

# Article

## The Mediation Disruption

A Path to Better Conflict Resolution through Interdisciplinarity and Cognitive Diversity

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The COVID-19 pandemic continues to challenge businesses with unparalleled difficulties. However, this crisis has also accelerated the decay of questionable business practices, thus creating a situation ripe for positively disrupting the status quo. For example, businesses are reconsidering the renting of large office spaces and opting instead to invest in their digital infrastructures. Corporate lawyers are updating how they draft and apply *force majeure* clauses to be more alert to possible catastrophic events, thus better shielding companies from liability. In other words, businesses find themselves in a precarious situation – that of crisis and pandemic – but also that of growth and opportunity, albeit in a rather Churchillian sense.

In the field of corporate dispute resolution, one such disruption worthy of (re)consideration is the unmooring of litigation as the staple of corporate conflict resolution and to increase the prominence (and our reliance) on mediation instead. In this short contribution, this quixotic assertion – that mediation ought to be the primary tool for corporate conflict resolution – will be supported by arguments as to why businesses can benefit from embracing this shift. In addition, this contribution will also recommend how those in the business of dispute resolution can further improve mediation – both in terms of substance and its marketing – through: 1) the promotion of interdisciplinary training for mediators; and 2) the fostering of a more cognitively diverse mediator pool.

### 1 The Need for Disruption

Businesses operate in a world of uncertainty, confronted by market failures and imperfect information. Prudent cost-benefit analysis, probabilistic thinking and adherence to Bayesian methods (where new inputs are constantly added into the ongoing assessment) are of paramount importance as businesses try to increase their chances of survival and success. The basic task of lawyers and in-house counsels in this equation is to minimise exposure to risks *ex ante* and to resolve conflicts as they arise *ex post*. However, the costs associated with these measures from ensuring compliance to getting companies out of legal entanglements are often very daunting. According to one survey conducted by the Association of Corporate Counsel, multinational organisations are spending an average of over \$16 million per year on legal matters including but not limited to 427 litigation-related issues and 2,198 contract reviews.<sup>1</sup> While some of these costs are inevitable, the labour costs and the psychological strain of being in the state of constant conflict can have a debilitating and taxing impact on a company, its culture and its people.

Mediation promises to alleviate some of these burdens associated with litigation and the toxic conflict culture. According to one European Parliament backed study,

1. Association of Corporate Counsel. (2019). 2019 Global Legal Department Benchmarking Report. Retrieved from [www.acc.com/sites/default/files/2019-06/ACC\\_Benchmark\\_062019.pdf](http://www.acc.com/sites/default/files/2019-06/ACC_Benchmark_062019.pdf) (consulted on July 18, 2020), pp. 8-10 (revealing the survey results of 508 legal departments of major organisations worldwide interviewed to assess the amount of both internal and external legal spending of these organisations).

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the average cost to litigate in the European Union is €10.449 while the average cost to mediate is €2.497. Therefore, when mediation is successful, European citizens can save over €7.500 per dispute.<sup>2</sup>

Even with these alleged benefits and the promulgation of the 2008 EU Mediation Directive,<sup>3</sup> mediation still remains an underutilised dispute resolution tool. Furthermore, even the promise of a more legally binding mediation settlement agreement with the Singapore Convention entering into force this year,<sup>4</sup> there are still lingering doubts on the future prominence of mediation. Nevertheless, given that we have an underutilised dispute resolution tool that is cheaper and faster than the existing alternatives, the key question for those in the business of mediation is: how do we market and popularise this tool to bolster it from its quasi-dormant state?

The remainder of this contribution will attempt to offer possible answers to this question with the following working hypothesis: Mediation must offer a better product relative to the other dispute resolution mechanism; one that is not only faster and cheaper, but one that offers a more open and amicable communication that leads to better substantive settlements. Two possible ways of ensuring this, as previously noted, is by advocating for a more interdisciplinary education for the mediators and for the pool of mediators to be more mindful of our cognitive diversity.

