LLB103 Lectures

Week 1- The contemporary importance of alternative dispute resolution

Alternative Dispute Resolution

Defining ADR

- **'**ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.'
- ***NEED TO BE ABLE TO DEFINE CONCEPTS FOR EXAM***

Key Processes

- Negotiation
- Mediation
- Conciliation
- Case appraisal
- Arbitration
- Litigation

Relevance

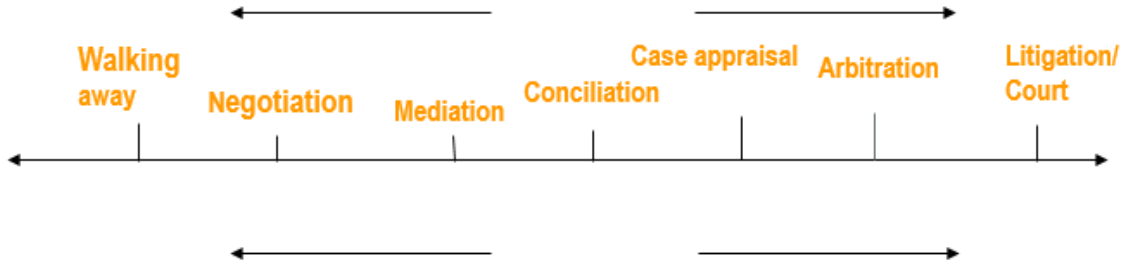
- DR is now the main way that disputes in Australia (and worldwide) are resolved.
- Litigation continues to be privileged as a dispute resolution tool in our law schools.
- It has been estimated that the number of commenced civil actions that culminate in adjudication is actually less than 5%.
- Legislation now makes ADR compulsory in a number of circumstances.
- For example, the *Civil Dispute Resolution Act 2011* (Cth) was enacted to ensure that parties take genuine steps to resolve disputes before civil proceedings are instituted (s 3).
- Section 53A of the *Federal Court of Australia Act 1976* (Cth) allows a court to refer a matter to mediation or arbitration.

Week 2- Introduction to ADR and the spectrum of dispute resolution forums

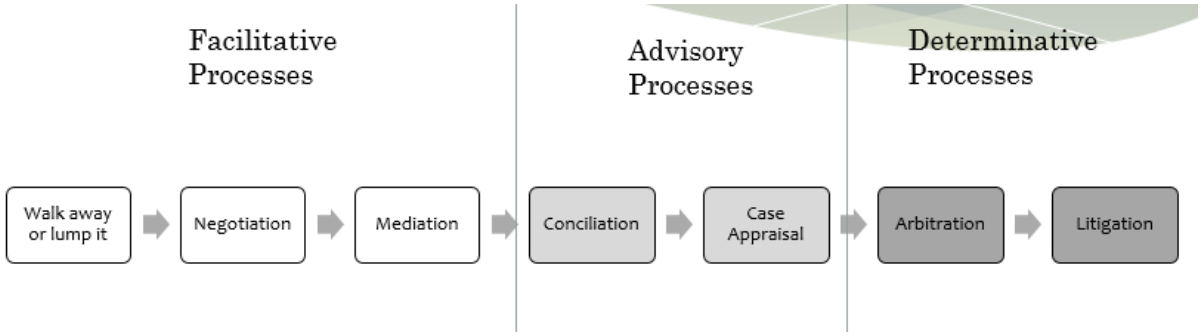
History

- Statutory regulation (must try ADR before litigation)
- Court-annexed dispute resolution
- Accrediting bodies and schemes (also providing training)

Dispute Resolution Spectrum



- As you move from one side of spectrum to other, consensuality of outcome changes
- Formality (in four different senses) changes from one side of spectrum to other as well
- Third-party intervention also changes from one side to the other



Why is the Spectrum a Valuable Tool?

- It helps to provide clarity in our thinking about dispute resolution options.
- It supports our understanding of processes.
- It helps with making comparisons and assessments between options.
- It provides us with a useful visual aid for communicating effectively with clients about the options available to them, and their characteristics, benefits and disadvantages.

Why must we use it carefully?

- A tool like the spectrum can only provide a relatively basic and unsophisticated representation.
- We should not underestimate the complexity of disputes, or the internal diversity that is possible within DR processes themselves.
- We have to beware that it does not result in too simplistic a map, or an over-generalisation or distortion of the nature of processes.

Facilitative Processes

- Facilitative dispute resolution processes:
  - …'are processes in which a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation' (NADRAC, 2003, p. 7).
- Mediation and negotiation for this course
- Third party not to enter dispute, but to facilitate dialogue to effectively solve dispute
- Independent third party has no role with respect to content → can't give advice to the parties (tell them what a judge is likely to do etc.)

Advisory/Evaluative Processes

- Advisory dispute resolution processes:
  - …'are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation' (NADRAC, 2003, p.4).
- Evaluative mediation, conciliation and case appraisal for this course
- Independent third party starts to provide advice about the law and what a likely outcome would be if it went to court
- Talk about how similar cases have been resolved in the past

Determinative

- Someone makes a determination or a decision
- Determinative dispute resolution processes:
  - '…are process in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination' (NADRAC, 2003, p.6).
- Arbitration and litigation for this course

Understanding the key processes

- Negotiation
- Mediation
- Conciliation
- Case appraisal
- Arbitration
- Litigation

Negotiation

- Where two or more people involved in a legal dispute communicate to see if they can resolve some or all of their issues/differences.
- "A verbal interactive process involving two or more parties who are seeking to reach agreement over a problem or conflict of interest between them and *in which they seek as far as possible to preserve their interests, but to adjust their views and positions* in the joint effort to reach agreement." (Anstey, 1991, p.91)
- Indirect- clients have a proxy or representative

- Indirect or assisted negotiation: '…is a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a dispute resolution practitioner (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation' (NADRAC, 2003).
- Assisted occurs when an independent third party has to assist or facilitate negotiation between two parties
- Direct is when two parties negotiate by themselves

Mediation

Facilitated Mediation

- Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:
    - Communicate with each other, exchange information and seek understanding
    - Identify, clarify and explore interests, issues and underlying needs
    - Consider their alternatives
    - Generate and evaluate options
    - Negotiate with each other; and
    - Reach and make their own decisions.
- A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes. (MSB Approval Standards, 2015, p.9)
- This is a facilitated mediation definition

Evaluative Mediation

- 'Evaluative mediation is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution. … Note: evaluative mediation may be seen as a contradiction in terms since it is inconsistent with the definition of mediation provided' (NADRAC, 2003, p.7).
- Evaluative mediation is sometimes referred to as advisory mediation

Basic Mediation Process

- Intake
- Mediator's opening
- Parties' statements
- Summaries and common ground
- Agenda
- Exploration
- Private Caucus
- Negotiation
- Agreement

Conciliation

- Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.
- The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement. (NADRAC, 2003)
- Where there are two or more people involved in a legal dispute and a third party conciliator:
    - Assists parties to try to resolve dispute
    - Uses certain steps to control the parties' communication and the negotiation process
    - Is not independent to dispute
    - E.g. Court officer or has expertise in the subject area
    - Gives clear guidance as to how dispute could/should be resolved.
- Very similar to evaluative mediation
- 'In NADRAC's view, 'mediation' is a purely facilitative process, whereas 'conciliation' may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term 'mediation' should be used where the practitioner has no advisory role on the content of the dispute and the term 'conciliation' where the practitioner does have such a role.
- NADRAC notes, however, that both 'mediation' and 'conciliation' are now used to refer to a wide range of processes and that an overlap in their usage is inevitable.'
- (NADRAC, 2003, p.3)

Case Appraisal

- Case appraisal is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved. (NADRAC, 2003, p.4)
- A case-appraiser assesses the merits of a case.
- Reaches a decision based on what a court may decide.
- In some areas courts refer matters to appraisers.
- One party may disagree and elect to continue in court, however then there may be costs implications
- Often used synonymously with expert appraisal

Arbitration

- A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination. (NADRAC, 2003, p.4)
- When an arbitrator hands down a decision, it is called an award.

Key Features of Arbitration

- An adversarial process
- Private
- Can be (and often is) voluntary or (sometimes is) mandatory
- Impartial third person (arbitrator) provides a decision based on law
- Parties (usually) select the arbitrator

- Arbitrator is often an expert in the field of the dispute, a barrister or a retired judge.
- Governed by statute in Australia

Litigation

- Litigation is basically state sanctioned and supported justice
- Adversarial system of dispute resolution enacted with the authority and resources of the State through the courts.
- The applicant/plaintiff makes an application to the court.
- The defendant is required to respond.
- Court documents must be filed and duly served.
- The litigation process is subject to:
    - Rules of evidence
    - Court procedural rules
    - Requirements of openness and accountability.
- Hearings occur before the judiciary – the role of the judge is to be an independent and impartial arbiter of the dispute, to consider the merits of the case for each side, and decide on who will win and who will lose.

Elements of the Spectrum Missing from the NADRAC Glossary

- Avoidance of the dispute, or walking away: this occurs when a person makes a judgment that they don't have the capacity or interest or willingness to engage with a dispute. Walking away from the dispute avoids the dispute.
- Direct or unassisted negotiation: The process whereby people in dispute simply get together to talk about the problem and try to find a solution which they can live with.

Key Variables in the Spectrum

- Some of the key variable characteristics of the processes in the spectrum include:
    - The time the process takes to reach a conclusion.
    - The cost of the process to parties.
    - The degree of formality involved.
    - The level of applicability of procedural rules.
    - The level of preparation required.
- Some of the variable characteristics of the processes in the spectrum include:
    - The level of formal documentation that is associated with the process.
    - The levels of legal representation allowed/or required.
    - The degree of third party intervention regarding the final decision/settlement outcome.
    - The degree of consensuality:
        - In terms of participation, and
        - In terms of whether parties determine their own agreement or whether a 3rd party imposes an agreement upon them.

Week 3- Negotiation

Negotiation

Introduction

- Lawyers are involved in negotiations daily.
- Lawyers negotiate on behalf of their clients, they negotiate with colleagues and they negotiate with all the different elements of the legal system.
- Negotiation is a part of virtually every process on the spectrum of dispute resolution options.
- Clients might negotiate together before they approach lawyers or during a legal process.
- Lawyers negotiate on behalf of their clients in the client's absence.
- Lawyers and clients negotiate together towards settlement. For example:
    - Mediation
    - Conciliation
    - Door of the court
- Our negotiation knowledge and skills can have a big impact on our clients and mean the difference between:
    - reaching agreement or not reaching agreement
    - obtaining a fair outcome or an unfair outcome
    - our client feeling that procedural justice has been served.

A Basic Concept of Negotiation

- Where two or more people involved in a legal dispute communicate to see if they can resolve some or all of their issues/differences.
- "A verbal interactive process involving two or more parties who are seeking to reach agreement over a problem or conflict of interest between them and *in which they seek as far as possible to preserve their interests, but to adjust their views and positions* in the joint effort to reach agreement." (Anstey, 1991, p.91)
- Negotiation is about compromise, not about one person being right and the other wrong.

Who is involved in negotiation?

- Direct negotiation
- Indirect negotiation
- Assisted or facilitated negotiation

Advantages of Negotiation

- Parties with their lawyers are in the best position to assess proposed solutions.
- Parties own the process and the outcome.
- Compromise often offers parties at least some of what they want.
    - (note: court may not give them any of what they want)
- Parties might not resolve all issues but may narrow them.

Disadvantages of Negotiation

- Power imbalances can lead to unfair or unjust outcomes.
- Inept practice or representation, or a failure to prepare adequately, can result in a party agreeing to a settlement outcome below what a court may order

Four Models of Negotiation

1) Adversarial
2) Integrative
3) Distributive
4) Principled (also referred to as interest-based bargaining)

- (Spencer, 2011, 30-46)
- Alexander and Howieson: Constructive

Adversarial

- Parties seek to maximise victory.
- One party wins over the other.
- A zero-sum game (what one party gains the other party loses). (Spencer, 2011, 30-31)
- Four elements (Menkel-Meadow, 1984, 31):

1) Target points set to reflect parties aspirations.
2) Resistance point reflect boundaries of agreement.
3) Ritual of offer and demand.
4) Compromise between target and resistance points.

- Options for outcomes are limited.
- Competitive strategies and rituals stifle creativity.
- Outcomes tend to reflect litigation remedies and court outcomes.
- Monetary solutions are a focus.
- Understanding adversarial negotiation can allow you to participate in it more effectively.
- Mixed models also become possible.
- The greatest benefit of this model is as a complement to other negotiation methods.

Integrative

- Characterised by adversarial nature but is distinguishable on the basis of trade-offs and concessions (Spencer, 2011, 32).
- If the parties to an integrative negotiation can find enough items of value then structured trade-offs will lead them to a satisfactory compromise.
- Beware strategic misrepresentations

Distributive

- This model is based on the assumption that the parties are generally seeking the same goals, and value the same items in the same way (Spencer, 2011, 33).
- Sometimes the words ‘distributive’ and ‘adversarial’ are used interchangeably.

Principled

- Developed by the Harvard Negotiation Project at Harvard Law School, explained famously by Fisher, Ury and Patton in *Getting to Yes.*
- The model distinguishes positions from interests.
- Create options for mutual gain.
- Uses objective standards for fairness.
- Removes the people from the problem.
    - (Spencer, 2011, 42-46)

An example of the difference between a position and an interest

- *Booth v Bosworth* [2001] FCA 143 provides a good example of where a focus on positions prevented an outcome that addressed the mutual needs and interests of the parties.

7 Elements of Principled Negotiation

1) Interests
2) Options
3) Alternatives (BATNA / WATNA)
4) Legitimacy
5) Communication
6) Relationship
7) Commitment
    - (See Spencer, 2011, 35-46; Fisher and Ertel, 1995)

Principled negotiation: How to?

- Use objective criteria.
- Separate the people from the problem.
- Identify positions and interests.
- Generate options
    - (Spencer, 2011, 42-46)

In order to practise this approach, lawyers for both sides need to:

- Establish mutual trust;
- Negotiate with integrity;
- Work cooperatively and collegially;
- Think creatively;
- Be prepared to compromise;
- Encourage each client to see things from the other's perspective; and
- Be assertive, not aggressive.

Limitations of the principled/interest based model

- Not all scenarios fit this model eg. in some matters adversarial, integrative or distributive bargaining is more appropriate.
- Model does not take account of fact that in, some negotiations, one or both parties are not interested in finding a mutually agreeable solution.
- In such cases one or both parties may also not be prepared to share relevant information so that a 'fair' outcome for both parties can be achieved.

Constructive Negotiation

- An attempt to bring a model of principled negotiation to the realities of legal practice (Alexander and Howieson, 2010)
- Relational positioning
- Exploring issues
- Generating options
- Reaching solutions
- 10 steps – see Chapter 4 (Alexander and Howieson, 2010, 68-102):

1) Step 1 – Preparation
2) Step 2 – Opening (soft-goal oriented, firm reasonable, problem solving)
3) Step 3 – Sending signals about relationship and priority information (building trust)

4) Step 4 – Gathering information
5) Step 5 – Agenda setting (don't forget to probe for hidden agendas)
6) Step 6 – Exploring interests (asking why, asking why not, reality testing)
7) Step 7 – Generating options
8) Step 8 – Problem-solving and bargaining (evaluate options, choosing your style)
9) Step 9 – Outcome and documentation
10) Step 10 – Reflective debrief

Lawyers need a knowledge of:

- The client, their underlying interests, personality, strengths and weaknesses, bottom line.
- The client's factual case.
- The relevant law and how to apply it to the facts.
- Court procedure so that correct documents filed and discovery completed.
- Dispute resolution eg. negotiation models, structure to most effectively negotiate for client.
- Negotiation and professional ethics.
- Any existing or possible power imbalances.
- Any cultural negotiation differences.

Lawyers need: dispute resolution and interpersonal skills

- Thorough and thoughtful preparation
- Identifying objectives
- Being realistic about outcomes
- Option generation
- Identifying underlying interests
- Meeting and greeting and establishing a negotiation 'atmosphere'
- Understanding the other party's needs and interests
- Picking up any hidden issues/agendas
- Communication skills:
    - Interpersonal skills: eg. open body language and eye contact
    - Listening actively and effectively
    - Expressing yourself clearly and assertively
    - Controlling anger and emotions e.g. reframing and summarising

Things to be aware of in in-person negotiations

- Facial expressions and body language.
- Direct communication skills: clarity of communication, correcting misunderstandings, speaking appropriately, avoiding shouting or pointing fingers or slamming the table.
- Use of questioning, summarising, reframing.
- Taking time.
- Asking for a moment to confer or to think.

Some advantages of in-person negotiation

- Parties can see each other's facial expressions and body language.
- Can create more direct communication channels: not have difficulties of misunderstandings that may occur when communicating via letter, email, messaging.
- Can assist with overcoming communication problems and reducing conflict.
- May be more effective in achieving an outcome that covers all or many underlying interests.

Some disadvantages of in-person negotiation

- May be threatening when there are power imbalances, e.g., may be unsafe when violence is a factor.
- Can be used as a tactic by one party to coerce other party to unfair outcome:
- E.g. using intimidation, threatening behaviour etc.
- May be too stressful for one party.
- May be inconvenient/too expensive for geographic or other reasons.

Ethical Issues in Negotiation

- Is it ethical to lie?
- Is it ethical to mislead?
- Is it ethical to exaggerate, engage in 'puffery'?
- Is it ethical not to disclose relevant information?
- Managing ethical duties to your client, to the court and to the law – especially if they conflict – can be difficult.

What are some legitimate tactics that can be used in legal negotiations?

- Careful preparation.
- Equipping client with participation knowledge and skills.
- Investigating and reality testing options and bottom lines prior to going into negotiation
- In the negotiation: taking initiative, using an agenda, being assertive (rather than aggressive)
- Strategic use of communication skills such as reframing and summarising skills
    - ➢ We explore these further in the week on communication

Using an agenda as an ethical tactic

- An agenda is a list of issues relating to the parties' needs and interests that need to be resolved.
- An agenda provides a structure and a framework for a negotiation.
- Issues can be prioritised.

Inequality of bargaining power in negotiations can be caused by:

- Cultural issues
- Gender issues
- Violence
- Mental health
- Drug or alcohol abuse
- Personality or skill issues: communication skills, levels of assertiveness
- Timing
- Access to knowledge
- Access to resources
- Differences in seniority in legal representation
- More on the issue of power later in the semester.

Week 4- Mediation

Mediation

Definition

- Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:
  - communicate with each other, exchange information and seek understanding
  - identify, clarify and explore interests, issues and underlying needs
  - consider their alternatives
  - generate and evaluate options
  - negotiate with each other; and
  - reach and make their own decisions.
- A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes. (MSB Approval Standards, 2015, section 2.2).

Can Mediators Evaluate?

