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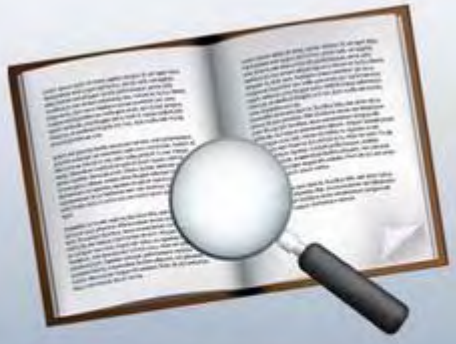

IN THIS ISSUE .....

EDITOR'S NOTE

I think mediation is finally moving to the right track. Making it just a tool to bring down court dockets, sidelining its value as the most effective method of resolution, finally seems to get rectified. The recent Supreme Court of India judgment highlights the beauty of settlement through mediation, where it said that mediation not only brings about a solution to the satisfaction of the parties and, therefore, create a win-win situation, but also brings outcomes which cannot be achieved by means of judicial adjudication. The Court emphasized the need for early resolution of disputes in order to stop the negative factor from growing and widening its fangs which may not be conducive to any of the litigants. The court said it is of the firm opinion that mediation is the best form of conflict resolution. So finally mediation is getting its true place!

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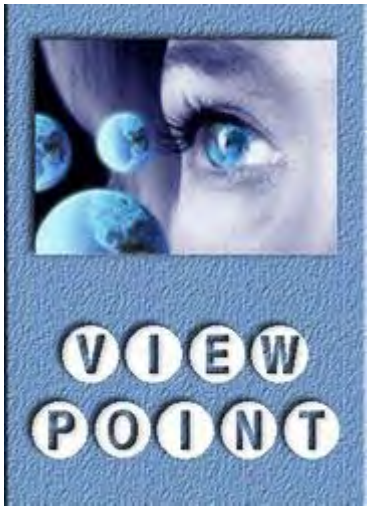
MORAL DAMAGES AND INVESTMENT ARBITRATION: A TRANSITIONAL ANALYSIS

PREET SINGH OBEROI



This article examines moral damages in investment treaty arbitration. It traces the origins of the concept of moral damages in French law and general public international law and assesses how moral damages differ from other awards of monetary relief. It identifies two conceptions of moral damages and, using these conceptions, examines whether the tests applied and conclusions reached by investment treaty tribunals can be justified. It concludes that moral damages are unlikely to become a pervasive and uncontroversial feature of the investment treaty arbitration landscape.

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Introduction

Moral Damages are often faced with a lot of ambiguity. There exist two conceptions of moral damages. The first is a compensatory remedy for a particular category of harms; those involving mental distress. The second being a form of punitive damages. The former is uncontroversial, however, it is unlikely to carry much significance in practice; this is because claimants tend to be corporations who cannot directly sustain mental distress. By way of contrast, the second conception moral damages as a means of punishing a respondent state are controversial; for reason that punishment is not a recognized function of monetary relief in public international law. It ought to follow from this that awards of moral damages are likely to be either infrequent under the first conception or controversial under the second conception.

This article is premeditated in the following structure: the first part deals with the concept of moral damages by examining its origins in both domestic law and public international law. The ensuing part elucidate an account of the investment treaty jurisprudence relating to moral damages, and the concluding part lays down fundamental issues of how moral damages might be implicit and the conditions in which they may be awarded.

Historical description

The idea behind moral damage is derivative from two essential terms ‘préjudice moral’ and ‘le dommage moral’ which mean moral prejudice and moral damage respectively. The first known instance of moral damages deilberated

in a court of law dates back to 1833, when a case involving damage to commercial reputations, the French Procureur Général envisioned the idea that compensation was payable for 'préjudice moral'.[1] Likewise, in 1877, compensation was awarded for 'le dommage moral' arising from wrongful death by the criminal chamber of the Cour de Cassation.[2] Yet, it was not until 1923 that we had a sound legal authority on the same. In another case involving wrongful death, the Cour de Cassation confirmed that compensation was owed for all types of damage resulting from a wrongful act. The préjudice moral, in this case, was mental distress caused by the loss of a father. The court, while removing all ambiguities in this respect, stated that compensation was available for damage which take forms other than reductions in wealth – préjudice moral or le dommage moral.[3]

The French Law, in all its tenacity, has always intended to keep the relief granted for préjudice moral or le dommage moral under the ambit of compensatory damages and let it litter into the domain of punitive damages.

