Dispute Resolution Centre

Dispute Resolution Centre Newsletter

Bond University *Year* 2008

Dispute Resolution Centre News Volume 27

BOND LAW
DISPUTE RESOLUTION NEWS
BOND UNIVERSITY
FACULTY OF LAW

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Recent Activities of Bond University Dispute Resolution Centre

29 February–1 March 2008 First Two Day Mediator Assessment Course, at Bond University, Legal Skills Centre, to satisfy National Mediation Accreditation Standards. (Visiting observers Professors Jim Brown from Florida, USA; and Michael Cowling from Pietermaritzberg, South Africa.) **Evaluations**

Basic Mediation Course 27-30 March 2008, Crowne Plaza, Surfers Paradise, presented by Laurence Boulle, Pat Cavanagh and Robyn Hooworth and coaches, Callum Campbell, Pippa Colman, John Hertzberg, Shanna Quinn, Tom Stodulka.

LAURENCE BOULLE

1 March	Appointed Acting Dean of the Faculty of Law, Bond University
2 April	Spoke to the IAMA Forum in Sydney on the new Accreditation System for Australian Mediators

PAT CAVANAGH

21 February	Negotiation Program with Leo Cussen Institute, Melbourne
8-9 & 15-16 March	Mediation workshop University of Queensland
19 March	In-house presentation with Santos, Jakarta Indonesia on Commercial Negotiation Skills
27 March	Presentation to specialist practitioners in mediation for Queensland Law Society
31 March	Presentation on Negotiation Skills to Urban Development Institute, Brisbane

JOHN WADE

6-11 January	Five day Advanced Mediation Course, SMU, Dallas Texas
10 January	Evening lecture on "Persuasion" for Southern Texas Mediation Association
7-8 February	Two day Negotiation course for Urban Development Institute of Australia, Brisbane
14-15 February	Family Law Council Meeting, Melbourne on theme of recognition of family laws of minority groups
28 February	Workshop on "Persuasion" for Dibbs, Abbott and Stillman, Lawyers, Brisbane
5 March	Attended conference in Canberra on National Mediation Accreditation Standards
7 March	One day negotiation workshop for post graduate students at Bond University
31 March – 4 April	Teaching at Universite de Catholique, Lyon. Presentation of paper "Judicial Decision-Making in Australia – Critique and Redemption"
14-15 April	Reunion with French alumni from Bond University, in Paris
1 – 2 May	Family Law Council Meeting in Sydney on theme of De Facto Marriages and Property Division
Projects in Progress	1. With Cara North, a Bond University Student, working on a hard copy and electronic collection of role plays in multiple areas of transaction and conflict negotiations and mediations. 2. Four post-graduate students from SMU and from Bond have successfully submitted articles for publication to the Bond University *ADR Bulletin*. Special thanks to Cheryl Hensel and to Yvette Zegenhagen for editing and administration work on the *ADR Bulletin.*

Recent publications of the Dispute Resolution Centre Members

Laurence Boulle, *Law of Globalisation*, Bond University Press, 2008.

This book is aimed at students and other readers introducing themselves to the complexities of globalisation. It focuses on the different forms of law which create the legal infrastructure of economic globalisation and on how they interact with one another. It explains how law is used both to maintain and oppose aspects of globalisation. It also evaluates the governance of the global political economy in terms of the standards of the Rule of Law.

Law is a central theme of the book but the text does not have a technical legal approach to the subject and it also deals with globalisation's broader social, economic and political dimensions. It also examines dispute resolution themes throughout the work.

Book Order Form – The Law of Globalisation

Fill in the order form below and send to:

The Administrator
Dispute Resolution Centre
School of Law
Bond University
Queensland 4229
AUSTRALIA

Fax: +61 7 5595 2036
Email: drc@bond.edu.au

PRICE – AUD $35 (including GST) plus AUD $10 postage – TOTAL $45.00

Please use this form to order

Cheques to be made payable to:

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I wish to order _____copy/ies of **The Law of Globalisation**

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Cardholders Name:_____

Signature:_____

Please print clearly

Name: .....

Address: .....

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Phone: .....

Fax: .....

Email: .....

Visitors to the Dispute Resolution Centre

- Jim Brown (& wife Millie) Stetson University, Florida

(From left: Millie Brown, Liz Spencer, John Wade, Jim Brown)

- Susan Franck, Williand and Lee Law School
- Tom Stodulka and Callum Campbell, Brisbane mediators
- Michael Cowling, Dean of Law, University of Kwa-Zulu Natal and promiment South African mediator
- Nadja Alexander, University of Queensland

Forthcoming Courses of the Dispute Resolution Centre

2008	Bond University Short Courses			
14 May	**Bond University**	**Short course 1 day**	**Conflict in Schools**	**McSwan**
16-17 May	**Bond University**	**Short course 2 days**	**Assessment Course**	**Brandon, Campbell, Stodulka**

23 June	**Princeton Room, Bond University**	**Short course 1 day**	**Healthcare Dispute Resolution Workshop**	**Bismark, Boulle, Elly**
31 July-3 August	**Crowne Plaza, Gold Coast**	**Short course 4 days**	**Basic Mediation Course***	**Bryson, Wade**
15-16 August	**Bond University**	**Short course 2 days**	**Assessment Course**	**TBA**
28-31 August	**Marriott Resort, Gold Coast**	**Short course 4 days**	**Advanced Mediation Course***	**Boulle, Wade**
16-19 October	**Melbourne**	**Short course 4 days**	**Basic Mediation course, in conjunction with Leo Cussen Institute. Phone (03) 96023111 email: lpd@leocussen.vic.edu.au**	**Boulle, Wade**
7-8 November	**Melbourne**	**Short course 2 days**	**Assessment Course, Leo Cussen Institute, Melbourne Phone (03) 96023111 email: lpd@leocussen.vic.edu.au**	**TBA**
27-30 November	**Marriott Resort, Gold Coast**	**Short course 4 days**	**Basic Mediation Course***	**Boulle, Taylor, Wade**
*** This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)**				

Restorative Justice Conference
Bringing Justice and Community Together

Wednesday 14 May 2008
Storey Hall, RMIT University
Melbourne, Australia

Email queries to Peter Condliffe, President & Conference Coordinator
Email: president@varj.asn.au
Phone: (03) 9225 6888
For further information go to www.varj.asn.au

Asia-Pacific Mediation Forum 4th Conference, Kuala Lumpur, Malaysia, 16-18 June, 2008.

