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Bond Dispute Resolution News Volume 2

BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

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Recommended Reading & Websites

J S Hammond, R L Keeney and H Raiffa, *Smart Choices – A Practical Guide to Making Better Decisions* (Boston: Harvard Business School Press, 1999) pp 244.

The dispute resolution movement fluctuates between triumphalist anecdote and dogma, and fragile connection to established forms of learning and wisdom. Helpful connections are found in literature and practice particularly to psychology, communications and cross-cultural studies. A rich field also lies waiting in management, military and business schools in relation to how to make wise decisions.

Mediators, lawyers, psychologists and other skilled helpers are fundamentally assisting people to make wise decisions in the face of conflict and uncertainty. This book, *Smart Choices*, and similar books which follow it, will become standard prescribed texts for lawyers and mediators as mandatory knowledge and skills slowly emerge in university and other dispute resolution courses.

In simple language and using easy-to-follow instructions, the book takes the reader through a series of cognitive steps which are essential to learn and practise in order to reduce the chances of unwise decisions for self or client. Although hindsight is 20/20 vision, this reader was reminded constantly of major organisational, legal and family conflicts which had escalated at least in part because none of these helpful steps were identified or addressed.

These ten steps can be practised like a golf swing. In summary, they are set out in each chapter as:

- **Problem**: How to define the problem (Mediators will hear echoes of the endless practice of reframing and problem defining on whiteboards)
- **Objectives**: How to clarify goals (Good news and bad news – "We've arrived early; but we're lost")

- **Alternatives**: How to create a range of alternatives apart from the usual "your solution" or "my solution"
- **Consequences**: How to set out what are the possible probable consequences of each alternative, and then measure these against your objectives
- **Tradeoffs**: How to pick which alternatives should be prioritised for the time being? (Negotiators will hear echoes of "You can't win everything"; "What can you live with?" "What can you give up for now in order to achieve your top priorities?")
- **Uncertainty**: How to think about and act on uncertainties affecting your decision (This chapter is often missing from mediation and dispute resolution courses)
- **Risk Tolerance**: How to take into account your own and other people's appetite for risk-taking (This is a factor which is blurred in the ubiquitous writing and dogma on "inequality of bargaining power" found in early dispute resolution literature)
- **Linked Decisions**: How to plan ahead for a series of decisions based on collecting information; then deciding
- **Psychological Traps**: How to avoid some of the standard tricks which the mind plays on us all when we are making decisions. (This chapter is mandatory reading for lawyers. We have been taught to believe that psychological truths do not apply to us)

This reader has already used "the system" of **smart choices** to advise clients diagrammatically on litigation decisions, and future career choices.

The book raises many fascinating questions for theorists and practitioners including:

- How can such a structured and rational method be used with a highly emotional client?
- How can the anecdotal cultures common to lawyers and mediators incorporate such a systematic problem-solving approach?
- How to deal with clients who resist systems and rationality?
- How can this degree of organisation be meshed with educational theories on different learning styles of clients?
- How can this vital systematic methodology of decision-making be incorporated into the already overcrowded curricula of mediation, law and psychology courses?
- How can mediators and negotiators use this helpful approach without causing loss of face for lawyers, managers and other skilled helpers (who should have already applied this method in the same systematic fashion)?

Smart Choices provides an excellent overview of systematic knowledge, process and skills attached wise decision-making. For conflict managers, this is the centre of our world.

JHW

Recent Activities of Bond University Dispute Resolution Staff

General Workshops

12-14 August	Short Course on Mediation on Bond campus with Professors Laurence Boulle, Pat Cavanagh and John Wade and coaches Margaret Newberry, Mieke Brandon, Leigh Robertson, Bernadette Rogers
21-22 August	Advanced Commercial Mediation Colloquium Ian Hanger, a well-known commercial mediator and barrister from Brisbane is co-ordinating an advanced mediation workshop on the Gold Coast on behalf of LEADR (Lawyers Engaged in Alternative Dispute Resolution) on 21-22 August. Approximately 59 well-known Australian commercial mediators are attending this workshop. Professors Boulle, Cavanagh and Wade from Bond University; Ilya Davies and Gay Clark from QUT; Nadja Alexander from the University of Queensland will be assisting Ian with facilitation of this program.
26-29 August	Short Course on Advanced Mediation held at the beautiful Couran Cove, South Stradbroke Island with Professors Laurence Boulle, Pat Cavanagh and John Wade.

