News magazine of the Indian Institute of Arbitration & Mediation

THE Indian arbitrator

THE INDIAN ARBITRATOR

Volume 1 Issue 6
July 2009

CONTENTS

Editor:
Anil Xavier

Associate Editor:
N. Krishna Prasad

Editorial Board:
Justice B.K. Somasekhara
Joseph Varghese
Geetha Ravindra (USA)
Rajiv Chelani (UK)

Publisher:
Indian Institute of Arbitration & Mediation

Address:
Second Floor, PDR Bhavan,
Foreshore Road, Cochin 682 016,
India.

www.**arbitrationindia.org**
Tel: +91 484 6570101 / 6570102

EDITOR'S NOTE

The growth of mediation as a method of alternative dispute resolution has been encouraging recently. But is the growth properly guided? The overemphasis on mediation and thereby the overcrowding of mediators without proper standards can lead to devastating results. Now we face numerous problems relating to the process of mediation, ethical issues, misconduct etc. Unless it is streamlined to a proper method, the credibility of mediation will be lost, leading to natural death of the mediation process and concept. As we had discussed before the requirement is to integrate and professionalise the ADR system on global standards. The role of IMI attains importance in this context. We would invite ADR professionals and lawyers around the world to submit your views, experience and suggestions on the current process of mediation and arbitration.

We also look forward to your contributions on various subjects related to ADR. We value your opinions and suggestions and will constantly strive to improve the quality and usefulness of the magazine, so as to serve you better.

The views expressed by the authors do not necessarily represent those of the publisher. The publisher makes all reasonable effort to ensure that the information provided is accurate, but does not guarantee or warranty accuracy, validity, completeness or suitability of the contents for any purpose. The information contained in this publication should not form the basis of any decision as to a particular course of action; nor should it be relied upon as a legal advice or regarded as a substitute for a detailed legal advice in individual case. Under no circumstances shall the publisher be liable for any direct, incidental, special and consequential loss and damage that results from the readers' reliance or non-reliance of information provided in this publication. The copyright of this publication vests solely and exclusively with the publisher and no part may be reproduced or transmitted by any process or means without prior written permission of the Indian Institute of Arbitration & Mediation. The information provided in this publication is as of date of publication, however many of the articles or contents might have been written earlier and may not cover the most recent developments.

For previous editions of the Indian Arbitrator, log on to:
http://www.arbitrationindia.com/htm/publications.htm

Lawyer Mediator, Non-lawyer Mediator – Who is better?

: ANIL XAVIER

After the advent of "modern" mediation, there has always been a debate as to who is the better mediator – the "Lawyer Mediator" or the "Non-lawyer Mediator"? Some conflict resolution professionals have even advocated that Non-Lawyer Mediators should not be allowed to practice mediation. On the contrary a section of professionals believes that Non-lawyer mediators are better.

But the fact remains that whatever be the opinions, non-lawyer mediators has brought their own strengths and attributes, many of which are not possessed by lawyer mediators, to the process of mediation. It is also a fact that there are outstanding mediators who happen to be lawyers.

Mediators are trained to look for, capitalize on, and synergize the parties' mutual personal or commercial interests in an attempt to resolve disputes that lawyers reduce to "legal cases"

Mediation – practice of law?

Almost all countries prohibit the unauthorized practice of law by lay persons. Does mediation constitutes "practice of law"? The core activity of the mediation process, viz., impartially facilitating discussions and negotiations by or between two or more parties in a dispute, is definitely not "practice of law".

Non-lawyer Mediators lack "legal knowledge".

The main drawback attributed to Non-lawyer mediators is that they lack legal training and thereby they are severely restricted in their ability to successfully mediate disputes. The reason being they cannot accurately assess the strengths and weaknesses of each party's case. And, if a non-lawyer mediator were to evaluate the likely outcome of a potential case and voice his opinion on it, it would constitute legal advice and as such an unauthorized practice of law! And therefore, since non-lawyer mediators cannot employ this technique, they cannot effectively mediate.

Now it has been accepted globally that a mediator is not giving legal advice and not apprising the parties of their legal rights. At most the mediator can do is to direct the parties to seek legal advice. By doing so the mediator maintains his proper place as a neutral third-party merely attempting to improve the lines of communication between the parties.

We have also seen that due to the legal training that a lawyer-mediator has received, it has often created an adversarial mentality, where one side stands in stark contrast to the opposing side, resulting in the inability to explore unique solutions that "law" is unable to consider.

