Denver Sports & Entertainment Law Journal

Volume 15
Issue 1 *Fall 2013*

Article 3

2013

MMA Negotiation

Garrick Apollon
false

MMA Negotiation

MMA NEGOTIATION

Garrick Apollon*

*Practicing corporate lawyer of the Bar of Ontario, Canada (2004) and part-time Professor of Law at the University Of Ottawa's Faculty of Law, French Common Law Section and Telfer School of Management undergraduate, MBA and EMBA Programs. Professor Apollon earned his J.D. from the University of Ottawa, 2003; L.L.B. (Civil Law) from l'Université Laval, 2000; LL.M. (Master of International Law) from l'Université Laval, 2002; and LLCM (Master of Comparative Law) from the University of Pennsylvania Law School, 2012.

I. Introduction:

This article intends to develop a new school of negotiation and dispute resolution[1] named MMA Negotiation. The idea of MMA Negotiation originates from the fact that as a practicing corporate lawyer, and professor of negotiation and dispute resolution, the author has observed that the school of Negotiation Jujitsu taught in the celebrated book *Getting to Yes*[2] and the Program on Negotiation at Harvard Law School[3] do not adequately prepare negotiators for "war" in the real world[4]. This article argues that the teaching of the school of "Negotiation Jujitsu" developed by Fisher and Ury, which encourages negotiators to focus on interest-based negotiation by using the strength of the other side to your advantage by deflecting it,[5] while being a fundamental strategy is at the same time too narrow of an approach to the art of negotiation.[6] There is no single generic actor or situation in negotiation.[7] Therefore, like the

[1] Negotiation should also be regarded as a core dispute resolution mechanism integrated in the mediation, arbitration or litigation process. *See* Gary Bellow & Bea Moulton, *The Lawyering Process* 11 (Foundation Press, 1978) (defining negotiation as a dispute resolution mechanism as follows: negotiation is the process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests. It is accomplished consensually as contrasted with the force of law).

[2] *See* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES (Peguin, 2d Ed. 1991) [hereinafter Fisher & Ury Getting to Yes] (the central ideas of the book are: separate the people from the problem, focus on interests and not positions, invent options for mutual gain, insist on using objective criteria, and understand your BATNA (Best Alternative To a Negotiated Agreement)).

[3] Professors Roger Fisher, William Ury, & Bruce Patton are all from the Program on Negotiation (PON) at Harvard Law School. The mission of PON is to improve the theory and practice of conflict resolution and negotiation by working on real world conflict intervention, theory building, education and training, and writing and disseminating new ideas; *see* http://www.pon.harvard.edu/academic-programs-faculty/ (last visited August 30, 2013). PON has offered an example of negotiation jujutisu in the Program on Negotiation Daily Blog; *see* PON Staff, *Become a (negotiation) jujitsu master*, HARVARD LAW PROGRAM ON NEGOTIATION DAILY BLOG (Oct. 22, 2009), http://www.pon.harvard.edu/daily/negotiation-skills-daily/become-a-negotiation-jujitsu-master/ (last visited Aug. 30, 2013).

[4] *See* Bruce Kahn, *Applying The Principle And Strategies Of Asian Martial Arts To The Art Of Negotiation*, 58 ALB. L. REV. 223, 223-24 (1994) [hereinafter Kahn, *Asian martial arts & the art of negotiation*] (theorizing that the practice of law revolves around conflict and lawyers serve their clients by helping them resolve or avoid disputes. Therefore, the emphasis on the context of the conflict which makes the study of Asian fighting arts so valuable for the lawyer involved in dispute resolution).

[5] Fisher, Ury & Patton, *supra* note 2, at 40-56 (stipulating that one of the core principles of principled negotiation is the necessity to avoid positional bargaining in negotiation to create more durable (win-win) agreements that satisfy both parties). It is important to nuance that Fisher & Ury do not deny the distributive nature of negotiation in many contexts. Rather, they argue that their principled negotiation approach is more effective and will result in better agreements even when claiming value.

[6] Ran Kuttner, *The Wave/Particle Tension in Negotiation*, 16 HARV. NEGOT. L. REV. 331, 359-60 (2011) [hereinafter Kuttner, *Wave/Particle Tension In Negotiation*] (offering the wave/particle duality in quantum physics as a new way of apprehending and approaching negotiation. Also discussing that the term "Negotiation Jujitsu" making use of the eastern martial arts as a metaphor needs further pedagogy to be developed in order to embrace what the martial arts have to offer. Though Fisher and Ury's approach touches on some skills that the practitioner of martial arts develops (*e.g.*, refraining from reactivity, sidestepping personal attacks), it is important to note that martial arts are more than a technique or set of skills to adopt. Rather, martial arts is a practice through which the practitioner cultivates a worldview, awareness and tools consistent with a more holistic view of conflicts).

[7] *Id.* at 352 (explaining that the theoretical perspective that undergirds knowledge of negotiation has advanced considerably; however, the teaching of interest-based negotiation in *Getting to Yes* is a convenient simplification, because considering 'the party' as a single generic actor allowed scholars to apply all of their individualistically oriented theory to the intra-group, inter-group, intra-organizational, and international levels); *see also* Richard Shell,

practice of martial arts, MMA Negotiation maintains the necessity for mindfulness and perceptive fluidity as the central focus to the practice of negotiation and dispute resolution.[8]

A strict translation of the term Jujitsu means gentle, soft and flexible.[9] This translation offers little insight into the martial art.[10] However, negotiation scholarship emphasizes the power of reframing and the manner a negotiator frames or describes negotiation to help create a new dynamic and achieve better results.[11] This article argues that reframing Negotiation Jujitsu for MMA Negotiation, will help the negotiator move away from a specific and narrow style focused on using principled negotiation to a more holistic and balanced style allowing MMA negotiators to use a more adaptable mindset when analyzing negotiation situations and choosing which strategy and tactics to apply to a situation to achieve the best results.[12]

UFC President Dana White[13] called the legendary Bruce Lee the "father of mixed martial arts (MMA)" stating: "If you look at the way Bruce Lee trained, the way he fought, and many of the things he wrote, he said the perfect style was no style. You take a little something from everything. You take the good things from every different discipline, use what works, and you throw the rest away."[14] Accordingly, MMA negotiators should not aim to focus too much on any predictable style of negotiation or specific professional expertise to achieve better results.[15]

Great MMA fighters like GSP[16] and Anderson Silva[17] use more of a defensive style such as jujitsu, but also other more offensive styles of fighting such as wrestling for GSP[18] and Muay

---

Bargaining for Advantage: negotiation strategies for reasonable people, xvi-xvii (Penguin Books eds., 2006) [hereinafter Shell, *Bargaining for Advantage*].

[8] Christopher Bates, *Lessons From Another World: An Emic Perspective On Concepts Useful To Negotiation Derived From Martial Arts*, 27 NEG. J. 95, 98-99 (2011) (discussing necessity for mindfulness and perceptive fluidity should be embraced as the core philosophy of engagement in conflict management) [hereinafter Bates, *Concepts Useful To Negotiation Derived From Martial Arts*].

[9] RENZO GRACIE & JOHN DANAHER, MASTERING JUJITSU, 2 (Human Kinetics eds., 2003) [hereinafter Gracie, *Mastering Jujitsu*].

[10] *Id.*

[11] Kuttner, *supra* note 6, at 338 (discussing the power of reframing in scholarship for the practice of negotiation).

[12] *Id.* at 352, 359-363 (discussing that interest-based negotiation is an over-simplification of negotiation and a more balanced pedagogy would help negotiators become aware of the interest/competitive-interest tension, allowing them to use both mindsets and approaches when analyzing negotiation situations and choosing which skills to apply in order to achieve best results. Also discussing the incorporation of the metaphor "Negotiation Jujitsu" in *Getting to Yes* has failed to present a mindfulness-based philosophy similar to the practice of martial arts).

[13] Dana White is the President of the Ultimate Fighting Championship (UFC), and started in 1993 as a professional mixed martial arts (MMA) organization. Since then, UFC is known as the fastest growing sports organization in the world. Dana White is a respected corporate leader and is considered one of the most accessible and followed executives in sports, with over two million followers on Twitter; *see* UFC, http://www.ufc.com/discover/ufc (last visited Aug. 28, 2013).

[14] Marc Wickert, *Dana White and the future of UFC*, FIGHT TIMES MAGAZINE, http://fighttimes.com/magazine/magazine.asp?issue=1&article=24 (last visited Sep. 3, 2013); *see also* Kev Geoghegan, *Bruce Lee claimed as 'father' of Mixed Martial Arts*, BBC NEWS (July 17, 2012, 7:38 PM), http://www.bbc.co.uk/news/entertainment-arts-18738422 (last visited Sep. 3, 2013).

[15] Kahn, *supra* note 4, at 233-34 (theorizing that warfare is the art of surprise and part of surprise is never be to be too predictable and letting others penetrate your real intentions).

[16] Georges "Rush" St-Pierre, also known as "GSP," is a Canadian from Montréal, Québec, a professional mixed martial artist and UFC world champion who holds black belts in both Kyokushin karate and Brazilian Jiu Jitsu. GSP's MMA fighting style includes Kyokushin karate (3rd dan black belt), Brazilian Jiu-Jitsu (black belt), Muay

Thai for Silva.[19] It is important to note that MMA negotiation is founded on the well-known fact that just like in the worlds of fighting or sports, if a good defense helps fighters/players or teams to win championships; a good offense is indispensable to score points and create opportunities to win.[20] As a practicing corporate lawyer, the author has witnessed Negotiation Jujitsu often resulting in one party getting completely overpowered by the other.[21] Therefore, this article argues that other blended techniques (especially if there is no real need to preserve a relationship or if your counterpart uses competitive tactics and deception) are necessary.[22] MMA Negotiation

---

Thai, Boxing and Wrestling. *See* TOUCHFIT: GEORGES ST-PIERRE, http://www.gspofficial.com/bio (last visited Sep. 3, 2013).

[17] Anderson da Silva is a Brazilian mixed martial artist and former UFC Middleweight Champion. Although known primarily for his mastery of Muay Thai Thai striking, Silva is also a Brazilian Jiu-Jitsu black belt. Silva holds the longest title defense streak in UFC history, which ended in 2013 with 16 consecutive wins and 10 title defenses. Silva is the consensus No. 1 pound-for-pound MMA fighter in the world according to ESPN, Sherdog, Yahoo! Sports and other publications. UFC president Dana White and other publications have called Silva the greatest mixed martial artist of all time. *See* Anderson Silva on UFC, http://www.ufc.com/anderson-silva-profile (last visited Sep. 3, 2013).

[18] *See* TOUCHFIT, *supra* note 16.

[19] *See* Silva, *supra* note 17.