The 4th Asia-Pacific Mediation Forum conference will be hosted jointly by the APMF and the International Islamic University of Malaysia.

Please visit the conference website at www.apmf2008.com

Conference abstracts are due on 15th, 2007 (see website for guidelines).

Pre-conference Mediation Training: 9 -13 June (5 days).

Pre-conference Workshops: 14-15 June (2 days).

Expressions of interest in conducting a pre-conference workshop are requested (half day, one day or two days). Please submit a title, name and biography of presenter(s), minimum and maximum number of participants, IT needs, etc. If the proposal is accepted and there are at least 10 participants, the workshop leader will have free conference registration.

New Mediation Resource

ADR BULLETIN

[*A publication of Bond University Dispute Resolution Centre*]

Subscribe now at – http://www.bond.edu.au/study-areas/law/centres/drc/publications/adrborderform.pdf

See website for recent articles http://www.bond.edu.au/study-areas/law/centres/drc/adr_bulletin.html

For further information: Email adrb@bond.edu.au

INSIGHTS FROM EXPERIENCED MEDIATORS

At each Advanced Mediation Course, participants are required to complete a questionnaire about what they see and do at mediations.

Set out below are the tabulated answers from the last Bond University Advanced Mediation Course. These answers, collected from mediators with many thousands of hours of experience, demonstrate yet again: the diversity of mediation practice, and some more tools for your toolbox. Please read, enjoy and reflect.

EXPERIENCED MEDIATORS QUESTIONNAIRE

September 2007

	Never	Occasionally	Often
1. Which of these (or analogous) interventions do you use??			
(a) No adequate disclosure, no mediation	**3**	**11**	**2**
(b) Insist on written legal advice from each lawyer	**11**	**2**	**2**
(c) Lawyers sit at far end of table	**6**	**6**	**4**
(d) "I want to see clients without their lawyers"	**1**	**5**	**10**
Parties must agree to presence			
(e) Without full authority to settle, no mediation?	**9**	**3**	**3**
(f) Intake meetings are essential	**3**	**7**	**6**

	Telephone			
(g)	"There's no point having a mediation, you are too far apart"	**11**	**4**	**0**
(h)	"There's no point having a mediation, unless X attends"	**7**	**5**	**2**
	If X is a party			
(i)	Divide disputants into separate rooms and shuttle offers	**1**	**12**	**3**
(j)	"That argument is unlikely to succeed because….."	**5**	**8**	**3**
(k)	"Here are the risks you take if you proceed to a court….."	**0**	**1**	**15**
(l)	Congratulate/summarise progress	**0**	**1**	**15**
(m)	I want to see lawyers without clients	**3**	**5**	**7**
(n)	Normalise – It's common for people in your situation to……	**0**	**4**	**12**
(o)	"I'm going to put these questions on whiteboard"	**2**	**6**	**8**
(p)	Other (add at least 4)			
Focus on clients – not advocates. *Display a clear understanding of law when appropriate.* *Conduct conference as soon as possible increase in delay and increase in difficulty.* *Describe the process in full at the beginning and keep going back to the "rules".*				✓ ✓ ✓ ✓
When no adequate disclosure has occurred, the mediation is adjourned to allow adequate disclosure. *Lawyers sit behind or beside their clients (slightly behind).* *The cost of further litigation exceeds the difference you are now at.*				
See clients separately after joint session *Insist lawyers advise clients on costs risks.* *Isolate areas of agreement/issues in dispute.* *"Put history of dispute behind and focus on what we can do today to resolve this dispute".*			✓	✓
Emphasising how much they have already achieved and using firm reality testing to assist bridging any final gap. *Use breaks when parties or when one of them becomes upset, angry or overwhelmed.* *If parties gain momentum in mediation stay silent and allow them and their lawyers to take more control of the process.* *If it is apparent overall agreements cannot be reached, using mediation to resolve any immediate or other issues so they feel sense of achievement that can empower them to move forward.*				

Is there something else that you would take instead of x? *Is it important for you to move on after this dispute – having it finalised may bring your plans into place.* *Perhaps you would (both) look at a result that you both can live with as a successful outcome?* *After all the advice (from your advisor) is given, you are the person who knows whether this will work in your situation.*			
Perfectly understandable to feel this way. *In my experience, being in the same room can assist the process.* *My being here brings a different dynamic into play. If he/she is overbearing I will step in.* *If no settlement this is what you have to cope with in the future.*			
Immediate intervention if behaviour deteriorates. *Only having one representative if the parties make submissions in general conference.* *In private conference, allowing all tribal members to make submissions.* *Promote the "empowerment" of the process.*			
Do you think it's an appropriate time that you wish to speak with your lawyer alone? *Do you need a break/talk to someone else at this point?* *If you're unable to reach a final agreement today – can we focus on interim arrangements.* *Would you be happy to trial some arrangements now that we can review in say 6 months.*			✓ ✓
We've talked about the past and what brought you here, now it's time to look for the future. *If we can't reach a settlement today you might wait 18 months for a final hearing.* *Do you want to put your life on hold and remain in limbo for another year or more.* *Have you though about the impact on you and your family if this dispute continues.*			✓ ✓ ✓ ✓
How will this dispute affect you in a year? *I can see how stressed you are by this dispute continuing.* *What will happen if a court decides for you and you lose?"* *What will happen if you have to sit in Court with the other side?*			✓ ✓ ✓ ✓
Please correct me if I'm wrong but your view is… *To clarify…*			