- Where a mediator uses a blended process such as advisory or evaluative mediation or conciliation, which involves the provision of advice, the mediator must:
  a) obtain consent from participants to use the blended process;
  b) ensure that within the professional area in which advice is to be given, they
     i. have current knowledge and experience;
     ii. hold professional registration, membership, statutory employment or their equivalent, and
     iii. are covered by current professional indemnity insurance or have statutory immunity and
  c) ensure that the advice is provided in a manner that maintains and respects the principle of self-determination.

  (MSB Approval Standards, 2015, section 10.2)

Purpose of Mediation

- A third party supports the parties in dispute to negotiate a mutually satisfactory outcome.
- Foundational philosophies include:
  - Party self-determination and empowerment
  - Mutual, relational process
  - Remedial imaginations, tailored outcomes
  - Interests can be served, positions can be contexualised and broken down.

MSB

- MSB = Mediator Standards Board
- The creation of one central entity responsible for mediator standards and accreditation in Australia.
- To fulfil its function, the MSB has developed the National Mediator Accreditation System (NMAS). This system includes rules for the accreditation and practice of mediation in Australia.
- *Approval Standards* which specify the training, assessment, personal qualities and experience required of a NMAS accredited mediator and for their renewal of accreditation
- *Practice Standards* which specify the minimum practice and competency requirements of a NMAS accredited mediator

- *Recognised Mediator Accreditation Bodies* (RMABs) which accredit mediators according to the Approval and Practice Standards

Key Steps of Mediation

- Intake
- Mediator's opening
- Parties' statements
- Summaries and common ground
- Agenda
- Exploration
- Private Caucus
- Negotiation
- Agreement

Pre-Mediation/Intake Phase

- Intake process undertaken by either:
  - Mediator or
  - Administrative officer
- Prior meeting/s or telephone conversation/s to:
  - Understand dispute
  - Ensure process is suitable, assess party capacity to participate in the process and authority to settle, screen and assess inappropriate matters
  - Discussion of process and costs
  - Reading and signing *Agreement to Mediate*
  - Ensure parties come prepared

Mediator's Opening Statement

- To explain the process and its objectives.
- To clarify the roles of the mediator and the parties.
- To clarify the non-adversarial role of lawyers (if present).
- To set some guidelines/ground-rules for conduct during the process.
- To explain process ethics such as the independence of the mediator and confidentiality
- *as far as law allows*
- To agree on time-frames and any time restraints.
- Ensure parties have the authority to settle
- To foreshadow reaching some level of agreement.

Parties' Opening Statements

- Parties are asked to speak, one at a time, about:
  - The background to the dispute; and
  - Their key concerns and issues - what they want to sort out at the mediation.
- Mediator uses questions (open, probing) to elicit the parties' underlying interests.
- Mediator summarises each party's statement.
- The goal is to ensure that each party hears the other party's perspective of the dispute.
- Mediator models effective communication skills.

Summary and Common Ground

- The mediator's summary of each party's statement helps to clarify understanding – using paraphrasing.
- Areas of common ground can then be identified to build trust and a sense of positive purpose.
- The psychological impact of reaching agreement on areas of common ground should not be understated (Spencer, 2011, p 59)

Development of the Agenda

- Mediator works out with the parties a list of common issues that will form the structure for the mediation.
- The agenda items are based on interests not positions.
- The agenda items are expressed in a way that is:
  - mutual
  - neutral
- Agenda items can be framed in the form of questions or statements.
- Example agenda in family dispute:
  1) What time will the children spend with each parent?
  2) What school should the children attend?
  3) How can we balance our different religious values in the way we parent our children?
  4) What extra-curricular activities should the children participate in?
  5) How can we effectively communicate in the future about our children?

Exploration and Problem Solving steps

- Mediator engages parties in constructive communication of the issues on the agenda.
- Option generation
  - Development and exploration of options
  - Evaluation and selection of options
- Bargaining and negotiation
  - Focus on interests
  - Distributive/integrative approaches may take over - particularly towards the end.

Private Caucus (Separate Meetings)

- Can occur at any time during after agenda has been agreed upon.
- Useful for exploring interests, hidden agendas, reality checking perspectives, option generating.
- Can also be used to break tension or to give the parties a break.
- An evaluative mediator will use this step to:
  - talk to client about prospects if case proceeds to court
  - Pressure to settle.
- Parties might use this step to seek external legal advice.

Final Phase

- Final decision-making
- Recording decisions and any agreement
  - Usually written and signed by parties and their lawyers (if lawyers present)
  - Lawyers should ensure client understands agreement and implications
- Closing statement by mediator

- Termination of mediation

Boulle's Four Key Models of Mediation

- Facilitative
- Settlement
- Evaluative
- Transformative
- Also narrative, therapeutic.

Lawyers' Roles

- Lawyers may or may not be present during the mediation: it may depend on the type of process, or the context.
- Lawyer's functions can be broken down:
    - Before
    - During
    - After

Before

- Suitability of mediation
    - Ensure appropriate dispute resolution process
    - Advocate for appropriate structure to suit client
- Process advice: steps in dispute resolution process
- Content advice: legal advice/ will an agreement be binding
- Preparing/coaching client
    - Coach client in readiness for their active role
    - Assist client prepare opening statement
    - Help articulate needs and interests and bottom line
    - Option generation – a spectrum of options the client can 'live with'
    - Attend to any information gathering/documents client needs
    - Risk assessment: Will we receive a better result if we go to court?
        - BATNA: What is the best result we can hope to achieve if we don't settle?
        - WATNA: What is the worst outcome that may occur if we don't settle?
- Discussing and signing an *Agreement to Mediate.*

During

- Supporting a party in making their opening statement.
- Being a second pair of ears.
- Double-checking the agenda.
- Assisting with option generation.
- In private sessions – assisting with reality checking and provision of on the spot legal advice that can support reaching agreement.
- Helping to draft a written agreement (binding or not binding)

After

- Lawyer debriefing client
    - Process
    - Content

- Explanation of agreement reached and the legal implications
- Making the agreement legally binding
    - Consideration of options for making this happen.
    - What are the legal consequences if the agreement is then breached?
- Dealing with second thoughts/disillusionment?
- Considering next steps if an agreement has not been reached.
    - What are the client's options?

Can You Be Forced to Mediate?

- See *Civil Proceedings Act 2011* (Qld)
- s43 Court may refer dispute to ADR process
- s44 Parties must attend at ADR process if court orders

Barrett v Queensland Newspapers [1999] QDC 150

- Factors taken into account to order all parties to mediation where one party objected:
    1) Judge could not conclude the mediation would fail.
    2) Trial may take longer than 10 days and would detract from court time available for other litigants.
    3) Three of four parties supportive of mediation.
    4) The second defendant, without admitting liability had agreed to pay the plaintiff's share for the mediator's fee and venue costs
    5) Application for mediation order made early and when substantial costs could be saved by all parties.
    6) There were risks in litigation, even for the opposing party.
    7) Skilled mediator may be able to assist parties despite difficulties in case.

Critical perspectives

Consensuality

- Two key meanings: voluntary participation and no compulsion to reach agreement.
- Hilary Astor questions: if parties are ordered to mediation can their agreement be "consensual"?
- The reality of much mediation these days is that it is mandated by statute or court ordered.
    - Consider implications for good faith participation and adherence to outcomes?

Neutrality of Mediators

- Do you think mediators can be neutral and impartial when mediating a dispute?
- Neutrality
    - Disinterest
    - Independence
    - Impartiality

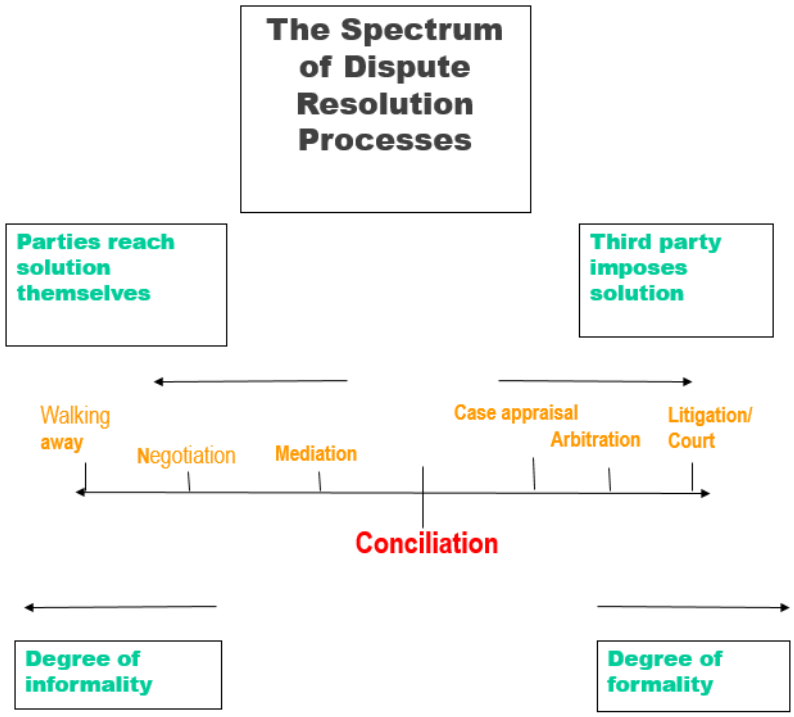
Appropriateness of Mediation

- When will a case not be suitable for mediation?
    - Power imbalances.
    - Need for a third party decision.
    - Need for an enforceable decision.
    - Urgency, criminal nature of issues.
- Avoid potential pitfalls through:
    - Screening processes.

- Intake.
- Ability to terminate.

Week 5- Conciliation, Case Appraisal and Arbitration

Conciliation



Meaning

- Used by different people in different ways:
- Informal discussions between parties and external agency to try to avoid, resolve or manage a dispute
- The state of manifesting goodwill and cooperation after being reconciled
- The action of bringing peace and harmony; the action of ending strife
- In Australia, there is regrettably little consensus amongst conciliation providers as to what conciliation means!

NADRAC Definition

- ***Conciliation*** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.
- Parties with assistance of conciliator
- Identify the disputed issues
- Develop options
- Consider alternatives
- Try to reach agreement

- Role of conciliator?

Similarities Between Mediation and Conciliation

- Mediator and Conciliator are an impartial third party (although if conciliating under a statutory scheme, conciliator is not neutral towards the law)
- Both processes identify disputed issues, develop options, consider alternatives and try to reach an agreement
- Neither Mediation or Conciliation are determinative processes
- Both Mediator and Conciliator determine the *process* to be used
- Spencer and Hardy [6.80]

Differences Between Mediation and Conciliation

- Conciliator may have an advisory role regarding the content of the dispute – Mediator does not
- Conciliator may advise on the outcome of a dispute
- Conciliator may suggest terms of settlement
- Conciliator may give expert advice on potential court outcomes
- Conciliator may actively encourage parties to reach an agreement

Is there a difference between evaluative mediation and conciliation?

- Expert/Advisory mediation
- Mediator an authority figure who evaluates case based on experience of:
- Law; and
- Court outcomes
- And offers recommendations of how case would be decided if proceeds to court
- Some would argue not “real” mediation

Conciliator Core Competencies

- Analysis
    - Assess the issues
    - Seek out necessary information
- Objective empathy
    - Establish rapport
    - Focus parties on interests
- Inventiveness and problem-solving
- Interpersonal skills
- Strategic direction
- Legislative framework
- Expert knowledge
- Multiple roles
- Personal flexibility
- Self-efficacy: personal power and psychological strength
- Managing expectations

Advantages of Lawyers

- Support role to client
- Can model co-operative non-adversarial negotiation behaviour

- Assist parties:
  - provide relevant information (documents etc)
  - to focus on interests
  - with option generation
  - integrative bargaining
  - reality testing
  - with terms of settlement
- Draft the agreement:
  - explain the agreement to client
  - consequences of non-compliance
  - file the agreement in court
- 'Shadow of the law'
- Advise on what the law is ie. legal rights
- So client can make *informed decision*
- Stop client agreeing to unrealistic settlement
  - maintain assertiveness
  - not let them be warn down by people and process; or
- At least talk them through this and reality test
- Deal with second thoughts/ regrets!!

Disadvantages of Lawyers

- Particularly:
  - If not familiar with dispute resolution process
  - If not familiar with the relevant law
- Attempt to interfere with process and structure
  - Cut through opening statements
  - Request shuttle conciliation in separate rooms
- Can model adversarial behaviour
- Can entrench positions (particularly unrealistic position if doesn't know the law well enough)
- If inexperienced won't be assertive enough with unrealistic client
- Can give up on the negotiation process
- Can be impatient with time

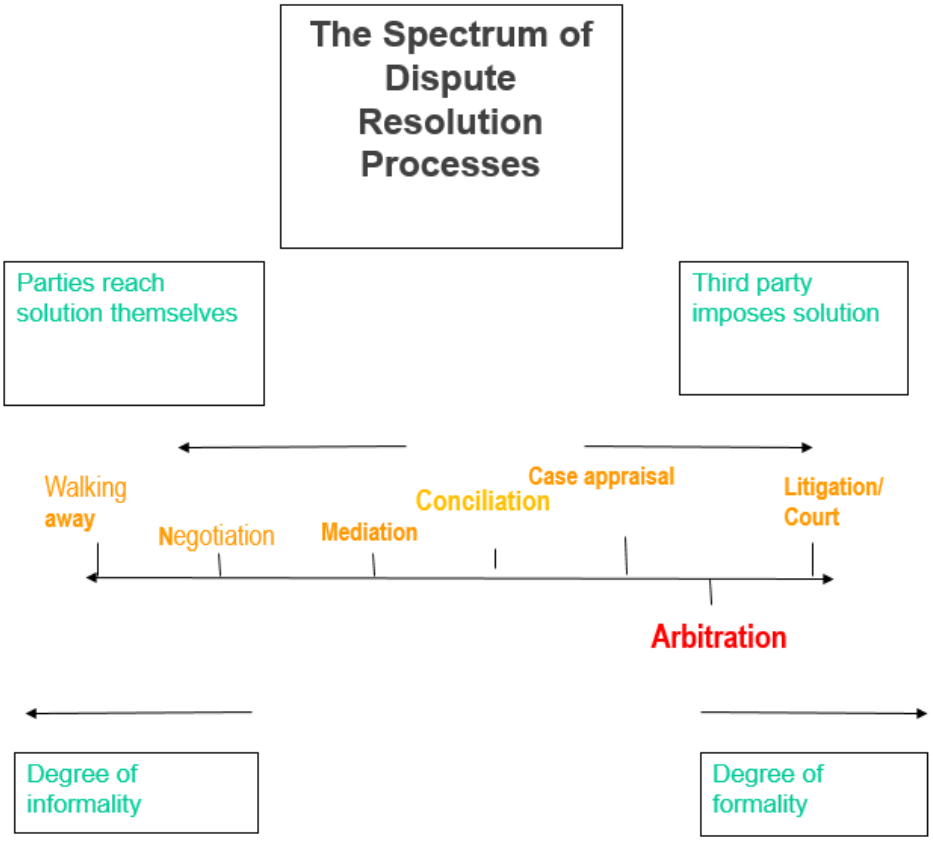
Where do Conciliations Occur?

- Australian Human Rights Commission (discrimination and human rights breaches)
- Fair Work Commission (Australia's national workplace relations tribunal) – unfair dismissal
- Family Law – Conciliation Conference

Case Appraisal

- ***Case appraisal*** is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved. (NADRAC)
- Note the *Civil Proceedings Act 2011* (Qld), sections 39, 41 and 44. Case appraisal seems to be defined in an unusual way (more akin to expert determination).

Arbitration



Arbitration Defined

- NADRAC defines Arbitration as:
  - A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.
  - **Determinative** dispute resolution processes are process in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative dispute resolution processes are arbitration, expert determination and private judging.
  - When an Arbitrator makes a determination, that decision is called an ***award***.

Key Features of Arbitration

- An adversarial process
- Private
- Can be voluntary or mandatory
- Impartial third person (arbitrator) provides a decision based on law
- Parties (usually) select the arbitrator
- Arbitrator is often an expert in the field of the dispute, a barrister or a retired judge.
- Governed by statute in Australia

Arbitration and Litigation Similarities

- Similarities between Arbitration and Litigation has seen debates as to whether Arbitration should be classified as ADR.
- Adversarial
- Impartial third party makes binding decision
- Lawyers often involved to argue case
- A formal process where parties may agree to have the rules of evidence apply

Arbitration and Litigation Differences

- With the exception of court-ordered arbitration, requires the consent of parties
- Private (as opposed to a public hearing in a court)
- Arbitrator usually selected by parties (cf: judge)
- Result binding only on the parties to the case (no precedential value)

Power to Legislate About Arbitration?

- Commonwealth's Constitutional power in s.51(xxxv) has been interpreted as restricted to arbitration in relation to employer/employee disputes.
- States have introduced Uniform Commercial Arbitration Acts so that arbitration is governed by legislation in a much broader fashion. Eg *Commercial Arbitration Act 2013* (Qld)

Referral to Arbitration

- Some courts in Australia have the power to refer to arbitration without the consent of the parties. In Qld, it must be with the consent of the parties: *Commercial Arbitration Act 2013* (Qld), s 8.
- Arbitration is used in a variety of contexts (the word commercial is defined very broadly), but most commonly in commercial contexts.

Uniform Arbitration Legislation

- *Commercial Arbitration Act 2013* (Qld)
- Features:
    - Voluntary,
    - Choice of expert arbitrator with expertise,
    - Private,
    - No formal reporting, no precedential effect,
    - Not bound by formal rules of evidence (but can choose to be),
    - Awards are binding,
    - Limited grounds for judicial review (s 34 and 34A, only on a question of law)

Unpacking the Advantages of Arbitration

- Party control – ability to present views, input re process, choice of third party decision-maker.
- Private
- Quicker and cheaper
- Final enforceable decision
- Objective process – expert evidence possible, third-party decision maker.
- Legal representation addresses power imbalances

Unpacking the Disadvantages of Arbitration

- Limited applications? Mainly relevant to commercial disputes.
- Process favours wealthy
- Objective, legalistic nature fails to adequately address conflict
- Adversarial process

Point of Reflection

- Is arbitration just a private form of litigation?

