BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

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Recent Activities of Bond University Dispute Resolution Staff

LAURENCE BOULLE

18 May	Professor Laurence Boulle attended a conference on use of terminology in ADR with members of Family Court, Federal Magistrates Service, Attorney General's Department and NADRAC, Melbourne.

PAT CAVANAGH

15 June	Presented a seminar in Hong Kong entitled "Opening Moves in Commercial Negotiations" for the Hong Kong Law Society.
2 August	Presented a seminar for NSW Law Society, Sydney "Ten Most Common Mistakes of Commercial Negotiators and How to Avoid Them".

BEE CHEN GOH

4 June	Associate Professor Bee Chen Goh delivered a seminar on 'Sino-Western Cross-Cultural Issues' in aid of the Executive Management Training for a group of visiting Chinese officials conducted by Wileman Education Australia and the Bond University Fischer Centre. She delivered the seminar in Mandarin. The training was held at Bond University.
18 June	Associate Professor Bee Chen Goh received a visit by Professor John Hogarth, Director of the Dispute Resolution Program, University of Bristish Columbia. They explored institutional collaborative programs, especially pertaining to cross-cultural issues in mediation.

JOHN WADE

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

BOBETTE WOLSKI	
20 June	CLE/Bond Breakfast seminar, titled "Seven Deadly Sins of Cross-examination:
1-4 July	Delivered two papers at the Australasian Law Teachers Conference 2001, Vanuatu. Papers titled "Mediator Settlement Strategies: Winning Friends and Influencing People" and "A Taxonomy of Approaches to Skills Integration in the LLB Curriculum".
25 July	CLE/Bond Breakfast seminar, titled "Ten Common Mistakes Made by Lawyers in the Courtroom".

Recent Publications of Bond Dispute Resolution Centre Staff

Laurence Boulle

- Chapter on "Mediation and other ADR Processes" in Vicky Waye (ed) *A Guide to Arbitration Practice in Australia*, Adelaide University and Institute of Arbitrators and Mediators Australia 2001

BOND PROFESSOR REAPPOINTED AS CHAIR OF COUNCIL

The Commonwealth Attorney General has recently reappointed Professor Laurence Boulle as Chair of the National Alternative Dispute Resolution Advisory Council for a second term.

During his first term of office between 1998-2001 NADRAC's main activities revolved around the development of a framework for standards for ADR practitioners. In 2000 it produced a Discussion Paper on standards and then, following an extensive nationwide consultation process, produced a final report, "A Framework for ADR Standards" (April 2001).

This report is expected to influence the local development of ADR standards by a range of service providers in the light of their circumstances and client base.

During this period NADRAC also provided advice to the Commonwealth Government on ADR in Courts and Tribunals, in particular the new Federal Magistrate's Service, on parenting plans under the Family Law Act, on criteria for referring disputes to different forms of ADR and on the applicability of ADR to small business disputes, such as in the franchise industry.

Professor Boulle indicated a number of likely activities for NADRAC's next term, including improvements in ADR research, data collection and evaluation. "ADR is in a dynamic stage of development," he said. "and there is likely to be attention to on-line ADR, the court references to ADR, the standardisation of language in legislation and a review of NADRAC's definitions paper on ADR".

Professor Boulle is Foundation Chair of the Dispute Resolution Centre at Bond University and the author of mediation texts in Australia and a number of other countries.

Forthcoming Courses in Australia

Bond Courses in 2001

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**

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

8 August	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*

Recommended Reading and Websites

The School of Law at the University of Western Sydney have recently launched a Dispute Resolution web site at http://adr.uws.edu.au.

Essentially, the site contains information for current students, prospective students and those simply with an interest in Dispute Resolution. The pages are filled with detailed descriptions of all postgraduate programs and individual subjects, timetable information, biographic details of all teaching staff along with hundreds of links to Dispute Resolution organisations, groups and agencies world wide. An on line journal is also featured together with hundreds of pages of Dispute Resolution articles written by UWS staff and associated authors.

LAUNCH OF ADR STANDARDS DOCUMENT

The National Alternative Dispute Resolution Advisory Council's document "A Framework for ADR Standards" was launched in Brisbane on 13 June 2001.

The report is the outcome of an extensive investigation by NADRAC into appropriate knowledge skills and ethics for different categories of ADR practitioners. The development of the report included an extensive consultation process within the ADR community, including public forums throughout the country which were attended by approximately 250 participants. Forty written submissions were also made on the earlier NADRAC discussion paper "The Development of Standards for ADR".

In its report NADRAC attempted to balance two principles. The first is the diversity principle which acknowledges the very wide diversity of contexts and circumstances in which ADR is practised. The second is the consistency principle which recognises the need for some minimal level of standards in all areas of ADR practice.

