Kluwer Mediation Blog

Ruminations on the Singapore Mediation Lecture 2013

Joel Lee (National University of Singapore, Faculty of Law) · Monday, October 14th, 2013

On 10 October 2013, Lord Woolf delivered the Singapore Mediation Lecture 2013 to a packed auditorium. The second 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. The inaugural Singapore Mediation Lecture was held in 2012 and the speaker was former president of Singapore, Mr. S R Nathan.

As many readers will know, Lord Woolf is well-known for, inter alia, the 1996 Woolf Report which some consider to be the catalyst for the development of ADR in the UK. In his 45 minute lecture entitled “Mediation: The Way Forward”, he raised a number of issues he thought was important for mediation to flourish on the years ahead.

As a member of the audience and the moderator of the panel discussion after, I would like ruminate in this entry, about two of the points he had made.

One of the clear messages that came across was that Lord Woolf felt that there was insufficient regulation of mediators. This was necessary for mediation to evolve into a profession. While Lord Woolf did not have strong views whether this regulation should be self-imposed or through an external source, he was clear that regulation should cover issues of mediation credentialing, standards, discipline and on-going professional development. Lord Woolf also singled out the International Mediation Institute as being at the forefront of canvassing for and supporting the professionalization of mediation.

It is difficult to disagree with Lord Woolf’s sentiments. For many in so many jurisdictions, promoting and supporting mediation has been a labour of love. It is often something we do on top of our day jobs. Perhaps this is no longer true for jurisdictions like the US, UK and Australia but it certainly started out that way and I dare say is certainly the position in Singapore at the moment. This was necessary because mediation has always had the deck stacked against it in favour of the more familiar and lawyer-comfortable forms of adversarial dispute resolution like litigation and arbitration. This state of play allowed for mediation to take root and grow. Of course, following from this metaphor, untrammeled growth can be harmful. It can lead to a lack of standards and questionable practices.

Therefore, at some point, a garden must be pruned to manage its growth and ironically, the pruning itself can engender further growth. As such, regulation should be welcome. The devil of course is in the details. The purpose of regulation must surely be to provide in the public a measure of confidence in mediation professionals. Credentialing needs to be in accordance with standards that

are transparent and legitimate. Structures for discipline must in place to ensure standards can be enforced and as with any other profession, mediators must keep current.

One of the questions that arises is whether it is the right time for regulation to be implemented in Singapore? Mediation has been in Singapore for almost 2 decades. During that time, it has grown from strength to strength, much of it in the last decade. There is now a threshold number of mediators if which some are beginning to charge commercial rates. The legal industry is also far more aware and, some would argue, amenable to mediation now.

For what it's worth, this writer feels that the time is right. However, it is important before regulation is implemented for all stakeholders to be consulted and involved. An inclusive approach should be adopted so that all those who have given of their time, energy and effort over the years do not feel they are being dismissed with a "thank you very much". Where possible, all of have legitimately contributed should be transited to the new system. It is important to continuing getting buy-in and to acknowledge that we stand on the shoulders of those who have gone before us.

The second point in Lord Woolf's lecture that I would like to single out is increasing the use of mediation for disputes. Lord Woolf made it clear that he did not feel that making mediation compulsory was the solution. He felt that, while there were situations in which compulsion could be justified, this generally went against the consensual nature of mediation. Judges should however encourage the use of mediation in appropriate cases and use costs to sanction unreasonable refusals to mediate.

This is a tricky issue. The fundamental point must be this. Lawyers are still the gatekeepers of where a dispute ends up in the official apparatus for resolving disputes between citizens. In Singapore at least, and the writer suspects this is true of other jurisdictions, when someone has a dispute, one of the first things that occur to them is to refer the matter to a lawyer. If that lawyer is not inclined, for whatever reason, to refer the matter to mediation, then the mediation movement may never get the chance to become, as some UK judges have expressed, a parallel system of justice.

Making mediation compulsory is simply one way of ensuring that disputes that are appropriate for mediation go to mediation. Although, this could well be shooting off a cannon to kill a flea and may have the undesirable effect of lawyers going through the motions in mediation or worse mis-using the mediation process.

Singapore has chosen not to go down the path of compulsion. Instead, it has instituted processes like the ADR Form and the Presumption of ADR to ensure that lawyers do consider with their clients the use of ADR at a relatively early point in the life cycle of their dispute. It has also amended in 2011 its cost provisions to allow judges to take into account the behavior of parties and counsel in relation to attempts to resolve the matter via ADR.

Ideally, lawyers should refer matters to whichever method of dispute resolution that is appropriate for that dispute. Which means that there should not be any presumption in favour of litigation or mediation or arbitration. And since we're speaking about ideal behavior here, self interest, whether by way of fees or other intangible considerations, should not feature.

The problem of course is that we do not live in utopia. Many lawyers are trained to think adversarially. Mediation and other forms of amicable dispute resolution are unfamiliar, foreign creatures that are seeking to encroach upon the traditional domain of the lawyer. Whether true or

not, many lawyers also see mediation as eating into their fees.

Education, time and experience are obviously the long-term solutions. And I am pleased to say that after 18 years of mediation being taught at the National University of Singapore Faculty of Law, in addition to the efforts of the Singapore Mediation Centre and other bodies, the tide is turning. We are beginning to see more independent referrals to mediation. Lawyers are now coming into mediations with to mindset that is helpful to it. Some lawyers have even begun a foray into collaborative legal practice.

In closing, I did not intend this entry to be a report of Lord Woolf's lecture and therefore have not referred to many things that he had spoken about. I hope my ruminations about two of his points have not been too boring and provided some food for thought.

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