Week 6- International Commercial Arbitration

An introduction to international commercial arbitration

Definition

- Arbitration is *'a process by which parties consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case'.*
- Elements:
  - consent
  - independent, non-governmental decision makers selected by the parties
  - final and binding
  - adjudicatory process
- *Gary Born defines Arbitration as 'a process by which parties consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case'.*
- Gary Born, *International Arbitration Law and Practice* (Kluwer Law International, 2012), 3.
- Born insists that all of the elements of this definition are important.
- Element 1: Consent - Arbitration is based on the consent of the parties to arbitrate. Consent to arbitration is critical. It is this consent which gives the tribunal jurisdiction over the parties and gives the tribunal authority to render an award that is final and binding upon the parties. Usually this consent is in the form of an agreement to arbitrate. This is vastly different to litigation where people are compelled to participate or risk judgment against them. The critical point is that the authority of the arbitrator to hear and determine the dispute, and to issue an award that is final and binding depends upon the parties' consent to arbitration. Usually this consent is found in an arbitration agreement that takes a the form of a clause within a commercial contract.
- Element 2: Arbitration is a process that involves independent, non governmental decision makers. The decision maker is a person, called the arbitrator, or a group of people collectively called the arbitral tribunal. They are selected by the parties or alternatively by an arbitral institution, or a combination of both. In rare cases, the arbitrator will be selected by a state court, but this is unusual. Arbitration is alternative dispute resolution because the dispute is not resolved by state courts. The judiciary of state courts are considered to be governmental decision makers because they are paid by the state. In arbitration, the dispute is resolved by the arbitrators.
- Element 3: Arbitration is final and binding on the parties. The arbitrator renders an award that is enforceable in a state court. Arbitral awards tend to be more easily enforced than the judgment of a state court resulting from litigation; this is because of the New York Convention which we consider shortly. It is this final and binding nature of the award that distinguishes arbitration from other forms of dispute resolution. In negotiation the parties find a solution for themselves. Mediation facilitates settlement but unlike an arbitral tribunal, a mediator does not reach a decision that binds the parties. A mediator encourages the parties to reach settlement.
- Element 4: Adjudicatory - Arbitration is an adjudication process. The arbitrator hears the facts of the dispute, applies the law to those facts and reaches a decision that is final and binding upon the parties. The decision of the arbitrator is called an arbitral award. The legal

framework of international commercial arbitration almost never allows appeal from an arbitral award on the merits – so the arbitral award is also final in the sense that it is the end of the matter for the parties. Almost no recourse is available to the unsuccessful party. While the lawyer in you might already be thinking this doesn't sound like a good idea, the commercial reality is that business people do want the dispute over and done with. They need to move on with conducting their business, so resolving the matter finally before a panel of experts carefully chosen by them might be the solution that best meets their needs.

International

- UNCITRAL Model Law on International Commercial Arbitration Article 1(3).
- Some elements of the only apply when the arbitration is international.
- Go to Article 1(3) Uncitral Model Law.
- To give an example, the UNCITRAL Model Law on Arbitration applies only to international commercial arbitration. It provides an extensive definition explaining when arbitration is international. The arbitration will be international if the parties to the arbitration agreement have their places of of business in different States; or if they agree the subject matter of the arbitration agreement relates to more than one country. Even if the parties both have their places of business in the same state the arbitration can still be international if the parties agree that the place of arbitration is a state outside where the parties have their places of business, or if the place where a substantial part of the obligations of the parties' commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is outside the State where the parties have their places of business.
- An example:
- The buyer has its place of business in Singapore. The seller has its place of business in New Zealand. Their contract includes an arbitration agreement that stipulates that the place of the arbitration will be Australia. The contract requires that the goods be delivered to the buyer's distribution outlet in Australia. This is a contract for the international sale of goods.
- A dispute arising under this agreement is international for two reasons, though one would be enough:
- (1) The buyer and seller have their places of business in different States.
- (2) The buyer and seller have agreed that the place of the arbitration is a state other than the states where the parties have their places of business.

Commercial

- UNCITRAL Model Law on International Commercial Arbitration Article 1(1).
- The arbitration must be commercial in order to trigger the application of the UNCITRAL Model Law on International Commercial Arbitration. The UNCITRAL Model law is an important part of the international legal framework of international commercial arbitration as we see in a moment. The UNCITRAL model law however will only apply where the arbitration is commercial.
- *The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or*

concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

- UNCITRAL Model Law on International Commercial Arbitration Article 1(1).

Why is International Commerce important?

- UNCITRAL specialises in the modernisation and harmonisation of international business and commercial law to foster increased opportunities for international trade.
- International trade leads to economic growth, higher living standards for all and increased opportunities for respect and harmony that contribute to world peace.
- UNCITRAL is the legal body of the United Nations.

Arbitration is the preferred dispute resolution mechanism in international commercial disputes. Why?

- Neutrality
- Centralised decisions on jurisdiction and choice of law
- Enforceability
- Expertise of decision makers
- Finality of the award
- Flexibility of procedure – including confidentiality

What is Party Autonomy

- The doctrine of party autonomy supports the freedom of the parties to agree as to how disputes arising between them should be resolved.
- Party autonomy allows parties to:
    - choose arbitration
    - select the substantive law to be used to resolve the dispute between them
    - select the arbitral law to be used to resolve procedural issues in the resolution of the dispute and
    - choose the procedure to be adopted in their arbitration.
- As we will see Procedural freedoms include:
    - tailoring the procedure to fit the magnitude and nature of the dispute
    - tailoring the mode of the hearings – ie oral hearings might not be necessary or focus on oral hearings to examine evidence or witnesses
    - allowing for fast track proceedings
    - agreement on their own timetable
    - agreement as to what must be disclosed (ie discovery can be tailored or eliminated).
- So the very first exercise of party autonomy is the arbitration agreement. That is what we will look at now.

The New York Convention

- The pro-enforcement regime of the New York Convention is one of the most highly valued attributes of international commercial arbitration
- The legal framework of international commercial arbitration is ‘pro-enforcement’. This means the international conventions and state laws work together to ensure that arbitration agreements and arbitral awards are enforced. In contrast, international commercial litigation lags far behind. The sole international treaty to recognise the parties’ choice of jurisdiction, has very few member states. The sole international treaty for the recognition and enforcement of foreign judgments has only four members. In addition there are

extremely limited reciprocal arrangements among regional courts to recognise and enforce each other's judgments. And enforcement abroad requires recognition. The prospects of enforcement action being successful are vastly different if you litigate or arbitrate.

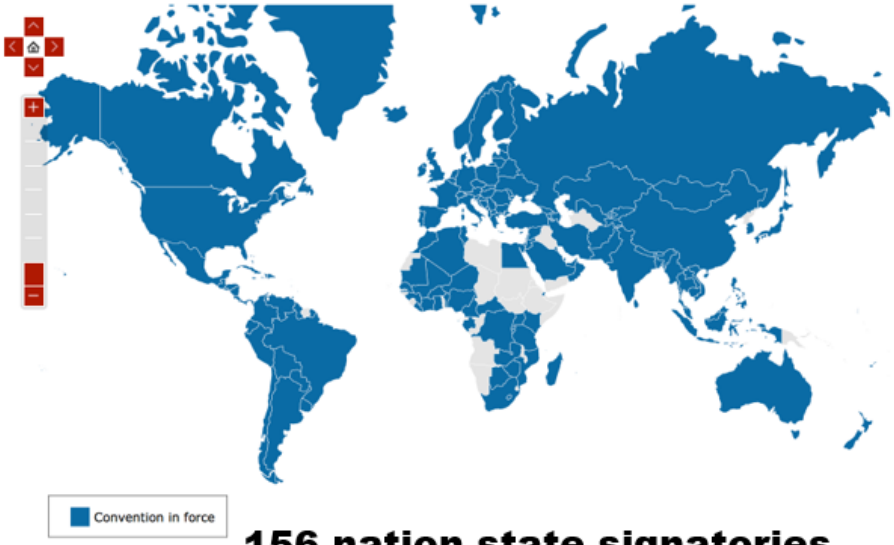
Arbitration

Enforcement in Australia – Chinese Arbitral Award

New York Convention – Australian courts are obligated to recognise and enforce foreign arbitral awards made in China.

Status map

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)



156 nation state signatories

This is considered to be the world's most successful private international law treaty

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Arbitration

Enforcement in Singapore – Chinese Arbitral Award

New York Convention – Singaporean courts are obligated to recognise and enforce foreign arbitral awards made in China.

- Is Singapore a signatory to the New York Convention? Yes it is. Actually all the countries involved in this arbitration are signatories to the New York Convention. This is not unsurprising. It is one of the most widely adopted private international law treaties in the world.

Litigation

Enforcement in Australia – Judgment of Chinese Court

No international conventions

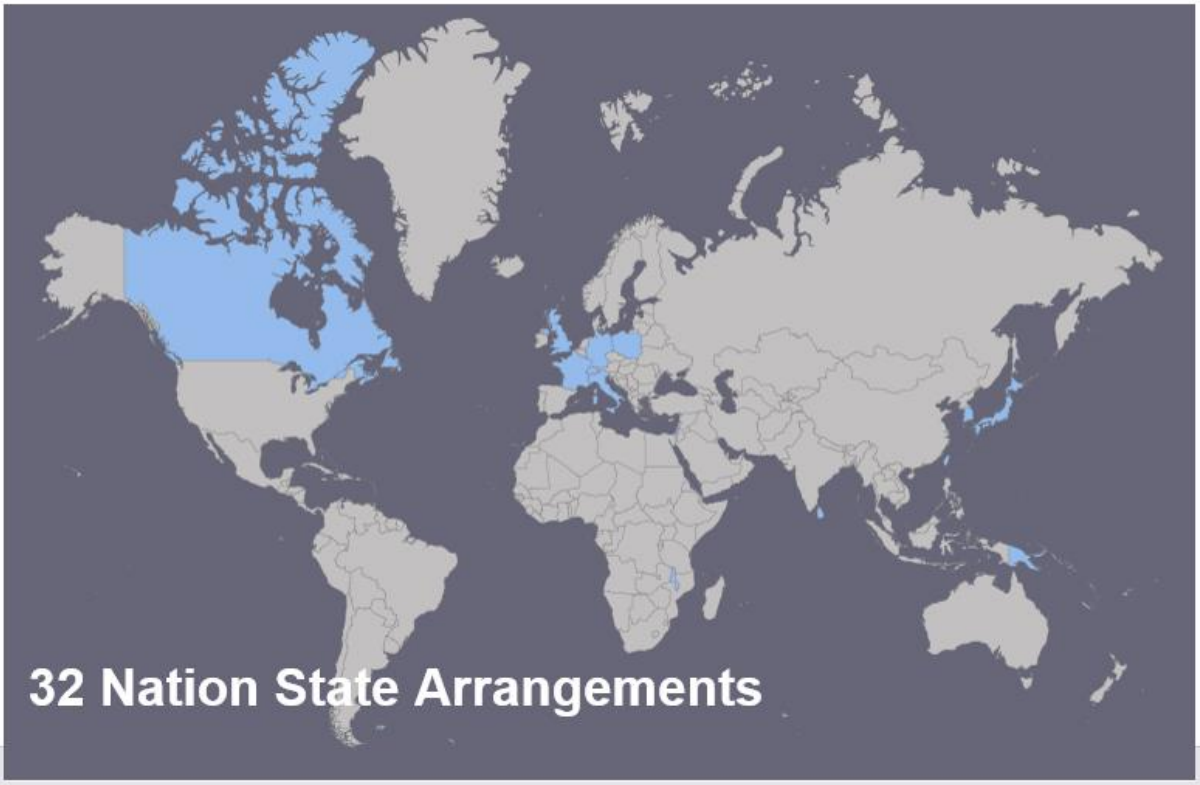
No reciprocal arrangements

The Chinese party would need to make application to an Australian court and prove that according to Australian law, the Chinese court had jurisdiction to hear and determine the dispute.

- Australia does have limited reciprocal arrangements in place, but not with China.
- Essentially this means you have to litigate twice and there is a great deal of uncertainty about the outcome.
- Arrangements for the recognition and enforcement of foreign judgments pale in comparison to the pro-enforcement regime in arbitration.
- If there is a reciprocal arrangement in place, then the two nations have already agreed to recognise and enforce judgments of each other's courts. These arrangements tend to be limited.
- If there is no reciprocal arrangement in place, then you need to convince the court to recognise the foreign judgment and this may involve the court revisiting decisions the first court made jurisdiction and choice of law. In other words, you may need to relitigate and the outcome can be unpredictable.
- Unlike arbitration, international conventions are of little assistance here. There is an international convention for the recognition and enforcement of foreign judgments. It has been in force since 1979 and has only 4 members: Cyprus, Portugal, the Netherlands and Albania.

- There is the Hague Convention on Choice of Court Agreements which might be relevant to help you establish that the foreign court did have jurisdiction to determine the matter, but this convention has not yet been widely adopted and Australia and China are not parties.

Australian reciprocal arrangements for the recognition and enforcement of foreign judgments - Foreign Judgments Regulations 1992 (Cth), Schedule



FOREIGN JUDGMENTS REGULATIONS 1992
Schedule Superior Courts

Item	Country	Courts
1	New Zealand	Court of Appeal High Court
1A	Province of Alberta, Canada	Supreme Court of Canada Court of Appeal of Alberta Court of Queen's Bench of Alberta
2	Bahamas, The Commonwealth of the	Court of Appeal Supreme Court
3	Province of British Columbia, Canada	Supreme Court of Canada Court of Appeal of British Columbia Supreme Court of British Columbia
4	British Virgin Islands	Eastern Caribbean Supreme Court
5	Cayman Islands	Grand Court
6	Dominica, Commonwealth of	Eastern Caribbean Supreme Court Court of Appeal High Court of Justice
7	Falkland Islands	Court of Appeal Supreme Court
8	Fiji, Republic of	Supreme Court Court of Appeal High Court
9	France (French Republic)	Cour de Cassation Cours d'Appel Tribunaux de grand instance Tribunaux de commerce Cours d'assise Tribunaux correctionnels
10	Germany, Federal Republic of	Bundesgerichtshof Oberlandesgerichte Bayerische Oberste Landesgericht Landgerichte
11	Gibraltar	Court of Appeal Supreme Court
12	Grenada	Supreme Court (consisting of the: Court of Appeal; High Court)
13	Hong Kong Special Administrative Region of the People's Republic of China, The	Court of Final Appeal High Court (consisting of the: Court of Appeal; Court of First Instance)
14	Israel, State of	Supreme Court District Courts Moslem Religious Courts Druze Religious Courts
15	Italy (Italian Republic)	Corte Suprema di Cassazione Corte di Assise Corte d'Appello Tribunale
16	Japan	Supreme Court High Courts District Courts Family Courts
16A	Korea, Republic of	Supreme Court Appellate Courts District Courts Family Court Patent Court Administrative Court
16B	Malawi	High Court Supreme Court
17	Province of Manitoba, Canada	Court of the Queen's Bench of Manitoba
18	Montserrat	Privy Council Eastern Caribbean Court of Appeal High Court of Montserrat
19	Papua New Guinea	Supreme Court of Justice National Court of Justice

19A	Poland, Republic of	Supreme Court Commercial Courts Courts of Appeal Provincial Courts
20	St Helena	Supreme Court
21	St Kitts and Nevis, Federation of	Privy Council Eastern Caribbean Court of Appeal High Court (Saint Christopher Circuit) High Court (Nevis Circuit)
22	St Vincent and the Grenadines	Eastern Caribbean Supreme Court (consisting of the: Court of Appeal, High Court)
23	Seychelles, Republic of	Court of Appeal Supreme Court
24	Singapore, Republic of	Privy Council: in respect of orders made on appeals from the Singapore Supreme Court and filed with the Court of Appeal of Singapore Supreme Court of Singapore (consisting of the: Court of Appeal; High Court)
25	Solomon Islands	Court of Appeal High Court
25A	Sri Lanka	Supreme Court Court of Appeal High Court District Court
25AA	Switzerland	Bundesgericht Kantonale Obere Gerichte Handelsgerichte
25AB	Taiwan	Supreme Court High Courts District Courts
25B	Tonga	Court of Appeal Supreme Court
26	Tuvalu	Court of Appeal High Court
27	United Kingdom, The	House of Lords Supreme Court of England and Wales Supreme Court of Judicature of Northern Ireland Court of Session
28	Western Samoa	Court of Appeal Supreme Court of Western Samoa

16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

Entry info force: 20-VIII-1979

Last update: 10-XI-2010
Number of Contracting States to this Convention: 5

View and/or print full status report

Members | Non-members

Members of the Organisation

States	S [1]	R/A/S[2]	Type[3]	EIF[4]	EXT[5]	Auth[6]	Res/D/N[7]
Albania		8-IV-2010	A	1-XI-2010			
Cyprus	1-II-1971	8-VI-1976	R	20-VIII-1979			
Netherlands	12-VII-1972	21-VI-1979	R	20-VIII-1979	1		
Portugal	21-VI-1983	21-VI-1983	R	20-VIII-1983			D

- So as you can see, on balance, arbitration gives you much higher prospects of being able to enforce your award.

Litigation

Enforcement in Singapore – Judgment of Chinese Court

No international conventions

No reciprocal arrangements

The Chinese party would need to make application to a Singaporean court and prove that according to Singaporean law, the Chinese court had jurisdiction to hear and determine the dispute.

- If the Australia assets of the unsuccessful party are insufficient to meet the judgment debt, then the Chinese company is essentially going to need to litigate in all three jurisdictions to first get the judgment and then satisfy the judgment. On top of all of that, you need to be extremely careful where you litigate. Not all courts are equally skilled in complex commercial matters. Consider this warning from Gary Born.
- *It is a harsh, but undeniable, fact that many national court systems are ill-equipped to resolve international commercial disputes. In many states, local courts have little experience in resolving complex international disputes and face serious challenges in reliably resolving commercial disputes. Moreover, in some states, basic standards of judicial integrity, competence and independence are lacking.*

  Of course, some national judiciaries include talented judges with considerable international experience. The courts of England, Switzerland, New York, Japan, Singapore and a few other jurisdictions are able to resolve complex transnational disputes with a fairly high degree of reliability. Nevertheless, even in these jurisdictions, local practices (like the jury trial or split legal profession) may obstruct efficient and objective dispute resolution. Moreover, in most legal traditions, judges are randomly assigned to cases, regardless of their experience. Judges are also ordinarily generalists, often without specialization in complex commercial matters, much less a particular type of transaction (e.g., M&A, joint ventures) or industry (e.g., oil and gas, insurance).

  Gary Born, pp 11-12.

The Arbitration Agreement

Consent

- The basis of all international commercial arbitration is consent.
- This consent is usually found in an arbitration agreement.
- Consent is one of the three critical elements that must be present in an arbitration agreement
    i. consent to arbitrate
    ii. scope of disputes to be referred to arbitration
    iii. finality of the award

Elements of Arbitration Agreements

- The arbitration agreement triggers the operation of a legal framework comprised of:
- international conventions
- state courts applying state law
- procedural rules
- soft law - best practice in arbitration.

Exercise

- Read this arbitration agreement and identify these critical elements:
    i. consent to arbitrate
    ii. scope of disputes to be referred to arbitration
    iii. finality of the award
- Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be finally resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia. The language of the arbitration shall be English. The number of arbitrators shall be three.

