Similarly, commercial mediators invariably inquire about disputants' business and other interests.[239] Often held in caucuses, these conversations explore the disputants' core concerns and strongest motivations.[240] These conversations demonstrate that more is usually at stake than the dollar claims generated by adjudicatory win-lose remedies.[241] 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.[242]

In addition, the business and other interests in play in commercial disputes frequently bear little relationship to the legal issues framed in adjudicatory processes like arbitration and

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237. See APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 17 (reporting that as compared to litigation, 80.1% use mediation to save time, while 68.5% use arbitration to save time); DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 19 (reporting that as compared to litigation, 84% use mediation to save time, while 73% use arbitration to save time); Lande, *supra* note 152, at 184 (74%–75% think mediation resolves matters within appropriate time and appropriate costs). A random sample of Indiana lawyers believed that mediation significantly reduced time needed to conclude nonfamily cases. Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 MEDIATION Q. 185, 190 (1994). In Latin America, mediation's informality allows it to be "fast and effective" and not "as slow and expensive" as litigation. *Mediation in Latin America*, *supra* note 16, at 419. A Scandinavian supplier and an Asian producer opted for a three-day mediation in London rather than an arbitration the disputants separately estimated would take one to two years and cost over one million pounds each. INTERNATIONAL MEDIATION, *supra* note 4, at 6.

238. The London-based Centre for Effective Dispute Resolution reports the average length of its transborder commercial mediations is two days. INTERNATIONAL MEDIATION, *supra* note 4, xiii. Commercial mediations often create a momentum toward and expectation of agreement. *Id.* at 29. Transborder mediations confront and help resolve problems of distance between disputants. *Id.* The mediator's involvement encourages participants to deal with different cultural senses of time and urgency by introducing quasi-formal, quasi-public dimensions of negotiating. *Id.*

239. *See* GOLANN & FOLBERG, *supra* note 1, at 154 (arguing that good mediators will attempt to encourage participants to identify their underlying interests during caucuses); MENKEL-MEADOW ET AL., *supra* note 1, at 228 (excerpting Lela P. Love, *Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreement*, 38 FAM. & CONCILIATION CTS. REV. 27 (2000)) (suggesting that interests, as "the underlying and inescapable human motivators that press us into action," supply one of the building blocks of constructive dialogue).

240. *Attorney Truthfulness*, *supra* note 118, at 134.

241. *Id.*; *see also supra* notes 8, 41 and accompanying text.

242. *See supra* notes 8, 41 and accompanying text. International commercial mediations typically seek to broaden discussions to include technical, reputational, and cultural concerns that are often obscured by the ways legal claims frame issues. INTERNATIONAL MEDIATION, *supra* note 4, at 24–26.

litigation.[243] 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.[244] Once mediators identify interests, they typically explore ideas in confidential caucuses for agreements that realize shared concerns, such as reducing transaction costs and preserving important commercial relationships.

Development and maintenance of international commercial connections takes time and money.[245] Research suggests that businesspersons and their lawyers believe that mediation helps resolve disputes while preserving important commercial relationships.[246] 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.[247]

Mediators challenge fixed-pie, zero-sum biases by testing the assumption that all participants value all aspects of disputes identically.[248] They conduct confidential discussions about how

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243. Phillips, *supra* note 159, 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 supra* notes 8, 41.

244. Phillips, *supra* note 159, at 5–6 ("This company makes money producing many things, from light bulbs to jet engines—but it does not make money writing legal briefs in court.") (quoting a senior General Electric attorney). The author also argues that "it might well be that the best solution to a dispute between 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 supra* note 8 and accompanying text.

245. Walde, *supra* note 39, at 1 (noting that creating international commercial and investment relationships is an expensive, high-risk, asset-building activity).

246. Eighty percent of the business executives, lawyers, and outside attorneys in one study said that mediation helps preserve business relationships. Lande, *supra* note 152, at 186. This finding is consistent with other studies suggesting that businesspersons and their lawyers believe that mediation preserves relationships better than arbitration does. *Compare* APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 17 (stating that 58.7% choose mediation to preserve relationships; only 41.3% choose arbitration for this reason), *with* DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 19 (stating that 56% choose mediation to preserve relationships; 38% choose arbitration for this reason).

247. Walde, *supra* note 39, at 3–4; *see also* Brooker & Lavers, *supra* note 57, at 198–200 (describing new deals and creative solutions arising from domestic commercial mediations in the UK). Although mediation outcomes can create velvet divorces through peaceful liquidation of relationships, settlement agreements often produce renegotiated contracts to help parties create win-win results. INTERNATIONAL MEDIATION, *supra* note 4, at 12–18. For example, many international intellectual property disputes begin as rights claims but are resolved as negotiated licensing deals. *Id.*; *see supra* note 244.

248. Human experience and research shows that negotiators seldom value all aspects of issues subjected to negotiation in mediation identically. BASTRESS & HARBAUGH, *supra* note 29, at 377, 379–94.

participants assess their interests.[249] 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.[250] 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.[251] All of these cognitive-bias-busting actions are made possible by confidential caucusing, which generates more information from which solutions can be fashioned.[252]

B. *Overcoming Cultural Barriers*

Businesspersons and their lawyers can develop awareness of their cultural biases and adjust their dispute resolution behaviors accordingly.[253] Doing this successfully requires reflecting on how culture affects behaviors[254] and experiencing other cultures over time[255] and in depth.[256] Business persons and lawyers involved in transborder commercial dispute resolution should know common differences generated by collectivist or individualist orientations and

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249. *Attorney Truthfulness*, *supra* note 118, at 134.

250. *Id.* at 134–35.

251. *E.g.*, LAWRENCE M. WATSON, INITIATING THE SETTLEMENT PROCESS: ETHICAL CONSIDERATIONS, *in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE, *supra* note 118, at 7, 16; *Attorney Truthfulness*, *supra* note 118, at 137; Stephen Schwartz, *The Mediated Settlement: Is It Always Just About the Money? Rarely!*, 4 PEPP. DISP. RESOL. L.J. 309, 314 (2004); Younger, *supra* note 118, at 956.

