Kluwer Mediation Blog

Changing the Frame: Some Challenging Issues for Promoting Mediation

John Sturrock (Core Solutions Group) · Thursday, January 28th, 2021

Anna Howard's first book, '**EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes**' (published by Kluwer), is an important contribution to the literature about the practice and promotion of mediation. It deserves a wide readership among academics and practitioners alike and I hope that potential readers will not be deflected by its relatively high price.

While focused on commercial mediation in the context of cross-border disputes in the EU, the book poses a number of fundamental questions for all those who have wondered about the "stubbornly low" uptake of mediation as a process for resolving disputes. Anna Howard's meticulous research, both deep and broad, invites us to consider new angles to this perennial conundrum, particularly from the perspective of those who would actually choose to use mediation.

A Different Reference Point for Mediation?

For me, this book provided several light bulb moments. I suspect that, for many of us, it may suggest that we may have been approaching the promotion of mediation in quite the wrong way. The main thrust is that the EU, in its attempts to promote its mediation Directive, has framed mediation as an alternative to litigation. However, having carried out research among those who are actually responsible for choosing whether or not to use mediation as a means to help resolve cross border commercial disputes, namely in-house legal advisers in mainly large companies, the author has discovered that this framing does not resonate with them.

In fact, for these decision-makers, the reference point should be negotiation, not litigation. They view mediation as an extension of the negotiation process in which they all engage much more than any other dispute resolution method. Litigation is after all relatively rarely used in most commercial (or indeed any) dispute resolution. Negotiation is the standard process for most people. For those of us who have always viewed mediation as a way to help parties whose negotiations are stuck, this seems an obvious point. But, although we may see it that way, most of us have argued for mediation's use by comparing it with the time, costs, risks, adversarialism and loss of control inherent in an adjudicative process. And, like the EU, we've called for proposals which address these. This may suit those who wish to reduce civil justice

budgets but it may fundamentally miss the point about the value which mediation adds, in and of itself.

In doing so, we have set mediation up in competition with litigation and to a lesser extent arbitration and other adjudicative procedures. This "oppositional approach" has created awkwardness with courts and justice systems. It has made some of us seem zealous or evangelical, relying on "anti-litigation rhetoric". And, as this book reveals, it does not resonate with users. While the author is careful to confine her conclusions to her field of study, I believe that the reasons she uncovers are likely to apply more widely. That is important because, while promoting mediation more explicitly as an assistance to parties with their negotiations opens up a much wider field of opportunity (whatever happened to "deal mediation"?), it also requires us to wrestle with the reasons expressed by the users for not wishing to call in a mediator to assist with negotiations.

Fear of Failure?

It is in this discussion that I feel this book is really valuable. To invite a mediator to help is to admit that the parties themselves have not been able to negotiate a solution. It is thus perceived as an admission of failure. Often this perception is felt by the commercial people in whose hands the negotiation has taken place, especially if the suggestion for mediation comes from those charged with finding an alternative way to resolve the dispute. Not only that but users fear that any agreement reached in mediation will be viewed as sub-optimal and subjected to criticism by others. Far better to abdicate responsibility for the outcome to a third-party decision-maker who can be blamed if the result is unsatisfactory.

I have to confess that these points concur with my own experience, especially in the public sector, where fear of being blamed often leads decision-makers to baulk at mediating at all or, if they take that step at least, causes them to back away from making brave and (to the outsider) necessary choices. The ultimate cost to the taxpayer is often greater but it is easier for the court to be held responsible for ordering a course of action. It's a perfectly understandable human reaction.

(The thought has occurred to me that this fear of admitting failure may also apply to civil servants and politicians. Why, many of us have asked, was mediation not tried in the Brexit negotiations? I recall one civil servant saying to me, in another context, that they did not wish to hand over to a third party – perhaps this was an indication of an underlying fear of losing control or appearing to have failed.)

As the book suggests, all of this points to the need to change the frame and articulate clearly the added value which the involvement of a skilled outside mediator can bring to unassisted negotiations which become stuck, without inferring failure by the parties. It also points to the need to address wider issues of responsibility and accountability in our commercial and public sector cultures. Fear, blame, binary choices and scapegoating are all too familiar especially when resources are limited and zero-sum choices seem all that is available. Against that backdrop, the book is right to suggest that we need to acknowledge that mediation asks a lot of many disputants.

Enforcing Mediation Agreements – the wrong approach?