Once, outside the domestic boundaries of France, we see an alike idea developed through various claims tribunals. The first occasion may be traced back to the Di Caro case, decided by the Italian–Venezuelan Commission in 1903, Umpire Ralston permitted compensation for 'the deprivation of personal companionship and cherished associations consequent upon the loss of husband...unexpectedly taken away' while establishing that this loss 'may not be translated into any certain or ascertainable number of bolivars or pounds sterling'.[4]

(Footnotes)

[1] Cass, Ch. Réunies, June 15, 1833, Sirey, (1833), I, 458, Conclusions Dupin, Proc. Gen.
[2] Cass, Crim., Mar. 22, 1877, Bull. Crim., No. 86, 178.
[3] Cass, Civ., Feb. 13, 1923, *Lejars c. Consorts Templier*, D.P.(1923), I, 52.
[4] *Di Caro* (*Italy v. Venezuela)* (1903) X RIAA 597, p. 598.

YOU MAY KNOW ME!

You may know me.
I am your constant companion.
I am your greatest helper; and I am your heaviest burden.
I will push you onward or drag you down to failure.
I am at your command.
Half of the tasks you do might as well be turned over to me.
I'm able to do them quickly.
I'm able to do them the same every time if that's what you want.
I am easily managed. All you've got to do is be firm with me.
Show me exactly how you want it done and after a few lessons I'll do it automatically the rest of your life.
I am the servant of all great men and women, of course; and I am servant to all the failures as well.
I've made all the great individuals who have ever been great.
And I've made all the failures that have ever failed.
But I work with all the precision of a marvelous computer. I work with the intelligence of the human being.
Be easy on me and I will destroy you.
Be firm with me and I'll put the whole world at your feet.
What am I?
I am A Habit!

~ Dr. Dennis P. Kimbro ~

This concept conversely seems to be well assumed in contemporary legal practice. Human rights tribunals have been frequent awarders of moral damages; both the Inter-American Court of Human Rights and the European Court of Human Rights (ECHR) frequently award them.[5] The Inter-American Court granted them in its very first award on compensation. [6] The purpose of an award of moral damages in the Inter-American system is to redress 'emotional harm' suffered by the human rights victim.[7] The purpose is not to punish the violating state.[8] The European Court of Human Rights also grants damages for 'non-pecuniary injury' resulting from treaty violations.[9] In, 1992 Letelier and Moffittcase, an ad-hoc international tribunal granted moral damages to the families of victims of unlawful killings by Chilean agents.[10]

The most distinguished episode in the fate of moral damages occurred as recently as June of 2012. While pronouncing the judgment in the Diallo case, the ICJ itself recognized that 'non-material injury' (considered synonymous with 'mental and moral damage' and 'non-pecuniary injury') is a known head of damage in international law. The Hon'ble Court awarded moral damages and noted that the quantum of moral damages necessarily 'rests on equitable considerations'.[11]

Governing International Law

The International Law Commission's Articles on State Responsibility (ASR) has also validated the idea of moral damages. Though, this may not directly concern investment arbitration yet tribunals do find a way around it. Article 31 of the ASR, for case in point, refers to the onus to make amends for 'all damage, whether material or moral'. The Commentary to the ASR explains the concept of 'moral damage' as, "moral damage' includes such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life.[12]

A curious provision that invites an expansive interpretation is Article 37. The aim is to remedy an injury which is not financially assessable. In exact, Article 37 aids that the injury which cannot be rectified by restitution or compensation can still generate an obligation to provide 'satisfaction'. Moral damages sneak up in this context. To focus this point we refer to the Rainbow Warrior award, wherein the Tribunal referred to satisfaction as a response to 'moral and legal damage'.[13] Satisfaction is an extraordinary remedy which is meant to assert the dignity of a wronged state. It leaves an enormous scope for interpretation as satisfaction may involve non-monetary reliefs too like declaration of an illegal act or merely an apology.

The legal escape route as seen by ECHR while granting damages as stated above is provided by Article 41 of the European Convention on Human Rights which allows it to grant 'just satisfaction to the injured party'. In the Inter-American system, awards of moral damages are not meant to serve a punitive function.[14] In its place, the focus remains on the mental or physical suffering sustained by the victim.[15] Further the European Court of Justice has awarded moral damages for mental distress caused by the prospect of an unlawful dismissal.[16]

(Footnotes)

[5] D. Shelton, *Remedies in International Human Rights Law*, 216 (Oxford U. Press 2001) (describing moral damages as 'compensation for dignitary violations, including fear, humiliation, mental distress') pp. 226–229 (describing the practice of the ECHR and the IACHR with respect to moral damages).

[6] *Velásquez Rodríguez Case*, Merits, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989), paras. 27, 50.

[7] *Ibid*.

[8] *Ibid* at paras. 38–39.