252. Bush, *supra* note 56, 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. Younger, *supra* note 118, at 959.

253. *See* Barker, *supra* note 39, at 19–29; *Proceedings of the CPR Institute for Dispute Resolution—Spring Meeting, June 1997*, 15 ALTERNATIVES TO HIGH COST LITIG. 102, 102 (1997) (arguing that different cultural processes should not be viewed as impenetrable).

254. *See* BERNARD MAYER, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE 87 (2000) (arguing that articulating the many different cultural norms regarding conflict that influence one's behaviors makes it easier to develop awareness of how one's practices and patterns might differ from others); Bryant, *supra* note 184, at 64–67 (suggesting that having lawyers consider similarities and differences with their clients helps them see how cultural factors may influence interactions).

255. *See* LEDERACH, *supra* note 3, at 63 (describing the slow, painful process of developing self-awareness regarding the biases in his mediation training style); *Mediation in Haiti*, *supra* note 183, at 76 (describing cultural learning occurring in a gradual, evolving process spanning four visits and seventeen workshops in Haiti).

256. *See* MAYER, *supra* note 254, at 87 (noting that 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.*

direct or indirect communication preferences.[257] An understanding of this principle helps them move from believing everyone should behave like they do to discovering common values and interests despite different orientations, preferences, and behaviors.[258]

Despite their best efforts, skilled negotiators operating under the influences of their cultural traditions often experience confusion upon encountering attitudes and behaviors flowing from different orientations.[259] Cultural influences substantially affect how disputants perceive, define, explore, and evaluate consequences of alternatives to adjudication.[260] Identifying, evaluating, and manipulating interests defeats the fixed-pie bias,[261] and cultural influences affect how disputants perceive, define, and prioritize their needs.[262]

Culturally fluent mediators can identify and correct miscommunications that prolong resolvable conflicts. Skilled transnational dispute mediators are attuned to subtle cultural patterns and nuances,[263] which allows them to spot signals that

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257. *Proceedings of the CPR Institute for Dispute Resolution—Spring Meeting, June 1997*, *supra* note 253; *see supra* notes 183–86 and accompanying text.

258. *See Proceedings of the CPR Institute for Dispute Resolution—Spring Meeting, June 1997*, *supra* note 253. 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 are misinterpreting or filling in, and why we are judging people who are different." Bryant, *supra* note 184, 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 too harshly." *Id.*

259. Harold Abramson, *The Culturally Suitable Mediator*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 68, at 591, 591 (2006).

260. *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 183, at 36.

261. *See supra* notes 239–42 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." MAYER, *supra* note 254, at 219.

262. BRETT, *supra* note 260, at 83–89; Abramson, *supra* note 259, at 592; *Mediation in Haiti*, *supra* note 183, at 36.

263. INTERNATIONAL MEDIATION, *supra* note 4, at 17. Scholars recommend learning about relevant cultures and their traditional communication and behavioral patterns before attempting intercultural dispute resolution. *See, e.g.*, Abramson, *supra* note 259, at 592 (suggesting that mediators should be trained and experienced in helping parties recognize culturally shared interests and surmount culturally based impasses); Christopher Honeyman & Sandra I. Cheldelin, *Have Gavel, Will Travel: Dispute Resolution Innocents Abroad*, 19 CONFLICT RESOL. Q. 363, 364 (2002) ("Some well-meaning people—though genuine experts in a given area—may inadvertently cause harm to persons and parties for whose culture, language, or circumstances these professionals' U.S. experience has left them inadequately prepared."); Jan Jung-Min Sunoo, *Some Guidelines for Mediators of Intercultural Disputes*, 6 NEG. J. 383, 387 (1990) (suggesting that mediators should make "every effort to learn about the cultural and social expectations of the persons they will deal with").

suggest the existence of barriers and misunderstandings.[264] Once these barriers are spotted, mediators can make sensitive comments and ask tactful questions to learn what differing expectations and behaviors mean to disputants.[265] Using this information, mediators can then translate for disputants in caucuses and bridge these barriers.[266]

This method of mediation also separates genuine cultural impasses from strategic ploys[267] and provides a forum for resolving barriers that disputants often cannot easily overcome in non-facilitated negotiation.[268] These barriers are usually significant when they touch elements required to overcome egocentric overconfidence and fixed-pie, win-lose biases. Co-mediation teams, with neutrals from each cultural tradition, are often effective.[269]

IV. YES, WE CAN TALK, AND TWO IMPORTANT CONVERSATIONS WE SHOULD HAVE

Business representatives and their lawyers should talk about how they wish to resolve disputes.[270] Doing this before disputes arise only makes sense. Research shows that some companies manage disputes systematically, view conflicts as expected rather than

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264. *See* Abramson, *supra* note 259, at 591 (suggesting that disputants from diverse cultures need a 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 4, at 17.

265. INTERNATIONAL MEDIATION, *supra* note 4, at 17; *see also* FISHER ET AL., *supra* note 82, at 168 (encouraging negotiators to question their assumptions and check out these questions when appropriate); Bryant, *supra* note 184, at 29 (recommending checking interpretations in cross-cultural situations). Mediation allows exploring sensitive cultural issues confidentially in caucuses. INTERNATIONAL MEDIATION, *supra* note 4, at 23.

266. *See* Abramson, *supra* note 259, at 594 (observing that 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 4, at 17.

267. *See* Abramson, *supra* note 256, at 599 (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).

268. *Id.* at 591.

