Kluwer Arbitration Blog

Kluwer Mediation Blog – October and November Digest

Anna Howard (Centre for Commercial Law Studies, Queen Mary University of London) · Monday, December 3rd, 2018

> "*Mediating is, in the end, service. Humility is its fertile soil.*" Bill Marsh in "David Richbell – Lessons in Life and Mediation"

The last couple of months have offered a collection of compelling posts on the Kluwer Mediation Blog. From the analysis of court decisions in Canada and Singapore on the enforcement of mediated settlement agreements, to insights into key developments on online dispute resolution, and onto a number of pieces on the increasing number of mandatory mediation initiatives across the globe – there is something for everyone. You will find below a brief summary of, and a link to, each of the posts on the Kluwer Mediation Blog in November and October.

In "The Politics Of Being Polyanna", Geoff Sharp considers the essential role played by mediator's optimism. Geoff explores how mediators can be authentic and transparent yet be optimistic when they are not. Drawing on the words of Bernie Mayer, Geoff explains that the mediator's job is to "*effectively hold the tension between being both optimistic and realistic.*"

"David Richbell – Lessons In Life And Mediation" – in this moving piece, Bill Marsh reflects on what made his close friend and colleague, the late David Richbell, such a good mediator. The many qualities identified include David's ability to understand what too few mediators do – that enabling people to understand each other will usually bring about resolution, whereas simply pursing resolution will often not bring about understanding.

In "Ontario Court Enforces Settlement Agreement", Rick Weiler examines the recent decision of the Ontario Superior Court of *455 Gordon Baker Holdings Limited et al. v. Toronto Transit Commission, 2018*, which demonstrates the approach a judge will take when a party calls into question the enforceability of a settlement agreement. Rick notes that, generally, the courts will have little patience with the phenomenon known as "settlers remorse."

In "Communication For Online Negotiation", Andrea Maia explores the barriers to, and the opportunities for, communication in online negotiation. Andrea considers techniques which can be used to improve communication and identifies innovations which may enhance online communication.

In "Public Policies In The Field Of Mediation: Between Appearance, Necessity and Opportunity",

Constantin-Adi Gavrila and Marin Padeanu describe the project "Mediation – Effective Public Policy in the Civil Dialogue" in Romania which aims to explore options for a public policy in Romania in the field of mediation. Constantin-Adi and Marin explain that the policy paper resulting from this project aims to transform mediation into an instrument which will contribute to the development of a culture of dialogue in Romania. They also identify the challenges and opportunities associated with this project.

In "Singapore Case Note Part 2: What Happens When A Party To A Mediated Settlement Agreement Has A Change of Heart?", in the second of a series of posts on the Singapore High Court case of *Chan Gek Yong v Violet Netto*, Nadja Alexander and Shou Yu Chong focus on two of the plaintiff's claims in her attempt to set aside the mediated settlement agreement and pursue her case through litigation. Nadja and Shou Yu draw on the comments of the High Court of Singapore to identify a number of takeaways for mediators.

In "To Compel Or Not To Compel: Is Mandatory Mediation Becoming Popular?", Rafal Morek identifies the increasing number of countries where mandatory mediation has been implemented, or is being explored, including Greece, Romania, India and Turkey, and provides a very useful summary of such initiatives.

In "Ethics in Mediation II: Of The Poor Man And The Lizard", Martin Svatos explores the importance and challenges for mediators in remaining impartial and independent. Martin also shares guidance on how parties may identify and address potential conflicts of interest, including Warren Buffet's front-of-the-paper test.

In "Triggering The Narrative – The Power Of Narrative Hooks", Rosemary Howell demonstrates the power of narrative triggers and explains their relevance for mediators as they seek constantly to assess the dynamics unfolding during mediations, considering whether and how to intervene. Rosemary draws on a recent, challenging mediation to describe how she innovatively introduced a new narrative into the mediation which then enabled the parties to resolve their dispute.

In "Listen – Please Listen", Greg Bond identifies the recurrent theme in all of the mediations in which he has been involved: each party wishes that the other would listen more. Greg explores why there is so little listening and considers how we might become better listeners.

