

Kluwer Mediation Blog

Promoting Mediation – Random Thoughts on Taleb, Newton and Systems

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[Author's Note: Some of the ideas in this post are taken from Nassim Nicholas Taleb's book "The Black Swan". I highly recommend it. I have probably misunderstood and misrepresented some of what he has said. All mistakes are mine]

I was recently in Seoul presenting at the "Mediation In Asia" conference organized by the Korea University Law School, the Korean Commercial Arbitration Board and the Korean Society of Mediation Studies. The conference revolved around two themes; the Promotion and Teaching of Mediation in Asia.

As I was listening to the distinguished speakers on the promotion of mediation, I was struck (ouch!) by a random thought relating to history and predictability.

Jurisdictions in which mediation is well developed will sometimes attribute the success of the movement to a single causal event or person. For example, "Mr. X was the father of mediation in Singapore" or the modern mediation movement began when Y happened".

Of course, one sometimes forgets that history is a narrative imposed upon a series of events to give it meaning. The problem is that as the events were happening, one did not necessarily know that this event was part of larger series that led to any particular outcome. The pattern only becomes apparent after the fact. Further, the pattern may sometimes deem irrelevant or not even consider some events that may well have contributed to that outcome.

Expressed mathematically, historical narrative is a "line of best fit" where the line drawn fits many of the dots and where some dots may be on either side of the line and there may even be some dots that are far away. But of course, "those dots are irrelevant", at least until a better model or narrative appears to explain every dot. And even then, it may still be incomplete.

Hence, depending on who one speaks to, different people may have different opinions as to who Mr. X is or what event Y was when it comes to the success of a mediation movement in any particular context. And of course, the more generally accepted version is what is considered history.

The "certainty" of history sometimes leads us down another path that is fraught with peril. This is the myth of prediction. It is said that those who do not learn from the mistakes of history are doomed to repeat them. Implied in this is that one can predict future trends or events with some

amount of certainty based on what has gone before.

I refer to this as the “myth of prediction” because in complex systems, Newtonian cause and effect only works to a certain point. For example, one can calculate with some accuracy what happens when one billiard ball hits another by taking into account force, vectors, etc. Newtonian cause and effect works fine here. The problem is Newtonian cause and effect explains nothing about the person holding the billiard cue.

Put another way, as mediators, we’ve all had the experience of doing an intervention that worked well in a number of cases and which didn’t seem to work at all in others. With the benefit of hindsight, we then attribute reasons as to why it didn’t work and may even say that one had a hunch “it wouldn’t work with these parties but it was worth a try”. Allowing for the possibility that some may have precognitive abilities, which I don’t, most of the time, we engage in the intervention because it worked in the past.

Hence, we talk about promoting mediation in jurisdiction where mediation is still at a nascent stage, one valid strategy is to look at where other jurisdictions were in the past and consider the measures that they have adopted to get to where they are today. However, it is important to note that the success of those measures is not an accurate predictor of whether they will succeed in one’s own jurisdiction. There are many context-sensitive conditions that can affect the outcome. Expressed metaphorically, just because a particular plant grows well in your garden does not mean it will grow well in mine and there can be many reasons why that can be so. Therefore, the simple takeaway must be that measures, if chosen must be evaluated for appropriateness as to context.

Apart from evaluating measures for appropriateness, what else can be done? Just as systems do not respond as well to Newtonian cause and effect, they do however respond to threshold. Put simply, threshold refers to the “last straw that broke the camel’s back” phenomena. Reframed in terms more palatable to animal lovers (in particular camels), it is usually an aggregation of events that gradually builds up to threshold and tips the system in the desired direction. The problem is that one never knows whether what one is doing is building up to that threshold or may indeed be the tipping point event.

Put simply then, everything we do in relation to mediation can promote mediation. And while we may sometimes hesitate to do something because it doesn’t seem large enough to make a difference, it does make a difference. It could be that event that is the tipping point.

It seems apt to end this post with a quote from someone who, by most accounts, did make a difference. If we kept this in mind while we go about promoting mediation, I believe we will get there.

“In this life we cannot do great things. We can only do small things with great love.”

– Mother Teresa –

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