269. Bowen, *supra* note 9, 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.*

270. *See* INTERNATIONAL MEDIATION, *supra* note 4, at 18 (suggesting that an important first step to using international commercial mediation is explaining and analyzing options with clients).

unusual occurrences,[271] and develop and follow resolution policies.[272] Effective dispute management includes helping lawyers understand business as well as legal issues and using mediation frequently to pursue interest-based negotiating.[273] Many U.S. corporations have developed such policies and programs and communicate them to outside counsel to ensure that work is conducted within their parameters.[274] Companies who favor mediation when initiating or defending disputes are more likely to manage disputes effectively than those who always choose adjudication first.[275]

The threshold question of who should decide what dispute resolution approach to use is answered differently in different cultures. U.S. business and legal traditions suggest that company representatives should ultimately decide this question in consultation with their lawyers. U.S. businesspersons value autonomy[276] and the power to make final decisions concerning major issues involved in dispute resolution.[277] U.S. legal ethics standards allocate decision-making authority regarding objectives of representation to clients and

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271. *See* DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 3 (suggesting that companies recognize that winning may be measured by how well overall total economic and noneconomic impacts of full array of disputes managed over time); McEwen, supra note 55, at 14 (noting that managing disputes when regularly involved in conflicts with customers, suppliers, joint venturers, and competitors is much different from managing individual disputes). Research also suggests that effective dispute managing companies are more inclined to adopt a portfolio approach to handling cases. DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 22.

272. *See id.* at 21 (observing that companies that have established dispute resolving policies are more likely to resolve disputes quicker and at less cost). This allows companies to identify and change tendencies to choose externally imposed outcomes to avoid personal responsibilities. INTERNATIONAL MEDIATION, *supra* note 4, 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. McEwen, *supra* note 55, 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 CONFLICT MANAGEMENT, *supra* note 40, at 4.

273. DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 5–6; McEwen, *supra* note 55, at 17.

274. *CPR Institute for Dispute Resolution Spring Meeting–June 1996*, 14 ALTERNATIVES TO HIGH COST LITIG. 98, 98–99 (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.

275. DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 21.

276. *See* LEBARON, *supra* note 182, at 61 (commenting that the United States demonstrates the prototypical individualistic culture which promotes ideas of the self as "independent, self-directed, and autonomous").

277. *Involving Business Managers*, *supra* note 44, at 151–52.

the means by which goals are pursued between them and their lawyers.[278]

Some business traditions, in contrast, allocate disputes not settled by intercompany negotiation to outside lawyers for resolution.[279] In these cultural contexts, businesspersons tend to view such disputes as legal matters to be handled by lawyers without further company involvement.[280] This might delegate to attorneys the critical question of which processes to use.

If consultations regarding dispute resolution mechanisms occur, they should include the identification and presentation of mediation as an option, either by lawyers or businesspersons. Most U.S. attorneys know of mediation as an option to adjudication, even though fundamental misunderstandings about it exist.[281] Research

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278. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002). Comment 2 clarifies this standard for consulting regarding means of accomplishing representational objectives:

> 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. U.S. legal education labels this process "legal counseling." BINDER ET AL., *supra* note 172, at 2–3. These interactions may be strongly influenced by existing business policies for managing dispute resolution. Substantial U.S. 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. *E.g.*, APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 22–23; DISPUTE-WISE CONFLICT MANAGEMENT, *supra* note 40, at 3–4; McEwen, *supra* note 55, at 24.

279. Gans, *supra* note 9, at 52.

280. *Id.* This allows short-term avoidance of further involvement by business personnel while transferring argument primarily to lawyers through adjudication. INTERNATIONAL MEDIATION, *supra* note 4, at 5. Fiat's legal counsel said that its managers believe disputes belong with lawyers, and that getting involved with conflicts complicated enough to require attorneys would not be productive. *How Mediation is Practiced in Europe*, *supra* note 229, at 98. 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.*

281. Most U.S. lawyers originally receive their knowledge about mediation through experience. *Lande*, *supra* note 152, 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 surveyed. *Id.* Notwithstanding the existence of court-connected mediation programs in many U.S. 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, the Author once received a call from a lawyer wanting to know where she could arrange "binding mediation."

shows that as U.S. businesspersons become more familiar with mediation, their lawyers usually serve as the primary source of information.[282] Lack of familiarity with mediation inhibits parties' willingness to choose it as a dispute resolution method.[283]

Research suggests that lawyer-client conversations regarding dispute resolution processes occur on a case-by-case basis rather than by establishing a general policy.[284] A case-by-case focus enhances decision makers' tendency to emphasize the uniqueness of particular fact patterns and creates potentially biased outcome predictions.[285] Lawyers should counter this tendency by exploring their clients' full range of interests—including the suitability of mediation for their

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282. Lande, *supra* note 152, at 169–71.

283. *Involving Business Managers*, *supra* note 44, at 155; *see also supra* notes 57–59 and accompanying text. As one company representative in the survey of 606 Fortune 1000 companies noted, "[n]ot 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 38, at 27. Problems may arise concerning knowledge about and understanding of mediation for lawyers and businesspersons 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 the need to educate judges, attorneys, and companies about the value of this process. *Mediation in Costa Rica*, supra note 58, at 11. Arbitration is the dispute resolution process best understood by disputants on both sides of the U.S. and Mexican border. Wright, *supra* note 36, at 57. Mandatory court-connected mediation, the source of most U.S. 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 16, at 415. Argentina, for example, passed a law in 1995 mandating mediation before any lawsuit could reach trial, except in family cases. James M. Cooper, *Latin America in the Twenty-First Century: 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. Sekolec & Getty, *supra* note 193, at 178. In addition to Argentina and Chile, Columbia, Ecuador, and Peru also have mediation or conciliation laws. Bowen, *supra* note 9, at 61–62; *Mediation in Latin America*, *supra* note 16, at 417; Sekolec & Getty, *supra* note 193, at 178. 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).

284. *See* APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38, at 19 (noting that companies generally make decisions to mediate on a case-by-case basis).

