

Kluwer Mediation Blog

“To be truly radical is to make hope possible, rather than despair convincing”

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Raymond Williams, *Resources of Hope* (published posthumously in 1989), p. 118

I write and will upload this blog on the eve of my departure for Paris and the ICC’s 12th International Commercial Mediation Competition. On the ‘due date’ for this blog, I’ll be somewhere between Auckland and London. Again, it will be my huge pleasure and privilege to be one of the many professionals at this student competition, acting as judge and mediator. There’s a dual pleasure in catching up with professional colleagues from across the globe and in working with the emerging generation of young mediators. One of the ICC’s express purposes in hosting this competition is to expose this generation of [predominantly] law students to mediation and especially commercial mediation.

Taking up [Geoff Sharp’s example](#) of providing hints for this year’s participants; Sabine Walsh’s ‘[resolutions](#)’ for mediators, and John Sturrock’s reflection on [kindness](#) as the parting thought for 2016, I want to pick up one aspect of this competition and of the world of international commercial mediation generally, and comment on ways in which we can expand our view of the value that is on the table in such encounters.

While the focus of the competition is on commercial mediation, the demographics of the participants and the design of the mediation problems make this an expressly international and, more importantly, intercultural mediation experience – and the highly inventive creation of fictional nations for the purposes of the competition won’t disguise or displace the reality of the cultural worlds the participants bring to the table. This is a prime opportunity not only to explore the intricacies of commercial mediation and negotiation, and to ensure that no commercial (whether monetary or relational) value is “left on the table”; it’s also as close to a ‘natural experiment’ in intercultural communication and negotiation as could be imagined.

My point is this: while there will be students from 66 universities, representing a significant diversity of nations, languages and cultures (noting parenthetically that “nations” and “cultures” aren’t necessarily the same thing and that one’s nationality is not always coterminous with one’s culture), there is a risk that the differences will be flattened in a couple of ways. First, and necessarily given the diversity, the competition runs on a common language: English. Clearly, there are many participants for whom English is a second language, though I’m always impressed and a little daunted by the fluency with which many of the participants manage the language even

in quite idiomatic ways. Further, as is increasingly the case globally, there will be many people for whom English is a familiar – possibly even first – language but whose English is nuanced in ways that reflect a distance from England’s shores [was it John Cleese who quipped that the UK and US were two countries divided by a common language?].

Second, the rules of the competition, and the instructions to mediators, specify a particular model and style of mediation – the interest-based, facilitative, principled problem solving style, with norms of mediator neutrality and confidentiality of the process at its heart. While this prescription is necessary in order to provide participants with a common experience of mediation and to ensure some uniformity of evaluation, this and the common language may have the effect of masking the differences between the parties that are also at the table.

For this reason, this blog is an invitation not only to the students taking on the roles of client and counsel at the competition, but also to the judges and mediators, to be aware of the unstated, and often unobserved and unrecognised differences between the parties that, despite the common ground of language and process, may well shape the parties’ perception of mediation, commercial relationships, the nature of purpose of mediation, and the design of acceptable outcomes. Two of the core assumptions of the familiar [Western] model of mediation are, first, that the mediator’s influencing role is restricted, typically non-substantive and accepted by consent of the parties, and second that the very nature of open engagement is oriented towards mutual, interest-based influence. Neither of those assumptions will hold true for all participants, except to the extent that they might have been shoehorned temporarily into that mode for competition purposes.

There is a further reason for raising this topic at this juncture: by the time this blog is published, President Trump will have taken office and, as others have reflected on these blog pages and widely in the press, these are times when intolerance, disrespect, narrow nationalisms, dangerously naive assumptions about others and outsiders, and casual racism are in evidence. It’s less than a year since I recall reading in the *Frankfurter Allgemeine Zeitung* – before the US election though well into the campaign – that some forms of racism and intolerance were now “*salonfähig*” or socially acceptable. While this aspect of our perception of diversity and difference is unlikely to raise its head at the competition, there’s always the possibility that simple neglect of or indifference towards those differences will imperceptibly shape our understanding of what it is we see; and that indifference can undermine respect.

