Kluwer Arbitration Blog

Kluwer Mediation Blog: February and March Digest (Part 1)

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> "[…] *one of the several paradoxes of mediation is that in many cases, the more logical, the more persuasive the argument, the more contrary and extreme the response. And in fact, what is needed, is the ability of advocates, and more so mediators, to build trust and create rapport. A mystical concept for some, instantly understood by others."* Geoff Sharp in 'Rehearsing in poetry but practicing in prose'.

During a period which saw an unprecedented number of visits to the Kluwer Mediation Blog, we also witnessed a particularly diverse selection of posts on the blog. Topics addressed include the Singapore Mediation Convention, lessons for mediators from Australian case-law on their duty of care to disputants, and the recent elections for the Romanian Mediation Council. There are also posts by a number of our authors on the recent ICC Mediation Competition in Paris, and a lively dialogue across posts on the need for more field-based research on mediation techniques.

In this first post in a two-part series, you'll find below a brief summary of, and a link to, each of the posts on the Kluwer Mediation Blog ("KMB") in February. Tomorrow, the second post in this series will be published, which will provide the summaries of the KMB posts in March. We hope you find these useful.

In "Singapore Convention Series: Why is there no "seat" of mediation?", Shou Yu Chong and Nadja Alexander explain why there is no 'seat' of mediation in the new Singapore Mediation Convention. Shou Yu and Nadja use a hypothetical scenario to explain the concept of 'seat' in international arbitration law and practice and why such a concept is not needed in international mediation. They also explain how the internationality of a mediated settlement agreement is determined in the convention.

In "Rehearsing in poetry but practising in prose", Geoff Sharp compares the portrayal of mediation at the recent ICC mediation competition with his experience from the "coalface" of mediated real-life cases. In particular, Geoff contrasts the "linear and purposeful" appearance of mediation at the competition with the "messier" reality of real-life mediations. Through his comparison, Geoff identifies what he considers to be the key skill needed: "the ability of advocates, and more so mediators, to build trust and create rapport."

In "What if mediation science originated in the real world?", Michael Leathes starts an important

conversation on the value and feasibility of conducting various types of field-based research on mediators' skills and techniques. Michael notes that much of the current research in this area is of the "controlled laboratory" type, adding that while such research has been valuable in the early development of mediation, there is now a need for the more credible and accurate type of research offered by real-life field research.

In "More on field-based research", Rick Weiler expresses his doubts and concerns about the type of research proposed by Michael Leathes in his earlier post. In particular, Rick identifies the following concerns:

- a focus on field-based research of effective mediation techniques will result in a neglect of other important areas of mediation research and which would likely lead to increasing the use of mediation;
- drawing on a comment made by Greg Rooney, "that in the complexity of human relationships, within which mediators operate, data is never repeatable"; and
- the Observer Effect (which Rick describes as the theory that simply observing a situation or phenomenon necessarily changes that phenomenon) significantly diminishes the chances of repeatable data being obtainable.

In "Cooperate or compete", Charlie Woods explores, in the context of a world in which resources are non-renewable and where embarking on a zero-sum game may have serious global implications for society and nature as a whole, what the right balance between competition and cooperation might be. Charlie explains how the challenges of stimulating more effective cooperation get harder and harder the larger the scale of operation. Charlie closes by posing a number of challenging questions, including: Should we focus more effort on learning from what has helped us work together in the past, to build relationships, based on a deeper and wider understanding of our shared interests that allow us to cooperate more effectively and efficiently to find solutions?

In "Time-limited mediation", Charlie Irvine explains why some mediators have developed a practice of time-limited mediation, confining sessions to 2 or 3 hours. Charlie also identifies some of the characteristics of time-limited mediation as it has evolved in his own practice, noting both the benefits and drawbacks of such mediation. Charlie concludes by noting how he is drawn to time-limited mediation, adding that "[a]t its best it is inexpensive, effective and light on its feet. Perhaps, more importantly, it seems a comfortable and humane way to dip into the ever-shifting stream of other people's conflicts."

In "Negotiating in blind faith", Jonathan Rodrigues and Karleen de Melo explore the issues which can arise when one of the parties to mediation is blind. Drawing on Karleen's experience as being a blind party to mediation, Karleen and Jonathan also offer guidance for both sighted and non-sighted participants in a mediation involving a party who is blind.