285. *See* McEwen, *supra* note 55, at 13 (observing that 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."). 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. *CPR Institute for Dispute Resolution Spring Meeting–June 1996*, *supra* note 274, at 99. Commercial conflicts too often generate an automatic "mediation is great in theory but not for this case" response. INTERNATIONAL MEDIATION, *supra* note 4, at 18; *see also supra* notes 81, 284 and accompanying text.

objectives, which involves asking whether fundamental principles are at stake and whether essential information can be obtained by means other than formal discovery.[286] They also include canvassing potential benefits of mediation, including how it aids in clarifying issues, overcomes impasse-causing emotions, provides storytelling opportunities, realistically examines alternatives to mediated agreements, and confidentially explores possible trades and creative solutions.[287]

Outside lawyers conducting these conversations must balance the needs to empathize with angry businesspersons and to demonstrate that they will commit the resources needed to overcome the outrages their clients have suffered,[288] with a full assessment of the transaction costs and other disadvantages of adjudication.[289] The cognitive biases discussed earlier and potential conflicting economic interests may tempt lawyers to use the emotions experienced by businesspersons to push adjudication rather than encouraging a full consideration of arbitration's advantages and disadvantages in the best interest of their clients.[290]

Economic concerns might create barriers for outside lawyers to suggest mediation as a transborder commercial dispute resolution option. Adjudicating by arbitration is often the only alternative identified and discussed in U.S. settings[291] and other traditions where lawyers exercise more decision making authority.[292] U.S.

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286. SCANLON, *supra* note 45, 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, differ from nonmediated negotiations, where no opportunities exist to counter spiraling mistrust. *Proceedings from the CPR Institute for Dispute Resolution—Winter Meeting, January 1997*, 15 ALTERNATIVES TO HIGH COST LITIG. 59, 61 (1997).

287. SCANLON, *supra* note 45, 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) the desire to fully explore creative, non-legal, business-created solutions. INTERNATIONAL MEDIATION, *supra* note 4, at 22.

288. *Dealing with Financial Disincentives to ADR*, *supra* note 86, at 45. Outside lawyers understand that they often must provide this type of reassurance to secure engagement for the representation. *Id.*

289. *See supra* notes 229–35 and accompanying text.

290. *See* MNOOKIN ET AL., *supra* note 67, at 167 (noting that attorneys sometimes add fuel to their clients' emotional fires to encourage adjudicatory choices).

291. A survey of 2,300 Ohio lawyers showed that even attorneys favoring mediation often do not refer a significant portion of their clients to mediation. Rogers & McEwen, *supra* note 147, at 841. Although most Ohio lawyers surveyed favored expanded use of mediation, only a tenth regularly recommended the process to their clients. *Id.*

292. When asked why they don't use mediation more often, 68% of twenty-five Italian companies surveyed said it was because their outside counsel had not identified it as an option. *How Business Conflict Resolution Is Being Practiced in China and Europe*, *supra* note 162, at 149.

corporate personnel complain that their lawyers fail to present mediation as an option.[293]

U.S. 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.[294] For U.S. companies, much of the cost of commercial disputes comes from paying outside lawyers to handle arbitration or litigation.[295] Most U.S. law firms

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293. *See CPR Institute for Dispute Resolution Spring Meeting—June 1996*, *supra* note 274, at 98 (describing that, in seventy lawsuits in the preceding year, outside counsel had not mentioned mediation as an option). Scholars argue that properly interpreting legal ethics rules obligates U.S. lawyers to counsel clients regarding mediation and other alternatives to adjudication. WATSON, *supra* note 251, at 10; *see also* Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 167–68 (1999) (setting out proper attorney conduct, including informing clients of dispute resolution options and discussing all proposed dispute resolution agreements); Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979, 981 (2001) ("Every lawyer ought to have an ethical obligation to counsel clients about the multiple ways of resolving problems and planning transactions."). Several U.S. states require attorneys to discuss mediation with their clients by ethics rules, court rules, and statutes. *See* Rogers & McEwen, *supra* note 147, at 862 (discussing U.S. states that require attorneys to discuss mediation with their clients by ethics rules, court rules, and statutes). 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, MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2007), and to make reasonable effort to expedite dispute resolution consistent with client interests. *See* MODEL RULES OF PROF'L CONDUCT R. 3.2 (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. *E.g.*, WATSON, *supra* note 251, at 10; Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 897 (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, 809 (1997). The Litigation Section Task Force on Ethical Guidelines for Settlement Negotiations has concluded that lawyers have a duty to advise clients promptly of adjudicatory alternatives after retention in a dispute. WATSON, *supra* note 251, at 10. U.S. proponents of client-centered counseling recommend that lawyers provide their clients with reasonable opportunities to consider alternatives that "similarly-situated clients" would likely find important. BINDER ET AL., *supra* note 172, at 332–33. 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. *See id.* at 284, 333 (naming mediation as a potential solution to litigation problems, and emphasizing the importance of suggesting such alternatives).

294. *CPR Institute for Dispute Resolution Spring Meeting—June 1996*, *supra* note 274, at 98.

295. *See* DEZALAY & GARTH, *supra* note 16, at 50–51 (arguing that 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 HIGH COST LITIG. 159, 160

who do this work charge for their services by billing their time at an hourly rate.[296] 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.[297] However, hourly billing lessens the connection between the benefits of representation to clients and the amount clients pay.[298] This disconnect tempts some lawyers to do unnecessary work to earn more fees.[299] Research suggests that more than three-fourths of U.S. in-house lawyers feel that hourly billing influences how much time outside lawyers spend on cases and significantly decreases incentives to work efficiently.[300]

Use of an adjudicatory process like arbitration requires 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.[301] These are tasks in line with lawyers' education and experience.[302] Applying the assumption that what one

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(December 1997) (observing that litigators, not business lawyers, dominate the arbitration process). *See generally Analyzing Company ADR Systems Practices*, *supra* note 236, at 54 (reporting that in 1999 General Electric spent 44% of the company's total outside legal expenditures on adjudication).

296. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 170 (2000). Commercial disputes are a lucrative market for lawyers. DEZALAY & GARTH, *supra* note 16, at 118; *see also* MNOOKIN ET AL., *supra* note 67, at 83 (arguing that hourly billing is used most often by deal-making attorneys and defense counsel in litigation).

297. MNOOKIN ET AL., *supra* note 67, at 83.

298. *Id.* at 83–84.