We have also come across situations where lawyer-mediators have embraced mediation, not out of the passion for dispute resolution, but as a mode to build-up rapport with the judges, in case of court-referred mediations or to network with the parties – indirectly a method of client-touting, which is highly alarming.

So, what does possessing a law degree actually do for the mediation process? According to most experts, it does very little.

But as stated earlier, it is also a fact that there are outstanding mediators who happen to be lawyers. But

are they outstanding because they are lawyers or because they have managed to expand their vision beyond the narrow focus which the law gives them?

Delivering Justice.

We have to keep in mind that lawyers are not the only people capable of delivering justice. Lawyers did not create "the Law" or "Justice".

No matter how sophisticated the clients are, they approach lawyers or courts with stories of injustice and not stories about the law. Lawyers or Courts could solve those "injustice" only when a right and a remedy exist. If you don't have a right, there's no remedy. On the contrary, Mediators are trained to look for, capitalize on, and synergize the parties' mutual personal or commercial interests in an attempt to resolve disputes that lawyers reduce to "legal cases".

The aim or purpose of mediation is to bring in all "aspects" or "skills" to create something better than a litigated resolution can deliver. The Mediators have to remove the rigid formalities and legal rules that often infect and hinder mediation. The parties have to concentrate on the issues at hand and explore unique solutions that courts are unable to consider. Mediation is a way of bringing people together privately to try to work out what they "really" want to achieve and to explore creative ideas for a settlement without prejudicing any later legal options if they prove necessary. This is the beauty and power of mediation.

There can only be "Good Mediators" and "Less good Mediators" – Mediators who can engage with a wide range of issues and those who can't.

Origin of Mediation.

We should not forget that the system of mediation was not evolved by legal experts. The concept of dispute resolution or "mediation theory and practice" was invented by village elders, sociologists, community activists, psychologists etc. So let us give credit where credit is due – to these "Non-lawyer" mediators who evolved a system of rendering justice without attending law school. Of course, not forgetting the fact that modern mediation was evolved and developed in 1976 by a gathering of legal scholars and jurists.

In the modern day mediations too, we have to acknowledge the contributions made by non-lawyer mediators in the field of professional mediation. For eg., the field of "divorce mediation" and "community mediation" have substantially benefited from the involvement of non-lawyer mediators. We cannot turn a blind-eye on the fact that mediation has developed due to the frustration people had by a legal system which "was too formal, adversarial, expensive, and inflexible". In response to these frustrations, mediators – both lawyer-mediators and non-lawyer mediators – worked in the creation and development of many mediation programs that remain intact today.

Limiting mediation to lawyers and retired judges significantly hurts the entire mediation process and negatively impacts the people that mediation intends to help, viz., The Parties.

Mediation; as a profession.

The expectations of parties of legal services are changing. The new requirement is "resolution" and not "litigation". Mediation is now being projected as a truly global profession. Time has come to abolish the distinction between lawyer-mediator and non-lawyer mediator. There can only be "Good Mediators" and "Less good Mediators" – Mediators who can engage with a wide range of issues and those who can't. To emerge globally as a profession, Mediators need to be accepted based on competence, qualification and credibility, regardless of their background.

The main reason which hinders the acceptance of Mediation as a true profession is the lack of a credible high-level qualification, training, professional conduct etc. Continuing Professional Development has to be more visible, organized and relevant. Code of ethics and conduct, process of disciplinary proceedings in case of ethical transgression etc. would add to credibility.

The users of mediation should not only understand it, but believe and trust in it for mediation to grow.

Role of IMI.

The International Mediation Institute (IMI) at the Hague set up in 2007 has taken efforts in defining, benchmarking and implementing global standards of practice, training and conduct of mediators. Its initial role is to credential quality mediators worldwide,

enabling them to be easily identified through a search engine.

IMI Certification is designed to provide and address the seven elements: Q-U-A-L-I-T-Y - Qualifications, Understanding, Acceptance, Leadership, Inspiration, Transparency and Yardsticks.

Conclusion.

Whether, you support the "Lawyer-Mediator" or the "Non-lawyer Mediator", the fact remains that basically you support mediation. As stated earlier, whether you are a lawyer-mediator or a non-lawyer mediator, the intention is to help parties resolve their conflicts – without the rigid formalities and legal rules that hinder resolution. The requirement is to gain the acceptability and trust of the parties.

