

The Future of ADR in 2020

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Two forgotten lessons emerged from the 1976 Pound Conference that, with a Big Bang, crystallized mediation into a recognised discipline. The first was in the title of Chief Justice Warren Berger's Opening Keynote - "*Need for Systematic Anticipation*". The second was a warning by Professor Frank E. A. Sander that the one thing that could hold back the progress of ADR it was "*the deadening drag of status quoism*".

Exactly ten years after the Pound Conference, the box office hit at cinemas across the world was *The Good, the Bad & the Ugly*, an Italian Western featuring three cowboys. It was about how the Goody prevails over the Baddie and the Ugly in a Mexican standoff. The movie inspires an interesting way of looking at things. If we try to itemise the top 10 Good, Bad and Ugly things about ADR, can we approach the future by maximising the Good, and sorting out the Bad and the Ugly? Can we use this categorization to *systematically anticipate* the future in order to make it truly Good and help us defeat the *deadenning drag of status quoism*?

There is much Good in ADR. In no particular order, here is my Good Top 10:

1. Training & education tools and techniques are well-established.
2. Some business schools are now teaching negotiation-based ADR as electives.
3. Good basic and advanced skills of ADR practitioners have developed.
4. Different styles and techniques have emerged, making the field highly versatile.
5. Collaborative law is increasing.
6. Judiciaries have increasingly embraced "ADR" in its various forms.
7. The success and satisfaction rates for mediation/negotiation-based ADR are high.
8. Arbitration institutions are embracing ADR processes far beyond arbitration.
9. Governments and international organizations are increasingly supporting ADR.
10. Court schemes to "robustly encourage" ADR are on the increase.

The Bad elements vary according to location. My random global Top 10 of the Bad:

1. Anyone can call themselves a "mediator", "collaborative lawyer", etc.
2. Few professional bodies exist with leadership standing to self-regulate the field.
3. Most training does not result in a credible qualification. Training standards vary.
4. The field lacks objective transparency on standards, feedback & ethics.
5. There are few experience-generation schemes for new mediators.
6. There is inadequate diversity in terms of gender and professional background.
7. Practice fields are narrow - eg few human rights, investor/state and tax mediators.
8. "ADR" limits the perception of the field to "alternative" and to a dispute focus.
9. Few mediators acquire inter-cultural skills to supplement their mediation skills.
10. There is very slow-take up of ADR in some key sectors - eg intellectual property.

And now my global Top 10 of the Ugly aspects of ADR - again in random order:

1. The field lacks effective leadership implementing a common basic strategy.
2. There is no widely-shared vision or action plan for the future.
3. Funding support to grow the field is grossly inadequate.
4. The field is balkanised and fragmented and key players fail to collaborate.
5. Failure to self-regulate will lead to forced/inappropriate government regulation.
6. Few complaint-handling processes have teeth to back up Codes of Ethics credibly.
7. The limited PR in the field relies on unconvincing or no data, and is poor quality.
8. Progress has relied heavily on a top-down approach from judges or governments.
9. Few users understand ADR, so too few cases come spontaneously to practitioners.
10. Inertia and apathy too often feed the *deadening drag of status quoism*.

Crafting a Shared Vision

The Bad top 10 and the Ugly top 10 are all fixable, with varying degrees of determination. Enough time has elapsed since the Pound Conference for vested interests to establish. Dinosaurs are not yet extinct in ADR. They roam around the field, devouring the juiciest cases, not spending much time on the professional development of others, freezing out fledgling talent, cold-shouldering competitors, lacking transparency, not seeming to care whether the field expands, plateaus or contracts. Too many large ADR providers focus on promoting themselves, rather than the field, inadequately communicating with their contemporaries. Without change, without another Big Bang that explodes these 20th Century attitudes and work practices, mediation will not rise anywhere near its potential. People tend to resist change; but they resist forced change most vigorously of all. We need a rationale for them to positively desire change, a compelling self-interest to motivate and inspire people to see the benefits and payback, and seek a new paradigm.

