

Towards Cross-Cultural Fluency in Mediation Standards

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Abstract

This article argues that the transplantation of the modern Western mediation model,¹ if to be successfully applied to an Asian context, must be accompanied by cultural adaptations to make mediation effective in the local context. The historical roots of mediation in Asia will be outlined first before analysing of the Western-centric modern developments in alternate dispute resolution. This article then questions whether the Western-oriented model of mediation is suitable in the context of Asian values and highlights several potential points of culture clashes. Practitioners mediating in a cross-cultural setting may wish to consider adaptations to the Western-oriented model proposed in this article. Finally, the article points out the positive progress made regionally and internationally in recognising cross-cultural competency in mediation accreditation standards, but argues that further development is required to adequately recognise cross-cultural competency in mediation.

I PAST AND PRESENT: AN EXAMINATION OF ANCIENT AND CURRENT MEDIATION PRACTICE IN ASIA

A *Historical Roots of Mediation in Asia*

Conflict is inevitable in any society. While the modern movements in out-of-court dispute resolutions have been termed 'alternate dispute resolution', there is literature which highlights that these processes have long been established in Asia as 'traditional' and as part of a functioning society.

In Ancient China, premised on the values of Confucianism and Taoism, the concept of harmony and cooperation are essential philosophical concepts.² Due to this emphasis on harmony, the Ancient Chinese often sought the aid of a third-party to assist in resolving disputes before resorting to official

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¹ See Laurence Boulle, *Mediation Principles: Process and Practice* (LexisNexis, 2nd ed, 2005); see also, Nadja Alexander, 'The Mediation Meta-Model – The Realities of Mediation Practice' (2011) 12 *ADR Bulletin* 1, 2.

² Cheng Qian, 'The Culture of China's Mediation in Regional and International Affairs' (2010) 28 *Conflict Resolution Quarterly* 53.

court action.³ ‘No litigation’ is a core tenet of Confucianism and a lawsuit was seen as disruptive to a harmonious society.⁴ The term 说和 (*shuō hé*), literally translated as ‘speaking peace’, is considered the equivalent to what we would now term ‘mediation’.⁵ In Ancient China, such mediations were typically conducted by friends, families, elders or others holding high prestige in society.⁶ Disputes within the family would be brought to the family head (usually the father or grandfather).⁷ Disputes within the clan would be brought to clan leaders, elders or others who combined learning, ability or wealth with a reputation for fairness and wisdom.⁸ Village disputes would be brought to the village leader and settled over ‘mediation tea’.⁹ The literature suggests that such mediation involved a wide range of matters including issues relating to contract, property, tort, family and even minor criminal law cases.¹⁰

Other Asian societies such as those in South-East Asia, Japan and Korea have also been heavily influenced by these tenets of Confucianism.¹¹ The Tokugawa Shogunate in Japan required that civil disputes be mediated by a village head prior to court action.¹² Confucian values influenced South Koreans to consider themselves part of an organic human society where order and harmony is sought over competition and adversarial relations.¹³ The Thais, influenced by the Buddhist values of compassion, have a cultural disapproval for confrontation and traditionally turn to village elders, monks and other leader figures to mediate their disputes.¹⁴

³ Ibid.

⁴ Ibid.

⁵ Guo-Ming Chen and William J Starosta, ‘Chinese Conflict Management and Resolution: Overview and Implications’ (1997–8) 7 *Intercultural Communication Studies* 1, 3.

⁶ Lim Lan Yuan, *Mediation Styles and Approaches in Asian Culture* (19–22 November 2003) Asia Pacific Mediation Forum <<http://www.asiapacificmediationforum.org/resources/2003/limlanyuan.pdf>>.

⁷ Jerome Alan Cohen, ‘Chinese Mediation on the Eve of Modernization’ (1966) 54 *California Law Review* 1207, 1216; see also Chin Kim, ‘The Modern Chinese Legal System’ (1987) 61 *Tulane Law Review* 1413; James A Wall and Michael Blum, ‘Community Mediation in the People’s Republic of China’ (1991) 33 *Journal of Conflict Resolution* 3 for further details on community mediation in China.

⁸ Cohen, above n 7.

⁹ Ibid 1221.

¹⁰ Ibid 1220.

¹¹ Danny McFadden, *Resolving Disputes in China Using Mediation* (2012) CEDR Asia Pacific 2 <<http://www.cedr-asia-pacific.com/cedr/uploads/articles/pdf/ARTICLE-20120116100514.pdf>>.

¹² Cohen, above n 7, 1209.

¹³ Yuan, above n 6; Donald Stone Macdonald, *The Koreans: Contemporary Politics and Society* (Westview Press, 1988).

¹⁴ Bruce E Barnes, *Culture, Conflict and Mediation in the Asian Pacific* (University Press of America, 2006) 91–2; Laurence Boulle and Teh Hwee Hwee, *Mediation: Principles, Process and Practice* (Butterworths, 2000) 192; Thawatchai Suvanpanich, ‘Thailand’ in Michael Pryles (ed) *Dispute Resolution in Asia* (Kluwer Law International, 3rd ed, 2006) 431.