[9] For instance refer *Konig Case*, (1980) 36 Eur. Ct. H.R. (ser. A), para. 19.

[10] *Re Letelier And Moffitt* (*United States v. Chile*) (1992) XXV RIAA 1, paras. 23, 31, 35, 38 and 41.

[11] *Ahmadou Sadio Diallo (Guinea v. Congo*) Judgment of June 19, 2012, para. 18, 24.

[12] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 202, 223 (Cambridge U. Press 2002).

[13] *Rainbow Warrior* (*New Zealand v. France*) (1990) XX RIAA 215, para. 122.

[14] For instance refer *BB v. UK,* Application No. 53760.00, Decision of Feb. 10, 2004, para. 36 ('The Court recalls that it does not award aggravated or punitive damages...').

[15] ECHR Practice Direction on Just Satisfaction Claims, Mar. 28, 2007, paras. 9, 13.

[16] See *Dineke Algera et al v. Common Assembly of the European Coal and Steel Community*, (C-7/56, C-3/57–C-7/57) [1957] ECR 39.

ICSID : Awards and Implications

Predictably in cases of investment arbitration moral damages seem farfetched. In the history of investment arbitration, moral damages have seen the light of day in few instances. Moral damages have been delayed a fair share before finally being accepted in the domain of international investment arbitration. The only cases where moral damages were awarded are Benvenuti v. Congo (decided in 1980) and Desert Line Projects v. Yemen (decided in 2008). The Benvenuti case was decided ex acquo et bono. Thus, it is of limited relevance where a tribunal is required to decide the dispute, and award remedies, in accordance with law.[17]

The desert line eye-opener

16th February 2008 marks a vital date in the life investment arbitration; the final award in the matter of Desert Line v. Yemen was granted.[18] It was decided under the Oman-Yemen BIT and thus a fundamental precedent in this area.

Desert line Projects, an Omani construction, was engaged in road construction work in Yemen. The Government of Yemen required making payments in lieu of the work so done. But the said payment was never made by the government of Yemen. So, Desert Line Projects initiated local arbitration proceedings and thus successfully acquired damages against the Government. Surprisingly, The Government refused to comply with the arbitral award and further sought to annul the award through local courts. As per facts, Desert Line projects were then coerced into a detrimental settlement agreement. It is pertinent to note that the coercive measures included a siege with heavy artillery, the arrest and detention of Desert Line Projects' employees (including the Chairman's son) by the Yemeni authorities, death threats against the Chairman himself and failures to protect Desert Line Projects from third parties.[19] The agreement , lead to a settlement by Desert Line Projects for half of the amount of damages awarded in the local arbitration proceedings. Due to acts of the State Desert Line Projects instituted claims under the Oman–Yemen BIT through which successfully established a breach by Yemen of the fair and equitable treatment standard.[20] The relief sought included OMR 40 million as moral damages for the coercive measures adopted by the Yemeni authorities. The moral damages were on account of: (a) the stress and anxiety suffered by its executives on account of being harassed, threatened and detained by the Yemeni authorities and (b) significant injury to its reputation, prestige and credit.[21] Oddly, the counterclaimants did not contest the Tribunal's jurisdiction to award moral damages yet the evidence of injury as well as whether the injuries in question could be attributed to the Government was questioned.[22]

(Footnotes)

[17] *Benvenuti v. Congo*, ICSID Case No. ARB/77/2, Final Award, Aug. 8, 1980, para. 4
[18] *Desert Line v. Yemen,* ICSID Case No. ARB/05/17
[19] Ibid at para 185
[20] Ibid at para 194
[21] Ibid at para 286
[22] Ibid at para 288

LESSON IN LIFE

A wise man sat in the audience and cracked a joke. Everybody laughs like crazy.
After a moment, he cracked the same joke again. This time less people laughed.
He cracked the same joke again and again.
When there is no laughter in the crowd, he smiled and said:
You can't laugh at the same joke again and again,
but why do you keep crying over the same thing over and over again?

Lastly, the award was granted in favour of Desert Line Projects, stressing that the 'physical duress exerted on the executives of the Claimant' and that the breach of treaty was 'malicious...therefore constitutive of fault-based liability'. Yemen was, 'therefore', liable to make reparation for all injury whether 'bodily, moral or material'. On the facts, the Tribunal concluded that the prejudice suffered was 'substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation'. The Tribunal awarded United States Dollars (USD) 1 million (approximately 38.63 million OMR) for 'moral damages, including loss of reputation' noting that the amount was 'more than symbolic yet modest in proportion to the vastness of the project'.[23]

The concept of 'exceptional' leaves much to the fancy. Doubts arises with regards to the effect that whether there is absence of 'physical duress' or even if the breach of treaty is not 'malicious', would the claim of moral damages still stand.

