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EDITOR'S NOTE

As you are aware, IIAM has evolved the concept of IIAM Community Mediation Service with the motto; "Resolving conflicts; promoting harmony" with the intention of bringing justice to the doorsteps of the people. IIAM's vision is to provide "Community Mediation Clinics" in all the villages of India. For the purpose of spreading this message, we are intending to form an IIAM Community Mediation Committee consisting of eminent, socially oriented people from among the Community. Amongst them, we can have a few members, as Ambassadors of IIAM CMS who can actively devote some time in the propagation of mediation and who can act as principal mediators and trainers. We would welcome you to partner with this exiting experiment of bringing justice between man and man in a society which is tending more and more towards strife and friction, by becoming a member of the Mediation Committee and partnering in establishing Community Mediation Clinics.



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Editor:
Anil Xavier

Associate Editor:
N. Krishna Prasad

Editorial Board:
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Geetha Ravindra (USA)
Rajiv Chelani (UK)

Publisher:
Indian Institute of
Arbitration & Mediation

Address:
G-209, Main Avenue,
Panampilly Nagar,
Cochin 682 036, India.

www.arbitrationindia.org
Tel: +91 484 6570101 / 6570102

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VIEWPOINT



Conflict Leadership (Part-2)

: MICHAEL LEATHES

In early 2009, a dozen General Counsel of international companies co-authored an article entitled “The Perfect Storm”¹. The factors feeding the storm were cited as economic and financial turmoil, the drive by corporate law departments for greater control over outcomes, and new Information and Communication Technology capabilities. The authors predicted that energy generated by this triple convergence would radically change the attitudes towards disputes held by both the supply and demand sides of the legal services market. It spells opportunity for those acting on President Obama’s The world is changing, and we must change with it, and loss for those that don’t, or drag their heels.

Early Case Assessment tools are easy-to-implement and convey the mindset effectively. They work best when conducted collaboratively with outside counsel.

Training and coaching delivered by professionals underpins mindset change. Mediation training is a great way to inculcate an interest-based negotiation ethic and skill set within a team. Many courses have the power to change how in-house lawyers feel about themselves, their role within the company and the value they can add. They usually emerge much less self-focused and political and as stronger team players. Training opens their minds to other outcome options. And that’s just the basic, 5-day type of mediation training. Advanced training can cover new negotiation techniques, the art of getting parties to the table in the right frame of mind, recognizing the time to litigate and the time to settle and breaking deadlocks. There are also great mediation advocacy courses to help prepare negotiators for a mediation and to play a proactive role in negotiations.

Internal Training can supplement external training by applying the skills learned to the company’s needs. Implementing dispute resolution clauses, choice of counsel and, where required, choice of mediator, liaising with opponents and early case assessments.

Role-playing predicaments – such as upcoming settlement or deal negotiations – is a powerful way to hone negotiation strategies, understand the other side’s possible options and to be better prepared. The act of writing the roleplays entails focusing hypothetically on the other side’s case and interests as well one’s own side - is by itself a useful discipline. New ideas, strategies and options often emerge from the process and subsequent debate and feedback, as well as being fun training for all involved.

Decision Trees and other guidance notes help in-house counsel to make the right process and personality choices when considering a mediation and not be wholly reliant on advice from outside counsel. Finding the right mediator and whether to use a process administered by a service provider can be easily facilitated through decision trees - see: <http://imimmediation.org/decision-tree>.



Large Projects can gain value from having a conflict avoidance capability, bringing a useful opportunity for in-house counsel to practice conflict management skills as a neutral. Many companies encourage conflict among different functions as a way to bring out the best decisions, but must also prevent that conflict becoming destructive.

CLE/CPD events can be organized internally with an emphasis on conflict avoidance, including lawyers from other companies to relate their own experiences.

