

Kluwer Mediation Blog - August and September Digest

Kluwer Arbitration Blog

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*"Yet for me the same nagging question continued: what are our values? Conflict seems to touch people at the deepest levels: it brings into play 'their judgement of what is valuable or important in life.' Yet the values of the mediator seem to be invisible." Charlie Irvine in *Mediation's Values: Still searching*.*

August and September offered the usual, rich variety of posts on the Kluwer Mediation Blog, including posts on key legislative developments, cases and conflict resolution programmes. There are, for example, posts on the Singapore Mediation Convention, the recently enacted mediation law of Georgia and the recent changes to the mediation law of Romania. There are also posts on an early intervention programme in Victoria, Australia, on online dispute resolution initiatives in Brazil, and on the role of empathy and values in mediation practice. You'll find below a brief summary of, and link to, each post published on the blog in August and September. We hope you find these helpful.

In *How in tune is your mind?*, Charlie Woods explores the role of cognitive biases in decision-making, and in particular the role played by fear and insecurity in shaping how we think. Charlie identifies ways in which mediation can help to engage more considered thought processes alongside our more unconscious responses. One

such technique identified by Charlie is the simple act of writing things down.

In *It's done: The Singapore Convention on Mediation*, Nadja Alexander shares some of the highlights from the signing ceremony of the Singapore Mediation Convention. Nadja's post includes a list of the 46 states that signed the convention at the signing ceremony and the details of the orchid named after the convention.

In *Mediation's Values: Still searching*, Charlie Irvine explores the role of values in mediation. Drawing on his earlier masters dissertation, Charlie shares what for him has continued to be a nagging question: What are our values? Charlie identifies that while conflict seems to touch people at the deepest levels, bringing into play their judgment of what is valuable or important in life, the values of the mediator seem to be invisible. Charlie uses an anecdote from his own practice as a mediator to illustrate the consequences of values questions for mediators, where clear choices about practice depend on the relative stress given to empowerment or fairness. Charlie notes that his experience as a mediator so far has led him to conclude that values questions are equally if not more significant than matters of technique.

In *The Mediation Agreement is Enforceable Title in Romania too, if Signed by Parties' Lawyers*, Constantin-Adi Gavrilă explains the recent changes to the Romanian Mediation Law which provide, among many other new provisions, that mediation agreements will be enforceable title in Romania if signed by the parties' lawyers. Constantin-Adi notes that this development was inspired by the Italian model. He also identifies that collaboration between the mediation profession, the legal profession and the government will be essential for the successful implementation of this policy.

In *The Magic of Empathy*, Alan Limbury emphasises the crucial role that empathy plays in the repertoire of mediators. Alan shares his insight from his post-mediation debriefs that sometimes the only way disputants can agree to end their dispute

and live with the outcome is when each perceives the mediator to have been empathetic, even if the other party was not. Alan also shares tools used by mediation teachers to build a heightened awareness of empathy and its special role. Alan emphasises the delicate balance required to manage the tension between the display of empathy and the appearance of neutrality in an environment where parties can seek to transform a mediator's empathetic behaviour into a role as their advocate.

In *A Blind Spot? - Conflict for Holy Beings*, Greg Bond draws on a poem by the Native American writer Joy Harjo, titled "Conflict Resolution for Holy Beings" to highlight the blind spot in the rational approach to mediation, with its clearly defined phases and elements. Greg considers whether parties might need a less rational path than that which tends to be found in the Western model of conflict resolution, and refers to the story told by Emma Lee in Rosemary Howell's recent post about how the indigenous people of Tasmania worked on conflict. Drawing on Emma's story, Greg asks which "old songs and old ways" are open to mediators from Western Europe.

In *What Gives You Hope?*, Ian Macduff invites mediators to consider what is it, in their work and experience in responding to conflicts, that gives them hope. Ian notes that in thinking about this core question, there are parallels both with the role of individual mediators who deal with conflicts on a daily basis, and with the hopes for mediation generally. In response to this question, Ian shares his own "starter kit" list which includes the terrific young people whom he has had the privilege to meet in classes, at the ICC's mediation competition and elsewhere, who have discovered for themselves the power of mediation.