I want to see each party and their lawyer separately.		✓	
Let's concentrate on everything that is agreed, you might be surprised on how much is, how close in some respects you are.			✓
What do you understand by 'cost benefit'? Let's just explore that – legal costs as well as personal costs.			✓
If we can't move at this point to a final settlement, can we get closure on some interim issues today and use that as a springboard for further mediation.			✓

	Never	Occasionally	Often
2. *What behaviours/beliefs/emotions do you see jamming the negotiations/mediation?*			
(a) A lawyer who has given wildly optimistic advice?		**7**	**9**
(b) Lawyers who themselves have become antagonistic/emotionally involved?		**11**	**5**
(c) A client(s) who is not listening to his/her own lawyer	**1**	**9**	**6**
(d) Poor summary and preparation of facts, BATNAS, offers, issues, transaction costs etc	**1**	**7**	**8**
(e) Concentration on legal questions and missing commercial interests		**7**	**9**
(f) Uncertainty of legal rules and the shadow of the law		**11**	**5**
(g) Rollercoaster of emotion		**2**	**14**
(h) "Entrapment" – disputants have invested too much in the conflict	**1**	**6**	**9**
(i) Other (at least 4 more)			
Fear, fear, fear, fear, fear *Reinforcement of past successful thresholds of control* *Changing issues at random to confuse and attack emotionally* *Predetermined cultural and religious beliefs that conflict with secular law.*			
Lawyer opposed to mediation process – an adversarial 'junkie'. *A client who (in terms of a matrimonial mediation) has not yet separated emotionally.* *Lawyers or clients unwilling to weigh up 'interests' as opposed to 'rights'.* *Parties who cannot move beyond 'past history' to focus on the future ie 'I don't care about costs or settling, I just want a court to vindicate that you…'*		✓ ✓ ✓	 ✓
History of distrust.			
Lawyers who do not listen to their clients. *Lawyers who come unprepared.* *Lawyers who have not adequately explained the risks of losing in court.* *Parties who are unrealistic in negotiations – "the principle".*			✓ ✓ ✓ ✓

	Never	Occasionally	Often
A self represented party who has not sought legal advice.		✓	
Unavailable data such as asset valuations, paper trail of expenditure and contributions etc.			✓
An unwilling participant (in court ordered mediations) who believes they have been forced to participate.		✓	
An aggressive and bitter party who is unable to "stand in the shoes" of the opponent.		✓	
Desire for revenge/punishment.			
Power imbalance.			
People that say they agree but don't mean it.			
People who use the forum to "grandstand".			
Disregarding of ADR by old heads "waste of time"		✓	
The behaviour of outside tribes who believe they are acting in the best interests of the party but are only complicating the process.		✓	
Ex spouses knowing how to push buttons.			✓
A propensity for parties to dwell in the past on perceived wrongs rather than look forward.			✓
Hidden agendas.		✓	
A pre-conceived, rigid "dollar figure" limit by one party.			
One or more items of significant emotional value to both parties, which item is indivisible.			
The threat to walk out when an impasse appears to have been reached.			
Firm legal advice as to entitlement from a party's lawyer which allows no flexibility.			
People constantly agreeing but then going back and shifting their positions.			
When a party agrees but then relies on the fact they need to consult others before finalising the agreement.			
When underlying cultural issues need to be understood and addressed			
The party who is so bitter they have nothing to lose.			

"I just want the judge to decide." *"I just want what I'm entitled to."* *Lawyers who can't or haven't clearly advised clients as to rights/entitlements.* *Unwillingness to compromise/agree at any cost.*			
Unwillingness to actually listen to what the other party is saying. *Some parties see that an injustice has been done to them and they want to righted.* *Power imbalance eg I have a bank of lawyers behind this and money is no object.* *A lack of empathy.*		✓ ✓ ✓ ✓	
Advocate who themselves are antagonistic. *Party/client who insists on "getting their own way".* *Effects of 'injury' reduce parties insight into own behaviour* *Other legal manoeuvres unknown and not disclosed – process is mandatory and must participate but "going through the motions".*		✓ ✓ ✓	✓

		Never	Occasionally	Often
3.	*What helpful behaviour have you seen from skilled helpers (eg lawyers, accountants) before or during mediations?*			
(a)	Provide mediator with short written summaries of facts and evidence	**0**	**9**	**7**
(b)	Provide mediator with short written summaries of legal issues, rules and arguments	**2**	**9**	**5**
(c)	Provide mediator with short written summaries of commercial questions, risks and a range of possible solutions	**8**	**7**	**1**
(d)	Suggest possible causes of conflict and reasons for jam	**5**	**5**	**6**
(e)	Suggest mediator interventions which may be helpful	**4**	**8**	**4**
(f)	Encourage clients to speak ▪ + 1 N/A	**0**	**7**	**8**
(g)	Are obviously prepared and organized	**0**	**7**	**9**
(h)	Use non-inflammatory language	**0**	**7**	**9**
(i)	Use outstanding communication techniques of appropriate questions, summaries, politeness, "what if…" proposals etc	**1**	**11**	**4**
(j)	Consult readily with mediator about breaks, hurdles	**1**	**9**	**6**
(k)	Other? (add at least 4 more)			
	Pleasant, professional approach – organised, timely and cooperative, with process, available promptly for any queries. *Fully prepared, client briefed and all documents exchanged ahead of time.* *Do not use jargon or legalistic language with client – transparent discussions at all times with mediator.* *Non combative and manages difficult client behaviour.*			✓ ✓ ✓ ✓
	A commitment to resolve the matter, regardless of the best "financial" outcome for the client. *Full disclosure of all documents in their possession.* *A commitment to the process eg advising client that they should fully cooperate in the mediation.* *A genuine and committed respect for the process.*		✓ ✓	✓ ✓
	Encourage clients to have faith/trust in mediator *Provide background/motivation for dispute in absence of parties.*			

