

May 2001

Bond Dispute Resolution News Volume 9

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BOND DISPUTE RESOLUTION NEWS

V o l u m e 9 • M a y 2 0 0 1

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Recent Activities of Bond University Dispute Resolution Centre Staff	Recent Publications of Bond Dispute Resolution Centre Staff	Forthcoming Courses in Australia
Forthcoming Courses in Indonesia, USA, UK	Thoughts & Themes	Bonding to Bond

Recent Activities of Bond University Dispute Resolution Staff

LAURENCE BOULLE

27 March	Professor Laurence Boule and Professor John Wade met with Japanese visitors Professor Dr Tatsuo Ikeda from the Law Faculty at Osaka University and Mr Takuya Ueda from Kikkawa Law Offices.
1-3 May	Professor Laurence Boule taught a Mediation Course at Mediate Today in Sydney.
25-27 May	Professor Laurence Boule will deliver the lead-in address entitled <i>The State of ADR in Australia</i> at "The Colloquium IAMA – The Next 25 Years" (Institute of Arbitrators & Mediators Australia) in Canberra.

PAT CAVANAGH

24 April	Associate Professor Pat Cavanagh presented <i>Ten rules for successful hard bargainers</i> at a CLE breakfast seminar in Brisbane
May 2001	Associate Professor Pat Cavanagh begins a 12 month contract in Jakarta as Senior Case Appraiser and Mediator. This involves resolving disputes between syndicated banks and businesses over debts ranging between \$10 and \$100 million (US). Pat's position is supported by the World Bank.
9-12 May	Associate Professor Pat Cavanagh and Professor John Wade presented a 3 day mediation course in Jakarta for the Indonesian Arbitration Association to a variety of judges, arbitrators, lawyers and university teachers. This course was supported by The Australian Attorney-General's Department Project sponsored by The Australian Agency For International Development (Ausaid) under the Apec Support Program.

JOHN WADE

19-21 April	Professor John Wade taught a 3 day <i>Family Arbitration</i> workshop in Perth with Philip Theobald and Bill Westbrook. This course will be offered again in Melbourne on 19-21 July; and Canberra on 11-13 October, 2001.
27-28 April	Professor John Wade attended Family Lawyers conference at Royal Pines. Gold Coast.
2 May	Professor John Wade presented an in-house seminar for Blake, Dawson, Waldron lawyers on <i>Representing Client at Mediation and Negotiation</i> in Brisbane.

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23 May	Professor John Wade will present a paper at Bond/Queensland Law Society Breakfast series in Brisbane “The Seven Big Questions for Lawyers and Mediators”.
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BOBETTE WOLSKI

2 March	Assistant Professor Bobette Wolski gave presentation on advocacy at the Queensland Law Society/Bar Association Law Symposium 2001 held at the Gold Coast.
15 March	Assistant Professor Bobette Wolski was co-instructor with John Wade at the Basic Mediation Course held at Bond Uni, Gold Coast.
2 April	Assistant Professor Bobette Wolski presented a paper on Dispute Systems Design at the Development & Environmental Dispute Management Conference held in Sydney on 2-3 April.

Recent Publications of Bond Dispute Resolution Centre Staff

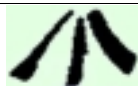
- **Ross Buckley** “Adversarial Bargaining: The Neglected Aspect of Negotiation” (2001) 75 *ALJ* pp181-189.
- **John Wade**, “Don’t Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge” (2001) 18 *Mediation Quarterly* 259-280.
- **Laurence Boulle**, *Mediation Skills and Techniques* (Butterworths, 2001).

Forthcoming Courses in Australia

Bond Courses in 2001

19-21 July	Melbourne	Short course – 3 days	Family Arbitration, Enquiries: Law Council, Elizabeth Marburg Phone: (02) 6247 3788	Wade
3-5 August	Melbourne	Short course – 3 days	Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111, email: dirooney@leocussen.vic.edu.au	Cavanagh Wade
16-19 August	Sheraton, Noosa	Short course – 4 days	Advanced Mediation Course	Wade Boulle
11-13 October	Canberra	Short course – 3 days	Family Arbitration, Enquiries: Law Council, Elizabeth Marburg Phone: 02 6247 3788	AIFLAM
6-8 December	Marriott, Gold Coast	Short course – 3 days	Basic Mediation Course	Wade Boulle Cavanagh

The Dispute Resolution Centre is pleased to publicise the following information on the Asia Pacific World Mediation Forum.