To develop the concept of mediation as a global profession, it is the right time for us to work together and share our views and insights for promoting and developing the profession more effectively. So join the movement of IMI, become IMI certified and help evolving global standards of mediation practice, training and conduct of mediators.

(Author: Anil Xavier is a lawyer and mediator. President of the Indian Institute of Arbitration & Mediation (www.arbitrationindia.org), he is also a member of the Independent Standards Commission of the IMI.)

Interested to contribute Articles?

We would like to have your contributions, provided they are not published else where. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, PDR Bhavan, Second Floor, Foreshore Road, Cochin - 682 016 or editor@arbitrationindia.com.

Publication of the Article will be the discretion of IIAM and submissions made indicates that the author consents, in the event of publication, to automatically transfer all copyrights thereof to the publisher of the IIAM Journal

Think ...

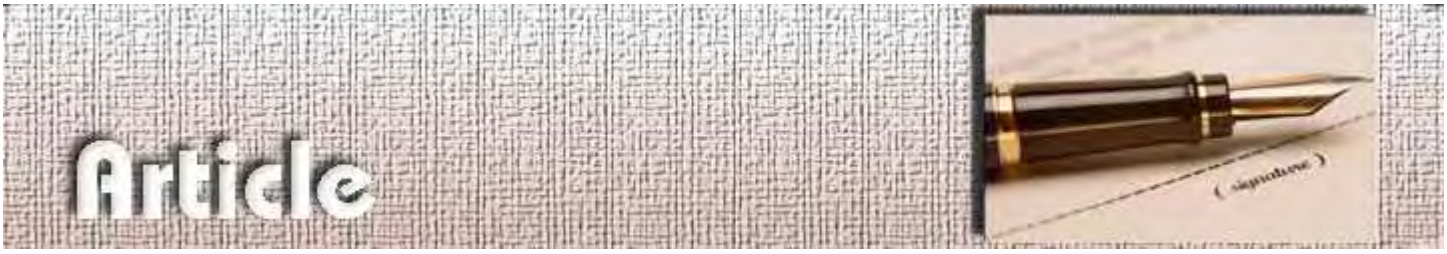
A story tells that two friends were walking through the desert. During some point of the journey, they had an argument and one friend slapped the other one in the face. The one who got slapped was hurt, but without saying anything, he wrote in the sand: "TODAY MY BEST FRIEND SLAPPED ME IN THE FACE!"

They kept on walking, until they found an oasis where they decided to take a bath. The one who had been slapped got stuck in the mire and started drowning, but his friend saved him. After he recovered from the near drowning, he wrote on a stone: "TODAY MY BEST FRIEND SAVED MY LIFE!"

The friend, who had slapped and saved his best friend, asked him, "After I hurt you, you wrote in the sand and now, you write on a stone, why?"

The other friend replied: "When someone hurts us, we should write it down in sand where the winds of forgiveness can erase it away, but when someone does something good for us, we must engrave it in stone, where no wind can ever erase it."

LEARN TO WRITE YOUR HURTS IN THE SAND AND TO CARVE YOUR BENEFITS IN STONE.



$e = mc^3$ / ADR

: SCOTT PETTERSSON

Arbitration is the child of commerce, where transactions across political boundaries made the search for neutral determinations and avoidance of delays in getting matters before a court essential.

A discussion of the relative merits of dispute resolution methods (with apologies to Albert Einstein) and some of the drivers to choice.

A translation this well known formula into our modern business existence is long overdue. By application of this formula (as amended), it may be that you can avoid atomic explosions of a dissatisfied superior, or a radio active wasteland free of clients. These graphic analogies are all considered in the sphere where Alternative Dispute Resolution (ADR) presents real options from the "lose lose" environment that can be the courts.

Best of all you will appreciate as you consider the elements, which you do not have be Einstein to put it into practice.

