

Kluwer Mediation Blog

Perspectives on Dispute Resolution – An Interview

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Writer's note: I was interviewed by the Singapore International Dispute Resolution Academy (SIDRA) for my perspectives on Dispute Resolution. This was published as a blog entry on 2 October 2017 on the SIDRA website. For my entry this month, I would like to reproduce that interview here. I would like to thank SIDRA for giving me permission to do so.

From your perspective, what are the top three global trends that are shaping the field of negotiation and dispute resolution? Why do you think these trends are important?

I'm seeing a gradual – if not rapid – decrease in the use of arbitration. Arbitrators may disagree with this but there is more data now that arbitration can be more expensive and take longer than litigation. Once people realise this and come to terms with this, they may ask themselves, "Why am I arbitrating?" Perhaps litigation is the new ADR. I see this as one facet of a trend.

The second facet relates to the notion that mediation is moving to a point where there is more certainty about enforceability. One of the appealing things about arbitration is its enforceability and its certainty. The key part about all of this is that mediation is moving that way. You still have no guarantee of an outcome, unlike arbitration where you know there will be an outcome, but you are beginning to see mechanisms right now whereby there are methods of making mediation enforceable, for example, the SIMC's Arb-Med-Arb process. It is essentially mediation with an arbitration method of enforcement. You are beginning to see conciliation conventions being hammered out. While that will take some time, it would begin to create some certainty. Also Singapore recently passed the Mediation Act. That itself has provisions built into the law where certain types of agreements can be registered as consent judgments. And all that is making mediation a little more certain.

So as arbitration is on the whole becoming less appealing and these measures are making mediation a lot more appealing. I think the third thing is the professionalisation of mediation and mediation advocacy. I can't stress that enough and I think that is important because we sometimes talk about the professionalisation of mediators (and that's what the Singapore International Mediation Institute or SIMI is supposed to do) but the fact is that apart from making mediation a profession so that mediators can be professionals in their own right, mediation advocates can be a profession in their own right. Now you could be a mediation advocate as part of your legal practice, or you could be a mediation advocate professional. I think once people make that shift, then I think what you are essentially saying is that I am a mediation professional, I have duties, responsibilities and skills and I deserve to be paid good value for my work. But whereas right now

a lot of the time most people are saying, “Well you know right now I am a lawyer but in a mediation I don’t earn so much and I may lose money.”

So of course these things are trends and are not immediate, but if these trends continue to develop in that sense, and if we continue to encourage these trends, then I suspect there is tremendous room for mediation to grow as a valid and useful form of dispute resolution, but not the only form of dispute resolution.

In light of these trends, what can negotiators and dispute resolution practitioners do now to position themselves well for the future?

If you are a lawyer right now, I would say learn as much as you can about mediation. This is really fundamental. Don’t come to the point that you are basically saying, “Oh I have to jump on the band-wagon now. It’s too late, everyone else on it already.” You want to be the first mover. If you read the circumstances and you know it’s going to be a big deal, then move quickly.

Now some lawyers actually did that in 1996. And now they are well placed today. Other people are playing catch up. And so what I am saying now is that you look at the trends and you plot it 10 to 20 years into the future in relation to mediation and mediation advocacy, I think lawyers should get in now. I think lawyers should play a part, take an opportunity to play a part, in shaping what mediation advocacy should be like as a profession. Make it their practice. Don’t let themselves be excluded from that. Because they shouldn’t be. They are well-placed to help their clients.

So I think they should position themselves in a way that they can say they can help a client whether it is litigation, arbitration or mediation – basically position themselves as a well-rounded dispute resolution lawyer, rather than say, “I can do mediation if you want me to, but I actually specialise in litigation”. That I think requires a change of mindset. That requires realising that this is an opportunity. And I think this is something that can be seized now so that they can position themselves well now, not 20 years from now.

How about people who are not lawyers but who want to become full time mediators?

Well honestly you can be a full time mediator and you can be a mediation advocate. There’s no reason why you need to be a lawyer to be a mediation advocate. Which is why it is so important for the lawyers. Because if the mediation advocates who are non-lawyers get into the act, and then they professionalise it, there is a possibility of them saying, “I’m sorry you missed the boat. And if they want to become a mediation advocate, then there’s a professional accreditation scheme.”

Now, I am not saying that that will happen. I’m just saying that the possibility of that could happen, since it is not limited to you having to be a lawyer. You can be a mediator or mediation advocate without being a lawyer. If that is the case, then if I was a lawyer, I would get in on it. Why deny myself a part of practice which can be rightfully mine?

So I can market myself as a mediator but if you don’t want me as mediator, I can be a mediation advocate. I can help you prepare for a mediation and represent you in a mediation. The only tricky part about all of that is whether that is considered part of the practice of law. Because obviously if I am not a lawyer then I can’t practise law. But I think there is scope for saying I am not practising law, I am not giving you legal advice, I am not representing you in court – all I am saying is that I am representing your interests, just as I can be a professional negotiator without being a lawyer. I don’t see why I cannot be a professional mediation advocate if I am not a lawyer.

When you suggest that people learn as much as they can about mediation, what you are suggesting they learn?

Learn what mediation actually is. In Singapore, it's 25 years on and in the USA, it's more than that. There is still a lack of understanding about what mediation is. Sometimes it's a misunderstanding about what mediation is.

We joke about mediation being meditation and all that other stuff. But with lawyers it is the same. Some lawyers say, "Oh the outcome of mediation is not binding." That's clearly wrong. The outcome of mediation, if there is a contract, then it is binding. What they actually mean is that there is no guarantee of an outcome of mediation because the mediator does not have the power to impose a decision on the parties. Well, maybe they know that or maybe they are just being imprecise about the communication. But we know lawyers. Lawyers are very precise about communication. I've had to deal with that sort of query. I have had to deal with the idea that somehow a mediation settlement is second class justice. And I say even the House of Lords in the UK have identified mediation as a parallel track of justice and parallel tool to the court system.