Forum Mundial de Mediación - World Mediation Forum - Forum Mondial de Médiation

Asia Pacific World Mediation Forum
Reconciliation: A Conversation Beyond Cultural Boundaries
Adelaide, South Australia
29 November –1 December 2001

The World Mediation Forum (WMF) is a not-for-profit global organisation committed to the ideals of continuing education, learning and promotion in the field of conflict management and dispute resolution. Forums are convened in various regions bi-annually, in the years between the global forums. The inaugural Asia Pacific WMF is being convened in Adelaide from 29 November – 1 December 2001.

This theme of the first forum was chosen to encourage exploration of the assumptions, knowledge and skills underpinning various intra-cultural conflict management processes, their application to cross-cultural conflicts and to mediation in different cultural contexts.

Expressions of interest to present workshops, short papers on panel presentations and facilitated dialogue sessions/conversations at the regional forum this year are currently being sought.

If you are interested in receiving more information please contact:

Re the WMF:

Dale Bagshaw,
Vice-President of the World Mediation Forum,
c/o University of South Australia,
St Bernard's Road, Magill 5072
or by fax - 61 8 8302 4377
or email - dale.bagshaw@unisa.edu.au.

Re Expressions of Interest:

Julie Hart, Resolve Advisors
PO Box 15, Paddington NSW 2021
or by fax – 61 2 9380 5687
or email – julie@resolveadvisors.com.au

Updates on the forum will be posted on the Ausdispute Website:
<http://www.ausdispute.unisa.edu.au>

Forum Mundial de Mediación - World Mediation Forum - Forum Mondial de Médiation

24 April 2001

Dear Colleague

Asia Pacific World Mediation Forum
Reconciliation: A Conversation Beyond Cultural Boundaries
Adelaide, South Australia, 29 November –1 December 2001

We are writing to invite you to express interest in participating in this forum.

About the World Mediation Forum (WMF)

The WMF convenes both international and regional forums. Dale Bagshaw, Vice President of the WMF and Director of the Conflict Management Research Group at the University of South Australia, is seeking to convene the first Asian Pacific forum in Adelaide later this year. The conference theme revolves around mediation and cross-cultural issues affecting people in the Asia Pacific region.

Forum Theme - *Reconciliation: A Conversation Beyond Cultural Boundaries*

The theme of this first forum was chosen to encourage exploration of the assumptions, knowledge and skills underpinning various intra-cultural conflict management processes, their application to cross-cultural conflicts and to mediation in different cultural contexts. We envisage that the forum will take place over 2.5 days and will include practitioners from diverse fields of practice, academics, students and other interested people. It will include plenary sessions with key note speakers addressing the theme.

The remainder of the program will consist of breakout sessions which will be a combination of facilitated dialogue sessions or conversations, panel presentations and workshops. It may be possible to run a session over more than one breakout period if appropriate.

We invite expressions of interest to present or facilitate sessions. Please complete the attached form and return this to us by **Friday 25 May 2001**.

Going Forward

We are extremely enthusiastic about this forum and hope that you will join us in making it a success. For further information please feel free to contact:

- regarding the WMF, Dale Bagshaw on 61 8 8302 4378 or dale.bagshaw@unisa.edu.au
- regarding this call for expressions of interest or the arrangements for the forum, Julie Hart on 61 2 9380 6466 or julie@resolveadvisors.com.au.

We look forward to your response and hope to see you at the forum.

Kind regards

Dale Bagshaw
on behalf of the Asia Pacific WMF 2001 Executive Committee
Dale Bagshaw, Sylvia Emmett, Shirli Kirschner and Julie Hart



Forum Mundial de Mediación - World Mediation Forum - Forum Mondial de Médiation

Expressions of interest for presentations at the Asia Pacific WMF 2001

a) Type of Session:

- () 2 hour workshop
- () 2 hour panel presentation and discussion (3 x 30 minute papers on a common theme)
- () Facilitated dialogue/conversation. Please indicate the length preferred - 1 hour or 2 hours_____

b) Presentation/Workshop/Conversation Title (10 words maximum):

c) Presentation/Workshop/Conversation Content:

