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It's a Question of Design: BYO Mediation

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy)/October 10, 2011

They say that you can take the girl out of Australia but that you can't take Australia out of the girl. So as an Australian living in Hong Kong, let me leave the east-meets-west stories for another time and begin with the very Australian concept of BYO.



It's a long established tradition in Australia to bring your own (BYO) wine, beer or other alcoholic beverage to restaurants and these are generally classified either as BYO or licensed. In addition to restaurants, BYO applies to suburban parties, barbecues and other 'cultural' events down under.

In the world of mediation and dispute resolution, BYO has a growing relevance beyond the fact that parties BYO their own conflict – which of course keeps mediators across the globe in business. Here I am talking about a different meaning and application of BYO, namely 'Build Your Own' ... process, of course.

There is a great temptation for mediators to remain within their comfort zones, particularly when regularly mediating a particular category of dispute, whether it be intellectual property, construction or family. 'Comfort zone' mediation involves mediators asking their usual preliminary conference questions and setting standard preparation requirements for parties. The process begins with the mediator's usual opening statement, which, in turn, sets the parameters for the process steps that follow.

Recently I took part in an inter-cultural exchange with fellow mediators facilitated by the International Mediation Institute. Among other things, we talked about what each of us actually does when we conduct a mediation. I was excited and at the same time reassured by the variety of styles and practices. After all, mediation promises flexibility, creativity and the opportunity to tailor dispute resolution to parties' specific needs.

But then, I wondered, how often do we put our minds to customising a mediation and drawing on the richness of practice interventions that exist? How often do we use the time in preliminary meetings to offer parties a chance to BYO mediation?

So ... if you are inspired to invigorate your BYO mediation practice, here are seven ideas that you might find helpful.

1. Invite party and lawyer input into timing, setting, approaches to communication and a range of other process features. This is easily done during preliminary meetings with mediation participants by asking parties about their expectations in relation to various aspects of the process.

2. In relation to a class action or series of related disputes, invite a range of people to participate in mediation design. This approach increases the likelihood that the process will reflect different values and a spectrum of learning and communication styles. Mediation design focus groups can be useful in relation to potential class actions referred to mediation, such as the Lehman Brothers-related Investment Products Dispute in Hong Kong where 200 requests were made for mediation.

3. Use the cultural environment of the parties. What informal mechanisms are in place in the relevant organisations or communities to discuss differences. How might these be usefully incorporated into various stages of the mediation process?

4. Be creative. For example think about integrating internet and computer technology into the process, and about ways of visualising the conflict on whiteboards, flipcharts or computer screens.

5. Provide choice as to time and timing. For example, mediations may be conducted using the single session model where the mediation continues for one or more days, subject to necessary adjournments agreed to by the parties. Alternatively, the multiple session model with regular mediation meetings conducted over a period of weeks or months might prove more suitable. Time variations relate not only to duration, but to the way breaks are handled, and to how those involved think about time.

6. Help parties and other participants develop the capacities needed to participate in mediation meaningfully. When conflicts are complex and protracted, involving multiple parties, it can be useful for everyone involved to share some language and capacities for collaboration. For example, conducting a pre-mediation workshop can be useful to get all parties in the same room talking together in the safety of a training environment.

7. Think about using multiple process tiers such as negotiation, mediation, neutral evaluation and arbitration. Build in mechanisms that allow parties to move both forward and backwards among the multiple process tiers. For example, mediation

may be paused to allow time for unassisted negotiation; alternatively mediation windows can be introduced during arbitration (see Christophe Imhoos' posting on the ICC's new Arbitration Rules).

BYO is an opportunity to inject freshness and passion into your mediations, thereby benefiting conflict-weary mediators as well as parties. It enhances your ability as a mediator to offer clients a tailor-made process with the capacity to generate innovative outcomes.

So, next time you're preparing for a mediation, think about going BYO.