Book Review

CONTEMPORARY ISSUES IN MEDIATION (VOL 9)[1]

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I. Introduction

1 The latest volume of *Contemporary Issues in Mediation*, now in its ninth edition, curates a diverse range of thought-provoking viewpoints collected from the Singapore International Mediation Institute's annual Contemporary Issues in Mediation Research Essay Competition. Multiple topics across international jurisdictions and the domestic context are covered, with the series sustaining its penetrating discussions on the latest issues in meditation.

II. Mediation mechanics and technological transformations

2 The recent trend in contemplating the influence of artificial intelligence ("AI") on the legal profession is sustained by Tristan Koh in "How Can Artificial Intelligence Assist Mediators: A Technical Analysis". This essay examines how a mediator may rely on the supplementary information provided by AI to enhance emotional communication and creativity during a mediation.

3 In Koh's view, AI-assisted emotional communication can provide an "objective" perspective through AI-based detection and recognition of text, voice and facial expressions, which a mediator can rely on to "ask more relevant questions". Koh highlights that various challenges ensue – such as the complexity of substituting parts of the mediator's job with AI; whether the data sets provided for machine learning are applicable cross-culturally; and the preference for face-to-face communication.

4 Koh's concerns provoke further questions that warrant further exploration. For example, how would the actual usage of AI be incorporated into the mediation process given issues of privacy; and would parties permit the placement of cameras and recording devices in a mediation setting simply for an AI to be able to receive the informational input of parties' facial expressions? Additionally, how would the storage of such data be kept confidential? As Koh further recognises, direct human interaction is

1 World Scientific, 2024.

something "which AI will never (or be unlikely) to replicate", reflecting the existence of structural limitations faced when seeking to infuse AI into the mediation process.

5 Koh moves on to canvass several technology-based approaches for dispute resolution, such as through algorithmic programming of the parties' options to achieve a Pareto-optimal solution – a situation where it is impossible to make someone better off without making someone else worse off; SmartSettle, a negotiation platform which asks parties to numerically rank their preferred solutions in an attempt to quantify the most pressing issues in the dispute; and Explainable AI ("XAI") to "generate explanations that the mediator and parties can understand".

6 Nevertheless, the ball remains in the mediator's court to deploy these technologies for actual creative problem-solving purposes, as each method explored by Koh appears to *optimise* the mediation process rather than *generate* out-of-the-box and creative solutions, the latter of which predominantly leads to breakthroughs in the mediation process. In the end, Koh acknowledges that there are areas of mediation which would be difficult for current AI to learn.

III. International mediations: legislative innovations and human rights violations

7 In her essay entitled "Contemporary View on the Legislative Improvement of the Mediation and Mediation Technologies in Socially Relevant Areas in Russia", Natalia Kharitonova tackles the legislative improvements that she views are required in Russia, given her opinion that pre-trial dispute resolution methods such as mediation are underdeveloped. Specifically, the Federal Law No 193-FZ of July 27, 2010 "On Alternative Procedure of Mediated Dispute Resolution (Mediation Procedure)" ("Federal Law No 193-FZ") does not: (a) normatively regulate mediation in educational organisations on the federal level; (b) apply to criminal proceedings related to administrative offences; and (c) grant notarised mediation agreements the force of writ of execution. Kharitonova further canvasses the principles of mediation governed under Federal Law No 193-FZ, such as on confidentiality, mediator independence and impartiality, and the equality of parties, amongst other relevant principles.

8 In examining potential areas for legislative improvement, Kharitonova highlights the low threshold of entry into the mediation profession and absence of training standards; the lack of a coordinating state body in the application of mediation and, fascinatingly, the resulting misuse of notarised mediation agreements as a means of conveniently legalising otherwise illegal conduct. Finally, Kharitonova crystallises her proposed enhancements to: (a) the qualification requirements for mediators; and (b) the creation of a unified federal register of mediators, providing much insight into the benefits accrued from such improvements. For any reader

with an interest in mediation in Russia, Kharitonova's essay provides a thoughtful analysis on the future development of Federal Law No 193-FZ.

