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Cultural Confusion — A good thing for mediation?

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Cultural Confusion — a good thing for mediation? (http://mediationblog.kluwerarbitration.com/2017/09/05/cultural-confusion-good-thing-mediation/)

Nadja Alexander (Editor) (http://mediationblog.kluwerarbitration.com/author/nadja-alexander/) (**Singapore International Dispute Resolution Academy (http://www.sidra.academy)**) / **September 5, 2017 (http://mediationblog.kluwerarbitration.com/2017/09/05/cultural-confusion-good-thing-mediation/)** / **1 Comment (http://mediationblog.kluwerarbitration.com/2017/09/05/cultural-confusion-good-thing-mediation/#comments)**

Greg Bond's recent post on **mediation cultures (http://kluwermediationblog.com/2017/05/24/mediation-cultures-relative-examples-mediator-lawyers-caucus-joint-session/)** reminded me of an encounter I had with a group of mediators several years ago. Allow me to share with you my recollection of what happened.

I was conducting a workshop on international and intercultural approaches to mediation for 15 freshly-minted mediators from a European country — all participants were nationally accredited and had completed more than 350 hours of training and assessment. As part of the first day I played a DVD of a real mediation conducted by a people's mediator in Guangzhou, Guangdong Province, China. The dispute involved a wife who wanted to separate from her husband; they had one child. After the first few minutes of the video, there were mutterings in the room; after 15 minutes, there were incredulous gasps and stifled giggles. At this point, I decided to pause the film and get feedback from the group. Unanimously they concluded that I must be playing some kind of trick on them and that this could not possibly represent a mediation process. They provided a host of reasons, beginning with the fact that the mediator, after hearing about the dispute, sought out the parties herself, suggested mediation, and then, on her own initiative, invited the parties' parents and work supervisors to the first joint session. Despite my best endeavours to convince them of the legitimacy of the film, the mediators remained adamant: this was not mediation.

Gosh, I thought, what will we tell the Chinese? They've been doing this process for quite a while, some people say for thousands of years. And now we want to tell them that this is not mediation?

Yes, these debates have been going on for some time and no, they show no signs of abating soon. This cultural confusion, I am reassured by Nora Bateson (2016), "is the healthy recognition that there is more than one way to think about something." For previous discussions on this blog see posts by **Adi Gavrila (http://kluwermediationblog.com/2017/05/24/mediation-cultures-relative-examples-mediator-lawyers-caucus-joint-session/)**, **Geoff Sharp (http://kluwermediationblog.com/2012/10/01/biased-is-better-and-impartiality-is-in/)** and **yours truly (http://kluwermediationblog.com/2012/10/06/towards-a-greater-global-understanding-of-what-mediators-do/)**.

The mediation field to date has been defined by its inward-focused debates about what is (and what is not) mediation. Much of this debate has centred around the so-called facilitative—evaluative dichotomy and whether "mediators" who engage in directive or advisory behaviour are really mediators at all.

However there is a emerging development in policy and practice that recognises the real diversity of mediation practice. The International Mediation Institute's world-wide mediator certification scheme expressly recognises that mediators approach their craft in different ways and are informed, at least to some extent, by different values. In Australia, the National Mediator Standards are based on a facilitative mediation model, while at the same time recognising diversity in practice as blended processes. In Asia jurisdictions such as Singapore and Hong Kong are beginning to question the cultural suitability of western facilitative mediation as they seek to introduce diverse mediation models through education and policy initiatives. For example, in Singapore training by **SIDRA (http://www.sidra.academy)** in diverse mediation models including culturally fluent Asian approaches to mediation can lead to nationally recognised accreditation by **SIMI (http://www.simi.org.sg)**. In Hong Kong the use of **evaluative approaches (http://www.info.gov.hk/gia/general/201505/23/P201505230570.htm)**to mediation such as expert advisory mediation and wise counsel mediation have been expressly promoted by the Government in particular in relation to intellectual property disputes. In the United States we hear about the **„Californication" of mediation (http://kluwermediationblog.com/2014/12/10/the-californication-of-mediation/)** — the almost exclusive use of private sessions or caucus in mediation and the tendency to dispense with pre-mediation meetings and even opening statements by the parties.

As this trend continues, the boundaries between mediation und other forms of ADR will become fuzzier. While this ambiguity is a legitimate cause of concern in relation to quality assurance and protection of users of mediation services, it also extends the capacity of the professional mediation community to influence dispute resolution practice in general. This means, in time, a larger slice of the (international) dispute resolution pie for mediators.

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Michael Mcilwrath

OCTOBER 11, 2017 AT 11:46 AM (HTTP://MEDIATIONBLOG.KLUWERARBITRATION.COM/2017/09/05/CULTURAL-CONFUSION-GOOD-THING-MEDIATION/#COMMENT-24894)

Nadja, this is a brilliant observation, and one that I can confirm after 18 months of charing the Global Pound Conference. You can imagine the debates that we had over definitions, with input coming from leading practitioners and academics around the world. In fact, we could not even agree on a simple meta-category such as “binding” vs “non-binding”.

In some places mediation is trumpeted as risk-free to parties since it is not “binding” as with litigation and arbitration. In other places it was felt – strongly – that the local practice of mediation was very much regarding as “binding” since the potential outcome is a settlement agreement that binds the parties. For the GPC, we chose to focus instead on consent during the process of resolving disputes, rather than on the outcome. And this is just one example.

But I am not sure whether the global trend is towards acknowledging and practicing more and different forms of mediation, or whether there is (or will be) movement towards consolidation around some of the more prevalent forms. If I had to guess, I’d say that, with respect to commercial disputes, the general trend will be towards fewer forms over time. That’s just how things tend to go in a globalized world where dispute practices are shared, and parties can try ways of resolving disputes that have worked in other locations.

Or maybe I’m wrong, and we’ll see an explosion of local variation in mediation practices instead of global standardization. Given the pace of growth of mediation, it’s too soon to tell. But we can agree it’s an interesting time to be involved in international commercial dispute resolution.

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