299. *Id.* at 84; *see also* RHODE, *supra* note 296, at 170 ("If lawyers are charging by the hour and lack other equally profitable uses for their time, they have an incentive to string out projects for as long as possible."). General research, not limited to business representation, on U.S. lawyers' hourly billing practices is not encouraging. Less than 5% of U.S. residents believe "that they get good value for the price of legal services." *Id.* at 168. Auditors have found demonstrable billing fraud in 5%–10% of reviewed bills, and questionable practices in another 25%–30% of receipts they analyzed. *Id.* at 179. Research suggests that 40% of U.S. lawyers confirm that "some of their work is influenced by a desire to bill additional hours." *Id.*

300. Of the interviewed in-house attorneys, 80% felt that the billable hour influenced how much time outside lawyers spent on a case, and 74% felt it decreased incentives to work efficiently. RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER 83–84 (1999). Professor Rhode notes that surveys suggest "about half of in-house counsel and chief executives believe that their law firms are overbilling." RHODE, *supra* note 296, at 169; *see also* William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 2 (1991) (discussing criticisms that hourly billing encourages inefficiency).

301. *See* Brooker & Lavers, *supra* note 57, at 162 (stating that the legal profession in the UK, anxious to maintain its monopoly in dispute resolution work, has assimilated arbitration into the formal system).

302. Lawyers need to perform different tasks and understand business interests to help clients mediate transborder commercial disputes effectively. *See* Cronin-Harris, *supra* note 111, at 861 (stating that lawyers have been asked to use flexible procedures focusing on business as well as legal issues). Lawyers need to pursue interest-based as

gets paid for strongly influences what one recommends, U.S. businesspersons assert that hourly billing provides lawyers a disincentive to mediate[303] and creates economic conflicts of interest between them and their lawyers.[304] Some contend that hourly billing practices are the primary reason mediation is not used more in commercial disputes.[305]

U.S. lawyers dispute these views and contend that, while they invariably mention mediation, their clients want adjudication most of the time.[306] They view the claim that hourly billing practices influence outside lawyers not to mention or recommend mediation as "outrageous."[307] In one study, 51% of outside counsel agreed that a substantial increase in the proportion of mediated disputes by their

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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.*

303. *See* McEwen, *supra* note 55, at 11 (reporting that a general counsel's statements that "[t]he hourly billing rate is the villain" blocking efforts to settle early and inexpensively, that hourly billing makes it "in the best interests of lawyers to do things slowly," and that the concept of early settlement "strikes fear throughout the entire body of a private law firm lawyer").

304. *Id.* In-house attorneys express disappointment with the apparent reluctance of law firms to put their clients' bottom line ahead of firm economics. *CPR Institute for Dispute Resolution Spring Meeting—June 1996*, *supra* note 274, 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 it becomes background noise. *Dealing With Financial Disincentives to ADR*, *supra* note 86, 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. Lande, *supra* note 152, at 182. A general counsel for a U.S. company, for example, noted that:

> 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 perhaps more of a feeling that you're making a determination strictly on a legal basis and your duty to vigorously defend your client.

Id.

305. *See, e.g.*, *Business Mediation, from All Points of View*, *supra* note 119, at 104 (presenting the opinion of an attorney that fee issues limit mediation use). 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.*

306. *See Dealing with Financial Disincentives to ADR*, *supra* note 86, at 48 (reporting the comments of a partner and a former managing partner of a Philadelphia law firm and former chair of the ABA litigation section). Some lawyers estimate that their dispute resolution conversations with clients produce a mediation flunk rate of 90%. *CPR Institute for Dispute Resolution Spring Meeting—June 1996*, *supra* note 274, at 98.

307. *Dealing with Financial Disincentives to ADR*, *supra* note 86, 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.*

firm or a major business client would not affect their personal compensation.[308] This survey also reported that 25% of outside counsel believed that an increase in the percentage of mediated matters would decrease their personal compensation.[309]

Mediation does not necessarily diminish law firm revenues. Billing for time spent helping clients prepare for and participate in mediations lessens adverse economic effects.[310] 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.[311]

Lawyers and their clients should have a second important conversation about creating contract provisions ex ante that require mediation before resorting to arbitral or judicial adjudication. Using a stepped approach of mediation first and, if not successful, then arbitration, provides opportunities to seek business-oriented solutions not constrained by conventional legal frameworks before spending time and money on adversarial, arbitral adjudication.[312] Stepped

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308. Lande, *supra* note 152, 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.

309. *Id.* Almost none of the inside counsel or executives surveyed expressed this concern. *Id.* Most of the outside counsel expected only a small decline in personal compensation. *Id.*

310. *See* Brooker & Lavers, *supra* note 57, at 190 (discussing findings that a large percentage of lawyers are satisfied with the cost of mediation, and that clients consider savings in legal costs when selecting the process). Large commercial mediations will inevitably involve plenty of billable hours for lawyers. *See id.* at 185 (arguing that representation will be employed for the negotiation process and the mediation itself). Preparation is essential to make international commercial mediation successful. *See* INTERNATIONAL MEDIATION, *supra* note 4, at 116–17 (identifying the lack of preparation as an obstacle to successful mediation). Lawyers are also needed to help disputants compare agreement options to likely adjudication outcomes. *See* Brooker & Lavers, *supra* note 57, at 185 (stating that people use the likely outcome of a court decision to guide negotiations).

311. *See* Lande, *supra* note 152, at 182–83. As one outside counsel in Professor Lande's study noted:

> [If] I suggested ADR 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 economical result for 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 86, at 48; *see also How Mediation is Practiced in Europe*, *supra* note 229, at 99 (noting that companies want lawyers looking at the long term, not short term, and seeking best results, especially if it means less litigation).

312. SCANLON, *supra* note 45, at 1.5. In some ways, this stepped approach parallels the Dispute Settlement Understanding of the World Trade Organization. Maraia Alejandra Rodriguez Lemmo, *Study of Selected International Dispute*

clauses typically provide that, upon notice of a claim arising from the contract between the parties, authorized representatives agree to mediate[313] in a specified way,[314] using specified neutrals,[315] within a certain period of time.[316] If mediation fails to resolve the dispute fully, the parties then agree to arbitrate with specifications for time, place, and other arbitral procedures.[317] Arranging arbitration as a fallback if all issues cannot be resolved at mediation provides an adjudication shadow that helps parties to act more reasonably when

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Resolution Regimes, with an Analysis of the Decisions of the Court of Justice of the Andean Community, 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 infra* note 354.