We need to start with a shared Vision. There is a very well-known Japanese proverb: *Vision without action is a daydream; Action without vision is a nightmare*. Clearly we need both the right Vision and the right Action. With the Good, the Bad and the Ugly in mind, a realistic Vision for this field in 2020 might be:

**Mediation and other consensual problem-solving processes
will be the primary way to avoid, mitigate and resolve conflicts
throughout the world.**

This simple Vision is currently lacking expression in the ADR field on a shared basis. It may be in people's minds, but they have not committed to it because the right Action plan has not been identified. It therefore remains a *daydream*. To become achievable, the right Action must also be identified and adopted on a widely-shared basis, and it needs to be Action that leads directly to the accomplishment of the Vision.

The Springboard

Before suggesting the right Action, is there one thing, above all others, that can make this Vision happen? I do not suggest there is a magic bullet, but is there a springboard from which we can leap forward to take the right Action to achieve the Vision? One of the Ugly aspects about ADR is how balkanised and fragmented the discipline is. We need to eradicate that devastating problem. We need a *collaborative* spring-loaded jumping-off from which the profession can address its future. Without it, there is nothing to bring us together, and we will continue to drift in space. I believe the right springboard is:

**A national professional body in every major country,
which does not compete as a service provider,
and is dovetailed into a global network of national professional institutions.**

The main blockage in my view is the absence of a widely-held perception of true independent professionalization of this field. Until that happens, with a professional body present and visible in most countries, there is no springboard, underpinned by academic and training excellence, for leaping out to achieve the Vision, and no basis for the other shared Action that needs to be taken to change the world of ADR for the better.

The Action Steps

Assuming we can construct the springboard of networked national professional bodies, what is the shared Action that needs to be taken? How can we *systematically anticipate* the future? More than a wish list, I would like to offer the following Action Plan:

1. Professional bodies will inculcate **consistent high level competency standards** for mediators and party representatives linked to a consistent, transparent, credible credentialing system that implements those standards. A common strong ethical code is put in place by each professional body, backed up by a complaint-handling process having the power to withdraw professional credentialing in the event of an upheld breach. Mandatory continuing professional development expectations will be introduced.
2. **Practitioners will voluntarily become credentialed** to distinguish themselves publicly as part of the profession, declaring adherence to the ethical code, participating in continuing professional development, and publicly declaring their credentials. Skills need broadening to include expertise in inter-cultural communication and hybrids and practitioners will improve transparency by publishing user feedback in their profiles.
3. Led by governments, but derived also from other stakeholders, there will be **serious funding for all professional bodies**.
4. **A research ethos and the generation of key statistics by educators and others** will now be funded, as well as experience sharing within the profession. Professional bodies in countries where mediation and problem-solving methods are nascent or absent will be funded.

5. Funding will also be applied to **raise awareness among users** so that the value mediation adds will be far better understood and therefore much more widely accepted. Mediation will be branded and promoted to companies for application in everyday ways.
6. **Professional bodies will encourage greater diversity in the global profession**, correcting the current domination by white Anglo-Saxon male lawyers, and encouraging diversity of specializations into human rights, CSR, IP and Tax.
7. Professional bodies, not being service providers or competing in the marketplace, will act as **conveners, approaching parties to propose a problem-solving process** suitable for and tailored to their circumstances.
8. Professional bodies will encourage new mediators and problem-solvers by **creating hands-on experience-generation schemes with experienced professionals**.
9. **The mediation profession will represent itself to regulatory agencies**, via its professional bodies, to ensure sensible and practical reform of laws and rules that currently inhibit development - such as privilege, enforceability of settlement agreements and preventing parties forcing mediators to testify in court as witnesses.
10. **Schools, universities and business schools will teach negotiation** and collaborative problem-solving as obligatory, not elective, courses. Peer mediation schemes will be prevalent, part-funded and supported by professional bodies.

I believe that, with this shared Vision and this Action Plan, it is within our collective grasp to mature over the next 8 years from a field or discipline into a fully-fledged global profession and be recognised as such by users and other stakeholders everywhere.