Please provide a brief description (150 words or less) suitable for the brochure that outlines the goals, content, and format of the session.

d) Attach an abbreviated resume(s) of the presenter(s) or workshop/conversation leader(s) of no more than 5 pages AND a short biographical note of no more than 50 words.

e) Category:

Please indicate the category which best describes the topic of your proposal:

Commercial () Community () Consumer () Court ADR () Criminal Justice () Cross Cultural () Organisational () Education () Employment () Environment () Family () Government () Health () Indigenous () Industrial relations () International relations () Labor () Ombudsman () Mediation () Spirituality () Standards/Ethics () Training () Children/Youth () Other: _____

f) Specific requirements:

Include here any audio-visual requirements and restrictions on numbers, particularly for the workshops.

Please provide your contact details – wherever possible we will use email and the Ausdispute Website for communications.

Name:

Postal address:

Email:

Fax:

Ph:

Financial assistance may be available to assist speakers who would otherwise not be able to participate.

Please return your response by **Friday 25 May** to Julie Hart, Resolve Advisors:

email: julie@resolveadvisors.com.au

Fax: 61 2 9380 5687

Post: PO Box 15, Paddington NSW 2021 AUSTRALIA

Advanced Commercial Negotiation Seminar Series 2001
5.30pm–7.00pm

SERIES I

Law Society of NSW
170 Phillip Street
SYDNEY NSW 2000

- 2 August [Pat Cavanagh](#) – *Ten Most Common Mistakes of Commercial Negotiators and How to Avoid Them*
- 20 September [John Wade](#) – *“Don’t Waste Your Time on Negotiation or Mediation: This Case Needs a Judge”*
- 19 October [Pat Cavanagh](#) – *“But You Can’t Do That!” Are there any Ethical Constraints in Negotiation?*
- 8 November [John Wade](#) – *How to Cross the Last Gap in Negotiations; Sixteen Methods*

SERIES II

Leo Cussen Institute
360 Little Bourke Street
MELBOURNE VIC 3000

- 26 July [Pat Cavanagh](#) – *Ten Rules for Successful Hard Bargainers*
- 23 August [John Wade](#) – *Risk Analysis in Litigation and Negotiation: “I Wish You Had Told Me Earlier Than This”*
- 18 October [Pat Cavanagh](#) – *How to Negotiate Successfully with Hard Bargainers*
- 15 November [John Wade](#) – *Diplomats and Dobermans – 15 Methods to Re-open Hopelessly Deadlocked Negotiations*

Forthcoming Courses in Indonesia, USA and UK

10-12 May	Mediation course for Indonesian Arbitrators in Jakarta.
	Professor John Wade will lead the following six courses in USA and UK:
29 May-2 June	Mediation course at Pepperdine University, Los Angeles
5-14 June	Mediation course at Vermont Law School
18-23 June	Mediation course at Southern Methodist University, Texas
27 June	Advanced Mediation Workshop, CEDR, London
29-30 June	Basic and Advanced Mediation Workshops, Family Mediation Association, London
2-3 July	(Wimbledon Tennis course)
4 July	Workshop for Penningtons, Lawyers, London

Thoughts and Themes

Goals and Measurement of “SUCCESS” at Mediation or Negotiation

Before attending a mediation, it is important for a representative to define with the client what is the range of goals of the mediation meeting. This exercise:

- Demonstrates a sophisticated understanding of the nature of the escalation and de-escalation of conflict;
- Reduces client disappointment;
- Reduces client recriminations against the representative for wasting time and money;
- Avoids premature declaration of war, or reversion to litigation.

Ideally, a “successful” mediation will score on many measures of success. For example, a mediation may result in a substantively fair outcome; opportunity to speak and be heard; acknowledgment of feelings, understanding of the opposition’s point of view; and a durable agreement. However, short of this ideal, a mediation or negotiation can be a “success” if it places smaller building blocks in place en route to an eventual agreement.

There is a naive tendency of some statisticians, lawyers and clients to have only two labels for a mediation or negotiation – either “successful” or “unsuccessful”.

The multiple measures of “success” and goals achieved will vary **within** a team of negotiators, and amongst the **tribe** behind the negotiators as well as among the representatives.

Fill in the following chart by ranking client goals.

Client Information Sheet – How Will You Measure “Success”? And What Are Your Goals At The Proposed Mediation/Negotiation?