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## 2 Interdisciplinarity and the Law Folk's Allergy to Emotions

Relying on various findings from evolutionary anthropology and cognitive sciences, the former Chairman of the Association of Corporate Mediation (*Vereniging Corporate Mediation*), Martin Brink, recently noted the following:

My conclusion is that conflicting parties will try to get their way if they feel they still have a chance to gain the upper hand. Fighting or litigating is one way to try to remain in control or to regain control. Only after spending all their effort and means to have things go their way will parties grow exhausted, frus-

trated – not only with their opponent but also with the situation they are not able to surmount by themselves – and become susceptible to reason.<sup>5</sup>

According to Brink, mediation generally plays second – or even third – fiddle to litigation because when people's feeling of control or autonomy is challenged, we revert to the 'fight, flight, or freeze' approach, rather than the 'sit down and self-reflect' approach.<sup>6</sup> Another reason why this latter approach is often the path less taken is that lawyers and law firms do not have a very strong incentive to change this status quo given that their relevance and survival is contingent upon continued conflicts of their clients.

This symbiotic relationship is not the only problem. Even though conflicts not only arise out of, but subsequently conjure strong emotions and feelings, courts and law folk are not adequately trained to handle them. If anything, displays of such fuzzy and intangible nuisances are frowned upon in this arena. However, this is part of the reason why litigation is an inferior product relative to mediation. The ideal dispute resolution process ought to entail grappling with and understanding these feelings and emotions, because – as this contribution will elaborate upon later – we make very irrational and poor decisions under circumstances of stress, risk and uncertainty, especially when our emotions are suppressed and not adequately dealt with.

It should not come as a surprise to many that the courtroom is not the most apt environment for venting out emotions and that lawyers are not the foremost experts of listening to one's sharing of feelings. Mediation vis-à-vis litigation offers a much more suitable environment for parties to express their feelings and grievances without reservation, which increases the chances of parties to resolving their conflicts in a more sustainable manner.<sup>7</sup> This process also provides a unique opportunity for businesses to acquire new information and insights to update their Bayesian calculations, which as previously noted, could be beneficial for businesses trying to stay ahead of the competition or finding meaningful collaborations.

Given that mediation has 'multidisciplinary roots [that] embrace law, psychology, economics, international relations, and more recently, neuroscience',<sup>8</sup> the mediation process is more flexible and open to addressing and tackling non-legal matters, which is one avenue of differentiation from litigation. This selling point is something that mediation and mediators can further improve upon to make their competitive advantages even larger. The more mediators understand about what makes

2. European Parliament Directorate General for Internal Policies. (2011). Quantifying the Cost of Not Using Mediation – A Data Analysis. *PE 453.180*, pp. 1,4 (stating that mediation 'saves both time and cost').
3. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This Directive aims to raise awareness and utility of mediation across EU Member States.
4. The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) will enter into force on 12 September 2020 and aims to ensure cross-border enforcement of mediation agreements between the 52 countries that have signed on (as of March 2020).

5. Brink M. (2019). Psychology of Conflict. *Corporate Mediation Journal*, (1-2), 3-7, p. 6.
6. *Ibid.*
7. Irvine C. & Farrington L. (2016). Mediation and Emotions: Perception and Regulation. In H. Conway & J. Stannard (Eds.), *The Emotional Dynamics of Law and Legal Discourse*. Oxford: Hart Publishing, pp. 211-240 (noting that '[m]ediation provides a useful lens through which to consider the place of emotion in disputes').
8. *Ibid.*

people tick, how to get parties to open up better, how parties signal their positions and how parties attempt to deceive not only others but themselves, the better the mediation process can be. To enable this upgrade, we need to train mediators in an interdisciplinary manner and encourage them to study fields as eclectic as evolutionary anthropology, social or organisational psychology, and cognitive neuroscience.

If Brink can rely on findings from these disciplines to explain why people are hardwired towards conflict when their autonomy is challenged, then surely, we can further expand our understandings of these subjects to find ways to make mediation an even better product through interdisciplinarity. The following section aims to offer a concrete example of how a functional understanding in fields such as social psychology could offer unique insights, which will facilitate not just the mediation process, but also on how companies can benefit from these types of reflections.