9 Joy Tan's must-read essay, "Mediation in Addressing Human Rights Violations in Asia", is intellectually rigorous, expansive in scope and contains a depth of research. While maintaining her resolute focus on analysing the value and role of mediation in the context of human rights violations, Tan concurrently navigates relevant cases studies from India, Pakistan, Indonesia, Malaysia, the Philippines and Thailand. Tan first examines mediation in the Asian context: a dispute resolution method that is familiar, yet is one that faces problems due to inherent power imbalances between parties and the lack of transparency in various Asian countries. Nonetheless, in Tan's view, mediation remains an effective method of protecting the parties' rights where effective mediators – especially impartial ones – possess the ability to equalise power imbalances inherent within the status quo.

10 In this vein, Tan notes that neutral institutions are a necessity to preserve the legitimacy of mediated outcomes and examines various human rights commissions to demonstrate this point. Tan further formulates a method of measuring the effectiveness of mediation in the context of human rights violations and applies this standard to various mediation mechanisms in the Philippines and Thailand. Indeed, Tan's essay implicitly encourages readers to reflect upon the need to deliver effective justice to the victims of the egregious human rights violations as covered in her case studies. Finally, Tan calls for the inclusion of leaders of all stakeholder groups to be involved in such mediation processes, as well as partnerships with civil society to provide a legitimising function for mediated outcomes obtained for human rights violations. Tan robustly concludes with a message of hope that "mediation is possible and valuable to bring parties forward even after violent conflict and human rights violations … to overcome challenges and contextualise it to Asia".

IV. Decisions, decisions, decisions: behavioural economics and game theory in mediation

11 In "Winning Together: Uncovering the Hidden Potential of Game Theory in Mediation", Kyna Chew presents her view that the use of game theory in mediation will grant mediators the ability to take on nuanced views of the parties' positions, a concept Chew terms the "prescriptive application of game theory".

12 In mirroring Colin F Camerer's three-step formula in "Progress in Behavioral Game Theory",[2] Chew opines that mediators may adopt the following approach: First, that the traditional mode of game theory be

2 See <https://www.aeaweb.org/articles?id=10.1257/jep.11.4.167> (accessed 1 November 2024).

applied to identify the "Nash Equilibrium" in mediation (or potential points of compromise) by analysing a "multitude of factors" such as the hidden costs of litigation in decisions, the risk of financial loss, reputational and opportunity costs, as well as emotional and psychological costs. Second, that behavioural and situational factors be identified, such as power disparities between the parties and their psychological biases. Third, that the identified behavioural and psychological factors be integrated and reframed by a mediator.

13 Chew thus provides a cogent "comparative law"-styled analysis by analogising pre-existing mediation methodologies and strategies to features found within game theory. Further, as Chew articulates, her proposals resemble the "Riskin model" in many ways – a four-grid categorisation of mediator orientations that is not too different from the typical game theory model where the information structure within the mediation changes with each new incoming piece of information. In totality, Chew creates and successfully reframes the mediation process from the angle of game theory in her essay.

14 Li Kelun's essay, entitled "Investigating Neighbour Disputes and Mediation in Singapore Through Behavioural Economics to Foster Stronger Communities", is inspired by the upward trend of disputes arising amongst neighbours in Singapore, as he conducts a behavioural-economic analysis into how parties formulate specific decisions during mediation.

15 First, Li examines possible reasons that render mediation ineffective in neighbourly disputes. For example, emotionally-charged communications, defensive posturing and perceptions of disadvantages incurred may all affect the parties' conduct during a mediation. Li argues that these reasons are explainable by concepts found in the field of behavioural economics, such as: (a) the endowment effect where parties value objects that they own more highly; (b) reactive devaluation induced by the fear of incomplete information; or even (c) optimistic overconfidence based on the parties' predictions of future events.

