Contemporary Issues in International Arbitration and Mediation

The Fordham Papers

2011

Arthur W. Rovine
Editor

MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2012

Hawking Our Wares in the Marketplace of Values—Sell Quality Not Cost When Promoting Mediation; the Interplay of Global Norms of Justice and Harmony in the Mediation Forum

Simeon H. Baum

I. INTRODUCTION: A TALE OF TWO PANELS—META CONSIDERATIONS EMERGING FROM THE CONFERENCE

One benefit of an event like Fordham's 6th Annual Conference on International Arbitration and Mediation is that it affords participants the occasion to hear experts in the field—those on the panels and those in the more comfortable audience seats—express observations and insights that lead the listeners to further, general reflections on ADR. My presentation for this conference, titled *Attitude, Atmospherics and Techniques in Transforming Impasse into Opportunity* was delivered for the first day's panel: "Mediation: a Functional Approach." The Conference director, Art Rovine, so dubbed our panel to distinguish it from the next day's mediation panel, which focused on variations in mediation across the international spectrum and thus was named: "Mediation: Geography and Institutions."

Our own, earlier panel's focus was on approaches, skills, insights, and techniques in mediation, and process variations, without necessarily making comparative references across nations or cultures. For that panel I drew on an article that I contributed to a recently published book on impasse breaking.[1] This article bore the pithy title: *The Technique of No Technique: A Paean to the Tao-te Ching and Penultimate Word on Breaking Impasse.* This piece—appearing in a compendium of impasse breaking techniques—makes a simple point. When it comes to promoting continued party engagement

[1] Definitive Creative Impasse-Breaking Techniques, Molly Klapper, ed. (New York State Bar Association 2011). http://www.nysba.org/AM/Template.cfm?Section=Shop&template=/Ecommerce/ProductDisplay.cfm&ProductID=5141

and resolution, of far greater effect than any technique or method is the mediator's character, orientation and presence. More particularly, this presence communicates a caring and openhanded connection, a quality of deep listening and flexibility, and the trust and respect that engenders confidence and generates a reciprocal attitude from the parties. It is more important to be freshly and deeply attentive and responsive to what actually presents itself in mediation than to be busy sorting through, and applying tools from, one's bag of impasse breaking tricks.

We will return to the central message of that article and my presentation later in this chapter. For now, we should note that the presentation drew heavily on a 2,500 year old Chinese classic: the *Tao te Ching*. This classic is the most central text of the Taoist tradition, which, along with the Confucian and Buddhist traditions, constitutes one of the three major religious-philosophical traditions of China.

Having disposed of my duties as panelist on day one, I relished the opportunity to hear the geographically oriented panelists speak on day two. Sure enough, a second of these three Chinese traditions was featured in Joseph McLaughlin's remarks. When discussing the viability of mediation as a process for use in China, Joe McLaughlin observed that the Confucian tradition, as one which values harmony in the five relations,[2] has long supported the use of mediation. He made this point in the context of discussing cultural differences, and followed a bit later with a memorable tale from his own experience representing the Chinese government in arbitration. When he reported a legal victory, his client's representative, a Chinese minister, to Joe's surprise described it as a "catastrophe." This victory had caused the counterparty to "lose face," making it much harder to negotiate a compromise through the use of a neutral third party and to do business together in the future. Again, there, a higher value was placed on harmonious relations than on being "right" and victorious.

Another aspect of Joe McLaughlin's remarks caught my attention. Joe began his presentation with the question of how to incentivize parties around the world to enter the mediation process—this was not specifically a geographical question but a universal question to institutions and parties. His response lists the most commonly referenced grounds: savings in time and cost, and reduction of disruption. He adds to the list the results of a

[2] These relationships run between: (1) ruler and subject; (2) father and child; (3) husband and wife; (4) older sibling and younger sibling; and (5) elder and junior friends. Harmony in these relations is supported by cultivating the qualities of: li, propriety; jen, humanity; reciprocity; yi, righteousness; http://faithresource.org/showcase/Confucianism/confucianismoverview.htm, Chan, Wing-tsit, A Source Book in Chinese Philosophy.

recent study which shows that parties are often ineffective at predicting court outcomes. Plaintiffs frequently reject offers in mediation that exceed what they get at trial. Defendants, while less frequently wrong, are on average off by over $1 million to their detriment when they make the error of rejecting an offer and waiting for the trial outcome. Finally, Joe noted that mediation affords parties flexibility in designing resolutions that take into account not only the relative legal risk and cost, but also other factors, like the possibility of an ongoing business relationship. This places a value on party autonomy, as well.