### 3 Pluralistic Ignorance

If more mediators possessed a functional understanding of these eclectic subject matters, these additional instruments in their toolkits could not only benefit the mediators to resolve conflicts better, but it could also benefit businesses that opt for mediation. Take for example the concept of pluralistic ignorance, which is an elementary concept students of social psychology are exposed to relatively early on in their studies. It starts with and builds upon the assumption that ‘people’s self-conceptions are greatly influenced by the group they take as their reference group’.<sup>9</sup> The phenomenon of pluralistic ignorance is ‘the circumstances in which individuals mistakenly assume that their beliefs, perceptions, and feelings differ from those of their peers’.<sup>10</sup>

In the field of social psychology, examples of pluralistic ignorance are rife. Imagine a student in a class – fearing that they will look stupid for asking a question – not raising their hand. Other students, seeing that no one else is raising their hand, also wrongfully believe that everyone else must already understand the material and thus does not ask a question. So, the students and also their teacher wrongfully believe that the class understands the concepts being discussed, which is the incorrect belief. If only the students knew that most of their classmates were lost as well, or if a brave student or even the teacher actually took the time to ask a question, thus creating the right environment for awareness and curiosity, this misconception could potentially have been

averted. However, in a group setting, this is an incredibly difficult task as

[p]eople will stay in line because their fellows do, yet, if they only knew that their comrades wanted to kick over the traces too, the institutional conformity of the group would quickly vanish.<sup>11</sup>

Pluralistic ignorance can manifest itself in various ways in the corporate context as well: For example, in evaluating stock performance, during a board members’ vote, when assessing customer/consumer demands, or when predicting what their competition will do.<sup>12</sup> A more specific example could be the following: It is possible for individual members of a company or its board to care deeply about sustainability or social responsibility; however, believing (perhaps wrongly) that others in the company or their shareholders only care about profits, choose to keep their voices silent. As a result, the company will behave in a manner that maximises profit, thus forgoing any corporate social responsibility that certain members of the company wanted to respect. If this company, with all of its dissonance, was to go to court, the lawyers representing them would likely try to maximise their financial award.

The process of mediation, however, can potentially open up a more profound discussion in terms of what the company is actually looking to gain and in that process, possibly expose the pluralistic ignorance of the parties. This is because steps such as information gathering, problem identification and joint discussion/negotiation are embedded in the mediation process, which invites parties to speak more candidly and openly, unlike in a more adversarial litigation process.

Terms like ‘groupthink’ have recently been popularised to suggest that making decisions as a group can sometimes amplify our biases and heuristics, which exacerbates our pluralistic ignorance problem.<sup>13</sup> This is partially due, not only to our cognitive limitations and bounded rationality, but due to invisible forces such as peer pressure and the feeling of safety that come with conformity. These forces effectively prevent group members from rationally speaking out their true beliefs, which creates a situation where the publicly displayed ‘behaviour does not accurately reflect individuals’ private beliefs’.<sup>14</sup> While mediation is not a panacea to this psychological phenomenon, if a mediator is aware of this phenomenon and asks the right questions and nudges

9. Miller D.T. & Prentice D.A. (1994). Collective Errors and Errors about the Collective. *Personality and Social Psychology Bulletin*, 20(5), 541-550, p. 547; referencing, Singer E. (1981). Reference Groups and Social Evaluations. In M. Rosenberg & T.H. Turner (Eds.), *Social Psychology*. New York: Basic Books, pp. 66-93.
10. Miller D.T. & Prentice D.A., *supra* note 9, p. 541 (arguing that pluralistic ignorance manifests in ways such as ‘illusory feelings of deviance’ and ‘perpetuation of unpopular social norms’).