16 Second, Li then proposes that mediators in such neighbourly disputes should be more interventionist to mitigate the parties' reactive devaluation by changing the element of authorship of any given proposal, as well as to practice constant reframing to reduce the endowment effect. Additionally, the essay suggests that mediators should overcome the parties' optimistic overconfidence "by offering their own opinions" on potential settlements – Li thereby adopts the view that an evaluative style of mediation could be beneficial in this context.

17 As recognised by Li, disputes between neighbours can be emotionally charged. It thus remains to be seen whether mediators should voluntarily incur the risk of the appearance of bias by rendering their personal assessments on the proposals raised, which is a judgment that the relevant mediator must make in the context of each specific mediation.

In concluding his essay, Li optimistically hopes that settlement rates will continue to increase and acknowledges that the Community Mediation Centre's work is generally successful.

V. Practicing empathy: dealing with negative emotions and trauma

18 In her essay, "The Role of Negative Emotions in Mediation", Erin Shan Liu argues that negative emotions can either be treated as: (a) obstacles to be managed by emotional intelligence, social awareness, relationship management and mastery of the self; or (b) a facilitative tool to resolve a dispute, since negative emotions potentially reflect the parties' core concerns and thereby serves a communicative function. As Liu laments, there is "insufficient research … on the advantages of negative emotions in the mediation context to be conclusive". Indeed, mediators would likely concur with Liu that negative emotions are simply a matter for mediators to resolve through emotional intelligence, and as other writers have noted, a matter of consistent and methodical reframing during the mediation process itself.

19 Sebastian Hoe Wee Kiat, in his essay entitled "Resolving Drama with a Trauma-informed Approach in Family Mediation", defines "drama" as "any situation or series of events having vivid, emotional, conflicting, or striking interests or results" and "trauma" as "an emotional response to a terrible event such as an accident or natural disaster". According to Hoe, trauma in the past can also cause current drama; Hoe thus suggests that a "trauma-informed approach" is necessary in mediating the "drama" of family disputes. The substance of such an approach entails mediators placing themselves in the parties' shoes and asking "what has happened to this individual?" In short, Hoe surmises that mediators should practice empathy, especially in alignment with the principles of "Safety, Choice, Collaboration, Trustworthiness and Empowerment".

20 Hoe proceeds to argue that such an approach is "professional and evidence-based" through the identification of signs and symptoms of trauma, thereby creating a conducive environment for mediation and remaining consistent with good ethical practice. Such signs and symptoms made in response to trauma can take form as a: (a) fight response; (b) flight response; (c) freeze response; or (d) fawn response. Interestingly, Hoe goes beyond the mediation process to consider the issue of vicarious trauma and how mediators may be affected by the parties' trauma, ultimately concluding that the usual self-care methods be maintained for each mediator's physical and mental well-being.

VI. Conventions and criminals

21 In his article entitled "The Choice of Law Issue in Article 5(1)(a) of the Singapore Convention", Teo Sheng Wei Jeriel conducts a substantive

analysis into the said topic. Students and practitioners of arbitration would immediately recognise the issue as one already inherent under the New York Convention.[3] The Singapore Convention on Mediation[4] ("SCM") attempts to escape the problem of Art 5 of the New York Convention by avoiding the inclusion of a specific choice of law rule. However, the lack of an express rule under Art 5 of the SCM begets its own ambiguity. The premise of Teo's essay is that the deliberate exclusion of such rules reflects the drafter's intent – supported by Teo's detailed examination of the relevant *travaux preparatoires* – to defer to the relevant choice of law rule as supplied by the private international law of the forum. Teo terms this the "private international law approach".