[20] *See* TOBIAS MOSKOWITZ, & L. JON WERTHEIM, SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON (Three Rivers Press, 2011) (in this New York Times bestseller, the University of Chicago behavioral economist Tobias Moskowitz teams up with veteran Sports Illustrated writer L. Jon Wertheim to overturn some of the most cherished truisms of sports, and reveal the hidden forces that shape how basketball, baseball, football, and hockey games are played, won and lost. This book theorizes that when it comes to winning a title, or winning in sports in general for that matter, offense and defense carry nearly identical weight). *See also* ROY J. LEWICKI, ALEX HIAM & KAREN W. OLANDER, NEGOTIATION: READINGS, EXERCISES AND CASES, SELECTING A STRATEGY, 19-22 (McGraw-Hill, 5th ed. 2007) [hereinafter Lewicki & Al, *Negotiation: readings, exercises and cases*] (discussing the advantages and challenges of competitive strategy in negotiation).

[21] For instance, I recalled my first opportunity to use interest-based negotiation strategy with lawyers and corporate leaders of a multinational oil company and felt overpowered and alienated (or more like a fool!). This bad professional experience also reminded me that while strongly advocating in favor of *Getting to Yes*, one of my MBA students (working as an executive in a Canadian oil company) at the University of Ottawa explained to me and the class that the interest-based theories behind *Getting to Yes* were too idealistic and impracticable to work in the real business world against greedy corporate leaders and organizations. *See* G.B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO L. J. 1996, 369-88 (theorizing on the limits of interested-based negotiation). The author explains that many of us who study and teach negotiations have been influenced by the possibilities of "win-win solutions," "getting to yes," "problem solving," "value creation," "expanding the pie," "non-zero-sum games," and "integrative bargaining." Subject to slight variations in usage, these terms may best be understood in terms of game theorists' distinction between "integrative" and "distributive" bargaining. Unlike in distributive bargaining (win-lose), in integrative bargaining (win-win), the amount of benefit available to the parties, and thus the size of the "pie," is not fixed but variable. In this sense, integrative bargaining is a non-sum game presenting opportunities for "win-win" solutions. The adoption of "win-win" or "win-lose" strategy and tactic is principally determined by the nature of the opportunities presented by various bargaining situations. It is now conventional wisdom that opportunities for "win-win" negotiations are usually widely available, often unrecognized and unexploited. However, this article argues that opportunities for "win-win" negotiation are not nearly as pervasive as is sometimes authoritatively asserted in negotiation scholarship. The author cites as examples: the parties of creating-value under uncertainties by differing probabilistic assessments of the likelihood of some future event or differing assessments of the likely future value of some variable (in other words unless the parties are willing to bet, no opportunity to expand the pie exists), difference in risk aversion may also affects opportunities for creating-value (some people or some cultures of adverse to risk and uncertainty and will not be willing to bet on uncertain contingencies), difference in time preferences regarding the payment or performance, etc.). Overall, this author argues that willingness to assume risk is the essence of all capitalist ventures and market exchange).

[22] *See* Kuttner, *supra* note 6, at 352 (theorizing that the teaching of negotiation cannot be conveniently simplified to the teaching of interest-based strategy). *See also* Shell, *supra* note 7, at xvi-xvii (theorizing that experienced

is all about using Negotiation Jujitsu (principled negotiation) as core strategy while being ready to use other strategies. Conventional wisdom shows that MMA Negotiation is a superior style of negotiating because it promotes full mindfulness and awareness of the human tension between adversarial and collaborative negotiation by blending all negotiation styles together.[23] Most 'traditional' negotiation arts such as Negotiation Jujitsu presented by Fisher & Ury have a specific focus; however, it is important to note that historically speaking, Jujitsu as a martial art had no specific focus.[24] MMA Negotiation has no specific focus and negotiators use experience and wisdom to determine which style is the most appropriate depending on the situation.[25] In organizational behavior, this approach in management is called situational leadership.[26]

MMA Negotiation should not be viewed as a gladiator fight where there are no rules or ethics, and domination and victory are the only finalities.[27] Instead, MMA Negotiation should be

---

negotiators know that there are too many situational and personal variables for a single strategy to work in all cases and should aspire to transcend the dual-orientation between "win-win" versus "win-lose" orientation in negotiation); Lewicki, Hiam & Olander, *supra* note 20, at 98-108 (discussing on the myth of "win-win" and explaining the strategic advantages of power and competitive strategy in negotiation).

[23] The author argues that negotiation needs to be linked to philosophy as the study of general and fundamental problems, such as those connected with reality, existence, knowledge, values, reason, mind, and language. Plato has always described Socrates as the greatest philosopher and his hero for his versatility. Plato describes Socrates as superiority on his intellectual skill and moral seriousness, to all of his contemporaries—particularly those among them who claimed to be experts on religious, political, or moral matters. *See* Stanford Encyclopedia of Philosophy, *available at* http://plato.stanford.edu/entries/plato/. For instance the Socratic Method is widely used in contemporary legal education by most law schools in the United States because the primary goal of this method in the law school setting is to build the intellectual versatility and practicality of law students. This method demonstrates that there are no unanswerable questions, and that critical thinking skills are necessary to explore the contours of often difficult legal issues. The theory behind the Socratic Method is that the law student is motivated to achieve greatness by the teacher's questions to reason rather than to recite. The law student must seek continual clarification of a proposition of definition by testing it with alternative conflicting possibilities in order. *See* June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1012-13 (1989). S*ee also* Kuttner, *supra* note 6, at 364 (concluding that that the task of a negotiator is not choosing between adversarial and collaborative negotiation, or between value-claiming and value-creating, but rather between two constructive approaches to negotiation. An astute negotiator must realize that these two mindsets are consistent with conflicting human tendencies, an inherent tension that represents what is to be human).

[24] *See* Gracie & Danaher, *supra* note 9, at 12 (theorizing on the origins of Jujitsu. The term Jujitsu only came about late in Japanese history and has developed in an unsystematic manner with no formal places of study, without full-time research or syllabus of instructions); Kuttner, *supra* note 6, at 363 (explaining that the Negotiation Jujitsu metaphor presented by Fisher & Ury fails to incorporate the mindfulness-based philosophy of martial arts).

[25] *See* Kahn, *supra* note 4, at 238 (explaining that beyond principle and strategy, martial arts, like negotiating, is mostly situational or circumstantial).

[26]Barry-Craig P. Johansen, *Situational leadership: A review of the research*, 1 HUMAN RESOURCE DEVELOPMENT QUARTERLY, 73-85 (Situational Leadership Model is a theory of business leadership that promotes the benefits of combining a range of managerial styles to cater to different people within the same organization. This is opposed to the more traditional view of the executive manager who may employ the same leadership tactics across an entire organization. By employing the strategies put forth in the Situational Leadership Model (*i.e.*, one size doesn't fit all), a manager would potentially have the capabilities to deal with a wide range of people and thereby create a more employee-centric and innovative organization through the level of direct contact he or she has with members at all levels. Situational leadership theory (SLT)—it sounds great, but will it work? This research concludes that is not possible to make a definitive statement based on experimental findings. This research notes that SLT is a good starting point for discussion about the dynamics of leadership behavior, subordinate expectations, leadership effectiveness, and decision making).

[27] *See* Susan P. Sturm, *From Gladiators To Problem-Solvers: Connecting Conversations About Women, The Academy, And The Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997) (criticizing the American ultra-

aligned with Richard Shell's pragmatic school of ethics in negotiation because, to put it bluntly, a pragmatic MMA negotiator will strike a bit more often than an idealist fighter from the Negotiation Jujitsu School from Harvard will.[28] However, just like in Shell's pragmatic school of ethics in negotiation, this article argues that a MMA negotiator should also always, "display great concern for the potential negative effects of deceptive conduct on present and future relationships."[29]

II. Historical and philosophical overview of the fertility of the legal transplant of MMA Negotiation in the American legal system:

Following William Ewald's logic of legal transplants, before attempting to transplant a legal philosophy such as MMA Negotiation into the practice of law in a legal system, a historical and philosophical analysis should be conducted to explore the "*law-in-mind*" of American lawyers and see if the legal transplant can be fertile.[30] As William Ewald states, "an efficient comparative legal study cannot confine itself to an investigation of a single, present-day legal system, but must also contain a substantial historical and comparative component."[31] Based on Ewald's theory (since this article invites the transplant of MMA Negotiation in the practice of law in the United States), this transplant must be preceded by an investigation of the American legal culture and history in order to know how American lawyers really think.[32]

First, this article argues that MMA Negotiation is significant for lawyers based on the fact that the practice of law revolves around conflict.[33] Historically, in common law there were four modes of trial: by jury, by ordeal, by oath, and by combat.[34] Therefore, The American practice of law still revolves around conflict because Anglo-American common law always builds on past litigation and American law schools teach through the reading and discussion of case law.[35] The

masculine "Gladiator" model of legal education and lawyering celebrating analytical rigor, toughness, and quick thinking. Defining successful performance as fighting to win: an argument, a conflict, or a case: even in more in formal settings such as negotiations or in-house advising, lawyering often proceeds within the gladiator model. Discussing the lawyer reasons back from the ultimate fight-in the courtroom, at the bargaining table, or in the administrative hearing- to develop strategies and legal responses that would best position the client to win should a crisis occur).

[28] Shell, *supra* note 7, at 213-14.

[29] *Id.*; *see also* Lewicki, Hiam & Olander, *supra* note 20, at 25 (explaining seven factors to evaluate the importance of the relationship between the parties in a bargain: 1. whether there is a relationship at all; 2. whether that relationship is generally positive or negative (whether the two of you have gotten along well or poorly in the past); 3. whether a future relationship is desirable; 4. the length of the relationship and its history, if one exists; 5. the level of and commitment to the relationship; 6. the degree of interdependence in the relationship; and, 7. the amount and extent of free, open communication between the parties).

[30] *See* William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?* 143 U. PA. L. REV. 1889, 1894 (1995) [hereinafter Ewald, *Comparative Jurisprudence and Law in Minds*]; *see also* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplant*, 43 AM. J. COMP. L. 489, 509 (1995) [hereinafter Ewald, *Logic Legal Transplant*] (theorizing a new approach to study legal transplant and that comparative law theories must be coupled with an awareness of the complex relationship between law and society and must also be grounded in an extensive investigation of the history of law).

[31] Ewald, *Logic Legal Transplant*, *supra* note 30, at 510.

[32] *Id.*

[33] Kahn, *supra* note 4, at 223.

[34] *Id.*

[35] *See* GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS, 18 (Oxford Univ. Press, 2005) [hereinafter Fletcher & Sheppard, *American Law in a Global Context*] (theorizing that common

better the law school, the less certainty, and the more students have to think for themselves.[36] Law students are encouraged to "*see the law not as black and white but as various shades of gray*."[37] Therefore, it is possible to argue that Anglo-American common law is historically connected to a more philosophically holistic martial arts style of teaching and practicing negotiation in the American legal system than Negotiation Jujitsu offered in *Getting to Yes*.[38] Moreover, I will argue that wise common law practitioners need to embrace a more particularistic[39] philosophy of thinking like the Chinese Philosophy of Dualism represented by the Yin-Yang symbol.[40] This symbol from ancient China is the most popular East Asian symbol in the world and represents how things should work. The outer circle represents the holistic "everything," while the black and white shapes within the circle represent the interaction of two energies.[41] Also, like the Eastern philosophy of Zen, great common law practitioners need to embrace a "*state of doubt*" in the development of their legal thinking because doubt allows us to explore things in a critical, open, and fresh way.[42]

---

law is based on history. Explaining that in civil law codification means that the legislative intervention broke with the feudal past. The civil code represents a new beginning. On the other hand, common law builds on the past on basis of case law, frequently reinterpreting the past in order to solve modern problems).