When lawyer is able to separate the problem from the people – doesn't "blame" other party. *When the lawyer is able to generate creative options.* *Experts being clear, prepared and impartial.* *Lawyers who read their clients well and suggest strategies such as breaks or shuttle when appropriate.*			
Suggest that the legal reps themselves *sort out disputed questions of financial contributions, bank records, etc.* *Accountants to give party or parties advice on tax benefits, flexibilities in the* way *a financial result is applied.* *Able to seek further advice quickly (eg by phone) if an issue requires it, or a new issue emerges.* *Gives* genuine *insight into the psychological limits of their client.*			
Ask them to try to settle "agreed facts" *Utilise experts such as accountants to give advice on best form of settlement for clients eg minimising CGT.*		✓	✓
Provide BATNA, WATNA etc at commencement of discussions. *Commence discussions with the representative of the other party prior to the Mediation conference officially beginning.*		✓ ✓	
Lawyers assisting clients when distressed. *Having documentation/evidence ready to be produced.* *Co-mediation – worked well with all concerned.* *Data provided from outside persons.*			
An understanding of the benefits of the mediation process. *An understanding of the process itself eg no cross-examination of opponent.* *An ability to explain the benefits of mediation to the client and be supportive of client during the process.* *An ability to give frank advice to client during separate sessions and assist mediation to reality test client's expectations.*		✓ ✓ ✓ ✓	
Ask me to independently outline range of likely outcome. *Ask me to attend private session when considering a counter/offer no bridge gap.*			✓ ✓
Committed to concept of ADR *Open minded as to solutions.* *Polite to opponent, active listening.* *Respectful to other parties' client.*		✓ ✓ ✓	

Show a preparedness to affirm the assistance mediator has provided. *Understand the need to strike while iron is hot ie terms of settlement on the same day.* *A genuine desire to achieve agreement when issues are too stupidly narrow to litigate.* *Lawyers action to overt steps so they can free themselves from their stupid clients.*			

4. *Write out at least three things you have learned in the last year of your mediation practice which you believe have made you a better mediator.*

- To use intake more effectively despite any time constraints.
- That it is not just "settlement" that matters it is the quality and durability for the particular parties that matter.
- To be aware of "sleeping dragons" ie using old valuations, needing updated superannuation valuations and CGT.
- Avoid tendency to become an advocate especially where there is an obvious power imbalance between the parties (this is difficult!)
- Break down areas of dispute into clearly identifiable components and then focus on these with a view to achieving consensus on some or all → minimise the dispute into something manageable.
- By showing people respect and consideration and listening to and acknowledging their perspective, a mediator can earn trust and much more likely to achieve a result.
- Flexible – adapt style (process) of mediation to meet the needs of the case.
- Patience and listen more and at times talk less.
- Timing of mediation is important and can be crucial to whether a settlement can be achieved.
- The knowledge that I cannot resolve everything.
- I am not the one who has to live with the outcome.
- People make decisions and evoke policies that are outside my power of influence, so "learn to live with it".
- Improved preparation – pre-conciliation interviews and document review.
- Concentrating on active listening and reframing with all parties assists better understanding of parties concerns and perspectives – for everyone.
- "Outside influences" can be a powerful inhibitor.
- Much more concentration, preparation on the intake process.
- Try a different approach if you think it may work, or may break a deadlock.
- Try to limit the "shuttle" effect of one on one meetings.
- Make sure to find out exactly who a support person was for one side. Need for full disclosure. Need for more concentration on intake process before mediating.
- I have been trying to be less judgmental (as in prejudging matter based on written material).
- The capacity to find practical solutions.
- A good brief on the relevant issues.

- The ability to demonstrate a thorough knowledge of the facts and to accurately recount those and the issues to the parties.
- Articulate simply – resist the use of technical jargon – particularly legal.
- Learn to listen to the parties and have them determine possible outcomes rather than becoming "Mr Fixit".
- Distance myself from the issues of the parties and not becoming an advocate for one over the other.
- Further experience in knowing about the "what ifs" – eg likely Court outcome. Medical panel outcome, if matter would proceed etc.
- Intakes before mediation.
- Tribes.
- Changes in Act/procedures that have made our obligations more stringent.
- The importance of preparation for a mediation and to arrange:
    - Pre-mediation meetings with each client and their lawyer/barrister to investigate their expectations and goals.
    - Clear instructions to legal representatives of their role in the process and necessity to be well prepared.
    - Discussing with legal representatives the possible exchange of disclosure documents prior to mediation to enable the facilitation of the mediation to proceed smoothly and avoiding any adjournment of the mediation.
- Reasserting impartiality throughout mediation.
- Never ask them if they want to call their lawyer!
- Break for private sessions to calm down.
- The concept of focusing on 'interests' as apposed to 'position' and avoiding horse trading.
- A willingness to try and 'change the mix' in terms of format.
- Being critical (hopefully constructively) of unprepared mediations.