Multi-Step Dispute Resolution Clauses are common these days, yet so many law firms fail to insert them and so many deals are still made without them. Having a contractual obligation, on all parties, to mediate before arbitrating or litigating completely avoids any weakness perception entailed in proposing mediation, because it is already agreed.

Dispute avoidance management objectives and reward programmes exist in some companies. They need careful implementation to ensure that inappropriate motivations for settling are excluded, but are a great way to convey and embed mindset change.

Visible Line Management Buy-In gives culture and mindset change that sense of authenticity and relevance to the business. It can take many forms, but real change cannot be achieved without it.

Corporate Ombuds, who often report to the GC or an independent director, can have a major impact. Their very existence, coupled with transparent results-based reporting, can send a powerful cultural message internally and externally. Ombuds can have a range of functions. Some are focused on resolving employee conflict between management and unions or between employees and management. They can have a fact-finding function and in some organizations Ombuds get engaged in conflicts between the company and its suppliers and customers. Some specialize in the delivery of employee communications programs and others have mentoring, whistle-blowing or community outreach functions. Companies such as Chevron, Coca Cola, Mars, Shell and United Technologies have an Ombuds function as well as many universities and international NGOs like the WHO.

Impact on outside stakeholders

All companies have a reputation platform. Whether they consciously manage it in the context of their dispute profile is another issue, but if they do, as they should, then the legal function plays a key role. How external stakeholders, including competitors and regulators, perceive the company's legal strategies, attitudes, competencies and actions plays an inevitable role in conflict avoidance, enforcement, negotiating position and many other capacities. Having the right outside profile, one generating respect, particularly within the

Interested to contribute Articles?

We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-209, Main Avenue, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.

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relevant Industries, in government circles and on search engines, is well understood. It's a kind of branding. Like branding, it involves subtle messaging.

Most parties engaged in conflict live in fear of being perceived as weak, and rightly so. Most, however, go about enhancing their reputation for strength in the wrong ways. Threatening behaviour merely invites a threatening response, distrust and a lack of respect. Parties with the resources to respond in like fashion will do so, and everyone climbs Glasl's escalation ladder as if they were choreographed. Mahatma Gandhi observed: *An eye for an eye, and soon the whole world is blind.*

There are many less primeval and smarter, more subtle ways to foster the right perception of strength through pragmatism without any hint of weakness or hesitation. One way – poorly understood and often dismissed as a distraction – is the importance of presenting at conferences and symposia, and writing articles. Every GC needs to manage their Google Profile with care. It's a key part of their organization's reputation. Yet few do.

Corporate Policies have an important internal and external power. A published policy that expresses a desire wherever appropriate to resolve matters at an early stage, is a perfect excuse for approaching the other side with a mediation proposal and avoids a weakness perception. Such policies cost nothing and do not limit freedom of action.

Managing relations with competitors is often high on the list. It's about how one acts and how those acts are perceived. The messages are often very subtle. The GC is well positioned to take the lead to avoid antitrust pitfalls. Proposing mediation to aid relations with governments on regulatory issues that involve various players within an Industry is a good way to communicate an inclination to mediate as a pragmatic process solution without in any way suggesting that it is driven by a sense of weakness. That propensity can then be applied in different contexts in inter-company conflicts with the same effect.

Deal Mediation is an emerging area having great potential. Because the settlement of a dispute is a deal, why confine use of mediation to situations with a conflict background? Some people have a negative reaction to this idea, believing that they do not need a mediator to help them negotiate, which is the job they are paid to do. That, however, is very superficial. Mediation takes the process and communication distractions away from the parties, enabling them to be more effective negotiators, improving the quality of their deals. And having a mediator present during a deal negotiation helps avoid failure.