I came away from Joe's remarks mulling over two interrelated reflections. First, what do we risk when we sell ADR, and mediation in particular, by focusing on savings in time and expense? What should be mediation's chief selling point? For me, Joe's mention of flexibility, autonomy and even his cross-cultural insight into the importance of harmony in Chinese culture hold the key. In selling mediation, we can describe what is unique about the mediation process itself—how it affects parties' communication and relationship; how it liberates parties to consider a wide range of needs, interests and realities; its humanistic focus; its possibilities for empowerment, recognition and understanding; its fostering of creative and appropriate resolutions; and its unique capacity to serve as a forum for the integration of the norms of justice and harmony. Quality of the process, rather than quantitative measures of time and expense, is major in selling mediation.

This leads directly to the second reflection. As a forum that fosters effective communication, respect for parties, and the ability to adjust to party needs, sensibilities, values, principles and circumstances, mediation is an ideal setting to bridge cross-cultural misunderstandings. A corollary is that in mediation, as a facilitated negotiation, it is critical to recognize cultural differences that might, if misunderstood, impede the negotiation. Some of a broader set of classic examples are misunderstandings where one culture might communicate directly where another might communicate indirectly; high or low context cultures; cultures which are more assertive or more accommodating or conflict avoiding; hierarchical as opposed to egalitarian cultures; cultures with different boundaries between the public and the private; cultures more or less comfortable with uncertainty; and cultures focused more on long term relationships or on short term transactional outcomes, such as in the Chinese minister example cited by Joe McLaughlin.[3]

[3] Fascinating work on cross cultural differences has been undertaken by Geert Hofstede. Charts by which he compares cultural differences of various countries can be found at: http://www.geert-hofstede.com.

Mediators sensitive to these cross cultural differences can help parties grow in understanding and avoid needless impasse.

It is natural for a regular conference on international ADR to reflect on cross cultural differences and on means for bridging cross cultural misunderstanding. This model presumes a pluralistic global community. While pluralism is rightly in vogue, we cannot fail to observe such remarkable growth in global community that, occasionally, a universal human community emerges. As a, perhaps, novel advance in this discussion, we will take a step beyond simply looking to avoid cross cultural misunderstandings in a pluralistic world. Beyond bridging divergent communities, there are times when we can borrow cultural norms or values from different communities to enhance our own—to the benefit of each. One instance can be found in appropriating the harmony norm that Joe identified, which can be found in both Taoist and Confucian traditions, to clarify the nature of mediation and to enhance the quality and function of that process. Thus the second effort in this piece will be to consider mediation as a forum for integrating the norms of harmony and justice.[4]

II. SELLING QUALITY, NOT QUANTITY, IN ADR AT HOME & IN THE INTERNATIONAL MARKET

The use of alternative dispute resolution processes continues to rise both within the United States and on the international scene. As cross border transactions increase, there is a growing desire to find dispute resolution forums that offer no "home court" advantage. Arbitration and mediation provide an answer to this need. The New York State Bar, for example, has recognized the importance of ADR to international business transactions through the work

[4] For roughly 20 years, I have seen mediation as a unique forum with the extraordinary capability of integrating the norms of justice and harmony. Apparently, I am not alone. Approaching the end of this paper, I found a far more detailed exposition of this theme in the work of Omid Safa, In Search Of Harmony: The Alternative Dispute Resolution Traditions Of Talmudic, Islamic, And Chinese Law (December 2, 2008), http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/Safacomparativelawpaper.doc. *See, also*, A. Berner, "Divorce Mediation: Gentle Alternative to a Bitter Process", in *Jewish Law Articles*, > www.jlaw.com/Articles/berner.html (visited 12 March 2000), suggesting that the search for peace and harmony is given paramount importance by of the same traditions whose prophets have trumpeted the call for justice. *See, also*, Berner's unpublished, "Pshara: The law of Compromise & Justice in Jewish Jurisprudence."