11. Katz D. & Schanck R.L. (1938). *Social Psychology*. New York: Wiley, pp. 174-175.
12. See e.g. Halbesleben J.R.B., Wheeler A.R. & Buckley M.R. (2005). Everybody Else is Doing It, So Why Can’t We? Pluralistic Ignorance and Business Ethics Education. *Journal of Business Ethics*, 56, 385-398; and, Westphal J.D. & Bednar M.K. (2005). Pluralistic Ignorance in Corporate Boards and Firms’ Strategic Persistence in Response to Low Firm Performance. *Administrative Science Quarterly*, 50(2), 262-298.
13. See e.g. Sunstein C.R. & Hastie R. (2015). *Wiser: Getting Beyond Groupthink to Make Groups Smarter*. Boston: Harvard Business Review Press.
14. Miller D.T. & Prentice D.A., *supra* note 9, p. 543 (noting that ‘it is that they preach the norms of their social identity and practice the beliefs of their personal identities’).

the parties as necessary, the mediation process could lead to a more meaningful and fruitful conflict resolution.

There is much to be lost when we fail to communicate internally within the organisation or externally with collaborators and even competitors. Not only are we capable of misjudging what is in the best interest for ourselves, but we can misjudge the interests of others and of the collective, which can lead to the persistence of a norm that does not accurately represent the organisation's interest. An outside presence like a mediator can help to clarify and resolve such situations, but it would take a mediator with impeccable soft skills and sensitivities. And herein lies a point of improvement for current and future mediators.

Although most mediators – practising and aspiring ones alike – have likely read seminal titles such as William Ury and Roger Fisher's *Getting to Yes*,<sup>15</sup> I venture to guess that only a small percentage of that cohort has also grasped works such as Daniel Kahneman and Amos Tversky's *Prospect Theory: An Analysis of Decision Under Risk*<sup>16</sup> or perhaps even less, Deborah Prentice and Dale Miller's *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*.<sup>17</sup> If mediators can be trained to think more holistically and add to their repertoires through exposure to these titles, then mediation can become an even better instrument for dispute resolution to displace litigation.

## 4 Cognitive Diversity

In addition to enhancing the mediators' collective toolkit through interdisciplinary education, another factor that can increase the quality and utility of mediation is the promotion of diversity and inclusivity within the practice of mediation. According to one study out of the United Kingdom, mediation – as it stands – is a 'field dominated by men'.<sup>18</sup> Even though

[a]t least half the people entering the legal profession and receiving mediation qualifications each year are women ... they represent fewer than a third of the most advanced working mediators in Britain.<sup>19</sup>

15. Fisher R., Ury W. & Patton B. (2011). *Getting to Yes: Negotiating Agreement Without Giving In* (3rd ed.). New Jersey: Penguin Books.
16. Kahneman D. & Tversky A. (1979). Prospect Theory: An Analysis of Decision Under Risk. *Econometrica*, 47(2), 263-291, p. 263 (critiquing that expected utility theory 'is not an adequate descriptive model' under conditions of risk, given that people tend to be more averse to risk in face of uncertainty and have 'inconsistent preferences when the same choice is presented in different forms').
17. Miller D.T. & Prentice D.A., *supra* note 9, p. 544 (arguing that 'individuals often err considerably in judging the sentiments of the other members of the collective as well as in estimating where their own position falls relative to them').
18. Darbyshire M. (2019, August 21). Mediation Needs More Women and Fewer Corporate Lawyers. *Financial Times*. Retrieved from [www.ft.com/content/6ca2d87a-9e64-11e9-9c06-a4640c9feebb](http://www.ft.com/content/6ca2d87a-9e64-11e9-9c06-a4640c9feebb) (consulted on July 4, 2020).
19. Darbyshire M., *supra* note 18 (citing to a research conducted by the Centre for Effective Dispute Resolution).