Singapore and Malaysia's Chinese population are also heavily influenced by Confucian values.¹⁵ It would appear that the Chinese tradition of choosing a person of repute and high standing in society to act as a mediator was commonplace in Singapore.¹⁶ The migrant Indian population of the region have their culture of *panchayat* to resolve community disputes.¹⁷ The ethnic Malay community also have a history of mediation through the cultural approach of *adab* (doing good deeds) and *rukun* (preserving harmony in the community),¹⁸ and mediate disputes through the *kutua kampong* (village administrator) or *imam* (religious leader).¹⁹

The above examples show that Asia is no stranger to mediation. Indeed, the emphasis on a harmonious relationship often ensures that mediation is the 'traditional' rather than an 'alternative' dispute resolution process.

B *The Modern Re-Emergence of Asian Mediation*

Moving forward into the 21st century, it has been said for some time now that we are in the 'Asian Century'.²⁰ With one half of the world's population, and an increase in importance as a global commercial hub,²¹ the demand for conventional and alternative dispute resolution services has risen in Asia.²²

In China, bodies like the China Council for the Promotion of International Trade Mediation Centre in Beijing have begun conducting training in modern commercial mediation processes and offer their mediation services to foreign companies.²³ In Hong Kong, the Centre for Effective Dispute Resolution Asia Pacific and the Hong Kong Mediation Centre are just two

¹⁵ Barnes, above n 14, 42. Barnes considers Singapore as part of the 'Confucian' group of countries. While Malaysia has a dominant Malay population, it may be argued that the Chinese population of Malaysia share similar Confucian values with their Singaporean counterparts.

¹⁶ Joel Lee and Teh Hwee Hwee, *An Asian Perspective On Mediation* (Academy Publishing, 2009) 10.

¹⁷ Hanna Binti Ambaras Khan, 'Community Mediation in Malaysia: A Comparison between *Rukun Tetangga* and Community Mediation in Singapore' (2013) 3(3) *Journal of Literature and Art Studies* 180.

¹⁸ Barnes, above n 14.

¹⁹ Khan, above n 17.

²⁰ Scott B Macdonald and Jonathan Lemco, *Asia's Rise in the 21st Century* (Praeger, 2011).

²¹ Dona Meadows, *If the World Were a Village of 1,000 People*, The Global Development Research Center <www.gdrc.org/uem/1000-village.html>, cited in John Barkai, 'What's a Cross Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem' (2008) 10 *Cardozo Journal of Conflict Resolution* 43, 44.

²² An examination of the decline of ancient practices of mediation in Asia is a worthy endeavor, but unfortunately outside the confines of this paper. Suffice it to say, industrialisation, urbanisation and/or colonisation could be factors in the decline of ancient mediation practices.

²³ McFadden, above n 11; *CPF Trains First Mediators for US-China Business Mediation Centre-Beijing* (13 July 2004) International Institute for Conflict Prevention & Resolution <<https://www.cpradr.org/news-publications/press-releases/2004-07-13-cpr-trains-first-mediators-for-u-s-china-business-mediation-center-beijing-press>>.

organisations which offer mediation services in the region.²⁴ In Malaysia, the Malaysian Mediation Centre was set up by the Bar Council of Malaysia in 1999 and offers mediation services and accreditation.²⁵ In Singapore, the Singapore Mediation Centre, opened in 1997, provides mediation services as well as trains and accredits mediators in Singapore.²⁶ Further, the International Commercial Mediation Centre and the Singapore International Mediation Institute (SIMI) were launched on 5 November 2014.²⁷ The former offers international mediation services and the latter sets standards and provides accreditation for mediators.²⁸ Regionally, the Asian Mediation Association was set up in 2007 and one of its aims is to increase awareness of alternate dispute resolution and promote the 'Asian' model of mediation.²⁹

II THE MODERN MODEL OF MEDIATION

There are a number of modern approaches to mediation in use today. The four main modern approaches are the 'settlement', 'facilitative', 'transformative' and 'evaluative' models.³⁰ Settlement mediation is where the mediator determines the parties' bottom lines and then persuades them to a point of compromise.³¹ The transformative model focuses on therapeutic techniques to treat the relationship, even at the expense of no settlement.³² Evaluative mediation is a model focused on the legal rights of the parties, where an evaluative mediator sits and offers an opinion on how

²⁴ There are about 30 or so separate mediator accrediting bodies in Hong Kong: see Wendy Lui, 'The Rebirth of Accreditation a Case of Hong Kong' (2011) *1 Tan Pan: The Chinese-English Journal on Negotiation* (2011) 63.

²⁵ The Malaysian Bar, *Malaysian Mediation Centre* <http://www.malaysianbar.org.my/malaysian_mediation_centre_mmc.html>; Khutubul Zaman Bin Bukhari, *Arbitration and Mediation in Malaysia* (2003) ASEAN Law Association <http://www.aseanlawassociation.org/docs/w4_malaysia.pdf>.

²⁶ Singapore Mediation Centre, *About Us* <http://www.mediation.com.sg/index.php?option=com_content&view=article&id=26&Itemid=198>. See also Joel Lee, 'The ADR Movement in Singapore' in Kevin Tan (ed) *The Singapore Legal System* (Singapore University Press, 2nd ed, 1999) 414.

²⁷ 'New Singapore International Mediation Centre Launched', *Today* (online), 6 November 2014 <<http://www.todayonline.com/new-singapore-international-mediation-centre-launched>>; National University of Singapore, 'Singapore International Mediation Institute Launched to Set World-Class Mediation Standards' (Press Release, 5 November 2014) <<http://news.nus.edu.sg/press-releases/singapore-international-mediation-institute-launched-set-world-class-mediation>>.

