

# Kluwer Mediation Blog - January and December Digest

## **Kluwer Arbitration Blog**

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Anna Howard (Centre for Commercial Law Studies, Queen Mary University of London)

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The end of 2018 and the start of 2019 brought the usual diversity of posts on the Kluwer Mediation Blog. Topics addressed include: recent legislation on mandatory mediation in Turkey, lessons on mediators' liability from a New Zealand Court of Appeal decision, reflections from the recent "Tbilisi Mediation Days" conference in Georgia, and the recent report on ADR and Civil Justice in England and Wales by the Civil Justice Council's ADR Working Group. You'll find below a brief summary of, and a link to, each of the posts written by the authors on the Kluwer Mediation Blog in the last two months.

In "The future of ADR and civil justice in England and Wales", Rafal Morek provides a detailed summary of the recent final report by the Civil Justice Council's ADR Working Group on ADR and Civil Justice in England and Wales. Rafal's summary includes the recommendations to address the three main themes identified in the report, namely a lack of awareness, availability and encouragement of ADR.

In "Everything is difficult before it is easy", Martin Svatos draws on the negotiating experiences of his students and of his early experiences of negotiating to explain the difference between negotiating and "conscious negotiating."

In "It's not cricket. But it is a lesson about why apologies matter", Rosemary Howell uses the recent Australian cricketing scandal to illustrate what not to do when apologising. Rosemary then applies the work of Debra Slocum and her research colleagues to the cricketing case study to demonstrate how to make a more effective apology. Such guidance will be very useful for mediators seeking to help parties to make things better, and not worse, when apologising.

In "Selecting a mediator; in general, in commercial cases - and in a kingdom in need", Greg Bond continues the debate about the qualifications that mediators need to mediate. In particular, Greg applies this issue to the potential involvement and selection of a mediator for the current difficulties between the UK and the European Union.

In "Who gets to talk; who gets to be heard", Ian Macduff draws on recent research in New Zealand on public participation in local government to highlight the challenges of ensuring that participation and access are open and representative. Ian then uses an example from his experience as a facilitator to illustrate how it is important for facilitators to understand that there will be those who do not expect to be heard in the same way as others.

In "Turkish mandatory mediation expands into commercial disputes", Tuba Bilecik examines the

recent expansion of mandatory mediation in Turkey into commercial disputes. Tuba describes the impact of mandatory mediation to date in Turkey, the key provisions of Turkey's new law on mandatory mediation and the challenges to its constitutionality. Tuba also considers what the future may hold for mediation in Turkey.

In "A neuro-linguist's toolbox - rapport: metaphors", Joel Lee explores how the identification and adoption of another party's metaphors can help to build rapport between parties. Joel also explains how a party can then reframe another's metaphors in order to lead discussions into a more beneficial direction.

In "What would you know about it? Some thoughts on gaining experience as a young mediator", Haley Weir draws on her own experience as a young mediator to highlight the challenges which can be faced by young mediators. Haley also identifies what she can bring, as a young mediator, to the table and encourages young mediators to continue to pursue opportunities to gain mediation experience.

In "Communication in the Whatsapp era", Andrea Maia uses recent examples of communications by political leaders, including the Brazilian president, Jair Bolsonaro, to highlight the changing nature of communication. Andrea considers how the application of non-violent communication skills could improve communication via new communication technologies such as Whatsapp.

In "The man who loved dogs", Rick Weiler draws on Leonardo Paduro's novel, *The Man Who Loved Dogs*, to identify some of the key issues faced by mediators, namely, epistemology, fear and compassion. Rick notes that the novel's treatment of compassion is perhaps the most instructive theme for mediators, and Rick explains the key role that compassion plays in his work as a mediator.

In "Gandalf, Choice, Power and Hope", Bill Marsh applies the wisdom of Gandalf, the wizard in Tolkien's famous *Lord of the Rings*, to the sense of powerlessness which those involved in conflict - mediators, parties and advisers alike - can feel. Bill explains how this sense of powerlessness can be converted into empowerment by turning our focus from the past to the present and the future, and by asking what it is that each of us can do, however small, to contribute in an apparently impossible situation.

In "A Mediator's Dilemma", John Sturrock describes a mediation dilemma in which he found himself and explains the steps he took to address the situation. John also asks readers to identify what the mediator may have missed in this situation.

In "Brexit negotiated? Online dispute resolution will be more than an alternative", Charlie Irvine discusses the rise of online dispute resolution ("ODR") and reviews recent developments, including a live, online Brexit negotiation, which point to a mainstream future. Charlie concludes that ODR will become an integral part of the justice system.

In "Let mediation be mediation. Conciliation versus mediation in Brazil", Maria Nazareth de Serpa explains the meaning of each of mediation and conciliation in Brazil. Nazareth describes how these terms are frequently used interchangeably and incorrectly, and highlights the importance of understanding the difference between these two dispute resolution processes.

In "A neuro-linguist's toolbox - rapport: values", Joel Lee identifies techniques which can be used to identify values, both our values and those of others, and explains how the identification of another's values can assist in building rapport. Joel notes how such techniques are similarly used in mediation, though in the context of identifying interests rather than values.

In "Is swapping shoes enough?", Charlie Woods explores how the concept of "reflexive cartography"

and the Design Council's Double Diamond approach might be used in mediation and facilitation projects to: help people better understand things from different perspectives; and to allow them to work together to see how a place or an organisation might be improved, or a mutually acceptable agreement might be reached.

In "Who pays the mediator for an Ontario MVA mandatory mediation?", Rick Weiler summarises the recent decision by the Ontario Superior Court regarding who is required to pay the mediator for mediations conducted under the mandatory mediation programme for motor vehicle actions. Rick also considers the impact of the court's decision.

In "Leading in Conflict", Bill Marsh draws on the wisdom of Richard Rohr, a Franciscan monk and thinker, to identify the key characteristics of "Creative leaders" when dealing with conflict. While the post focuses on the category of the parties to a conflict, Bill notes that mediators also need to lead and therefore Richard Rohr's characteristics apply as much to mediators as to parties.

In "Mediation lessons from the cases - Part 1", Alan Limbury identifies the important lessons regarding mediators' liability which can be found in the New Zealand Court of Appeal case of *Robert Samuel McCosh v David A R Williams*. Alan also uses this case to provide helpful guidance for mediators on how to exclude their liability for their actions during and after the mediation, and whether having anything to do with the mediation or not.

In "My 2018 Christmas notes on algorithms, my own children, sustainability, choice, and the human heart", drawing on Yuva Noah Harari's *Homos Deus: A brief history of tomorrow* and, in particular, Harari's vision of a post-humanist world in which Dataism reigns and where choices are made by algorithms, Greg chooses in this Christmas Eve post to write on the topics of sustainability, choice and the human heart.

In "Tbilisi mediation days - a glance into the history, the present, the future", following the "Tbilisi Mediation Days" international conference in November in Tbilisi, Georgia, Sophie Tkemaladze explains the history of mediation in Georgia and identifies the current and future challenges and opportunities for mediation in Georgia. In particular, as regards the present, Sophie draws on discussions at the conference to identify the following two challenges: the rights-based approach of Georgia's legal culture and the way in which lawyers have been trained; and mediators' inability (so far) to exercise leadership and mediate among themselves.

In "Don't just do something. Sit there", Anna Howard draws on her experience in a recent mediation with John Sturrock to explore the challenges, and the impact, of the mediation skill of saying nothing. The points which Anna identifies have relevance far beyond the mediation room.