Overview of dispute resolution, suggestions, solutions and options – tips from a practitioner and options

By Michael Mills[1]

Abstract

Michael Mills, draws on his extensive experience in the legal profession to unveil the trade secrets of truly successful and effective dispute resolution lawyers. In doing so, Mr Mills identifies a number of suggestions, solutions and options that dispute resolution lawyers ought to consider when advising and representing clients. Throughout his article, Mr Mills covers a range of topics relating to communication, techniques of persuasion, barriers and dispute resolution strategies, all of which are critical to the dispute resolution process in its many forms. Although he concludes that there is no one key technique or 'golden rule' which delivers successful dispute resolution, Mr Mills certainly provides readers with an invaluable and concise go-to guide for successful dispute resolution techniques and solutions.

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Over many years, a vast array of outstanding analysis, research and writing by 'scholars and practitioners in a broad range of disciplines'[2] has sought to answer the question: 'how can people best deal with their differences?'[3] This is a key and practically crucial query for any person or party involved in a dispute (as well as any professional adviser).

As put by Professor Mnookin, lawyers (and other dispute resolution advisers) have what Abraham Lincoln described as a 'superior opportunity to do good'.[4] They can be peacemakers, they can help people construct fair and durable commitments, feel protected, recover from loss and resolve disputes.[5] The difficulty is that there is no one single key or approach or technique to achieve these worthy aims. Human nature and the myriad of circumstances which can give rise to a dispute, even in a commercial context, are too complex for that.

In light of these difficulties, anybody dealing with a commercial dispute for the first time should keep in mind that there are a range of process options available which serve to facilitate and enhance the effective resolution of disputes. Ascertaining which of these dispute resolution processes may be best for the dispute at hand requires, in turn, a broad understanding of each process. Once an objective and informed choice of process is made, the next critical question concerns how the chosen process is best applied.

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[2] M Moffitt and R Bordone (eds), *The Handbook of Dispute Resolution* (Jossey-Bass, 2005) pp xi.

[3] Ibid

[4] RH Mnookin, SR Peppet and A Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Boston: Belknap Press of Harvard University Press, 2000) p 3.

[5] RH Mnookin, SR Peppet and A Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Boston: Belknap Press of Harvard University Press, 2000) p 3.

Of course, due to the almost infinite variety of human personality and factual circumstances that could exist, it is nothing short of heresy to try and reduce the art and science of successful dispute resolution down to seven or even 10 brief points. Conversely, there are several common denominators in almost every dispute. The first is human nature. The psychology of human beings is a full university degree in its own right and indeed, dispute resolution is now also becoming one too.[6] Dispute resolution processes continue to evolve and change, and different skills and procedures are called upon to keep up with those changes. To this end, there are a myriad of useful texts on the dispute resolution processes of: negotiation, mediation and other forms of alternative dispute resolution, arbitration, and court hearings. However, ultimately, successful dispute resolution in all procedures will depend on how persuasively you communicate with the other party(s) in a consensual dispute resolution process, or how effectively you communicate with the other party(s) and decision maker in an adjudicative process (such as arbitration).

Given the importance of communication, it is good news that social norms and practices for how to get along and communicate with each other in a community are passed along to us from childhood. Anthropologists who have studied dispute resolution in Western and non-Western societies consistently find clear evidence that codes for conduct are passed from generation to generation, because otherwise, society would break down. We are all highly influenced from birth by the social forces around us. These social forces for community conduct have many descriptions, including folk psychology or common sense. Yet, it is common sense which often seems to be forgotten, especially in the heat of a dispute:

(a) the common sense of listening to people if you want to understand their point of view and be able to better respond from a fully informed standpoint;
(b) the common sense of treating people with courtesy and respect if you wish to reach an agreement with them;
(c) the common sense of knowing it is best not to say something if you would find it highly offensive if the same thing was said to you;[7] and
(d) the common sense that establishing a connection with another other person through empathy or shared experiences and values can make your communication much more powerful and persuasive.

Although these points may sound obvious, it is astonishing how often common sense is left behind when it comes to a dispute and in the course of attempts to resolve it (or not).

Open mind and line of communication

Dispute resolution practitioners are constantly advised to keep an open mind and maintain an open line of communication. This is what I and others refer to as being ‘conditionally open’. It is an important concept, particularly in circumstances where a party may eventually wish to cooperate or at least hold a sensible discussion after a period of resistance. If you have consistently remained conditionally open, then you will not only be receptive to this, but have kept open the possibility of sensible dialogue – right to the end or the ‘door of the court’. Indeed, many self-help books rightly advocate how you should ‘never burn bridges’ or ‘make enemies’. This advice also holds true in dispute resolution. Certainly, in a dispute you will sometimes need every ounce of patience you have to remain polite, pleasant and open to discussion. Similarly, practitioners must demonstrate patience, discipline (putting one’s ego to one side) and persistence in equal measure if the other party is annoying, stubborn or both.