of a Task Force in which Joe McLaughlin played a significant role.[5] Further evidencing the recognition of the importance of arbitration on domestic and international fronts, the NYSBA Dispute Resolution Section has issued protocols for discovery in domestic commercial arbitration and for international arbitration.[6]

As ADR use spreads, providers and enthusiasts, including counsel who would introduce the idea of mediation to their clients or adversaries, continue to refine their sales pitch. For years, savings in time and cost have been major selling points for mediation, and not without good cause. There is little doubt that cases can be brought to resolution in mediation in far less time and for much lower cost than would be incurred were the case to continue down the litigation track. Despite this intuitively plain observation, years ago, the RAND Corporation issued a report concerning mediation in Federal District Court pilot programs, stating that there was no statistically significant evidence that mediation saved parties time and cost.[7] This caused quite a stir in ADR circles. Closer analysis of that report revealed that emphasis needed to be placed on the concept of "statistical significance"; RANDs data was just too thin. The available data did show, in the limited cases studied, savings of time and cost, after all.[8] Subsequent studies and the wealth of

[5] *See*, Final Report of the New York State Bar Association's Task Force on New York Law in International Matters, with accompanying brochure "Why Choose New York For International Arbitration?" June 25, 2011, http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentFileID=53613. The Report offers reasons to adopt New York law in international transactions, and to feel comfortable resorting to New York courts. Nevertheless, the Report stresses advantages that can be found in using ADR processes as well. It annexes a brochure on international arbitration (beginning at page 85), and also contains a section stressing the importance of mediation as an alternative to both arbitration and litigation. *See, id., at* page 34.

[6] In 2009, while I was Chair of NYSBA's Dispute Resolution Section, a task force led by Carroll Neesemann, John Wilkinson and Sherman Kahn published a Report on Arbitration Discovery in Domestic Commercial Cases. *See*, http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf. That report addressed proposes a balance between the extremes of excessive and insufficient discovery aided by a list of factors to be considered by arbitrators in making discovery decisions. The following year, NYSBA's Dispute Resolution Section prepared a set of Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration. *See*, http://www.nysba.org/Content/NavigationMenu42/November62010HouseofDelegatesMeetingAgendaItems/internationalguidelines.pdf.

[7] RAND, "An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act" (1996) (the "RAND ADR Report").

[8] *See* observations of *Report of New York County Lawyers Association Committee on Arbitration and ADR Comment on ADR Program Implemented Pursuant*

experience with mediation over the years show that mediation does save parties time and cost.[9]

One factor that emerged from the early RAND Report was that, apart from benefits of time and cost, the vast majority of parties and counsel who used mediation were satisfied with the process. Satisfaction studies begin approaching the most significant features of mediation—that there are process differences that create a different quality of experience for participants in this form of dispute resolution. It is important that mediation experts, attorneys, in-house counsel, and corporate representatives responsible for the creation or choice of dispute resolution mechanisms keep their focus on this qualitative benefit of mediation. Beyond quality of the process, flexibility of results and attendant control of the dispute resolution outcome is also a key, related selling point.

Apart from RAND type challenges on time and cost, which have generally fallen by the wayside, one reason to stay focused on qualitative benefits is the consequence of quality or value-based critiques. To argue primarily in terms of time and cost can lead purists and persons of integrity to conclude that they are willing to wait and pay the price for the "right" result. These users might believe that they should reject mediation as a poor substitute for justice; a lazy, pusillanimous short cut; and avoidance of cost, delay, risk, and difficulty that persons, or companies, of integrity would face. The argument continues that we need legal outcomes to build the great society; to enhance long term utopian goals of progressive development of social good. If, as a society, we are to send a message to future disputants that certain rules must be obeyed, then short term losses—in the form of cost, delay, risk and disruption in connection with a particular case—must be shouldered by today's disputants for the benefit of future humanity.

