Kluwer Arbitration Blog

Kluwer Mediation Blog – April and May Digest

Anna Howard (Centre for Commercial Law Studies, Queen Mary University of London) · Tuesday, June 4th, 2019

> "*In negotiations of all kinds, the greater your capacity for empathy – the more carefully you try to understand all of the other side's motivations, interests and constraints – the more options you tend to have for potentially resolving the dispute or deadlock*". Deepak Malhotra of Harvard Business School quoted by John Sturrock in Process And Empathy Are Critical For Success In Political (And Other) Negotiations

The last couple of months on the Kluwer Mediation Blog have offered the usual diversity of posts, both in terms of subject matter and geographic reach. They include updates on new mediation legislation in Azerbaijan, Romania and Georgia, a detailed summary of a bold Australian research initiative on dispute resolution, and posts on the extent to which mediators manipulate parties and the impact of such manipulation. You'll find below a brief summary of, and link to, each post on the Kluwer Mediation Blog in April and May.

In The Surprising Effectiveness Of Hostile Mediators, Rick Weiler shares the unexpected finding of recent research by Ting Zhang, Francesca Gino and Michael I. Norton that hostile behaviour by mediators leads to not just more agreements but better agreements. Rick then considers the relevance of this finding for mediators and their practice.

In Is A Bird In The Hand Worth Two In The Bush?, Charlie Woods explores some of the cognitive biases to which parties are susceptible in mediation and which are also relevant to addressing some of the significant challenges we face, such as climate change. In response to his question, Charlie concludes that in order to answer this question we "*really need to know much more about the birds, how and why they are valued, how those involved value the future and what the probability is of there being a bush with birds in it when they get there!*".

In It's Not Just About The Money And Other Food For Thought For Mediators, John Sturrock draws on some of his recent mediations to identify the following guidance which he hopes will be helpful to other mediators: it's not all about the money; when the wheels come off, re-engage the key players; get under the surface; ask questions; use a worked example; encourage forward-thinking momentum; and last but not least, provide food.

In Mediation Without Mediator, Constantin-Adi Gavrila explains a recent Romanian law which

provides for “mediation” between tax authorities and taxpayers. Constantin notes that the “mediation” described in this law is not actually mediation but negotiation as a third-party mediator is not part of the process. Constantin-Adi explores the possible reasons behind the incorrect use in this law of the term “mediation” and their consequences.

In Mediation Lessons From The Cases –Part 3, Alan Limbury draws on the New South Wales Court of Appeal Case of *Studer v Boettcher* to identify lessons for lawyers, disputants and mediators regarding their approach to mediations. For mediators, Alan’s guidance includes the importance of holding joint sessions with the disputants, noting that ‘shuttling can inhibit opportunities for the disputants themselves to restore relationships and find creative solutions’. Alan also identifies the importance of ensuring beforehand that all the “right” people attend the mediation, and of being available for as long as the parties want.

In Mediator = Manipulator?, Greg Bond responds to Rick Weiler’s earlier post on The Surprising Effectiveness Of Hostile Mediators and explores the meaning of manipulation and the various ways in which a mediator might manipulate the parties. Greg identifies, for example, that “*when I sit between my clients and the door to make it just a little harder for them to walk out, or when I engage with one person I feel needs more support, or who I feel needs to be heard … then I am manipulating. And I am doing so because I believe that this will increase the chance of a good process and a good result.*” Greg then identifies important questions and conclusions about the relationship between a mediator and his or her clients.

In Conflict, Framing And Accountability, drawing on the recent tragedies in New Zealand and Sri-Lanka, Ian Macduff notes that if ever there were powerful – and tragic – examples of the importance of how we frame our perceptions of conflicts and of others, these two events stand out. Ian explains that well-established research in communication theory has pointed out that framing is more communicative than cognitive action. He adds that how significant parties frame issues such as these recent events is a way of conveying a message about how we might collectively continue the conversation.