Hence – at last – my reason for choosing the quotation from Raymond Williams: if, as we might believe from the gloomier news coverage, these are dark days for intercultural understanding and communication, and Kant’s ideal of hospitality towards strangers seems a remote delusion, we can and should see a gathering such as the ICC’s competition as just the kind of occasion to give more express attention to the rich differences that are represented at the table. If, too, as commercial negotiation gurus tell us, we need to ensure that no commercial or tangible value is left on the table after the deal is struck, it’s worth adding from the intercultural angle that there is almost certainly going to be another kind of value on the table, which is invariably worth digging for.

A few brief examples may assist to illustrate the simple traps. Some years ago, at an international negotiation competition, the American judge commented on the pleasant surprise of watching two Asian student teams in action, noting their courtesies, careful modes of address, and – he thought – more gracious style. However, he asked, isn’t this a “less efficient” way of negotiating?

Second, at an earlier iteration of the Paris mediation competition, judges commented on the ways

in which an Asian team “failed” to correct their mediator’s faulty interpretation of their narrative, unaware that – for that team, from that world – the mediator still stands higher in a social hierarchy and is not to be overtly questioned.

And finally, observers need to be mindful of those cultural styles in which the covert (the assumed, the understood) is not always made overt: not all of us wear our hearts on our sleeves, particularly in confronting difference.

Participants, whether role-playing students or mediators and judges, could do no better than to look at the criteria designed by the International Mediation Institute as the standards for accreditation as ‘intercultural mediators’. See <https://imimmediation.org/intercultural-certification-criteria> [in the interests of disclosure, I was part of the task force that developed these criteria]. There’s no need to repeat those criteria in this blog, as they are readily accessible; but the point here is twofold: first, even a quick skim of those criteria will reveal the likelihood that something else is going on at the mediation table, even while the negotiating parties are ostensibly talking about commercial matters; and second, an awareness of those nuances, assumptions, perceptions and tools may allow us to be aware of ways in which we can enhance the conversation – even if only by asking the right kinds of questions as to how others see things. There’s nothing quite so powerful and respectful as a question which conveys genuine inquiry about another’s understanding of what might appear to be a shared reality.

Even without those questions, the common model of mediation also risks deflecting us from understanding that even apparently simple ideas at the heart of the process – such as “interests” – carry a cultural freight. As Kevin Avruch comments, in discussing the assumptions about tradable utilities and “interests” which guide Western models of negotiation:

“Of course, the nature of utilities is not a problem at all in neoclassical economics, since if one defines a utility as anything desirable or valued, then one simply needs to identify what, in a given culture, is desired or valuable, and then look around to discover individuals striving to maximise it left and right. The adequacy of this conception of utility for understanding other cultures has long been questioned, but the questions become harder if one imagines trying to “transact” (say, negotiate) across different “utility universes.” For even if we assume that a behavioural theory of utility maximising holds across all cultures, if we admit that the nature of utilities varies cross-culturally, then to imagine intercultural “rational” transactions, we would also have to assume that culturally-specific utilities are essentially fungible.”

Kevin Avruch, “Toward an expanded ‘canon’ of negotiation theory: Identity, ideological, and values-based conflict and the need for a new heuristic,” *Marquette Law Review*, 89: 567, 571 [2006].

We – as mediators and judges – may well prepare for this competition by reading the wonderfully imaginative scenarios that have been prepared; but if the larger aim is that of fostering the next generation of international (and by definition intercultural) negotiators and mediations, the IMI recommendations are worth bearing in mind: “Mediators should strive to apply their understanding of culture as a tool to understand and foresee possible patterns of behaviour while considering mediation as a social process in inter-cultural cases, helping people from different cultures to communicate optimally with one another. . . Mediators should learn to prepare for inter-cultural mediations by researching and anticipating possible culture affects and by figuring out what process may work best for the participants.”

Raymond Williams does, however, provide a cautionary comment on this, of course: “Culture is one of the two or three most complicated words in the English language.” *Keywords* (1983).


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