



# International Dispute Resolution – reconciling technique and methods with cognitive studies

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## Dispute resolution

- **‘Alternative Dispute Resolution’ (ADR)**
  - Negotiation and mediation; informal, at times involuntary. Mediators cannot ‘force’ parties to settle
- **Alternative to Litigation – ARBITRATION**
  - Defined legal relationship; final and binding outcome. Formal and procedures to be followed
- **Mainstream – LITIGATION**
  - Can sue in both contract and tort. Very formal, rights of audience only to legal professionals admitted to practice in that jurisdiction; proceedings not fully understood by laypeople

## Negotiations

Some basic points to consider when negotiating:

- **“Know thyself”** – understand your objectives, what do you seek to achieve? It is common that people go into a negotiation not knowing what they really want to achieve. Not just that this can be frustrating to the other party, it can also be counter-productive.
- **Always know your BATNA** (“Best Alternative To a Negotiated Agreement”)
- **Strength and weaknesses:** also commonly referred to as “SWOT” – Strengths, Weaknesses, Opportunities and Threats. It is essential to understand what you can, as well as cannot expect to achieve. Be realistic about your own position but you should also consider or evaluate the other party’s position before going to the negotiation table.
- **Strategies:** as the saying goes, ‘do not go into a battlefield without a proper plan’ so prepare yourself well, adopt necessary strategies. The other party might have sought legal advice so they will impose their position on you, hoping that you will give in.

## Possible strategies in negotiations

- **Competitive strategy** – negotiating to get it all. *“No, I don’t agree and I will want everything that I am asking for”*. This may eventually lead to legal battles due to unwillingness to compromise. Quite likely, future business opportunities will no longer be considered and this is ‘burning bridges’.
- **Cooperative strategy** – finding a solution that fits all, distributed outcome/ benefits for all; compromise, perhaps the parties treasure future business opportunities. E.g. *“I will pay you in full now but for the next shipment, you will give me a substantial discount to cover up my present outlay”*.

*“We cannot negotiate with those who say, ‘What is mine is mine and what’s yours is negotiable’ (John F. Kennedy)*

## Negotiation tips and techniques

- Emotion – restraint emotions instead of turning a negotiation into a bitter process.
- Think positive – negative thinking can make you react emotionally or appear weak in front of your opponents
- Separate people from the problem – do not get personal. If the problem is difficult, focus on the people; if the people is difficult, focus on the problem.
- Focus on your interest, not rights – it's not about who is right or wrong, it's about what you want to achieve and get the dispute settled as soon as possible

## Negotiation tips and techniques

- Generate a variety of options and possibilities – people like options and do not want to feel constrained. It is like how you expect to be given a menu in a restaurant.
- BATNA - a term coined by Roger Fisher and William Ury in their 1981 bestseller book, *Getting to Yes: Negotiating Without Giving In*. It refers to 'the ability to identify a negotiator's best alternative to a negotiated agreement, is among one of the many pieces of information negotiators seek when formulating deal making and negotiation strategies'

## Negotiating with difficult people

- **Build a golden bridge** – give the other party 'face' but still defend your interest. One possible way is to help your 'opponent' find a solution to his problem as that will result in solving your own problem too.
- **Listen** – always listen and give your opponent an opportunity to speak and vent his/her frustrations. Human beings by nature want others to listen to them; you do not have to agree but just listen first. Once they are done, it's your turn.
- **You don't have to become good friends with your opponents** – a negotiation is a process, transaction, etc. You don't have to make friends with your 'opponents' if you can't, hence do not be bothered about the person being 'nasty' or unfriendly. One goes into a negotiation process to resolve their disputes, not to be influenced by other factors or thoughts. If a dispute can be resolved satisfactorily and can build bridges, by all means.

## Dispute resolution methods

|                                      | Negotiation  | Mediation    | Arbitration                 | Litigation                  |
|--------------------------------------|--------------|--------------|-----------------------------|-----------------------------|
| <b>Adversarial/Conciliatory</b>      | Conciliatory | Conciliatory | Adversarial/ Conciliatory   | Adversarial                 |
| <b>Decision maker</b>                | Parties      | Parties      | Third Party - arbitrator    | Third Party - judge         |
| <b>Dispute resolution guaranteed</b> | No           | No           | Yes                         | Yes                         |
| <b>Right to walk away</b>            | Yes          | Yes          | No – unless mutually agreed | No – unless mutually agreed |
| <b>Control over process</b>          | Parties      | Parties      | Parties + Third Party       | Third Party                 |
| <b>Formality</b>                     | No           | No           | Yes                         | Yes                         |
| <b>Confidentiality</b>               | Yes          | Yes          | Yes                         | No                          |
| <b>Enforceability</b>                | No           | No           | Yes – globally              | Yes - locally               |