JOHN WADE

24 –29 May	Law School, Pepperdine University, Los Angeles – Short course on Mediation
2 – 5 June	Association of Family and Conciliation Courts Conference, Vancouver. One day workshop with Joan Kelly; workshop with Sally Pope
7 - 12 June	Mediation workshop for judiciary; Montgomery, Alabama
5 – 10 July	Association of Family Mediators, Chicago. One half day workshop and one panel with Woody Mosten

Recent Publications of Bond Dispute Resolution Centre Staff

Laurence Boulle

Globalising Mediation

In 1996 Laurence Boulle published in Australia his book *Mediation: Principles, Process, Practice* (Butterworths, Sydney) which has now become a standard text in Australia.

Reflecting the globalisation of mediation, Laurence has worked with local co-authors to rewrite this book for different markets. The general pattern is for Parts I and II, on theory and process, to be marginally adapted and Part III on practice to be substantially rewritten to take account of local developments.

In 1997 the book was rewritten for South Africa, in 1998 for New Zealand and in 1999 for Canada.

Laurence has just returned from the UK and Singapore where proposals have been accepted to publish local versions of the book. These are expected to emerge in early 2000. Thereafter a Zanzibar edition is proposed.

Ross Buckley

Ross, one of the Bond negotiation experts, has recently published in another field of interest. ***Emerging Markets Debt: An Analysis of the Secondary Market*** (London: Kluwer Law International 1999)

This book is a study of the role of the markets in the debt of developing countries, and their contribution to the recent global economic crises.

Forthcoming Courses

Bond Courses

12-14 August	Bond University	Short course - 3 day	Basic Mediation Course, and Foundation Family Mediation Course, run in conjunction with AIFLAM	Wade, Cavanagh, Boulle
20 August	Lennons, Brisbane	1 day workshop	Commercial Negotiation Strategies for Personal Injury Lawyers	Cavanagh
26-29 August	Couran Cove, South Stradbroke Island	Short course - 4 day	Advanced Mediation Course, run in conjunction with AIFLAM	Wade, Cavanagh, Boulle
13 September	Bond University	Postgraduate - 14 week	Mediation (Laws 762)	Boulle
6-11 September	Bond University	Short Course - 5 day	Theory and Skills of Family Mediation (Laws 789) (satisfies regulations under the *Family Law Act*)	Wade
13,14,16-18 Sept	Bond University	Postgraduate – 5 day	Advanced Commercial Negotiation (Laws 779)	Cavanagh
23-26 September	Melbourne	Short Course - 4 day	Basic Mediation and Negotiation Course Victorian Bar Association	Wade, Cavanagh, Boulle
15-17 October	Melbourne	Short Course - 3 day	Family Arbitration	AIFLAM
3-5 December	Sheraton, Noosa	Short Course - 3 day	Basic Mediation Course	Wade, Cavanagh, Boulle

Written reviews of Bond mediation courses continue to be outstanding, for example:

Noosa, May 1999	*Alabama, June 1999*	*Bond University, Aug 1999*
♦ *The course was very good. It combined theoretical*	♦ *Best seminar I've attended in 21 years as an attorney.*	♦ *Appreciate the fact that course leaders adjusted*

and practical aspects well. ♦ *Useful information on negotiating skills.* ♦ *I have told my law partner that to practice litigation he must do this or similar course. Why weren't we taught psychology at Law School?*	♦ *Best CLE course ever. Very informative. Excellent instructor.* ♦ *New theories and ideas that can be used immediately*	*programme to suit requests/needs of participants.* ♦ *Great interplay between presenters. Got a lot from coaches.* ♦ *Very impressed with the course and the lecturers and the coaches. You came highly recommended and I can honestly say I was not disappointed.*

Thoughts and Themes

The last newsletter included a *self-test*. Set out below are some possible answers.

