

# BEYOND LITIGATION: MEDIATION FOR CHANGING SOCIETY

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# Why Mediation?

## **1. The timing factor:**

- Evolution of current litigation practices and evolution of ADR.

## **2. The needs of the modern society:**

- Empowerment and personal agency.

## **3. Mediation's ability to add value:**

- Ability to add value to the parties to the dispute, lawyers involved and wider society.

# Mediation in Australia

- 1. Why Mediation is struggling to reach its full potential in Australia:**
  - Used as an ad-hoc mechanism for litigation.
  - Lack of support and developed Eco-System for mediation.

# How to Bridge the Gap?

- 1. Who are the key players?**
  - Government, Courts, Disputing Parties, Lawyers and Mediators.
- 2. Lawyer's role:**
  - I believe lawyers/law firms play the most important role.
- 3. How ADRA can assist lawyer's role:**
  - Committed to developing dispute resolution landscape since 1986.

# The Timing Factor

- 1. Dispute resolution before complex litigation:**
  - *Lex Mercatoria* – a special form of dispute resolution. Special non-denominational courts for merchants and international traders travelling along the Silk Road based on mediation and arbitration.
- 2. Common Law of England and Wales before 1500 AD:**
  - Mediation was the main means of dispute resolution, even for criminal matters.
- 3. Development of English Common Law as it is now:**
  - Development of trade and commerce within the empire.
  - Empire.
  - Profession of barristers.

# The timing factor- The Modern Era

- 1. New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the NYC):**
  - Post WWII development.
- 2. UNCITRAL Rules – 1976.**
- 3. UNICITRAL Model Law- 1985:**
  - Post Cold-War development.
- 4. The Singapore Convention on Mediation- September 2020:**
  - Model Law on Mediation-2018.

# The timing factor -Rapid Development of Technology

- 1. From 1980 to now rapid advances in technology have led to:**
  - Better and faster communication.
  - Advances in global trade as it has never happened in human history.
  - Globalisation of human activity as never before.
- 2. Need for fast, efficient and interactive dispute resolution mechanisms – Silk Road again on a Global Scale.**

# The timing factor- Human Factor

- 1. The global shift towards democracy and personal agency.**
  - Democracy is not just a form of government.
  - Every voice and perspective matters.
  - Transparency and self-determination.
  - Empowerment.
- 2. Emerging New-World: feudal or hierarchical dispute resolution mechanisms and needs of the modern society.**
  - Does the current system provide adequate answers?

# Potential of Mediation- Ability to add Value

- 1. The structure of mediation.**
  - Party control.
  - Confidentiality.
  - Flexibility and creativity.
- 2. Do we harness the full potential of mediation?**
- 3. What can we achieve in mediation? – What value we can add to the client using mediation?**

# Ability to add value- The Power of Being Heard

1. Every person holds a universe of thoughts, emotions, and stories. In the hustle and rigidity of litigation, these tales often get buried. Mediation revives this silenced chorus, reminding us of the profound power of simply being acknowledged.
2. The experience of being acknowledged, even without resolution, can be transformative – The experience of Mediation.
3. Ability to build trust and understanding.
4. Evaluate with litigation experience- XXN.

# Ability to add value- Self- Determination, Empowerment

1. Legal battles often feel overpowering, confusing and disempowering. Mediation, however, brings decision-making back to the parties, ensuring they are active participants in the process.
2. Satisfying one of the fundamental needs of modern society - The empowerment of personal agency and ownership in decision-making.
3. This educational aspect of mediation is critically important for the mediation experience, particularly in comparison to the disempowering experience of litigation.
4. Modern commercial client, education and self-determination.

Ability to add  
value- Ability  
to explore  
areas where  
litigation  
struggles-  
Emotional  
Issues

1. Even though litigation understands conflict through general legal concepts, behind every conflict there are unique emotions and conflict patterns involved.
2. Ability to understand emotions, and conflict patterns and acknowledge and resolve.
3. Ability to understand business dynamics, business conflict patterns and resolve.