Very Important = 5
 Important = 4
 Marginal Importance = 3
 Not Relevant = 2
 Unsure = 1

GOALS AT THE MEDIATION/NEGOTIATION	RANK
1. To clarify what this dispute is about	
2. To be listened to	
3. To regain some control over a confused situation	
4. To meet in a comfortable situation	
5. To make speeches and presentations about the strength and reasonableness of my position	
6. To have my difficulties acknowledged by the other side	
7. To give an apology of some kind	
8. To receive an apology of some kind	
9. To communicate directly, rather than through lawyers or other people	
10. To understand why these claims are being made	
11. To understand the other disputants better	
12. To clarify alleged facts and evidence	
13. To have the mediator express opinions on the reasonableness of our respective claims	
14. To reach at least partial agreement	
15. To reach agreement at the low end of possible range of outcomes	
16. To reach agreement at the mid-range of possible range of outcomes	
17. To reach agreement at the high end (in my favour) of the possible range of outcomes	
18. To avoid the delay, cost and uncertainty of further conflict	
19. To create at least some doubt in the minds of the other disputants about the reasonableness of their claims	
20. To “beat” the other disputant	
21. To have an opportunity to express my feelings	
22. To have a mediator who controls procedure, air-time and politeness fairly	

Bond Dispute Resolution News

23. To have any agreements expressed quickly in a legally binding document	
24. To reach an agreement that all parties can live with	
25. To reach an agreement that is likely to be observed	
26. To lay foundations of politeness and clear communication for a later agreement	
27. Other ??	
28.	
29.	
30.	
31.	

Date: _____

Signed: _____

Problem Definition

“She who defines the problem, controls the outcome”

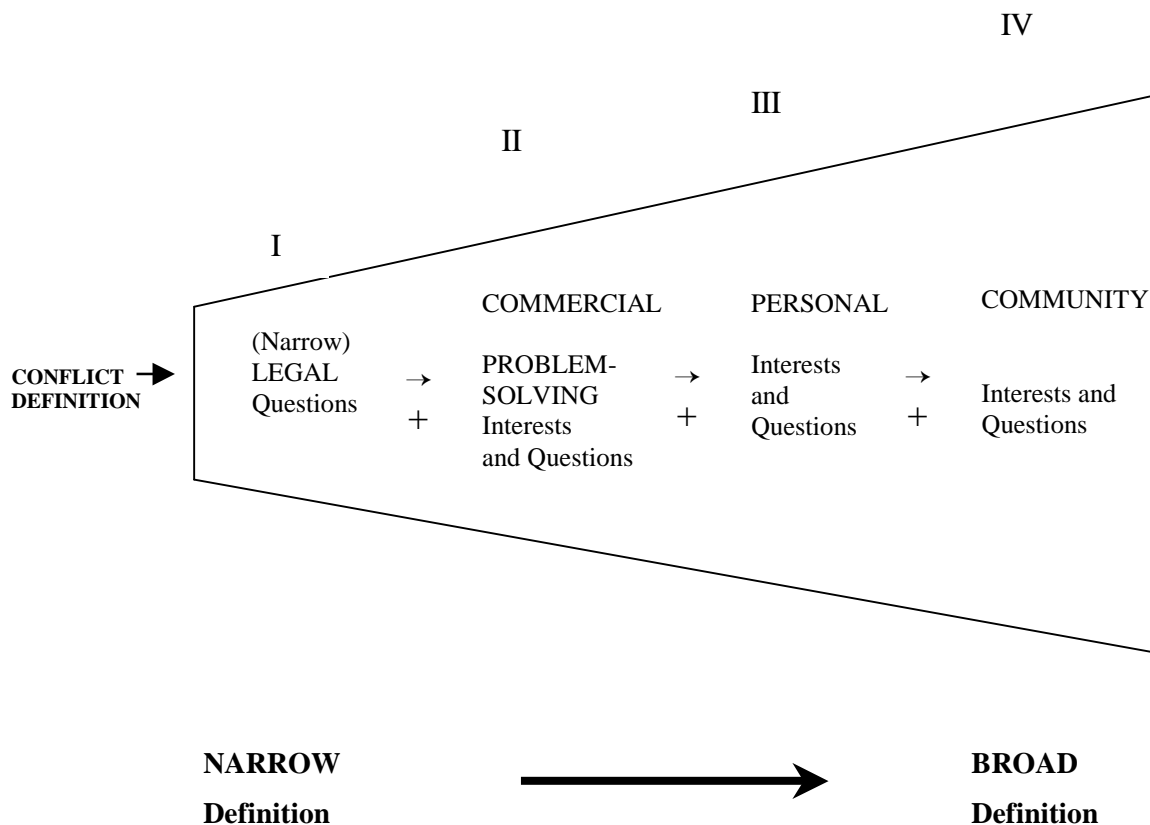
Another area where the mediator’s task coincides completely with the representative’s task, is that of defining the problems or the questions which need to be answered by the disputants. Lawyers sometimes call this “issue” definition, though the word “issue” is far too often defined narrowly as only “legal” issues. Legal issues are rarely what any dispute is about.