In "Reading the Virtual Landscapes of Disputes: The Expanding World Of Digital Justice", Ian Macduff identifies the key themes which emerged in the recent 2018 Forum on Online Dispute Resolution at the Centre for ICT Law and School of Law in Auckland. In particular, regarding the topic of innovation, Ian identifies the themes of the growing significance of digital technology in the courts, and the potential for automation in access to legal information and resources. As regards the topic of impact, Ian notes that the discussion centred on the challenges of ethics and digital technologies and, more fundamentally, on the question of trust.

In "A View from Frankfurt", John Sturrock considers how our engagement as mediators can make a difference. Drawing on the variety of work in which John is involved, John identifies a recurring theme which can be summed up in the following words which he heard yet again very recently: "I wish we had talked about this two years ago." John emphasises that mediators are called to help people to talk – and to listen to each other, and in so doing they help them in turn to listen to – and hear – each other.

In "Against Mediation Regulation", in the third of a series of blogs on the "Mediation Moves"

Conference recently held at Viadrina University in Frankfurt, Tatiana Kyselova draws on her involvement in one of the conference's workshops to explore a number of reasons against mediation regulation. In so doing, Tatiana draws on a refreshingly wide range of contexts and countries.

In "Mediator Engagement And Politics – And Other Things We Care About", John Sturrock shares insights from another workshop from the Viadrina conference which explored the extent to which mediators can or should disclose or express their views when engaged in politically-related mediation work – or more generally. Drawing on the work of Ken Cloke and Bernie Mayer, and exploring difficult and important questions, John's post provides much food for thought.

In "Enabling Access, Enhancing Capabilities", Ian Macduff explores how the notable advances in digital technology offer significant new options for disputants and dispute resolution providers, thereby widening the scope of access to justice. Importantly, Ian notes that "access" needs to be expanded to "accessibility" in order to capture the further steps that need to be taken to meet the promise of the access to justice movement for those whose disabilities are not catered for by digital pathways.

In "Mediation Moves – A Conference, A Workshop, A Movement", in the first of a series of posts on the "Mediation Moves" conference recently held at Viadrina University, Greg Bond shares the original way in which the preparatory workshop opened. In his thoughtful reflections on that experience, Greg identifies that being able to talk about our own vulnerability and to listen to the vulnerability of others makes a difference, and not only to our mediation practice.

In "Compulsory Mediation – the Australian Experience", Alan Limbury provides a detailed summary of the mandatory mediation provisions in Australia and draws on research to demonstrate their positive impact. Alan also shares the courts' reasoning, in a number of key Australian cases, for ordering mediation which captures and conveys the inherent value of mediation.

In "Singapore Case Note: What Happens When A Party To An MSA Has A Change Of Heart?", Nadja Alexander and Shou Yu Chong, provide a detailed summary of the recent case of *Chan Gek Yong v Voilet Netto*. In particular, Nadja and Shou Yu focus on the Singapore High Court's treatment of allegations made by one party that the mediators pressured that party to sign off on the MSA. Nadja and Shou Yu also identify the lessons which those interested in mediation can take away from this case.

In "Greece: Mediation Going Compulsory. The Sequel", Haris Meidanis explores the latest developments regarding mandatory mediation in Greece. Following the postponement of the mandatory mediation provisions in the recent mediation law until September 2019, Haris considers and responds to the reasons for the resistance to these provisions on mandatory mediation.

In "Mediation Navigation Beacons", Rick Weiler draws on his nearly 30 years of experience in mediating to identify certain core principles which he comes back to in every case he mediates. These are, as Rick describes them, his mediator's navigation beacons to which he turns and which he teaches to his law students. They include the principle of high expectations which Rick describes as: "My experience in the mediation process (and, frankly, life beyond) has been that people and events rise or fall to meet your expectations. We must model that sense of high expectations in every interaction during the mediation."

In "How Many Shades Of Grey?", against the backdrop of Colin Woodward's work on the

relationship between the objectives of individual freedom and the common good in American politics, Charlie Woods considers how the entrenchment of positions in the political context reflects some of the ideas behind the concept of a zone of probable agreement (ZOPA) in a negotiation. Charlie then identifies factors which influence the chances of falling within the ZOPA.

In "The Cultural Factor And Universal Business Practice", Antonietta Marsaglia draws on her recent experience as a co-mediator in a cross-border dispute to consider the value of co-mediation for such disputes while also exploring the universal business language and values which transcend cultures.

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