Other studies find similar findings elsewhere, which reveal how women and minorities are under-represented in the legal sector, including alternative dispute resolution.<sup>20</sup> This is partially explained by the reality that corporate clients 'tend to go to those with long histories in the law' when searching for the right mediator, and in the field of international commercial dispute resolution, those with long histories in the field tend to be older white males.<sup>21</sup>

There are good reasons for changing this unjust status quo, apart from the more obvious reason of promoting fairness and equality. In short, organisations with high diversity tend to perform better than organisations with low diversity: For example, according to one particular study, firms with female CFOs are more profitable to the tune of \$1.8 trillion.<sup>22</sup> Perhaps similar benefits could be expected if we diversified the cohort of mediators dealing with international corporate matters. However, it is important for us to bear in mind that we should not seek for diversity and inclusivity just for the sake of doing so. Such token measures have often proven to be rather ineffective, if not counterproductive.<sup>23</sup> Instead, the type of diversity that truly leads to better performance is *cognitive* diversity, which has to do with how someone thinks and 'how [a] person might process information, engage with, or respond to change'.<sup>24</sup> To put the 'firms with female CFOs generate more profits' example into this context, it is not the token gesture of hiring a female leader that correlates with profits. It is also not due to the misguided belief that 'women try to avoid losses and are more cautious', as some wrongfully suggest. The real difference-maker is that of culture. The firms that have cultivated and fostered 'a culture conducive to making female appointments' are the successful and profitable ones.<sup>25</sup> In other words, the types of organisations that invite and nurture cognitive diversity – and not those looking only at the numbers superficially – are the types of organisations that actually benefit from diversity. What this suggests is that ini-

20. See e.g., Meyer J. (2019). Notes from the United States on Diversity in ADR. *Corporate Mediation Journal*, 1-2, 11-12; citing to, Olson E. (2017, July 24). A Bleak Picture' for Women Trying to Rise at Law Firms. *The New York Times*. Retrieved from [www.nytimes.com/2017/07/24/business/dealbook/women-law-firm-partners.html](http://www.nytimes.com/2017/07/24/business/dealbook/women-law-firm-partners.html) (consulted on July 25, 2020); see also, The 2019 Law360 Glass Ceiling Report. (2019). *Law360*. Retrieved from [www.law360.com/articles/1164440/the-2019-law360-glass-ceiling-report](http://www.law360.com/articles/1164440/the-2019-law360-glass-ceiling-report) (consulted on July 25, 2020) (reporting about the 'lack of parity for female attorneys in private practice').
21. Darbyshire M., *supra* note 18, (quoting Tony Willis, a mediator with Brick Court Chambers in London, who admits that of the 13 mediators listed on their website, all are 'male, white and, arguably, over the age of 50').
22. Sandberg D.J. (2019, October 16). When Women Lead, Firms Win. *S&P Global*, 1-10, p. 1 (arguing that '[f]irms with a high gender diversity on their board of directors were more profitable').
23. Reynolds A. & Lewis D. (2017, March). Teams Solve Problems Faster When They're More Cognitively Diverse. *Harvard Business Review* (noting that while '[r]eceived wisdom is that the more diverse the teams in terms of age, ethnicity, and gender, the more creative and productive they are likely to be... we have found no correlation between this type of diversity and performance').
24. Reynolds A. & Lewis D., *supra* note 23.
25. Sandberg D.J., *supra* note 22, p. 3.

tatives like the American Bar Association's Resolution 105,<sup>26</sup> the Equal Representation in Arbitration pledge to recognise and empower women in international arbitral tribunals, and corporate board members resigning to make room for minorities at the table<sup>27</sup> are all symbolically very important steps. Yet, above and beyond these gestures, we must find ways to promote cognitive diversity by changing our culture more systematically.

This is of paramount importance because cognitive diversity is something that can be suppressed and eliminated if there is a culture of conformity. As the previous section noted, 'people like to fit in ... [and so] they are cautious about sticking their necks out', and in 'a strong, homogenous culture ... we stifle the natural cognitive diversity in groups through the pressure to conform'.<sup>28</sup> In light of this concern, we must ensure that the pool of mediators enable and facilitate a culture of inclusivity. As things stand, this is a clear point of improvement for the practice of mediation, which is still perceived as 'an old boys club'.

