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Mediation: The new normal?

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26. Mediation: The new normal?

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"Our trust in the future has lost its innocence. We know now that anything can happen from one minute to the next. Politics, religion, economics, and the institutions of family and community all have become abruptly unsure."

Irish poet and philosopher, John O'Donohue[730]

Imagine

Imagine a tightrope walker, walking along a tightrope, holding a long, light rod. To help her balance, the performing artist continually moves the rod, changing the angle of the rod to maintain a constant – her balance in space. If she were to hold the rod in a fixed position, what would happen? She would fall off. In other words, the variation of the rod has the function of maintaining the deeper continuity which enables the artist to make it to the other end, alive. In this essay, the tightrope walker offers a metaphor for dispute resolution systems. In order for a dispute resolution system to survive, it needs to be agile and adapt to changing circumstances; to evolve – just like a tightrope walker.

COVID-19 and conflict

In the year 2020, as the COVID-19 pandemic brings the world to a near standstill, the moving imagery of the tightrope walker is more compelling than ever. Caught in this ongoing moment of uncertainty, we are being asked to reimagine many things – how we work, how we socialise, how we travel, and how we live as family units. We are also being asked to reimagine how we manage conflict – from the kitchen table to the boardroom table.

Within families, the impact of the pandemic has been felt in a myriad of ways. Whether it's the pressure of confinement, precipitating disputes, domestic violence and divorce or COVID-linked unemployment causing hardship at home, there are indications of a rise in family-related conflict.[731]

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[730] John O'Donohue, *Divine Beauty: The Invisible Embrace* (Bantam Press, 2003) at p 13.

[731] Amanda Taub, 'A New COVID-19 Crisis: Domestic Abuse Rises Worldwide' (*The New York Times*, 14 April 2020) <https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html> accessed 21 July 2020; Emma Graham-Harrison, Angela Giuffrida, Helena Smith, and Liz Ford, 'Lockdowns around the world bring rise in domestic violence' (*The Guardian*, 28 March 2020)

In commercial and consumer settings, countless arrangements have been disrupted through no fault of either party, from disrupted travel to frustrated joint venture construction contracts. As a result, courts around the world are bracing themselves for a tsunami of legal cases emerging from the pandemic that will consume them in the years, if not decades, to come. For many, this means that timely and affordable access to justice in a court of law will not be a realistic expectation. And yet, the chances for businesses to survive this global economic downturn will depend, in large part, on the timely and commercially sensible resolution of disputes.

No matter how we cling to its deep and firm tradition, we can't help but feel the solid ground of the legal system shift under our feet, to reveal fault lines in the litigation, and to some extent arbitration,[732] landscapes. Emerging through the cracks, however, newer forms of Appropriate Dispute Resolution (ADR) such as mediation are seemingly pandemic-proof. In fact, the future of mediation has never looked rosier.

Mediation 2020: freedom within framework

So what is it about mediation that makes it attractive in these changing and challenging times? To continue the tightrope metaphor, mediation systems offer users the procedural agility and intuitive responsiveness of the moving rod to navigate unprecedented change. At the same time, mediation systems are grounded in robust regulatory frameworks, characterised by solid standards of ethical integrity and professional competence, which keep the parties' feet moving forward on the thin wire that leads to resolution. In other words, there is freedom within framework.

It is precisely this freedom that gives commercial parties the opportunity to rise above their entrenched adversarial positions and engage with their counterparts to address problems in creative ways that:

- can lead to commercially sensible outcomes,
- preserve business relationships, and
- avoid further disruption to business activities, for example through lengthy litigation proceedings.

<https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence> accessed 21 July 2020.

[732] Paul Baker and Naomi Vary, 'International Risk Team: Arbitration in the time of Coronavirus - should Tribunals suspend proceedings?' (*Reynolds Porter Chamberlain LLP*, 22 April 2020) <https://www.rpc.co.uk/perspectives/insurance-and-reinsurance/international-risk-team-arbitration-in-the-time-of-coronavirus-should-tribunals-suspend-proceedings/> accessed 21 July 2020; Chahat Chawla, 'International Arbitration During COVID-19: A Case Counsel's Perspective' (*Kluwer Arbitration Blog*, 4 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/04/international-arbitration-during-COVID-19-a-case-counsels-perspective/?doing_wp_cron=1595311993.3482420444488525390625> accessed 21 July 2020.