[36] *Id.* at 10.

[37] *Id.*

[38] Kuttner, *supra* note 6, at 360 (theorizing that Negotiation Jujitsu in *Getting to Yes* fails as a pedagogy to include an emphasis on the philosophical underpinnings of the wave-like mindset (*i.e.*, cultivate an holistic worldview, mindset and skills) in training/teaching for spiritual development); *see also* John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-cultural and Dispute Resolution*, 8 PEPP. DISP. RESOL. L. J. 403, 444 (2008) [hereinafter Barkai, *A Perspective on Cross-cultural and Dispute Resolution*] (theorizing that the concepts of principled negotiation in *Getting to Yes* emerge from American scholars from Harvard University and is consistent with the American culture. *Getting To Yes* reflects with its emphasis on cooperation reflect feminine society whereas U.S. have been empirically classified by Hofstede as a highly masculine society where competition and confrontation are valued. *Getting to Yes* searches for "mutual gain" and a high long-term orientation in its search for enduring agreements, explaining that these principles are not consistent with American business values).

[39] FONS TROMPENAARS & CHARLES M. HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS 29-50 (2nd ed. 1998) [Hereinafter Trompenaars & Hampden-Turner] (theorizing and offering empirical comparison between Universalist (rules-oriented) versus Particularist (situational-oriented) business people). American society is based on Universalism. This means for Americans justice and fairness is embedded in the definition of business relationships: the law and a contract ensures that all parties are treated in a transparent, accountable and consistent manner (universal justice is based on the contract- a "deal is a deal). However, a wise American lawyer will understand that each case presents particular circumstances and situations (such as the relationship between the parties) and must be argued on this basis. For instance, an experienced common lawyer will be able to use particularism of the facts to argue a fiduciary duty or constructive trust, two famous equitable remedies in common law imposed by a court to benefit a party that has been wrongfully deprived of its rights.

[40] *See* TONY FANG, CHINESE BUSINESS NEGOTIATING STYLE, 30 -32 (2000) [hereinafter FANG] (explaining that the Chinese Philosophy of Dualism is represented by the Yin-Yang symbol is the ancient Chinese understanding of how things should work: the outer circle represents the holistic "everything," while the black and white shapes within the circle represent the interaction of two energies).

[41] *Id.*

[42] Kuttner, *supra* note 6, at 362 (explaining that in the teaching of Zen, doubt is a state of openness that allows us to explore things in an open and fresh way. In Zen this is not an existential doubt that should be overcome, but an inherent and essential insecurity one transforms into upon giving up the illusionary self-security or self-confidence of the "beginner's mind").

In sum, Asian martial arts philosophy asserts that there is no objectivity or absolute truth to serve as a benchmark in a fight.[43] Therefore, I argue that since American common law is based on case law and develops from litigation, the astute MMA negotiator understands that the idea of objectivity and universalism[44] in our legal system is an ideal, and that every case should be bargained on the basis of the particularism[45] of its own merits based on the applicable universal legal and ethical principles.[46]

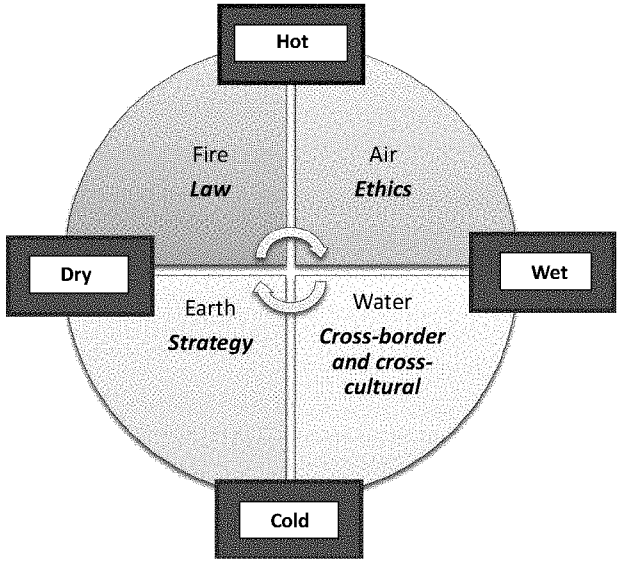
III. The four core disciplines of MMA Negotiation as the spirit of the MMA Negotiator:

The role of a lawyer is to manage legal risks by uncovering legal threats and opportunities associated with the negotiation of a deal or dispute.[47] A prudent lawyer knows that a risk level (high, medium or low) for a deal or dispute in legal risk management is generated by the interaction of the probability/likelihood of adverse outcomes and the potential negative consequences/impacts.[48] Negative consequences of a legal risk may not necessarily be legal but can be more corporate, financial, reputational, ethical, etc.[49] Therefore, to have practical utility

[43] Kahn, *supra* note 4, at 225-26 (theorizing that Asian philosophy has never been concerned with identifying and defining permanent laws of science or philosophy: rather, Asian thought focuses on the nature of process and with how to influence and shape these processes).
[44] *See* Trompenaars & Hampden-Turner, *supra* note 39.
[45] *Id.*
[46] Fletcher & Sheppard, *supra* note 35.
[47] *See* Richard Susskind, THE FUTURE OF LAW 290 (Oxford University Press, 1998) [Hereinafter FUTURE OF THE LAW] (predicting that the future of law will shift from problem solving (reactive) to problem prevention (proactive). While legal problem solving will not be eliminating in tomorrow's legal paradigm, it will nonetheless diminish markedly in significance. The emphasis will shift towards legal risk management).
[48] *See* TOBIAS MAHLER & JON BING, STOCKHOLM INSTITUTE FOR SCANDIANVIAN LAW 1957-2010, CONTRACTUAL RISK MANAGEMENT IN AN ICT CONTEXT -- SEARCHING FOR A POSSIBLE INTERFACE BETWEEN LEGAL METHODS AND RISK ANALYSIS 339- 357 (2006), *available* at http://www.scandinavianlaw.se/index.php/display (explaining that risk management is universally understood by ISO as a set of coordinated activities to direct and control an organization with regard to risk. The term "risk" is the interaction between the probability of unwanted event and its consequences. Authors explain that legal risk management is based on preventive law. The theory of preventive law means the legal and practical principles for anticipating and avoiding legal problems). *See also* SUSSKIND, *supra*,note 47 (predicting that the future of law will shift towards legal risk management).
[49] Educated in French-Canadian law schools, the author has great respect for the Cartesian philosophy. For Descartes, the essence or nature of a mind, is to think (Descartes' original phrase, "*je pense, donc je suis"* that can be translated in English as "I think, therefore, I am"). *See* GARY HATFIELD, RENE DESCARTES, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed, 2011), *available* at http://plato.stanford.edu/entries/descartes/ (last visited Aug. 13 2013). (explaining that for Descartes, if a thing does not think, it is not a mind. In terms of his ontology, the mind is a (finite) substance, and thought or thinking is its attribute. Although Descartes begins the analysis by an initial examination of adventitious ideas, he ultimately extends it to cover the idea of God, which is the paradigm of an innate idea. Despite the tensions that arise among Descartes' interpretations, scholars agree that with respect to innate ideas, Descartes recognizes at least three ways to see the reality: the idea of God, the idea of (finite) mind, and the idea of (indefinite) body). This article concurs with Descartes's Discourse on the Method presenting the method to arrive to understand reality as a set of fundamental principles that one can know as true without any doubt (i.e. this Cartesian philosophy can be linked with the martial arts theory of "state of doubt"). In other words, even though this article uses the Aristotle four natural elements for practicality, I agree with Kuttner theory of Wave/Particle as a alternative to Aristotelian physics, since the Wave/Particle theory expresses the duality between win-win/win-lose tension in negotiation as a valuable metaphor for approaching the need to hold both seemingly contracting negotiation approaches in a complementary manner. *See* Kuttner, *supra* note 6, at 333.

MMA Negotiation should be viewed and practiced on the foundation of four core disciplines like the four elements of nature to allow the negotiator to reframe his reality.[50]

The Four Core Disciplines of MMA Negotiation as the Spirit of the MMA Negotiator:



According to Aristotle in his article "On Generation and Corruption," the human existence could be viewed on the basis of the four natural elements.[51] For the cognitive philology[52] purpose

[50] *See* WILLIAMS, C., DE GENERATIONE ET CORRUPTIONE, Translated with a commentary, Oxford: Oxford University Press, 1983. (explaining the Aristotelian philosophical understanding that the reality is based on observations and real experiences; this essay offers the Four Elements (earth, wind, fire and water) to provide an explanation for the Greek philosophical theories on the perception of the reality and the world. The four Aristotelian elements, earth, air, fire, and water, had substantial forms that combined the basic qualities of hot, cold, wet, and dry: earth is cold and dry; air is hot and wet; fire is hot and dry; and water is cold and wet. These elements can themselves then serve as "matter" to higher substantial forms).