Party Autonomy and Procedure

- Unlike litigation, there is no code of civil procedure in international commercial arbitration.
- Party autonomy: The parties can agree to procedural rules that suit them.
- The parties' choice of procedural rules tends to be closely related to their choice between institutional arbitration and ad hoc arbitration.
- The procedural rules chosen by the parties are an important layer of the legal framework of international arbitration. The parties' choice of procedural rules tends to be closely related to their choice between institutional arbitration and ad hoc arbitration. We will look at the differences between these now.

Private arbitral institutions and Procedural Rules

- **Australian Centre for International Commercial Arbitration (ACICA)**
- Hong Kong International Arbitration Centre (HKIAC)
- International Chamber of Commerce (ICC)
- London Court of International Arbitration (LCIA)
- Singapore International Arbitration Centre (SIAC)
- Note also the UNCITRAL Arbitration Rules

The arbitration clause you have just looked at is the model clause developed by a private arbitral institution called ACICA – the Australian Centre for International Commercial Arbitration. There are a number of leading private arbitral institutions including those listed on this slide.

Party autonomy allows the parties to chose institutional or ad hoc arbitration. This choice is likely to influence their choice of procedural rules.

Institutional arbitration means that a private, non-governmental, arbitral institutions, such as one of these, will play a role in the arbitration. These institutions are experienced in arbitration, but they do not resolve the dispute. The dispute is resolved by the Tribunal. The institution administers the resolution of the dispute by the arbitral tribunal, almost always in accordance with the arbitration rules of the institution. Each institution has its own set of procedural rules.

Private arbitral institutions offers a service where they will take the agreement you have reached and compose an arbitral tribunal in accordance with your agreement. They will vet the potential arbitrators to make sure none has a conflict of interest, they will make sure you have access to facilities to conduct the arbitration, they will ensure you have a timetable for your arbitration and then help you to stick to that timetable. They stipulate the fees for the arbitrators and make sure you attend to payment of that fee. Some arbitral institutions also offer a service where they have their private "court" of arbitration experts check the award to make sure it is correct prior to its release. If you use a private arbitral institution to administer the arbitration, then you are likely to gain efficiency advantages.

Ad hoc

It is not necessary to use an arbitral institution. The parties can administer the arbitration themselves. This is called ad hoc arbitration. Ad hoc arbitration is generally only used where counsel and the tribunal are extremely experienced and expert in arbitration. The state courts must also be highly experienced in arbitration to properly support ad hoc arbitration. Ad hoc arbitration generally requires much higher levels of cooperation between the parties, and you do need to consider how forthcoming such co-operation is likely to be when the parties are in dispute. The UNCITRAL Arbitration Rules are suitable for use in ad hoc arbitration.

Having made the decision of institutional arbitration, which institution will you choose? This decision will likely be influenced by the rules of that institution. Most, but not all, institutional rules are based on the UNCITRAL Arbitration Rules. Institutional rules can and do vary. Choosing a particular institution usually means that the arbitration will be conduced in accordance with the arbitral rules of that institution, or vice versa.

When the parties nominate a set of arbitral rules in their arbitration agreement, then those rules form part of the arbitration agreement between the parties. They are expressly incorporated into the contract.

- HKIAC model clause
- *Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted*.

Wise Use of Party Autonomy

- Party autonomy in international commercial arbitration enables the parties to agree to the terms upon which they will arbitrate.
- A 2010 survey of corporate counsel at leading corporations around the world revealed that they advise that party autonomy should be exercised to select:
    - the choice of substantive law
    - **the sea**t (i.e. this is essentially the choice of procedural law. The arbitral law of the "seat" governs all the procedural legal issues arising in the arbitration. The arbitral law of the seat is called the *lex arbitri.* The seat is the jurisdiction (or legal place) of the arbitration. It is not the physical venue where the arbitration is held – that can be anywhere irrespective of the choice of seat)
    - the procedure to be used in the arbitration, especially
        - identification of institutional rules
        - the number of arbitrators and how they will be appointed, and
        - the language of the arbitration.
- When drafting the arbitration agreement, best practice dictates that consideration be given to stipulating the parties agreement as to the following terms, or selecting procedural rules that give power to the tribunal to determine these issues:
    - the applicable law of the arbitration (lex arbitri)
    - the procedural rules
    - the number of arbitrators and how they will be appointed, and
    - the language of the arbitration.

- The ACICA rules provide:
- if the parties do not stipulate a seat, then the seat will be Sydney: Article 23.
- if the parties do not stipulate how the tribunal will be appointed, then they will be appointed in accordance with the procedure set out in Article 12. i.e. each party selects one arbitrator and then those two arbitrators select a third, who sits as president of the arbitral tribunal.
- if the parties do not agree on the language of the arbitration, this can be determined by the tribunal: Article 24.

The Legal Framework

Arbitration Agreements

- The arbitration agreement is where parties demonstrate their consent to final and binding arbitration of disputes.

- One of the most fundamental doctrines of international commercial arbitration is party autonomy. This gives the parties freedom to choose:
    - the seat (and arbitral law),
    - the substantive law
    - the procedure of the arbitration (eg language and number of arbitrators).
- The arbitration agreement is the very first piece of the jigsaw puzzle of the legal framework. The possible puzzle pieces are so many and varied that the completed puzzle can look vastly different for every arbitration. Exercising party autonomy puts the puzzle pieces into place.

International Conventions

- International conventions on international commercial arbitration have achieved breathtaking success when compared to other private international law treaties.
- We are going to look at the New York Convention in more detail. It is far and away the most important.
- The European Convention seeks to supplement the NY convention. It has 31 signatories from mostly European nation states. Just be aware that this convention exists and that all member states are also members of the new york convention.
- The Panama Convention has 19 member states from North and South America. US courts have been reluctant to enforce the Panama convention where the dispute falls within the application of the New York Convention. Again, I just want you to be aware that this convention exists and that all member states are members of the NY Convention
- The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. ('The New York Convention')
- https://treaties.un.org/Pages/CTCTreaties.aspx?id=22&subid=A&lang=en
- The European Convention on international Commercial Arbitration, Geneva, 21 April 1961. ('The European Convention')
- https://treaties.un.org/Pages/CTCTreaties.aspx?id=22&subid=A&lang=en
- The Inter-American Convention on International Commercial Arbitration, Panama, 30 January 1975. (The Panama Convention)
- http://www.oas.org/juridico/english/treaties/b-35.html

The New York Convention, 1958

- Part of Australian law by virtue of the International Arbitration Act 1974 (Cth), sections 2D, 7 and 8.
- The New York Convention's importance is twofold:
    - all contracting states must recognise and enforce international arbitration agreements (Article II)
    - all contracting states must recognise and enforce foreign arbitral awards (Article III)
- Both requirements are mandatory.
- This convention is only four pages long and it is highly recommended that you read this convention. Earlier in this lecture we looked at this treaties status, and you will recall that it currently has 156 member states. Of the three international convention, this is the one of which Australia is a signatory.
- As you might already know, when a state signs a convention it is obligated to bring its obligations under that convention into its domestic law. States to this in a variety of ways. In Australia is in necessary for an Act to be passed bringing the terms of the convention into

Australian domestic law. Australia's obligations under the New York Convention form part of Australian domestic law by virtue of the International Arbitration Act 1974 (Cth), specifically sections 2D, 7 and 8.

- http://www.comlaw.gov.au/Details/C2011C00342/Html/Text#_Toc292369532.
- Gary Born says that this convention is the most successful private international law treaty in history and it is this widespread adoption that has caused it to be so successful in facilitating the use and enforcement of international commercial arbitration agreements as well as the recognition and enforcement of foreign arbitral awards.
- The importance of this convention is twofold. These are also its two mandatory requirements. The first is the presumptive enforceability and validity of international commercial arbitration agreements. All contracting states must recognise and enforce international arbitration agreements subject only to highly specific and extremely limited exceptions: Article II. Article II uses mandatory language – each Contracting State shall recognise. Also consider Article II(3) which Gary Born equates to specific performance. It says "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it nds that the said agreement is null and void, inoperative or incapable of being performed." So if the parties have entered into a valid arbitration agreement, then the state court is required to refer the parties to arbitration and not hear the dispute themselves.
- The second point is contained in article III – it requires that all contracting states recognise and enforce international arbitral awards subject only to highly specific and very limited exceptions that are listed in Article V – these exceptions are rarely made out. Most of these grounds are highly technical and procedural: Excess of jurisdiction, invalidity of the arbitration agreement, matters relating to the composition of the arbitral tribunal, where the award has been rendered invalid in the jurisidction where it was made, the subject matter of the dispute is arbitrable in the state where the award is to be enforce or whether it would be contrary to public policy to enforce the award in the state where the award is to be enforced.

State Arbitration Laws

- The UNCITRAL Model Law on International Commercial Arbitration
- http://www.uncitral.org/uncitral/en/index.html
- 72 Nation States have adopted the Model Law:
- http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
- The UNCITRAL Model Law has force of law in Australia by virtue of *International Arbitration Act 1974* (Cth), s 16.
- http://www.comlaw.gov.au/Details/C2011C00342/Html/Text#_Toc292369532
- The UNCITRAL Model Law does tend to dominate the landscape in State Arbitration Laws. Section 16 of the International Arbitration Act 1974 (Cth), states that the UNCITRAL Model law has force of law in Australia. The Model Law was developed by UNCITRAL. UNCITRAL is the legal body of the UNITED NATIONS that relates to international trade. The focus of the work of unictral is commercial law reform, modernisation and harmonisation of international business rules. One of the ways UNCITRAL works towards this objective is the development of treaties, model laws, and rules acceptable to its global membership.
- You might already know that a model law is different to a treaty. When a state becomes a signatory to an international treaty, it is obligated to introduce the terms of the treaty into

its domestic law without any amendment at all. A model law is different. It is a suggested law. One of the benefits and objectives of model laws are uniformity of laws. Therefore ideally the state will not modify the model law, or modify it only where the model law offers options for modification to adopting states. For example, the Model law allows adopting states to modify the model law to recognise arbitration agreements even if they are not in writing. Not all member states have adopted this particular modification and these states still require an arbitration agreement to be in writing.

The UNCITRAL Model Law

- The Model Law is set out in *International Arbitration Act 1974* (Cth), sections 2D, Part III, Schedule 2.
- Use the tables on the following slides as a guide through Schedule 2.
- The Model law brings all of the fundamental principles of international commercial arbitration into the domestic law of adopting states.
- The model law incorporates a number of the most important principles in international commercial arbitration.

★	Article 1(3)	when is arbitration international?
★	Articles 2 and 20	party autonomy extends to choice of the seat of arbitration
★	Article 5	judicial non-interference
	Article 7	defines arbitration agreements
	Articles 8 and 9	validity & enforceability of arbitration agreements
★	Articles 10 - 15	party autonomy extends to composition of the tribunal. This includes all matters in Articles 10-15.
	Article 16	*kompetenz-kompetenz*
	Chapter IV	interim relief
★	***Chapter V***	conduct of proceedings
★	Article 18	the parties must be treated with equality and each party must be given a full opportunity to present its own case
★	Article 19	party autonomy extends to choice of procedure

- **Article 1**: As you are already award, the model law only applies to international commercial arbitration - Article 1(3).
- **Article 2** limits the application of the model law to where the seat is located in Australia. The choice of the seat is one of the things that parties ought to nominate in their arbitration agreement. This is possible because of a fundamental doctrine of international commercial arbitration: **Party Autonomy**. Party autonomy is what allows the parties to select the seat for themselves. Party autonomy is embodied in Articles 2 and 20. The seat is sometimes called the legal place of arbitration, but it should not be confused with the physical venue where the arbitration is held. The arbitral law of the seat is called the ***lex arbitri***. The *lex arbitri* is the law that applies to procedural issues arising in the arbitration. It is not the law that is applied to resolve the substantive dispute (that can be some other law – it does not have to be the law of the same nation state as the seat). So where the parties exercise their party autonomy to nominate Brisbane as the seat of their arbitration, if the arbitration is international and commercial in nature, then the arbitral law that applies is the *International Arbitration Act 1974* (Cth). This is the *lex arbitri* when an arbitration is seated in Australia. The parties might also nominate in their agreement that the law that applies to determine the substantive issues in dispute will be the law of New Zealand, or Singapore or Germany or London. This is possible in international commercial arbitration.
- **Article 5** reflects a fundamental principle of international commercial arbitration – **judicial non-interference** – ie that the judiciary will support the arbitration, but it will not interfere. As Gary Born says the judiciary must not micromanage the arbitration process.
- **Articles 10-15** also reflect the doctrine of party autonomy since they allow for the parties to reach agreement as to the composition of the tribunal. The Model law provides for what will happen in default of agreement, but the parties are free to agree to the number of arbitrators, how they will be appointed, the grounds upon which arbitrators can be challenged, the procedure to be followed in bringing such a challenge, the procedure to be followed when an arbitrator withdraws and the procedure to be followed when a vacancy arises in the tribunal following successful challenge or withdrawl of an arbitrator.
- **Article 16** – the arbitral tribunal is the competent authority to determine challenges to its own jurisdiction over the parties. The validity of the arbitration agreement, and its scope is also determined by the arbitral tribunal. The tribunal reaches decisions on its own jurisdictional competence. The tribunal's decision on its own jurisdiction can be challenged in the courts of the seat (and only the courts of the seat), but this must be done within very strict timeframes laid down in the *International Arbitration Act 1974* (Cth). These provisions supplement Article 16. If the challenge is not brought within those strict time frames the right to challenge is lost, and the tribunal's lack of jurisdiction cannot then be raised as grounds to set aside the award in the seat, or to resist enforcement or recognition of the Australian award abroad.
- **Chapter V** is another example of the doctrine of party autonomy at work. **Article 19** allows for the parties to agree to the procedure to be followed in their arbitration, but in default of agreement, the Model law says that the Tribunal can determine the procedure to be followed in the arbitration. This includes the admissibility, relevance, materiality and weight of the evidence. However the doctrine of party autonomy is not unlimited and one of the most important limits on party autonomy, particularly the freedom of choice of procedure is contained in **Article 18. Article 18** reflects another fundamental doctrine of international commercial arbitration and that is that the parties must be treated with equality and each

party must be given an opportunity to present its own case. party autonomy extends to choice of procedure

Article 22	choice of language
Articles 21, 23-24	commencement of proceedings, submission of pleadings and the oral hearing
Chapter VI	making the award and ending the arbitration
Article 28	the tribunal must determine the dispute according to the substantive law chosen by the parties. Stipulates what is to happen if the parties fail to stipulate.
Articles 29 - 32	the form and content of the award
Article 33	correction of the award
Chapter VII	recourse against the award
Article 34	grounds upon which an award can be set aside
Articles 35 and 36	recognition and enforcement of foreign arbitral

- **Article 22** also recognises party autonomy. The parties may choose the language of the arbitration, but in default of agreement, the Tribunal may choose the language to be used in the arbitration. This includes all documents, the language of the hearings and any translation requirements as the tribunal sees fit.
- **Article 28** also recognises the doctrine of party autonomy since it recognises that the parties are free to choose the substantive law that applies to determine the substantive issues in dispute between them. If the parties chose the substantive law, then the tribunal must apply that law to decide the issues in dispute. But if the parties fail to agree on what the substantive law will be, then Article 28 stipulates that the tribunal has power to decide what the substantive law governing the dispute will be.
- Articles 29-32 all deal with the form and content of the final award, and what is to happen if the parties reach a settlement prior to the making of the final award. These articles all deal with how the arbitration process ends. Article 33 says that the award can be corrected within 30 days after it has been handed down, but these corrections will only be the corrections of typographical, clerical or computational errors. Article 33 does not allow for review or appeal from the award.
- Article 34 is relevant to the unsuccessful party. If the unsuccessful party can make out any of the grounds set out in article 34, it can bring an action in the state courts of the seat to set the award aside. The successful party may wish to enforce the award in the seat. If the unsuccessful party wishes to resist enforcement in the seat, it must bring an action to set the award aside on one of these grounds in article 34. Similarly, if the successful party wishes to

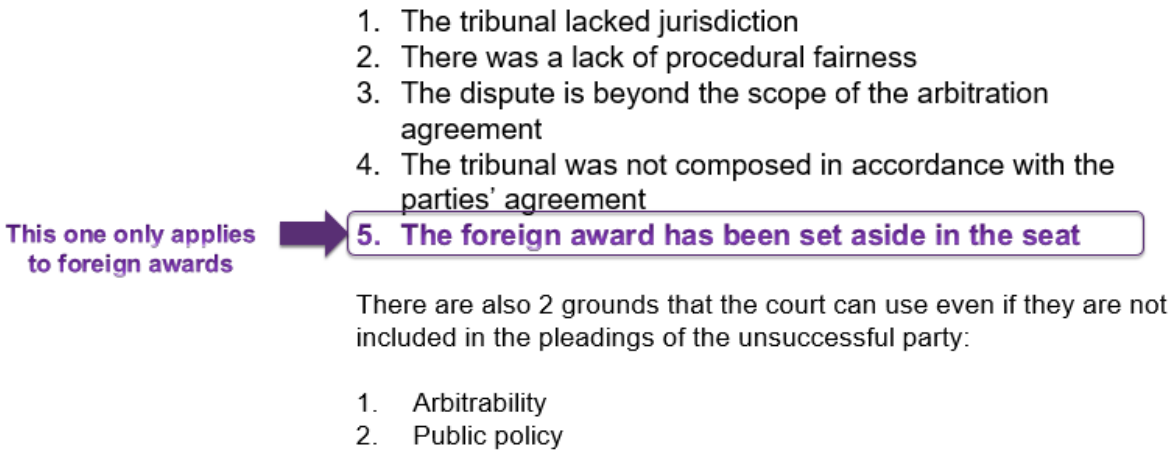
enforce the award abroad, then the unsuccessful party can only resist enforcement and recognition on the grounds that are listed in articles 35 (recognition of foreign arbitral awards) and article 36 (enforcement of foreign arbitral awards).

- Chapter VII outlines the options for the parties after the award. This slide summarises the options for the unsuccessful party.

- Under the model law the grounds for setting aside, and the grounds for resisting recognition and enforcement of a foreign award are almost identical. They are also identical to the grounds for resisting recognition and enforcement of a foreign award under the New York Convention. These are the grounds in articles 34 and 36 of the Model Law. They are the same as those in Article V of the NY Convention

- Options for the unsuccessful party

    a. bring an action in the courts of the seat to have the award set aside
    Only the courts of the seat can set aside the award. If it is set aside it cannot be enforced in the seat.
    b. resist recognition and enforcement of the award abroad.
- The grounds are extremely limited and highly specific:



1. The tribunal lacked jurisdiction eg the unsuccessful party may argue that it did not consent to arbitration and that the arbitration agreement is invalid.

2. There was a lack of procedural fairness eg the unsuccessful party may argue that the parties were not afforded equality in presenting their case.