4.2 Precedents along the way

The Desert line case though may be an exceptional one, yet it did not arise in isolation. There were numerous decisions that led to the 2008 landmark award. Though almost all of the preceding claims for moral damages were in fact unsuccessful but there are a few cases wherein moral damages asserts an academic significance. While removing the grain from the shaft we see three such cases Lemire, Tza Yap Shum and the Biwater case.

The findings of the Lemire and Tza Yap Shum cases, clearly reject the all requests for moral damages, however, they provide valuable assistance on the applicable legal standard. In Lemire, the Tribunal established a three pronged test for the award of moral damages as follows:

> ".... moral damages can be awarded in exceptional cases, provided that –
>
> - the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
> - the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
> - Both cause and effects are grave or substantial."[24]

The Abovementioned test was reiterated by the the Tza Yap Shum tribunal.[25] The tribunals in both the cases found that in light of the facts and circumstances of the cases before them, moral damages could not be made out. The test imputes a high level restraint on the part of the tribunals in order to award moral damages. That is to say that establishing mental suffering may not be enough, the egregious conduct by the state is also to be proved. Whether this combination of requirements is warranted is discussed further below.

Though investment arbitration has had limited number of precedents, yet, an authoritative legal standard may be attained. As has been illustrated above we see that there are certain elements that may be made out in order to invoke moral damages in an investment claim. The attributes that may be assigned to such a remedy, though were intended to be compensatory in nature, yet have turned out to be rather punitative in nature. We must now look at another important question of identification of moral damages as a unique remedy that may separated from the rest.

(Footnotes)

[23] Ibid at para 290

[24] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Final Award, Mar. 28, 2011, para. 333

[25] *Tza Yap Shum v. Peru*, ICSID Case N. ARB/07/6, Final Award, July 7, 2011, para. 281

Conclusion

Moral damages often appear to the layman as an interesting area in the legal parlance. This paper indulges into the often mythical concept of moral damages. Coming to culmination of this paper and thoroughly looking into all the aspects of moral damages under International Arbitration, we understand a clear understanding of a few things. Firstly, that Moral damage can be thought of as a fine for egregious behavior or as compensation for non-pecuniary injury. If they are fines then it is a radical step for tribunals to award them because punitive damages are not well-recognized in public international law. Tribunals seeking to award punitive damages would be introducing a novel remedy on grounds which have not been agreed in the treaties which they are charged with applying. The view taken under this paper is that the better view, therefore, is that moral damages are compensation for non-pecuniary injury. Even if compensatory, moral damages will rarely be awarded in investor–state arbitrations. Most claimants are corporations which will struggle to establish mental distress although the European Court of Human Rights is less concerned with this issue; it has not presented a robust justification for its position.

For reasons elaborated in the paper above, it seems fairly improbable that moral damages would ever become an omnipresent and debate-free feature of the investment arbitration landscape. Owing to the subjugation of the idea of moral damages to the preconditions of mental distress, egregious conduct of the state, it becomes a fatality waiting to happen. To add to that there is always the rider of punitive damages which encompass an enormous restraint on investment tribunals as punitive damages are impermissible under public international law.

A woman called Mount Sainai Hospital. She said “Mount Sainai Hospital? Hello, Darling, I’d like to talk with the person who gives the information about the patients. But I don’t want to know if the patient is better or doing like expected, or worse. I want all the information from top to bottom, from A to Z.”

The voice on the other line said “Would you hold the line please, that’s a very unusual request.”

Then a very authoritative voice came on and said, “Are you the lady who is calling about one of the patients?”

She said: “Yes, darling! I’d like to know the information about Sarah Finkel in Room 302.”

He said “Finkel. Finkel. Let me see. Farber, Feinberg — Finkel. Oh yes, Mrs. Finkel is doing very well. In fact, she’s had two full meals, her doctor says if she continues improving as she is, he is going to send her home Tuesday at twelve o’clock.”

The woman said “Thank God! That’s wonderful! She’s going home at twelve o’clock! I’m so happy to hear that. That’s wonderful news.”

The guy on the other end says: “From your enthusiasm, I take it you must be one of the close family.”

She said “What close family? I’m Sarah Finkel! My doctor doesn’t tell me anything!

TRANSITION MATTERS (PART - 2)

TONY WHATLING

A mediator has to understand that there is a major transition to be made from pre-existing work roles and responsibilities to the work of the dispute resolution practitioner. The importance of this transitional journey cannot be overstated and yet, surprisingly, it is rarely ever discussed or referred to in mediation literature. The author explains this transition and emphasises that restoring the balance between the two hemispheres may be necessary to succeed at mediation. It is this difference that justifies the need for significant changes in thinking and in practice.