Moreover, as Marijke Wolfs, the Secretary General at ICC Netherlands, recently noted, '[i]nternational business mediators with the right experience, language skills and intercultural sensitivity are nowadays not so easy to find, either in The Netherlands or more widely'.<sup>29</sup> So we must develop these talents and foster them. One way of accomplishing this task is the aforementioned promotion of interdisciplinary education and training of mediators. Moreover, we – as a community of mediators – must create an inclusive culture, where mediation is not perceived as a profession only limited to lawyers and retired judges, but open to a wider range of professionals.<sup>30</sup> So while corporations might be tempted to seek out only 'professional' mediators with a litigation background that can understand and appreciate 'the way things are done' in the business world, this global pandemic crisis is a good opportunity in disguise to reconsider this questionable status quo as well.

## 5 Summarising Remarks

The uncertain path to our shared prosperity – especially if we are to come out of this current global pandemic with our collective humanity intact – requires us to

26. ABA Resolution 105 'urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities...'
27. For example, Alexis Ohanian, the founder and former CEO of Reddit gave up his board member position to be filled by a black board member.
28. Reynolds A. & Lewis D., *supra* note 23.
29. Mulder C. (2019). Marijke Wolfs: 'Students Today Represent the Next Generation. Internationally Oriented Corporate Mediators with the Right Experience, Language Skills and Intercultural Sensitivity are Not Easy to Find'. *Corporate Mediation Journal*, 1-2, 29-31, p. 30.
30. Darbyshire M., *supra* note 18 (quoting Jane Andrewartha of Clyde & Co: 'The single most helpful thing that can be done to enrich mediation when it comes to diversity is to make sure we are getting people from all professions.')

rethink and adjust the status quo. While it may be trying times for businesses to even stay afloat, their survival and future success hinge upon shedding dead weight and adjusting, regardless of how awkward and uncomfortable the transition may be. When it comes to corporate dispute resolution, the necessary disruption is to challenge the default of going to court, paying lawyers exorbitant amounts of money and litigating disputes in a taxing, adversarial manner. Mediation is not only the better product that acknowledges our interconnectedness, but it is a service that offers the parties in conflict a more mindful path out of it. Mediation allows businesses to communicate better and more openly, thus enabling the collection of useful data points and insights. Moreover, parties are not shackled by the procedural burdens of litigation and control who mediates and how they mediate, thus retaining the parties' sense of autonomy.

So, for businesses, choosing mediation – especially if enhanced by mediators with an interdisciplinary education and cognitively diverse insights – will not only lead to faster and cheaper dispute resolution, but this enlightened path could offer more satisfactory and sustainable solutions. As such, opting for mediation can become a meaningful competitive advantage for businesses. While Brink suggested that '[o]nly if the deployment of power or control fails to bring success, a deeper layer of reflection may open a gateway to negotiation and settlement',<sup>31</sup> businesses must realise that, especially in times of a global crisis, whatever power and control that they may be clinging on to could be fleeting. Thus, a more feasible and pragmatic approach that invites parties to voluntarily relinquish their illusion of control and to come to the table in a more open-minded and collaborative fashion could be the more apt form of dispute resolution in the emerging status quo.

For those in the mediation business, we must continue improving and diversifying the pool of mediators who are able to competently handle complex mediations. One sure way to increase the utility and popularity of mediation is by increasing the talent pool of mediators through interdisciplinary training and fostering a culture that protects cognitive diversity. Now is not the time to be complacent, for even in the field of international commercial and corporate mediation, clients tend to be 'younger, female, or from more diverse backgrounds and don't necessarily want to see the same faces popping up as mediators'.<sup>32</sup> While mediation has the potential to disrupt our conceptualisation of 'alternative' dispute resolution, in order for that to happen, we all must curb our own implicit biases and pluralistic ignorance and learn to see our conflicts – and how to defuse them – more holistically. In sum, as our society (d)evolves, businesses and those in the dispute resolution business must heed the call to adapt with the times accordingly.

31. Brink M., *supra* note 5, p. 6.

32. Darbyshire M., *supra* note 18 (quoting Louise Freeman, a commercial litigation partner at the London-based law firm Covington.).