Settlement Counsel are increasingly used by companies in conflict situations because this simple approach offers a perfect way to focus outside counsel on deal making rather than litigating. Boston Law Collaborative sums it up this way: *[In this] process ... both parties are represented by counsel, but the parties and their attorneys agree, in writing, to attempt to settle the matter without litigation or even the threat of litigation. They promise to take a reasoned stand on every issue, to keep discovery informal and cooperative, and to negotiate in good faith. If either party seeks intervention from a court, both attorneys must withdraw from representation.*

Hybrids should always be considered. Because ADR is inherently consensual on a process level, the process can always, with agreement, be adapted to suit the needs of each case – unlike litigation. There are different dispute resolution processes, some of them consensual and non-binding, others adjudicative and binding, and consequently there are a multiplicity of hybrid processes that can be envisioned to combine two or more of them. An example is Arb-Med. The parties chose a neutral to wear two hats (or it could be two neutrals, each wearing a different hat). First, the neutral acts as a conventional arbitrator but when the parties have made their representations, the neutral writes an award and seals it in an envelope without disclosing its conclusion to the parties. The neutral then stops being an arbitrator and becomes a mediator with the goal of aiding the parties to reach a consensus. The parties agree in advance that if they fail to reach a settlement by a certain time in the mediation phase, they will open the envelope and be bound by the decision it contains. Usually, they also agree that if a settlement is reached, the envelope is opened only if both or all parties agree. The underlying psychology provides a powerful and equal influence on the parties to settle. For more details on this process see: www.imimmediation.org/?CID=129&cType=document.



Outside Counsel need to understand the mindset of their clients in order to service their needs properly. They represent an important element in conflict management. Client expectation needs to be communicated, their contribution constantly monitored and their value fully leveraged. Many are re-wiring themselves from Litigators to Resolvers but some still dismiss mediation as the lawyers' equivalent of homeopathic medicine, and consider ADR as Alarming Drop in Revenue. But as their clients change, they change.

Payback

In 2003, the American Arbitration Association/ICDR published study based on analysis of 250 large and medium-sized companies. It found that some were "Dispute-Wise" while others were not. "Dispute-Wise" companies were those that focused on preserving relationships, had a strong inclination to outcomes and certainty, were enthusiastic about ADR and less committed to litigating all cases on principle. The results indicated that Dispute-Wise companies held more sustainable relationships with third parties and had 28% higher price/earnings ratios than the average of all public companies. The most "Dispute-Wise" had 65% higher P/E ratios than the least Dispute-Wise. Coincidence?

Tomorrow's Answers Today

AkzoNobel's motto *Tomorrow's Answers Today* captures the very essence of dispute resolution. Igniting an explosion of ideas, to use Frans Johansson's phrase in *The Medici Effect*, is what is needed in this important field of human endeavour. The ideas expressed above hardly scratch the surface of conflict avoidance and resolution. There are many other possibilities – mini-trial, early neutral evaluation, baseball arbitration, evaluative and transformative mediation models, neutral fact-finding, and so on. Nobody has a monopoly on ideas and they are there to inspire and be used. The art is to know they are out there, understand them, see what worked for whom and why, continually inherit the latest thinking and to have the wisdom and creativity to keep adapting. That's Conflict Leadership.

(Author: Michael Leathes is the Director of International Mediation Institute, The Hague, Netherlands. This Article is based on a presentation made to 24 General Counsel and Legal Directors of international companies meeting in Frankfurt, Germany on September 3rd 2009)



The Lighter Side

Jimmy's high school science teacher announced to his class that Easter and resurrection is a myth. "Sir, I believe in God," Jimmy protested. The teacher replied, "Jimmy, the real world excludes the possibility of miraculous events such as the resurrection. The resurrection is a scientific impossibility. No one who believes in miracles can also respect science."

"God isn't limited by science," Jimmy responded. "He created science!" Engaged by Jimmy's outspoken faith, the teacher proposed a scientific experiment. Reaching into his refrigerator, he produced a raw egg and held it up. "I'm going to drop this egg on the floor," he stated. "Gravity will pull it toward the floor with such force that the egg will most certainly break."