In the subject formula the letters in the formula represents the following terms.

e **Expectation**. In this formula expectation represents the views of the workers with regard to quiet enjoyment of their daily toil, and management's view that a professional line manager will ensure cordial efficient working relationships amongst staff. In a broader sense it represents the societal view that we will deal with conflict in a quick, civil and if possible consensual way.

m **Method**. There are now a variety of 'methods' available for dealing with disputes, amongst them are litigation, procrastination, conciliation, mediation, adjudication, negotiation, arbitration and countless variations and combinations of these methods / processes

c3 **Cost, confidentiality & continuity**. These three words often represent the key drivers for parties in a dispute. With cost including staff time, turnover, training and direct cost to the business such as legal fees. Confidentiality is exactly that; these are not methods that require disclosure of outcomes and it is very rare that the processes are subject to review by either the courts or the community. Continuity represents the relationship between the disputants, court processes often mark the end of a relationship while ADR processes frequently allow the relationship to continue; they may even flourish. There are of course many other drivers that could be included such as culture or convenience, but I did not want to go to more than one power greater than the good professor.

adr **Alternative Dispute Resolution**. This definition is now used interchangeably with appropriate dispute resolution. This represents the process of selecting the method to address the dispute. By placing the denominating formula over this, I have excluded from my discussion those processes which are curial in nature. Those processes excluded are fundamentally the courts' described as

'litigation'. This leaves two determinative processes to consider, from those listed in **method** above, arbitration and adjudication. The remaining processes are facilitative, that is, where the disputants determine and agree the outcome.

Expectations deliver energy to a dispute. The expectation can be created by the disputant or imposed from a party who is apparently external to the dispute. In truth these external parties are often present in many senses in the heart of the dispute and are not recognised as participants. It may be that a senior manager has stated a level of performance required in maintaining an effective work environment. Internally, it may relate to a participants understanding of work policies, reward and recognition structures or innumerable other variables. The most troubling aspect of expectations is that they are often not ever expressed to other parties, and remain as undisclosed barriers to settlement. The net effect of an undisclosed expectation is that it can often not be met. In a mathematical or analytic assessment this means the equation does not balance.

If the formula is not in balance, the agreement is impermanent, therefore the dispute is not resolved but merely deferred. This can equally occur where the expectation is far exceeded, as the illusory level of expectation created in the last dispute may provoke future disputes.

In a mathematical sense **'e'** generates a value and this must be equalled by the other side of the equation for the outcome to be true.

Methods abound for dealing with disputes; some of the pros, cons and practice tips for those options listed above are investigated.

Litigation is excluded from detailed development because of the formulaic structure involving ADR. This is potentially a little simplistic as many parties who head to court now are sent directly to an ADR process (most commonly mediation), before they are 'permitted' to return to the full blown adversarial system. This has been a great step forward and has significantly reduced the waiting time to access a judicial determination. (Interested readers may wish to review a study conducted in Ontario where mandatory mediation was introduced and trialed over 23 months[1])

Procrastination was one of the options listed above. It is practised to excess by uncertain managers and occasionally very effectively by the very sage amongst us. Those who practise this skill wisely recognise the transient nature of some disputes and let time take its course; cooling off. When practised poorly it has added the procrastinator as a party to the dispute and fuelled the original concern. How many times have the words been spoken with indignant tone 'and now (insert name) won't do anything about it!'

Conciliation (serendipitously flanked by concierge (a person who know all in large apartment blocks) and concise (brief and to the point)) is the process of pacifying or resolving disputants. It has come to mean an assisted discussions process by a person who has skills or knowledge in one of the areas in dispute. Examples of its use are the industrial dispute arena, where specialists in labour law and associated specialities such as Occupation Health and Safety will guide discussions down fruitful paths to a satisfactory conclusion that all parties accept they can live with. In many regards this is method used by marriage counsellors.

Mediation is the most successful of the ADR methods / disciplines and is much in favour with the Courts currently. This is a process like conciliation where a neutral third party assist the disputants (there can be more then 2) to identify the issues, separate the people from the problem[2]. Mediation has a variety of methods of actual conduct though some elements appear to common to most practice styles. These elements include: allowing parties to speak their mind (venting), high levels of confidentiality, private sessions and sessions with all parties, parties reality testing proposed solutions for sustainability and desire for enforceable outcomes). In most cases the end point of mediation is an enforceable written agreement (which is enforceable as a contract). Most practitioners claim an industry wide success rate of about 85%. Because it is an informal process the other strong points made for it by its proponents are cost (most mediations are les than 1 day), and speed (it is common for a mediation to be resolved within two weeks of an agreement to mediate being executed).