It just takes some time to seep through because I think most human beings don't like change. Change is unfamiliar to us. So get familiar. Take courses, read etc. To be fair, that has improved. Lawyers and non-lawyers have become more aware as compared to 20 years ago. But that trend has to improve. We need to increase opportunities for education of law students before they become lawyers. We need to have ways of educating the users so that users know that there is this creature called mediation. It's actually a very business friendly solution. At some point, I can foresee a future where the user is basically saying to a lawyer, "I've heard about mediation, let's do that first." And so even if a lawyer does not advise a client about mediation, which they should in my opinion, maybe then the user will say, "Why did you not tell me about mediation?"

So that is education all around and that is important.

I think in Singapore you have a core group of lawyers who are very supportive of mediation and all the more power to them. But the challenge in Singapore is getting the industry to a threshold where the cases match the capacity. This I think is the challenge for all the mediation service providers.

What do you think are the biggest problems / challenges that people face in their negotiations and conflicts, and what can people do to effectively overcome such problems / challenges?

There are maybe two problems / challenges but they are inter-related.

The first is that when you put on a win-lose mind-set, all you see are problems, you don't allow yourself to see solutions. So the first problem is the whole notion of a zero sum mentality. This is honestly harder to overcome than what one might think. At some level it is instinctive, at one level one might argue it's part of fight or flight. Therefore when someone pushes you, you automatically want to push back. This is an instinct you can train out of. So when you have this urge to fight, it becomes very hard for you to want to find an amicable solution.

The second challenge is basically – and this is a related point – being able to master yourself. This is being able to say that despite one's win-lose tendencies, despite the fact that I think that this person has offended me, wronged me etc, I can overcome this need to be competitive and be aggressive and basically say I am not in an arena where my life is at stake, I am not in a situation where there is a saber tooth tiger coming at me, I am in a position where I can see that there is a

problem. And you solve the problem and you move on.

To sum it up in another way, do you want to be happy or do you want to be right? I think a lot of people want to be right, even though it makes them unhappy. They will fight to be right, even though it hurts them. But if you want to be happy, you can be happy and right. But sometimes, it's just saying let's just be happy. Something wrong has happened, it's gone wrong, life happens, but is dwelling on that necessarily the best possible solution? This is fundamental to mediation which is the whole forward looking paradigm, moving away from the blame and looking at solutions, and just getting people to do that.

If they can do that, then mediators will be out of a job – and that's great. If people can manage their own disputes, we won't need mediators. But having said that, I don't think we should be afraid of that. We will have plenty of work for mediators, lawyers, arbitrators and judges because there will always be more than enough conflict to fuel the machine. But from my perspective, the key thing is to, as part of our personal evolution, we need to learn to deal with our own personal difficulties, challenges, problems in more effective ways that contribute to the sum total of good. Either personally, into the community or into the world. And right now that's just not happening.

How we see conflict and deal with it is fundamental to commercial matters. How we see the world is how we conduct business. How we see the world is how we resolve conflicts in the business world.

What will make you stop and say, “Wow, that person is a good negotiator/mediator”?

If they were balanced and they had a high degree of self-mastery. As William Ury recently in his publications says it's about “Getting to Yes with Yourself” and what that means is developing internal congruence with what it is that you are doing. So it's not just about getting to yes, it's about getting to yes with yourself. I think the key part about getting to yes with yourself is the notion of mastering your need to win, your fear, your fight, flight and freeze responses and be able to keep your balance when even trouble is happening.

So the analogy I would use is like the hurricane. When trouble is happening around you, but you are the eye of the hurricane where it is absolutely still. Balance is the difference between being assertive as opposed to being aggressive. Balance is the difference between being able to be empathetic as opposed to being able to lose boundaries. So it's important to be assertive without being aggressive, to feel for someone but without losing one's boundaries, to be able to disagree respectfully without being disagreeable. All these denote people who are in balance – physically, emotionally, mentally, spiritually. So I would say the X-factor of a good mediator or negotiators comes from self-mastery.

This is interesting because I was expecting you to tell me that certain specific skills make someone a good mediator or negotiator.

Those are the trees, I'm looking at the forest. You can teach someone to do something, but if they don't believe they can or they don't have an identity that are congruent with those beliefs, it sabotages their ability to do that. It's not so much teaching people to do certain things, it's more of embedding an identity. So if I take an analogy from martial arts, I can teach people how to fight, I can teach people how to defend themselves, I can teach people how to use techniques, but actually what you really want to do is to educate someone who is a martial artist – someone who has wu de (??) or martial virtue. That's not a technique, it goes beyond the techniques. It's the same for

negotiation. You can teach people collaborative skills and interest-based negotiation but there are some people who just cannot carry it out. These are the people whose mindset remains non-collaborative. So there must be congruence between identity, mind-set, beliefs, values and skills. When all those are aligned just like a laser, then you can burn through metal. But if it's diffused light, then all you do is shine light but so what? It has no effect.

In your experience, how do you go about building this mind-set and identity?

It's multi-layered. You are constantly drilling. You have to teach them the skills but you also have to teach them the supporting beliefs. That's where unconscious teaching is engaged – you teach through metaphors, through stories. You get them to see the value of the change in mind-set. You slowly shift them. It's incremental until you hit threshold. You can't just turn it on and off, it doesn't work like that. The workshop looks like it is teaching skills but the underlying covert operation is the mind-set shift. That's why the first few weeks are always so hard because you are pushing against the mind-set. Past a certain point, people tip and that's when it becomes easier. So you change the thought and the paradigm and everything else will change and become far more easy.

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