Kluwer Mediation Blog

Reflections on Cologne University's Summer Academy in Mediation

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Each September for the past 11 years, Cologne University, under the auspices of CENTRAL (the Center for Transnational Law: http://www.central.uni-koeln.de), and in Association with the German Institution of Arbitration (DIS: www.dis-arb.de) has hosted a Summer Academy in International Commercial Arbitration. More recently – 8 years ago – an academy on mediation was added, to run alongside that arbitration programme. I've been fortunate enough to be involved with the mediation programme for the past four years, facilitating the first two days of the four-day programme.

Each academy attracts a range of young participants – it is aimed at "emerging" professionals hoping to kickstart their dispute resolution careers – from across Europe, Africa, Latin America, the UK, the US, and, to a lesser extent, Asia and Oceania. The numbers in each academy still reflect the relative reception of arbitration and mediation, in that typically the arbitration programme is oversubscribed and the mediation programme has a healthy and diverse group of around 20. However, the numbers in both groups are going up, and what we've noticed in the last couple of years is a degree of "crossover" – people who have participated in the arbitration academy come back the next year to take the mediation academy.

The programme, under the guidance of Prof Dr Klaus Peter Berger, who is current President of the DIS, is wonderfully constructed and suitably complex to keep these two groups fully engaged for the 4 days – indeed, it could well take a day or two longer, but that's another matter. My aim here is not much to describe the programme in detail as that would sound too much like a advertising plug; but rather to reflect on some of the key takeaways that I now have after 4 years with the programme.

In brief, the academies – running in tandem – are built around a complex commercial transaction that has gone wrong through the failure of one supplier (who, in turn, was affected by a regional economic melt-down). The ripple effects are those that many commercial mediators and arbitrators will have met on many occasions – looking upstream to the suppliers who have collapsed; looking downstream to the contracts that have been agreed on the basis of the expectation of supply between the two main parties; and of course looking sideways to other potential suppliers who see an opportunity to take advantage of this parlous situation. Even that aspect of the scenario alone is a useful illustration of what most mediation trainers know and convey, that the mediation typically involves the interests of and impact on parties who are not at the table.

I'll not spoil the story with further details here. Instead, I'll pick up two or three issues that have emerged for me from my involvement in this programme.

First, given the disparity in registrations between the two academies, it seems to me that we have a mirror of the public and professional perception of the relative roles and significance of arbitration. Notwithstanding some 4 decades of "modern" development and the support of major players such as the International Chamber of Commerce, mediation still has some catching up to do. Quite apart from the academies, there is a persistent question as to how we "sell" mediation, even in those parts of the world where mediation has a far longer history than adjudication or arbitration. The ICC is clearly onto something when they shift the meaning of the "ADR" acronym from "alternative" to "amicable" – and other jurisdictions and agencies substitute words like "appropriate". Given the widely accepted currency of the acronym, there may still be some recovery from the "alternative" tag, not least because of the strength of recent commentary on ADR and civl justice by respected authors such as Professor Dame Hazel Genn who, with some justification, takes issue with the "negative legitimacy" relied on in selling mediation – that is, mediation's perceived or claimed strength is that it is NOT adjudication; or that adjudication embodies the evils of formal, inaccessible, costly, contentious "justice" that only ADR can remedy. This selling of mediation becomes a bit like the comparative and combative advertising that is banned in some jurisdictions, and that centres on the inadequacies of the competitor's product.

So, my first question arising from this experience – and going back some 30 years as well – is a question for the mediation community on selling mediation in such a way that this emerging generation of professionals will see it as a viable professional path. Those of us already engaged in the practice know this; but I'm not sure that we're doing the best job in selling either to those coming into their professional lives or to those who – because of political, professional or economic influence – can help or hinder.

Second, one of the nice touches of the parallel academies is that, because we deal with the same scenario, we can compare notes on process and progress through the course of the first three days. This becomes more specifically a part of the programme on the fourth day when participants in both academies are brought together to examine process, outcomes and principles. What remains fascinating for me is the potential in the mediation academy to arrive at a settlement that keeps the parties in business and without huge settlement costs, whereas the arbitral awards are typically costly and not relationship-friendly. This, of course, is not itself an argument against arbitration which remains an essential avenue for a significant range of complex, international transactions: there will be times when the untangling (to use John Paul Lederach's metaphor of "nets" and disputes) has to be done with finality by a tribunal. It is, however, a point on which to promote mediation – and, in due course, to see the balance of participants becoming more equal.

As a sideline to this, many of us will also know practitioners in law firms the bulk of whose work is arbitration, whether as counsel or as members of an arbitral panel; and we'll also know from conversations that they do, or could do, a fair amount of mediation – yet this still doesn't have the gravitas or the imaginative grip that arbitration does. It's as though those practitioners, who do seriously accept the value of mediation, can't quite confess to this personal slippage from the "real" work of lawyers.

And finally, given the international spread of participants, these academies are themselves working laboratories on the intercultural elements of dispute resolution. This perhaps is more the case in mediation where there is, by definition, less reliance on the rules of procedure than on the power of

process . . . and it's on those subtleties of process and communication that we can trip each other up. My simple question here, which I'll continue to explore in these academies, is whether, when we do mediation, we're speaking the same language but with different accents and dialects or in fact speaking different languages of dispute processing.

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