The report's main recommendation revolves around a code of conduct which would be developed through a system of self-regulation by ADR service providers, taking account of the particular nature of their services and clients.

The NADRAC report was launched by the Attorney-General of the Federal Government, Mr Daryl Williams QC. The meeting was also addressed by Mr David Bryson, Chair of the NADRAC Standards Committee and Professor Laurence Boulle, Chair of NADRAC. The launch was attended by approximately eighty people at the old Customs House, Brisbane.

Copies of the report can be obtained through the Bond University Dispute Resolution Centre and can also be downloaded from the NADRAC website at www.nadrac.gov.au.

Thoughts and Themes

ADR Developments in the Region

Working the Triangles in Indonesia: Mediating Debt Restructuring Disputes: Part I

Patrick Cavanagh

Background

The broad parameters of the current Indonesian economic crisis are well known. Indonesia suffered disproportionately during the Asian economic burn-out and its economic difficulties continue. One aspect of this situation is the inability of many Indonesian businesses to deal with corporate debt.

Compounding the effects of the economic slowdown and defective financial regulation, a massive deterioration in the exchange rate has aggravated the impact of the extensive amount of dollar-denominated private sector external debt. This in turn continues to threaten the viability of the banking system.

The total level of distressed debt is estimated to be US$59 billion, with the total of loans to the Indonesian commercial community assessed at US$119 billion.

Corporate debt restructuring is one of a number of preconditions for full economic revival. As part of a multi-faceted economic recovery effort, the Government of Indonesia, supported by

the IMF and the World Bank, created the Jakarta Initiative Task Force (JITF) in November 1998.

The JITF provides advice and mediation services to facilitate debtor-creditor restructuring agreements. The process is time bound and the mediator plays an active role in restructuring the process and also in applying penalties in the event of non-compliance.

Restructuring Processes

In general terms, restructuring can be completed in one of two ways, formal or informal. The former requires an effective insolvency law, while the latter depends on the activities of the banking and commercial sectors, with some input from governmental agencies.

The Indonesian scheme belongs to the latter category. This informal process has been influenced by, and enjoys the support of, the international banking and financial community. The object is to reach agreement on debt restructuring between the creditors and the debtor. Traditionally these informal restructuring processes have been totally voluntary, but the reality of the Indonesian programme is that sanctions can be imposed on 'unco-operative' parties.

A recent review by the Asian Development Bank of the different informal restructuring programmes currently operating in Asia (*Guide to Restructuring in Asia*, Asian Development Bank (2001) 6) identified the main elements in the process as follows:

- The creation of a forum for negotiation. Although it may seem a somewhat abstract notion, this involves the development of a commercial environment in which a debtor and its creditors may come together to negotiate.
- The appointment or selection of a 'lead creditor' to provide motivation, leadership, organization and administration to enable negotiations to commence and advance.
- The selection of a 'steering committee' that is representative of creditors and the debtor to assist the lead creditor and to act as a provisional sounding board for proposals in respect of the affairs of the debtor.
- A 'standstill' that takes the form of an agreement for the suspension of adverse actions by both creditors and the debtor during a defined time period to enable negotiations to occur.
- The engagement of professional expert advisors from a variety of possible disciplines.
- The provision of information regarding the debtor, its business activities, and its current financial and trading position.

All of these elements feature in the current Indonesian scheme.

The ultimate objective of any debt restructuring scheme is to maximise the value of the company and to lessen the social and financial consequences of corporate failure. In an ideal scheme this laudable aim is accompanied by the concepts of certainty, predictability, stability, connected efficiency and transparency.

What is of significance for present purposes are the challenges for the outside mediator in developing the negotiation environment between debtor and creditors in the Indonesian context.

Predictable Problems for the Mediator

There are a number of problems that face a mediator in debt restructuring matters. Some of these will be familiar to practising mediators and some are quite specific to Indonesia and to the subject matter under discussion.

The familiar problems are:

- The financial, commercial and legal issues are complex.
- The debts and the amounts in dispute are large. The minimum debt level that allows entry into the Indonesian programme is A$ 20 million and the larger disputes involve many billions of dollars.
- There are multiple parties representing the lenders. As most of the loans were financed by syndicates of banks it is not unusual to have 10-50 parties representing the borrowers. Most commercial mediators are aware of the problem of negotiating with such a large group with disparate aims and competing objectives.
- Some parties are emotional and honestly believe that the problem is 'not their fault'; they have a close attachment to their family run business that may employ many thousands of long term employees. Any failure of the company will have dire social and economic consequences to the community. The prospects for any dismissed employees obtaining alternative employment are minimal.
- There are difficult factual questions on the future capacity of the company to pay any rescheduled debts or to comply with the terms of negotiated agreements.
- It is difficult and time-consuming to establish the negotiating authority of parties, especially those who represent overseas corporations.
- There are often inter-party creditor disputes over what should be the appropriate response to the difficult financial position of the company, for example liquidation or resuscitation.