Heading in the Right Direction?

Reality checking is a key mediator skill. Does this go against the flow, or does it ride the crest of a wave? Some examples:

The European Union's Mediation Directive in 2008 conspicuously called for adherence to codes of conduct and other effective quality control mechanisms for mediation.

In Australia, a National Mediator Accreditation System was introduced in January 2008 by the quasi-governmental National ADR Advisory Council (NADRAC).

The International Mediation Institute (IMI) has been pushing mediator credentialing since 2007. It has established a set of high-level criteria and standards for mediators approved by users. Providers, trainers, educational institutions, Courts and others can adopt them into their own processes, get them approved by the IMI Independent Standards Commission as Qualifying Assessment Programmes (QAPs), and then attest the individual competency of mediators to those standards. So far, there are 22 approved QAPs in 14 countries, including one in Singapore and two in India.

In June 2012, the 21st Congress of the International Council for Commercial Arbitration - ICCA - was held in Singapore. The Opening Plenary Speech was given by the then Attorney General of Singapore, Sundaresh Menon, SC recently announced as the next Chief Justice of Singapore. The second half of his speech was captioned with the startling question: *The Beginning of the End?* He said that for arbitration to be sustainable long-term, arbitrators needed to self-regulate and have uniform ethical standards. He emphasized that the field had a collective responsibility for this, and that the arbitration community *must never lose sight of, and never give up on [this goal]*.

In a ground-breaking development, in August 2012, the Mediation Committee of the American Bar Association's Section of Dispute Resolution expressed its support for local (as opposed to national) innovations in mediator credentialing provided they meet six guidelines for what an effective credentialing program should include. These are:

1. Clearly define the skills, knowledge & values.
2. Ensure candidates have adequate training.
3. Be administered by an organization distinct from the trainer.
4. Have a consistent assessment process for determining skills, knowledge & values.
5. Explain clearly what is being certified.
6. Provide a transparent system to handle complaints, including de-credentialing.

The ABA Task Force also opposed barring non-lawyers from being credentialed.

And the most urgent cry for action is from the users - that is, parties, particularly those who regularly find themselves having to litigate. Users now have higher expectations. They don't want years of process. They have to reduce their risk and increase their certainty, improve their efficiencies, enhance their reputations, retain control instead of delegating it, move faster, add value, exhibit their integrity, stay within budget, reduce cost and generate outcomes. Litigation is far less likely to meet these needs than ADR.

Organisations are increasingly applying to their dispute portfolios the Six Sigma organisational management strategy. Pioneered by GE in the mid-1990s, and now adopted by tens of thousands of major organizations worldwide, Six Sigma is about increasing the quality of process outputs by removing the causes of problems and defects. In most cases, ADR is far more likely than litigation to meet Six Sigma quality criteria.

The Benefits by 2020

Using the springboard to implement the 10 Action steps will be like a Big Bang:

- The field will become widely recognised as a true, independent profession.
- Family, community, business and other users will recognise and respect the profession for its quality and value and its capacity to address their needs.
- This will cause parties to spontaneously use neutrals to help resolve conflicts and negotiate contracts. There will be less reliance on a top-down approach.
- Users will choose to use ADR techniques, including mediators, to make deals.
- There will be an even greater use of "other ADR" by arbitration institutions, driven by better-informed and more demanding clients.

- Greater respect for mediators and other problem-solving professionals will result in the visibly increased use of mediation by governments, on the political level, in State-Investor issues, in the UN and the World Trade Organisation and in other highly public disputes that involve human rights and corporate responsibility and Governments will see little or no reason to regulate mediation standards.
- Hybrids and collaborative negotiation will flourish, with more negotiations being based on collaborative problem-solving using advanced techniques and processes.
- There will be more work for dispute resolvers as users aim to reduce risk and cost.
- Litigation will be the new meaning of *Alternative Dispute Resolution*.

The Paradigm Shift in Attitudes Needed to Achieve the Vision

So, if the movement, recognition and need all exist, and it's fairly easy to achieve, why is there still plenty of evidence of Professor Sander's *deadening drag of status quoism*?