Negotiation and Mediation Conceptual and Terminological Self Test Possible Answers

1. **High/soft; low/soft** is a culturally common way to begin negotiations by offering a solution which is considerably outside the range of expected eventual objective solutions. (eg "I want at least $1 million"; "we will pay you $1000 to go away"; "I want an abject written apology").
2. **Reasonable firm** is a less common method of beginning negotiations. The speaker gives a long explanation how (s)he used objective criteria from several reliable sources to calculate an offer; ("reasonable") warns that (s)he will not be able to move off this offer ("firm"); then eventually makes the offer.
3. **"Adjustive dissonance"** is the phenomena whereby people adjust to loss at different rates. For example, one is in shock/anger/denial at the loss of a farm; child; spouse; health, while the other has accepted the loss and "wants to get on with his/her life". Outwardly, the disputants are negotiating about money; but really, they are miscommunicating about their different rates of emotional adjustment.
4. **"Lumping it";** "giving up" or "yielding" is probably the most common way of handling grievances in all cultures. ("That's life; don't complain; no-one will listen to you; it's not worth the hassle" etc)
5. **Conflict analysis** (or **conflict diagnosis**) is an attempt intuitively or systematically to analyse confidently or speculatively at what are the causes of a dispute; and how far the dispute has changed in nature due to escalation. Analysis is then usually followed by an intuitive or systematic listing of possible methods to respond to the conflict.
6. **Intra-psychic conflict** is a conflict which has been mainly caused by a deep hurt carried by an individual (or group) whether (s)he goes. It is sometimes expressed that "we all carry baggage from our past" For

example “my mother used to ignore me like you are doing”. The conflict may at first present as having entirely different causes than such hidden causes.

7. **Tribal conflict** is an analysis of the main cause of conflict is emanating from people who are in the “background”. The conflict is being driven mainly by the comments, money and expectations of tribal members including relatives, friends, bosses, next-door-neighbours and lawyers.

8. **Entrapment** is a psychological state whereby a disputant is apparently unable to weigh up the costs of a conflict because (s)he has become so committed to the vaguely defined concept of “winning”, or at least “not losing”. (eg during the Vietnam War, “we have already lost 54,000 casualties, so we can’t give up now”.)

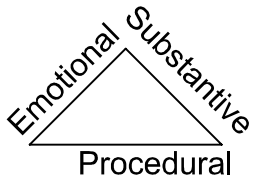
9. **Dehumanisation** is a psychological state and linguistic transition which occurs during conflict which both justifies past behaviour; and encourages future aggressive conflict (eg policemen are “pigs”; Bill is “the manager”, Mary is “that bimbo” etc)

10. **Deindividuisation** is a psychological transition which occurs during conflict which transforms individual people into groups of “things”. Once again this transformation enables rationalisation of past behaviour (eg atrocities); and encouragement of future energetic conflict (eg “greenies”; “typical males/females”; “management”; “multi-nationals”; trailer-park trash”).

11. **Good cop - bad cop routine** is a very effective and common team negotiation strategy whereby one member (A) is pleasant and the other (B) unpleasant. Thereby the opposition negotiators are constantly encouraged to talk to the pleasant person, as otherwise they will have to deal with the angry, irrational, crazy and out-of-control other team member.

12. **An add-on is** a standard negotiation strategy whereby one person just as an agreement is about to be reached, raises another topic for discussion. (“There’s just one more thing...”). This is sometimes a sub-conscious strategy used by a person whose life is given meaning by the continuation of the conflict.

13. **Satisfaction triangle** is a symbol used to remind negotiators/managers/judges/mediators, that settlements are more likely to be reached and to last if they reflect **three** elements of satisfaction - procedural (eg “we were listened to”) emotional (eg “my sense of despair was acknowledged and legitimated”); substantive (“the outcome was in the range of feasible results if the conflict was not settled”)



14. **Negative intimacy** is the psychological state of enjoying the conflict (colloquially, a "conflict junkie" or "resentnik"). Someone who is negatively intimate will undermine settlement, and continue the conflict at almost any cost. It gives him/her a meaning to life.