Ability to add  
value- Ability  
to explore  
areas where  
litigation  
struggles-  
Cultural  
Aspects

1. There are many cultures and legal traditions in the world.
2. **Main legal traditions:**
  - Civil Law (including much of Europe and South America).
  - Common Law (including the UK, Australia and much of the USA).
  - Customary Law (including socialist, cultural and aboriginal systems).
  - Religious Law (including Shari'a law systems and Rabbinic systems).
  - Hybrid or Pluralistic systems (including the South African/Sri Lankan civil/common, Vietnamese Communist/civil system and the Israeli Civil/Rabbinic system).
3. People in each of these legal systems think, analyse and resolve a dispute differently. When it comes to cultures it is much more complex. Mediation has the ability to accommodate differences and create new opportunities.
4. “The worst settlement by the parties is better than the best decision by a Judge” [European Civil Law Quote].
5. Why this part is particularly important to Australia?

CIVIL LAW

COMMON LAW

MUSLIM LAW

CUSTOMARY LAW

MIXED SYSTEM



# Ability to add value- Conflicts as an Opportunity

1. Disputes are traditionally seen as problems. Mediation, however, reframes them, turning barriers into bridges for new opportunities and relationships.
2. Mediation doesn't just quell the flames of conflict; it harnesses their heat, forging new paths, relationships, and horizons previously unseen in the fog of adversarial battles.
3. Ability to take conflicting parties beyond adversarial rules-based world view- win and lose mentality. Bound by rules, litigation often offers one-size-fits-all solutions. Mediation, in contrast, is an artisan's workshop, where solutions are not just found but crafted, tailored to the unique fabric of each dispute.
4. Mediation's ability to create new business opportunities.
5. Needs of the modern client, modern commercial society and mediation's ability to turn conflict into new opportunities.

# Ability to add value- Nash Equilibrium

## 1. Ability to take parties from Nash Trap to Nash Equilibrium.

- The point of the Nash Equilibrium is that the choices you make should depend on what everyone else does. Thus, each strategy in a Nash Equilibrium is a best response to all other strategies in that equilibrium.
- The Nash equilibrium is a self-enforcing agreement, that is, an agreement that once reached by the parties does not need any external means of enforcement because it is in the self-interest of each party to follow the agreement if the others do. It holds because there cannot be any gain by independent action on either side's part.
- When parties are at a Nash Equilibrium they have no desire to move because they will be worse off if they do. Therefore there is no need for a trusted authority, like the judicial system, to sustain them. Their state of equilibrium makes them sustainable. (Shifting the Focus from Mediating the Problem to Mediating the Moment-G Rooney and Margaret Ross)

# Ability to add value- Nash Equilibrium and the Ripple Effect

1. Mediation's touch is gentle, yet its impact is profound. Beyond the immediate stakeholders, its ripples reshape society's conflict landscape. It becomes a beacon, shining light on values of respect, empathy, and unity, reminding us all of the potential of collaborative harmony.
2. In my personal experience, 95% of the Civil Litigation Disputes can be resolved in mediation.
3. From that, properly mediated majority of the mediations are naturally capable of reaching Nash Equilibrium.
4. "Properly mediated" does not require extraordinary skills or complex processes.
5. Facilitative mediation with proper preparation and with 1 or 2 basics above, particularly, experience, empowerment, and exploring conflict dynamics will achieve the purpose.

# Potential and the Gap

1. As the time is now if we reach the full potential of mediation, disputes can add value to parties and the society at large.
2. Most other countries, particularly developed countries either already getting the benefit to their economies through the advancement of mediation and related global trends or properly preparing themselves to get the maximum advantage:
  - Singapore;
  - UK and USA;
  - European Union;
  - India, China, Hong Kong, Malaysia and many other countries.
3. Most above countries have changed their laws and started new initiatives (centers for dispute resolution) but mostly the legal community has changed their attitude towards dispute resolution.
4. Australia as a global leader:
  - Have we done enough to get maximum benefit to Australia as a dispute resolution leader?
  - Or are we still mostly confined to a hierarchical dispute-resolution mindset and attitude?

# Potential and the Gap

1. I believe the answer to the above question is complex and depends on each person's worldview.
2. However, in answering the question I invite all of you to consider:
  - The true potential of mediation as discussed above;
  - What we experience day in day out basis in Australia as lawyers; and
  - What other countries have achieved?
3. My answer to the above question is that even though a lot has been done in recent years, there is a lot more to be done, not only to catch up to the World Standard or Standard of South East Asia but also for the Australian public to get the true benefit of mediation.