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Clients are commonly invited to "Leave fault and blame out of the proceedings, not interrupt and to treat each other with respect" – Oh come on - who are we kidding?

One final example in this, by no means totally inclusive list, is that of understanding the normality of, and getting to feel comfortable with, managing conflict and what is often raw emotion, rage, distress, despair, hurt etc.

One important first key idea, is that we all hold personal 'life scripts' about conflict. Depending on our early life experiences, we may regard conflict as potentially exciting, creative, energising and positive. Alternatively, we may see it as scary, worrying, potentially painful and essentially negative. Most of us will be somewhere in between and are likely to say that our position would depend very much on the specific circumstances involved. Where we stand personally is not predictive of our effectiveness as mediators, but we do need to be aware of how conflict affects us personally, as well the effect it has on the negotiation process in dispute resolution. As Haynes points out: Conflict is frightening to most people. Most professionals are either scared of conflict between clients and so try to suppress it, or believe that it is inherently wrong and so avoid it. Yet conflict is universal to all mediation cases. The question is not whether conflict exists but how it can be made constructive. (Haynes 1989, p. 3 in Whatling 2012, p. 137)

A major landmark in my own development as a mediator involved adapting my personal life script so as to be

able to see conflict as potentially positive and creative. Surprisingly, nothing before mediation training had served to bring me to this view regarding attitude to conflict – not through training in youth work or social work, and yet, if such careers are not substantially about managing conflict what are they about. (Whatling 2012, p. 138).

Opinions as to how far emotion should be tolerated, or indeed perhaps even encouraged in mediation, differ between practitioners. Haynes in his UK training workshops tended to regard emotion as un-useful dialogue though in writing he did qualify this significantly when he writes: *It is useful to think about client emotional behaviour in two ways: offensive and defensive. Offensive behaviour is non-useful and best ignored by the mediator unless it prevents progress in the mediation process… Defensive emotional statements are often useful because they alert the mediator to underlying issues, or indicate emotional issues which, if dealt with enable the mediator to continue the mediation process, negotiating for a solution that meets the parties' goals.* (Haynes 1993, p.11)

Note how Haynes does recognise the possibility that emotion may be preventing 'progress in the mediation process.'

Practice experience suggests that unresolved emotion quite commonly inhibits the mediation process and progress, operating as it often does as covert driver that may inhibit, or indeed sabotage, attempts at negotiation of settlements on substantive issues.

As Thelma Fisher put it more than 20 years ago: *Any conciliator learns that conflict between couples has positive and negative power. It can create energy for negotiation or destroy it. ….The conciliator will respond to the conflict instinctively; the danger signals appear as in any situation of actual or impending conflict. Conciliators must learn to interpret these signals, as conflict is their stock-in-trade.* (Fisher 1992, p.121).

Robert Benjamin also makes interesting observations on this issue: *Conflict is first and foremost about people's passions, desires, and emotions in collision. The friction of conflict generates heat, which, like any form of natural energy, can be squandered or harnessed. The sources could be scarce resources, an inability to communicate or empathize, a moral clash over good or evil, or a power struggle of some variety. Typically they are inextricably intertwined and sometimes disguised. ……what is required is the deft and subtle touch of a third party attuned to the rhythms of conflict, with the necessary feel and intuition to be effective. Those qualities are, however, difficult to find in the midst of a Western techno-rational culture that is dedicated to the belief that problems are predominantly solved by rational analysis and reasonable discourse. At least initially, disputes are not susceptible to logic; traditional notions of the dispassionate, above-the-fray, neutral, and objective expert can be not only ineffective but even counterproductive in managing heated, longstanding disputes….Developing the requisite skills is a twofold task.*

First we must recognise the importance of moving outside the strict and narrow rational paradigm our culture has defined…….second we must find models of practice that offer support and give direction. (Benjamin 2003, in Bowling & Hoffman pp. 78-79).

By now the reader will be aware that my position on conflict and emotion in mediation is that – since it is both inevitable and indeed entirely natural – managing it constructively may be a significantly different skill than that already developed by many trainee and novice mediators.

For example, from my own experience of delivering CPD training for Collaborative Law practitioners, it was noticeable that they were very open about the extent that – coming as they did predominantly from legal practice – they had quickly realised how unskilled they felt at managing high emotion in joint meetings. The particular group concerned had dealt with this by recruiting qualified counsellors to work with each party, so as to prepare them emotionally and psychologically, to behave in joint session in accordance with the requirements of the Agreement to Mediate, the additional costs of the involvement of a counsellor being born by the parties concerned.