Moreover, it is the freedom to design mediation procedures and tailor outcomes to suit unique sets of disputants' needs that has encouraged a diversity of mediation practices that include facilitative, expert advisory, wise counsel, transformative mediation and other approaches. Beyond this, mediation services are increasingly offered online and as a core component of mixed mode dispute resolution procedures such as Arb-Med-Arb.[733] International commercial mediation has been successfully used in a range of sectors including manufacturing, mining, construction, intellectual property, and insurance and reinsurance.

Mediation has come to represent a rich and sophisticated smorgasbord of choice within the ADR field.[734] The diversity of mediation is well illustrated by the Singapore International Mediation Centre ("SIMC") COVID-19 Mediation Protocol issued in June 2020. The Protocol aims to provide businesses with an expedited, economical and effective route to resolve any international commercial dispute during the COVID-19 pandemic period. It is illustrative of a leading mediation service provider reaching out to a severely disrupted market.

Under the Protocol, parties are offered an expedited, economical and effective route to attempt to settle their international commercial dispute during the COVID-19 pandemic period. Multiple variations of the mediation procedure are available. For example, mediation may be offered offline (face-to-face), online or in a blended on- and offline mode; diverse mediation practice models are available depending on the needs and wishes of the parties. Single mediators or mediator teams from around the world may be appointed. Here, online mediation is appealing as it circumvents the challenges posed by global travel restrictions. Mediator appointments are made within 10 days and mediations generally take one day at SIMC. Further, if parties prefer, SIMC can offer a mixed mode Arb-Med-Arb procedure.

Finally, for matters with a Singapore connection, SIMC's COVID-19 protocol neatly complements Singapore's COVID-19 (Temporary Measures) Act. As the Act provides temporary (and not

[733] Examples of this include the SIMC-SIAC Arb-Med-Arb Protocol (see Singapore International Mediation Centre, 'Arb-Med-Arb' <http://simc.com.sg/dispute-resolution/arb-med-arb/> accessed 21 July 2020 and the Singapore Infrastructure Dispute-Management Protocol (see Singapore Mediation Centre website <https://www.mediation.com.sg/our-services/overview-of-services/singapore-infrastructure-dispute-management-protocol/> accessed 21 July 2020.

[734] See Chief Justice Sundaresh Menon, 'Shaping the Future of Dispute Resolution & Improving Access to Justice' (Global Pound Conference Series 2016, Singapore, 17 March 2016) <https://www.supremecourt.gov.sg/Data/Editor/Documents/Global%20Pound%20Conference%20Series%202016,%20Shaping%20the%20Future%20of%20Dispute%20Resolution%20%20Improving%20Access%20to%20Justice.pdf> at [25]: "An ideal system of justice is one that delivers justice that is customised to each type of case, keeping in mind the subject matter, the parties, and the desired outcomes. This is a situation where one size does not always fit all. In this regard, it would perhaps be timely to embrace a paradigm shift and understand 'ADR' as a reference to 'Appropriate Dispute Resolution' instead. This requires us to move away from our traditional and rigid ideas of how disputes should be resolved, towards a flexible and option-laden model where disputants are well-placed to choose the ideal mode of dispute resolution from a suite of options."

permanent) relief from legal action, parties can make best use of the temporary reprieve to mediate a commercial solution that is sustainable for both parties in the longer term. Here the focus is not so much on strict legal rights, but fairness, reasonableness and, as tightrope walkers will tell you, balance.

Mediation is promoted as a flexible process conducive to reaching innovative solutions beyond that which courts and arbitral tribunals can offer. At the same time, this does not mean that it is without structure. Mediation's freedom is offered within a framework. In most cases, international commercial mediation is founded upon flexible and mutually derived contractual arrangements, and can take place on an *ad hoc* or institutional basis.

In terms of institutional frameworks, we have observed the development of institutional capacity for mediation of cross-border disputes since the late twentieth century. Major international arbitration institutions now also offer mediation services[735] and mediation centres, initially focussed on local disputes, have extended their services to include the mediation of cross-border disputes.[736] Of particular note is the establishment of organisations dedicated to the provision of international mediation services, such as the SIMC[737] and the Japan International Mediation Centre-Kyoto.[738] In addition to institutions that offer *commercial mediation* for cross-border disputes, institutions specialising in specific practice areas of international mediation are emerging. Specialisation areas include consumer e-disputes, family, intellectual property ("IP"), investor–State disputes and State-to-State disputes.[739]

The gradual and steady growth of international mediation practice and its institutionalisation has been accompanied by the development of a robust (international) legal framework that gives mediation the legal "teeth" to be able to respond to real, immediate needs.