Adjudication is one of the determinative processes encompassed in ADR. This means that a request is made of a party, considered by the parties to be sufficiently qualified, to determine a matter for them. In most cases the determination is final and is subject to limited

(Footnotes)

[1] The website of the Attorney general of Ontario is located at http://www.attorneygeneral.jus.gov.on.ca/

[2] This is a mediator buzz phrase relating to focussing on the actual issue and not the personalities. An example might be where one party describes another as lazy the mediator may identify an issue of productivity and the lead the parties into discussing what is acceptable and how can it be measured.

common law rights of appeal, such as duress, misrepresentation and alike. This is sometimes used in association with the other facilitative methods such as conciliation or mediation. It has recently been encompassed in some legislation with power passed to 'experts' outside the traditional Government / Courts compact[1]. Its key benefits are that the adjudicator is neutral, expert and usually readily available. As an informal process (in most cases) it is faster and can be done from written submissions rather then evidence being led and refuted through the adversarial system of the courts.

Negotiation is a leopard that has changed its spots, as a science has grown around the practise. Once most commonly used with the adjective tough, it is now more aligned with effective. A tool for all of the methods it is increasingly used as a stand-alone method, where a professional negotiator is employed to deal with particular situation. Most of the modern practitioners utilise a method based around that developed at Harvard, where the generation of options, use of standards and close analysis of key drivers are the norm.

Arbitration is the child of commerce, where transactions across political boundaries made the search for neutral determinations and avoidance of delays in getting matters before a court essential. It is now governed by many clearly stated rules both within Australia[2] and internationally[3]. The arbitration process is determinative and in most cases is internationally enforceable through the domestic courts. The process is similar to the Australian court system and is often, though not always formal in nature.

All of these methods, and the others that remain undescribed are valid. What must be borne in mind is the requirement to have a method. In a mathematical sense, if values were attributed to each component of the equation that unless the expectation value is zero, then having a value of zero for method (zero here being when there is no expectation or no method) will balance. This is because it is a mathematical proof that multiplying any number by zero will deliver an outcome of zero.

Cost, confidentiality & continuity along with culture, convenience and similar drivers work to assist in the selection of the method and provide input to the range of acceptable outcomes. In the event that the outcome falls well below the value ascribed to expectation it is possible that either parties will not reach an agreement in a facilitative process or will seek recourse to further consideration in a determinative process (this may be by process of appeal or alike). While all of the **'c'** words may not be present some must be, or you would be unlikely to have a dispute.

While most understand immediately how cost can be a business drivers, many fail to contemplate how the choice of **'m'** can be affected by such factors as continuity and culture. The adversarial approach of litigation most frequently rings a close to any future business relationship. This can also be a consequence of selecting a method which is culturally abhorrent to another party. Confidentiality, is legally complex to describe with certainty, however, as many of the methods described are private processes which may be conducted under an enforceable agreement of confidentiality, settlement terms are rarely revealed. Convenience is another central factor, with the escalating costs of many formal processes and the diversion for core activities represented by dispute it should not be undervalued.

Conclusion

Disputes are a reality of the human condition. The nature of them is to diverse to be represented by a single solution strategy, by employing the formula detailed above disputants may be able to cover many of the bases required to be contemplated before embarking on the dispute path. Much of that path should be internal to the organisation, and solutions can be found along the way; however to maintain control and to meet the **'e'** whatsoever it may be you will have to look externally at some stage. When that stage is reached, do so as an informed choice, part of your strategy.

Your legal adviser should be able to assist you in explaining choices, or a professional organisation like LEADR can assist. For those who wish to investigate some of the possibilities you may consider, 'Getting to yes' by Fisher and Ury[4] or 'A sudden outbreak of common sense' Ackland[5].

(Author: Scott Pettersson is the Chief Executive Officer of LEADR, Australasia's leading mediation members organisation. (www.leadr.com.au)

(Footnotes)

[1] See for example the Building Industry Security of Contracts Payment Act NSW

[2] Most States have laws covering the conduct convening and effect of arbitration see for example the Commercial Arbitration Act in most jurisdictions.

[3] While there are several the most widely accepted are United Nations Commission on International Trade Law (UNICTRAL)

[4] Century (a Division of Random House)

[5] Hutchison Business Books

What the six honest serving men have to offer

: TONY WHATLING

The right sort of questions are vital to the professional mediator, according to the author, a trainer and consultant in conflict management. Quoting Kipling and his 'six honest serving men', he explains the subtleties required.

The effective mediator uses questions, just as a plumber uses a wrench, a surgeon a scalpel or a fireman a hosepipe. As John Haynes points out in Fundamentals of Family Mediation[1], the mediator: "cannot give advice or instructions on what to do. The clients provide the answers. Using questions is one way of helping the clients maintain control of the content".