In Why Your Experience Is Important In International Dispute Resolution, Nadja Alexander, Matthew Coghlan and Aziah Hussin identify key recent developments in international dispute resolution and note the important role which research can play in developing international dispute resolution systems. They then summarise notable recent research in this field and explain the aim of Singapore’s first International Dispute Resolution Survey with the assistance of Singapore Ministry of Law.

In After Italy And Turkey, Azerbaijan Also Follows The Opt-Out Mediation Model, Ruslan Mirzayev provides a detailed overview of Azerbaijan’s Law on Mediation which came into force on 29th March 2019. Ruslan explains the reasons for this law and examines its provisions, including the opt-out mediation model which the law adopts. Ruslan identifies particular challenges which such a model raises for Azerbaijan.

In Commercial Mediation and Good Decisions, Rick Weiler draws on recent Canadian scholarship dealing with the psychological costs of litigation to question whether the currently predominant model of commercial mediation – a single session of 3 or 6 hours – supports good decision-making by litigants. Rick explores whether changes might be needed to truly meet the interests of the clients, such as whether commercial mediators should offer a more client-centred process involving multiple sessions and whether mediators should be better trained in the available tools

clients can use for making a good decision.

In Don't Sit On Your Ass[ets] – Part 1: The People, in the first in a short series on how parties and advisers can best deploy the "assets" at their disposal in a mediation, Bill Marsh notes that often an under-employed asset is the parties. Bill identifies the reasons why too often the parties can end up taking a back seat. He explains how the key to understanding client participation is to think of it in terms of impact and influence: the impact which comes from someone telling their own story; and how that can influence the outcome of the mediation. Bill then identifies a number of questions, the answers to which determine whose voices should be heard, to what extent, and on what topics.

In A Coffee With Ati Alipour, Andrea Maia shares a question and answer session with Ahdieh (Ati) Alipou Herisi, one of the judges of the recent CPR International Mediation Competition, which took place during an event for the Young Mediators Committee of the Brazilian Center for Arbitration and Mediation. Topics explored in the Q&A session include the Singapore Mediation Convention, the future of mediation in resolving international commercial disputes, mediation in the US courts and the role of co-mediation.

In Formality and Informality: Mediating In The Shadow Of The Courts, Charlie Irvine questions the description of mediation as "informal" compared to the "formal" method of court proceedings. Charlie uses an example from when he was a duty mediator in court to illustrate the trickiness of navigating the different levels of formality of the communication registers in each of mediation and the court. Charlie concludes by arguing that characterising mediation as "informal" seems irrelevant and unhelpful.

In Courts Should Be The Alternative! Georgia Soon To Adopt The Law On Mediation, Sophie Tkemaladze provides a detailed overview of Georgia's draft law on mediation. Sophie explains how the draft is divided into two parts: the substantive regulation of mediation, and its institutional set-up. Sophie notes how the issue of who can be a mediator was one of the main points of difference within the drafting group. Sophie describes how the process in Parliament seems to be unusually collaborative, where most stakeholders are driven by a common purpose: How to ensure the most efficient regulatory framework which will foster usage and trust in mediation.

In Here's How Mediation Science Truly Can Originate In The Real World, following his earlier post What If Mediation Science Originated In The Real World? Michael Leathes identifies the need for large-scale field-based research on real-life mediations. Michael then explores how such research may be carried out, including the use of an "in-group" researcher, such as a member of one party's in-house business or legal team, and why potential funders may be willing to fund such research.

In Optimism In Mediation: Part II – Opportunity In Every Difficulty, Martin Svatos offers some guidance to help mediators' improve their interpretation of actions which they cannot influence. Drawing on Martin E.P. Seligman's, *Learned Optimism – How to Change Your Mind*, Martin applies Seligman's three characteristics of permanence, pervasiveness and personalization to a hypothetical situation which may occur a mediation. Martin also identifies practical and accessible ways in which mediators may improve themselves.