Some examples of this 'best behaviour' expectation accessed from recent Collaborative Law practitioners websites include:

Respect.

Each party agrees to act respectfully and avoid disparaging or vilifying any of the participants.

A team of professionals is assembled to help the parties understand and resolve their disputes in many different contexts. The disputes maybe legal disputes or emotional and include: mental health counsellors/coaches for each party, neutral financial advisors, accountants, parenting specialists, child specialists, vocational experts, and appraisers, if needed.
What is Collaborative Law?
by Mary D. Beaulier

Finally, in some cases where communication between a couple is difficult, you and your spouse may choose to retain Coaches to assist you both. Coaches can assist in creating a new communications dialog that will allow you to optimally work within the Collaborative model.
Understanding The Basics Of Collaborative Family Law
by Sherri Goren Slovin

It is not for me to argue about the extent to which such practice models do or do not achieve better outcomes. I highlight them simply so as to illustrate the marked contrast between those writers and practitioners who see conflict and emotion as natural, inevitable, and furthermore functional to effective dispute resolution, and those who do not.

Chris Richards writes: *The fact that nearly half of all British families are, at some stage the arena for a separation or divorce struggle seems therefore, to call for a supportive, not a blaming, response from professionals. In consequence Solicitors Family Association (SLFA) lawyers, family court judges and magistrates, mediators and children and family court advisory and support service (CAFCASS) reporters all aspire to calm down, not inflame, and to transform, not reinforce, the accusations and recriminations The professional script declares that no one is to blame for the break-up. Marriage break-ups just happen: in the words of an archbishop, some marriages 'die'.*

Most of the clients whom I have seen do not believe the professional script. It is utterly at odds with the intensity of their disappointment and apprehension. Their marriage has not died, it has been killed. Each party vies with the other to convince the mediator, at least of the unsound credentials of the other, and at most, of her or his treacherous cruelty.

Family mediators are taught that they should acknowledge emotions, but they need to do more than this, they need to validate them. Separating people have a right to feel anger, fear or distrust. Mediators who brush feelings aside and tell their clients to focus on the future not on the past hurts will get nowhere. Clients must gain some confidence that their feelings are understood. Understanding means listening without rejecting or colluding. When clients feel acknowledged, they will be able to focus rationally on the future – not before. …It is the difficult skill of the mediator to allow the expression of blame, and simultaneously to acknowledge both viewpoints, with the utmost respect. (Richards 2001)

A final word here from a lawyer mediator, on this controversial issue regarding emotion in mediation, seems apposite: *According to Zen Buddhism, one way enlightenment can be achieved is by holding two contradictory thoughts in the mind simultaneously. This, I have found, is more easily said than done. Perhaps I am handicapped in this endeavour by virtue of professional training: as a lawyer my mental functioning has shifted decidedly to the left brain. I know one lawyer-turned-mediator (or as the joke goes, a recovering lawyer) who describes law school as a process in which the left brain circles around the right brain and eats it.*

If that is the case, learning to practice mediation has presented me with the task of recovering the right-brain function, the place where creativity and nonlinear thinking flourish. Indeed, restoring the balance between the two hemispheres may be necessary to succeed at mediation because the work is inherently difficult, is multidimensional, and requires not only logic but also inventiveness. ….The very complexity of the work is one of the things that make it so appealing: no matter how much experience we have, no matter how skilled we may become, mastery always eludes us. For people who love challenges, mediation is a natural calling. (Hoffman 2003, p.167 in Bowling and Hoffman 2003)

The transitions debate needs also to touch on issues of mediator style and models of practice. Whilst space here prevents detailed descriptions of these, most mediators will be familiar with such labels as ‘facilitative’, ‘evaluative’ and ‘directive’ styles.

Non-directive mediation and the client as expert.

Let us return now to some of the other philosophical issues that underpin facilitative mediation practice. Conflicts and disputes brought to mediators by clients are rooted in, and are in no small part a product of, their past, present and future and their thoughts, feelings, attitudes, beliefs and actions, not those of the mediator. Being mindful of these essential principles in practice is to believe that, by definition, clients should be regarded as the ‘experts’ in their circumstances and ‘subjective universe’. This being so, they are also, by definition, the experts in their own conflict and dispute situation. It follows that they are best placed to resolve the problem(s), not least because they will have to take personal responsibility for implementing any changes, actions and agreements made in mediation. The fact that spouses may be exhibiting something akin to temporary madness, in the trauma of separation and being at war over the children’s future care, should never lead us to fall into the trap of thinking either that they are mentally ill or that they need a mediator to tell them what time to put their children to bed. Problems brought to the mediator are the domain of the parties in dispute, not of the mediator. The role of the mediator is to empower the parties to solve the problems and to resist the urge to relieve client distress by assuming the burden of their difficulties. (Whatling 2012, pp. 37-38).