[51] *Id.*

[52] The purpose of this article is not to defend the philosophical adequacy of the Aristotelian Four Elements for negotiation and dispute resolution, but as cognitive philology processes to help negotiators in a practical manner to reframe their human mental process in face of the art of negotiation. *See* RICHARD MCKEON, ARISTOTLE'S CONCEPTION OF LANGUAGE AND THE ARTS OF LANGUAGE, Classical Philology 41, no. 4 (1946): 193-206. (theorizing on Aristotle's conception of language and the arts of language. For Aristotle language is not only has a basis in man's bodily organs and psychological powers, but it is, in turn, one of the natural bases of the virtues of social and political relations, and it constitutes the natural means of imitation in the art of literature and the matter of which literary works are formed. Aristotle analyses the arts of language in terms of symbolic properties and linguistic structures for the development and acquisition of knowledge, power, virtues, and arts. In sum, for Aristotle in philology, the artificial composition and symbolic structure, is the end of the numerous arts which are employed in scientific demonstrations, practical communications and regulations, and aesthetic compositions). This means the author wrote this article of the premise that despite is scientific components (e.g. game theory, psychology, etc.), negotiation remains an art. *See* Kahn, *supra* note 4, at 234 (stating that even the most empirically based authorities on the subject of negotiation agree that at a certain level negotiation is an art).

of understanding the human mental process of a MMA negotiator, Aristotle's view of the human existence should be as follows. Firstly, a MMA negotiator needs to be grounded and "down to earth" by understanding that strategy is the earthly aspect of all negotiations (earth). Second, a MMA negotiator should try to avoid "getting burned" by avoiding/managing legal risks and pitfalls (fire). Third, a MMA negotiator should aspire to be courageous and virtuous and maintain his morals by elevating his mind (air). Fourth, the mind of the MMA negotiator should be worldly and shapeless like water in order to adapt to cross-border and cross-cultural challenges (water). The fifth and transcendental element is the spirit of the MMA Negotiator because these four elements can themselves serve as "matter" to higher substantial forms, such as how the mind of a MMA negotiator sees the reality and the world.[53]

a) Strategy discipline (Earth);

First and foremost, to understand MMA Negotiation, it is fundamental to move away from the common way of defining negotiation and dispute resolution as a dual-concern theory, meaning the opposition between a collaborative win-win approach versus a competitive win-lose approach.[54] As noted by Shell in "Bargaining for Advantage," defining negotiation as a dual-orientation between "win-win" (*i.e.*, collaborating by enlarging the "pie" by creating value for the deal that will allow both parties to completely satisfy their concerns and interests) versus "win-lose" (*i.e.*, when the negotiator focuses on value-claiming or value-expansion by only focusing on his individual profit and satisfaction) is a non-practical simplification of negotiation.[55] MMA Negotiation recognizes that negotiations and disputes cannot be strategized in a predictable manner. Sun-Tzu refers to strategy as "making the most favorable conditions in your favor."[56] This means using proactive action, controlling the rhythm and using the strategy of surprise.[57] MMA Negotiation recognizes that interest-based strategies like crafting your BATNA can be difficult to apply in practice.[58] On the other hand, applying effective

[53] The fifth and transcendental element is the Spirit (also referred to as Quintessence) represented things not of our everyday life or for the purpose of this article the Cartesian philosophy, martial arts "state of doubt", and ultimately the Kuttner theory of Wave/Particle as an alternative to Aristotelian physics. It is important to note that the concept of the five elements formed a basis of analysis for Eastern philosophy in both Hinduism and Buddhism. Therefore, Aristotle's view of the human existence can be viewed as consistent with martial arts and the philosophy of MMA Negotiation developed in this article.

[54] SHELL, *supra* note 7; *see also* JULIE MACFARLANE & JOHN MANWARING, DISPUTE RESOLUTION 137 (2d ed. 2003) (stating that a negotiator 's dilemma metaphor should be taken seriously but not literally. The dilemma is also meant to apply to each tactical choice. The line between "creating" and "claiming" need to not be clear-cut. The essence of effective negotiation involves managing this tension, creating while claiming value).

[55] Id.

[56] Kahn, *supra* note 4, at 231.

[57] *Id.* at 231-33.

[58] J. LEWICKI, ALEX. HIAM & KAREN W. OLANDER, NEGOTIATION: READINGS, EXERCISES AND CASES, 80-85 (McGraw-Hill, 5th ed. 2007) (explaining that negotiation scholars refer to Best Alternative to a Negotiated Agreement (BATNA) as the plan B or backup plan. The authors explain that BATNA can be difficult to apply in practice because it is difficult for a negotiator to assign an objective score to his BATNA because it is qualitatively different from the deal under negotiation or because it involves risk or uncertainty. Also explaining that a skilled negotiator should pursue the difficult task to try to determine what is the other side's BATNA). [hereinafter NEGOTIATION: READINGS, EXERCISES AND CASES]. *See also* ROY J. LEICKI, DAVID M SAUNDERS & JOHN W. MINTON, ESSENTIALS OF NEGOTIATION, 58-84 (4th ed. 2007) [hereinafter ESSENTIALS OF NEGOTIATION] (theorizing on strategy and tactics of integrative negotiation. Explaining that win-win negotiation is hard particularly because even well-intentioned negotiators can make the following three mistakes: failing to negotiate when they should, negotiating when they should not, or negotiating when they should but choosing an inappropriate strategy).

competitive-based bargaining strategies and tactics is far from a simple task.[59] Using offensive and competitive strategies in negotiation such as MPP,[60] Good-cop and Bad-cop, the simple principle of never saying yes to the first offer,[61] etc., also require a great deal of practice and skills.[62]

MMA Negotiation does not encourage negotiators to think in a linear manner like the Western philosophy of the two-world paradigm as the benchmark for the negotiator's conception of objectivity.[63] MMA negotiators know that there are too many situational and personal variables for a single strategy to work in all cases.[64] Moreover, a recent data-driven study in cross-cultural management demonstrated that the dual-concern model of conflict management theory is not a good candidate for predicting negotiation behaviors during cross-border and cross-cultural negotiations.[65] If the dual-concern theory is overly simplistic, how should negotiators approach the process of negotiating? They should perceive the process as an interplay of the three fundamental approaches to negotiating and resolving disputes:[66]

> 1) **Right-based**[67] (*i.e.*, legally binding litigation and arbitration and non-binding right-based mediation such as mini-trial.[68] In dispute resolution, the right-based method can

[59] ESSENTIALS OF NEGOTIATION, *supra* note 58, at 27-57 (theorizing on strategy and tactics of distributive negotiation and explaining that they can also backfire, and there evidence that very adversarial negotiators are not effective negotiators. Explain the fundamental importance to recognize and understand distributive tactics if they are used against you in negotiation.); NEGOTIATION: READINGS, EXERCISES AND CASES, *supra* note 20, at 98-108 (theorizing that win-win negotiation is a myth and power negotiation teaches negotiators to win at the negotiation table but leave the other person feeling we won).

[60] NEGOTIATION: READINGS, EXERCISES AND CASES, *supra* note 20, at 98-99 (explaining that Maximum Plausible Position (MPP) – means the most you can ask for and still appear credible).

[61] ESSENTIALS OF NEGOTIATION, *supra* note 58, at 100-01 (explaining that if you say why to the first offer without a good justification, it triggers two negative thoughts in your counterpart's mind: "I could have done better" and " Something must be wrong").

[62] *Id.* at 27-28 (explaining that many negotiators are attracted to distributive/competitive negotiation and look forward to learning and sharpening an array of hard-bargaining skills; others are repelled by distributive/competitive negotiation and would rather walk away than negotiate this way. They argue that distributive/competitive negotiation is old-fashioned, needlessly confrontational and destructive. The discussion aims to understand the dynamic of distributive/competitive negotiation for negotiators to obtain better deal, allow negotiators who are by nature uncomfortable with distributive/competitive negotiation to manage distributive/competitive situations proactively, and help negotiator understanding distributive/competitive strategies and tactics at the claiming value stage of any negotiation).

[63] Kahn, *supra* note 4, at 225-26.

[64] SHELL, *supra* note 7.

[65] Zhenzhong Ma, *Chinese Conflict Management Styles and Negotiations Behaviours: An Empirical Approach*, 7 INT'L JOURNAL OF CROSS CULTURAL MGMT. 101, 114 (2007).

[66] See on three approaches of resolving disputes: WILLIAM URY, JEANNE M. BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED 3-19 (1988) [Hereinafter URY](discussing the three approaches to resolving disputes: Interests, Rights, and Power). *See also* Garrick Apollon, *The Importance of an ADR Program For The Effective Enforcement of International Human Rights Under The Free Trade Agreement Hope II Between The United States and Haiti*, 25 Fla. J. Int'l L. 117, 121-22 (discussing the there are three main ways to get what you want in life or to resolve a dispute (i.e. right-based, power-based and interest-based). Explaining that the correlation between bargaining and dispute resolution in international commercial and human rights disputes is evident; in all instances, the power-based and interest-based approaches are viewed as more effective than the rights-based approach).

[67] URY, BRETT & GOLDBERG, *supra* note 66.

[68] The ADR method of mini-trial has certain features that permit the accommodation in international business transactions, especially with regard to cross-cultural disputes such as Chinese or Japanese preference for non-judicial dispute resolution and the American preference for arbitration or for face-to-face negotiations within the

also be associated with the power-based method because in litigation and arbitration, there is a winner and loser. In negotiation, the right-based method means that the negotiator will advocate his rights based on case law and legislation, but also social proof[69]);

2) **Interest-based**[70] (*i.e.*, non-binding negotiation, reconciliation, mediation or conciliation where interests are considered and considerations are offered to reach an agreement or settlement between the parties); and

3) **Power-based**[71] (*i.e.*, the ability to coerce the other party with the law, power and/or force).

These three approaches are the common ways people attempt to negotiate and resolve their disputes.[72] However, in a cross-border or/and cross-cultural negotiation these three approaches are influenced by the cultural differences between the parties.[73] Finally, the MMA Negotiator must realize that the American society is one of the most legalistic and litigious societies in the world.[74] Therefore, negotiation in the United States is culturally oriented towards a more right-based orientation.[75]The approaches mentioned above are subject to legal risk management to avoid legal risks.[76] This leads us to the Legal discipline as the second discipline of MMA Negotiation.

b) Legal discipline (Fire);

Acting within the boundaries of the law is the main concern of Americans and people living in societies where the Rule of Law prevails.[77] This premise does not necessarily mean that all negotiators embrace the natural virtue of the law and ethics.[78] This article argues that the famous Prediction Theory of the Law of Holmes presenting the "Bad Man" applies to negotiation, meaning that negotiators may care little for ethics or lofty conceptions of natural law; instead

---

context of judicial dispute resolution. *See* Leo Kanowitz, *Using the Mini-Trial in U.S.- Japan Business Disputes*, 39 Mercer L. Rev. 641 (1988) (defining the mini-trial is voluntary, confidential, and nonbinding simulated trial (with flexible procedural rules) and very useful in cross-cultural dispute like Japanese-American legal disputes).

[69] For instance in 1907, Brandeis was also the first American jurist at the U.S. Supreme Court and pioneer in citing social research and data to demonstrate the public interest in his briefs.

[70] URY, BRETT & GOLDBERG, *supra* note 66.

[71] *Id.*

[72] *Id.*

[73] Trompenaars & Hampden-Turner, *supra* note 39, at 20-24 (discussing that there is limited debate in the scholarship related to international business that the single most influential factor is culture).

[74] *See* LARRY A. DIMATTEO AND LUCIEN J. DHOOGE, INTERNATIONAL BUSINESS LAW: A TRANSACTIONAL APPROACH 123 (Thomson-West eds., 2nd ed. 2006) (discussing the preference for litigation for Americans versus the cultural preference for ADR for many cultures such as East Asian business cultures).

[75] *Id.*

[76] Susskind, *supra* note 47 (discussing that the future of the law is a shift from a reactive to a proactive practice of the law. This means the rise of legal risk management).

[77] Fletcher, *supra* note 35 (theorizing that American law is based on the Constitutional principle of separation of powers among the legislative, executive, and judicial branches of government. The three branches of government are of equal power. There is no rule of law for resolving conflicts among them).