In Mining Frank Sander's Legacy – Triage And More In A Bold Australian Experiment, Rosemary Howell provides a detailed overview of a bold Australian research initiative sponsored by the Dispute Settlement Centre of Victoria and led by Danielle Hutchinson, a lawyer, mediator and

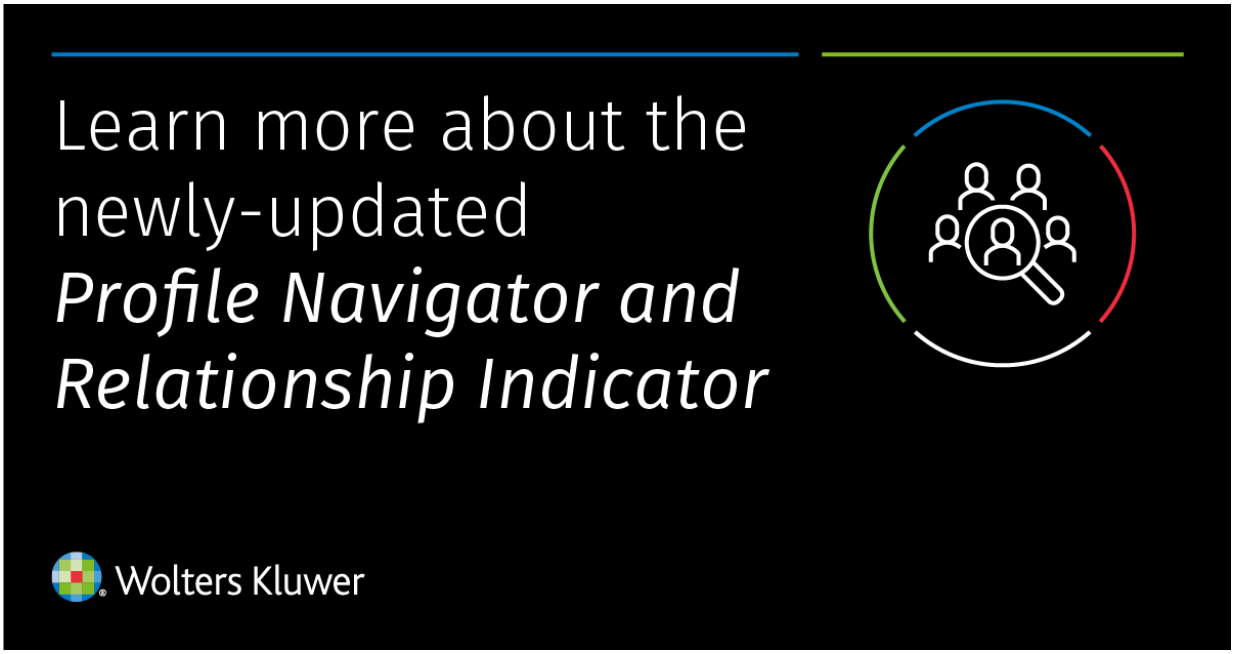
academic. The Triage Resourcing Modality Matrix (TRAMM) combines two hierarchical axes to

1. predict an outcome,
2. recommend the dispute resolution process that is most resource-effective and best for the dispute, and
3. maximise opportunities for a good outcome.

One of the key outcomes of TRAMM is that it is outperforming human operators in matching parties to processes and in predicting outcomes.

In Brexit And No End In Sight: A View From The Perspective Of A Theory Of Negotiation, Greg Bond draws on negotiation and conflict theory to identify possible explanations for why UK members of parliament have not been able to agree to Theresa May's deal with the EU. These include the best alternative to a negotiated agreement (also known as your no-agreement alternative), cognitive biases and the differing interests of principals and their agents.

In Process And Empathy Are Critical For Success In Political (And Other) Negotiations, John Sturrock draws on the work of Deepak Malhotra and Kenneth Cloke to identify the three central components of effective negotiation: framing, process and empathy. John emphasises that any new negotiating approach to Brexit must address these issues of process and empathy and that we must find ways to deal with complexity, volatility, uncertainty, and ambiguity.



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