313. Giving special attention to the definition of mediation makes sense to mitigate cultural misunderstandings. Abramson, *supra* note 9, at 325; *see supra* notes 191–96 and accompanying text. It is essential that all participants understand the mediation process and its objectives. INTERNATIONAL MEDIATION, *supra* note 4, at 116. 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 nonbinding, often facilitative and occasionally evaluative, assisted negotiation. Abramson, *supra* note 9, at 325–26.

314. Selecting, adapting, and designating an "off the shelf set of mediation rules" is recommended. Abramson, *supra* note 9, at 326. This permits designing a focused process that serves the needs of parties. *Id.* Starting from scratch requires substantial time, effort, and expense, and many organizations have mechanisms in place that can easily be 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 offers procedures that provide useful ground rules encompassing selecting mediators, structuring the mediation process, and gaining administrative support for conducting mediations. *Id.*; SCANLON, *supra* note 45, at 2.16–2.17.

315. Mediator selection is extremely important because mediators vary substantially in experience, relevant knowledge, and preferred approach. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 15. Agreeing on the mediator or mediators and the precise process in advance avoids delays that quarrels about these issues can generate. *See* Abramson, *supra* note 9, at 26 (suggesting obligation clauses, time tables, and clear procedures for selecting a mediator). Advance designation of mediators allows them to help resolve problems when controversies first arise, before they ripen into disputes and conflicts. *See* Gans, *supra* note 9, at 54 (arguing in favor of the early selection of a neutral party). Most organizations' rules include provisions on mediator selection. SCANLON, *supra* note 45, 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. Abramson, *supra* note 259, at 591–93; *supra* notes 263–69 and accompanying text.

316. Phillips, *supra* note 159, at 8. Definite time frames accomplish management efficiency objectives. SCANLON, *supra* note 45, at 2.17. They also dampen inclinations reluctant parties might have once disputes arise either to avoid mediating or to use the process to delay adjudication in bad faith. Abramson, *supra* note 9, at 326.

317. *See* SCANLON, *supra* note 45, at 2.16 (providing a sample two-step mediation and arbitration clause).

mediating and gives them alternative outcome predictions to consider in evaluating agreement options.[318]

The difficulty in securing an agreement to mediate causes many businesses to use adjudication.[319] Contracting for a two-step dispute resolution mechanism of mediation first, then arbitration, before disputes arise avoids significant obstacles to agreeing on a dispute resolution mechanism after a conflict has begun.[320] Creating this contractual obligation commits companies to mediation and prevents a single disputant from vetoing use of this potentially valuable process.[321]

U.S. courts generally conclude that predispute agreements to mediate are enforceable.[322] Predispute agreements obligate parties only to sit down together to discuss the dispute—they do not require them to reach agreement.[323] Frequently, these discussions either

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318. *See* Keith L. Seat, What Every Antitrust Lawyer Should Know About Alternative Dispute Resolution, Presentation at the ABA Administrative Law Conference 4 (Nov. 6, 2003), *available at* http://keithseat.com/documents/WhatEvery AntitrustLawyerShouldKnowAboutADR.pdf ("The benefits of both mediation and arbitration can be obtained by mediating first and then using binding arbitration to resolve any outstanding issues."); *see also* Abramson, *supra* note 9, at 327 ("When arbitration is the backup, settlement agreements that result can be incorporated into a 'consent arbitration award' which can then be enforced under the relatively reliable New York Convention . . . ."). Presumably this will also work in Latin America under the Inter-American Convention on International Commercial Arbitration, which is similar to the New York Convention in many respects. de Araujo, *supra* note 18, at 51.

319. APPROPRIATE CORPORATE DISPUTE RESOLUTION, *supra* note 38 at 24. 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 three-quarters of 606 companies surveyed. *Id.* at 26.

320. *See, e.g.*, Abramson, *supra* note 9, at 324 (observing that parties are usually not in the mood to think about dispute resolution creatively when deals go sour); Gans, *supra* note 9, at 54 (discussing that early selection of a neutral party is best before suspicion sets in after conflicts arise); Phillips, *supra* note 159, at 8 (discussing the understanding that few disputants would agree to mediate if the suggestion was made after disputes arose).

321. *But see* Barendrecht & de Vries, *supra* note 61, at 100 (emphasizing that if one participant has a preference for something other than mediation, such as litigation, the preference prevails).

322. Kathleen M. Scanlon & Adam Spiewak, *Enforcement of Contract Clauses Providing for Mediation*, 19 ALTERNATIVES TO HIGH COST LITIG. 1, 1 (2001); *see also* Semco LLC v. Ellicott Mach. Corp. Int'l, No. 99-1928, 1999 U.S. Dist. LEXIS 10710, at *1 (E.D. La. July 9, 1999) (granting preliminary injunction preventing premature invocation of arbitration contrary to contract term requiring mediation first). Specific enforcement and contract damages have been allowed. Scanlon & Spiewak, *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. de Araujo, *supra* note 18, at 52–53. One Minister advanced "the dubious theory" that enforcing such clauses violated "the right to access to justice." *Id.* at 53.

323. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 14.

resolve some or all of the disputed issues, or they allow efficient design of subsequent arbitration.[324]

Businesses and their lawyers often spend little or no time during the negotiation phase discussing how they will handle disputes after a transborder deal takes effect.[325] Several common negotiation dynamics militate against negotiating stepped mediation-arbitration clauses in transborder commercial contracts. These include time constraints and the desire to close deals as soon as economic issues, transaction terms, and other relevant conditions are completed.[326]

Dispute resolution clauses are sometimes called "midnight clauses" because negotiators leave them until then end, and then, late at night or early in the morning, simply use boilerplate arbitration language.[327] Negotiating thoughtful stepped dispute resolution clauses takes time and money.[328] This might influence some businesspersons and lawyers to view boilerplate arbitration clauses as default, status quo terms, triggering a cognitive bias in favor of the traditional over the alternatives.[329]

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324. *Id.*; *see also* Barker, *supra* note 39, at 10 (stating that mediation allows parties to structure the framework for future negotiations); Brooker & Lavers, *supra* note 57, at 200 (citing a solicitor's experience that mediation narrowed the issues for trial); Younger, *supra* note 118, at 960 (arguing that mediation can narrow the issues for the parties). Process design decisions that can result include facilitating information exchange and selecting arbitrators. Brooker & Lavers, *supra* note 57, at 200. Pre-adjudication mediation has been described as a risk-free process. *Involving Business Managers*, *supra* note 44, at 154.

325. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 6; *see also* Gans, *supra* note 9, at 52 (noting that companies rarely provide for dispute resolution provisions); Phillips, *supra* note 159, at 8 ("[T]oo few contracts include stepped clauses.").

326. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 6. The desire to close deals sometimes discourages using stepped dispute resolution clauses because the time it takes to negotiate them delays closure on the deal. *Involving Business Managers*, *supra* note 44, at 158.

327. Phillips, *supra* note 159, at 8. Dispute resolution clauses are often viewed by lawyers and their clients as boilerplate provisions. Rome, *supra* note 295, at 159. Typical dispute resolution clauses are boilerplate constructions that often turn out to be totally unsatisfactory for many businesses and commercial contracts. *Id.*

328. *See* Barendrecht & de Vries, *supra* note 61, at 93 (observing that transaction costs are disincentives to contracting). 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.*

329. *Id.* 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. Carbonneau, *supra* note 48, at 1202–03. This bias is partially explained by tendencies to see defaults as entitlements from which it is difficult to depart. *Id.*; *see also Inertia and Preference in Contract Negotiation*, *supra* note 124, at 1585 (arguing that parties are less likely to bargain around default contracts than might be expected because they may think of default terms like entitlements). A related influence is a general preference for inaction over action. *Id.* at 1586.

Relationship concerns often inhibit the negotiation of stepped dispute resolution clauses. Businesspersons and lawyers often experience reluctance to introduce what might be perceived as negative perspectives into discussions with their prospective partners.[330] Businesspersons and lawyers might also suffer from an optimistically overconfident expectation that no serious disputes will arise.[331] The conscientious lawyer's insistence that perfect contracts do not exist and that the best time to realize the benefits of avoiding adjudication is before disputes arise counters this bias.[332] The best time to plan effective dispute resolution is when parties share good will and high hopes.[333] A tactful expression of concern for the future of the business relationship often disarms parties hesitant to discuss dispute resolution when commencing a relationship.[334]

Negotiating an agreement to mediate after disputes arise, while possible,[335] is difficult. These requests often confront another cognitive bias, a negative reaction stimulated by the adversarial relationship that exists in a dispute.[336] Called "reactive devaluation," this cognitive bias suggests that evaluations of proposals in dispute resolution change depending on their source.[337] Proposals to mediate might generate this response, particularly from disputants unfamiliar with neutral-assisted negotiation.[338] Unfamiliarity with mediation makes the adversary's intentions for proposing it difficult to discern, and this reinforces tendencies to devalue and reject it.[339]

U.S. businesspersons and lawyers may encounter additional difficulties in proposing mediation after disputes arise. U.S. processes and procedures are disfavored and feared in many countries

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330. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 6.

331. *See id.* ("New business partners often have overly optimistic expectations for their relationship."); *see also supra* notes 103–08 and accompanying text.

332. *See* Phillips, *supra* note 159, at 8 (stating that disputants had to be reminded that there are no perfect contracts, and that it is best to arrange the process earlier rather than later).

333. *See* Abramson, *supra* note 9, at 324 (stating that the best time to discuss dispute resolution is when the parties are negotiating the business deal because the parties are optimistic); Gans, *supra* note 9, at 52 (arguing that the time to deal with potential conflict is during negotiations, when there is mutual good will and hopes are high).

334. *Involving Business Managers*, *supra* note 44, at 159.

335. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 17 ("If the parties have not included a provision calling for mediation of disputes in their business agreement, they may agree to mediate after a dispute has arisen.").

336. *See* MNOOKIN ET AL., *supra* note 67, at 165 ("[A] party may devalue a proposal received from someone perceived as an adversary, even if the identical offer would have been acceptable when suggested by a neutral or an ally.").

337. *Id.*

338. *See* Barendrecht & de Vries, *supra* note 61, at 97 ("One of the important factors behind reactive devaluation is the lack of knowledge about the actual intentions of an adversary and, consequently a lack of knowledge the intentions behind an offer.").

339. *Id.*

of the world.[340] Mediation's use of neutral-assisted negotiation is much more common in U.S. domestic disputes than elsewhere in the Americas,[341] and this makes it easier to perceive mediation as a U.S.-specific process.

In addition, many countries in the Americas have resisted efforts to import U.S. ideas about mediation without change.[342] U.S. parties suggesting mediation must avoid implying that their domestic approaches to and experiences with this process are the right ways to think and act.[343] Substantial evidence suggests that U.S. models of conflict resolution are based on assumptions that do not coincide with the cultural traditions and behavioral influences of Latin Americans to whom they are presented.[344] For example, one of the Chamber of Commerce-initiated commercial mediation centers developed in Bolivia objected to "the Harvard model" of dispute resolution because it did not directly transfer to Bolivian commercial expectations and experiences.[345] Negotiators facing these and other challenges might seek the intervention of an independent third party to suggest mediation to all disputants.[346] Sometimes arbitrators perform this role.[347]

V. 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

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340. *March 1998 CPR Winter Meeting Supplement*, 16 ALTERNATIVES TO HIGH COST LITIG. 45, 47 (1998).

341. *See, e.g.*, Anderson, *supra* note 9, at 58 (observing that the United States leads other countries in its frequency of mediation use).

342. *See Mediation in Costa Rica*, *supra* note 58, at 26–27 (arguing that American efforts to export methods without change is offensive to Latin American nations, and that some Latin Americans have argued that American methods are not directly adaptable to their situations).