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[735] See e.g. International Chamber of Commerce Mediation Rules (1 January 2014); London Court of International Arbitration Mediation Rules (1 July 2012); and Permanent Court of Arbitration Optional Conciliation Rules and Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment.

[736] Examples include the Centre for Effective Dispute Resolution in the United Kingdom (see Centre for Effective Dispute Resolution website <https://www.cedr.com> accessed 21 July 2020, Resolution Institute in Australia (see Resolution Institute website <https://www.resolution.institute> accessed 21 July 2020, and JAMS in the United States of America (see JAMS website <https://www.jamsadr.com> accessed 21 July 2020.

[737] See Singapore International Mediation Centre website <www.simc.com.sg> accessed 21 July 2020.

[738] See Japan International Mediation Centre-Kyoto website <https://www.jimc-kyoto.jp> accessed 21 July 2020.

[739] See e.g. for IP disputes: World Intellectual Property Organization Mediation Rules (effective from 1 January 2020), available at <https://www.wipo.int/amc/en/mediation/rules/> accessed 21 July 2020; for investor-State disputes: International Centre for Settlement of Investment Disputes, "Investor-State Mediation" <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx> accessed 21 July 2020; International Bar Association Rules for Investor-State Mediation (4 October 2012) <https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012).pdf> accessed 21 July 2020; for family disputes: European Justice, 'Médiation familiale binationale' <https://e-justice.europa.eu/content_crossborder_family_mediation-387-fr.do> accessed 21 July 2020; for consumer e-disputes: Tyler Technologies website <https://www.tylertech.com/products/Modria> accessed 21 July 2020.

Mediation law regulates various aspects of mediation including the procedure itself and rights and obligations of participants involved in mediation. Further, specific mediation laws can trigger pathways to mediation procedures; some laws also regulate mediator standards of conduct and ethics. By way of illustration, in Singapore, a combination of institutional rules, court practice directions and legislation regulates mediation and mediators. In relation to cross-border disputes, the most notable international developments are the UNCITRAL Model Law on International Commercial Mediation (2018)[740] and the UN Convention on International Settlement Agreements Resulting from Mediation (called the Singapore Convention), which is to be ratified in September 2020).[741] Whereas the Model Law provides a template for jurisdictions to draw from in terms of general regulation of cross-border mediation, the Singapore Convention establishes an expedited enforcement framework for international mediated settlement agreements, binding upon States that ratify it. In other words, the Singapore Convention is mediation's equivalent of the New York Convention on Arbitration[742] – which provided the catalyst that has led arbitration to become the procedure of choice for international commercial dispute resolution.[743]

Mediation's promise of freedom with framework sounds appealing. But what do the users say?

What the users say

Courts, mediation institutions and individual mediators boast varying settlement rates of between 75% and more than 90%.[744] These statistics certainly make mediation an attractive option but they don't tell the whole story. Let us delve a little more deeply into what users say about the

[740] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (UN Doc A/73/17)', available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf> accessed 21 July 2020.

[741] United Nations Convention on International Settlement Agreements Resulting from Mediation (20 December 2018); see United Nations Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed 21 July 2020.

[742] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (10 June 1958).

[743] Nadja Alexander, Vakhtang Giorgadze and Allison Goh, 'International Dispute Resolution Survey: 2020 Final Report' ("SIDRA Survey") (3 July 2020) <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html> at p 6, Exhibit 4.1.2.

[744] See e.g. Mediate with George website <http://www.mediatewith.me> accessed 21 July 2020; Singapore International Mediation Centre, 'SIMC Announces Appointment of New CEO, and Board Member' (1 May 2018) <http://simc.com.sg/blog/2018/05/01/simc-announces-appointment-new-ceo-board-member/> (accessed 21 July 2020); Gary Shaffer, "Court Annexed Mediation By The Numbers" (2018) <https://nysba.org/NYSBA/Coursebooks/Spring%202018%20CLE%20Coursebooks/The%20Litigative%20DNA/III.F.%20Gary%20Shaffer%20-%20Court%20Annexed%20Mediation%20by%20the%20Numbers.pdf> at pp 16, 25–26; Singapore Law Watch 'Mediation' <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation> accessed 21 July 2020; Annie de Roo and Rob Jagtenberg, 'Mediation in the Netherlands: Past – Present – Future' (2020) 6.4 *Electronic Journal of Comparative Law* <https://www.ejcl.org/64/art64-8.html> accessed 21 July 2020; CEDR Asia Pacific, "Mediation FAQs" <http://www.cedr-asia-pacific.com/cedr/mediator/faq.php> accessed 21 July 2020.

attractiveness of mediation as a dispute resolution procedure. A recent international survey has captured the experiences of client and legal users[745] from common and civil law jurisdictions in relation to a range of cross-border dispute resolution mechanisms including mediation. The highlights from the SIDRA Survey 2020 relevant to mediation are set out below.