Following on from those ideas, what I want to do is to propose that questions in mediation are not 'value-free'. Questions convey particular meaning from the questioner to the respondent. The type of questions used indicate the very 'values-in-action' which are central to mediation practice. Even an apparently innocent open-ended question contains a 'value statement', that I the questioner am interested in your opinion, ideas and thoughts on this issue. I need you to help me understand your situation. Consequently a range of values and principles are conveyed when the mediator, especially in the early stages of the process uses only open-ended questions to explore issues, wants and positions. Through the continued use of such questions, the further the mediator proceeds into the stages of developing and exploring options, the more the essential mediation principles become explicit.

Only the parties really know how to define and clarify the problems and issues from the context of their own experience

Such principles would include, for example, the assumption that only the parties really know how to define and clarify the problems and issues from the context of their own experience. Consequently we can also assume that they are in the best position to define potential solutions for their future actions. Given these two assumptions we can go on to say that the parties are best placed to determine what actions will be feasible and realistic for them to carry out in their world, not that of the mediator. Ultimately this value set' acknowledges that the parties need to be responsible for designing and implementing negotiated agreements since it is they who have to live with the consequences, Open-ended questions, then, are the 'stock-in-trade' of the creative problem solving element of the mediator's task. There is ample literature devoted to this style of problem solving process, for example in the world of business management.

Mediators from professional backgrounds may have difficulty in adopting such question styles and values, in practice if not in principle. In my experience and involvement with the training of family mediators, community mediators and health authority conciliators, this may be explained by the other professional role responsibilities these people may also carry (eg social work, probation, law). Such professionals are frequently called upon to give information and advice. As we know, the two roles are easily confused, in the mind of the listener, if not the speaker.

What seems to happen is that clients bring with them a constant expectation of such advice and problem solving help. This in turn tends to combine with problems of limited time, plus a certain satisfaction for the professional at being able to help people by coming up

(Footnotes)

[1] 'The Fundamentals of Family Mediation', J. Haynes [1993] Old Bailey Press.

with good ideas. The net result is to make it difficult to recognise where the distinctions are drawn between ideas and information - and advice about how best to solve the problems.

So how do mediators develop skills in the use of open-ended Questions? (which for the benefit of this paper we could say are questions which cannot be answered with a 'yes' or no'.) To begin with, we need to understand that the primary purpose of an open-ended question is to make people think for themselves and about themselves. A closed-ended question on the other hand requires only that the respondent thinks deeply enough to be able to answer 'yes' or 'no'. The process is further complicated by the risk that the respondent will attach a variety of meanings to the choice of the yes' or 'no'. They will be influenced for example, by thoughts about how the questioner might want them to respond, or about what advice, information, or problem solving ideas are 'embedded' in the question. Either way the respondent is distracted from the more important activity, which is to explore and think 'out-loud' about their own unique situation. A further consequence of the 'yes/no' answer is that the questioner acquires little or no information from the respondent and consequently may fail to understand fully either the client's views or the context of their particular problem.

Although not totally safe from the 'wiles' of a would-be compulsive problem-solver, we are likely to be posing an open-ended question if in general we use questions which begin with: what? how? who? where' when? This can be compared with closed-ended questions which usually begin with: have you? did you? will you? could you? were you?

The wise words of Rudyard Kipling are worth bearing in mind: "I keep six honest serving-men (They taught me all I knew); Their names are What and Why and When And How and Where and Who."

Notice in particular Kipling's second line, which I interpret in this way: that as problem solvers all we need to know can be discovered through those few simple questions. In mediation and problem-solving the questions are not asked in Kiplings order nor in linear form but work best in circular and recurring order.

For example: What has happened so far' Who has talked to whom about what? How did they respond when that was done? How did that compare wit hat was expected? What needs to be thought about now and what needs to happen next? What would be an ideal outcome to this dispute? What would need to happen to make that possible? When would be the best time to do something about that? Where would be the best place to do that?

Obviously all these questions can be addressed separately or jointly to the parties in dispute. The questions clearly convey an implicit 'value' message, that whatever skills and knowledge the mediator may bring from their own personal and professional experience, they think that the parties are the experts in understanding their own unique situation. This carries the added benefit of re-connecting people to their own day-to-day problem-solving and survival skills capacity. Such questions can also be used to create a diversion from 'naming', 'blaming' and 'claiming' behaviour which is inevitably located in the past history of the dispute. The parties cannot change the events of the past but when helped by the mediator, through open-ended problem solving questions, they have the opportunity to change the future.