15. **Positional and interest based negotiation**
These two styles of negotiation are both useful. Both usually co-exist in any one negotiation. Positional (sometimes called "distributive") consists of beginning with a **solution** (a position), being met by a counter-solution, and each party attempting to create doubt with the other by bluffs, threats and providing misinformation. Interest-based (sometimes called "principled" or "integrative") consists of each party seeking to understand motives and interests behind particular solutions ("increase the chips on the table") and then attempting to package offers (usually prefaced by the ubiquitous phrase "what if….").

16. **Structural conflict** is conflict caused by patterns or structures of actual or perceived power which create perceived inequality of bargaining power. (eg "banks always beat customers"; "women always win in Family Court"; "the legal system requires us to draw up inflammatory documents" etc).

17. **Value conflict** is conflict caused by different beliefs on what is true or important (eg "lying is wrong"; "trees are more important than logging"; "top down management is better than consultative management"; "a balanced life is more important than high income" etc).

18. **Data conflict** is conflict caused by disputants having different **information** (eg "if we go to court, a judge will do x…."; "I did not say that"; "it is not normal for children to be distressed"; etc).

19. **Duelling experts syndrome** is a common pattern of behaviour which usually escalates, rather than resolves, conflict. Each disputant employs a different expert (lawyer, valuer, engineer, psychologist), tells different stories to each expert, expressly or impliedly hints at the advice she wants from the expert, and the expert in order to curry favour tells the client what (s)he wants to hear (without sufficient qualifications). The professional egos of the experts then make it difficult for either expert to change his/her advice. The disputants then pay large amounts of money to resolve an avoidable conflict between the two experts rather than between themselves.

20. **Settlement mediation** is a very common form of assisted negotiation. A settlement mediator (often working in a court building) emphasises the costs of continuing the conflict, casts doubt on over-confident negotiators, hints what a judge would do, and quickly suggests splitting the difference. This form of mediation requires little training, is cheap, fast, stress-free and sometimes has impressive settlement rates (often reached in the waiting rooms for complex reasons).

21. **Problem-solving mediation** is otherwise known as "facilitative" or "classical" mediation. This process involves a skilled third party assisting disputants to negotiate by listening, uncovering interests (if possible), acknowledging emotions, defining issues and brainstorming possible solutions.

22. **Post-settlement blues** are the feelings of regret experienced by many negotiators soon after agreeing to a settlement. They have difficulty remembering events during the negotiation and feel that they may have given away too much.
23. **Cognitive dissonance** is a tension experienced by most people when their behaviour, feelings and beliefs are out of harmony. This phenomenon has a profound effect on conflict. For example, young lawyers who are required culturally to *act* aggressively, soon develop hostile emotions and belief systems about the "opposition". Clients who have acted "badly" in the past tend to develop a belief system and emotions to rationalise (or harmonise) their hostile behaviour.
24. **Tool-box of interventions** is a colloquial phrase to describe the range of possible interventions to a particular conflict. Professional dispute resolvers tend to spend a lifetime expanding the number of tools in their toolbox; and enjoy swapping anecdotes and theories about interventions.
25. **Creating doubt** is the fundamental umbrella strategy of all negotiators, especially against positional bargainers. Doubts can be raised gently or assertively about alleged facts, evidence, rules, procedures, delays, costs and the range of possible or probable outcomes.

Mediation Music

A new genre of learning is sweeping the conflict management industry – namely doggerel poetry set to popular tunes. These are guaranteed to empty any room or end any conference.

Please send in your contributions.

Mediate

By Jeffrey G Kichaven (tune of "Yesterday")

Mediate, There's no time too early or too late
To tell 'em that our case is great
So take the dare, and mediate

Suddenly, it's not half the case it used to be
There's a risk that's hanging over me
That dialogue showed openly..

Chorus Why we went to trial, I don't know we couldn't say
We said something wrong, now we long to mediate

Mediate, it's the last chance to collaborate
Bring your clients in and tell it straight
Oh serve them well and mediate

Lawyer Blues

By John Wade (tune of “San Francisco Bay Blues”)

I got the blues when my clients said they don’t need me no more
They told me I’d become a dinosaur
If they ever come back to me
I’m going to treat them diagnostically,
Talking to my clients for a hefty problem-solving fee

Well I’m sitting down in my office, wondering which way to go,
Accountants and those mediators, have stolen my cash flow
Think I’ll take me a lap top, cause I’m feeling blue
Write a steamy Grisham novel, about a judge I once knew

Oh well, I ain’t got a nickel and I ain’t got a lousy dime,
If they don’t come back, think I’m gonna turn to crime –uh, hu,
If I learn how to reframe, it’s going to be a whole new game,
Mediating conflict will become my claim to fame
-----don’t quit your day job
Mediating conflict will become my claim to fame.