[78] *See* Alvin B. Rubin, A *Causerie of Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975) (discussing ethics in negotiation, particularly ethics for the lawyer negotiating with other lawyers or with laymen. Theorizing on the lack of legal and ethical rules for bargaining).

they may care simply about staying out of jail and avoiding paying damages.[79] In Holmes's mind, therefore, it was most useful to define "the law" as a prediction of what will bring punishment or other consequences from a court.[80] This theory based on legal realism may mean that a lawyer will correctly advise his client to avoid the consequences of disobeying the law. Not all negotiators will want to obey the law just for the sake of obeying it.[81] This means in the practice of negotiation and dispute resolution, the Rule of Law and importance of contractual liability, tort liability or even criminal liability may have relative importance in defining the rights and obligations of the parties for a negotiator.[82] This goes back to the analysis that negotiation is the interplay of power-based, right-based and interest-based approaches.[83] For example, following a power-based approach, a negotiator may illegally coerce another party to do something. On the basis of the right-based approach, a negotiator may have the right to launch a lawsuit and to enforce a legal award. On the basis of the interest-based approach, a negotiator may sometimes prefer to settle a dispute amicably in order preserve the relationship and his reputation.

The theory of the Prediction of Law demonstrates the interaction between the law (fire) and ethics (air) in negotiation and dispute resolution. Like Holmes states, even the "Bad Man" can have as much reason as a "Good Man" to avoid the reputational risk of being perceived as evil, and therefore will see the practical distinction between morality and law.[84] Most importantly, Holmes's Prediction of Law theory is based on legal realism and the fact that humankind while aspiring to virtue is far from perfect.[85] President Abraham Lincoln once stated that "it has been

---

[79] *See* Sanford Levinson and J.M. Balkin, *The "Bad Man," The Good, And The Self-Reliant*, 78 B.U. L. REV. 885 (1998) [hereinafter *The "Bad Man," The Good, And The Self-Reliant*] (theorizing on the famous ideas associated with Justice Oliver Wendell Holmes--and with The Path of the Law in particular. One of the first that comes to mind is his famous image of the "bad man." Although this metaphor has been one of Holmes's most lasting legacies, it has also been one of his most troubling as well, for it suggests that the deepest truths about the law can be found by adopting the perspective of someone who is "bad."). *see also* Marco Jimenez, *Finding The Good In Holmes's Bad Man*, 79 FORDHAM L. REV. 2069 (2011) [hereinafter *The Good In Holmes's Bad Man*] (discussing Holmes's theory, despite its extraordinary influence, has been widely misunderstood and can be more profitably understood-by both supporters and critics alike--not as supporting the bad man but the good, by providing an effective counterpart to the traditional positivist theory of law for which Holmes's bad man theory has so often been associated. Holmes's theory supports the idea that only by recognizing the differences between the concepts of law and justice, rather than by stressing their similarities, can the two be brought together and integrated into the social fabric upon which law must necessarily rest).

[80] Levinson & Balkin, *supra* note 79, at 893.

[81] *Id.*

[82] *Id.*

[83] Ury et al., *supra* note 66.

[84] Levinson & Balkin, *supra* note 79, at 888 (theorizing on the fact that the "good man" versus "bad man," Holmes tells us, is motivated by conscience. Adherence to conscience, rather than fear of some predicted misfortune, offers the good person a "reason for conduct." Presumably, the good person would not violate a just or morally binding law even if public authorities stopped punishing its violation or the courts were closed. Hence Holmes's definition also seems to imply that for the good person, law is something other than predictions of official behavior; instead, law is a norm that generates a feeling of obligation to obey it, regardless of the probability of state-enforced sanctions resulting from disobedience. This, we take it, is the point of Holmes's statement that the good person "finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience").

[85] Levinson & Balkin, *supra* note 35, at 900 (explaining this instrumental conception is entirely familiar to American legal scholars, especially those living in the generations after Legal Realism. It is the conception that Holmes promoted and announced as the wave of the future in The Path of the Law. Indeed, The Path of the Law stands as one of the first programmatic statements of the instrumental conception).

my experience that folks who have no vices have very few virtues."[86] This could mean that the definition of virtue under the Holmes Prediction of Law, Confucian Rule of Men (Ren-Zhi) and in the jurisprudential development of the American constitution with *Marbury* and the institution of judicial review,[87] all appear to have a lot in common with the concept of Virtù notably theorized by Niccolò Machiavelli, centered on the survival and martial spirit of a country or leader to retain and gain power.[88] Virtù for Machiavelli extends the study of classical virtue in the sense of skill, valor and leadership, to encompass the individual prince or war-leader as well.[89] As a result, the Machiavellian conception of Virtù is fascinating for MMA Negotiation.[90]

---

[86] *See* Stefan K. Estreicher, *Defect Theory: Elusive State-of-the-art*, MATERIALS TODAY 6.6, 2003, at 26-35 (applying the famous reflection of Abraham Lincoln when he once said "it has been my experience that folks who have no vices have very few virtues" to physics. The physicist notes that his wit and wisdom apply equally well to the analysis of defects in materials for physics. By 'defect,' the physicist means a native defect or an impurity. The physicist emphasis that words 'defect' and 'impurity' have an intrinsically negative connotation, but defects are often desirable. They affect or even control the optical, mechanical, and electrical properties of materials).

[87] This article argues another interesting and controversial comparative legal argument to demonstrate the validity of this theory and the similarity between the jurisprudential development of the American Rule of Law under Holmes's Prediction of Law and the Chinese Rule of Men under Confucian philosophy. Under the Confucian Rule of Men, martial arts leaders, political leaders, and business leaders have to lead by virtue, like benevolent autocrats or good fathers (*see* Hofstede et al., CULTURES AND ORGANIZATIONS, SOFTWARE OF THE MIND, INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL 76-80 (McGraw Hill eds., 3rd ed. 2005) [hereinafter Hofstede's Five Cultural Dimensions]. The Confucian Rule of Men may appear to be a strange Eastern legal philosophy only applicable to the practice of martial arts for Westerners, incompatible with our Western conceptions of democratic society based on the Rule of Law. However, this article argues that this Confucian legal principle is deeply rooted in the jurisprudential development of the American legal system by the historic institution of judicial review in American constitutional law. Chief Justice Marshall paradoxically states in Marbury (*see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) that, "the government of the United States has been emphatically termed a government of laws, and not of men." However, the Chief Justice arguably created--either intentionally or accidently--a "government des juges" (*see* Édourd Lambert, *Le Gouvernement Des Juges* (avec Préface de Frank Moderne 2004) by instituting the doctrine of judicial review which follows a similar philosophical thinking to the Confucian Rule of Men under which legislative and executive actions of American elected officials, public officials, and leaders can subject to review (and also invalidation) by the American judiciary elite that must lead them with virtue as stated in Marbury. *See also* on the Rule of Men Teemu Ruskola, *Law Without Law, or Is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL OF RTS. J. 655, 659-60 (2003) [hereinafter Ruskola Law Without Law] (explaining that Chief Justice John Marshall said "the government of the United States has been emphatically termed a government of laws, and not of men." Although there is much debate over just what the rule of law means, there is a resounding consensus about what it is not: it is not the "rule of men." However, the author states that the rule-of-law/rule-of-men distinction should not be based on a philosophy of law comparison that is too moralistic and too black and white in order to keep its practical analytic utility). *See* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) (theorizing on the legal pragmatism behind the prediction of law theory).

[88] *See* Russell Price, *The Senses of Virtu in Machiavelli*, EUROPEAN HISTORY QUARTERLY 3, no. 4, 1973, at 315-45 [hereinafter The senses of Virtu in Machiavelli] (theorizing that the conception of virtue encompasses a broader collection of traits necessary for maintenance of the state and "the achievement of great things").

[89] *See Power, Niccolò Machiavelli, Virtù, and Fortune*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *available at* http://plato.stanford.edu/entries/machiavelli/ (last visited Aug. 13, 2013) (explaining that Machiavelli employs the concept of virtù to refer to the range of personal qualities that the prince will find it necessary to acquire in order to "maintain his state" and to "achieve great things," the two standard markers of power for him. This makes it brutally clear there can be no equivalence between the conventional virtues and Machiavellian virtù. Machiavelli expects princes of the highest virtù to be capable, as the situation requires, of behaving in a completely evil fashion. For the circumstances of political rule are such that moral viciousness can never be excluded from the realm of possible actions in which the prince may have to engage).

[90] For instance, MMA fighter Canadian champion GSP stated that he has a "dark side" as his main pre-fight psychological battle against his opponent Diaz for the UFC 158 (*see* St-Pierre vs. Diaz championship on March 16, 2013 at the Bell Centre in Montréal). This statement illustrates an attempt for GSP (usually showing exemplary

MMA Negotiation challenges the negotiator to develop a "thoughtful set of personal values that they could, if necessary, explain and defend to others."[91] Far from being amoral, MMA Negotiation defends the Rule of Law (true MMA fighters see fighting not just as a game but an honorable way to live), but if necessary, the MMA negotiator will be able to explain a breach to a contract because the contract was unconscionable in the first place as a moral action.[92] In sum, the philosophical examples demonstrate that MMA Negotiation cannot be approached in a manner that is too linear, too moralistic or based too much on the black and white distinctions between law (fire) and ethics (air) to remain of practical analytic utility.[93]

c) Ethical discipline (Air);

In *Bargaining for Advantage*, Richard Shell contributed to the world of negotiation by helping negotiators practically identify their own ethical beliefs.[94] This article invites MMA Negotiators to do the same by being self-aware and aware of other negotiators' ethical orientation in negotiation on the basis of Shell's three schools of bargaining ethics: (1) "It's a game!" (the poker school); (2) "Do the right thing, even if it hurts!" (the idealist school); and (3) "What goes around, comes around!" (the pragmatist school).[95] Shell stresses that a negotiator's attitudes about ethics are preliminary to every negotiating strategy, tactic, and activity.[96] This perspective particularly reinforces the fact that strategy (earth) is dependent on the natural interplay between the element of fire (law) and air (ethics) in MMA Negotiation. In other words, something may be legal but immoral according to the values of the negotiator (*e.g.*, terminating a contract for a minor breach). On the other hand, something might be illegal but moral for a negotiator (*e.g.*, justifying a breach of a contract on the basis of the theory of efficient breach[97]).

---

sportsmanship and ethics to his opponents and fans) to be feared and make it brutally clear that he also has an internal battle between conventional virtues and Machiavellian virtù. *See Georges St-Pierre, Interview on Diaz, Pulling Out from the Fight, and Must Finish Diaz*, YOUTUBE, http://www.youtube.com/watch?v=_iDE1r4yHaM (last visited Aug. 13, 2013). An in-depth discussion of the Machiavellian conception of Virtù for the MMA Negotiation theory is beyond the scope of this article and is currently under research.

[91] Russell, *supra* note 88, at 315-45 (meaning that based on Machiavellian conceptions an MMA fighter or MMA Negotiator cannot only aspire to be loved but also needs to be feared and respected).