343. LEDERACH, *supra* note 3, at 38; *see also Mediation in Costa Rica*, *supra* note 58, at 26 (warning that Latin Americans do not appreciate the U.S. models of conflict resolution).

344. *Mediation in Costa Rica*, *supra* note 58, at 26; *see also* LEDERACH, *supra* note 3 at 51. U.S. mediation models are not uniformly accepted in Latin America. Wright, *supra* note 36, at 61.

345. Wanis-St. John, *supra* note 283, at 354–55.

346. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 15, at 18.

347. *Id.* Rule 18 of the CPR Arbitration Rules, for example, provides that "[w]ith the consent of the parties, the Tribunal at any stage of proceedings may arrange for mediation . . . by a mediator acceptable to the parties." *Id.* (quoting CPR INST. FOR DISPUTE RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION, R. 18.2).

it.[348] When used appropriately[349] as an opportunity to embrace interest-based negotiation that seeks the best outcomes for parties willing to avoid the additional time, expense, and uncertainty of arbitrating,[350] mediation often produces relatively quick and inexpensive solutions that honor businesses' needs and concerns.[351]

Regional trade agreements typically neither prohibit nor particularly encourage mediation. NAFTA, for example, does not specifically authorize alternative dispute resolution mechanisms (ADR) except in cases of disputes about the interpretation and application of NAFTA and in investment disputes.[352] NAFTA and CAFTA encourage the use of arbitration and other means of ADR for the settlement of international commercial disputes.[353] Their provisions do not mention mediation specifically except where they list processes their commissions might use after party negotiations fail.[354] Failure to mention mediation more prominently affirms these trade regimes' prevailing bias in favor of arbitral adjudication.[355]

Exposure through trade regimes to countries with well-developed mediation systems has helped other nations learn the value of

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348. McEwen, *supra* note 55, at 3; *see also* INTERNATIONAL MEDIATION, *supra* note 4, at 7 (observing that mediation on its own cannot overcome "irreconcilable differences" between parties in the global community).

349. 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 15, at 324; *see also* Brooker & Lavers, *supra* note 57, at 203–11 (describing inappropriate uses of mediation in the United Kingdom); *Attorney Truthfulness*, *supra* note 118, at 134–37 (estimating attorneys' lies about interests and priorities in U.S. mediation). This manipulation of mediation stems from adversarial thinking and 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 32, at 98.

350. *See* WATSON, *supra* note 251, at 15 (noting that the 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).

351. *Cf.* Gans, *supra* note 9, at 53 (stating that legal remedies are often too draconian, and suing someone rarely serves business goals).

352. Freese & Spagnola, *supra* note 20, at 61.

353. *See, e.g.*, Anderson, *supra* note 9, at 58 (arguing that the language of NAFTA encourages resolution and places focus on arbitration); Luis M. Martinez, *U.S. Signs CAFTA*, DISP. RESOL. J., Aug. 1, 2004, at 9, 9 (asserting that CAFTA provides for a dispute resolution process that includes arbitration).

354. *See* Central America-Dom. Rep.-U.S. Free Trade Agreement art. 20.5, Aug. 5, 2004, 21 U.S.T. 2517, 43 I.L.M. 514 (recognizing the steps the Commission may take to assist the parties to reach a "mutually satisfactory resolution of the dispute"); North American Free Trade Agreement, U.S.-Can.-Mex., art. 2007, Dec. 17, 1992, 32 I.L.M 289 (1993) (stating that the Commission may have resources to good offices, conciliation, and mediation).

355. *See* Anderson, *supra* note 9, at 58 (arguing that mediation must be promoted to overcome barriers such as cultural ignorance).

assisted negotiation.[356] Adding mediation provisions to international treaties in the Americas might encourage the development of mediation processes in Latin American countries where it is not yet well established.[357] While the Mercosul integration treaties make no mention of mediation or conciliation specifically,[358] they allow aggrieved parties to participate in assisted-negotiation mechanisms before arbitration.[359] This communicates that mediation is a serious option.[360] Commentators have noted how helpful it would be to have NAFTA, CAFTA, Mercosul, and other regional trade bodies adopt provisions endorsing stepped dispute resolution that begins with mediation.[361]

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 in changing routines and traditional expectations, combine to generate a default resort to adjudication. Tradition, rather than purposeful choice, appears to dictate excessive reliance on arbitration even as mediation has emerged as a useful commercial dispute resolution process.

This decision to arbitrate rather than mediate, like many others negotiators make, often seems suboptimal in hindsight.[362] This Article suggests several strategies for making the often optimal choice to mediate before adjudicating. If parties to transborder commercial disputes are serious about achieving resolutions that best effectuate their interests, it is essential that these parties—and their lawyers—acknowledge and overcome the cognitive and cultural barriers that persistently push them toward adjudication.

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356. *Mediation in Latin America*, *supra* note 16, 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 U.S. corporations through NAFTA. *Id.* These interactions have also helped mediation organizations form in Brazil and Mexico. *Id.*

357. *Id.*

358. de Araujo, *supra* note 18, at 26–27, 36 (noting that the dispute resolution in Mercosul does not mention mediation or conciliation, although private disputants can participate through consultations with Mercosul's trade commission).

359. *Mediation in Latin America*, *supra* note 16, at 432; Brazilia Protocol for the Settlement of Disputes arts. 2–3, 25, Mar. 26, 1991, 36 I.L.M. 691.

360. *See generally* GLOBAL TRENDS IN MEDIATION, *supra* note 4, at 6 (noting that the globalization and regionalization of trade law is stimulating new interest in mediation.).

361. *See* Anderson, *supra* note 9, at 63 (urging NAFTA to endorse mediation). Further reforms of regional trading bloc procedures are needed to trigger greater use of mediation to meet the needs of international trade. INTERNATIONAL MEDIATION, *supra* note 4, at 13.

362. *See* Adler, *supra* note 67, at 773 (proposing that in hindsight, any deal one negotiates may seem sub-optimal).

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