Fixing Jimmy with a look of challenge, he concluded his proposal. "Now Jimmy, I want you to pray right now and ask your God to keep this egg from breaking when it hits the floor. If he can do that, then you'll have proven your point, and I'll have to admit that there's God." After pondering the challenge for a moment, Jimmy slowly stood to pray. "Dear Heavenly Father," he began. "I pray that when my teacher drops the egg...it will break into a hundred pieces! And also, Lord, I pray that when the egg does break, my teacher will have a heart attack and die! Amen."

After a unison gasp, the stunned class sat in silent expectation. For a moment the teacher did nothing. At last he looked at Jimmy and then at the egg. Without a word he carefully put the egg back in the refrigerator.

Article



Dealing with Conflicts – A Theoretical Underpinning!

: CHANDANA JAYALATH

When individuals rally round, their differences in terms of power, values and attitudes, emerge conflicts. They arise from numerous sources. Conflicts are not necessarily destructive, but can lead to new ideas and approaches to organizational processes, and increased interest in dealing with problems. Conflict, in this sense, can be considered resourceful, as it facilitates interpersonal skills. As more and more organizations promote teamwork, the need for training in conflict resolution is inevitable. The author explores the need.

A major advantage a team has over an individual is its diversity of opinion. However, diversity may sometimes result in a conflict. As more and more organizations promote teamwork, the need for training in conflict resolution is inevitable. Varney (1989)¹ reports that conflicts remain the number-one problem for most of the teams operating within large energy companies, even after repeated training sessions on conflict resolution. One reason for this may be that the managers are not giving adequate significance to nip in the bud. Varney's research shows that although most managers are aware of disagreements, they seldom assign a high priority to solving conflicts.

When individuals rally round, their differences in terms of power, values and attitudes, emerge conflicts. Although, it is often difficult to expose the sources of conflict, they arise from numerous sources generally falling into three categories according to Varney; communication factors, structural factors and personal factors. Barriers to communication are among the most detrimental source of misunderstanding. Communication barriers include poor listening skills; insufficient sharing of information; differences in interpretation and perception; and nonverbal cues. Structural disagreements include the size of any organization, turnover, level of participation, reward systems, and interdependence among employees. Personal factors include things such as individual's self-esteem, their personal goals, values and needs. In order for a conflict to be dealt with successfully, managers and team members must understand its unpredictability and its impact on individuals and the team as a whole.

Conflicts become negative when it is left to escalate to the point where people begin to feel defeated and a combative climate of distrust and suspicion develops (Bowditch & Buono, 1997)². Varney (1989) proposes that negotiation is the most

(Footnote)

¹ Varney, G. H. (1989). Building Productive Teams: An action Guide and Resource Book, San Francisco, CA: Josey-Bass, Inc.

² Bowditch, J. L., Buono, A. F. (1997). A Primer on Organizational Behavior (4th ed.). New York, NY: JohnWiley & Sons.



effective response to conflicts when parties operate in a system where there is interdependency. Negotiation as a process involves listening to both sides, seeking common areas of interest so that individuals can understand each other's position. Each party should then be allowed to express their feelings and get hostility out of their systems while admitting partial contribution for the conflict. Indeed, this requires good listening, low defensiveness, and an ability to stay in the mode of problem-solving. Agreement as to what steps will be taken to resolve the problem is important to prevent any gap of understanding. Meanwhile, the source of conflict enables everyone understands the facts of the dispute, before emotions overtake them. When agreement areas are identified, people can move towards a consensus by developing a strategy conducive for an amicable settlement.

Fisher et al. (1995)³ offers a similar five-step approach to resolving conflict.

- Acknowledge that a conflict exists.
- Gain common ground by putting the conflict in perspective with the goals and purpose of the team.
- Seek to understand all angles of the disagreement, keeping in mind that understanding is different from agreement.
- Attack the issue, not each other. Channel anger and hostility into problem solving and action planning.
- Develop an action plan describing how each person takes part in problem-solving.