## Dispute resolution methods

|                    | Negotiation              | Mediation                     | Arbitration                        | Litigation |
|--------------------|--------------------------|-------------------------------|------------------------------------|------------|
| <b>Cost</b>        | Low to none              | Low                           | High                               | High       |
| <b>Speed</b>       | According to the parties | Typically fast                | Slow                               | Slow       |
| <b>Complexity</b>  | None                     | No                            | Yes                                | Yes        |
| <b>Enforcement</b> | Mutual                   | Mutual – settlement agreement | Globally but not always guaranteed | Locally    |

## Cultural considerations

Why cultures and customs matter in dispute resolution? Consider the following quotes:

*“Some businessmen deal with their foreign business partners with a substantial amount of cultural arrogance, i.e. they expect them to behave exactly like their counterparts back home”*

*(Buchmann, IDR (2004), 38; Hunter, Arb. Int’l (2000), 379, 388)*

*“Consequently, when they try to interpret their counterpart’s negotiation behaviour, they are blinded by their own cultural biases”*

*(Rau, Sherman and Peppet, Processes of Dispute Resolution; quoted in K.P. Berger Private Dispute Resolution in International business)*

## Cultural factors

- Local cultures matter when it comes to dispute resolution. It can influence one's thoughts, needs or demands, thus affecting dispute resolution processes. For example, punctuality is very important in the German culture, therefore, should you arrive half an hour late for a meeting to discuss dispute settlement, it is not difficult to figure out the sentiment of the German party at this meeting.
- In the western culture, it is acceptable to ask questions for clarification sake however in the Asian culture, it can be perceived as distrust, directness or questioning authority.
- In societies where Confucian values are embraced such as in Korea, China or Japan, the choice of negotiators matter. For example, sending a junior manager or non-decision maker to negotiate with a senior manager can be considered an insult.

## Hofstede dimensions of national culture

(<https://www.hofstede-insights.com/models/national-culture/>)

- **POWER DISTANCE INDEX (PDI)** - degree to which the less powerful members of a society accept and expect that power is distributed unequally. The fundamental issue here is how a society handles inequalities among people.
- People in societies exhibiting a large degree of Power Distance accept a hierarchical order in which everybody has a place and which needs no further justification. In societies with low Power Distance, people strive to equalise the distribution of power and demand justification for inequalities of power.
- **INDIVIDUALISM VERSUS COLLECTIVISM (IDV)** - Individualism, can be defined as a preference for a loosely-knit social framework in which individuals are expected to take care of only themselves and their immediate families. Its opposite, Collectivism, represents a preference for a tightly-knit framework in society in which individuals can expect their relatives or members of a particular ingroup to look after them in exchange for unquestioning loyalty.

## Hofstede dimensions of national culture

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- **MASCULINITY VERSUS FEMININITY (MAS)** - this dimension represents a preference in society for achievement, heroism, assertiveness, and material rewards for success. Society at large is more competitive. Its opposite, Femininity, stands for a preference for cooperation, modesty, caring for the weak and quality of life. Society at large is more consensus-oriented. In the business context Masculinity versus Femininity is sometimes also related to as “tough versus tender” cultures.
- **UNCERTAINTY AVOIDANCE INDEX (UAI)** - expresses the degree to which the members of a society feel uncomfortable with uncertainty and ambiguity. The fundamental issue here is how a society deals with the fact that the future can never be known: should we try to control the future or just let it happen? Countries exhibiting strong UAI maintain rigid codes of belief and behaviour, and are intolerant of unorthodox behaviour and ideas. Weak UAI societies maintain a more relaxed attitude in which practice counts more than principles.