[92] Omri Ben-Shahar, *Fixing Unfair Contracts,* 63 STANFORD LAW REVIEW 869, 870 (2011) (discussing that various doctrines of contract and consumer protection law allow courts to strike down unfair contract terms. The formation of unconscionable contracts occurs when a party with more bargaining power and more sophistication understands the terms of the contract; the less powerful and naive party does not. Theorizing on the forms of interventions for a judge in unconscionable contracts when the sophisticated party takes advantage of this asymmetry and drafts a term that its counterpart fails to appreciate or conceals some of the implications of the contract).

[93] Ruskola, *supra* note 87, at 656 [hereinafter Ruskola Law Without Law] (discussing that comparisons between Sino-American legal and ethical values are often too linear, too moralistic or too black and white to remain of practical analytic utility).

[94] Shell, *supra* note 7, at Chapter 11 (theorizing on ethics for negotiation).

[95] *Id.*

[96] *Id.*

[97] *See* Ronald J. Scalise Jr., *Why no "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contact*, 55 AM. J. COMP. L. 721, 721-66 (2007) (discussing the American theory of "efficient breach" of contract, long heralded by the proponents of the law and economics movement, as a civil law scholar would do in his own jurisdiction. Because a number of cultural and doctrinal hurdles that stand in the way of judicial and scholarly recognition of the theory, civil law jurisdictions are less favorable for the existence and development of the doctrine of efficient breach than American law).

The Second World War provides an historic lesson for distinguishing legality from legitimacy. Nazi Laws were legal but were immoral and evil.[98]

A negotiator also needs to have a holistic view of the interaction between the Four Core Disciplines of MMA Negotiation. A negotiator needs to realize that if any strategy (earth) in negotiation is dependent on the interaction between morality (air) and law (fire), all these elements are influenced by the powerful element of the cross-border and cross-cultural differences (water). In negotiation, strategies, laws and ethics are defined by the boundaries of legal jurisdiction and national culture.[99] The natural interplay of the Four Core Disciplines of MMA Negotiation encourage the negotiator to not oversimplify the world by espousing any particular ethical school, but instead challenges the MMA Negotiator to defend his own virtue to others without falling in the trap of ethical relativism and not be able to distinguish good from evil.[100] For instance, for Americans, a trustworthy negotiator honors the contract (American business people will commonly say "a deal is a deal, a contract is a contract").[101] In contrast, for the Chinese, a trustworthy negotiator honors a changing circumstance. A contract must be capable of adapting to a changing business relationship.[102] For Particularistic cultures like in East Asia, South Asia, Africa, the Middle East, the Caribbean or Latin America, the contract only marks the beginning of a business relationship and preserving the harmony of the relationship comes before the terms and conditions of a contract.[103] These different legal and ethical orientations often cause Universalist American negotiators and negotiators from more Particularistic cultures like Brazil or China to distrust each other.[104] MMA Negotiators

[98] This reflection is based on the teachings of my Professor Harry Reicher at Penn Law in the field of international human rights. In his efforts to make us understand the power of the law, Professor Reicher taught us that the most powerful weapon of the Nazis to achieve the Holocaust was their laws and decrees that deprived Jews of rights and ultimately subjected them to extermination. This reflection goes back to the fact that the right-based method in negotiation is mainly utilized to legitimize an action. *See* Shell, *supra* note 7.

[99] K. Zweigert & H. Kötz, INTRODUCTION TO COMPARATIVE LAW 3 (Oxford University Press, 3rd ed. 1998) (explaining that the laws of people from cultural, economic, political, moral (philosophical and theological) social and historical accident or to temporary or contingent circumstances).

[100] Shell, *supra* note 7, at 205. *See also* Joseph Desjardins, AN INTRODUCTION TO BUSINESS ETHICS 22 (McGraw-Hill, 3rd ed. 2009) (explaining ethics is not like math, science, or accounting. One cannot look up the right answer or calculate the answer with mathematical precision. People differ about ethical judgments, and this seems based in personal feelings and emotions. Relativism represents a serious challenge to ethics, including business ethics, because if it is correct there is no reason to continue to study ethics. If all opinions are equally valid, then it makes little sense for us to attempt to evaluate ethical judgment in business. Philosophical ethics, from the relativist perspective, becomes little more than a process of values clarification in which we can clarify and elucidate our values but not justify them. However, while people may be entitled to hold any opinion they wish, not all opinions are equal).

[101] Trompenaars & Hampden-Turner, *supra* note 39, at 29-51 (demonstrating empirically that cross-cultural formation of relationships and rules is based on Universalism for Americans (respect for the contract and rules) v. Particularism (*i.e.*, relationships and chaining/evolving situations) for Chinese).

[102] *Id.*

[103] Trompenaars & Hampden-Turner, *supra* note 39, at 29-51.

[104] *See* Fons Trompenaars, DID THE PEDESTRIAN DIE?: INSIGHTS FROM THE GREATEST CULTURE GURU (Capstone Publ'g Ltd. 2003). This empirical research is an accumulation of a decade of research into cultural diversity across the globe with a wide range of client organisations as a globe-trotting consultant for the firm he runs with Charles Hampden-Turner - THT consulting. The title is taken from a hypothetical dilemma Trompenaars presents to managers - so far to about 70,000 managers in over 65 countries. He asks them to consider the situation in which they are a passenger in a car driven by a close friend. That friend knocks down a pedestrian. The friend was travelling well above the speed limit - say 35 miles an hour in a 20-mile-an-hour-zone. There are no witnesses. The friend's lawyer suggests that testifying under oath on the friend's behalf that he was only doing 20 miles an hour

understand that ethical (*i.e.*, moral, doctrinal, ideological, religious, political, social and aesthetic) values vary across cultures, and are in many ways aligned with belief systems in a particular society.[105] This leads us to study the cross-border and cross-cultural discipline (water).

d) Cross-border and cross-cultural discipline (Water);

Bruce Lee refers to the idea of a "mind like water" in order to make the mind calm; like the surface of undisturbed water.[106] Japanese Karate also refers to the idea that "water reflects accurately the image of all objects within its range, and if the mind is kept in this state, apprehension of the opponent's movements, both psychological and physical, will be immediate and accurate."[107] In today's world marked by globalization, this means that the MMA negotiator should be able to adapt to his opponent like water and particularly to cross-border and cross-cultural situations.

MMA negotiators realize that someone might be a great negotiator within his own familiar style of negotiation (own national culture, with his own people) but could be a poor or average negotiator with foreign counterparts from a different style and culture.[108] Operating in a new economic, cultural, legal and/or political environment, there are great challenges facing the international negotiator.[109] Dealing with cultural differences remains the single most influential and challenging task for the international negotiator.[110] If culture matters, an historical MMA

---

may save him from serious consequences. Trompenaars asks whether the friend has a definite right, some right or no right at all to expect someone (the manager being asked the question) to testify to the lower figure. He also asks whether - irrespective of such right - the manager would testify to the lower figure. The answers received have varied around the world and, to some extent, comply with existing stereotypes. The Swiss almost unanimously feel that the friend has no right to expect his friend to perjure him/herself, and that in no circumstances should this be considered. However, in Venezuela and, interestingly, in China, less than 35 per cent of people agree with this line. The point is that culture is not uniform but it is often a major determinant of attitude and of action. It is rich, varied and, at times, problematic. American negotiators may tend to be seen as corrupted and evil foreign negotiators embracing a more particularistic view on ethics. MMA Negotiation invited American negotiators to realizes that this particularistic ethical orientation of protecting relationships above the law is incorporated in American law with the Spousal privilege (also called marital privilege or husband-wife privilege) preventing spouses from having to condemn, or be condemned by, their spouses.

[105] *Id.*

[106] *"Bruce Lee Referes to the idea a Mind Like Water,"* YOUTUBE, http://www.youtube.com/watch?v=lzLhiWd9Efw (last visited Aug. 14, 2013).

[107] Kahn, *supra* note 4, at 226-27.

[108] Jeswald W. Salacuse, *Ten Ways that Culture Affects Negotiating Style: Some Survey Results*, 14 NEGOTIATION JOURNAL 221, 221-40 (1998) (explaining empirical research report on ten ways that culture affects negotiating style. In a survey of 310 persons from 12 countries and 8 occupations, the author asked participants to rate their negotiating style covering ten negotiation process factors. The countries that were represented in the survey were Spain, France, Brazil, Japan, the U.S, Germany, the U.K., Nigeria, Argentina, China, Mexico and India. The occupational specialties included law, military, engineering, diplomacy/public sector, students, accounting, teaching, and management/marketing. Overall, the research shows that culture has a profound impact on negotiations and profoundly influences how people think, communicate and behave. The great diversity of the world's cultures makes it impossible for any negotiator, no matter how skilled and experienced, to understand fully all the cultures that may be considered).

[109] Claude Cellich & Subhash C. Jain, GLOBAL BUSINESS NEGOTIATIONS: A PRACTICAL GUIDE 4-13 (Thomson South-Western eds., 2004) (presenting an overview of challenges that an international business negotiator is facing in the global business environment).

[110] Trompenaars & Hampden-Turner, *supra* note 39, at 29-50 (discussing that there is limited debate in the scholarship related to international business that the single most influential factor is culture).

fight between two legends (Matt Hughes v. Gracie) demonstrates that there is no superior style of fighting: in this fight American wrestling and fighting style happened to be more effective than the Brazilian jujitsu because of the fighter and the situation surrounding the fight.[111] As a result, a MMA Negotiator understands that sometimes cultural differences matter a lot, and sometimes not at all.[112] A MMA Negotiator also understands that if Jujitsu Negotiation based on principled negotiation is a core discipline to master the art of negotiation, it also needs to be adapted to cultural differences between the negotiators and the totality of the situation.[113]

A MMA Negotiator considers it necessary to blend different styles of negotiation by studying comparative law[114] and comparative management[115] to achieve a superior holistic style of negotiation.[116] A MMA Negotiator also understands that no negotiator can adapt to all styles of negotiating based on the plurality of cultures in the world, and that becoming a universal or global negotiator who can negotiate efficiently in all cultures is a myth.[117] While trying to adapt to all styles and cultures, a MMA Negotiator is self-aware of his strengths and weaknesses in the face of other negotiation styles and cultures.[118] A MMA Negotiator embraces the thinking of Robert Greene, author of the *48 Laws of Power*, who states that, "every individual is like an alien culture. You must get inside his or her way of thinking, not as an exercise in sensitivity but out of strategic necessity."[119] Meanwhile a MMA Negotiator understands that in certain situations where the negotiator has a choice of adapting to a discriminatory foreign law or a cultural norm, choosing to adapt to such law or norm may be interpreted as a sign of weakness and

[111] On UFC 60: Hughes vs. Gracie was a mixed martial arts event held by the Ultimate Fighting Championship on May 27, 2006, Hughes wins by TKO (punches) at 4:39 of round one. *See UFC 112: Matt Hughes KOs Renzo Gracie*, YOUTUBE, http://www.mmafighting.com/2010/04/10/ufc-112-matt-hughes-kos-renzo-gracie (last visited Aug. 12, 2013).