# The Question?

1. The real question is what stops us from achieving the full potential of mediation?
2. The answer can be complex. However, in my experience as a mediator, solicitor and a barrister for the last 15 years, the answer can be divided into 4 parts:
  - The limited role – The majority of the time, mediation in Australia today, is an ephemeral interlude before a looming court performance.
  - Lack of preparation for mediation.
  - The ways actual mediations are conducted.
  - Lack of developed mediation Eco-System.

# The Problem

1. The above four can be expanded:
  - No specific preparation for mediation other than position papers – for a successful mediation a lot of preparation is required- identification of conflict dynamics or business dynamics.
  - Lack of dispute system design- negotiation strategies do not involve the process but rather positional negotiations.
  - Conducted in a legalistic manner with an overemphasis on positions rather than underlying interests, emotions or creative solutions.
  - Individual positional negotiations are common, yet they miss the collaborative potential of open dialogues and joint sessions.
  - Lack of identification of cultural differences and use of the difference for creative solutions.

# The Problem

- Mediation Myths- Mediation is neither a retreat nor a reckless reveal of strategies. It's high time we debunk these myths and recognize mediation for what it truly is—a platform for understanding, collaboration, and inventive problem-solving.
- Mediation Myths- Suggesting mediation is a weakness.
- Lack of interdisciplinary collaboration- While legal minds dominate, there is a conspicuous absence of voices from other disciplines, whose inclusion could enrich the mediation process.
- Lack of advanced skilled mediators – Mostly command and control method of mediation is used avoiding joint sessions which require soft skills to navigate through legal principles, positions, emotions and underlying interests to achieve creative value-added solutions.
- Lack of mediation training for all the professionals involved in the dispute resolution process.

# Bridging the Gap- Lawyer's role

1. As we navigate the changed modern society, a glaring gap becomes apparent. While litigation lags, mediation hasn't quite risen to the occasion.
2. The societal compass points towards empowerment, autonomy, and quick creative solutions.
3. Australia, as a dynamo of commerce and dispute resolution in the Southern Hemisphere, finds itself at a critical juncture. Our global standing hangs in the balance.
4. Lawyers, with their influence and expertise, have a paramount role. By embracing mediation, they can redefine the contours of the Australian legal landscape.
5. A robust mediation ecosystem doesn't just benefit the disputing parties. It aids businesses in flourishing, courts in streamlining processes, and firms in unlocking new revenue streams.

# Building the Mediation Eco- System- Lawyer's role

1. Understanding your client and other parties beyond the adversarial rules-based worldview:
  - Client's needs.
  - Client's business needs.
  - Conflict dynamics between the parties.
  - Cultural differences and cultural needs.
  - The business environment of the client.
2. Understanding mediation as a process rather than one single event:
  - What benefits your client will get through mediation?
  - What kind of mediation process or a mediator is best suited to mediate or case manage the process:
    - Facilitative, evaluative, transformative or mediator capable of conducting mediation in all three formats.

# Building the Mediation Eco- System- Lawyer's role

1. Seek help from a Mediation Organisation or from a mediator:
  - Have a confidential discussion with or without the client.
  - If necessary use a mediator to challenge your own client.
2. Early engagement of mediation services.
3. Use of parallel services, mediation and litigation- case management between the two processes.
4. Use Dispute System Design to achieve the best result.
5. Provide specific advice above and beyond position papers.
6. Advocacy in mediation.
7. More use of the Med-Arb process.

# Should it be Cheap?

1. Mediation “properly conducted” is a better service than litigation.
2. It does not necessarily need to be cheap but always remains cheaper than litigation.
3. This is about adapting to the needs of modern society and creating harmony, abundance and wealth.
4. This is about empowerment and self-determination.
5. For the lawyers, this is about creating new business, and wealth and providing their clients a better service.
6. This is about courts performing their function better and directly related to the Rule of Law.

## How ADRA can assist you

1. ADRA is a voluntary organization.
2. ADRA started its journey in 1986 since it has been at the forefront of the Australian dispute resolution landscape.
3. ADRA is an inclusive organization with experienced practitioners from all walks of life.
4. ADRA is an Accreditation Body and ADRA trains mediators nationally and internationally.
5. ADRA is holding the World Mediation Conference in Sydney in 2024.
6. ADRA is committed to transforming the Australian dispute resolution landscape to suit modern needs.
7. For more information, visit <https://adra.net.au/>