3. The dispute is beyond the scope of the arbitration agreement i.e. Look at the words of the arbitration agreement to determine the scope of disputes referred to arbitration.

4. The tribunal was not composed in accordance with the parties' agreement eg if the parties agreed that the tribunal would be composed of 3 arbitrators but the tribunal was in fact composed of 1 arbitrator.
5. The foreign award has already been set aside in the seat.

- There are also 2 grounds that the court can use even if they are not included in the pleadings of the unsuccessful party:

    1. Arbitrability
    2. Public policy
- The decision to set aside or refuse to recognise or enforce is always at the discretion of the court.

Arbitrability in Australia

- **If Australia is the seat**, an Australian court MAY set aside the award if the subject matter of the dispute is not arbitrable.
- Eg. Criminal law matters are not arbitrable in Australia.
- **If the award was made abroad**, i.e. a foreign award, and the successful party is seeking recognition and enforcement in Australia, the Australian court MAY refuse recognition and enforcement if the subject matter of the dispute is not arbitrable in Australia.

Public Policy in Australia

- If Australia is the seat, an Australian court MAY set aside the award if it is contrary to public policy in Australia.
- Eg. An award made in circumstances where the parties were not afforded natural justice would be contrary to public policy. Similarly if the arbitrators were bribed, or otherwise lacked impartiality and independence.
- If the award was made abroad, and the successful party is seeking recognition and enforcement of that foreign arbitral award in Australia, the Australian court MAY refuse recognition and enforcement if recognition and enforcement of the award would be contrary to public policy in Australia.

Not all jurisdictions have adopted the Model Law

- Some non-Model Law states are leading examples of best practice in arbitral law despite not having adopted the Model law:
    - *Code of Civil Procedure* (France)
    - *Federal Code, Private International Law* (Switzerland) ('Swiss CPIL').
    - *Arbitration Act 1996* (UK)
    - *Arbitration Act 2015* (Netherlands)
- The model law has been widely, but not universally adopted. Signatories to the NY Convention will have a statutory legal framework for international commercial arbitration, but their national arbitration law may not always be an adoption of the model law. Some of these countries include the most important centres of international commercial arbitration including France, Switzerland, the UK and the Netherlands.

Procedural Rules

- The procedural rules form part of the legal framework governing the arbitration.
- To give sound, strategic advice on choice of institution and rules, you need to understand the range of choices, their differences, their strengths and weaknesses.
- The rules form part of the arbitration agreement if they are incorporated by reference. The impact of this is that the procedural rules are an important part of the legal framework that governs the arbitration.
- As you have seen the UNCITRAL Model law, is a fairly skeletal framework for the procedure of the arbitraiton. It generally says the parties can agree on this point of procedure, but if

they fail to reach agreement, the Tribunal can decide. When the parties adopt Rules, then they are reaching agreement on that point. The Rules cover a lot of the matters covered in the UNCITRAL Model Law, but in a lot more detail by adding flesh to the bones. This means that most procedural matters are dictated by the procedural Rules. The Rules agreed by the parties only apply to the extent that they are not inconsistent with the *lex arbitri (ie if Australia is the seat of the arbitration, then this is the International Arbitration Act 1974 (Cth), which incorporates Australia's obligations under the NY Convention and adopts the UNCITRAL Model Law).*

- **Differences**
- For example the ICC rules have a process where the award is scrutinised for accuracy by its private court of arbitration prior to its release. The ACICA rules have very high requirements for confidentiality. The HKIAC Rules are highly regarded by both Chinese and Indian courts.

Soft Law – Best Practice in International Commercial Arbitration

- UNCITRAL Notes on Organising Arbitral Proceedings
- IBA guidelines of Conflicts of Interest in International Arbitration
- IBA Rules on the Taking of Evidence in International Arbitration
- IBA Guidelines on Party Representation in International Arbitration
- As you already know the parties can chose their own procedural rules, but there are some areas where the international conventions, model law, and institutional procedural rules are all silent. These include things such as the taking of evidence and party representation. In the taking of evidence, the model law and the procedural rules generally just say the tribunal can do whatever it feels is appropriate. So what should the tribunal do? Private bodies such as the international bar association fill this space through the development of guidelines. Many of these guidelines have been so widely adopted in international commercial arbitration that they have been elevated to best practice and are increasingly being considered as soft law. Just be aware that these guidelines exist. There is no need for you to read them or study them.

Week 7- Mental Health and the Law

- Mental health is "a state of well-being in which every individual realises his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community." (WHO)
- Stress and depression are inextricably connected to law school and the law profession
- *"the solution to law student distress seems much more likely to be found in programs that help students create buffers against stress and depression"* Peterson & Peterson, 2009
- *"Law school thus appears to be an ideal site to develop and embed prevention and early intervention measures to address mental health difficulties that similarly affect law students and legal practitioners"* Larcombe & Fethers, 2013

There are many ways to maintain good mental health. Today we will focus on:

- Exercising strengths
- Creating a Life Worth Living - Values
- Help Seeking
- Helpful Actions
- Mindfulness

Week 8- Advocacy and Dispute Resolution

What is an advocate?

- Oxford Dictionary: 'the public support for or recommendation of a particular cause or policy' or 'the profession or work of a legal advocate.'
- Legal Dictionary: 'the art of conducting or presenting proceedings before a court. An advocate's work comprises argument or making speeches, examining witnesses and preparation and planning for these tasks.'
- Text book: 'The role of a legal advocate is to assist the client in continuously reassessing what they need and want (and why), in light of what is possible and what the costs may be, and then to advance that goal.'

The Role of an Advocate: What do Lawyers do?

- '*Lawyers work as advocates in a number of different ways and forums and this activity is much broader than simply making arguments in court. As advocates for our clients we represent, we facilitate, we challenge, and we mobilise. As we do these things we persuasively influence the minds of others. This process of influence is not limited to court, but rather takes place in a range of environments such as meetings, negotiations, mediations or even for example, on the phone or in a letter. Advocacy is in effect the art of persuasion and involves the ability to develop and present a well reasoned and logical argument in a range of different contexts, based on your legal knowledge and an expert analysis of the client's problems'*

Effective Advocacy

Be Prepared

- Preparation is critical to effective lawyering generally, but is particularly important for effective legal advocacy. Being prepared means that you:
    - know the facts.
    - know the law.
    - have explored and evaluated a range of options and avenues for action.
    - have developed a clear, logical argument.
    - have collected relevant evidence.
    - know the other side's case, what they are likely to propose and have evaluated the implications.

Be Engaging

- Be mindful of your audience. Who are you trying to persuade?
- Engagement is central to the art of being persuasive.
- An engaged audience is one that can be persuaded because they are involved and participating in the process of communication, they are understanding (or letting you know if they don't understand), and they are actively considering and responding to your argument

Written Advocacy

- Be short
- Be direct
- Be persuasive
- Persuasive advocacy is clear, brief and to the point.
- Be mindful of word choice.

- Focus on choice of nouns and verbs that most powerfully convey your point.
- Avoid superfluous words. This contributes to clarity.
- Be logical → ensure your material is well structured and logical. This will make it persuasive.

What does 'be logical' mean?

- Your conclusion must be supported by argument – possibly more than one.
- Each step supporting your argument is a premise.
- Each premise must relate to and support your conclusion.
- Each premise must be true. In law, generally, a premise will be true if it is supported by authority. In fact, a premise will be true if there is sufficient evidence to establish its truth.
- One of the most flawless approaches to persuasion in oral argument in arbitration is to say to the Tribunal. Madam President, I will establish there are four reasons why this arbitration agreement is valid and ought to be enforced. You need only be convinced of any one of these for you to have jurisdiction to hear and determine the dispute and render an enforceable award.

Written Submissions

- Written submissions allow the reader to:
  - see the issues in sharp focus
  - see the issues in the full context
  - consider the arguments ahead of oral argument and identify vulnerabilities
  - contextualise oral arguments
  - "provide a buttress in maintaining the structural integrity of argument during oral presentation".
- Margaret McMurdo, President Queensland Court of Appeal.
- *Advice common to all written submissions - Margaret McMurdo, President, Queensland Court of Appeal, 175-177:*

1. Written submissions should be carefully proof read. Avoid sloppy punctuation, incorrect spelling and unnecessarily complicated sentence structure. Your submissions must be accurate, succinct and grammatically correct. Errors of this nature may distract the judge from the merits of your argument.
2. KISS (Keep it simple) and ERR (Edit, Review and Refine)
3. Statements of law and facts are accurate
4. When there are competing legal arguments, do not merely refer to the cases that support your contention. Show the judges what an erudite and honourable lawyer you are by referring to the competing authorities. Then explain why the unhelpful authorities should be distinguished or not followed and your line of argument preferred before the other party's advocate has a chance to get under sail.
5. Do not quote large passages – limit yourself to critical portions.
6. Do not paraphrase statutory language – keep to the precise words and phrases of the Act
7. State the legal principle relied upon, cite authority for the principle (especially the pinpoint page reference), and explain its relevance to your argument. Principal arguments should be clearly and succinctly made in the body of the submissions.
8. In discussion of cited cases it is ordinarily unhelpful and poor advocacy to set out the facts of the case at length.
9. Make sensible concessions.

Oral Advocacy

How to be Engaging

- Don't be boring.
- An engaged audience is rarely bored.
- Knowing your audience is critical to engaging them.
- Don't be dramatic. Use humour and narrative where it is appropriate.
- Be prepared to converse (to and fro), but do not be informal.

Speak Well

- Oral advocacy involves a clear, logical structure to argument that is on point, focussed, clearly stated and concise.
- However, advocating face-to-face with someone requires consideration of a range of additional strategies that support engaging your audience.
- Be physically present.
- Be confident.
- Use your voice.
- Pace yourself.
- Use silence strategically.
- Make eye contact.
- Be interesting.
- Harness emotion.

Types of Advocacy

Adversarial Advocacy

- Adversarial advocacy is premised on winning. It is characterised by a variety of factors including position taking, a focus on strict legal rights and maximising the chance of victory.
- Adversarial advocacy has its place in our legal system but is generally only one small part of a lawyer's tool-kit. The daily work of most lawyers involves a broad range of skills including practice of non-adversarial advocacy skills.
- Adversarial advocacy is based on a one party losing at the expense of another party winning.
- **Non-adversarial advocacy** proceeds on the basis that a matter can be cooperatively settled.

Non-Adversarial Advocacy

- Non adversarial advocacy is characterised by:
- A deeper and closer working relationship with the client
- Helping a client engage with their conflict and coming up with strategies to manage that conflict
- A focus on negotiation
- Considering the interests of the other side and those external to the dispute
- Understanding what a 'best outcome' might be
- An advocacy role that appreciates relational, emotional and psychological issues

Lawyers as Advocates

- The approach lawyers bring to the task of advocating on behalf of a client, and the sorts of skills needed, vary depending on the context of the advocacy.
- However, there are a number of keys to effective advocacy that are relevant no matter what the approach or context is.

- Some people are born with the qualities of a good advocate, but anyone can learn to be more persuasive.

Supporting a Positive Professional Identity

- Advocacy can support a positive professional identity for lawyers because:
  - Legal advocates help people who don't have the knowledge, skills, or expertise that we have.
  - As advocates we negotiate and argue for people - we speak, act and write on their behalf.
  - We help people pursue their needs and interests, legal rights and entitlements.
  - We support them in addressing their concerns and in achieving dignity through empowerment.
- As legal advocates we help people make informed decisions and develop options.
- We give people choice and control.
- We help people resolve complex issues and disputes.
- Advocacy is a very positive role for lawyers in society.

Week 9- Communication skills for Dispute Resolution Practitioners

Why?

- Communication skills are critical for all lawyers.
- Many disputes originate from communication issues: namely either a lack of communication or misunderstandings in communication.
- Effective communication isn't easy.
- It is a skill but not an innate one.
- Effective communication requires understanding (yourself and others), empathy and flexibility.

Communication

- The exchange of thoughts, messages, or information, as by speech, signals, writing, or behaviour. www.thefreedictionary.com
- Our communication style is a culmination of:
  - Personality
  - Culture &
  - Training

- U = IQ + EQ + CQ

Personality

Understanding the Person you are communicating with

- DISC Model
  - Director
  - Influencer
  - Stabiliser
  - Conscientious
- We are all made up of a mixture of these approaches, but some dominate others.

Director

- Extroverted and task oriented
- Driven by results, recognition and challenges.
- Confident.
- Takes the lead.
- Effects change.
- May appear arrogant under pressure.
- May use adversarial approaches.
- Not always good team players.

To communicate well with a director:

- Capture their interest.
- Gain their respect.
- Avoid direct challenges to their control.
- Focus on facts, concrete concepts and a systematic approach.
- Active listening is essential.
- Compliment, recognise.
- Don't waste their time, waffle or be too hesitant.

- Avoid to much focus on feelings and emotions.

Influencer

- Extroverted and people-oriented.
- Like change, new ideas, cooperation.
- Fear disapproval.
- Outgoing, enthusiastic, optimistic.
- Big picture oriented/not so good on the detail.
- May appear disorganised.
- May talk too much and listen too little.
- May speak before they think!

To communicate effectively with an influencer:

- Reflect their optimism and enthusiasm.
- Acknowledge the big picture/global perspective.
- Acknowledge feelings and creativity.
- If being critical offer an alternative idea or solution.
- Avoid becoming bogged down in detail too early.

Stabiliser

- Introverted and people-oriented.
- Reserved but work well in teams.
- Accommodating of others.
- Slow to recover if hurt.
- Prefer steady as opposed to sudden change.
- Need security, fear isolation and standing out.
- Patient, loyal, tactful.
- Might be prone to procrastinate.

To communicate effectively with a stabiliser:

- Take time to develop a rapport.
- Ask for their ongoing feedback – what do they think?
- Be patient with eg silence – don't fill the gaps!
- Make them feel valued.
- Minimise risk eg let them take advice or confer with others.
- Lead them with a systematic approach.
- Explain your position clearly.
- Expect them to take adversarial approaches personally.

Conscientious:

- Introverted and task-oriented.
- Need high standards, to be appreciated, to produce quality work.
- Fear criticism and imperfection.
- Reserved and focussed on immediate task.
- Systematic approach to work.
- Prefer to plan for change.
- Can be very cautious and inflexible.
- Need help to adapt and think creatively – and work outside an adversarial framework.

To communicate effectively with a conscientious person:

- Be punctual, organised, prepared, ethical and thorough.
- Use an agenda and follow it.
- Focus on concrete concepts and facts.
- Support ideas and proposals with evidence.
- Emphasise the quality of your argument.
- Deliver what you promise.
- Expect them to take criticism personally.

Reactions to Conflict "Amygdala Hijack"

Fight

- Shouting
- Slamming doors
- Finger pointing
- Invading personal space
- Hanging up
- Foot stomping
- Picking arguments

Flight

- Silence
- Walking away
- Shutting down
- Seeking a defender
- Refusing to act
- Being 'frozen'
- Avoiding conflict

Conflict's Impact on Communication

Fight

- Insist on own way
- Criticising others
- Humiliating others

Flight

- Say yes when want to say no
- Playing victim
- Pleasing & pacifying others

Fight and Flight

- Deliberately making mistakes
- Sulking, Sarcasm, going slow, sabotaging work

How to Respond to Conflict

- "People behave badly when they are feeling out of control and powerless.
- Powerful people don't threaten – they act.
- Powerless people threaten. The most effective way to influence their behaviour is to empower them". *John Haynes*

Culture

Dealing with Cultural Differences…

- High/Low context cultures
- Individualist/Competitor
- Collectivist/Cooperator

Dimensions of Culture

The Mind and Heart of the Negotiator 4/e (Thompson)

Cultural Dimension		
Goal: Individual versus Collective Orientation	Individualists/Competitors: Key goal is to maximize own gain (and perhaps the difference between oneself and others); source of identity is the self; people regard themselves as free agents and independent actors.	Collectivists/Cooperators: Key goal is to maximize the welfare of the group or collective; source of identity is the group; individuals regard themselves as group members; focus is on social interaction.
Influence: Egalitarianism versus Hierarchy	Egalitarians: Do not perceive many social obligations; believe one's value is determined by the resources one can offer, usually economic or intellectual.	Hierarchists: Regard social order to be important in determining conflict management strategies; subordinates expected to defer to superiors; superiors expected to look out for subordinates.
Communication: Direct versus Indirect	Direct Communicators: Engage in explicit, direct information exchange; ask direct questions; are not affected by situational constraints; face-saving issues likely to arise.	Indirect Communicators: Engage in tacit information exchange, such as storytelling, inference-making; situational norms.

Source: Brett, J. (2007). *Negotiating globally: How to negotiate deals, resolve disputes, and make decisions across cultural boundaries (2nd ed.)*. San Francisco, CA: Jossey-Bass.

Training

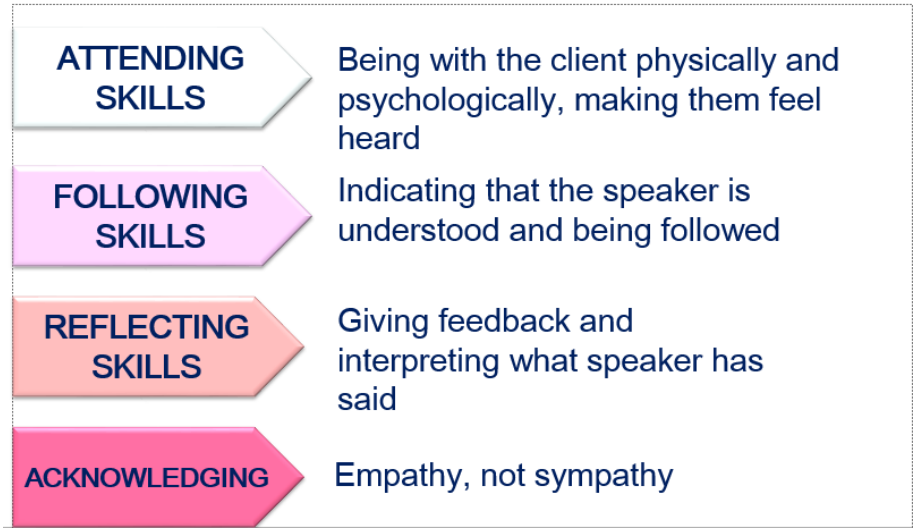
Communication Skills for Dispute Resolution Practitioners:

- Non-verbal communication
- Active listening
- Paraphrasing and summarising
- Identifying interests as well as positions
- Questioning
- Reframing

Non-verbal communication

- Posture
- Eye contact
- Use of voice
- Tone
- Pace
- Vocal variation
- Body language

Active Listening



When we listen actively people will:

- adopt the same approach
- calm down
- change pitch & tone
- feel "better" "happier" "more confident"
- tell the story in a shorter period of time

When we listen "interruptively" people will exhibit:

- increased feelings of stress and anxiety
- frustration
- disappointment with the exchange
- anger
- discomfort
- confusion &
- need more time to recount their story

Examples of reflecting skills

- Boulle and Alexander (2012):
- "You sound like …"
- "It seems that …"
- "What you are saying is …"
- "The main concern for you is …"
- "So your point is that …"

Do say

- "I can see you're feeling really upset"
- "I can see you're very frustrated"
- "I can see that you've had a bad time lately"

Don't say

- " I understand how you feel…"

Paraphrasing and summarizing

- Restating back to someone what they have said
- Briefly recapping the important features
- Identifying the dominant feelings
- This technique can:
  - provide a compact, neutral organised version of discussions,
  - pick up and highlight key issues,
  - remind the parties progress is being made,
  - provide acknowledgement of perspectives, needs and interests.
- Good summarising requires an ability to:
  - retain important information
  - recall and condense important information
  - make appropriate selections of information
  - present the information in a way that is **mutually** acceptable
- Boulle and Alexander (2012)

Positions v Interests

- Position
  - Statement of what client says they want
- Interest
  - Why they want it
  - Underlying concerns needs/wants/fears

Reframing

- Reframing is more than summarising because it involves more than just restating what a party has said.
- Reframing is used not only to change the words being used but also the context of the party's statement
- When done successfully it can lead to a change in perspective or perception on the parties' part and this altered attitude or view can lead to changed behaviour.

