

The Fifth Asian Mediation Association Conference

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Over two days in October, the Asian Mediation Association held its fifth biennial conference in Jakarta. The theme was ‘Can Mediation Survive in a World of Trumpian Negotiators?’ It was a tale of cross-cultural harmony that the Indonesians, courteous to a fault, checked with their US contacts to ask whether the president might be offended. ‘Why?’ was the unanimous response.

The plenary talk on the topic was delivered by Messrs Raymond Lee and Said Faisal, members of the organizing Indonesian Mediation Centre. As advocates we will all have experienced – even if we do not call them by their theory names – the basic bargaining styles.

- Distributive bargaining is the competitive bargaining strategy in which one party gains only if the other party loses.
- Integrative bargaining is where parties collaborate to find a ‘win-win’ solution to their dispute. It seeks mutually beneficial agreements based on the interests of the disputants. This is the basis of the so-called Harvard model, the model taught and used by mediators around the world.

The speakers pointed out that there were two water bottles on the speakers’ table and three speakers including the moderator. It is easy to see – if not resolve – the application of either of the orthodox strategies. Or you can dwell on them for ages. It may merely become a question of whether King Solomon slices the third bottle vertically or horizontally.

President Trump’s style isn’t necessarily negative. It just may have a different scope. One element of the president’s approach is ‘think big’; start with the idea that 20 bottles are needed. Where the matter goes, well that’s another thing altogether.

We were reminded of Roy Cohn. Cohn is a study for any lawyer. Many of us will recall that he was the lead on Senator Joseph McCarthy’s investigation into Communist activity in the 1950s. Long after McCarthy was dead, Cohn was practising in New York



City. So to the New York Times of 23 December 2017:

Although both [Messrs Murdoch and Trump] parlayed their inheritances into global power, they have stubbornly viewed themselves as outsiders at odds with the establishment. When Mr. Murdoch entered the British newspaper market in 1968, London society shunned him and his vulgar tabloids, *The Sun* and *The News of the World*, which he used to wound his enemies and advance his political interests. Mr. Trump withstood a similar wariness among the elite after he made himself a Manhattan player through his brazen

deal making and hucksterism.

To make their way upward in New York, both men relied on a powerful friend, the lawyer Roy M. Cohn, a ruthless fixer who made his name in the 1950s as the chief counsel to Joseph McCarthy, the Red-baiting senator, before representing some of the city’s most powerful figures, including the mobster John Gotti and the New York Yankees owner George Steinbrenner.

Mr. Cohn connected Mr. Trump to Mr. Murdoch and the tabloid he bought in 1976, *The New York Post*. The upstart developer saw that he could benefit from the brash daily — especially its Page Six gossip column, which started a year after Mr. Murdoch became the paper’s owner.

One has to have a working philosophy

Most of us see mediation as closing down a dispute. It can be difficult to carry such a framework into a place where a party may be thinking of opening up avenues we have never heard of.

Another session saw a lively discussion about UNCITRAL’s model for mediation. UNCITRAL provides legal standards by use of conventions, model laws and other means. Since the 1980s, states interested in being involved with and parties to, international commercial arbitrations have had the benefit of access to UNCITRAL’s model law and rules.

Flagging compromise

Singapore, well-represented at the conference, is spearheading a similar role for UNCITRAL in mediation. As I understand, the process moves to its next UN milestone in December this year. The address from the Singaporeans provoked questions about the value of formal structures in an essentially informal process.

Compare arbitration. Yes, both are voluntary. But arbitration involves voluntary submission. The submitting party may not