Accurate and helpful problem definition requires considerable skill by both representatives and the mediator working co-operatively. As a (legal) representative usually hears from a client well before a mediator, that representative should attempt the first draft of “what are the problems/questions/issues?” This list of questions will evolve as the representatives, clients and mediator come to understand the layers of the conflict more clearly. If possible, each representative should prepare a draft list of questions or problems and give these to the mediator well **before** the mediation.

Levels of Problem Definition

Leonard Riskin has suggested that problem definition can take place at (at least) four conceptual levels – namely legal, commercial (or problem solving), personal and community levels (L. Riskin, “Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed”(1996) 3 *Harvard Negotiation Law Review* 71.)

As a conflict is diagnosed more carefully, the layers of causes are unpeeled. Problem definition progressively changes and expands.



The same conflict can be analysed at one or more of these levels. For example, where there is a dispute between a retailer and a buyer of a motor car over a persistent loss of power in the car, the “issues” can be defined as follows:

Legal Questions

- (1) What are the terms of the contract of sale, express or implied?
- (2) Has a term been breached?
- (3) How serious and frequent is the breach?
- (4) To what extent is liability for the breach exempted by an exemption clause?
- (5) What statutes, if any, also apply to this consumer contract?
- (6) Has the breach caused any foreseeable losses?
- (7) Has the buyer also caused a portion of the loss by contributory negligence or failure to mitigate damages?
- (8) How should the monetary damage caused be calculated? (by expectation, restitution, reliance or indemnity measures)

Problem Solving or Commercial Questions

The narrow legal issues become hidden behind a series of questions which look at the bigger picture from a business perspective.

- (1) What should be done about the losses of power to the car:
 - in the past?
 - for the future?
 - in the short term?
 - in the long term?
- (2) By what process can the losses of power be measured?
- (3) How can the reputations of both parties be preserved and enhanced by the way they resolve this dispute?
- (4) If any problems occur with the car in the future, by what process can they be dealt with?
- (5) How can a flood of flow-on claims be avoided or minimised?

Personal Questions

Once a mediator or representative begins to listen to a client, (s)he often discovers that the “real problem” has little or nothing to do with its legal or even business clothing. To operate on the legal problems is to cut off the wrong leg. For example:

- (1) Why was I not treated respectfully in the past?
- (2) What should be done about past disrespectful treatment?
- (3) How will I be treated in the future?
- (4) How will I recover from the humiliation this has caused me in front of my friends/relatives/business associates?
- (5) I have often been treated badly by large businesses – how can this behaviour be improved?

Community Questions

These are problems which arise out of the dispute for those who are **not** represented at the mediation or negotiation table (eg. the public in environmental disputes; children in custody disputes; future buyers in manufacturing conflicts; future patients in medical disputes).

- (1) By what process could other defective cars be located?
- (2) What can be done about any other existing defective cars?
 - in the short term?
 - in the long term?
- (3) How can this defect be avoided or minimised in future cars?
- (4) What quality management process can be set up to check future cars?

Competent representatives and mediators have the ability to listen, and then draft questions at the level which reflects accurately each client's concerns, and which are most likely to assist all disputants progress towards an acceptable solution.

(Extract from J H Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre: 2000) pp76-78).

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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These are available from our website, namely –

<http://www.bond.edu.au/law/centres/drc/newsletter.htm> and can be read or printed down from there.

J H WADE
Director
Bond University Dispute Resolution Centre