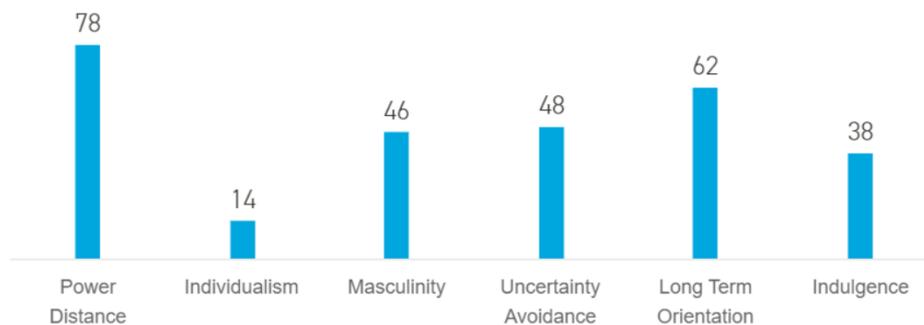
## Hofstede dimensions of national culture

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- **LONG TERM ORIENTATION VERSUS SHORT TERM NORMATIVE ORIENTATION (LTO)** - Societies who score low on this dimension, for example, prefer to maintain time-honoured traditions and norms while viewing societal change with suspicion. Those with a culture which scores high, on the other hand, take a more pragmatic approach: they encourage thrift and efforts in modern education as a way to prepare for the future.
- **INDULGENCE VERSUS RESTRAINT (IND)** - Indulgence stands for a society that allows relatively free gratification of basic and natural human drives related to enjoying life and having fun. Restraint stands for a society that suppresses gratification of needs and regulates it by means of strict social norms.

## Hofstede dimensions – Indonesia

(<https://www.hofstede-insights.com/models/national-culture/>)



## Hofstede dimensions – Indonesia

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- POWER DISTANCE** - Indonesia scores high on this dimension (score of 78) which characterises the Indonesian style: Being dependent on hierarchy, unequal rights between power holders and non power holders, superiors in-accessible, leaders are directive, management controls and delegates. Power is centralized and managers count on the obedience of their team members. Employees expect to be told what to do and when. Control is expected and managers are respected for their position. Communication is indirect and negative feedback hidden. High Power Distance also means that Indonesian co-workers would expect to be clearly directed by the boss or manager – it is the classic Guru-Student kind of dynamic that applies to Indonesia.
- INDIVIDUALISM** - a low score of (14) is a Collectivist society. This means there is a high preference for a strongly defined social framework in which individuals are expected to conform to the ideals of the society and the in-groups to which they belong. One place this is visible clearly is in the aspect of the Family in the role of relationships. Another example of collectivist culture of Indonesia is in the equation between child and parent.

## Hofstede dimensions – Indonesia

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- **(cont/..) INDIVIDUALISM** - Indonesian children are committed to their parents, as are the parents committed to them all their growing lives. Their desire is to make their parents' life easier. There is a desire to take care of parents and give them support in their old age. There is an Asian saying that is accepted in Indonesia, "You can get another wife or husband but not another mother or father". This family loyalty is also apparent in the fact that Indonesian families keep elders (such as grandparents) at home instead of sending them to any institution. In Individualist societies the focus is on the nuclear family only.
- **MASCULINITY** - Indonesia scores (46) on this dimension and is thus considered low Masculine. In Feminine countries the focus is on "working in order to live", managers strive for consensus, people value equality, solidarity and quality in their working lives. Conflicts are resolved by compromise and negotiation. Incentives such as free time and flexibility are favoured. Focus is on well-being, status is not shown. An effective manager is a supportive one, and decision making is achieved through involvement. In contrast, Masculine countries and to an extent lower Masculine countries that do not score too low on the scale to be called Feminine countries, display the traits of the Masculine societies but in a lesser degree.

## Hofstede dimensions – Indonesia

(<https://www.hofstede-insights.com/models/national-culture/>)

- **UNCERTAINTY AVOIDANCE** - Indonesia scores (48) on this dimension and thus has a low preference for avoiding uncertainty. This means that there is a strong preference in Indonesia toward the Javanese culture of separation of internal self from external self. When a person is upset, it is habitual for the Indonesian not to show negative emotion or anger externally. They will keep smiling and be polite, no matter how angry they are inside. This also means that maintaining work place and relationship harmony is very important in Indonesia, and no one wishes to be the transmitter of bad or negative news or feedback. Another aspect of this dimension can be seen in Conflict resolution. A tried and tested, successful method of conflict diffusion or resolution is to take the more familiar route of using a third party intermediary. Perhaps one very key phrase in Indonesia that describes how this works is "Asal Bapak Senang" (Keep the Boss Happy). The reason is multifold; but if you extrapolate to UAI dimension you can see that keeping the boss happy means you will be rewarded and if you are rewarded you have no economic or status uncertainty as you will keep being a valuable member of the company.