The Ballad of John Wade

By Jeffrey G. Kichaven (tune of “Waltzing Matilda”)

Once a jolly law prof set about to mediate,
Under the shade of a whiteboard, you see
and he sang as he read from his cards that come with bubblegum,
You'll come a-working your bargains with me!

Working your bargains,
Working your bargains,
You'll come a-working your bargains with me,
and he sang as he read from... (sing 3d line of each stanza)
You'll come a-working your bargains with me!

Down came an impasse to bother those who mediate,
Up jumped the law prof and grabbed it with glee!
And he sang as he slid that im-passe 'cross his abacus,
You'll come a-working your bargains with me!

(chorus)

Up rode a lawyer, mounted on his legal briefs,
Listing his law rights, 1 - 2 - 3!
Take that silly impasse, straight into the caucus room,
and you'll still be working your bargains with me!

(chorus)

Up jumped the law prof, sprang into the caucus room,
Raising the doubts for all to see!
And he sang as he showed, there are 60 ways to mediate,
So you'll come a working your bargains with me!

Chorus (2x).

Visiting North American Law Students Study at Bond University

For the last two years, law students from Duke, Northwestern, Wisconsin, Florida and Western Ontario law schools have spent a semester studying at Bond University. Bond University's three semester calendar fits neatly with the summer break and two semesters of US, Canadian and European Universities. These visiting students have particularly studied dispute resolution and international commercial law subjects.

Here are a few comments:

- *"The semester I spent at Bond University School of Law was one of the most enriching and rewarding educational experiences in all my years of schooling" (Duke student)*
- *"My living arrangements while here have been nothing short of superb…" (Duke student)*
- *"This University provides educational and living opportunities that are not available anywhere else" (Duke student)*
- *"The experience of studying abroad at Bond exceeded my expectations both professionally and personally" (Northwestern law student)*
- *"The [Bond] professors all possessed top-notch credentials, excellent teaching skills, and obviously cared about the welfare of the students"…"The classrooms are state of the art" (Northwestern law student)*

These rave responses have emerged consistently to the Bond experience.

If you know someone who may be interested in the Bond-semester-abroad study experience, please refer them to:

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WHY TEACH/LEARN PROBLEM-SOLVING MEDIATION, RATHER THAN EVALUATIVE MEDIATION?

When teaching mediation courses in North America, I am often asked a version of the following question: "Why should we study and practise problem-solving (PS) mediation, when the most common form of mediation we see is strongly evaluative?" (E) or: "Why study and practise problem-solving (PS) mediation when many lawyer brokers are only comfortable recommending that clients use a strongly evaluative mediator?"

These are insightful questions – why foster your own unemployment?

Here are some of my standard answers for your consideration:

1. E mediation processes are often improved by incorporating (not replacing) PS skills and process.
2. As brokers, we have many clients who do not need E mediation (valuable though that service is to some clients). As informed brokers we need a stable of competent and identifiably PS mediators.
3. A far wider *range* of conflicts can be mediated by an individual PS mediator, as compared to the narrow range of expertise of an evaluative mediator. That is, in the *long run* expert PS mediation *potentially* opens more job opportunities than E mediation.
4. Why study E mediation when that particular field is already overcrowded with retired judges? They will always have a marketing edge in E mediation.
5. E mediation process cannot readily be taught to a diverse group of students. By definition, the student group must have a common area of evaluative expertise.
6. When voluntary or mandatory mediator accreditation eventually emerges in your organisation, state or country, it will inevitably accredit a model of PS mediation. (Competency tests cannot be readily developed for E mediation). So be prepared!
7. PS mediation avoids the risks of legal liability for incorrect advice which will eventually fall upon E mediators (not a major risk at this stage of history).
8. PS mediation avoids the current array of convenient fictions which pretend that E mediators do not give "legal advice".
9. PS mediation requires years of reflective practice and study to master. Many experienced lawyers can practise a form of E mediation with no study or practice at all, as it so closely resembles arbitration.