²⁸ *Ibid.*

²⁹ See ASEAN Mediation Association, *About AMA* <<http://www.asianmediationassociation.org>>. The founding members are the Hong Kong Mediation Centre, the Indonesian Mediation Centre, the Malaysian Mediation Centre, the Philippines Mediation Centre and the Singapore Mediation Centre.

³⁰ Boulle, above n 1.

³¹ David Spencer and Michael Brogan (Cambridge University Press, 2006) *Mediation Law and Practice* 102.

³² *Ibid.*

a judge might decide, to help parties reach an agreement.³³ The facilitative model involves a neutral mediator merely facilitating the process of a dialogue between the parties.³⁴ Of the four, the facilitative model may be said to be the most commonly deployed. It is the preferred approach in the US and is the model endorsed by the National Mediation Accreditation System in Australia.³⁵ This article therefore focuses on the facilitative model and proposes how mediation standards can appropriately calibrate the facilitative model, where appropriate, to an Asian setting.

The facilitative model has its origins in the Harvard Negotiation Project and can be credited to the work of Professor Roger Fisher.³⁶ The facilitative model attempts to shift parties from a rights-based approach to an interests-based approach and is marked by its focus on the needs and interests of the parties. The mediator takes a back-seat approach and merely acts as a facilitator of the proceedings. The mediator, generally, neither advises the parties nor recommends solutions.³⁷ The focus is on self-determination; it is for the parties to provide solutions to the disagreement.

It has been well accepted that despite the aforementioned historical experience with mediation, the modern alternate dispute resolution landscape is led and heavily influenced by movements in the US, Australia and the UK.³⁸ The Hong Kong Mediation Centre, for example, practices the facilitative model, which is endorsed by the Hong Kong Mediation Accreditation Association.³⁹ Mediators of the Malaysian Mediation Centre are trained by the Australian Accord Group or then-LEADR Association of Dispute Resolvers in Australia (now the Resolution Institute).⁴⁰ In Singapore, the Singapore Mediation Centre practices the facilitative model and accordingly trains its panel of mediators using this approach.⁴¹

Given the West's advances in the alternate dispute resolution arena, most mediation practitioners and coaches in Asia were trained overseas and exposed to the Western school of alternate dispute resolution.⁴² This irony

³³ Ibid.

³⁴ Ibid.

³⁵ Dale Bagshaw, 'Challenging Western Constructs of Mediation' in Dale Bagshaw and Elisabeth Porter (eds) *Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace* (Routledge, 2009) 13; *National Mediator Accreditation Standards* (1 July 2015) Mediator Standards Board <<http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>>.

³⁶ Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement without Giving In* (Penguin, 1981).

³⁷ There are of course, some exceptions where mediators have taken a blended approach and provide an opinion of the parties' legal rights.

³⁸ Lee and Teh, above n 16, 11.

³⁹ Hong Kong Mediation Accreditation Association Limited, *Mediation in Hong Kong* <<http://www.hkmaal.org.hk/en/MediationinHongKong.php>>.

⁴⁰ Bukhari, above n 25.

⁴¹ Lee and Teh, above n 16, 11.

⁴² Ibid.

has not been entirely lost — in 1997, at the opening of the Singapore Mediation Centre, former Chief Justice of Singapore, Yong Pung How remarked that we now have ‘to re-learn mediation from the West [and] develop a model that suits our culture and diverse ethnic backgrounds’.⁴³ However, and as outlined below, the facilitative model — where the focus is on self-determination and the onus is on the parties to provide solutions — may not be entirely suitable in an Asian setting.⁴⁴ Participants with ‘Asian values’ may be less willing to provide their own solutions, preferring instead to defer to the mediator’s authority to avoid offending the other party.

A *Clash of Cultures: Potential Problems*

The problem with the interests-based facilitative model is that it is premised on a certain set of Western-oriented cultural assumptions and values.⁴⁵ Lee and Teh identified four key assumptions inherent in the interests-based model:⁴⁶

- (1) Primacy of the individual and individual’s expectation of autonomy. The mediator acts only in a neutral, passive manner.
- (2) Prioritisation of the interests of the individual above that of the community.
- (3) Direct and open communication, which encourages the participants’ active engagement in resolving the dispute.
- (4) Unconditionally constructive approach to maintaining a good relationship.

As disputes become increasingly cross-jurisdictional and cross-cultural, it has been recognised that the Western-oriented model cannot be transplanted wholesale across cultures without losing some of its effectiveness.⁴⁷ Mediators, despite their good intentions, may ultimately cause harm.

However, at the same time, it has also been noted that one would be unwise to dismiss the normative interests-based model too quickly.⁴⁸ A nuanced approach should be taken by adopting, but adapting — taking the interests-based model, but modifying it where necessary to accommodate cultural differences.

⁴³ Ibid 12.

⁴⁴ A fuller discussion of what these ‘Asian values’ are is discussed below. The author acknowledges that the Asian values debate is an ongoing one — as highlighted below, there is at least some evidence to suggest that these values do differ from Western ones, and it is on this premise that the adaptations to the facilitative model is proposed.

⁴⁵ Ibid 34.

⁴⁶ Ibid 36–9.

⁴⁷ Tania Sourdin, *Alternate Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 504.

⁴⁸ Lee and Teh, above n 16, 18–19.