I have not borrowed Kipling's 'Why?' in my list of questions. Such questions are frequently used in a blaming or accusatory form, or with an 'embedded' blame message and as such are invariably 'past-negative' in focus: Why did you walk out on us when we needed you most? Why are your children so rude to me? Why did you keep doing that when you knew how upset I would be? Why do you smoke and drink so much?

Why? is a legitimate problem solving interrogative but such Questions are usually very hard to answer. Why, for example, do most of us persist in doing things we know only too well are either unwise or unhealthy or both?! In disputes it is also problematic, since to answer a why? question is to risk giving power to the other party. Equally it may risk admitting 'liability' for what was often an interpersonal and - cause-and--effect' activity involving any number of other people and their behaviour. The Why? question can be avoided by asking about the objectives of the behaviour in question. Such questions begin with a What? As in:. What did you hope would happen when you...? What were you afraid would happen if you owned up about..,? What sort of events tend to lead to you doing that, and what would you and others need to do differently to make sure that does not happen again?

Another problem with the Why? question and with closed-ended questions is that they can propose answers, solutions, or worse still, imperatives. When persistent attempts through open-ended questions have failed to stimulate the party's own problem-solving ideas, it may be appropriate for the mediator to make some suggestions - the last refuge of the desperate mediator! However this needs to be done intentionally, not by default through a question. Examples of the latter would be: Why have you not taken advice from the Housing Department? You should take advice from the Housing Department. Have you thought about taking advice from the Housing Department? Have you thought about

taking advice from the Housing Department as one of your options?

The first is a clear example of an embedded suggestion within a why? question. The second is a clear imperative, and in general both are inappropriate for the mediator role. The others invite the parties to consider such actions but can be seen to involve embedded suggestions: that the mediator thinks such actions to be a good idea. The problem with all of these mediator-proposed ideas is that, however good they are, they may miss underlying issues which have not yet been expressed. They may also be what one of the parties has already proposed as the solution and can be seen by the other party as side-taking by the mediator.

It is important to remember that whatever the purpose of the question, the meaning is always defined by the respondent. Only when the answer is given will the mediator know how the respondent has interpreted the question. As a general rule, mediators should never give clients imperatives on the content or outcome of their negotiations, Within mediation, imperatives are only appropriate when they relate to the process of the negotiations. It is acceptable to tell parties to calm down, not to interrupt or threaten each other. It is not acceptable to instruct parties to consult the Housing Department, whom the children should live with. how they should behave with the neighbours etc.

In view of the importance of questions, both for the value state-ments they convey and for the problem solving process, it is surprising that relatively little attention has been given to the subject in mediation literature to date. It is even more surprising, if we recognise that they are the primary tools available to the mediator. This being so, mediators have a responsibility to acquire a good range of such tools, understand their specific function, practise and develop skills in their use, and know when and how to employ them with a clear purpose and intent. It should not be a random process but one which involves the selection of the right question for the particular purpose, with a good understanding of the likely outcome of its use.

At the start of this article I proposed that the values and principles of mediation are constantly demonstrated 'in action' by the questions mediators use. Hopefully this will encourage mediators to reflect on the type of questions they use and to develop skills in the use those questions which endorse the principles of mediation.

(Author: Tony Whatling is a professional mediator, trainer and consultant in conflict management.)

The Lighter Side

A motorist, driving by a ranch, hit and killed a calf that was crossing the road. The driver went to the owner of the calf and explained what had happened. He then asked what the animal was worth.

"Oh, about $200 today," said the rancher. "But in six years it would have been worth $900. So $900 is what I'm out."

The motorist sat down, wrote out a check, and handing it to the farmer he said,

"Here is the check for $900. It's post-dated six years from now."

Think ...

Remember not only to say
the right thing at the right time,
but to leave unsaid
the wrong thing at the tempting moment.

Upcoming Judicial reforms in India

India's Law Minister, Mr. Veerappa Moily has said soon after taking over the charge that the Government would stress during the next five years on judicial reforms and also would ensure that rule of law touched every individual including the last man in queue. This would go a long way to realize "simple, speedy, cheap, effective and substantial" justice. For decades judicial system has been crying for reforms as the cheap and speedy justice has been by and large elusive. There is a huge pendency of over 2.5 crore cases despite measures to reduce it. Experts have expressed fears that there has been a loss of public confidence in the judiciary, and an increasing resort to lawlessness and violent crime to settle disputes.