In short, the preceding critique puts the norm, value and ideal of justice front and center. We will turn later to examine the role of justice in mediation and to consider the degree to which individualized justice, as well as positive societal impact, is furthered by that process. We will address that in the context of a discussion of mediation as a forum in which we can integrate the norms of justice and harmony. At this point, it bears noting that a focus

to Civil Justice Reform Act of 1990 In the United States District Court for the Eastern District of New York, as sent to the ADR Advisory Group to the United States District Court for the Eastern District of New York, (September 22, 1997), http://www.mediators.com/adr-com.html.

[9] *See, e.g.*, Report to the Judicial Conference Committee on Court Administration and Case Management, entitled "*A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990*," by The Federal Judicial Center, (January 24, 1997).

on quality of the mediation process and the benefits it offers in controlling and fashioning an appropriate outcome does not generate the same offended reaction as do arguments about time, cost, and disruption. This does not, of course, negate the additional efficiency values of saving time, limiting cost, and reducing disruption through mediation.

III. QUALITATIVE ADVANTAGES FOSTERED BY THE MEDIATION PROCESS

Listed and developed below are aspects of the mediation process which provide qualitative advantages over dispute resolution approaches found in litigation and arbitration.

Depth and Range

Mediation has been variously defined. A centrist view is that mediation is a negotiation or dialogue facilitated by a neutral third party. Many things can happen, emerge, and be addressed in a negotiation or dialogue. The wide range of human valences addressed in mediation is part of what makes this so rich and rewarding a process. We go far beyond assessment of legal issues and can span the range from intimate personal disclosures, to business considerations and financial constraints, social pressures, hierarchical concerns and personal, philosophical, cultural or even religious values. A skilled mediator can facilitate discussion in a manner appropriate to each. Empathetic, compassionate listening appears for emotions. Appreciative inquiry applies to values, experiences and perceptions. Creative wonder fosters brainstorming. Reflective questioning and analytic clarity can develop legal alternatives; including risk and transaction cost analysis. Thoughtful encouragement, practical engagement, and creative testing of possibilities foster business discussions. Humor, tact, clarity, and sensitivity keep discussions moving between the parties and overcome snags, awkwardness and entanglements. The ability to have these various human dimensions handled in a way that is appropriate for each is a vital selling point of mediation.

Freedom

Mediation, as Joe McLaughlin pointed out, has some universal features. It is an expression of party freedom. Parties, not counsel, court, jury, or arbitrators,

make the decisions that affect the mode of their interparty communication as well as the outcome of their negotiation. Freedom is a quality worth selling.

Flexible, Free, Creative, Appropriate Resolutions (Individualized Justice)

A corollary to this freedom is the nature and form of the parties' resolution. Parties can fashion agreements that work best for their needs, independent from legal considerations. They can do business deals that a court could never invent. They can issue apologies which a court can never force. They can preserve, restore, and even enhance relationships in ways beyond the capacity of any third party to impose.

Acknowledging Actual Circumstances

Mediation can take into consideration the entirety of parties' circumstances and look to develop a negotiation process and resolution that is sensitive to and works for these circumstances. These are wonderful qualities of mediation, well worth touting.

Process Control, Flexibility and Responsiveness

Unlike trial, mediation is a process which is designed for party control. Mediators check in with the parties, and with counsel, to see whether it makes sense to continue in joint session or in private meetings, known as caucuses. Mediators take cues from parties on what issues they would choose to address. The flexibility and responsiveness of the process, to accommodate the reality, needs, interests, preferences, communication styles, and timing considerations of all participants is yet another selling point worth highlighting.

Fostering Empowerment and Recognition

Mediation theorists identify various quality enhancing features of mediation. The transformative mediation school sees mediation as a process that can focus on the quality of parties' communication, and as a consequence the quality of their relationship. Conflict, itself, is seen as a crisis in relationship. The mediator in this view has the dual purpose of fostering party empowerment, and fostering recognition. Empowerment involves recognizing the wide range