Despite my own enduring attachment to this essential philosophy of client as expert, my concern about the other styles actually has less to do with their application by mediators, than the extent to which such practitioners may be totally unaware of the philosophical underpinnings and consequences of that which they do.

Facilitative mediators working in family mediation would commonly expect complex children’s financial and property issues to take somewhere between three and six sessions. Such mediators would be working to the facilitative principles defined earlier and on the assumption that hitherto the parties had taken major responsibility for understanding, deciding on and managing those important elements of daily life, and so are ideally placed (with some help from the impartial mediator) to resume that role and responsibility. On the other hand, some lawyer mediators, working to directive principles, regularly resolve all such family financial and property cases in one joint session, or at most two. How do they do that? They do it by having the parties submit all financial data before the first session. The data are examined by the mediator prior to the first meeting. Typically such mediators then explain to the parties that, having studied the financial data, they are able to recommend the obvious optimum settlement. Words commonly used involve such legal terms as ‘putting a charge on the property’ and ‘pension splitting’. The parties, knowing the legal background of the mediator, and frequently being caught up in the turmoil of separation and divorce, are often in no fit state to question the professional wisdom offered and therefore settle on that basis. Often at least one of the parties, commonly the ‘leaver’, has a wish to settle as quickly as possible and with the minimum costs. The extent to which such behaviour is right or wrong depends clearly on which position we take on the values and philosophical underpinnings of practice referred to earlier. From my discussions with them, lawyers who favour this style clearly have no comprehension that this way of working might in any way be questionable. This is all the more concerning because commonly they are often affiliated to professional associations that, in their membership codes of practice, prohibit such advice giving. My two chief concerns are first that, as yet, we do not know how many such settlements a year or so down the road will be seen by one or both parties as unfair or inequitable from their own perspective. Second, and of far greater concern, is that the parties are probably never informed as to the type of mediation on offer or what the alternative options of mediator style might be. (Whatling 2012, pp. 30-31).

Maslow is not left-brained linear, but right-brained recursive.

Many readers will be familiar with the four key learning stages we experience when undertaking the task of new learning, particularly where it involves applied studies.

Maslow described the stages as:

1. Unconscious incompetence

The individual does not understand or know how to do something and does not necessarily recognize the deficit. They may deny the usefulness of the skill. The individual must recognise their own incompetence, and the value of the new skill, before moving on to the next stage. The length of time an individual spends in this stage depends on the strength of the stimulus to learn.

2. Conscious incompetence

Though the individual does not understand or know how to do something, he or she does recognize the deficit, as well as the value of a new skill in addressing the deficit. The making of mistakes can be integral to the learning process at this stage.

3. Conscious competence

The individual understands or knows how to do something. However, demonstrating the skill or knowledge requires concentration. It may be broken down into steps, and there is heavy conscious involvement in executing the new skill.

4. Unconscious competence

The individual has had so much practice with a skill that it has become "second nature" and can be performed easily. As a result, the skill can be performed while executing another task. The individual may be able to teach it to others, depending upon how and when it was learned.

It is important to understand that Maslow's four learning stages are not a single event-linear concept, but are recursive. We are never as it were, in a state of permanent 'unconscious competence' – unless perhaps when we are dead. Each new major change in our profession is likely to cycle us again through the discomforts of Maslow's learning stages.

In times of major change the learners shall inherit the earth, while the knowers shall find themselves beautifully equipped to deal with a world that no longer exists. (Eric Hoffer).

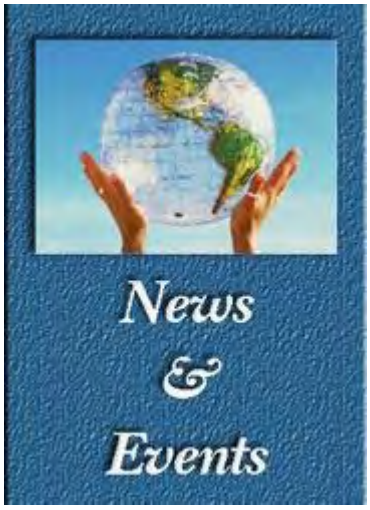
Finally, I return to the last words in the title of this article – 'and does it matter'?