Factors in choice of mediation and satisfaction levels

The SIDRA Survey shows high satisfaction rates with mediation for the resolution of cross-border disputes. In selecting mediation, client and legal users indicated the following factors as important in their choice of mediation:[746]

- impartiality/neutrality (86%)
- speed (85%)
- confidentiality (83%)
- flexibility of processes (82%)
- cost (81%)
- flexibility in choice of institutions/venues/mediators (77%)
- clarity in rules and procedures (76%).

Overall users were satisfied with their mediation experience in terms of these factors -- client users slightly more so than legal users, with 72% to 80% of client users indicating high levels of satisfaction, depending on the specific factor.[747]

Mediator selection

In terms of selection of mediators, the Survey results highlight the importance of trust-worthy neutrals with cultural familiarity.[748] Add to this the importance users attached to impartiality, flexibility and speed in terms of mediation procedure[749] and we observe the appeal of the 'freedom' that mediation offers.

[745] As defined in the SIDRA Survey client users refer to corporate decision-makers and in-house counsel, whereas legal users refer to legal practitioners external to the client: see SIDRA Survey (n 743) at p 1.
[746] ibid at p 46, Exhibit 7.1.1.
[747] ibid at p 46, Exhibit 7.1.4.
[748] ibid at p 56, Exhibit 7.3.1.
[749] ibid at p 46, Exhibit 7.1.1.

Mediation compared to arbitration and litigation

From a comparative perspective, the SIDRA Survey indicates that mediation enjoys higher satisfaction in relation to speed and cost (68% of users were satisfied with the speed of mediation and 65% with its cost) as compared to litigation (speed 45%; cost 48%) and arbitration (speed 30%; cost 25%).[750] If we drill down further and distinguish between client and legal users, we find that 72% of client users indicated being 'very satisfied' or 'somewhat satisfied' with costs in mediation.[751] Mediation is by far the leading choice of dispute resolution in respect of speed and costs, especially for client users.

Mediation in mixed mode or hybrid procedures

It is noteworthy that users of mediation rated finality and enforceability as the two least important factors when selecting mediation. This reflects users' awareness of the opportunities and risks of mediation in international settings. Despite the extremely high settlement rates, [752] mediation does not always offer finality as there is a small chance that parties will not reach a settlement; by comparison, arbitration and litigation will result in an award or a judgment, although these may be subject to appeal. Further, the relatively small number of instances of litigation about mediated settlement agreements, suggest that in most instances, parties stick to their deals and legal enforcement is not an issue. Nevertheless, in a small number of cases, a party may seek to enforce a mediated settlement agreement or invoke it as a defence to arbitration or litigation proceedings.[753] The survey findings suggest that where users think there is a reasonable chance of settlement and that the risk of non-compliance is low, they are more likely to favour mediation for the host of reasons listed previously. Where concerns exist about finality and/or enforceability of outcomes, we see users turning to mixed-mode (also known as hybrid) procedures with mediation and arbitration components. For users, mixed-mode procedures promise the best of all worlds – finality, expedited enforceability and preservation of business relationships.[754] With the Singapore Convention on Mediation coming into force in late 2020, the flexible procedure of stand-alone mediation procedures will take place within a more robust international framework that parallels that of arbitration. In the years to come, this may reduce the current appeal of mixed mode procedures.

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[750] ibid at p 10, Exhibit 4.2.2.
[751] ibid at p 11, Exhibit 4.2.3.
[752] ibid.
[753] James Coben and Peter Thompson, 'Disputing Irony: A Systematic Look at Litigation About Mediation' (2006) 11 Harvard Negotiation Law Review 43; Eunice Chua, 'Enforcement of International Mediated Settlements without the Singapore Convention on Mediation' (2019) 31 SAcLJ 572 at pp 572–574; Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Martinus Nijhoff Publisher, 2008).
[754] SIDRA Survey (n 743) at pp 73–74.

