Book Review

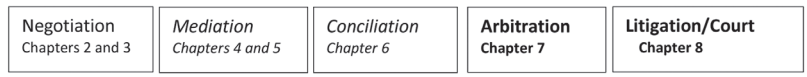
DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE TO SUCCESSFUL ALTERNATIVE DISPUTE RESOLUTION

Reviewed by Mieke Brandon and Elizabeth Rosa*

Dispute Resolution: A practitioner's guide to successful alternative Dispute Resolution, by Michael Mills, Thomson Reuters Lawbook Co, Sydney, 2018, 681 pages: ISBN 978-0-455236-04-9. Hardcover $184.00.

> The central focus of this book – the query: which dispute resolution approach and process is best – and when, how and why – is a question which the legal profession and decision makers have grappled with for many decades.[1]

This book demystifies what each dispute resolution process across the spectrum has to offer:[2]



Mills describes all the alternative dispute resolution (ADR) processes used in Australia, as well as internationally, with a focus chapter on Asia. In all his chapters, Mills has an eye on the human element in ADR processes and how an understanding of others' needs can assist a resolution. He also reminds us of the important message that ADR is not the alternative but the main form of dispute resolution in the 21st century. It is recommended reading for all legal practitioners, dispute resolvers, mediators and students in these fields as well as academics, trainers and coaches, or mentors and supervisors. The text is richly illustrated with case studies, anecdotes and illustrations together with don't and dos, such as various skills, techniques and interventions across the spectrum of dispute resolution processes identified in the text. Michael Mills is a leading commercial lawyer and "his work provides guidance in both choosing and applying the optimal dispute resolution approach to achieve a successful outcome".[3]

CHAPTER 1 INTRODUCTION: DISPUTES AND THE TECHNIQUE OF PERSUASION

The dynamics of conflict and dispute are introduced here with an explanation of the differences between a conflict and a dispute, together with a definition of "successful dispute resolution". Several case studies provide examples of conflicts and disputes, including a comparison between five conflict management categories: (1) *forcing*, (2) *avoiding*, (3) *compromising*, (4) *accommodating* and (5) *collaborating*.[4]

The pros and cons of a dispute resolution process by reference to litigation/court are added to provide an overview across the spectrum, including a range of techniques that may result in successful dispute resolution within each approach.[5] At the end of the chapter the author forecasts that there is increased scope "to resolve disputes much more successfully – whether that be through techniques to prevent the dispute worsening and/or to achieving their optimal resolution (measured by speed or need)".[6]

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[1] The Honourable JLB Allsop OA, Chief Justice, Federal Court of Australia, in Foreword (April 2017) vii.

[2] See 8, fn 28, 19 and Appendix 1.1.

[3] See back cover of the book.

[4] [1.90] 18.

[5] [1.190] 37–39.

[6] Mills, 80.

Chapter 2 Negotiation: Effective Skills and Approaches

The hurdles of people problems, human emotions and needs, such as the illustration and narrative around Maslow's basic human desires[7] are explored. Approaches to negotiation are described in the context of conflict management styles, collaborative, open (soft) negotiation,[8] positional (hard) bargaining[9] and principled negotiation.[10] In the conclusion, the author appropriately suggests that the techniques for creating value and principled negotiation largely overlap with techniques for effective communication and persuasion.

Chapter 3 Negotiation: Preparation and Techniques of Successful Negotiation

> Effective communication and people skills are described as the cornerstone and mode of successful negotiations. Indeed, the process skills of attentive listening, communication, perspective and ability to build a productive relationship with the counterparty of any negotiation, are the platform for successful negotiation.[11]

The first half of this chapter is highly influenced by the classic principles outlined by Fisher, Ury and Patton[12] which are used in most types of dispute resolution processes.[13] However, there is "no one right process, approach or silver bullet" because "negotiation is a dynamic human interaction in countless different circumstances" according to the author. The complexities of what type of negotiation process might work best for whom, when and with what particular content in which situation are discussed.