In "Elections for the Romanian Mediation Council", against the backdrop of a description of the current mediation climate in Romania, Constantin-Adi Gavrila explains key changes to the Romanian Mediation Council. In particular, Constantin-Adi identifies differences between the legal framework of the Mediation Council when it was established in 2006 and its current form and explains the issues brought about by these changes. Constantin-Adi urges both the Council and mediators to explore important questions on the representation and regulation of mediators and the broader issue of the promotion of mediation.

In "An implied ground for refusal to enforce iMSAs under the Singapore Convention on Mediation: the effect of Article 6", Shou Yu Chong and Nadja Alexander draw upon a hypothetical situation to explain that an implied ground for refusal of enforcement of international mediated settlement agreements could be read into Article 6 (which addresses parallel enforcement proceedings) of the Singapore Convention. They explain that this would be an implied defence founded upon the fact that the international mediated settlement agreement sought to be enforced has already been refused enforcement by the courts of another signatory State.

In "How can we sell the mediation product if we haven't worked out what it is?", Greg Rooney continues the conversation started by Michael Leathes' earlier post on field-research on mediation and Rick Weiler's response by exploring two questions, namely:

- whether, with enough real-world research, mediation can be neatly presented as 'a discrete valuable product', and
- why people and organisations do not embrace mediation.

In addressing these questions, Greg draws on Newtonian physics and complexity theory to challenge a structured rules approach which emphasises efficiency and outcomes and inhibits variation and diversity.

In "Optimism in mediation: Part 1 – The captain goes down with the ship", inspired by recent conversations at the ICC Mediation Competition, Martin Svatos explains the indispensability of optimism in mediation. In particular, Martin identifies the reasons why one must be optimistic to be a good and efficient mediator, including the important reason that the mediators' faith and confidence in the mediation process will transfer across to the parties. In the second post in this series, Martin will identify ways in which optimism can be maintained and enhanced in mediation.

In "Mediation lessons from the cases – Part 2", Alan Limbury considers the case of *Tapoohi v Lewenberg & Ors (No 2)* [2003] VSC 410, in which the Supreme Court of Victoria, Australia, considered it arguable that a mediator owes a duty of care to the disputants. Following a detailed summary of the case, Alan identifies lessons for mediators, including that mediators use a formal Mediation Agreement under which they can expressly exclude liability to the parties. Alan also notes how this case illustrates the dangers of the mediator drafting the settlement agreement. He adds that the mediator can usefully hover behind those writing the settlement agreement, occasionally suggesting some language or the need to address a topic, but not in a way that could be understood as telling them what to do.

In "Changing the world? An inspiring encounter at the ICC International Commercial Mediation Competition", Greg Bond describes how, at a new event at the ICC mediation competition– an intergenerational round table involving workshops for student and professional participants together – the following question was asked: "How do you, as young mediators, wish to change the world?" Greg shares a number of the "magical" answers from young mediators, adding that it was inspiring to hear how this group of young people saw mediation and their role in it as a purposeful contribution to society as a whole and not primarily as a professional skill in a future career in the legal profession.

In "Pause and effect", drawing on his recent involvement in the ICC Mediation Competition, Ian Macduff comments on observations made about timing and pauses in communication. In particular, Ian describes that what worked, for emphasis, coherence, comprehension, changes in

tone, were those pauses between fragments of spoken paragraphs. Ian explains how in mediation, as in conversation, the value of the pauses can be at least a moment for one's conversational partner to catch up. They can also offer a moment for the speaker, to gather his/her thoughts, reflect on the choice of words, and provide a verbal underlining of what has just been said.

In "Never give up: perseverance in mediation – and life?", John Sturrock explores a familiar theme for mediators and for lawyers acting for clients in mediation: perseverance. Drawing on his experience in recent mediations, John identifies a number of key observations regarding perseverance, including to name just a couple:

- your job (as lawyer/mediator) is to challenge assumptions and keep looking for new angles and ways to see thing; and
- that involves the classic techniques of really good questioning, really keen listening, reframing the words/topics, getting under the surface (again and again), changing the environment and/or the participants, constantly benchmarking against the alternatives, teasing out the various options however obscure.

(To be continued…)

This entry was posted on Saturday, April 6th, 2019 at 12:00 pm and is filed under Kluwer Mediation Blog, Mediation, Negotiation, Singapore Convention on Mediation
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