B *Asian Values and Culture*

Before embarking on the task of adapting the facilitative model, it is necessary to identify the salient ‘Asian values’ that may be incompatible with the interests-based model. Culture is said to be ‘the collective programming of the human mind that distinguishes members of one human group from another’; culture in this sense is a system of collectively held values.⁴⁹ What then constitutes ‘Asian values’?⁵⁰ Some propose that Asian societies draw from the teachings of Confucius and are thus based on four interrelated tenets: social harmony, a hierarchal society, social conformity, and compromise and non-litigiousness.⁵¹ Some of these values are also held in non-Confucian societies in Asia. For example, the Malay’s deference to authority, conformity, suppression of individual preferences and avoidance of confrontation mirror Confucian values.⁵²

It is useful to pause to consider Asia; can it be said to have any one consistent set of ‘values’ given its many countries, religions and cultures? Given the large geographical region and the myriad of cultures within, it may be difficult to state definitely that all within Asia share these ‘Asian values’. However, there is evidence to show that there are some shared values within this region. One shared value that crosses borders and religions is the idea of communitarianism — the concept that responsibilities to the family and the community take precedence over the individual — which can be found in East Asia, Singapore, Indonesia, Malaysia and Thailand.⁵³ Another shared value is the notion of duties and responsibilities, as opposed to individual rights, which some have suggested was an imported concept.⁵⁴ To add quantitative data, a survey was conducted by Hitchcock across eight East Asian countries and the US where participants were asked to select from a list of values those that they considered important in their country.⁵⁵ It is telling that the participants from Asia selected an orderly society and harmony as their top two values.⁵⁶ In contrast, the Americans chose freedom of expression and

⁴⁹ Geert Hofstede, *Culture’s Consequences* (Sage Publications, 2nd ed, 2001).

⁵⁰ There is of course debate as to whether it is possible to conclusively define what these ‘Asian values’ are. There is literature to suggest that these ‘Asian’ values are not in fact, limited to Asia. I do not propose to delve into an analysis of this in this paper. However, I acknowledge that Asia does not hold a monopoly on these values and indeed, as articulated later in this paper, Aboriginal Australian and even military culture embody very similar values.

⁵¹ Bobette Wolski, ‘Culture, Society and Mediation in China and the West’ (1997) 3 *Commercial Dispute Resolution Journal* 96, 102–3.

⁵² Norma Mansor, ‘Managing Conflict in Malaysia: Cultural and Economic Influences’ in Kwok Leng and Dean Tjosvold (eds) *Conflict Management in Asia Pacific* (1988), 152–7, 161–4.

⁵³ Diane Mauzy, ‘The Human Rights and “Asian Values” Debate in Southeast Asia: Trying to Clarify the Key Issues’ (1997) 10(2) *The Pacific Review* 210, 215.

⁵⁴ *Ibid.*

⁵⁵ David Hitchcock, *Asian Values and the United States: How Much Conflict?* (Center for Strategic and International Studies, 1994).

⁵⁶ *Ibid.*

personal freedom.⁵⁷ Further, a number of surveys conducted by the *Far Eastern Economic Review* across nine Asian countries (with Asians and Western expatriates) and Australia showed an Asian preference for harmony, order and a respect for authority in contrast to the Australians and Western expatriates.⁵⁸ These studies appear to suggest that there are a set of Asian values distinct from Western ones. As noted by Huntington, the values most important in the West are least important worldwide.⁵⁹

Hofstede's six dimensions on culture establish a framework that could be used to distinguish cultures.⁶⁰ Two dimensions are particularly illustrative here. 'Power distance' measures how society handles inherent inequalities arising from prestige, wealth and power. Cultures with a high power distance index tend to be comfortable with an authoritative and hierarchal society while cultures with a low power index tend to be more comfortable with flat organisational structures and shared authority. Countries like Australia, the UK and the US have low power indexes while Asian countries tend to have noticeably higher scores. On the 'individualism/collectivism' index, the dimensions indicate that Asian countries tend to favour collectivism over individualism. One theory is that Asian rice-growing societies were grouped into villages isolated from each other and were thus highly dependent on the community for survival.⁶¹ These two dimensions also overlap with the Confucian values of social harmony and hierarchy. As will be discussed, these Asian values will have implications for the mediator and may require the mediator to adapt the facilitative model to accommodate suit the participant's cultural values.

C Adopting and Adapting: Implications for the Mediator

1 Mediator's Standing

As discussed earlier, throughout much of Asia, traditional mediation was effected by family heads, village elders and/or village leaders. The mediator is thus expected to be someone of greater standing when compared to the disputants; Lee has argued that this expectation continues in Asia today.⁶² In Singapore, the Singapore Mediation Centre's panel of Principal Mediators reflect an eminent section of society. Generally, Principal Mediators are judges, senior civil servants or partners of law firms.⁶³ Similarly, Singapore's Community Mediation Centre mediators

⁵⁷ Ibid.

⁵⁸ See *Far Eastern Economic Review*, 12 September 1996 and 8 August 1996, cited in Mauzy, above n 53, 216–7.

⁵⁹ Samuel Huntington, 'The Clash of Civilizations?' (1993) *Foreign Affairs* 72(3), 22.

⁶⁰ The six dimensions are 'power distance', 'individual/collectivism', 'masculinity/femininity', 'uncertainty avoidance,' 'long-term orientation' and 'indulgence': Hofstede, above n 49, 224.

⁶¹ Rhoads Murphey, *A History of Asia* (Longman, 4th ed, 2002) 5.

⁶² Lee and Teh, above n 16, 62, 71.