22 Teo further navigates through two alternative approaches to the problem which he terms the "autonomous interpretation approach" and the "validation principle approach". In dismissing the first, Teo argues that characterising subjective arbitrability as an issue of capacity is limited, and aptly points out that the superficiality of the autonomous interpretation approach is such that it is a "solution in search of a problem". In short, the approach possesses little utility in the context of the SCM. Teo also rejects the "validation principle approach" that there is an expansive choice of law concept to be applied for the incapacity defence. Indeed, as Teo's analysis demonstrates, common sense should prevail over legal acrobatics to avoid the overcomplication of an issue which can be simply resolved.

23 Teo concludes strongly by arguing that Art 5(1)(a) should have been left out of the SCM entirely, and that there was simply no reason to deal with the issue of capacity as *sui generis* where all other vitiating factors were already subject to the law governing the settlement agreement. In totality, Teo's essay contains substantive depth, insightful submissions and reflects upon the contours of the SCM that warrant further contemplation by practitioners, academics and thought leaders alike.

24 In the context of Singapore's criminal justice system, Wayde Chan argues for a greater acceptance of victim-offender mediation ("VOM") in his essay entitled "At the Intersection of Justice: Where Victim-Offender Mediations and Singapore's Criminal Justice System Meet". An incisive essay for all individuals who are interested in criminal procedure, Chan examines the scope and functionality of VOM – in the form of criminal mediation – in Singapore's legal system. Chan explores the various advantages of implementing VOM at a pre-sentencing stage, such as the: (a) psychological and financial benefits; (b) protection of procedural efficiency given its concurrent occurrence alongside the criminal proceedings; and

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (entered into force 7 June 1959).

4 United Nations Convention on International Settlement Agreements Resulting from Mediation (20 December 2018) (entered into force 12 September 2020).

(c) otherwise limited benefits accrued by permitting VOM to occur at the pre-charging or post-sentencing stage.

25 Chan takes an additional step to weave together clashing viewpoints surrounding the use of VOM as a mitigating factor in criminal sentencing by looking through the lenses of forgiveness, remorse and restitution. In tying up loose ends, Chan considers the operability of VOM in comparison to more traditional mediations, as well as VOM's natural implications on the scope of confidentiality inherent to mediation. Chan's review of VOM and its applicability in Singapore is comprehensive and rightly emphasises the need for VOM to complement rather than compromise the established criminal law system in Singapore.

VII. Mediation competitions: pedagogical paradox?

26 Muhammad Syazwan Bin Ramli explores the educational value of mediation competitions in skill development, cultural exposure and the promotion of mediation in his essay, "Learning Through Competing: The Pedagogical Value of Mediation Competitions in Mediation Education". Syazwan opines that the competitive nature of mediation competitions *improves* the effectiveness of mediation training due to the level of commitment and motivation naturally accrued by virtue of the competition format. Moreover, Syazwan highlights that the structure of mediation competitions via the judging rubrics provides specific direction for students to grow in terms of their mediation skills. Indeed, Syazwan offers an alternative take on the contrarian perspective that the element of competitiveness unproductively inculcates a win-lose mentality, whereas mediators should ideally adopt a win-win approach to settlements.

27 The cultural element of such competitions is also scrutinised under this essay as to whether mediation competitions are overly "westernised" and culturally imperialistic, or whether the cross-cultural and cross-jurisdictional exchanges are educationally constructive for students. Finally, Syazwan rightly points out that such mediation competitions enhance students' interest in and passion for the field, with the ancillary benefit of preparing students for their future careers. Participants of mediation competitions and their coaches would enjoy reading Syazwan's analysis as he passionately concludes that "mediation is more than just a legal dispute resolution mechanism – it is a way of life".

VIII. Conclusion

28 I commend the exceptional work by all the contributors, as reflected in each essay's composition of high-quality thought, a deep passion for mediation and the provision of astute recommendations. I encourage readers to delve deeply into each of the essays for a greater appreciation of the depth

of analysis provided by each contributor, as well as their contemplations on the future of mediation in practice.