This method allows all parties to acknowledge the nature of the conflict, and then jointly work towards a settlement. As with Varney's (1989) approach, the key to this process is responding quickly and effectively when conflict presents itself. Teams are cautioned to avoid covering up painful issues. Sooner or later, unresolved issues tend to resurface, often in uglier forms than before. Along the same lines, teams should not automatically defer an issue to management, as this dis-empowers the team. Instead, they should learn how to handle disputes themselves, requesting help from management only when their own attempts at resolution are nearing collapse. Accordingly, teams often collaborate closely in order to reach a consensus. The ability to use collaboration requires the recognition of and respect for everyone's ideas, opinions, and suggestions. Consensus requires that each participant agree on the points being discussed before it becomes a part of the decision. The goal is to have individuals accept a point of view based on logic and reasoning. When individuals can understand and accept the logic of a differing point of view, it means a consensus is nearby.

(Footnote)

³ Fisher, K., Rayner, S., Belgard, W., (1995). Tips for teams: A ready Reference for Solving Common Team Problems. New York: McGraw-Hill, Inc.



Think ... Let Go Of The Past

Release what needs to be free. It's really hard to let go. For many of us it is instinctive to cling. Holding on to it only causes pain.

When you let go of the old things, you pave the way for new things – experiences that are perhaps more exciting, adventurous or wholesome. When you let go of the past, you free yourself. You are letting go of that which is rotting and decaying. You are then ready to embrace the fresh, unopened buds of change.

Have the courage to let go. When you relinquish the past, your future embraces you.



Conflicts are not necessarily destructive, however. Amongst different styles in facing a conflict, it is very common to see a person avoid or deny the existence of conflict. Unfortunately, in this case, the conflict often lingers in the background during interaction between the participants and creates the potential for further tension. A second response style is where a person mistakenly equates conflict with anger, which increases the degree of friction and defensiveness. A third way is to use power and influence to win at the other's expense allowing their competitive impulses to emerge. None of these styles are rational and professional in modern arena. Interestingly, conflict is an opportunity to unleash potential of individuals. Diversity of opinion allows for full consideration of every angle of a situation and can lead to growth, opportunity and often, a better outcome. It helps release of frustration, formation of new perspectives, more informed decision making, and increased cohesion. Therefore, conflicts can lead to new ideas and approaches to organizational processes, and increased interest in dealing with problems. Conflict, in this sense, can be considered resourceful, as it facilitates interpersonal skills. As such, differences need not lead to dissatisfaction but rather can lead to innovation and creativity. (Maier;1965). A person with different ideas, especially if he or she is a subordinate, can be seen as a troublemaker or as an innovator depending on the other's attitude. Conflicts can be amicably resolved when the parties are willing to learn from each other in a collaborative relationship. This essentially requires a genuine deviation from what is aptly called paradigm blindness – the utter belief that the way we have been doing since a long time is the one and only solution, which is typically come across in beaucratic systems where the individuals feel a new approach as a threat to their survival.

The interpersonal skills are related to the development of a 'helping relationship' and include amongst other things, mutual trust and respect, candid communication and awareness of the needs of the others (Burke:1969). The problem solving skills are centered on locating the problem, seeking, exploring and testing alternatives, and selecting the best alternative. Burke insists that knowledge and insight gained through experience with the benefits of problem solving and the dysfunctional effects of other strategies would be valuable in developing interpersonal skills, collectively resulting in a win-win situation.

Confrontation problem solving method includes specific attitudinal and skill components that encourage constructive use of disagreements. As depicted in the Blake and Mouton conflict model, the parties use two axes to represent two important conflict strategies namely; goal and relationship. Each of these strategies is appropriate under certain conditions. For example, if neither the goal nor the relationship is important, then the best thing is to tactically withdraw. If the relationship is extremely important and the task is not so, then smoothing is appropriate. However in many conflict situations, both the task and relationship are important. In these situations, confronting and negotiating often lead to the best outcome.