Another significant finding addressed in this book is how unimportant enforceability of mediation agreements is for the interviewees. They go further: mediation agreements are freely entered into contracts like any others which spring from commercial negotiations. Their comments suggest that there is no rational basis for according the former preferential treatment over the latter. Indeed, it is arguable that to do so is unsound in theory. Speaking for myself, I have always considered the initiative which led to the Singapore Convention on enforceability of mediation agreements to be misconceived and to confuse a contract, reached by consensus with the help of a mediator, with a third-party imposed court order or arbitration award. This book offers the user affirmation of that very point, "a solution in search of a problem" as one interviewee put it.

I do wonder if the prevalence of erstwhile litigation lawyers in mediation policy-making and practice has led us to an unfortunate place, both in the narrow sense of the Singapore Convention and more generally in the way mediation has been presented to the outside world? Of course, it has rather suited us to present mediation in a particular way as it plays to our knowledge and skills but have we done it a great injustice, even come close to throwing the baby out with the bathwater? As this book points out, mediation is often grouped with litigation and arbitration as a third party process, often in the context of "legally constructed" cases. If we think about it, this is a fundamental error of categorisation and almost bound to deter many potential users who view disputes much more broadly.

Challenging Our Views?

Do you find yourself resisting these observations and questions? For those of us who have staked a lot in recent years on a particular approach to promoting mediation, that would be understandable. But the point of, and made in, this book is that we need to step back, take stock, avoid a merely reflexive response and be deliberate and curious in our approach. One of its charms is its regular recourse to more philosophical sources for inspiration. Drawing extensively on the writing of John Paul Lederach, Anna Howard reminds us that the obvious answer may be right in front of us, but that we are blind to it. We need to challenge our predetermined solutions and confirmation biases – and be prepared to change our framing.

Indeed, referring also to the excellent examination of brain science by Tim Hicks in his book 'Embodied Conflict', the author reminds us that cognitive biases afflict us all, mediators and users. For the latter, this is about the impact on decisions about entering mediation at all, as much as what happens during it. This topic is a field ripe for further discussion as we seek to frame the changes which will bring about much greater use of this hugely beneficial and constructive contribution to society which we call mediation. For providing stimulus and provocation along the way, Anna Howard deserves our gratitude and admiration.

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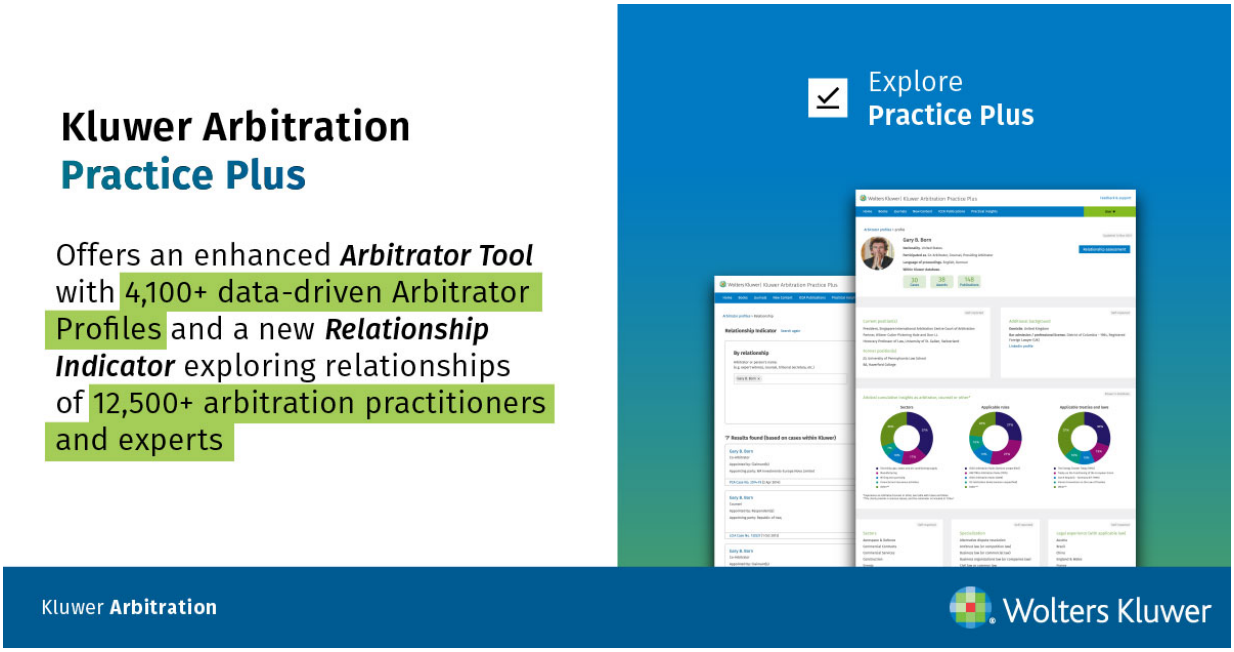

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