The second half of this chapter details everything the reader always wanted to know from preparation to advantages and disadvantages in the use of particular tactics and techniques, how to manage deadlocks[14] and process advantages, problems and limitations.[15]

The chapter ends with some habits of successful negotiators,[16] "golden rules" from the author's repertoire of top negotiation tips,[17] also acknowledging that there are many traps and no "one" approach that can promise a successful negotiation outcome.

Chapter 4 Mediation: The Process, Its Advantages, Problems and Limitations

There is a preliminary introduction to and description of mediation, the best use of mediation as dispute resolution processes, as well as its shortcomings, together with illustrations of the diamond model[18] with the description of the four steps to be taken before mediation session can be staged:

[7] [2.80] 94–98.

[8] [2.303] 126–131.

[9] [2.370] 132–134.

[10] [2.380] 134–148.

[11] Mills, n 6, 162.

[12] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement without Giving In* (Penguin, 3rd ed, 2011).

[13] [3.80] 174–175.

[14] [3.890] 267–271.

[15] [3.920] 271–274.

[16] [3.88] 265–267.

[17] [3.930] 274–294.

[18] Figure 4.1 Diamond model of mediation 300.

The purpose of the pre-mediation conference is to establish whether the parties have no barriers to be able to communicate with each other, and, as the author describes: "is there scope for a 'sensible discussion to occur between sensible people to seek to reach a sensible outcome?'"[19] At pre-mediation the mediator also establishes if mediation is appropriate and/or what type of mediation should occur. This is particularly important as previous negotiations may have failed, for whatever reason, and the parties seek a mediator who is accredited and familiar with a facilitative mediation process, with excellent communication and people skills, process and substance expertise, where appropriate, to guide the disputants.[20] A facilitative mediation diamond shaped model with top and a bottom triangle[21] is described, together with the purpose of each stage of the process followed by some of the advantages, problems and limitations of such a process.[22]

The National Mediator Accreditation System (NMAS) sets the criteria for the mediator standards[23] in Australia. The NMAS recognises the distinction between conciliators and mediators and describes conciliation as a "blended process" in which they use a typical facilitative approach of the mediator "with an additional limited advisory role".[24]

Chapter 5 Mediation: Preparing for and Conducting

Negotiation v Mediation is contrasted in Figure 5.1,[25] which illustrates the different stages in each process as well as areas that overlap. This chapter describes in detail how the process of commercial mediation, based on negotiation theory, is conducted. Each phase is explained with how a mediator uses their role, from an opening statement to private sessions and a negotiated outcome. In these types of dispute there are usually lawyers present as advocates with content expertise and once a deal is reached they can draft a legally enforceable agreement at the end.

Theories as to mediation's role are explored, including the "transformative mediation approach" as described by Bush and Folger, providing an opportunity for insight, interpersonal understanding, and creating longer term benefits for repair in the relationship between the disputants.[26] This approach in which the parties seek self-growth and empowerment is described in contrast to commercial disputes where a problem needs to be resolved.[27]

While mediation is often described as "assisted negotiation" it is a stand-alone process with its own models and approaches in which mediators develop their own styles within the classic facilitative model. This offers a selection, for example, to fit the process to the problem as outlined by the author who describes that there are important differences between "shuttle diplomacy",[28] constructive, transformative and directive mediation.[29]

[19] Mills n 6, 300.

[20] For additional information about pre-mediation see [4.60] 302–304.

[21] [4.40] 300.

[22] [4.140] 313–315.

[23] [4.210] 327. National Mediator Accreditation System (NMAS), effective from 1 July 2015. Many professional mediators are NMAS accredited and/or registered according to professional standard such as Family Dispute Resolution Practitioners (FDRPs). For NMAS, see <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf>.

[24] [6.40] 393. NMAS standards, n 23, section 10.2.

[25] Figure 5.1, 336.