In *What's the Point?*, John Sturrock draws on the work of Daniel Klein and Victor Frankl to pose the following challenging and important questions for mediators: What is our purpose? Our cause? Our why? How do we define "success"? How do we find what we are looking for? John concludes by offering guidance by his fellow Kluwer blog writer Charlie Woods, which includes his description of mediators being guerrilla gardeners, sowing seeds and not knowing where or what might

bear fruit.

In *Mistakes Were Made*, Rick Weiler shares the recent decision of the Ontario Supreme Court in *Kearns v Canadian Tire Corporation Limited*, 2019 ONSC 4946 (CanLII) which reminds mediators and lawyers that settlement agreements are contracts like any others and will not easily be set aside. Rick notes that this case is important to lawyers and mediators as it highlights the need for meticulous preparation by lawyers prior to mediation including double-checking the facts upon which positions are based. Rick draws on the case to also propose an interesting hypothetical ethical issue for mediators.

In *The New Virtual Doors at the "Multidoor Courthouse"*, Andrea Maia shares some of the topics that she will address, together with her colleague, Daniel Becker, in the 2019 International ODR Forum to be held on 23-30 October in Williamsburg, Virginia, USA. In particular, Andrea identifies a number of Brazilian ODR initiatives regarding consumer relations that are being offered by public and private entities. Andrea also refers to a recent case in Brazil in which a judge ruled that a consumer who had brought legal proceedings against a bank had no standing because he had not attempted an alternative dispute resolution prior to commencing legal proceedings.

In *A Neuro-Linguist's Toolbox - Self-Care and Improvement: Preliminary Thoughts*, as part of an ongoing series of posts focused on using Neuro-Linguistic Programming (NLP) in amicable dispute resolution, Joel Lee identifies the importance of self-care and improvement for mediators. Joel identifies ways in which mediators can achieve self-care and how NLP can help. In particular, Joel explains how according to NLP, physiology, state and representation (all of which are explained in Joel's post) interact systemically. According to NLP, by changing one of these aspects, we can change the experience.

In *Singapore Convention Series - Strategies of China, Japan, Korea and Russia*,

Olivia Sommerville shares the opinions and analysis of speakers at the 3rd Asia Pacific Conference “Singapore Mediation Convention: Strategies of China, Japan, Korea and Russia” held on 2 August 2019 in Seoul. Olivia’s post summarises how the Singapore Convention is perceived by countries in the Asia Pacific region, indicating how the convention may affect existing legal practices for international commercial mediation. Olivia focuses on the perspectives of China and Korea, who have signed the Singapore Convention, and Japan and Russia, who have yet to sign.

In Presumptive Mediation, Rafal Morek describes the system of presumptive mediation which will be adopted by the state courts in New York by the end of the year. Rafal explains that presumptive mediation is an automatic, pre-trial, state-wide programme of court-sponsored alternative dispute resolution. Rafal identifies similar existing programmes at state courts in the US and notes the differences between those programmes and the new presumptive mediation system.

In Early Intervention – An Encouraging Case Study, Rosemary Howell highlights the importance of early intervention processes which precede mediation, particularly in the workplace environment, and which are not getting the same enthusiastic press as mediation. Rosemary identifies the key features of an evolving programme by the Department of Health & Human Services in Victoria, Australia, which serves as a useful case study on early intervention. The programme provides employees with a pathway to resolve matters involving inappropriate behaviour and conflict as an alternative to the usual formal departmental processes. Rosemary identifies the important lessons which can be learnt from this programme, including its recognition that there is a relationship between human wellbeing and an ability to deal well with differences.

In On Perception, Everyday Aggression and Dialogue, Greg Bond uses two recent everyday experiences to highlight how perceptions of the same event can differ so greatly and the importance of dialogue. Greg notes how politics in Germany and in Europe are becoming more and more divisive, with some saying that we need to

regain our abilities to listen to each other and to engage in dialogue. Greg also identifies how he has resolved to de-escalate everyday aggression and conflict.

In *We Have the Law! We Signed the Convention! What's Next*, Sophie Tkemaladze identifies two key developments for mediation in Georgia: the adoption of the Law of Georgia on Mediation on 18 September 2019; and signature by Georgia of the Singapore Mediation Convention on 7th August 2019. Sophie shares the reasons why these events are important and explains the main features of Georgia's new law on mediation. Sophie also lists a number of recommendations in order to build upon these key developments.