[112] HARVARD LAW SCHOOL, *International Business Negotiations: Cross-Cultural Communications for International Business Executives*, PROGRAM ON NEGOTIATION, 2010, at 2, *available at* http://www.pon.harvard.edu/freemium/international-negotiations-cross-cultural-communication-skills-for-international-business-executives/ (last visited Aug. 26, 2012).

[113] John Barkai, *What's a Cross-Cultural Mediator to do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 50 (2008) [hereinafter Barkai's Cross-Cultural Mediator] (theorizing that the concepts of principled negotiation in Getting to Yes must be adapted to cultural differences).

[114] Ewald, *supra* note 30, at 2111 (discussing Ewald's proposal for comparative lawyers to transcend the simple dichotomy between law-in-books and law-in-action, or law in economical or sociological statics, and constructively focus on what he calls "law-in-minds").

[115] Comparative management (or cross-cultural management) theories are studies in virtually all undergrad and MBA programs in North America through the mandatory course of Organizational Behavior. This course is usually mandatory for all undergraduate and MBA students all Canadian and American business schools. I have been teaching Organizational behavior at the undergraduate level at the University of Ottawa's Telfer School of Management since 2006.

[116] *See* John Chu, *The Art of War and East Asian Negotiation Styles*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 161 *passim* (2002) [hereinafter Chu, The Art of War and East Asian Negotiation Styles] (discussing East Asian negotiation styles).

[117] Salacuse, *supra* note 108, at 221-40 (demonstrating that the great diversity of the world's cultures makes it impossible for any negotiator, no matter how skilled and experienced, to understand fully all the cultures that may be considered).

[118] Chu, *supra* note 116.

[119] Robert Greene, THE 33 STRATEGIES OF WAR 169 (Penguin Grp. eds., 2007) (discussing the importance to view adaptation not as an exercise of sensitivity but as an exercise of strategic necessity for winning wars).

abandonment to his moral character and that fighting for principles is what makes strong leaders.[120]

IV. How MMA Negotiation works in practice:

There are three sequences (pre-fight, the fight and post-fight) to apply this model in practice: **I. Pre-fight**: First and foremost, as stated previously, since a MMA Negotiator "displays great concern for the relationships and his reputation,[121] he will make sure to evaluate the importance of the relationship prior to determining his strategies and tactics. For instance, international strategic alliances such as international joint-venture or mergers and acquisitions will probably require the elaboration of more relational strategies to ensure to leverage the synergic forces to build a solid corporate marriage.[122] On the other hand, a single negotiation for a house or car will usually not require the same level of consideration for a long term relationship.[123] The same idea applies if a negotiator needs to negotiate a legal dispute in the context of a franchise agreement where the relationship is vital versus a legal dispute in a purchase agreement with a buyer that could be easily replaced.[124] After having assessed the importance of the relationship for the negotiation, a MMA Negotiator will prepare his negotiation on the basis of the four disciplines. The disciplines should be used in practice as follows:

a) How to use the Strategic negotiation discipline in practice;

A MMA Negotiator understands that negotiation cannot be defined in a linear manner, as win-win or win-lose, and should aim to transcend the dual-concern theory by embracing a more holistic approach on strategy.[125] A MMA Negotiator needs to be ready to compete by reading books on war philosophy such as Robert Greene's *The 48 Laws of Power*, *The 33 Stratagies of*

[120] *See generally* Sean T. Hannah, Bruce J. Avolio & Fred O. Walumbwa, *Relationships between Authentic Leadership, Moral Courage, Ethical and Pro-social Behaviors,* 21 BUS. ETHICS QUARTERLY 555, 555-78 (2011) (discussing that organizations constitute morally-complex environments, requiring organization leaders to possess levels of moral courage sufficient to promote their ethical action, while refraining from unethical actions when faced with temptations or pressures. Using a sample drawn from a military context, this article explores the antecedents and consequences of moral courage for leaders and followers).

[121] Shell, *supra* note 7. *See also* Lewicki & Al, *supra* note 20 (explaining seven factors to evaluate the importance of the relationship between the parties).

[122] Christiane Demers, Nicole Giroux & Samia Chreim, *Merger and acquisition announcements as corporate wedding narratives*, 16 JOURNAL OF ORGANIZATIONAL CHANGE MANAGEMENT 223, 223-42 (1998) (analyzing mergers in financial sector in Canada as corporate marriages. This article demonstrates that approaching a merger as a corporate marriage can influence the foundations of legitimacy for the merger and the contribution of the various corporate actors). *See also* Sue Cartwright, Cary L. Cooper, *Organizational marriage: "hard" versus "soft" issues?*, 24 PERSONNEL REVIEW 32, 32-42 (1995) (discussing the substantial increase in merger and acquisition (M & A) activity both domestically and internationally during the 1980s which, in contrast to previous waves of M & A activity, involved organizational marriages between organizations in the same area of business activity. As a result, merger synergy has become increasingly dependent on the wide-scale integration of people and their organizational cultures).

[123] Lewicki & Al, *supra* note 20 (explaining seven factors to evaluate the importance of the relationship between the parties).

[124] *Id.*

[125] Shell, *supra* note 7.

War, *The Art of Seduction* and *Mastery*,[126] Sun Tzu's *The Art of War*,[127] *On War* from Clausewitz,[128] negotiation books on the competitive strategies and tactics that can be applied to negotiation and dispute resolution,[129] and scholarship articles on the limitations of principled negotiation in practice.[130] Most importantly, a MMA Negotiator should never undermine the importance of embracing principled negotiation as a core strategy and review the concepts associated with *Getting to Yes* and other similar books.[131]

b) **How to use cross-border and cross-cultural negotiation disciplines in practice;**

The author has developed a toolbox to help MMA Negotiators to compare, understand and adapt to the cross-cultural differences of the parties and use different approaches from those in American domestic negotiations to leverage the cultural diversity as a competitive advantage. This Toolbox is composed of four indispensable tools. The first tool is Edward T. Hall's comparative model with the notion of high and low cultural contexts.[132] The second tool is the

[126] Robert Greene is an American best-selling author and speaker known for his modern books on strategy, power and seduction. He has written four international bestsellers: ROBERT GREENE, THE 48 LAWS OF POWER (Penguin Books eds., 2000); ROBERT GREEN, THE ART OF SEDUCTION (Profile Books eds., 2001); ROBERT GREENE, THE 33 STRATEGIES OF WAR (Penguin Books eds., 2007); ROBERT GREENE, THE 50TH LAW (HarperCollins eds., 2009) (with rapper 50 Cent).

[127] SUN TZU, THE ART OF WAR (Samuel B. Griffith ed., Oxford Univ. Press 1963) (500 B.C.E.) (The Art of War is one of the oldest and most successful books on military strategy and conflict management philosophy in both the Eastern and Western worlds. For more than two thousand years it remained the most important military treatise in Asia. The universal admiration for Sun Tzu largely comes from the teaching that, "the best way to accomplish more is to do the least." The Art of War promotes the use of powerful psychological tools to outwit, outsmart and deceive opponents in order to turn weakness into strength and achieve the desired outcome without shedding blood and fighting).

[128] *See* BERNARD BRODIE, A GUIDE TO THE READING OF "ON WAR" (Princeton Univ. Press 1976) (discussing the military and political treatise of the Prussian general Carl von Clausewitz stating for instance that war is a political instrument but that in the course of war will tend to favor the party with the stronger emotional and political motivations, but especially the defender. This analysis was contrary to the common prejudice that soldiers generally endorse aggressive warfare. On the basis of this theory, an MMA Negotiator will never underestimate an "underdog").

[129] G. BELLOW & B. MOULTON, *supra* note 1.

[130] Kuttner, *supra* note 6, at 352 (discussing the claim of negotiation scholarship that the business world of the new millennium is much more complex and in need of development of negotiation theory different than the principled negotiation model of Harvard). *See also* L. L. Putnam, *Challenging the Assumptions of Traditional Approaches to Negotiation*, 10 NEGOTIATION JOURNAL 337, 337-46 (1994); John K. Butler, *Trust expectations, information sharing, climate of trust, and negotiation effectiveness and efficiency*, 24.2 GROUP & ORGANIZATION MANAGEMENT 217, 217-38 (1999) (discussing empirical evidence that sharing information and transparency in negotiation does not always result in trust-building).

[131] J.M. Senger, *Tales of the Bazaar: Interest-Based Negotiation Across Cultures*, 18 NEGOTIATION JOURNAL 233, 233-49 (2002) (discussing interest-based negotiation, as popularized by Fisher, Ury, and Patton (FISHER, URY & PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Houghton Mifflin Harcourt eds., 1991)), as a favored negotiation style of many people in the United States and other parts of the developed world. The authors, one of whom is an American attorney who has traveled widely, assesses how that approach works in different cultural contexts. Using illustrations from his own experiences, the author shows how interest-based techniques work successfully, as well as the limitations of this approach in some situations).

[132] *See* E.T. HALL, THE SILENT LANGUAGE (Doubleday eds., 1959) (influential concept of high/low context communication); E.T. HALL, THE HIDDEN DIMENSION (Doubleday eds., 1966); E.T. HALL, BEYOND CULTURE (Doubleday eds., 1976); E.T. HALL, THE DANCE OF LIFE, THE OTHER DIMENSION OF TIME (Doubleday eds.,1983); GRUNDER, JAHR & HALL, HIDDEN DIFFERENCES: STUDIES IN INTERNATIONAL COMMUNICATION (1985); E.T. HALL,

comparative model of Hofstede's Six Cultural Dimensions as he recently added a sixth dimension.[133] This cross-cultural management tool based on extensive empirical research is probably the most utilized tool in international business.[134] The third tool is the comparative model of Trompenaars' and Hampden-Turner's seven cultural dimensions.[135] This cross-cultural management tool complements Hofstede's six cultural dimensions and is also based on extensive empirical research.[136] The fourth tool is the comparative model of Barkai's Cultural Dimension Interests.[137] Barkai argues that effective cross-cultural negotiations and dispute resolution requires an understanding of Cultural Dimension Interests (CDIs).[138] As a legal scholar, his theory reviews many of the cultural interests that impact negotiation and dispute resolution by: 1) specifically reviewing the cultural theories of Edward T. Hall, Geert Hofstede, Fons Trompenaars and Charles M. Hampden-Turner, and Richard D. Lewis; 2) considering country-specific anecdotal accounts of national negotiating behaviors; and 3) reviewing some specific beliefs, behaviors, and practices that impact national negotiation styles and approaches.[139] Barkai also encourages negotiators (especially when engaging in Sino-American negotiations) to study the 36 Chinese strategies.[140] As a legal scholar, John Barkai's CDI theory is particularly important for MMA Negotiation for two reasons. Firstly, John Barkai explains that the concept of principled negotiation from Harvard is consistent with effective cross-cultural negotiation as long the negotiator is able to identify interests that seem to have a basis in cultural differences.[141] Secondly, CDI focuses mainly on cross-cultural differences between American and Asian negotiation styles and behaviors and since martial arts philosophy emerges from Eastern philosophy, this is a fundamental comparison to be studied.[142]

c) **How to use legal negotiation discipline in practice;**

First, MMA Negotiation stresses the importance for the lawyer and his client to understand that legal risk management is a shared responsibility, where the intake management of the client is fundamental for the lawyer to fulfil his role successfully.[143] This means that the client is often best suited to determine the negative non-legal impacts (*e.g.*, corporate, financial, political, reputational, etc.) of a legal adverse outcome.[144] Too many lawyers and businessmen forget that

---

HIDDEN DIFFERENCES: DOING BUSINESS WITH THE JAPANESE (Anchor Press & Doubleday eds., 1990); E.T. HALL, UNDERSTANDING CULTURAL DIFFERENCES, GERMANS, FRENCH AND AMERICANS (Intercultural Press eds., 1990).