[26] R Bush and J Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass, 1994).

[27] [5.390] 384.

[28] [5.290], [5.400].

[29] [5.390] 383–395.

Chapter 6 Other Dispute Solutions

Overviews of conciliation, dispute resolution boards, expert determination, early neutral evaluation and other forms of expert/case appraisal as well as mini-trials, online ADR and court ADR initiatives and processes are addressed in this chapter. Additionally ADR advocacy and the techniques of persuasion as well as pre-trial settlement and conferencing are discussed together with the advantages of each process to assist the reader to choose the best process for their client. Conciliation, for example, would be helpful if the parties want an independent third party to mediate discussions and *provide advice*.[30] Dispute resolution boards have been helpful in resolving disputes in complex construction and infrastructure projects. Expert determination and early neutral evaluation offer the benefit of having a dispute determined by a person with specialist knowledge.

Med-arb involves mediation and if the matter is not resolved, the mediator, as the arbitrator, can provide a non-binding evaluation of each party's case to assist settlement discussions. A mini-trial has the advantage of referring the dispute to the parties' own representatives (rather than a third party) to retain control over the resolution of the dispute. Online ADR is often used for consumer complaints handling, not yet for commercial disputes.[31] Other blended ADR such as the conciliation/arbitration model have been successful in the workers' compensation area.[32] The chapter ends with summaries of ADR processes that have been adopted by the Australian Federal and State Supreme Courts, in particular the referral of court matters to mediation and, in some cases, to settlement conferences. While the summary is comprehensive, it would be useful to know how often the less common processes, like early neutral evaluation, are used in Australia so the reader would know what practically can be recommended to clients.

Chapter 7 Arbitration: The Process, Its Advantages and Limitations

Arbitration is generally used when parties to a contract have agreed that any dispute will be resolved by that process.[33] Mills notes that the Australian Government has a goal of making Australia a "regional hub" for international arbitration.[34] The advantages of arbitration include time-saving (it is quicker to commence an arbitration than traditional court adjudication), the arbitrator has industry experience and there is neutrality and confidentiality.[35] A detailed outline of the process is provided to assist legal practitioners in this area.

Chapter 8 Adjudication: Preparing for and Conducting

This chapter outlines a "how to" manual for legal practitioners in running an adjudication/hearing. This pertains also to arbitration which is an adjudicative process. It gives useful steps for case preparation and research, evidence preparation and trial processes, including cross-examination. The "psychology of persuasion" and the "hierarchy of human needs" are brought in as helpful to bear in mind for advocacy.

Chapter 9 International Arbitration and Dispute Resolution: An Asian Perspective

Mills indicates that in "Western" countries, ADR processes are the norm as a way of resolving disputes. In Asian countries, such as in China, Hong Kong, South Korea and Japan, as well as developments in other Asia-Pacific countries, ADR is even more common.[36] In China, for example, "mediation has been

[30] [6.50] 394.

[31] [6.330] 411.

[32] [6.330] 412.

[33] [7.10] 437.

[34] [7.50] 441.

[35] [7.210] 467.

[36] [7.210] 467.

the prevalent form of dispute resolution for thousands of years". Hong Kong has become an international arbitration hub.[37] There has also been a significant increase in the use of mediation in civil disputes in Hong Kong.[38]

In Summary

Mill's book shows us a range of dispute resolution options and the advantages and limitations of each process. While giving an overview, the author delves into each process and discusses the intricacies of conducting negotiations in those areas. A detailed guide for conducting negotiations as well as adjudication is given, which will be a valuable resource for lawyers, particularly those new to the area. In his focus on legal and commercial mediations, he also highlights the emotions and human needs that underlie all conflicts.

The wide reach of *Dispute Resolution: A practitioner's guide to successful alternative Dispute Resolution* will make it a "go to" book for lawyers, students as well as mediators, trainers and educators.

[37] [9.60] 575.

[38] [9.80] 577.