Kluwer Mediation Blog

If mediation is the answer, what was the question?

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This question emerges from a recent three-way Skype conversation with a couple of mediation colleagues, in anticipation of a US-sponsored conference on ADR, to be held in Brazil later this year. As it transpired, the predominant interest of the conference was and is on arbitration rather than mediation, so that conversation has taken a longer term turn, with a view to seeing what might be done to foster mediation in Brazil and in Latin America generally (knowing that it is already flourishing in some jurisdictions, and that its alphabetical sibling, ODR, has strong support in, for example, Argentina).

The reason I raised that question is because those closely involved with mediation may sometimes need to temper enthusiasm for the process with a reality check as to whether what we imagine promoting is in fact what's needed or whether mediation is being used to resolve issues that are better dealt with at, say, policy or judicial levels. I recall, too, reading a very brief and somewhat snaky book review some years ago, in which the sum total of the reviewer's observations was that "This book fills a much needed gap." It takes only a moment's translation to realise that the reviewer thought the world would have been a better and richer place without that book. An equally cynical version of this emerged in the bumper sticker campaigns leading up to a General Election in New Zealand a number of years ago, in which the campaign slogan of one (now defunct) party was that "X Party is the answer". Almost immediately, one of the other major (and still extant) parties responded with the bumper sticker: "If X Party is the answer, it must have been a stupid question."

Neither of these one-liners qualifies as intelligent conversation, but they may reveal a value in going back to what it is we imagine we're addressing in our proposed solution. We can see this in reading the array of recent official or research papers on the broad theme of access to justice, in reflecting on the slow progress of implementation of the 2008 EU Directive on Mediation, and in noting the array of institutional developments in mediation across the globe. I've mentioned this point before, in an earlier blog, but if we were to review the literature on access to justice and ADR generally over the past 40 years, we would note (I'll boldly assert without doing the necessary survey, other than having read a lot of this material over at least 30 years) that there has been a significant change in tone, style, purpose, formality, and expectation when authors or committees or judiciary reflect on the value of mediation.

I was reminded of this in going back to an early article on mediation by David N. Smith, entitled "A Warmer Way of Disputing" (26 *Am. J. Comp. L. Sup*. 205 1977-1978). Having read this

initially at the time of publication, there was a double pleasure in rediscovering this piece, not only to be reminded of the ethos of mediation nearly 40 years ago, but also to find that the author was the same David Smith who has been a colleague of mine at SMU for the past 7 years. Collegial connections aside, the point that I'd draw from this is that, if we were to place this article alongside, say, the recent JUSTICE report on *Delivering to Justice in an Age of Austerity*, we'd find a significant shift in language: while mediation is still the perceived solution, the 'problem' it purportedly addresses has shifted: of less concern now (other than in the specific fields of community mediation, médiation sociale and so on) are issues of community strengthening, the challenge to legal formalism, the political reclaiming of disputes (echoed, for example, in Christie's early article on "Conflicts as Property" or Carrie Menkel-Meadow's question as to "whose dispute is it anyway?"). In place of those critical, cultural and perhaps communitarian arguments for mediation we now tend to see far more economic and instrumental reasons for promoting mediation. True, it is not forgotten that mediation can soften the edges of conflict, encourage disputants to find their own solutions, retain party confidentiality: none of those attributes is lost. But I suspect we're likely to find that the question to which mediation is an answer is becoming more system-oriented (time, cost, resources) than disputant-centred.

One further expression of the ideal of ADR was in Frank Sander's notion of "fitting the forum to the fuss" [FEA Sander & SB Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure," (1994) *Negotiation Journal*, Vol 10, 49-68] – the idea that a diverse array of tools of dispute resolution could, if well-managed, provide a context-sensitive, culturally-appropriate set of resources for dealing with the everyday conflicts – and many of the legal conflicts – that we find ourselves in. If, however, the JUSTICE Report is anything to go by, the "fuss" is less a matter of the disputants' tangle than the recognition, in a number of jurisdictions, that the civil justice system is creaking under the strain – a strain less of the flood of litigants streaming to the doors than of the reduction in resources available for civil and indeed criminal justice.

The positive spin-off in this is that it obliges us to be more creative and flexible in the ways in which we imagine our response to conflict, as has been shown in recent reports such as "Transforming the Criminal Justice System" [2014 – available at www.gov.uk/government/publications] or the Civil Justice Council's Report on "ODR for Civil Justice Claims" [https://www.judiciary.gov.uk/reviews/online-dispute-resolution/odr-report-february-2015/].

The distance we've come, not only in the last 40 years, but also in those examples of non-judicial dispute resolution from which at least the pioneers drew inspiration, was illustrated for me when I recently read Dr Fernanda Pirie's excellent book, *The Anthropology of Law* [Clarendon, 2013]. Almost in passing she notes that, in non-Western societies, mediators typically begin their role with a "recitation" which reminds parties of important (possibly sacred) texts, social norms and long precedents. Here, the mediator is intermediary not only between the parties, but also between those parties and social norms. Switch now to contemporary mediation, and think of the form of "recitation" that mediators use – which will, with variants of course, refer to the confidentiality of the process, the impartiality of the mediator, the decision-making autonomy of the parties and so on. If mediation is, in its earliest forms, the answer to questions of social ordering, it becomes in its contemporary forms, an answer to the demands of privacy, autonomy and, in its increasingly institutionalised form, efficiency and instrumental goals.

The one point I'd end with is that, while "mediation" remains descriptively the same process with

which we began (at least in the modern phase) 40 years ago, instrumentally and politically it is not necessarily the same. The irony won't be lost on many mediators who have been in the field (if that's what it is) for much of that time, that what was marginal becomes mainstream, and what was alternative now becomes "appropriate" [having been "additional" for a short time]. As Frank Sander noted [http://www.mediate.com/articles/sanderdvd03.cfm] it is part of the life cycle of this development that we move from experimentation to incorporation to institutionalisation. And, at each stage, the "question" to which mediation may be the "answer" shifts ground.

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