Different Objectives of Reframing

- Taking out the sting/detoxifying the statement.
- Shifting from a position to interests.
- Mutualising the problem.
- Removing emotive language.
- Shifting from the past to the future.
- Helping parties move forward.
- Moving from a negative to positive perception.

Useful reframes of negative terms:

- 'He's telling lies' could become 'so you doubt the accuracy of some of the points made?'
- 'I can't stand it when …' could become 'so you feel uncomfortable with …'
- 'It's all her fault' could become 'so you had different expectations of her?'
- 'He totally ignored me' could become 'so you are saying there was inadequate communication or consultation?'
- 'I have my rights' could become 'so you are looking to exercise your options?

Questioning

- There are many different styles of questioning:
- Open questions
- Focused questions
- Closed questions
- Clarifying questions
- Empathetic questions
- Probing questions
- Leading questions
- Suggestive questions

Open questions

- Purpose: To achieve general disclosure and exchange of information in an open-ended way. To get discussions under way.
- Example: 'James could you tell us in your own words why you don't want to build a fence between your property and Melinda's?'

Closed Questions

- Purpose: To control the disclosure of information. To illicit a positive or negative response.
- Example: 'Can you tell me Melinda whether you have obtained a quotation for the cost of building the fence?'

Clarifying questions

- Purpose: To verify or correct the listener's understanding of what is being said. To ensure accuracy of understanding of facts, issues, needs, concerns and priorities.
- Example: 'So James, are you saying that you consider the quote obtained by Melinda to be too expensive for your current budget?'

Leading questions

- Purpose: to lead the speaker to the listener's pre-determined outcome, to illicit information or perspectives that the listener already knows.
- Example: 'Now Melinda, you were the person responsible for obtaining three different quotes for the fence, is that right?'

Suggestive Questions

- Purpose: To suggest possible or obvious options for settlement.
- Example: 'James, would it be possible for you to find a viable alternative way of paying for the fence – such as taking out a personal loan for example?'

Effective Communication: The Environment

- The environment is very important to achieving effective communication.
- Macro and micro environment issues affect the way people communicate.

Week 11- Lawyers as managers and resolvers of disputes and conflicts

Lawyers as Managers and Resolvers of Conflict and Disputes

- Clients come to see lawyers about disputes they are having
- They expect the lawyer to provide advice on how best to handle that dispute
- Law is a people profession and people are presenting with their conflicts/disputes
- A knowledge of conflict theory can help lawyers perform their role

Conflict

Positives

- Prevents stagnation
- Allows problems to be closely examined
- Motivates problem solving
- Assists in personal growth
- Releases tensions
- Encourages creativity and innovation
- Find better ways to do things

Negatives

- Provokes anger/fear/aggression
- Relationship breakdowns
- Can hinder communication
- Make provoke self-destructive behaviour
- Tillett, pages 14 and 15; Condliffe, pages 19-20.

Terminology

- **Conflict theory literature distinguishes between 'conflict' and a 'dispute'.**
- **Conflict**: A conflict arises when two or more people or groups perceive that their values or needs are incompatible – whether or not they propose, at present or in the future, to take any action on the basis of those values or needs.
- **Dispute**: A dispute arises when two or more people or groups perceive that their interests, needs or goals are incompatible and they seek to maximise fulfilment of their own interests or needs, or achievement of their own goals (often at the expense of the others).
- These definitions highlight that a conflict is wider than a dispute.
- Parties can be in conflict with each other without any actions being taken
- A dispute therefore is a manifestation of conflict
- Note, there are many different definitions of conflict/dispute, but these are the ones we will be running with in this course.

Tillett identifies Different Forms of Conflict

- **Interpersonal conflict** - conflict that occurs between two or more individuals.
- **Intrapersonal conflict** – conflict that arises within an individual.
- **Intergroup conflict** – conflict that occurs between two or more groups.
- **Intragroup conflict** – conflict that occurs within members of a group.

- Interpersonal – Rachael and James are going to get lunch. Rachael wants sushi, James wants burgers.
- Intrapersonal – Lawyer filling in time sheets, should I add a bit of extra time
- Intergroup – Labour v Liberal federal election
- Intragroup – LNP internal disagreement over particular policies

Perception versus reality

- Does conflict exist only when values and needs are objectively incompatible?
- What if one (or both) of the parties believe (wrongly) that their values and needs are incompatible with another? Can conflict still be said to exist?
- Tillett and French note that conflict is essentially based on perceptions (rather than reality) and feelings (rather than facts). Do you agree with this analysis?
- What are the implications of your answer for legal practice?
- Yes, conflict can still be said to exist, because the definition of conflict refers to the perception of incompatible needs and wants, rather than any objective incompatibility.
- Importance to legal practice – important to understand client's perceptions of whether they are in conflict or not and reality test those perceptions

Models of Conflict

The Deutsch Model

Incompatible Behaviour	**Actual conflict**	**False Conflict**
Compatible Behaviour	Latent Conflict	Non-Conflict
	Conflicting Interests	Common Interests

The Duffy Model

Subjectively Perceived Conflict	**Actual conflict**	**False Conflict**
No subjectively Perceived Conflict	Latent Conflict	Non-Conflict
	Objective Conflict	No Objective Conflict

Reflecting on Conflict

- Identifying examples of
  - actual conflict,
  - false conflict,
  - latent conflict and
  - non-conflict.
- James and his brothers need to use the one family car
- Actual – need to use the car at the same time, travelling to different places, no public transport available
- False – arguing about use of the car. We are both going to the same party
- Latent – Haven't though about how we are getting to a party yet. Both assume that the car is free for them to use.
- Non-conflict – Both know we are going to different parties. James catches bus, Simon takes car.

Sources of Conflict

- Data Conflict
- Interest Conflict
- Structural Conflict
- Value Conflict
- Relationship Conflict

Morre's Circle of Conflict

- Interest Conflict – perceived incompatible interests of the parties(substantive, procedural, psychological)
- Data Conflict – perceived incompatibilities of data (lack of information, different levels of info)
- Relationship Conflict – inadequate or broken down communication between the parties arising from misperceptions, emotions, moods etc
- Structural Conflict – result from systemic or structural problems (unequal control, power, ownership etc)

- Value Conflict – perceived incompatibility of fundamental values or beliefs
- Refer to Moore, Sphere of Conflict

Lawyers Role

- What then is the lawyer's role with respect to conflicts and disputes?
- Quick Question – *When a person comes to see a lawyer, are they usually looking for help with a conflict, or a dispute?*
- As lawyers, should we help clients resolve a conflict, or manage a conflict?

Conflict Resolution v Conflict Management

- **Conflict resolution** refers to the terminating of a conflict by going to the root of the problem. Conflict resolution, as opposed to mere management or settlement, points to an outcome that, in the view of the parties involved, is a permanent solution to the problem...conflict resolution deals with the total human being, encompassing personal and cultural differences, and deals with this person in the total society, encompassing social differences.
    - (Burton, 1989, p2)
- **Conflict management** involves implementing strategies to limit the negative aspects of conflict and to increase the positive aspects of conflict. This may lead to an outcome that the parties see as a solution, even though the underlying conflict continues to exist.
    - (Field, Duffy & Huggins, 2014, p359)
- Should lawyers be conflict resolvers or conflict managers?
- What is the difference between these two roles?
- Why does Condliffe prefer the term conflict management?
- Lawyers should try and resolve conflicts where possible, but where not, they should try and manage conflict
- Some conflicts can't be resolved, but can be managed
- Some conflicts shouldn't be resolved and should be escalated.

How can a lawyer help a client manage conflict

- Conflict can be managed according to:
- Rights
    - **Rights** are concerned with entitlements, credibility, merits and position. It is a permission to do something, or an entitlement to goods, services or treatment. Legal rights are highlighted in legislation and the common law.
- Power
    - **Power** is the capacity to get things done and the ability to exercise control over people, events, situations and oneself. Power is about advantage and superiority of position.
- Interests
    - **Interests** are concerned with needs and desires. Interests can be contrasted with positions. A position describes *what* a party wants. An interest describes *why* a party wants something.

ADR as a response to conflict

- If conflict is to be managed around rights, power and interests a lawyer can use their effective analysis of a conflict or dispute to help a client evaluate different forums in which the conflict can be resolved.

- Different forums will lend themselves to managing/resolving conflicts in different ways.

What is power?

- Power = the ability to affect the perceptions, attitudes and behaviour of others (Boulle & Alexander, 2012, 299).
- Negotiating power is the ability to identify and use sources of power to help negotiate a favourable outcome.

Negotiating Power

- Negotiating power is the ability to influence others.
- The concept of negotiating power is relevant to all the dispute resolution processes on the spectrum.
- Power is based on perception - what the other party thinks about your power is directly relevant to how much power you actually have.
- Fisher distinguishes between:
    - Real negotiating power (which is the power you actually do possess), and
    - An illusion of power (which involves the other side believing you have power you actually do not possess).
    - Negotiators need to assess their negotiating power in the context of the other side's power.

Assumptions about power in dispute resolution contexts

- (Boulle & Alexander, 2012, 299):
- Power disparities almost always exist.
- Contexts for power imbalances are many and different.
- Power is a complex phenomenon – everyone has at least some power.
- The perception of power can be more important than the objective conditions of power.

Sources of Power

- Financial.
- Knowledge, understanding.
- Ability to harm or reward.
- Access to authority.
- Access to the media.
- Legal or moral.
- Reputational needs.
- BATNA/WATNA (risks).
- Financial – I can spend more money on this than you
- Knowledge – I have more information about this than you
- Reward or coercive power
- Access to authority – lawyers/experts…I have powerful allies
- Legal or moral – the law is on my side. I am acting in accordance with higher values
- BATNA – I have a strong fall back position

A mediator's role where there are power disparities?

- To remain neutral and objective? What will happen then?
- To intervene into the content of the dispute to rectify power imbalances? What happens to mediator neutrality?

- A middle path? A real possibility?
- See MSB Practice Standards section 6 “Power and Safety”
- Much interpersonal conflict is hyped up by individuals making assumptions about the actions of others, and the meanings of those actions (perceptual error and judgmental bias).
- “Peace is not the absence of conflict, but the ability to cope with it.”

Week 12- Dispute resolution and psychology

Intro

- Law is about people
- Psychology is the study of the human mind and human behaviour
- Therefore, there are benefits in law students and lawyers understanding some 'psychology basics' and appreciating the inter-disciplinary nature of any law related job.
- Given that lawyers deal with people on a regular basis, and often with people who are in conflict, it is incredibly important to understand *why* people behave, think and feel in certain ways. By understanding the drivers behind why people think and act in certain ways, we can gather a better understanding as to why people engage in conflict/disputes. We can also then begin to appreciate what a person might need to think, see or hear in order to help them resolve a conflict or dispute.
- The law is an applied discipline, it is more than what is written in cases and legislation. It is applied to the behaviour of people.
- A common misconception of psychology held by lawyers, is that psychology only concerns itself with mental health issues, such as depression, anxiety, stress. These issues fall under the heading of clinical psychology, which is a particular psychological specialisation.

What is psychology?

- Psychology is a scientific discipline that studies human behaviour and the mental processes that underlie it.
- There are many different specialities and sub-disciplines of psychology. For example:
    - Behavioural psychology
    - Developmental psychology
    - Organisational psychology
    - Clinical psychology
    - Educational psychology
    - Positive psychology.

Psychology methods

- Psychological studies usually employ empirical research methods, which use observation and experience to gain knowledge.
- Empirical research in psychology is often characterised as either quantitative (the collection and analysis of numerical data) or qualitative (the collection and analysis of data in the form of interviews, focus groups and/or observation of behaviour).

Law

- Law doesn't operate in a vacuum.
- Law is an applied discipline.
- Law is a tool of social organisation, regulating people's conduct.
- The effect of law upon people is as much a psychological issue as it is a legal one.
- Psychology can inform the development and the implementation of the law for the benefit of society.

Law and Psychology

- Legal psychology takes finding from social and cognitive psychology and applies them to the actors and processes that make up a legal system
- Forensic psychology is focussed on the interaction between psychology and the criminal law (ie eye witness testimony, mental incapacity, insanity etc).
- Legal Psychology + Forensic Psychology = Law and Psychology
- Psychology as a field of study is much larger than mental health issues. That particular body of psychology is known as clinical psychology

Cognitive Psychology

- Many of the concepts we will deal with this week are strongly associated with the field of cognitive psychology
- Cognitive psychology is focussed on the internal working of the mind. It is the study of how people perceive, remember, think, speak, and solve problems (Psychology: Making Connections by Gregory Feist and Erika Rosenberg)

Intelligence

- No universal definition
- 'the cognitive ability to learn from experience, to reason well, to remember important information, and to cope with the demands of daily living.'
    - Robert Sternberg, The triarchic mind: A new theory of human intelligence (New York: Viking, 1988).
- This model of intelligence can be contrasted with Gardner's theory of multiple intelligences

Intelligence and some thoughts for law students

- You are all intelligent – you have to be, to be studying law at QUT.
- When law students begin law school, their academic identity becomes the highest ranking of their identities.
- Imposter syndrome!!!
- Equating intelligence with good grades and being a good lawyer is really problematic
    - What if you don't do well in a law exam?
    - What if you lose an important case for a client?
    - What if you are unsure how the law relates to a particular issue and what a judge may decide?
- Intelligence is more than just 'book smarts'

Linguistic	Sensitivity to the spoken and written language, the ability to learn languages and the capacity to use language to accomplish certain goals.
Musical	Skill in the performance, composition and recognition of musical patterns, and particularly pitch, rhythm and timbre.
Logical-mathematical	The capacity to analyse problems logically, carry out mathematical operations and investigate issues scientifically.
Spatial-visual	The capacity to perceive the world accurately, to recognise and manipulate the patterns of wide space as well as the patterns of confined areas.
Bodily-kinesthetic	The ability to use one's body for expressive as well as goal directed purposes, and the capacity to work skilfully with objects.
Interpersonal	The ability to notice and make distinctions among other individuals and (in particular) among their moods, temperaments, motivations and intentions.
Intrapersonal	The ability to understand oneself, to have an effective 'working model' of oneself – including comprehending one's own desires, fears and capacities, and to draw upon them as a means to understanding and guiding one's behaviour.
Naturalist	Having a greater sensitivity to nature and a sense of place within it, the ability to nurture and grow things, a greater ease in interacting with animals and expertise in the recognition and classification of numerous species of the environment.

Multiple Intelligence

- People are intelligent in many different ways.
- It doesn't make sense to compare different intelligences and say that one is better than another.
- Instead, we should link our intelligence strengths to our particular chosen mode and area of lawyering.
- Instead of asking 'how smart am I' ask 'how am I smart'.
- This is an important step to maximising a positive professional legal identity.

Emotional Intelligence

- Strong link and overlap between intrapersonal and interpersonal intelligence and emotional intelligence
- Mayer, Caruso and Salovey suggest that:
- [e]motional intelligence refers to an ability to recognise the meanings of emotion and their relationships, and to reason and problem solve on the basis of them. Emotional intelligence is involved in the capacity to perceive emotions, assimilate emotion-related feelings, understand the information of those emotions, and manage them' (Mayer, Caruso & Salovey, 2004).
- EQ can be broken down into 4 main competencies

- Perceiving emotion
- Understanding emotion
- Managing emotion
- Using emotion

Emotional Intelligence and Difficulties

- Lawyers as managers of conflict and non-adversarial advocates see value in addressing the emotional content of a dispute
- The ability to empathise with a client is an important emotional intelligence skill
- The difficulty for lawyers is to engage in accurate meaningful empathy, whilst maintaining objectivity and professional boundaries
- Clients need to feel that their dispute has been heard and understood. Empathy is essential in achieving this.
- Boulle correctly notes that '[e]mpathy does not signify agreement, nor does it amount to sympathy with, or compassion for, another. It involves convincing a person that the listener has entered their world of perceptions, if only temporarily'
- sympathy conflates the feelings of a judge with the feelings of the participant. This is reflected in the Greek origin of the word sympathy (sympatheia = to suffer together).

Transference/Countertransference

- Like emotional contagion and emotional flooding, transference and countertransference are common in legal practice.
- They are not necessarily problematic as long as lawyers appreciate when they are at play.
- Lawyers need to closely monitor their own reactions to clients, based upon their previous experiences and unresolved issues.

Memory

- Law students and lawyers are exposed to a large amount of written and oral material and are sometimes expected to recall that information.
- Lawyers will often be working on a number of legal matters at the same time. There can be a lot to remember about each matter.
- Having a good memory can help with competent and skilful lawyering.
- Memory relates to an individual's ability to store, retain and recall information
- According to cognitive psychology, memory is passed through three phases:
- Sensory registers,
- Short term memory, and
- Long term memory.
- Miller (1956) noted that short term memory contains 'seven, plus or minus two' slots, into each of which one chunk of information can be placed.
- Short term memory can be increased through 'chunking'
- Getting info in, holding on to it and then getting it back out.
- Sensory register – hold information about a stimulus for approximately half a second. Stimuli that make a greater impression are passed on to STM.
- The things that you are processing in your memory at any one time is the short-term memory. This is a limited store for things that you can think about at one time -- typically around seven.