[133] *See* Hofstede, *Dimensions of National Cultures*, GEERTHOFSTEDE.COM, http://geerthofstede.com/dimensions-of-national-cultures (last visited Sep. 15, 2013) (explaining the sixth dimensions: Indulgence versus Restraint. Based on Minkov's World Values Survey data analysis (empirical research) for 93 countries, has been added, called Indulgence versus Restraint. 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).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Barkai, *supra* note 113, at 83.

[139] *Id.*

[140] *Id.*at 44.

[141] *Id.*

[142] *Id.*

[143] Susskind, *supra* note 47.

[144] *Id.* (legal risk management should be practiced in a holistic manner and should be related to the organizational and financial consequences. Therefore, the intake management and feedback of corporate clients to the lawyer in his

legal risk management is a shared responsibility and that an advisory or transactional lawyer (unlike a litigator) is often more like a MMA coach and does not always get to fight for his client.[145] The success of the lawyer is often dependent on the ability of his client to provide the necessary information and intake management for him to formulate an adequate strategy and legal risk management plan to be implemented.[146]

Second, MMA Negotiation means the ability to work domestically but also internationally as today's business world requires. A MMA Negotiator should use Ewald's "*law-in-minds*" comparative law theory in practice.[147] This theory helps American lawyers working globally on international business transactions to focus on the synthesis of comparative jurisprudence.[148] For instance, based on this theory, an American MMA negotiator/lawyer will understand that the most effective way to resolve a legal dispute with a Chinese party may not be arbitration, but negotiation or mediation; not just because of the cultural preference of the Chinese for ADR, but also because of judicial corruption issues in China. The Convention of New York for the enforcement of arbitral awards has limited effect in practice. [149]

d) **Ethical negotiation discipline in practice;**

A MMA Negotiator should be self-aware and aware of other negotiators' ethical orientations in negotiation on the basis of Shell's three schools of bargaining ethics[150] and remember that ethics is also largely influenced by the context/situation and cultural differences.[151] For instance, a MMA Negotiator knows that empirical researchers have shown that given the importance of building and maintaining relationships and saving face in a collectivist culture like China, it is expected that the propensity to lie may be greater and more adaptive for collectivist negotiators and lawyers.[152] Therefore, a MMA Negotiator astutely understands that ethics is linked with the concept of "saving face" and managing reputational risks for a negotiator.[153]

---

determination of the potential consequences/impacts of an adverse outcome is vital to generate relevant risk information).

[145] Joel F. Henning, *The Lawyer as Mentor and Supervisor*, 10 LEGAL ECON. 19, 20 (1984) (explaining that the lawyer should realize that he or she is not the main actor but more a mentor, coach or supervisor with an expertise in law that must be offered with wisdom to his client).

[146] *Id.*

[147] Ewald, *supra* note 30.

[148] *Id.*

[149] John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L. L. 329, 381 (2006) (distinguished professor of law at the University of Minnesota Law School).

[150] Shell, *supra* note 7.

[151] *Id.* at 87 (discussing the importance of the context in negotiations). *See also* Michael E. Brown & Linda K. Treviño, *Ethical Leadership: A Review And Future Directions*, 17 THE LEADERSHIP QUARTERLY 596, 596-616 (2006) (theorizing on the emerging construct of ethical leadership and compares this construct with related concepts that share a common concern for a moral dimension of leadership (*e.g.*, spiritual, authentic, and transformational leadership. In a post-Enron world, practitioners have strong incentives to select for and develop ethical leadership in their organizations and researchers want to study ethical leadership in order to understand its origins and outcomes)).

[152] Harry C. Triandis et al., *Culture and Deception in Business Negotiations: A Multilevel Analysis*, 1 INT'L JOURNAL OF CROSS CULTURAL MGMT. 73, 75 (2001) (discussing the impact of culture on deception in business negotiations).

[153] *Id.*

II. The fight: During the negotiation, a MMA Negotiator will remain aware of himself and of his opponent, and most importantly the totality of the situation.[154] This means a MMA Negotiator espouses the teaching of Sun-Tzu that, "if you know your enemies and know yourself, you will not be imperiled in a hundred battles; if you do not know your enemies but do know yourself, you will win one and lose one; if you do not know your enemies nor yourself, you will be imperiled in every single battle."[155] The MMA Negotiator's game plan must be crafted based on a full awareness of oneself and the totality of the situation and, most importantly, the game plan cannot be static and must evolve with changing circumstances.[156] This means that a MMA Negotiator understands that the interaction of the Four Core Disciplines of MMA Negotiation is not just part of the pre-fight/preparation to a negotiation, but on-going throughout the fight/negotiation and that his sprit as the fifth transcendental element will always remain his greatest asset.

III. Post-fight: After each negotiation, a MMA Negotiator, like any athlete, will make sure to reflect on his performance and get feedback from coaches/observers to learn from his mistakes and successes.[157] Despite his mistakes and losses, a MMA Negotiator will not get discouraged easily and demonstrate courage and determination.[158] As well, despite his successes and victories, a MMA Negotiator will remain humble and understand that a position of advantage or glory is not permanent.[159]

V. Conclusion:

MMA Negotiation reveals a more sophisticated and holistic philosophy of negotiation and dispute resolution.[160] MMA Negotiation focuses primarily on self-awareness, awareness of the other side, and the totality of the situation.[161] The main objective of MMA Negotiation is to create a better flow, increase creativity, improve synchronicity, and enhance bonding and trust-building.[162] MMA Negotiation does not necessitate war and also aims to enhance trust-building and peaceful negotiation because it understands that, to have peace, a negotiator must be ready for war. For example, the great Canadian world UFC champion, GSP, started martial arts as a kid

---

[154] Kuttner, *supra* note 6.
[155] *See* SUN TZU, THE ART OF WAR (Lionel Giles trans., Thrifty Books 2009) (500 B.C.E.). *See also* Chu, *supra* note 116, at 163 (2002).
[156] *Id.*
[157] *See* Jean Côté & Wade Gilbert, *An integrative definition of coaching effectiveness and expertise*, 4.3 INT'L JOURNAL OF SPORTS SCI. AND COACHING 307, 307-23 (2009) (theorizing on an integrative definition of coaching effectiveness and expertise that is both specific and conceptually grounded in the coaching, teaching, positive psychology, and athletes' development literature).
[158] Joseph L. Badaracco Jr., *The Discipline Of Building Character*, HARVARD BUS. REVIEW 114, 114-24 (2009) (theorizing on leadership and that character is forged at those defining moments. Explaining that to become leaders, managers need to translate their personal values into calculated action. This article theorizes that defining moments force leaders to find a balance between their hearts in all their idealism and their jobs in all their messy reality).
[159] Kuttner, *supra* note 6.
[160] *Id.* at 363 (explaining that more work is needed in negotiation scholarship in order to frame incorporation of mindfulness-based philosophy and practices into negotiation pedagogy so that negotiators methodically cultivate the mindset and approach of wave-like negotiation interactions as presented in this article).
[161] Kahn, *supra* note 4, at 225-26 (theorizing on the importance for a negotiator of aspiring to full self-awareness and full awareness of the situation like for the martial arts combatant).
[162] *Id.* at 357.

to be able to defend himself against bullies.[163] GSP created a foundation to help kids who get bullied.[164] Unfortunately, humankind tends to only respect power,[165] and many negotiators are like the bully in the schoolyards; until you show them that you're not afraid and can strike back, they will keep coming at you and encourage other bullies to do the same. Ultimately, MMA Negotiation wants to empower negotiators and prevent negotiators from being bullied, or feeling powerless or alienated.[166] MMA Negotiation embraces the complexity of negotiation by understanding the basic contradictory and dynamic human tensions between choosing adversarial and collaborative approaches to negotiation and dispute resolution.[167]

[163] *See* Georges St. Pierre, http://www.gspofficial.com/gsp-anti-bullying, GEORGES ST. PIERRE FOUNDATION (last visited Aug. 24, 2013) (the goal of Georges St-Pierre Foundation is very simple: help youth, stop bullying and promote physical activity in schools).

[164] *Id.* (the author would like to dedicate this article to GSP. Like GSP the author is proud to be French-speaking and born in the Province of Québec in Canada. As a kid he was also bullied like GSP and decided to empower himself by doing boxing classes, but the author later played college football and won the first Vanier Cup in 1999 with the Rouge & Or of Laval University currently respected as one of the best football teams in the history of Canadian football. Therefore, the author sees himself through GSP for his inflexible determination and courage in his quest for winning, but also for his sportsmanship and humanitarian work with his foundation to help kids who are victims of bullying because this is a growing social problem all around the world).

[165] For instance many lawyers forget that the formation of the law in a society is largely determined and influenced by the power, violence and revolutions. S*ee* HARNOLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 18-19 (Harvard Univ. Press, 1983) (discussing law and revolution in the formation of the Western and American legal traditions). *See also* Lytle, Brett & Shapiro, *The strategic use of interests, rights, and power to resolve disputes*, 15.1 NEGOTIATION JOURNAL 31, 31-51 (1999) (discussing choosing an opening strategy, breaking conflict spirals of reciprocated rights and power communications, and when and how to use rights and power communications effectively in negotiations); Gerald R. Williams, *Style and effectiveness in negotiation*, NEGOTIATION: STRATEGIES FOR MUTUAL GAIN: THE BASIC SEMINAR OF THE HARVARD PROGRAM ON NEGOTIATION 156-69 (Sage Publications ed., 1993) (affirming that effective negotiators were not all cooperative in their approach (contrary to the common belief based on Getting to Yes) and neither adversarial and collaborative approach to negotiation and dispute resolution can claim a monopoly on effectiveness. Effectiveness as a negotiator depends not on which approach he or she decides to adopt but on what he or she does within that particular strategy. Therefore, both have the potential to be used effectively).

[166] *See* Kahn, *supra* note 4, at 225-26 (theorizing that martial arts can promote peace).

[167] Kuttner, *supra* note 6, at 364 (arguing that negotiation must be theorized and practiced in a more holistic manner following the wave-like approach).