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(Author: Dr. Chandana Jayalath, a Chartered Quantity Surveyor, working at the Public Works Authority in Doha, Qatar, on secondment basis.)

Promoting Student Authors

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

News & Events



ICCA to publish Judges' Guide to New York Convention

ICCA will launch its new Guide to the interpretation of the New York Convention in May 2011, coinciding with ICCA's 50th Anniversary celebrations in Geneva. The Guide is part of a program to assist uniform interpretation and application of the New York Convention worldwide, and takes the form of a practical guide to be used by judges. ICCA Honorary President, Professor Pieter Sanders, will act as General Editor of the Guide, which has been penned by a group of experts including ICCA Members Neil Kaplan, Guido Tawil and Gabrielle Kaufmann-Kohler, with Kim Rooney and Marike Paulsson and with the assistance of Judy Freedberg and Silvia Borelli.

International Investment Treaty Arbitration on the rise

Two recent international reports in relation to investment treaty arbitration will be of interest to companies that invest in, or that are considering investing in, regions that are politically or economically unstable. The reports, released by the International Centre for the Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD) respectively sets out the current state of play of international investment arbitration, and confirms the continuing growth in international investment treaties and arbitration based on international investment treaties. Companies which invest in, or which are considering investing in, regions which are politically or economically unstable should be aware of these developments and the opportunities available to structure their investments to take advantage of these protections.

Kishenganga: UN fixes US jurist for Indo-Pak arbitration

The United Nations has appointed American jurist Stephen Myron Schwebel to head an International Court of Arbitration to settle the dispute between India and Pakistan over Kishenganga hydro power project in Jammu and Kashmir, paving the way for the commencement of legal proceedings.



Are you interested to promote Mediation Clinics?

Indian Institute of Arbitration & Mediation welcomes you to take part in an exiting attempt of social transition to make our world a safe, sustainable, peaceful and prosperous place to live. Make an important contribution by adopting or supporting Community Mediation Clinics in India.



For details visit www.communitymediation.in



Indian Universities to have specialized study on Arbitration

Indian Law Minister M Veerappa Moily, speaking at International Arbitration Centre's conference on 'India: Prime Global Business Destination — An Arbitral Perspective', at Singapore, said: "As the Indian economy develops with increasing international investments, the Indian universities would be encouraged to create a separate faculty or department for arbitration law as a specialized study and incisive research." He said India has a comprehensive, contemporary and progressive legal framework to support international arbitration that is on par with the best in the world and every effort was being made to resolve problems that hinder working for arbitration in India, starting with amendment of certain provision of law to changing mindset of stakeholders including judges, arbitrators, lawyers and parties involved in such process.

Court Mediation solving more civil cases in China

According to China's Chief Justice, Wang Shengjun, litigants either withdrew lawsuits or reconciled with the other party after court mediation in nearly 8.3 million civil cases in China in the 30 months ending June this year. The 8.3 million cases accounted for more than 61 percent of all civil cases concluded in the period. According to him, court mediation is playing a positive role in resolving social conflict and managing society,

'Mediation bus' to deal with traffic altercations in China

China has deployed a 'mediation bus' as an initiative to deal with growing disputes and altercations in public buses to reduce pressure on the city police. With two retired police officials and a serving police officer, the bus would crisscross through the city to attend to the recurring incidents of quarrels. In operation on a trial basis since October 15, the vehicle has helped in resolving about ten disputes. Passengers can call the bus by phone or by sending a text message. The mediation service is voluntary and free. In addition to the mobile mediation bus, two mediation rooms, aimed at helping in resolving disputes on the subway or in taxis, have also been in use since October.

Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment. You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded. For more details on CDM, mail to training@arbitrationindia.com

Nothing is ever lost by courtesy.
It is the cheapest of the pleasures;
costs nothing and conveys much.
It pleases him who gives and him who receives,
and thus, like mercy, it is twice blessed.

~Erastus Wiman~