The Danish mediator, skills trainer, psychotherapist and lawyer, Tina Monberg, has developed a *Nordic Model* of what our attitude to the ADR field should be. Tina points out that ADR practitioners are wired through their training and practice to get parties to collaborate for a higher, shared goal - yet paradoxically, those skills too often desert them when it comes to how they organise themselves professionally. Tina proposes we make a conscious *paradigm shift* to an interest-based system involving Servant Leadership, Personal Leadership and Enablement/Facilitation. Tina points out that this is a typical *Nordic Model* of behaviour, but perhaps the authors of *An Asian Perspective on Mediation* might also identify it as an *Asian Model*. Either way, Tina calls this interest-based system the *Butterfly Effect*ⁱⁱ, a term derived from Chaos Theory and coined by the Kyoto Prize winner Edward N. Lorenz, and she combined it with the ideas of Robert K. Greenleaf, the originator of the notion of Servant Leadership.

The left wings of the Butterfly represent Servant Leadership, which entails vision for the wider environments in which we work and live, expressed with authenticity, humility and truth. Servant Leadership is devoid of compulsion, hierarchy, supremacy, champions and rulers. Its sole aim is to create an inclusive, functioning, framework to benefit everyone.

The right wings represent Personal Leadership - each practitioner taking individual responsibility for their actions and maximizing the professional freedom created by the Servant Leadership framework.

The central body of the Butterfly facilitates communication and engagement between the Servant Leaders and the Personal Leaders in order to keep them combined and aligned in a dynamic self-sustaining system that is stable and mutually-beneficial.

This collaborative interest-based model is instinctively embedded in the DNA of mediators and problem-solvers. Can we apply it to how the field develops in the future?

The Servant Leaders are the professional bodies that establish the practice and approval standards, the credentialing and self-regulating system, set up the ethical codes, promote the field, fund the research, design the experience generation schemes for new professionals, encourage diversity and engage in dialogue with governments.

The Personal Leaders are the practitioners, those running the provider organisations, trainers and assessors who each take responsibility for achieving and exhibiting their competency transparently, take their professional development and learning seriously, seek user feedback and stay on a continuous learning curve to ever-increasing excellence.

Educators, judges, users, governments and other stakeholders form the central body, enabling and facilitating the collaboration and synchronization between the Personal Leaders and the Servant Leaders, keeping the wings beating synchronously.

The management guru, Warren G. Bennis, in his international bestselling book *On Becoming a Leader*, defines leadership as *the capacity to translate Vision into Action*. The functional approach for doing that lies in the simple Butterfly Effect. All we have to do is apply our attitudes and instincts as collaborative solution providers by consciously adopting a paradigm shift to the interest-based model on behalf of the whole ADR field.

Summary

The field currently lacks a global strategic focus and direction. We are not *systematically anticipating* the future. There are Good, Bad and Ugly aspects to ADR. The Bad and the Ugly can be corrected. To do this, professionals in the field and other stakeholders need a shared Vision and a shared Action agenda. The first step is to build a springboard, a network of national professional bodies around the world. They will consult with stakeholders to establish consistent standards, apply a consistent and credible Code of Ethics, stimulate research and statistics, generate considerable funding from stakeholders and expertly promote understanding and acceptance by users of problem-solving techniques. These bodies will be the profession's Servant Leaders. The Personal Leaders - practitioners, providers, trainers and assessors - will help the Servant Leaders, and themselves, in a multitude of ways, including allowing skills to be credentialed, signing up to ethical codes and enthusiastically walking the pathway to continuous improvement. The profession's stakeholders will act as enablers, because they need to see this happen. There are already moves in this direction, the Asian Mediation Association being one of them. The payback for all is very considerable. If bankers had taken such steps to professionalise themselves 10 years ago, would the world now be experiencing such global financial turmoil? Perhaps not.

It is time for another Big Bang.

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ⁱⁱ www.butterflyeffect.dk