## Hofstede dimensions – Indonesia

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- **LONG TERM ORIENTATION** - This dimension describes how every society has to maintain some links with its own past while dealing with the challenges of the present and future, and societies prioritise these two existential goals differently. Normative societies, which score low on this dimension, for example, prefer to maintain time-honoured traditions and norms while viewing societal change with suspicion. Those with a culture which scores high, on the other hand, take a more pragmatic approach: they encourage thrift and efforts in modern education as a way to prepare for the future.
- Indonesia's high score of 62 indicates that it has a pragmatic culture. In societies with a pragmatic orientation, people believe that truth depends very much on situation, context and time. They show an ability to adapt traditions easily to changed conditions, a strong propensity to save and invest, thriftiness, and perseverance in achieving results.

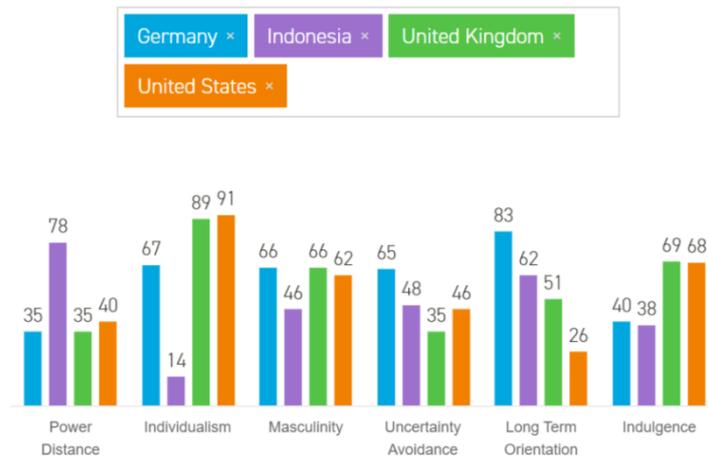
## Hofstede dimensions – Indonesia

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- **INDULGENCE** - This dimension is defined as the extent to which people try to control their desires and impulses, based on the way they were raised. Relatively weak control is called "Indulgence" and relatively strong control is called "Restraint". Cultures can, therefore, be described as Indulgent or Restrained.
- The low score of 38 in this dimension shows that Indonesia has a culture of Restraint. Societies with a low score in this dimension have a tendency to cynicism and pessimism. Also, in contrast to Indulgent societies, Restrained societies do not put much emphasis on leisure time and control the gratification of their desires. People with this orientation have the perception that their actions are Restrained by social norms and feel that indulging themselves is somewhat wrong.

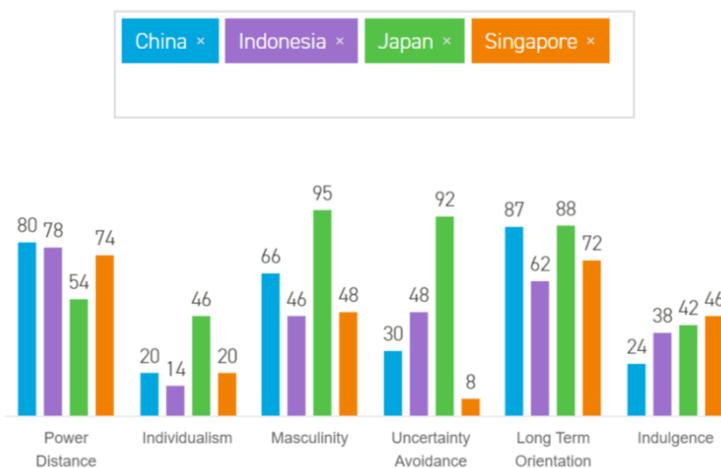
## Hofstede dimensions – Indonesia compared

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## Hofstede dimensions – Singapore

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- **POWER DISTANCE** – High (74), primary Confucian background (Chinese). One of the key principles of Confucian teaching is the stability of society, which is based on unequal relationships between people. Confucius distinguished five basic relationships: ruler-subject; father-son; older brother-younger brother; husband-wife; and senior friend-junior friend.
- **INDIVIDUALISM** - Singapore, with a score of 20 is a collectivistic society. This means that the “We” is important, people belong to in-groups (families, clans or organisations) who look after each other in exchange for loyalty. Here we can also see the second key principle of the Confucian teaching: The family is the prototype of all social organizations. A person is not primarily an individual; rather, he or she is a member of a family. Children should learn to restrain themselves, to overcome their individuality so as to maintain the harmony in the family. Harmony is found when everybody saves face in the sense of dignity, self-respect, and prestige. Social relations should be conducted in such a way that everybody's face is saved. Paying respect to someone is called giving face.