Technology

As social distancing has become a standard way of living and doing business with the global pandemic, platforms for the conduct of virtual/online hearings have the potential to become the 'new normal' for conducting mediation sessions. How do users relate to technology in mediation?

Almost half (48%) of client users (compared to 28% of legal users) rated platforms for the conduct of virtual/online hearings as 'extremely useful' or 'useful'. There was an almost identical finding as regards e-discovery/due diligence. By availing themselves of virtual platforms, client users are able to participate in meetings and mediation sessions online with minimal disruption to their schedules and business. Similar results were reported in relation to negotiation support and automated negotiation tools,[755]and analytics for appointment of mediator and/or counsel.[756] These findings suggest that client users are ahead of legal users in recognizing the usefulness of technology in mediation, showcasing progressive thinking on the part of client users. With increased usage and familiarity of technology-aided mediation tools and platforms, we expect this trend to continue.

The findings present an opportunity for legal users to consider greater use of technology in mediation in order to address client expectations on the same.

Lawyers and mediation

As the previous discussion on technology suggests, there are opportunities for lawyers to adapt their dispute resolution practices to survive the pandemic, and thrive in the long term. Technology aside, another opportunity for the legal profession is the new specialisation of mediation advocacy.

Mediation advocacy skills encompass expertise in advising clients on when mediation may be appropriate or even required; they extend to competency in drafting mediation clauses, mediation agreements and mediated settlement agreements in line with the latest developments in (international) mediation law. Mediation advocacy also refers to the role lawyers play during mediation sessions – a role that can be as diverse as the approaches to mediation itself. In short, lawyers have a vital role to play as advocates in mediation procedures; a role which demands a fundamentally different – yet complementary – skill set compared to traditional trial advocacy. Mediation advocacy involves a multi-dimensional paradigm shift for trial lawyers, from:

[755] ibid at p 59, Exhibit 7.4.2.
[756] ibid.

- the adversarial to the collaborative;
- win-lose to win-win;
- a past focus to a future focus;
- a focus on lawyers in trial procedures to a focus on parties in mediation procedures; and
- the need to convince a third-party umpire to the need to reach a consensus with the other side in relation to the resolution of the dispute.

Further, mediation offers lawyers an opportunity to reimagine how they manage their clients' disputes as part of a resilient pandemic-proof business plan. There is an old lawyers' joke that ADR does not stand for Appropriate Dispute Resolution but rather Alarming Drop in Revenue. For the record, there is no empirical research to support this assertion. Rather, research indicates that in the current economic climate, organisations that are more likely to weather unexpected large-scale storms, such as COVID-19, feature excess resources, a diversified business portfolio and a loose coupling of the components of the overall system – factors often present in family businesses.[757] When it's business as usual, these factors can be signs of inefficiency – conventional wisdom would suggest that excess resources be trimmed and that systems should be streamlined and optimised. However, as researchers Nirmalya Kumar and Phanish Puranam convincingly argue, "The lesson is that systems composed of weakly coupled parts can take unexpected hits to some parts without the whole system crashing." How does this relate to mediation and law firms? For clients, mediation makes business sense. For lawyers, it can mean business diversification, placing long-term goals over short-term profits and investing in their legal team to skill them up for mediation advocacy in addition to trial and arbitration advocacy.

Mediation – the new normal?

In John O'Donohue's poetic and prophetic words, written more than a decade ago, there is a sense that every aspect of our lives has become 'abruptly unsure'. It applies equally to disrupted supply chains as to the application of legal principles to situations previously not contemplated. To deal with the impact of disrupted food supply chains and ongoing movement restrictions, many of us have begun generating our own solutions from home cooking to growing our own herbs and vegetables. In a similar way, mediation allows us to reclaim ownership of our own conflicts and to generate our own socially and commercially sensible solutions to manage them.

[757] Nirmalya Kumar and Phanish Puranam, 'The resilience of family-controlled business groups: 'Survival of the unfit?'' (*The Edge Singapore*, 9 July 2020) <https://www.theedgesingapore.com/views/family-business/resilience-family-controlled-business-groups-survival-unfit> accessed 21 July 2020.

Mediation is not a panacea – there is always going to be opportunity as well as risk in walking the tightrope. But, right now, mediation, in all its diversity, is the best forum we have to deal with the relational and commercial aspects of conflicts emerging from global and local disruptions we could not have imagined less than one year ago.