	Essential	Preferable	Not Necessary	Ranked as one of 5 top priorities
5. *Assume you are involved personally as a disputant in a dispute over management and distribution of profit in a large business. What features would you like to find in your chosen mediator? (READ Question 6 before you answer)*				
(a) Warmth and friendliness	3	11	1	**2**
(b) Substantive expertise in the area of dispute – eg, law, accounting, engineering.	3	10	1	**5**
(c) Follows a predictable mediation process	5	3	7	**4**
(d) Highly organised ▪ *ie Prepared?*	11	4	0	**10**
(e) Stickler on process rules, good behaviour, speaking in turn	4	9	2	**1**
(f) Good sense of humour	5	8	2	**4**
(g) Excellent diversion strategies	7	6	2	**3**
(h) Ready to express strong opinions; give strong advice	1	9	5	**3**
(i) Strong opinions on process; but reluctant to give opinions on judicial outcomes	2	8	4	**2**
(j) Protects the reputations of lawyers	0	1	14	
(k) Persistence and patience	13	1	0	**9**
(l) Excellent communication skills - listening	15	0	0	**14**
(m) Reframing, summarising skills	13	2	0	**12**
(n) Good drafter of documents	1	10	4	**1**
(o) Other (at least 4 more)				
Provide listening skills that go beyond the mere nodding of heads. *Reframes that give a clear indication that what I have said has been heard.*				
Organises pre-mediation meeting to discuss causes of dispute and possible interventions. *Is well-prepared for mediation.* *Readiness to discuss issues in order of parties' priorities.* *Ability to conduct multi-party mediation.*	 ✓	✓ ✓ ✓		

Be prepared. *Fair and impartial* *Equal time in private meetings.* *Good looking.*				
Flexibility – change their behaviour for circumstances, dynamics that apply *Their behaviour is assertive rather than aggressive.* *Tolerate ambiguity, inconsistency etc. of ???, behaviour etc.*		✓ ✓		
Persuasive language. *Respectful of client expertise.*				
Able to read the psychology of the parties re when to advise, stop, change direction, etc. *Ability to manage difficult or intrusive parties, helpers, advisors.* *Able to suggest alternative strategies in the 'big picture' with a focus on moving on after settlement.*		✓		
Neutral party to dispute + organisation in question. *Neutral location for mediation.* *Confident and assertive.* *Professional approach.*				
An ability to think beyond the square. *An ability to understand my point of view.* *Mature and experienced in life.* *Totally impartial.*	 ✓ ✓ ✓	✓		
Show respect for me and my goals. *Experience/knowledge in the area of dispute.*	✓	 ✓		
Able to look behind legal outcomes and be creative with solutions. *Able to move people from positions held to interests/gains to be achieved.* *Someone who can help improve communication.* *Someone who always appears fair and impartial.*				 ✓

6. *Following question 5, as Mediators tend to fall short of godlike perfection, your Mediator will be strong in only five of these characteristics. In column 4, please rank in order your five top priorities.*

Number of votes for – 1-5 top priorities

Book Review

Review of "The Law of Globalisation",

by Laurence Boulle,

Bond University Press, 2008.

A major gap in the Australian legal literature has been filled. This book analyses the many different laws from a wide range of sources that together support and regulate globalization.

In eight chapters the author traverses a broad landscape. From the legal requirements for the market economy and the national laws needed to support globalization, through to emerging law and governance in the global economy and the interaction of the rule of law and globalization, the intellectual breadth of this work is impressive. It analyses the downsides of globalization and gives fair treatment to the phenomena's many critics.

Few authors, alone, could have written this text, and it is much the stronger for being the work of one mind. It has a coherence that few multi-authored legal texts share. The book is aimed primarily at law students, undergraduate and postgraduate, but there is much in here for scholars.

Globalisation is not new. As the Nobel laureate, Amartya Sen, pointed out in his Deakin Lecture in Melbourne in 2000,

> "high technology in the world of 1000 AD included paper and printing, the crossbow and gunpowder, the clock, the iron chain suspension bridge, the kite, the magnetic compass, the wheelbarrow and the rotary fan. Each one of these examples of high technology … a millennium ago was well-established and extensively used in China and … practically unknown elsewhere. Globalisation spread them across the world, including Europe."

But while globalization is an age-old phenomenon, its potency has been greatly enhanced by modern telecommunications, international finance and the manufacturing practices of multinational corporations.

Australian law schools have, to the best of my knowledge, been relatively slow to offer courses in the law of globalization, preferring to treat this information in traditional categories such as the Law of Trade, the Law of International Organisations, International Finance Law, and the like. However, there is much to be said for subjects on the Law of Globalisation, or Globalisation and the Law, the title depending, perhaps, upon whether one wishes to stick fairly tightly to the law that governs globalization, as this text does, or one wishes to take an even broader approach to a truly global topic. Laurence Boulle teaches an undergraduate course on the Law of Globalisation at Bond University, where Laurence and I taught together for 16 years, and I am about to offer a new postgraduate course on Globalisation and Commercial Law at the University of New South Wales.

Courses that attempt to address globalization and its legal regulation as one coherent phenomenon offer some advantages over traditional courses. The student of Trade Law may gain a detailed knowledge of provisions of the General Agreement on Tariffs and Trade or of the Dispute Settlement Understanding of the WTO but they are unlikely to appreciate the roles of the various international organizations, of which the WTO is but one, in shaping the legal environment in which international trade and commerce occurs. There is much to be said early in one's professional education for being exposed to the big-picture perspective. Anyone with a sound grasp of fundamental legal principles and techniques can grapple with the wording and jurisprudence of Article XX(b) of the GATT, when required to do so. Without a course on globalisation, however, seeing how all the pieces come together can probably only be hard won from long years of professional experience.

Laurence Boulle's text does an admirable job of supporting the teaching of courses in this new field. I hope law teachers throughout the country, armed with this admirable text, take a step in a new direction and begin to offer courses on the law of globalization.

Ross P Buckley

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Thoughts and Themes

Overconfidence defined

By Nirvana Ma[*]

A working definition of 'overconfidence' is - an artificially inflated estimate or prediction of a past event or future outcome. Many psychological and sociological studies have been conducted on the topic, and it is now a widely accepted phenomenon.[1] The trait appears most predominantly when difficult questions are posed, and least when questions are simplest.[2]

What causes it?

Many academics have hypothesised about the causes of overconfidence. In particular, Loewenstein and Korobkin have separately provided a total of six sound explanations for the trend.[3] Their results can be broadly categorised as cognitive factors, and cultural or environmental stimuli. The manifestation of overconfidence in negotiation is likely to be due to a combination of the factors, rather than one exclusively.