⁶³ Singapore Mediation Centre, *Panel of Principal Mediators* <http://www.mediation.com.sg/index.php?option=com_content&view=article&id=65&Itemid=246>.

are drawn from grassroots and community leaders.⁶⁴ It is thus submitted that a mediator in an Asian context should ideally be a person of standing in society that the disputants will respect.

2 Looking for Leadership

As mentioned above, inherent as part of the Asian values is the collectivist and hierarchal nature of Asian societies. This, coupled with the fact that the mediator is expected to be a person of prestige and authority, often leads to the disputant expecting guidance from the mediator. These values ask that disputants consider the needs of the collective in addition to their own. They thus naturally look to the mediator as one of high standing in society for some sort of input. The mediator who adopts a strict hands-off approach would therefore be seen to be ineffective and may be viewed to have abdicated their responsibilities.⁶⁵

3 Collectivism and Communication

Asian values of collectivism, maintaining social harmony and an acceptance of a hierarchal society as evidenced by Hofstede's power index research would therefore be incompatible to the Western-oriented values of open and direct communication in mediation. Disputants in an Asian context may be more reserved and communicate through implicit, non-verbal cues in order to prevent embarrassment for either party. The culturally aware mediator should thus be prepared to assist participants in rendering explicit what may have been implicit in their behaviour.

D Two Practical Examples⁶⁶

1 Opening Statement

Lee and Teh offer some suggested variations in the opening statement of mediators in an Asian context.⁶⁷ The suggested changes result in an opening statement that is more formal, addressing participants by their title 'Mr/Mrs' and expecting them to do the same. While the mediator still informs the parties that the process is voluntary, the language reflects the mediator's expectation that a genuine attempt should be made by all to engage in the process. Ground rules are explained as an expectation rather than a matter for consensus. Additionally, and most noticeably, the mediator introduces himself with his credentials and professional titles. This, as explained earlier, arguably has a positive effect in an Asian setting and lends credibility and legitimacy to the mediation.

⁶⁴ Khan, above n 17, 183.

⁶⁵ Lee and Teh, above n 16, 68.

⁶⁶ I draw these suggestions from Lee and Teh. While a multitude of examples are offered in their work, I select only a few as illustrative examples.

⁶⁷ Lee and Teh, above n 16, 78.

2 Option Generation

In the facilitative model, the mediator takes a hands-off approach and avoids offering solutions. However, because of the preference for non-direct communication and the importance of social harmony, disputants in an Asian context may be reluctant to offer options that may be perceived as offensive to the other party. Therefore it has been suggested that the mediator should take the initiative and provide some options while asking the disputants to add some of their own. Further solutions can also be canvassed in private sessions. In this manner, the options generated may be said to be the collective result of all and not attributable to any one party, thus saving 'face'. Lee and Teh have also suggested that mediators take ownership of the option generation where appropriate.⁶⁸ The weight of the mediator's authority behind those options may make it easier for parties to accept them.⁶⁹ There is, however, a fine line to this approach. Using the mediator's authority to bring pressure on disputants to accept a solution may or may not have consequences later on. While this is a feasible suggested approach, more research should be conducted to determine its effectiveness.

E *Applicability of the Modified Approach*

It should also be noted that this suggested modified approach to the facilitative model is not purely limited to an Asian context and may also suit other cultures and sub-cultures within Western society. The military and armed services are examples of sub-cultures within Western society that share many of the 'Asian values' articulated earlier. There is a 'high-power' culture inherent in the rank and hierarchy of the military.⁷⁰ This hierarchy also makes open and frank communication difficult. There is also arguably a collectivism culture as service personnel look towards the larger needs of the organisation in addition to their own. In a dispute involving two service personnel of a certain rank, a mediator of inferior rank may not be taken seriously and the legitimacy of the mediation may be questioned. However, a mediator of similar rank or higher rank would experience similar issues as the Asian authoritative mediator — participants would look to and expect guidance from the mediator.

Similarly, in Australian Aboriginal culture, a neutral mediator may not be appropriate. The mediator should also have some links to the community where the dispute has occurred and importantly, must be a respected

⁶⁸ Ibid 84.

⁶⁹ Ibid.

⁷⁰ Joseph Soeters and Ricardo Recht, 'Culture and Discipline in Military Academies: An International Comparison' (1988) 26(2) *Journal of Political and Military Sociology* 169.

individual.⁷¹ For these reasons, a respected elder in the community is selected to mediate the matter.⁷²

However, one should note that while the mediator must be culturally aware, it would be remiss to adopt a one-size-fits-all approach. Sourdin also cautions against two types of errors.⁷³ A ‘type I’ error is where a mediator underestimates the significance of culture in a dispute. A ‘type II’ error is where a mediator overestimates the significance of culture in a dispute.⁷⁴ Lee cites the example of a Chinese person born in California, raised in New York and educated at Oxford.⁷⁵ This hypothetical person may share some or none of the Asian values described above and it would be inappropriate for a mediator to make invalid assumptions. Additionally, even if this hypothetical person was raised and educated in China, influences like television, movies and the internet can lead to a blurring of cultural values.⁷⁶ A mediator that overestimates the impact of Asian values on the hypothetical Chinese disputant may be committing a ‘type II’ error.

III RECOGNISING CULTURAL FLUENCY IN MEDIATION TRAINING AND ACCREDITATION

In light of the importance of cultural context in mediation and the implications that cultural insensitivity can have on mediation, it is crucial that recognition of cultural fluency is embedded in both mediation training and accreditation schemes. In Asia, at the time of writing and to the best of the author’s knowledge, there does not exist a system of regional or national accreditation for mediators, let alone cultural fluency in mediators. Hong Kong and Singapore can be said to be leading the region in the mediation landscape (as can Australia), yet neither has established a national system of accreditation, let alone formalised training in cultural awareness.