To repeat, these are some of the reasons why teachers emphasise skills and process towards the problem-solving end, rather than at the other end of the creating doubt, giving information, ideas, opinion, advice and "legal" advice evaluative end of the spectrum. This emphasis does not diminish the clarion call for multiple forms of clearly identified mediation services to meet the different needs of clients in conflict.

J H Wade

The Transition of ADR to ADM

Nomenclature in the dispute resolution world has gone through many transitions.

Four Versions of "ADR"

1. ADR – *"Alternative" Dispute Resolution* is now considered to be politically and sociologically incorrect in some cultures. 'Alternative' reflects egocentric description description of the world by a few trial lawyers. Worldwide statistics show that over 90% (closer to 95%) of the conflicts which enter lawyers' offices; or court files settle by agreement or abandonment. In the Australian *Family Law Act,* negotiation, counselling and mediation are labelled "PDR" (Primary Dispute Resolution). By definitional implication and statistics, litigation is now "alternative dispute resolution".
2. ADR – *"Additional" Dispute Resolution* was an early transition to placate defensive lawyers who were concerned that litigation was being linguistically downgraded. Everyone acknowledges that there are statistically few conflicts which definitely need a judicial decision (like brain surgery). However, the word "additional" is inaccurate if statistics continue to show that over 95% of conflicts are "resolved" by negotiation, abandonment, counselling or some form of mediation (as compared to by judicial decision)
3. ADR – *"Appropriate" Dispute Resolution* is a helpful reworking of the letter "A" to bring to the forefront the vital diagnostic question "which intervention is appropriate for which conflicts at what time?"
4. ADR – *"Assisted" Dispute Resolution* as a description elevates the area of study and practice to embrace a wide range of professions and working groups. Potentially, this label may reduce some of the competitive turf grabbing that has occurred between traditional and newer work groups such as therapists, lawyers, mediators, financial consultants, and change-managers. The generic concept of a "skilled helper" re-emerges. It also provides a helpful reminder of the continuum of differences between self help and the gradual intervention of a variety of skilled helpers.

ADM – "A……. Dispute Management"

As the dispute resolution movement has matured through conflict, institutionalisation, diversity, practice and theory development,

1. There has been an encouraging recognition of the inter-disciplinary nature of the study of conflict. The vast literature on conflict and change in management and psychology schools has encouraged replacement of the word "resolution" with ubiquitous "management".
2. Many practitioners have reported some unease with the triumphal word "resolution" (like medical practitioners overselling "health"). "Resolution" implies some degree of harmony whereas many personal, organisational and international conflicts are redirected into manageable levels, rather than closed, ended or "resolved".

Thus the words, "alternative", "additional", "appropriate" or "assisted" can be inserted in front of "dispute management" (ADM).

ADM – "A…….Decision-Making"

A further helpful linguistic alternative has focussed on the letters "DM" to stand for "decision-making". Again "ADM" can be "assisted" decision making. The latter two are particularly useful conceptual developments.

The concept of "decision-making" enables –

1) The rich literature of psychology and management to enter mediation and lawyering cultures.
2) Mediation and lawyering to continue their search (often reluctant) for theories behind practices. (See the writing of Chris Honeyman)
3) Demystification of many of the tasks of skilled helpers.

However, this constant widening of necessary "basic" knowledge and skills of mediators and lawyers provides serious challenges both to traditional educational curricula and to slick training courses.

For an excellent introduction to decision making theory and process, I recommend the book J S Hammond, R L Keeney, H Raiffa, *Smart Choices – A Practical Guide to Making Better Decisions* (Boston: Harvard Business School, 1999) – reviewed at the beginning of this newsletter.

Bonding to Bond

If you have any suggestions about this newsletter; *OR* if you or your colleagues would like to be included on, or excluded from receiving this occasional newsletter, **please send us a message** with your e.mail address to:

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BACK-ISSUES OF BOND DISPUTE RESOLUTION NEWSLETTER

These will be transferred to our website, namely – http://www.bond.edu.au/law/centres/drc/newsletter.htm and can be read or printed down from there.

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