- Things get into short-term memory from two directions: directly from external senses or recalled from long-term memory. 'Thinking' as an act contains much switching of items to and from long-term memory.
- long-term memory can store much larger quantities of information for potentially unlimited duration (sometimes a whole life span). Its capacity is immeasurably large.
- Short term memory becomes long term memory through regular use, sequencing and strong emotional experiences

Perceptual error and Judgmental bias

- Perceptual distortion is a natural side effect of being in a conflict and a major force preventing effective conflict resolution:
    - Mistake interpretation for sense impression
    - Fundamental attribution error
    - Egocentric beliefs about others' backgrounds and experiences
    - Egocentric beliefs about intent of others
    - Fallacy of oversimplification
    - (Coltri, Alternative Dispute Resolution: A Conflict Diagnosis Approach)

Week 13- Ethics

Ethical decision-making is fundamentally important to lawyering

- Being able to make ethical decisions as a lawyer requires more than just a knowledge of the rules of ethics.
- The rules are sometimes ambiguous, or simply don't clearly apply to a situation.
- A knowledge of the rules must be supported by a personal ethical framework; a professional moral compass.

Why are legal ethics so important?

- Ethical practice is the foundation of legal professional practice because 'lawyers occupy a critical and sensitive place in the functioning of a society governed by the rule of law' (QLS).
- Lawyers owe their highest ethical duty to the Court and must be 'fit and proper' persons to hold that office.
- Lawyers' ethics impact on public confidence in the profession and in the administration of justice.

What are lawyers' ethics?

- 'Principles and values which, along with conduct rules and common law, regulate a lawyer's behaviour' (QLS website).
- Professional guidance as to what is right and wrong in the conduct of daily practice.
- A reason for the public to trust the integrity of our work and of the legal system.
- A quality benchmark through an enforceable regulatory system.

The discrepancy between public opinion and legal professional reality.

- The daily stresses and rigours we face as lawyers in ensuring that our professional conduct is ethical are not readily recognised.
- The mismatch between the way we view ourselves as an ethical profession, and society's view of the profession, can have negative implications for the development of a positive professional legal identity.

Sources of lawyers' ethical obligations

- Extrinsic sources – such as the Australian Solicitors Conduct Rules (ASCR) and the Legal Profession Acts.
- Common law – as found, for example, in disciplinary hearings.
- Intrinsic sources – including personal values and principles of honesty, courtesy, loyalty and competence.

Ethical decision-making skills

- Ethical decision-making skills are complex and take time and experience to develop.
- Most ethical issues arise in the heat of the moment.
- Even the most experienced legal professionals are challenged by ethical dilemmas in their daily work.
- To fulfil our ethical obligations as lawyers, we need to remain committed to life-long learning about ethics and ethical decision-making.

Ethics in dispute resolution

- Lawyer's ethical duties when acting for clients in dispute resolution environments are the same as their general ethical obligations in professional practice.
- For example, the Australian Solicitors Conduct Rules cover the behaviour of lawyers in dispute resolution processes because 'court' is defined as including '(h) *an arbitration or mediation or any other form of dispute resolution.*'
- (ASCR Glossary of Terms).

Australian Solicitors' Conduct Rules (ASCR)

- Commenced on 1 June 2012.
- Introduced a new national system of regulation of the professional conduct of solicitors in every State and Territory of Australia.
- The rules specifically apply to the work of solicitors.
- A 'solicitor' is: '(a) an Australian legal practitioner who practises as or in the manner of a solicitor; or (b) an Australian registered foreign lawyer who practises as or in the manner of a solicitor'.
- (ASCR Glossary of terms).

The ASCR ethical rules

- The ASCR articulate ethical rules in relation to:
  - Fundamental duties
  - Relations with clients
  - Advocacy and litigation
  - Relations with other solicitors, and
  - Law practice management.

Paramount duty

- 3. Paramount duty to the court and the administration of justice
- 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

4.Other fundamental ethical duties

4.1 A solicitor must also:

- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
- 4.1.2 be honest and courteous in all dealings in the course of legal practice;
- 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
- 4.1.4 avoid any compromise to their integrity and professional independence; and
- 4.1.5 comply with these Rules and the law.

7.Communication of advice

- 7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

ASCR definitions

- "court" means:
- (a) any body described as such;
- (b) any tribunal exercising judicial, or quasi-judicial, functions;
- (c) a professional disciplinary tribunal;
- (d) an industrial tribunal;
- (e) an administrative tribunal;
- (f) an investigation or inquiry established or conducted under statute or by a Parliament;
- (g) a Royal Commission;
- (h) an arbitration or mediation or any other form of dispute resolution.

Advocacy and litigation

- 17. Independence – avoidance of personal bias
- 17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable
- **19. Frankness in court**
- 19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.
- 19.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.
- 19.3 A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

Common law and fiduciary duties

- ASCR clause 2.2 says that ethical practice for lawyers is regulated by both the rules themselves and also the common law.
- Common law duties include duties of confidentiality and privilege, as well as fiduciary duties.
- The fiduciary relationship between a solicitor and their client creates a legal and ethical relationship of trust.
- It also creates a responsibility for the fiduciary to use 'the power that knowledge and position give' effectively and justly for the benefit of the beneficiary.

Ethics for barristers

- The Australian Bar Association is a national body for the Independent Bars of the States and Territories.
- The Association has developed model conduct rules for barristers that are implemented by the Bar Associations of the States and Territories.

Barristers' conduct rules

Section 15 Barristers' work consists of:

- (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution

Definitions: **Section 116 'court'**

- means any body described as such and all other judicial tribunals, and all statutory tribunals and all investigations and inquiries (established by statute or by a Parliament), Royal Commissions [the Crime and Misconduct Commission/ICAC or equivalent], arbitrations and mediations.

Barristers' advocacy

- 'Lawyers who plough on in the traditional way do so at their peril. The peril is that they will lose their clients. They will end up with dissatisfied clients. Word will get around. They will be perceived to be interested principally in large fees. I think that a clear-sighted recognition of the ADR trend is important to the future of the Bar'. Justice de Jersey (1990)

Guidelines for lawyers in mediations

- "Mediation is not an adversarial process to determine who is right and who is wrong. Mediation should be approached as a problem-solving exercise. A lawyer's role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support….The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result " pp6-7.
- Law Council of Australia, *Guidelines for Lawyers in Mediations* (March 2007) http://www.lawcouncil.asn.au/programs/national-policy/alternative-dispute-resolution/documents.cfm

Further guidelines…

- "To participate in a non-adversarial manner: Legal representatives are not present at mediation as advocates, or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal representative who does not understand and observe this is a direct impediment to the mediation process… ."
- The Law Society of New South Wales, *Mediation and Evaluation Information Kit* at para 2.3, p15 http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf

Honesty

- *Legal Services Commission v Mullins* [2006] LPT 012 (Legal Practice Tribunal Brisbane, 23 November 2006).

Ethics for lawyers as mediators

- Lawyers' roles in dispute resolution contexts can extend to the role of acting as a mediator.
- The role of mediator raises different and complex ethical issues such as:
  - mediator neutrality and impartiality, and
  - confidentiality in mediation.

How useful are the standards of ethical conduct in the dispute resolution context?

- They are useful as an aspirational measure – and for the development of practitioner artistry through reflective practice.
- They are not so useful as clear guides for mediator conduct or for clients who want to enforce standards.

The difference between ethical rules and ethical judgement (1)

- Ethics is really about analysis and decision-making.
- What *should* you do?
- How *ought* you to behave?
- At the figurative ethical fork in the road, *which direction* should you take?

The lawyers' moral compass

- The outer ring represents the service and justice contexts of lawyering, and the role of the profession in the administration of justice and the rule of law.
- The middle ring represents the 'stakeholders' that lawyers owe duties to including the court, the client, the colleague, and the community.
- The inner ring represents the ethical principles that drive the duties that lawyers owe: fidelity, honesty, propriety and competency.

Developing a moral compass

- Ethical problems often fall short of a clear definitive answer.
- To deal with the 'grey areas' of ethical decision-making lawyers need logical analysis skills and common sense.
- Being an ethical legal professional also requires intentional and careful development of an ethical framework.
- An ethical framework supports the processing of ethical problems and the application of the rules of professional ethical conduct.

A 9 step deliberative ethical decision-making model

- Step 1: Identify the ethical issue
- Step 2: Consider initial options
- Step 3: Identify interests
- Step 4: Consider sources of authority
- Step 5: Consider broader ethical considerations
- Step 6: Consult and seek guidance
- Step 7: Consider the consequences
- Step 8: Make a decision
- Step 9: Summarise a diary note

Knowing when to seek help

- If lawyers are ever stuck in knowing what to do about an ethical legal issue help is available:
- It's important not to bottle up concern and confusion, rather talk to someone and ask for help and advice.
- Consider asking a trusted colleague in your work area.
- Another excellent source of help and advice on ethical issues is the Law Society or Bar Association.

LLB103 Tutorials

Week 2 – Contemporary Importance of ADR:

Should there be an "A" in Alternative Dispute resolution? If so, what should it stand for?

It could stand for 'assisted' or 'appropriate' or 'additional' but not 'alternative' because disputants have a choice over how they resolve disputes and litigation is just one. (Spencer, 2011, p.3)

How do you define 'dispute resolution'?

The processes used to resolve legal disputes (whether within or outside court proceedings) and including such processes as negotiation, conciliation, mediation, evaluation and arbitration. (Spencer, 2011, p. 1)

'Alternative Dispute Resolution (ADR) is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution.' (Field, Duffy and Huggins, 2014, p. 402)

Does the training of lawyers prevent them from being effective dispute resolution practitioners?

Although most Australian universities teach dispute resolution as part of their core education, many don't have compulsory courses. As a result, the focus has been litigation. (Spencer, 2011, p. 18-19)

What is a positive professional identity?

It is not a static concept. Could be understood as the way in which an individual views themselves in a legal professional role. (Field, Duffy and Huggins, 2014, p.10)

Name the three elements that comprise a professional identity.

Personal identity, role identity, social identity (Field, Duffy and Huggins, 2014, p.11)

What are intrinsic motivations?

Motivations that are authentic to you. E.g. enjoying, or finding interest in, the intellectual stimulation of learning and analysing the law, achieving mastery as measured by internal rather than external benchmarks, working collaboratively, and achieving personal growth. (Field, Duffy and Huggins, 2014, p. 23)

What are extrinsic motivations?

Preoccupation with ones weighted average mark, the level of prestige and reputation of the university, and an emphasis on physical appearance and image. (Field, Duffy and Huggins, 2014, p. 23)

List five professional roles that you could enter with a law degree.

1) Solicitor
2) Barrister
3) Dispute resolution practitioner and trainer
4) Academics
5) Community legal service coordinator

(Field, Duffy and Huggins, 2014, p. 5-8)

What is imposter syndrome?

When one feels that everyone in the room knows more than they do or is better educated or capable than they are. (Field, Duffy and Huggins, 2014, p. 18)

Week 3

What have been the most important factors driving the move towards the adoption of informal justice processes?

- Autonomy/ degree of consensuality
- Time
- Cost
- Formality
- Procedural rules
- Preparation
- Formal documentation
- Level of legal representation and third-party intervention
- Outright winner/ outright loser
- Focus on issues important to people instead of just legal rights and obligations
- Preservation of relationships (co-operation instead of one winner and one loser)

(Field, Duffy and Huggins, 2014, p. 417)

Do alternative approaches to dispute resolution improve overall access to justice within our community?

- Yes as they more time and cost effective ('some studies show that ADR clients can save up to 95% of the costs they would have outlaid going to court'. (Field, Duffy and Huggins, 2014, p. 416)
- No… is it creating a two-tier legal system?
- No… distraction from ongoing problems in legal system?
- No… is it being professionalised by self-interested groups?

(Field, Duffy and Huggins, 2014, p. 443)

Draw the spectrum of dispute resolution forums. When you move along this spectrum, what changes can you see in the way these processes work?

Walk away or avoid the dispute → negotiation (unassisted or assisted) → mediation → conciliation → arbitration → litigation (Field, Duffy and Huggins, 2014, p. 405)

The full spectrum of Alternative Dispute Resolution processes go from informal/consensual processes where the parties retain control and decide the outcome to formal/adjudicative processes where the parties cede control and the neutral decides the outcome. (Field, Duffy and Huggins, 2014, p. 403)

What are the main differences between mediation and litigation?

Mediation

- Facilitative
- Parties speak on own behalf/ autonomy
- Voluntary
- Private

(Field, Duffy and Huggins, 2014, p. 407)

Litigation

- Judge
- Lawyers
- Not voluntary
- Public

(Field, Duffy and Huggins, 2014, p. 409)

What factors should be considered when choosing a dispute resolution process?

- Needs and interests of parties (look at positions (what do they want) and interests (why do they want it) p.421)
- Subject matter of the dispute
- Number of parties involved
- Previous conflict/ severity of dispute
- Client and their context
- Lawyers knowledge and skills in ADR

(Field, Duffy and Huggins, 2014, p. 439)

Should the legal profession be as involved in dispute resolution as they currently are?

- Lawyers may be overly adversarial
- Inadequate DR training and skills
- Knowledge of law and legal position
- Increase in knowledge of ADR skills

(Field, Duffy and Huggins, 2014, p. 441)

Should lawyers properly advise their clients of dispute resolution options? If so, how can they properly do so? (if you are unsure about the answer to this question, consider the Australian Solicitors Conduct Rules).

- Solicitors' Rules - 7 - Communication of advice:
    - 7.1- A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
    - 7.2- A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Week 8

Define mediation

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'.

(NADRAC, 2003, p. 9)

What are some of the criticisms of the evaluative model of mediation?

- A mediator who subscribes to the evaluation mediation model will attempt to assist the parties in a more robust fashion to settle based on the substantive issues in the mediation by encouraging them to consider more rights based solutions (Spencer, 2011, p.51)
- Criticised as being coercive, top-down, heavy-handed and not impartial

Why is it important that mediators be able to describe accurately which model of mediation they use?

- The models are divergent in terms of the basic principles of mediation
- Differ in the emphasis the mediator and the parties place on how they arrive at an outcome and the actual outcome of the mediation (Spencer, 2011, p.51)

What are some of the benefits and problems of court-connected mediation?

Benefits

- Reduces court delays
- Cheaper than litigation
- More willingness to negotiate and bargain in good faith
- (Spencer, 2011, p.72-73)
- Some people are glad to have court control
- Increased bond for use of ADR
- Advantages of ADR are becoming institutionalised
- (Spencer, 2011, p.75)
- Define more narrowly the issues for litiagtion

Problems

- Less motivation to settle
- Settlement rates
- Effectiveness of settlement
- Disadvantaged poorer litigants (financial burden on parties who would have settled because 90% settle)
- Poorer people are also more susceptible to an early settlement of less than they are entitled
- Promotes state rights over the individual
- (Spencer, 2011, p.73-74)
- Effects consensual nature

“Experience has shown that willingness to negotiate and to bargain in good faith is the decisive factor in whether a case is suitable for conferencing or mediation.” (Spencer, 2001, p.73)

“Voluntary participation also ensures that mediation will not be used as a case management tool or used by the tribunal to ensure or manipulate speedy resolution of applications for the sake of case management.”

What are some factors that must be considered in any particular case in determining whether mediation is an appropriate form of dispute resolution?

- Motivation of the parties to attend and participate in good faith
- Desire to mediate after the parties have been advised of what the mediation process involves
- The availability of the parties and whether they have authority to settle the dispute
- The availability of information and stakeholders in the dispute affecting the outcome, but only as it affects the implementation of potential settlements
- There are no insurmountable power imbalance issues
- (Spencer, 2011, p.51-52)

Week 9

- Chapter 5 Spencer- focus on pp 125-129 Conciliation; pp 137-139 Case Appraisal
- Chapter 7 Spencer and Hardy pp 349-355- History of CAA **2013** (Qld)
- DOMESTIC COMMERCIAL ARBITRATION WILL BE A Q ON EXAM

Define Conciliation

- Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.
- Note: there are wide variations in meanings for 'conciliation', which may be used to refer to a range of processes used to resolve complaints and disputes including:
    - Informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute
    - Combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement'.
- NADRAC, 2003

Define Arbitration

- Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.
- NADRAC, 2003

Why did conciliation emerge as a distinct dispute resolution process?

- P. 317 Spencer and Hardy
- S51(xxxv)- CAA→ provision for employers/employees to resolve industrial disputes
- Rise of union movement (1890's) (shearer strikes, wharf strikes → dependent on farming, imports/exports)

Similarities and Differences Between Mediation and Conciliation

Similarities Between Mediation and Conciliation

- Mediator and Conciliator are an impartial third party (although if conciliating under a statutory scheme, conciliator is not neutral towards the law)
- Both processes identify disputed issues, develop options, consider alternatives and try to reach an agreement
- Neither Mediation or Conciliation are determinative processes
- Both Mediator and Conciliator determine the *process* to be used
- Spencer and Hardy [6.80] 2014 p 316

Differences Between Mediation and Conciliation

- Conciliator may have an advisory role regarding the content of the dispute – Mediator does not
- Conciliator may advise on the outcome of a dispute

- Conciliator may suggest terms of settlement
- Conciliator may give expert advice on potential court outcomes
- Conciliator may actively encourage parties to reach an agreement
- Choice of 3rd party more likely to have specific expertise in dispute
- Spencer and Hardy [6.80] 2014 p 316

What types of disputes would be most appropriately addressed using conciliation?

- Where there is a power imbalance
- Conflict is too high for mediation but needs more directive conciliator (e.g. human rights specifically discrimination laws (AUSTRALIAN HUMANS RIGHTS COMMISSION) and fair work commission → complaints of unfair dismissal against employer)

How did uniform Arbitration Acts develop?

- Look at history in Spencer and Hardy chapter 7
- Provision that states etc. can make laws in relation to industrial disputes (uniform national legislation of the Commercial Arbitration Act 2013)
- CAA 1990 was replaced with CAA 2013 to comply with international obligations of UNCITRAL

Is Arbitration in Australia mandatory or voluntary?

- In nearly all cases it's voluntary
- In some states its mandatory under CAA2013
- Section 8 of Queensland CAA, one party must consent
- If one party consents, it becomes mandatory for the other party

Describe the formal requirements for the appointment of an arbitrator?

- P.88 Spencer & Hardy
- S11(2) CAA → parties appoint arbitrator
- If they can't agree s11(3) (LOOK AT LEGISLATION)

Does an arbitrator have to make her or his award in writing?

- Yes, s31(1) CAA

What circumstances give rise to an award being set aside? Quote your authority

- A party to the arbitration agreement referred to in section 7 was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it
- The party making the application was not given proper notice of the appointment of an arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case
- Contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act
- S34 and 34(a) CAA (you can only appeal on a question of law)
- S6 CAA → appeal will be heard by lone supreme judge (or district judge if they both agree cause its cheaper)

Tribunals

- No rules of evidence in tribunals → not the most credible evidence
- Arbitration is tribunal
- Awards not judgements

Week 10:

Read Chapters 1 and 2 of Gary Born, International Arbitration Law and Practice, 2012 (available on QUT Library Databases/Kluwer)

Consider the scenario and discuss the answers to the questions:

A buyer has its place of business in Singapore. The seller has its place of business in Hong Kong. Their contract for the sale of goods includes an arbitration agreement that stipulates that the seat of the arbitration will be Australia. The contract requires that the goods be delivered to the buyer's distribution outlet in Australia. The goods are delivered but the buyer refuses to pay the purchase price.