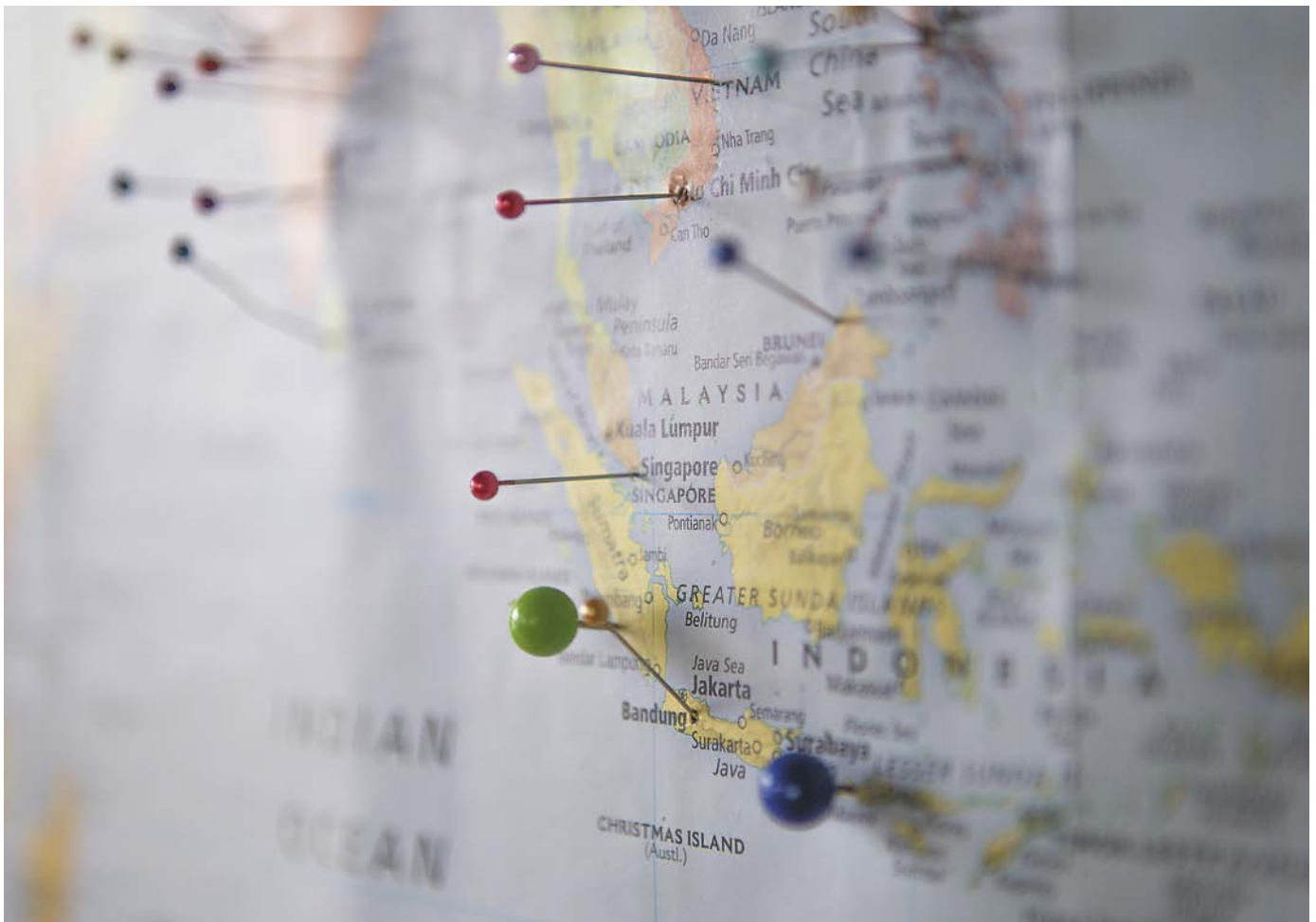


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like the result and an enforcement process is necessary for this reason alone. Theoretically, mediation is no different. A party agreeing one day may wish to renege on the next. But experience tells us that this happens rarely in mediations.

If this is so, the questioners wanted to know, why impose requirements on what best operates as an ad hoc process? The project's supporters replied that yes, mediations had a high rate of resolution in the complete sense, ie they didn't have to be enforced. That said, there was a place for a structure which lent confidence to parties considering involvement.

There are strong arguments each way. Two hundred and fifty years ago, Lord Mansfield was faced with modernizing English commercial law operating a century behind the continent. He succeeded and went on to make England the centre of commercial law. Two tools were the simplification of the given case and a utilization of general principle. Those tools are vital but can often operate in tension. The same tension operates here, and the resolution will be watched with interest by all affected.

The conference ranged from maritime and building disputes to medical negligence and to family law. Dr Paul Gibson from Sydney gave useful insights into the social brain and the way it works in mediations (and elsewhere!)

Campbell Bridge SC shared the stage with two delegates from Nepal. The topic was mediating complex disputes. Bridge drew upon his experience to give some case hypotheticals which were well-received. The Nepalese team led by Ms Preeti Thapa gave an insight into the work of the Asia Foundation. The next time we reflect on our frustration in a mediation at 2.30pm with the parties are going nowhere, consider the difficulties of a recent federation and democracy, Maoist and royal biases, a feudal past and widespread gender bias, with regular physical upheaval as well, usually in the form of earthquakes. Delegates were privileged to get an insight into an ambitious program of community mediation intended to be instrumental in forging a peaceful society for the future.

The win-win Wow mediation technique

I gave a paper on mediation advocacy, sharing the stage with Mr Anil Xavier, the current president of the Indian Institute of Arbitration and Mediation, and George Lim SC, a noted Singaporean mediator who spoke about building a career as a mediator.

The conference was launched by the Indonesian Minister for Law and Human Rights and addressed by the Governor of Jakarta. The minister hails from northern Sumatra and his attendance (with the musicians who preceded and followed him) was a healthy

reminder of the importance of diversity to Indonesia, a place with hundreds of cultures. As for the governor, the 2017 election occurred in circumstances where the former Christian governor had been jailed for blasphemy. As governor, he has his work cut out, balancing the demands of a large Muslim constituency and those of the wider electorate in a time of change. He has great presence and has been mentioned as a future president.

One of the delegates remarked to me that the Australian media's obsession with politics was the good fortune of a stable country where nothing seriously reportable happens. An interesting perspective.

Big. Diverse. We would do well to understand Indonesia better.

Whatever, these keynote speakers are leaders of a complex, huge and rapidly modernizing nation to our immediate north. The convenors of the conference achieved something special in having them both deliver engaging talks about the power of peaceful dispute resolution and its utility at all levels.