

Kluwer Mediation Blog

Selecting a Mediator: in General, in Commercial Cases – and in a Kingdom in Need?

Greg Bond (Bond & Bond Mediation / University of Wildau) · Thursday, January 24th, 2019

There is an old debate in mediation circles about the qualifications (formal and informal) that mediators need to mediate, and what specialist knowledge they are expected to have. In some countries, mediators are required to be qualified lawyers – so that the legislator has answered at least one of the questions in this old debate in a restrictive manner, right or wrong. But do you need to have expertise in the substantial matter of what is disputed to be able to mediate? And what do you need to be (or not be) seen as trustworthy and neutral? How much experience must you have, and what with?

I tend to think that being too prescriptive on mediator qualifications will be an obstacle in getting to mediation and may be involve misunderstandings on what mediators do and can do. On the other hand, there is a large number of matters I would not trust myself to mediate, where I lack experience and expertise (or the guts).

I was once approached to offer to mediate a commercial dispute between two companies in two different states. The request was for a mediator who was not a citizen of either of the countries in question but spoke both languages, and someone who was qualified in the law of both states, as well as having extensive mediation experience and legal expertise in the very specific field of business in question. I still wonder if they ever found a mediator.

Imagine a large kingdom, once united and now less so, in which politics is divided on an issue of great importance. The government cannot get its bills through parliament, but parliament cannot decide on alternative courses of action. Within that parliament, the major parties cannot even find a majority among their own members. Some of them are refusing to talk to others. Otherwise there is a lot of shouting across the old-fashioned despatch boxes, in a venerable parliament building known as a palace that seats factions across from each other like two hostile camps, and almost close enough to spit at each other. There is a great tradition of vociferous disagreement, which has traditionally meant that government must rely on its majority to get business done. There is no tradition at all of cross-party consensus building.

Together these parliamentarians cannot find a majority for a general election, which might give the people a chance to shape decisions, and neither will they agree on a direct referendum on the issue that is so divisive. Asking the people to decide may not be a wise idea in any case, as it may not produce a clear result and course of action and it is likely that it would incite further frustration, anger and division in the kingdom.

Between that kingdom and a major international alliance of neighbouring states there is a great difference of opinion on how that country should manage a process of leaving that alliance. The people who live in this large kingdom are divided too, with many arguing passionately for one thing, many for the other, and many getting more and more frustrated that decisions cannot be made. And the kingdom, once highly respected for its democratic institutions, is beginning to seem just a little bit ridiculous.

A former leader of this kingdom, himself a major, suggests in public that its present head of government must now act as a mediator in her own parliament, attempting to reconcile the differences in parliament in such a way that a consensus can be found. The present head of government is wise enough to know that she cannot mediate, as she will always be seen to have her own interests at heart, whether that be the case or not. She does, however, think that bringing together a group of influential parliamentarians and party leaders with a mediator might be of some assistance. This situation is ripe for mediation. So she asks herself who might the mediator be.

It will have to be someone neutral, she thinks. So not a member of any of the parties in parliament. No one who can be seen to represent the interests of the neighbouring alliance of states either, of course. It has to be someone who has not spoken out on the issue before, which rules out a good many potential candidates. Someone who might have the respect of the people of this kingdom, not just its politicians. Someone with some moral authority. So probably someone whose name is well known. She wonders if the kingdom's monarch or next-in-line to the throne might be eligible, or a religious leader, but she decides that she needs to go further afield for neutrality and rules out anyone holding citizenship of either the kingdom or of any of the other twenty-seven member countries in the international alliance. Or indeed of any other country that has any kind of special status of cooperation with that alliance.

It has to be someone competent, she thinks. So that person needs to have intricate knowledge of the issue under dispute – in this case trade agreements and border controls, and a number of specific areas of international law, not to mention parliamentary procedure in her own country and the history of the kingdom's relationship with the alliance it is seeking to leave. And of course, whoever it is to be must have tons of experience in mediating complex political deadlock.

This is not going to be easy. She wonders if she can ask former heads of state from countries in the world's other great continents, or a former leader of another great international alliance, but one by one she discounts all the names that occur to her.

In the end she decides that the suggestion made by one of her predecessors in office was not helpful at all. She wishes he had kept his mouth shut. Better not mediate this after all. She asks her husband to pour her a small whisky and decides to soldier on and keep praying for the best.

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