While the current state of affairs may be lamented, it may also be noteworthy to point out that Australia, despite being regarded as a leader in the alternate dispute resolution landscape, implemented its own National Mediator Accreditation System only in 2008.⁷⁷ Its establishment was not without issues of its own and even today their National Mediator Accreditation Scheme (NMAS) is not compulsory; there is neither formal

⁷¹ Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis, 2nd ed, 2002) 154–5.

⁷² *Ibid.*

⁷³ Sourdin, above n 47, 505.

⁷⁴ *Ibid.*

⁷⁵ Lee and Teh, above n 16, 46.

⁷⁶ *Ibid.* 47.

⁷⁷ Mediator Standards Board, *National Mediator Accreditation System - A History of the Development of the Standards* <<http://www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf>>.

training nor registration requirements for one to serve as a mediator in Australia.

The Australian NMAS and the International Mediation Institute's (IMI) schemes may however be used as a basis for future regional or national Asian accreditation systems recognising cultural fluency.

A *International Mediation Institute*

The IMI's Inter-Cultural Certification appears thus far, in the author's view at least, the gold standard for cross-cultural training in mediation. Unlike the NMAS' Practice Standards, which only allude to competence in 'cross-cultural issues in mediation and dispute management', the IMI sets out in detail the substantive criteria for IMI Inter-Cultural Certification. These include how collectivist cultures may impact the mediation,⁷⁸ and how to assist participants to render explicit what may have been implicit in their behaviour,⁷⁹ which caters to disputants from a culture that prefers non-direct and non-open communication. Certification also requires mediators to be more facilitative when it would assist disputants from a culture of high-power index as they would appreciate the guidance and input of an authoritative mediator.⁸⁰

Unfortunately, the IMI's Inter-Cultural Certification is a separate, optional course to its standard certification program.⁸¹ Additionally, because of the international nature of the IMI, there is currently no jurisdiction that requires either the IMI standard or Inter-Cultural Certification to practise as a mediator.

B *The Australian National Mediator Accreditation Scheme*

The NMAS is a voluntary national accreditation scheme which provides a minimum standard of training and assessment for all mediators.⁸² The Mediator Standards Board is responsible for the development of mediator standards and the implementation of the NMAS. Under the NMAS, a Recognised Mediator Accreditation Body (RMAB)⁸³ that meets certain criteria may accredit mediators. The NMAS now maintains a

⁷⁸ IMI, *Inter-Cultural Certification Criteria*, s II(A)(1) <<http://imimediation.org/intercultural-certification-criteria>>.

⁷⁹ *Ibid* s II(B)(4)(d).

⁸⁰ *Ibid* s II(B)(6)(b).

⁸¹ IMI offers its standard Certification through Qualifying Assessment Programs run by mediation training bodies in individual countries. The Australian program for example, is run by the Resolution Institute. See IMI, *How to Become IMI Certified* <<http://imimediation.org/how-to-become-imi-certified>>.

⁸² Mediator Standards Board, *Mediator Standards* <<http://www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas>>.

⁸³ See Mediator Standards Board, *Accreditation Bodies* <<http://www.msb.org.au/accreditation-bodies/rmab-contact-list>> for a full list of RMABs.

Register of National Accredited Mediators.⁸⁴ One can look up a NMAS mediator on the register and confirm accreditation status as well as the RMAB that accredited the mediator. Although NMAS accreditation is not a requirement to practise as a mediator in Australia, in practice many reputable organisations and court-annexed mediations do require mediators to be accredited.

A NMAS mediator must comply with both the Approval and Practice Standards set out by the Mediator Standards Board. Notably, the Practice Standards require competence in ‘cross-cultural issues in mediation and dispute resolution’.⁸⁵ While this may be an ideal competency standard, one can question the thoroughness of the training and examination process. The Approval Standards prescribe a minimum of 38 hours training, where the candidate must have participated in nine simulated mediations, acted as a mediator in at least three, and received written feedback in at least two of those simulations. In addition to cross-cultural issues, the Practice Standards also mandates competence in multiple areas set out in the 14 page document.

One may question whether it is practically possible to delve in-depth into every competency standard set out in the Practice Standards in a 38 hour course. One may also question how ‘cross-cultural issues in mediation and dispute management’ may be assessed. The examination for accreditation process involves the candidate acting as mediator in a session which is then recorded and sent for assessment.⁸⁶ In the absence of specific cultural issues brought up in the assessment mediation, how can cross-cultural competency be practically assessed?

While the NMAS’ Practice and Approval Standards are positive guides for a standardised competency standard, further developments are required to ensure true cross-cultural fluency in the Australian mediation landscape. RMABs should be encouraged to ensure cross-cultural competency is actually taught and audited to ensure compliance. Assessment may be by way of a written scenario or short essay, in addition to the video assessment.

There are a number of sub-cultures within Australia that exhibit Hofstede’s ‘high power distance’. As indicated earlier, the military has a hierarchal system that values deference to authority.⁸⁷ Increasingly, mediation is being deployed as a system of dispute resolution within the armed forces.

⁸⁴ Mediator Standards Board, *Register of Nationally Accredited Mediators* <<http://www.msb.org.au/mediators>>.