Would this dispute be 'international' and/or 'commercial' for the purposes of the UNCITRAL Model Law?

- A dispute arising under this agreement is international for two reasons, though one would be enough:
- (1) The buyer and seller have their places of business in different States.
- (2) The buyer and seller have agreed that the place of the arbitration is a state other than the states where the parties have their places of business

Would the UNCITRAL Model Law form part of the legal framework of the arbitration?

The UNCITRAL Model law is an important part of the international legal framework of international commercial arbitration as we see in a moment. The UNCITRAL model law however will only apply where the arbitration is commercial.

What else would form part of the legal framework applicable to the arbitration?

- The legal framework of international commercial arbitration almost never allows appeal from an arbitral award on the merits – so the arbitral award is also final in the sense that it is the end of the matter for the parties. Almost no recourse is available to the unsuccessful party.
- The legal framework of international commercial arbitration is 'pro-enforcement'. This means the international conventions and state laws work together to ensure that arbitration agreements and arbitral awards are enforced.
- The arbitration agreement triggers the operation of a legal framework comprised of:
  - international conventions
  - state courts applying state law
  - procedural rules
  - soft law - best practice in arbitration.
- The procedural rules chosen by the parties are an important layer of the legal framework of international arbitration. The parties' choice of procedural rules tends to be closely related to their choice between institutional arbitration and ad hoc arbitration. (p. 34 lectures)
- Arbitration Agreements → The arbitration agreement is where parties demonstrate their consent to final and binding arbitration of disputes.
- International Conventions
- The New York Convention, 1958

- State Arbitration Laws
- The UNCITRAL Model Law
- Procedural Rules

Choose one of the arbitration agreements below and answer these questions:

Clause A

i. What is the seat of arbitration?

Brisbane

ii. Which procedural rules apply to the arbitration?

Rules of Arbitration of the International Chamber of Commerce

iii. Does the agreement stipulate the number of arbitrators, and if so how will the arbitrators be appointed? If the agreement is silent as to the number of arbitrators, how will this be resolved?

2/3 – if this is silent there will be three

iv. Does the agreement stipulate the language of the arbitration? If the agreement is silent as to language, how is this resolved?

English – if this is silent the tribunal will decide

Clause B

i. What is the seat of arbitration?

Sydney- if they do not stipulate it will be Sydney (article 24)

ii. Which procedural rules apply to the arbitration?

Rules of Arbitration of the International Chamber of Commerce ACICA 2016

iii. Does the agreement stipulate the number of arbitrators, and if so how will the arbitrators be appointed? If the agreement is silent as to the number of arbitrators, how will this be resolved?

There are three

iv. Does the agreement stipulate the language of the arbitration? If the agreement is silent as to language, how is this resolved?

The tribunal will decide on the language – article 24

Clause C

i. What is the seat of arbitration?

Brisbane

ii. Which procedural rules apply to the arbitration?

Rules of Arbitration of the International Chamber of Commerce SIAC Rules

iii. Does the agreement stipulate the number of arbitrators, and if so how will the arbitrators be appointed? If the agreement is silent as to the number of arbitrators, how will this be resolved?

1 or more 6.1

iv. Does the agreement stipulate the language of the arbitration? If the agreement is silent as to language, how is this resolved?

The tribunal will choose the language – 19.1

Note the answers to questions iii and iv will be in the procedural rules identified in the arbitration agreement. For Clause B, the answer to question i is in the procedural rules. Links to these procedural rules are on blackboard.

Clause A:

"Any dispute arising from or in connection with this Contract shall be submitted to arbitration under the Rules of Arbitration of the International Chamber of Commerce. The language of the arbitration shall be English. The seat of arbitration shall be Brisbane, Australia. Each party may nominate their own arbitrator and the two nominated arbitrators shall nominate the presiding arbitrator. The parties shall have 14 days to accept or reject the appointment. The parties may select the place of arbitration."

Clause B:

"All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement, (including the formation, existence, validity, enforceability, performance, or termination of this agreement), or the subject matter of this Agreement, shall be finally resolved by arbitration under the ACICA Rules 2016. The arbitration shall occur before a Tribunal of three arbitrators appointed in accordance with the Rules. The Tribunal will render an award that is final and binding."

Clause C

"All disputes arising out of or in connection with the present contract shall be finally settled under the SIAC Rules by one or more arbitrators appointed in accordance with the said Rules. The seat of the arbitration shall be Brisbane, Australia."

Week 11 (Advocacy and Power in dispute resolution):

Read Chapter 13 of Field, Duffy and Huggins:

What is legal advocacy?

- 'The role of a legal advocate is to assist the client in continuously reassessing what they need and want (and why), in light of what is possible and what the costs may be, and then to advance that goal.'

Why do people need an advocate?

- to provide expertise in the law (subject matter)
- to provide a procedural understanbding of the law (such as filing documents, knowing how to commence an action, knowledge of jurisdictional limits)
- to be an articulate spokesperson who can state their case persuaviely
- to negotiate on their behalf
- to validate their concerns
- to ease their fears and vulnerabilities
- to have someone 'on their side'
- to have someone to talk to
- to help protect an individual from losing something important
- to give someone a voice, who otherwise feels disempowered
- (Field, Duffy & Huggins, 2014, p. 377)

Describe adversarial advocacy and when it might be used in legal practice.

- 'Adversarial advocacy involves acting on behalf of a client with a central emphasis on attempting to maximise victory.' (Field, Duffy & Huggins, 2014, p. 387)
- It is basically all about winning
- It is usually associated with litigation because there is a winner and loser at the end of the day

Describe non-adversarial forms of advocacy and when they are used in legal practice.

- Non-adversarial advocacy (unlike adversarial) promotes the management of conflict around interests rather than positions (Field, Duffy & Huggins, 2014, p. 390)
- A non-adversarial lawyer finds the litigation, win/lose forum somewhat limiting because there are ADR forums that promote much fuller resolution of a legal dispute without the remedial and legal restrictions of a litigated process
- Negotiation, medition and conciliation (Field, Duffy & Huggins, 2014, p. 391)
- Focusing on strict legal entitlements, instead of understanding why each party wants what they do, can mean that options for mutual gain and creative problem solving are overlooked
- ADR forums present the opportunity for conflict to be discussed in all of its dimensions

In what way can legal education be argued as promoting adversarial advocacy?

- Mooting
- Negotiation/mediation competitions
- Volunteer at CLC

What ethical issues are associated with legal advocacy?

- Legal practitioners have a duty to:
  - Obey the law
  - Their client
  - The courts and the proper administration of justice
- A lawyer cannot break the law, or breach their duty to the court, on the basis that they are maximising the chance of victory for their client
- (Field, Duffy & Huggins, 2014, p. 396)
- The dilemma of the two hats → concern that with the recognition of different types of advocacy, lawyers may struggle with having to constantly switch hates between negotiation and litigation mode
- (Field, Duffy & Huggins, 2014, p. 397)

How can the concept of advocacy contribute to the development of a positive professional identity for you as a young lawyer?

- Help people who don't have the knowledge skills or expertise that we have (Field, Duffy & Huggins, 2014, p. 377)
- Help people pursue their needs and interests, as well as their legal rights and entitlements
- Support them in addressing their concerns and in achieving dignity through empowerment
- Help them make informed decisions, we develop options, we give them choice and control, and we help them resolve complex issues and disputes that would otherwise impact negatively on their life
- Protectors of legal and human rights and interests

What is negotiating power?

- Negotiating power is the ability to influence others.
- The concept of negotiating power is relevant to all the dispute resolution processes on the spectrum.
- Power is based on perception - what the other party thinks about your power is directly relevant to how much power you actually have.
- Fisher distinguishes between:
  - Real negotiating power (which is the power you actually do possess), and
  - An illusion of power (which involves the other side believing you have power you actually do not possess).
  - Negotiators need to assess their negotiating power in the context of the other side's power.

Why is it important for lawyers to understand issues of power imbalance in dispute resolution and be able to help their client manage them?

- Need to protect vulnerable parties (e.g. due to violence, mental health issues or drug and alcohol problems)
- Benefits of ADR can be lost if parties are so unequal that it isn't possible for party self-determination and empowerment to be possible for both parties
- Do they have the capacity to represent their own interests? Can they articulate their needs, interests and concerns? Are they able to generate a range of viable options that they can live with?

- If power imbalance → a party's ability to agree freely to an outcome that satisfies their own interests is severely compromised
- (Field, Duffy & Huggins, 2014, p. 444)

Max Wilson slipped over in a restaurant in Brisbane that is a well-known global franchise. He slipped because the restaurant was negligent in not erecting signs to say that the floor was slippery after it had been washed and waxed. You have been asked to represent Max Wilson. You are a junior solicitor in a medium-sized Brisbane firm. The global franchise has a team of 50 in-house lawyers. The global franchise is offering a very low settlement offer to Mr Wilson with the promise that if the matter goes to litigation, they will hire the best barristers, appeal any decision that goes against them and generally drag the matter out.

What advocacy approach will achieve the best outcome for your client in this situation? What skills will you need to achieve your client's best interests?

Week 12:

Read Chapter 12 of Field, Duffy and Huggins:

What is the difference between conflict and a dispute?

- Conflict occurs between individuals and between groups, at all levels of society, and in all aspects of life. Conflict is part of human relationships and interaction. It is an inevitable part of life, affecting everyone to some extent, and often on a daily basis. (Field, Duffy & Huggins, 2014, p. 342)
- DISPUTE: 'A dispute arises when two or more people or groups perceive that their interests, needs or goals are incompatible and they seek to maximise fulfilment of their own interests or needs, or achievement of their own goals (often at the expense of the others)' (Tillett & French, 2010, p.8)
- CONFLICT: 'A conflict arises when two or more people or groups perceive that their values or needs are incompatible- whether or not they propose, at present or in the future, to take any action on the basis of those values or needs.' (Tillett & French, 2010, p.8).
- Burton sees the difference between conflict and dispute as relating to the intractability of the issue/s (Burton, 1996).
- Conflicts are entrenched disagreements where neither of the parties is willing or able to negotiate or compromise
- Dispute are usually a shorter term phenomenon where accommodation between the parties is possible
- (Burton, 1996)
- Conflict is a state of opposing interests, needs and values
- A dispute is an action or process undertaken in an attempt to resolve a conflict
- This means that a conflict can exist without a dispute, but a dispute cannot exist without a conflict.
- (Yarn, 1999, p. 155)

Explain what it means to manage a dispute around rights, interests or power.

- This model doesn't analyse the content of the dispute itself, but rather looks at conflict in terms of the basic elements of interests, rights and power, assessing which approach is best for a particular dispute. (Furlong, 2005, p. 20)
- Interests have to do with a person's needs and desires, and why they want something
- Interest based approaches try to reconcile or find a solution that meets the interests of the parties. Interests refeer to the parties needs, hopes, and fears
- Tend to be more consensual and succeed when both parties get enough of their interests met to agree on a solution (Furlong, 2005, p. 110)
- Rights concern what a person is entitled to, usually under some legal source. Rights based approaches are characterised by parties asserting or focussing on the superiority of one party's rights over the rights of the other parties (Furlong, 2005, p. 110)
- Power is the capacity to get things done and the abilities to exercise control over people, events and situations (Field, Duffy & Huggins, 2014, p. 362)
- Power based approaches are characterised by parties bringing to bear all the resources they have at their disposal against the other party in an attempt to win

What is conflict resolution?

- Conflict resolution refers to the terminating of a conflict by going to the root of the problem (Field, Duffy & Huggins, 2014, p. 358)
- Conflict resolution… points to an outcome that, in the view of the parties involved, is a permanent solution to the problem (Burton, 1989, p. 2)

What is conflict management?

- Conflict management involves implementing strategies to limit the negative aspects of conflict and to increase the positive aspects of conflict. This may lead to an outcome that the parties see as a solution, even though the underlying conflict continues to exist. (Field, Duffy & Huggins, 2014, p. 358)

Read Chapter 1 of Tillett and French (CMD):

What are the positive aspects of conflict?

- Although conflict is popularly identified with fighting, with destructiveness, and with discomfort (if not pain), it can also have a positive role. Importantly, this depends very largely on its being resolved: conflict that has been suppressed, concealed, avoided, or worked around, or in which a fight has produced a winner and a loser, is unlikely to be creative or constructive, and is more likely to be destructive. (Tillett & French, p. 14)
- prevents stagnation
- stimulates interest and curiosity
- provides for problems to be examined
- motivates and promotes problem-solving
- assists in personal growth, identity, and development
- promotes group identity and cohesion
- stabilises and integrates relationships
- releases tensions
- provides the basis for personal/social change
- encourages self-examination/assessment
- encourages communication
- encourages exploration of others
- promotes awareness of the needs/wants/preferences of others
- encourages creativity and innovation

What are the negative aspects of conflict?

- Most people will probably find it easier to identify the destructive or negative effects of conflict, but it need not be discussed in absolute terms of good or bad, destructive or creative. For example, a relationship conflict-such as an argument about the choice of pet-can lead to an enhanced and strengthened relationship, with increased communication and understanding of each party by the other. However, it can also lead to a breakdown of communication, to separation, and to mutual distress-even, in extreme cases, ending in violence.
- provokes anger/anxiety/distress/fear/aggression
- breaks down relationships
- creates dysfunctional patterns of interaction
- hinders or breaks down communication
- obstructs problem-solving

- hinders self-development
- breaks down group cohesion/identity
- encourages entrenched position-taking
- may provoke self-destructive behaviour
- may provoke violence: verbal, psychological, or physical

Research Pruitt and Kim's 'Dual Concern Model'. What are the five main approaches to dealing with conflict?

Week 13:

Read Chapter 9 of Field, Duffy and Huggins:

Explain the difference between traditional legal research methods and research methods used in the field of psychology.

- Psychology is a scientific discipline, its research methods are different to those employed in law.
- Legal research is usually doctrinal research (Field, Duffy & Huggins, 2014, p. 358)
- DOCTRINAL RESEARCH: 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments' (Pearce, Campbell & Harding, 1987)

How might Howard Gardner's theory of multiple intelligences inform the way that a lawyer communicates with their client?

- This theory suggests that human potential and the ability to cope with demands of living can be explained with reference to eight different intellectual capacities: (Field, Duffy & Huggins, 2014, p. 267)
    - Linguistic
    - Musical
    - Logical-mathematical
    - Spatial-visual
    - Bodily-kinaesthetic
    - Interpersonal
    - Intrapersonal
    - Naturalist
    - (Field, Duffy & Huggins, 2014, p. 268)
- Lawyers require strong interpersonal intelligence
- Law is a people profession and lawyers need the ability to interact and communicate effectively with others
- Need to be able to perceive moods, motivations, intentions of an opposing party
- (Field, Duffy & Huggins, 2014, p. 269)

Define emotional intelligence, emotional contagion and emotional flooding

- **Emotional intelligence** refers to an ability to recognise the meanings of emotion and their relationships, and to reason and problem solve on the basis of them. Emotional intelligence is involved in the capacity tgo precieve emotions, assimilate emotion-related feelings, understand the information of those emotions, and manage them. (Mayer, Caruso & Salovey, 1999, 267)
- **Emotional contagion** is a psychological phenomenon that refers to the 'catchability' or contagiousness of emotions. (Field, Duffy & Huggins, 2014, p. 272)
- **Emotional flooding** occurs when an individual becomes swamped by emotions.
- Emotional flooding is most likely to occur when people experience negative emotion that has been triggered by an external event, or even their own negative thoughts. (Jones & Bodtker, 2001)

How might countertransference influence the way that a lawyer interacts with their client?

- Counterference is the term used to describe feelings evoked in the therapist by the client
- Counterference refers to a lawyer's reactions to the client in the present that stem from the lawyers past experiences and unresolved issues (Field, Duffy & Huggins, 2014, p. 275)
- Counterference arises when a counsellors past or present experiences are realised in his or her clients present situation (Burwell-Pender & Halinski, 2008, 41)
- The lawyer can't do much about transference
- Transference may take form of over-friendliness, hostility, or a challenging of the power dynamic between lawyer and client
- Power imbalance

Why might an appreciation for the field of psychology be important to a positive professional identity for law students and lawyers?

- Understanding why people act the way they do (and why people sometimes act irrationally) is an important skill
- Lawyers face conflicts for their clients so the psychology behind interpersonal communication is relevant
- Understanding aspects of the different sub-disciplines in psychology can make us better and more creative lawyers, more effective negotiators and sometimes better human beings
- (Field, Duffy & Huggins, 2014, p. 282)

Read Chapters 6 & 11 of Field, Duffy and Huggins:

Administrative Appeals Tribunal Act/Queensland Civil and Administrative Appeals Tribunal Act 2009 (Qld)

- Enforces court-annexed dispute resolution

Uniform Civil Procedure Rules 1999 (Qld)

- Apply to civil proceedings in the magistrates, district and supreme courts and are designed to supplement the dispute provisions already appearing in the empowering acts of those jurisdictions
- Numerous sections detailing the administrative and procedural matters relating to the conduct of mediation and case appraisal

Why is it said that legal ethics are more than just the rules of professional conduct?

- Lawyers' ethical obligations in their professional practice can be said to come from three main interrelated sources:
    1) Extrinsic- such as Australian Solicitors Conduct Rules (ASCR) and the Legal Profession Acts in each state and territory (Field, Duffy & Huggins, 2014, p. 169)
    2) Intrinsic- personal values and principles of honesty, courtesy, loyalty and competence that the legal profession regards as representative of best standards of ethical, professional practice
    3) Common law- as stated most often in disciplinary headings (Field, Duffy & Huggins, 2014, p. 170)

How are the ethical obligations of solicitors and barristers dealt with differently?

- The Australian Bar Association is a national body for the Independent Bars of the state and territories. The Association has developed model conduct rules for barristers that are implemented by the Bar Association at the state and territory level (Australian Bard Association, Current ABA Model Rules, 2013) (Field, Duffy & Huggins, 2014, p. 319)

How are lawyer's ethical duties in dispute resolution contexts regulated?

- Lawyer's ethical duties when acting for clients in dispute resolution environments are the same as their general ethical obligations in professional practice. The ASCR covers the behaviour of lawyers also in dispute resolution processes. It does so by defining 'court' as including '(h) an arbitration or mediation or any other form of dispute resolution' (Queensland Law Society, 26) (Field, Duffy & Huggins, 2014, p. 321)