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[1] Scott Plous, *The Psychology of Judgement and Decision Making* (1993), Chapter 19.
[2] Ibid.
[3] George Loewenstein, *Self-serving Assessments of Fairness and Pretrial Bargaining* (1993) 22 J. Legal. Stud. 135, 139; Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice* (2006) 21(2) Ohio St. J. On Disp. Resol. 281, 290.

The two main cognitive factors are 'differential attention' and the 'above-average effect'. These are both supplemented by a third factor known as the 'illusion of control'. Human beings typically utilise cognitive shortcuts such as these to help manage the overload of information processed day-to-day.[4] An unwelcome side effect of these shortcuts is that it becomes difficult or impossible to have wholly rational decision-making or entirely thought-out decisions.[5] This leads to bias - in this case, the overconfidence bias.

The concept of 'differential attention' is that human beings naturally pay more attention to those facts which suit them.[6] This is demonstrated by 'biased recall' which was most famously studied in the 1950's by Hastorf and Cantril.[7] In that study, students from Princeton and Dartmouth were shown film of a football game between the two universities. Dartmouth was then accused of foul play, and the students were asked to recall how many penalties were committed by each team during the course of the game. Unsurprisingly, the Princeton students found the Dartmouth team to have committed more than twice as many infractions as the Princeton team, whereas the Dartmouth students thought the teams committed roughly the same number.[8] The emphasis placed on positive facts, and tendency towards bias in recalling those facts, gleans an obvious outcome. If positive facts are recalled more readily, subjects will ultimately have a positively skewed version of the world. An overconfident prediction of success follows.

The 'above-average effect' refers to the tendency of human beings to calculate the potential outcome of a situation with reference to their control over same.[9] That is, as most people tend to assess themselves as being better than the average, their participation in a scenario must equate to an 'above-average' chance of success.[10] For example: "because I am in control here, and I am better than the average driver, I have an above-average chance of winning this race". Kramer and Pommerenke suggested that this is a way of protecting one's self-esteem and self-image.[11] This mentality leads to an overoptimistic outlook, and is particularly relevant to lawyers in negotiation. A lawyer who is assessing the chance of success should the dispute go to court might say: "I'm a better barrister than the lawyer on the other side of the table. With my skill and luck, if we go to court, I'm sure I'll hit this one home".[12] Again, the logical consequence of this effect is overconfidence.

The final cognitive factor is the 'illusion of control', which refers to how much power human beings believe they have over their lives.[13] A strong sense of control is described as internal 'locus of control'.[14] It is likely this mentality develops in each individual human being as a result of various environmental and genetic factors. It has also been suggested that culture is a determinative factor of the trait.[15] For example,

[4] Rodney G Lim, *Overconfidence in Negotiation Revisited* (1997) 8(1) Intl. J. Confl. Manage. 52, 53.
[5] Ibid.
[6] Korobkin, above n 3, 285.
[7] Korobkin, above n 3, 286.
[8] Ibid.
[9] Korobkin, above n 3, 287.
[10] Ibid.
[11] Lim, above n 4, 54.
[12] Korobkin, above n 3, 293.
[13] Korobkin, above n 3, 288.
[14] Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes* (2005) 2005 J. Disp. Resol. 289, 301.
[15] Ibid.

countries such as the United States and Norway have a culture of strong internal *locus*, where it is generally believed that one can achieve anything one desires.[16]

A study of this hypothesis found subjects valued lottery tickets they had personally chosen higher than ones which were randomly assigned to them.[17] The subjects were also more likely to retain the tickets of their choosing, when given the opportunity to trade for a random ticket with better odds.[18] The effect is a tendency of human beings to overestimate the amount of control they have over a situation they are facing. When this factor is combined with the 'above-average effect', it leads to a severely inflated prediction of success.

The three types of environmental stimuli which affect conflict resolution are parties not being fully informed; parties only discussing the topic with like-minded people; and insufficient quantum of litigation.[19]

Firstly, when a party to a dispute lacks certain facts pertaining to same, it is impossible for them to accurately predict what outcome might be attained through litigation. In negotiations, it is a common tactic for parties to withhold certain facts, as there are no legal disclosure requirements or rules of evidence which apply.[20] The Priest-Klein selection hypothesis posits that where subjects possess incomplete or imperfect information, they incorrectly estimate the case's value.[21] A prediction based on limited information would likely be overoptimistic, as it is doubtful that an opponent would reveal weaknesses in his/her case.

Secondly, where a disputant discusses his/her case with like-minded people only, he/she is unable to objectively assess the situation. In the absence of external reasoning and doubt, the case's strengths will be reinforced and the weaknesses will be underestimated. The consequence of this is obvious.

Finally, there are areas of law which have not been clearly pronounced by the judiciary, or an insufficient quantum of litigation exists to date.[22] In this situation, it will be difficult for a lawyer to advise his/her client with any degree of certainty. When combined with the 'above-average effect', a lawyer may conclude that the ambiguity in the law is more likely to be resolved in their favour, rather than their opponent's. This outlook has no basis, and is overconfidence in its purest form. It must be noted that the legal 'system' itself encourages overconfidence, as each lawyer interviews only one client, thus selective information 'in' leads to incorrect initial advice 'out' or at least 'heard'.

How Overconfidence is Manifested

Behavioural examples

At the onset of negotiation, the aim is primarily to avoid litigation by reaching a mutual agreement. Notwithstanding participants sharing this common goal, it is

[16] Ibid.
[17] Korobkin, above n 3, 288.
[18] Ibid.
[19] Korobkin, above n 3.
[20] Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005).
[21] Loewenstein, above n 3, 136.
[22] Loewenstein, above n 3, 158.

inevitable that not every negotiation will reach settlement. To maximise the opportunity, a negotiation must be as effective as possible. Achieving this requires co-operation from all participants in employing a number of behaviours, such as: willingness to compromise, making of trade-offs, and readiness to negotiate.[23] A disputant will employ this type of conduct to an extent correlated to his or her assessment of the alternatives available.[24] Fisher and Ury name these the Best Alternative to a Negotiated Agreement (BATNA) and Worst Alternative to a Negotiated Agreement (WATNA).[25] A good BATNA and WATNA will take in to account factors such as costs, time, values, and future plans, and must be realistic.