⁸⁵ Mediator Standards Board, *National Mediation Accreditation Standards* (2012), 9 <<http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>>.

⁸⁶ The Resolution Institute website gives a good overview of the examination process: Resolution Institute, *Assessment of Mediator Competency* <<https://www.resolution.institute/accreditation/assessment>>.

⁸⁷ Soeters and Recht, above n 70.

The proposed adapted facilitative model, is equally applicable to mediations in the military setting — for example, a mediator taking a more hands-on approach in the option generation phase of the mediation would benefit military parties who may be reluctant to offer suggestions in a hierarchal environment. Similarly, Aboriginal Australians value tradition and conformity over self-direction,⁸⁸ and this could potentially lead to less option generation during the mediation for fear of coming off as confrontational. The culturally aware mediator would therefore step in, where appropriate, by taking the lead in the option generation phase.

C A Singapore Case Study

1 *Optional Training in Cultural Fluency*

The Singapore Mediation Centre (SMC) offers an accreditation scheme. Upon completion of a two day introductory Strategic Conflict Management course⁸⁹ followed by a three day advanced level Strategic Conflict Management course.⁹⁰ The completion of both courses allows one to sit for the Associate Mediator Accreditation Assessment and, if successful,⁹¹ allows one to be registered as an Associate Mediator of the SMC and be appointed for mediation sessions under the auspices of the Centre.⁹² The SMC's training utilises the facilitative interest-based model and its accreditation program also assesses candidates on this basis. The introductory Strategic Conflict Management Course includes a compulsory component on culture and is designed to encourage mediators to be aware of cultural differences.⁹³ Augmenting this is a separate workshop, 'An Asian Perspective on Mediation', that aims to give candidates insights into the impact of the unique features of an Asian culture on the resolution of disputes and to raise awareness of how cultural considerations impact the interest-based model of mediation.⁹⁴ At the time of writing, the workshop is optional and separate from the standard training and accreditation program.

⁸⁸ Gerard J Fogarty and Colin White, 'Difference between Values of Australian Aboriginal and Non-Aboriginal Students' (1994) 25(3) *Journal of Cross-Cultural Psychology* 394.

⁸⁹ SMC, *Strategic Conflict Management for Professionals (Module 1)* <<http://www.mediation.com.sg/workshops/strategic-conflict-management-for-professionals-module-1>>.

⁹⁰ SMC, *Strategic Conflict Management for Professionals (Module 2)* <<http://www.mediation.com.sg/workshops/strategic-conflict-management-for-professionals-module-2/>>.

⁹¹ SMC, *Associate Mediator Accreditation Assessment* <<http://www.mediation.com.sg/workshops/mediation-skills-assessment/>>.

⁹² *Ibid.*

⁹³ Email from Loong Seng Onn (Executive Director of the Singapore Mediation Centre) to author, 8 May 2017.

⁹⁴ SMC, *An Asian Perspective on Mediation - Face, Guanxi & Hierarchy* <<http://www.mediation.com.sg/workshops/an-asian-perspective-on-mediation-face-guanxi-and-hierarchy/>>.

Despite the lack of formalised training and accreditation requirements in cultural awareness, it should be noted that research indicates that mediators from the SMC have been prepared to depart from a strict facilitative model where appropriate.⁹⁵ This bodes well, suggesting that the mediators' awareness of the importance of culture through experience rather than a formalised training program.

2 A New Professional Standard — Compulsory Competency in Cultural Fluency?

The lack of a standardised system across Asian jurisdictions recognising and accrediting mediators in mediation skills and cultural awareness in mediation is a cause for concern. However, leading Asian jurisdictions like Hong Kong and Singapore offer some hope for the future. The establishment of the Hong Kong Mediation Accreditation Association Limited (HKMAAL) on 28 August 2012 is a step towards national accreditation.⁹⁶ The founding members include the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Mediation Centre and the Hong Kong International Arbitration Centre.⁹⁷

The HKMAAL aims to be the premier accreditation body for mediators in Hong Kong with the long term goal of forming a single accreditation body in Hong Kong.⁹⁸ However, it remains to be seen how this will be implemented — there are currently 30 or so various mediator accrediting bodies in Hong Kong and amalgamating these poses a difficulty. The challenge for Hong Kong, as it was for Australia, is in asking each of the individual mediator accrediting bodies to give up their authority to a larger supervisory body. Indeed, it is telling that while set up as premier accreditation body, the HKMAAL does not actually conduct mediation courses, instead it merely approves mediation courses by other bodies.⁹⁹ In its *Guidelines for Mediation Course Providers*, the HKMAAL suggests that the courses they supervise encompass 'cultural and gender issues'.¹⁰⁰ However, there are no details as to the depth and scope of this. Indeed, the

⁹⁵ Lee and Teh, above n 16, 42, 86, 87.

⁹⁶ Hong Kong Department of Justice, *Dispute Resolution* <<http://www.doj.gov.hk/eng/public/mediation.html>>.

⁹⁷ HKMAAL, *Organisation Chart* <<http://www.hkmaal.org.hk/en/OrganisationChart.php>>.

⁹⁸ Lui, above n 24.

⁹⁹ HKMAAL, *Mediation Training Courses* <http://www.hkmaal.org.hk/en/trainingcourse_notes.php>. See also the FAQ Page: HKMAAL, *Frequently Asked Questions* <<http://www.hkmaal.org.hk/en/faq.php>>, stating that the HKMAAL does not provide mediation courses.