Specific problems for the mediator

The specific problems are related to the prevailing legal, social and economic constraints in Indonesia. While these are not unique among different countries of the world, they do provide a lack of alternatives that are generally available to mediators in Australia.

The first and most important constraint relates to confidence in the existing legal system. There is a widely-held view that 'any case can be bought' and that judicial incompetence and corruption is wide-spread. The newly appointed Chief Justice was recently reported as claiming that approximately 75 % of judges are corrupt. Many commercial practitioners resident in Jakarta believe that this figure is understated. The recently appointed Attorney General has identified the existence of a 'court mafia' and estimated that it will take two decades to remedy the problem.

Another contributing factor may be the low status and financial return afforded to members of the judiciary. Judges currently earn US$ 95 per month. This represents a substantial increase on their previous monthly salary of US$65 per month. These low salaries increase user scepticism of competency levels and honesty.

It is widely believed that local creditors enjoy favoured treatment over the foreign creditor, and even over the government when acting as a creditor. (The government often has this status as it acts as a repository for the debts of failed banks.)

Allied with this belief is a strong perception that political considerations play a major role in court determinations, and that many cases are determined on matters other than the merits. This all provides a complex structural environment in which debt restructuring mediations take place.

A further problem for the mediator is the lack of confidence in the economic stability of the currency. This leads to reluctance among the parties to conclude agreements as the exchange rate may move to their disadvantage. At the time many of the loans were negotiated the rate

of exchange was US$1=Rp. 4000. The figure is currently US$1= Rp.11500. This means that loan repayments have increased 300% during the course of the loans. Most economists predict that while the current political stability exits the currency will continue to be highly volatile.

In addition to these extraneous factors there is the problem that there is little agreement as the 'facts' in many of the negotiations. There is a widespread belief among lenders that some of the funds have been misused or placed outside of the jurisdiction. It is common to find that in some negotiations the explanations as to 'where did the money go' are regarded with complete scepticism. A general view that corruption was and continues to be a reality in public life leads the mediator to question constantly the accuracy of information provided at the mediation.

Remedies

Those commercial mediators who deal with parties without any procedural assistance will be intrigued by the powers available to their counterparts in this debt restructuring programme in Indonesia.

A 'carrot and sticks' approach has been incorporated into the rules. These allow a mediator to reward a co-operative party and punish those who are seen as non-compliant. These rules are binding on all participants. The mediator has the specific power to order that:

- All parties shall attend all scheduled meetings.
- All parties shall send representatives 'knowledgeable about the issues involved and who posses sufficient ability to discuss such issues'.

In addition the rules contain the following:

- A failure to participate 'in good faith' will be grounds for remedial action.
- All parties shall retain 'competent professionals', share information on a transparent basis and respect the legal rights of the parties.
- The government may direct a party to participate.
- Within five days of referral a case manager will be allocated.
- Within ten days an initial meeting with the referring party will be held.
- Within 20 days the mediator will hold a meeting with the other party.
- Within 30 days a preliminary report by the mediator on the issues is to be distributed, together with a preliminary schedule.
- Within 40 days the negotiations shall commence. If no agreement on the schedule is possible then the case manager will issue determinations on timing.
- A matter may be dismissed by the case manager as 'not appropriate', to be accompanied by a draft report.
- The report will comment on compliance or non-compliance with the schedule, a statement on facts of negotiation and current status.
- If within 30 days parties are unable to resolve issues, the final report is to be issued and there is a discretion to file with 'appropriate government authorities'.
- Any party may introduce the report into 'any litigation for any purpose'.
- If the case manager finds 'bad faith' the Attorney General can initiate bankruptcy proceedings.

Such procedural assistance is of real benefit to the mediator. However it also involves the mediator moving into a dual role in which the mediator acts also as a referee or umpire. These procedural rules reflect the reality of the current Indonesian political and economic climate.

Some mediators adopting and wishing to retain a neutral stance decry the presence of these extra 'sticks'. However they have proved effective and largely responsible for the successful restructuring of $US 12 billion in corporate debt. It appears that in this area, at this time, such adoptions of the mediation model are justified.

Part II of this paper will identify the array of 'tools in the toolbox' that are used as options for settlement

Pat Cavanagh is Associate Professor of Law, Bond University, and is currently serving as Senior Mediator and Case Manager, Jakarta Initiative Task Force, Indonesia. He can be contacted at pat_cavanagh@bond.edu.au.

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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.

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Director
Bond University Dispute Resolution Centre