I hope that I have made the case for 'transition matters' to be raised in the consciousness – and therefore in a more open and recurring debate – between mediation trainees, trainers, experienced mediators and PPC's. I hope too that a case has been made for recognition of some of the distinctive and significant features of mediation practice. It is this difference that justifies the need for significant changes in thinking and in practice, as trainees move from their everyday previous role functions and responsibilities into the challenging, often demanding, yet always exciting world of dispute resolution.

I am aware that much of the above content may be seen as overly challenging of trainees and practitioners from a legal background. Trainees from the social sciences orientation too will have a substantial transition to make. For example in trying to absorb the complex technical business of legal processes, for example in family mediation how the law deals with divorce, as well as welfare benefit entitlement and housing law. In the main this knowledge is what I tend to describe as 'Knowledge not for use' – in other words mediators need the psychological comfort of having such knowledge, not least for when their clients refer to it. However this is not significantly different from a lawyer mediator's need to acquire some basic awareness of couple relationship dynamics and child development.

Different travelers on any transitional road should be helped through trainers, mentors and PPC's. Arguably this should be no different from any good staff management induction process that identifies not just strengths and qualifications, but also areas of shortcomings so as to identify what is needed to bring them up to speed.

NEWS & EVENTS



MEDIATION IS THE BEST FORM OF CONFLICT RESOLUTION: SUPREME COURT OF INDIA

A Bench of the Supreme Court of India on 08/05/2014, while deciding a Special Leave Petition held that mediation is one of the best forms, if not the best, of conflict resolution. The Court observed that there is always a difference between winning a case and seeking a solution. Through mediation, the parties will become partners in the solution rather than partners in problems. The Court emphasized the need for early resolution of disputes, in order to stop the negative factor from growing and widening its fangs which may not be conducive to any of the litigants before the Court. The court also held that the beauty of settlement through mediation is that it may bring about a solution which may not only be to the satisfaction of the parties and, therefore, create a win win situation, the outcome which cannot be achieved by means of judicial adjudication.

SINGAPORE EXTENDING MEDIATION SERVICES TO MORE WORKERS

The Ministry of Manpower is looking to extend mediation services to more workers, regardless of job profile and salary. The Tripartite Mediation Framework helps professionals, managers and executives settle disputes and grievances over salaries and contracts with their employers. As of now, this is available only to managers and executives who earn up to S$4,500. However, there are plans to scrap this salary cap and include rank-and-file workers at the same time.

NEW BATCH OF MEDIATORS ACCREDITED

The Indian Institute of Arbitration & Mediation accredited a new batch of mediators after the succesful mediation training program held from 9th to 13th June. The mediators ranged from different professional background, including lawyers, engineers, psychologists, bankers etc.

GOA COMMUNITY MEDIATION CENTRE TO BE LAUNCHED

The Goa Community Mediation Centre will be officially launched on 22nd June 2014 by Mr. Justice Madan B. Lokur, Judge, Supreme Court of India. The launch will be followed with a half day workshop on “Introduction to Mediation and Conflict Reduction Without Destroying Relationships”. The speakers would include Mr. Anil Xavier, President IIAM, Mr. E.O. Mendes, Managing Trustee GCMC, Mr. S.G Bhobe and Mr. George Ninan, Trustees, GCMC.

Upcoming Training Programs from

INDIAN INSTITUTE OF ARBITRATION & MEDIATION
institution for dispute resolution & management

MEDIATION TRAINING PROGRAM

It is now manifestly clear to both entrepreneurs and practitioners that a comprehensive professional exposure to negotiation and mediation is necessary to engage in cutting edge and high quality practice for effectively making deals and resolving conflicts. Effective conflict resolution skills is the key to prevent destructive conflict, enabling lawyers and consultants to better assist their clients in business deals and disputes. Mediation has become a truly global profession, earning international recognition.

The training program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation. The program will enhance the understanding and ability to negotiate and resolve conflicts, as well as provide a solid foundation in ADR processes and to serve as ADR practitioners and neutrals. Through discussion, simulations, exercises and role-plays, the program will focus on the structure and goals of the mediation process and the skills and techniques mediators use to aid parties in overcoming barriers to dispute resolution. The training also gives emphasis on the code and ethical standards of mediation. As per IIAM Mediator Accreditation System, based on the International Mediation Institute, The Hague (IMI) standards, a candidate having successfully completed Mediation Training Program will be categorized as Grade B Mediator and eligible for empanelment with IIAM.

For further details about the training program, please see the link: http://www.arbitrationindia.org/htm/events.html.

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is an ongoing 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 mail to training@arbitrationindia.com

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The root of the word problem is pro
and pro means to advance.
~ Ken Robbins ~