Theoretically, if a proposed agreement is superior to what a participant believes his/her BATNA to be, he/she should accept it.[26] It is likely that the participant will rely heavily upon his or her lawyer for advice and information in this respect. Thus, the lawyer's level of confidence will be crucial to the behaviour of the participant. An overconfident lawyer will assess their client's BATNA as better than what it would be in reality. A client can be led to believe that if no agreement is reached, he/she can go to court and win. As Fisher and Ury state: "The better your BATNA, the greater your power."[27] Consequently, there is less incentive for the client to compromise or make concessions.[28] Reasonable and/or realistic offers may then be rejected.

In addition to developing a BATNA, each party must consider their 'bottom line', also known as the 'reservation point'.[29] This invisible line will depend upon the WATNA, and a careful calculation of costs involved in pursuing the alternatives to settlement. Costs refer not only to monetary costs, but also time costs, opportunity costs, and so on. The 'bottom line' is the minimum amount a seller will accept, and the maximum amount a buyer is willing to pay.[30] Where the 'bottom lines' of the participants overlap, a settlement/bargaining/contract zone of agreement is created (see Appendix 1).[31] In theory, any figure or option which appears within this zone should be acceptable to the parties. The problem that overconfidence creates is that where the BATNA is inflated, the bottom line follows (see Appendix 1). Thus, the zone is diminished and the range of mutually acceptable outcomes is reduced.

Linguistic examples

"We want $X or we are out of here."

"Based on current case law, we believe that our client is entitled to $X. We strongly suggest that you accept this offer, because you are not going to win if we go to court."

"You have no chance! Who are you kidding? This is a cut and dried case."

[23] Boulle, above n 20.
[24] Bobette Wolski, Legal Skills - a practical guide for students (2006), 340.
[25] Roger Fisher & William Ury, *Getting to YES: Negotiating an Agreement without Giving In* (2nd ed, 1991), 101.
[26] Wolski, above n 24, 401.
[27] Fisher & Ury, above n 25, 106.
[28] Margaret A Neale & Max H Bazerman, *Perspectives for Understanding Negotiation: Viewing Negotiation as a Judgemental Process* (1985) 29(1) J. Confl. Res. 33, 46.
[29] Fisher & Ury, above n 25, 102.
[30] Ibid.
[31] Boulle, above n 20.

Advantages and Disadvantages

In order to classify the products of overconfidence, the objective of negotiation must be defined. Success in negotiation has been described by Korobkin as: "a settlement ending the dispute" or should there be auxiliary reasons involved other than just the facts, then "an impasse".[32] Other academics use measures of success such as the parties' satisfaction, the sustainability of the outcome, and whether adversarial relationships improved, *et al*.[33] For the purposes of this essay, negotiation success is defined as "reaching the best possible resolution which satisfies all parties' interests". Where overconfidence reduces the likelihood of disputants reaching an agreement the trait must be seen as a disadvantage. However, looking ahead of the outcome, the bias may have additional effects on participants, which in turn influence the negotiation result.

Disadvantages

As discussed above, overconfidence reduces the range of mutually acceptable outcomes that may be created in a negotiation. By doing this, overconfidence makes it more difficult to reach a resolution, and in this way is a disadvantage. However, the trait has other negative effects. Pruitt and Kim describe four basic strategies used in negotiation as *contending*, *problem-solving*, *yielding*, and *avoiding*.[34] The use of one of these strategies generally rules the others out, and so a choice must be made about which strategy to use.[35] Pruitt and Kim list four sets of theoretical notions which affect choice - one of which is related to overconfidence, named the *perceived feasibility perspective*.[36] This notion evaluates the four strategies by the extent to which the strategy is capable of achieving the party's goals. If a participant exhibits overconfidence, keeping all other variables constant, the feasibility of using contentious tactics will increase. Use of contentious tactics can be risky as it may alienate the other disputant/s and start a conflict spiral. Other risks involve developing a reputation for contentious behaviour, or triggering 3rd party censure.[37]

Advantages

Alternatively, overconfidence can prove an advantage if a negotiator has difficult aspirations.[38] The definition of 'aspiration' is "the particular target level of benefit a negotiator strives to achieve at any given time".[39] A working definition is - an ambition, an objective, a goal. Difficult aspirations, compared to easily attainable aspirations, are those which cannot be easily accomplished, or that the opposing negotiator is unlikely to agree to readily.[40] While not being unrealistic, these aspirations reflect attainable goals but may require a little extra work to be realised.

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[32] Korobkin, above n 3, 283.
[33] Sandra Kaufman & Barbara Gray, *Using Retrospective and Prospective Frame Elicitation to Evaluate Environmental Disputes* (http://urban.csuohio.edu/~sanda/papers/eval01.pdf) accessed 26 November 2007, 1.
[34] Dean G Pruitt & Sung H Kim, *Social Conflict: Escalation, Stalemate, and Settlement* (3rd ed, 2004), 38.
[35] Pruitt & Kim, above n 34, 39.
[36] Pruitt & Kim, above n 34, 47.
[37] Pruitt & Kim, above n 34, 52.
[38] Lim, above n 4, 56.
[39] Pruitt's definition as stated by Lim, above n 4, 55.
[40] Lim, above n 11, 56.