## Hofstede dimensions – Singapore

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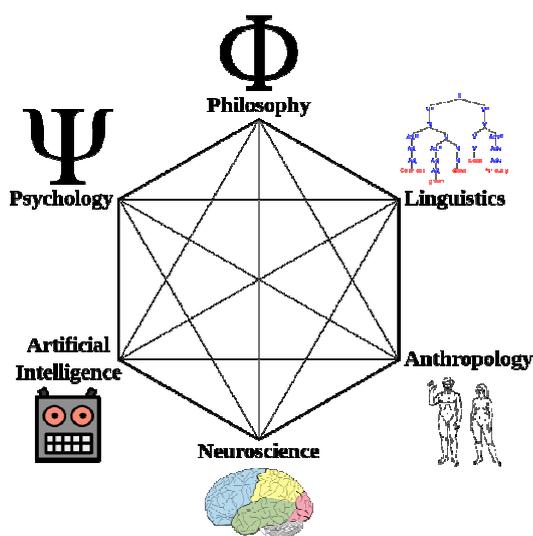
- **MASCULINITY**– Singapore scores 48 and is in the “middle” of the scale but more on the Feminine side. This means that the softer aspects of culture such as leveling with others, consensus, sympathy for the underdog are valued and encouraged. Being modest and humble is seen as very important; thus showing that one knows it all and therefore has come to educate the counterparts is not liked. Conflicts are avoided in private and work life and consensus at the end is important. During discussions being cautious is important, not to being too persistent. We can also see the feminism in the governments defined five “shared values” again: 3) Community support and respect for the individual.
- **UA** - Singapore scores 8 on this dimension and thus scores very low on this dimension. In Singapore people abide to many rules not because they have need for structure but because of high PDI. Singaporeans call their society a “Fine country. You'll get a fine for everything”.

## Hofstede dimensions – Singapore

(<https://www.hofstede-insights.com/models/national-culture/>)

- LONG TERM ORIENTATION** – Singapore scores 72, this high score is reflected in Singapore which shows cultural qualities supporting long-term investment such as perseverance, sustained efforts, slow results, thrift; being sparse with resources, ordering relationship by status and having a sense of shame (see also again the Confucian teaching). Singapore has also become one of the five dragons with an immense economic success. Whereas westerners have been looking for the truth, the Singaporeans are emphasizing virtue and the way you do things. They are always keeping their options open as there are many ways to skin a cat. Westerners believe that if A is right, B must be wrong, whereas people from East and Southeast Asian countries see that both A and B combined produce something superior. This mindset allows for a more pragmatic approach to business.
- INDULGENCE** - This dimension is defined as the extent to which people try to control their desires and impulses, based on the way they were raised. Relatively weak control is called "Indulgence" and relatively strong control is called "Restraint". Cultures can, therefore, be described as Indulgent or Restrained. Is it not possible to determine a preference on this dimension because of Singapore's intermediate score of 46.

## Dispute resolution & cognitive science



## Dispute resolution & cognitive science – mental faculties

- **Language** – as a tool of communication. Talking is not always communicating but communicating requires language. How we convey messages, describe our thoughts, negotiation, etc
- **Perception** – how we understand information, learn, organise, identify or interpret; in dispute resolution, how we use data and interpret the other party's perceived intention, views and position taken
- **Reasoning** - rights or interests? Logic? Justification of our rights, interests, demands and needs; also arguments and reasoning
- **Emotion** – temperament, reaction and how we control our mental activity whether pleasure or displeasure; do we maintain reasonableness and level headedness when handling a specific issue
- **Memory** - experiences and retention of information which may influence our future action. Retain good or bad experiences and using them in our decision making

## Convergence of theories & practices - reflections

- Is there a scope for applied cognitive science in dispute resolution?
- Do all human beings have their unique strengths and weaknesses, thus 'pressing the right or wrong buttons'?
- Would better understanding of the other party e.g. sympathy and empathy play a crucial role in the dispute resolution process?
- Will strict corporate policies which are devoid of human 'touch' become hindrances to dispute resolution?

# Questions & Answers

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