

The Singapore Mediation Lecture 2014

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The Singapore Mediation Lecture 2014 was delivered on 26 September 2014 by Mr. Brad Berenson, the Vice President and Senior Counsel for Litigation and Legal Policy of General Electric. The third lecture in this series, the Singapore Mediation Lecture is a result of a partnership between the Singapore Mediation Centre, the Singapore Management University School of Law and Harry Elias Partnership. Previous speakers were the former president of Singapore, Mr. S R Nathan (2012) and Lord Woolf (2013).

The title of the lecture was "The Mediation Imperative: Why Successful Companies Embrace Mediation". I do not propose to reproduce the speech here. The speech will be published in the Asian Journal on Mediation in 2015. In the interim, the text of the speech can be accessed [here](#).

In this entry, I would like to explore some of the points that Mr. Berenson brought up that might be of interest to those in the corporate arena who find themselves having to persuade their colleagues or clients to refer their matters to mediation.

Mr. Berenson essentially made a very strong case for General Electric's use of mediation. From a cost perspective, this makes sense. Litigation is costly. There is, of course, the fees to contend with. This is par for the course. However, for every dollar that goes to legal fees is one dollar that won't be ploughed back into the business. This affects the business as a commercial proposition and the losers at the end of the day will be the shareholders.

Apart from these pecuniary costs, there are also indirect costs. While litigation (and arbitration) is often extolled over mediation because it has a certainty of outcome, what is often uncertain is who will emerge the victor in the litigation altercation. Parties often lose control over the determination of the outcome, the locus of control residing in the counsel and judges. Litigation is often bad for business relationships and bad for the business' reputation. Even when a party wins in court, this is not necessarily the same thing as a win for the business.

I was particularly struck by an example provided by Mr. Berenson where GE was the defendant and the plaintiff a former business partner. 10 years of litigation incurred legal fees of over \$400K. At the end of the day, the plaintiff "won", obtaining a judgment of \$500K. This was 10% of the original claim of \$5 million. Further, the legal fees could well have been used to fund a settlement agreement. While there was a technical victory, it was a Pyrrhic one. The plaintiff lost its business.

Sometimes, parties think that mediation will not work because negotiations had already been attempted by the parties and had not been successful. Mr. Berenson made the point that negotiations can fail for many reasons. It may be that the parties are unskilled in negotiation or may have had unrealistic expectations. Impasses could occur because parties are unwilling to share information or are not even willing to broach mediation. Negotiations can also fail, despite the best intention of the parties, because of cultural differences.

In these cases and more, mediation can assist. By introducing a new element i.e. the mediator into the system, the mediator can manage the sharing of information, get parties to explore creative and extra-legal solutions such that parties can break out of the win-lose mindset. A well trained mediator can also traverse the cultural gap that may be plaguing the negotiating parties. It should not be surprising, of course, that in today's international business context, cultural differences are a very significant factor.

Mr. Berenson also asked the question, "Why not mediate?" There is very little downside to mediation. Mediation represents a very small cost and time commitment, relative to other forms of dispute resolution. It is certainly faster and cheaper than litigation and arbitration. By choosing to engage in mediation, you are signaling a willingness to find a solution and restore harmony to a situation of conflict. These are all signs of respect for a business partner with whom you might be having a problem with at the moment, but could potentially continue to do business with.

Even when mediation does not result in settlement, mediation can change the conflict situation by renewing dialogue, defining and refining the issues and new strategies and decisions can be engaged in depending on the information obtained at mediation.

At the end of the day, Mr. Berenson stated very strongly that General Electric could not afford not to use mediation. Mediation has contributed to the success and growth of General Electric and while internal customers and business partners were slow to initially take on mediation, there is no doubt that General Electric now embraces mediation as an early form of dispute resolution. I think many companies could stand to gain from General Electric's example.