With difficult aspirations in mind, it is easy to imagine that in such a negotiation, particularly if time constraints were imposed, participants may feel pressured to 'give up' or settle for a less than ideal outcome. However, Lim posits that overconfidence may actually encourage persistence, being an advantage for those negotiators. Being more persistent may push parties to work harder and justify to themselves more strongly that their continued effort will end in success.[41]

To conclude, where a participant has easily attainable aspirations, overconfidence can be a disadvantage where it leads to realistic offers being rejected. In cases of difficult aspirations, overconfidence can be an advantage where it encourages persistence in achieving those aspirations.

How a Mediator Can Add-value

The first method of overcoming lawyer and/or client overconfidence is raising awareness of the trait. Bazerman and Neale found that educating negotiation participants about overconfidence increased the accuracy of their BATNA and WATNA assessments, increased concessionary behaviour, and increased the success of the outcomes.[42] Korobkin terms this "help parties de-bias themselves".[43] While Bazerman and Neale's study arrived at positive results, other evidence suggests that merely explaining that overconfidence exists does little to alter peoples' thinking.[44] This is because the characteristic of the trait itself is to believe that good things are more likely to happen to you, and conversely bad things are less likely to happen to you. So, while a participant may be aware that the overconfidence bias exists, they are prone to believing that they themselves are less likely to suffer from the bias, as compared to their opponents.[45]

The second method is to ask each party to 'step into the one another's shoes'. Two ways to do this is either ask the participants to list possible weaknesses in their case, or to ask the legal representatives to consider the arguments which might be presented by the opposition in court.[46] The reason why this method is less effective on litigation lawyers is because most legal professionals are skilled and trained in anticipating potential counter-arguments. In fact, it would be incompetent for any lawyer not to do so. Thus, this exercise is really asking the lawyer to repeat a task they have already undertaken. Furthermore, during the course of identifying counter-arguments, the lawyer will almost certainly have generated rebuttals to same. The task of verbalising these to the mediator may actually increase overconfidence. Nonetheless, this method may be useful for unrepresented participants.

The third method is to ask the lawyer to place himself in the role of a 'disagreeable adjudicator'. The lawyer must explain to the mediator the reasoning behind his/her case being unsuccessful. By doing this, the lawyer will be forced to take a negative view of the dispute, and concede there is some possibility that his/her case will not conclude as expected. Studies have found that subjects have more belief in an outcome occurring if they explain why it might occur, also known as the 'explanation

[41] Ibid.
[42] Margaret A Neale & Max H Bazerman, above n 28, 50.
[43] Korobkin, above n 3, 294.
[44] Ibid.
[45] Korobkin, above n 3, 295.
[46] Ibid.

bias'.[47] The aim of the action is to increase the plausibility of the undesired outcome, in the lawyer's mind, thereby creating doubt and reducing overconfidence.

The fourth method is for the mediator to "facilitate a process by which the participants de-bias each other".[48] This method involves both parties agreeing to a form of 'mini hearing', whereby both sides' arguments would be presented, and evidential documents made available to all parties. Giving the disputants and their lawyers the opportunity to hear the strength of the opposing case has been seen to be effective in reducing overconfidence.[49] However the hurdle in instigating this method lies in obtaining the consent of the lawyers to carry out the process. It is human nature to prefer to maintain secrecy when involved in a dispute and particularly in negotiation where judicial rules of discovery do not apply. Lawyers in particular are trained to create fog and legal mystery. Only excellent lawyers can say "I will set out my three best arguments..." without hesitation.

The fifth and final method of overcoming lawyer and/or client overconfidence is for the mediator to directly de-bias the parties. To do this, the mediator would 'play devil's advocate' with each side by bluntly challenging their positions and evaluations.[50] By explaining the weaknesses in each party's case to them, this forces the disputants to reconsider their prediction of success. The aim is to shock the client and/or lawyer enough to assuage their confidence. While this may be an effective tool, there are ancillary issues regarding the use of this method. Parties may react to this method by 'shooting the messenger' and rejecting the mediator's assertions, or manner. As a result, the mediator may be rendered useless for future meetings. The mediator may additionally become branded by gossip as negative and unaccommodating.

Mediation theory describes two main types of mediation - facilitative and evaluative. A facilitative mediator has no advisory or determinative role in the outcome and merely aids in the process of mediation whereby a resolution is attempted. An evaluative mediator will take a more active role in guiding the parties towards a settlement in accordance with rights and entitlements, and in view of possible court outcomes.[51] To use this fifth method would be entering the boundaries of evaluative mediation, which some practitioners believe is a contradiction in terms.[52] The writer offers no advice in this respect except to note that it is Korobkin's belief that a "firm hand" and "active participation" are critical to overcoming impediments to settlement.

Conclusion

Overconfidence is a psychological bias which will never be eradicated from the human psyche. It serves a purpose; in promoting emotional and mental wellbeing. In the legal domain, the overconfidence bias is something lawyers are not taught in law school, or alerted to during their professional life. If they do become aware of it, it is

[47] Korobkin, above n 3, 296.
[48] Korobkin, above n 3, 297.
[49] Ibid.
[50] Korobkin, above n 3, 298.
[51] National Alternative Dispute Resolution Advisory Council, *Terminology: A Discussion Paper* (2002) accessed via www.nadrac.gov.au on 2 December 2007, 17.
[52] Ibid.

only through extensive working experience combined with self-reflection. Thus in assisted negotiation, it may often be an impediment to achieving a resolution.

The appearance of overconfidence in one or more disputants can diminish the zone of agreement, and consequently reduce the possibility of the parties reaching an agreement. Overconfidence can also lead to the use of contentious tactics, which carries its own risks. On the other hand, the mentality can also breed persistence where it is sought to achieve difficult aspirations. As such, overconfidence can prove to be both a disadvantage and an advantage.

Overcoming a simple divergence of interests requires co-operation, patience, skill, and motivation. Where overconfidence is exhibited, a mediator must possess an awareness of the bias, and knowledge of how to surmount the trait if need be.

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