¹⁰⁰ HKMAAL, *Guidelines for HKMAAL Stage 1 Mediation Course Providers*, 6 <<http://www.hkmaal.org.hk/admin/Editor/assets/20140710%20Guidelines%20for%20HKMAAL%20Stage%201%20General%20Mediation%20Training%20Courses%20Providers.pdf>>.

HKMAAL suggests that these are ‘suggested contents only’ and the training bodies are free to ‘adapt and deviate’ as necessary.¹⁰¹

It is likely that Hong Kong may end up with a model similar to Australia’s — a National Mediator Accreditation System overseen by the Mediator Standards Board but with individual Recognised Mediator Accreditation Bodies continuing to play a role. Nonetheless, there is room within such a system for training and competence in cultural awareness and fluency as a pre-requisite to mediator accreditation.

There is also optimism in Singapore. As mentioned, the SMC already offers an optional course in Asian mediation. Similarly, that mediators of the SMC should be aware of cultural issues in mediation and are thus prepared to depart from a pure facilitative model. It is submitted given Singapore’s demonstrated competence in this area, there should be a national accreditation system that formalises cultural awareness training and competency standards as pre-requisites to accreditation.

In December 2013, Singapore’s Ministry of Law announced the establishment of an International Commercial Mediation Centre and the SIMI in Singapore that would, inter alia, offer international mediation services and, working with the IMI, set standards and provide accreditation for mediators. This indicates the first significant step towards a national accreditation system, and unlike Hong Kong, Singapore has only a handful of mediation bodies to deal with.¹⁰² At the time of writing, the SIMI has developed a mediator system with several levels ranging from level one (for the most junior of mediators) to a SIMI Certified Mediator (at the highest level).¹⁰³ Notably, this highest tier of a SIMI Certified Mediator allows for the title holder to apply to become an IMI Certified Mediator, without having to go through an additional assessment process.¹⁰⁴ While still in its infancy, the SIMI model acknowledges cross-cultural fluency as a key feature of the SIMI credentialing scheme, stating that:

Another defining aspect of the SIMI Credentialing Scheme is an inter-cultural component. This is present in the requirement for the training and assessment to be a SIMI Accredited Mediator Level 1, and is reflective of the diverse profile of disputants in the modern world. SIMI Mediators

¹⁰¹ Ibid.

¹⁰² The current bodies in Singapore that accredit and/or offer mediation services are the Consumers Association of Singapore, the Community Mediation Centre, the Singapore Mediation Centre, the Singapore International Mediation Institute, the Singapore International Mediation Centre and the various court-annexed mediation schemes. There are also a number of private and government organisation that offer mediation services, though they appear to be limited to internal disputes where at least one party has some relationship with the organisation and do not appear to purport to offer accreditation: see Goh Joon Seng, *Mediation in Singapore: Law and Practice* (2003) ASEAN Law Association <http://www.aseanlawassociation.org/docs/w4_sing2.pdf>.

¹⁰³ SIMI, *SIMI Credentialing Scheme*

<<http://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme>>.

¹⁰⁴ Ibid.

distinguish themselves through their knowledge in identifying and knowing how to deal with cultural differences that may arise at a mediation.¹⁰⁵

It is difficult to ascertain, at this point, how much of the cross-cultural fluency is required for a SIMI Accredited Mediator Level 1. The current path towards attaining this lowest level of accreditation at the SIMI is through a 'SIMI Registered Training Program'. According to the SIMI's website, the SMC is currently the only organisation registered to conduct this program. However, the different tiers of SIMI accreditation are a positive sign. Subsequent levels of SIMI accreditation require significant mediation experience.¹⁰⁶ Therefore SIMI offers budding mediators a long path to deepen and broaden their mediation skills, including cross-cultural fluency.

IV CONCLUSION

The importance of recognising cultural fluency in mediator training and accreditation is a challenge facing many jurisdictions.¹⁰⁷ It has been noted that the European Union mediation community is also grappling with developing a uniform model for training and credentialing its mediators in cross-cultural settings.¹⁰⁸ In this regard, they look to the IMI as a model to follow. However, it has also been acknowledged that despite the progress IMI has made, much more needs to be done in this area.¹⁰⁹

Further questions should also be raised as to the fairness and equity of the mediation, both in process and at the ultimate outcome, if the lack of cultural awareness on part of the mediator negatively impacts the mediation. What are the professional implications for the mediator? Can this, for example, be a basis for a re-mediation? Should this be a ground for judicial intervention?¹¹⁰ The law on justiciability of mediation is a complex one and at this juncture the author offers neither expertise nor a fixed position in this regard, merely a caution that these are significant considerations that must be taken into account.

In conclusion, cross-cultural implications in mediation remain a live issue. The transplantation of Western-oriented models of mediation may not be effective in a different culture. As this article argues, more must be done to ensure a consistent and standardised training and accreditation system in

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Barkai, above n 21; Siew Fang Law, 'Cultural Sensitive Mediation: The Importance of Culture in Mediation Accreditation (2009) 20 *Australian Dispute Resolution Journal* 162.

¹⁰⁸ Jacqueline Nolan-Haley, 'Evolving Paths to Justice: Assessing the EU Directive on Mediation', cited in Arthur Rovine (ed) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011* (Brill Nijhoff, 2012) 418.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

the region that recognises cultural competency in mediators. Cross-cultural fluency in mediation should be the way forward in an increasingly diverse dispute resolution landscape that now operates.