China adopts ADR law on rural land disputes

In the face of increasing land disputes and social unrest in rural areas, China has passed a first of its kind law to facilitate the fair settlement of disputes to maintain "harmony and stability", the country's top legislature announced on Saturday. Under the law, which will go into force in January, arbitration committees will be set up in every county and city "to settle disputes concerning rural land contract management in a timely and just manner," said the Standing Committee of the National People's Congress, the country's highest legislative authority.

Singapore amending laws to strengthen mediation

Community mediation is set to take on a bigger role with changes expected to the law to strengthen the use of mediation. The Home Affairs Ministry will be developing community-based solutions to deal with community-related problems. Taking it further, the Ministry of Law will increase public awareness when it comes to community mediation by highlighting the advantages as well as the process of mediation. More training will be given to community mediators to further advance their skills. With the face of terrorism constantly evolving, the various agencies will also continue to coordinate and collaborate to deal with the issue.

Out of Court settlements encouraged in Indonesia

As per a research conducted by women's non-governmental organization Limpapeh from 2003 to 2004 in West Sumatra, it was found that villagers were satisfied with out-of-court settlements which they said were more effective and less complicated than pursuing a dispute in court. A solution reached between mediators will be brought to a high council comprising village elders for approval. Based on this finding the Supreme Court has encouraged out-of-court settlements to resolve disputes at village level. Chief Justice Harifin Tumpa said that considering that mediators play a significant role, courses and trainings will be held those who are interested in mediating. The World Bank has also shown interest in this method and intends to develop this cultural heritage through further research and education.

A mentor is not a person who gives you advice.
A mentor is a person whose advice you follow.
~Mike Murdoch~

Protest on decision to close National Center for Conflict Resolution

Mediators and professionals across the country are condemning the Israel Justice Ministry for its plan to close the National Center for Mediation and Conflict Resolution, in accordance with a decision reached by the previous government. The Justice Ministry said the decision to close the center stems from both professional and budgetary considerations. The center, it said, was established to encourage the mediation process, and has fulfilled its function now that mediation is firmly established across the country. But the protestors reject the ministry's argument. According to them, the citizens have a right to conflict resolution outside the court and a right to have a body that develops standards and principles of mediation. The Knesset Constitution, Law and Justice Committee has called for the ministry-based center, which oversees some 25 public mediation centers throughout the country and has been in operation for 11 years, to remain open. The Justice Ministry has agreed to reconsider the matter.

Upcoming Events

Seminar on Legal Contract Excellence

IIAM endorses the seminar on Legal Contract Excellence hosted by Marcus Evans. The Seminar will be on 13-14 August 2009 at Le Royal Méridien Mumbai. The Seminar will address the current challenges in managing contracts during this global financial crisis.

This two-day ground breaking conference is complete with excellent presentations, extended sessions and panel discussion from top-notch industries players. Delegates will gain first-hand information on various innovative techniques in legal contract management. Attendees will also discover ways of avoiding unnecessary disputes, strategies in drafting contracts and risk involved in contract management. For more details about the program, log on to: www.arbitrationindia.com/htm/iiam_law_lectures.html

WIPO Conference & Workshop

10 Years UDRP – What's Next? : A Conference organized by the WIPO Arbitration and Mediation Center on October 12, 2009 at Geneva, Switzerland, will mark the tenth anniversary of the Uniform Domain Name Dispute Resolution Policy (UDRP). The Conference will seek to draw lessons from the UDRP experience of the WIPO Center with a view to informing similar or other processes in the future of the Domain Name System. Among the participants of this event will be numerous WIPO domain name panelists, Domain Name System stakeholders, as well as authorities and individuals concerned with the implementation of dispute resolution mechanisms. WIPO is also holding an Arbitration Workshop on October 15-16, 2009. Conducted by experienced WIPO Arbitrators, this Workshop will provide intensive basic training of a practical nature for party representatives in arbitration and for arbitrators, as well as others wishing to familiarize themselves with the international arbitration process. For further information, please see http://www.wipo.int/amc/en/events/index.html

Certificate in Dispute Management (CDM)

CDM is a distance learning course valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.

For details on courses and training programs; mail to: training@arbitrationindia.com