Nevertheless, whilst it is important to be conditionally open, you ought to avoid becoming ‘cooperative’ or ‘collaborative’ in a blindly optimistic or naïve manner. Rather, you should warily seek to elicit

[6] For example, the Master of Dispute Resolution at UTS, Sydney.
[7] I regularly act both as a mediator or a counsel to a party in mediation and cannot recall the number of occasions when a mediation has been progressing well, until it has been derailed by a seemingly inflammatory remark or observation. When afterwards the party has been asked why they said it, the explanation so often comes down to: ‘I knew I shouldn't, but felt it needed to be said anyway.’

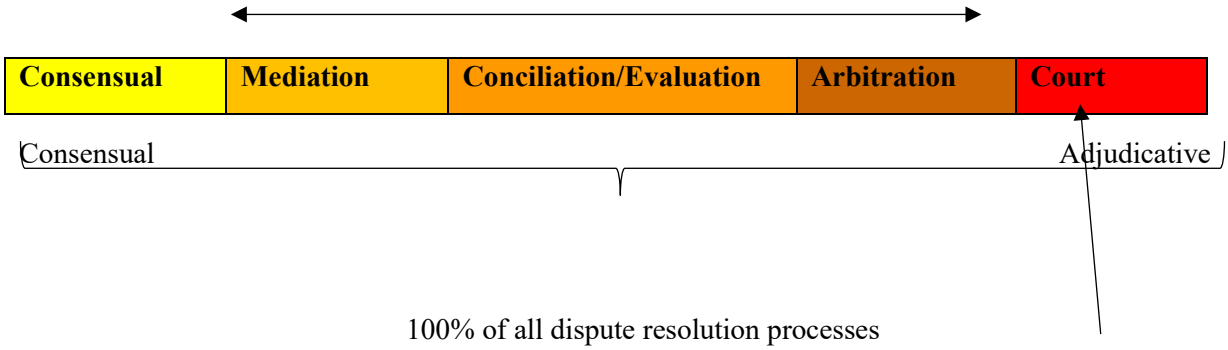
cooperation, while remaining ready to respond and punish attempts to take advantage of your approach, although 'ultimately forgiving of transgressions.'[8] In this way, throughout all types of consensual dispute resolution, your conduct is conducive to efficient communication and value creation, but not a prisoner to it. Even when it comes to adjudicative processes, your approach, arguments and advocacy will be much more effective if you keep an open mind to what the other party's case and argument is (for they may have a point or worse, be right) and maintain an open and effective line of communication (as the flow of information could prove decisive). Hence the emphasis on being polite, respectful and acting with integrity at all times. It is also tactically smart, as you never know when you may wish to negotiate an agreement on an interlocutory issue and/or a settlement deal, rather than proceeding to the hearing and judgment. In short: be patiently and persistently conditionally open, but never in such a manner that causes you or your client to become someone else's 'fall guy'.

Techniques of persuasion

The details and nuances around the technique of persuasion vary according to the dispute resolution process you are involved in and the forum in which the dispute is being aired. Similarly, the rules, practices and procedures which apply to the different fora for the myriad of dispute resolution processes vary significantly. These variations can be crucial. However, in essence, the techniques of persuasion for each are pretty similar. They are often common sense. They start and end with how you communicate. Indeed, many barristers will argue that oratory and advocacy are the most important communication skills, and that persuasive legal advocacy calls upon sound legal research, excellent analytical skills and mastery of the facts of the dispute. I agree that all of these statements are true and that effective advocacy in a court or other adjudicative hearing involves each of these elements. The point though is that the key elements which make up effective persuasion in different forums – formal and informal – are often similar. What is more, modern commercial dispute resolution occurs vastly more often outside the formal hearings, judgments and decisions of court and arbitral panels. How? Often by negotiation, communication, mutual understanding and consent.

[8] D Lax and J Sebenius, *The Manager as Negotiator: Bargaining for Co-operation and Competitive Gain* (Free Press, 1987) p161.

Dispute resolution processes – the full spectrum or continuum[9]



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In turn, this makes an understanding of the techniques of persuasion in all its different forums/forms, all the more important.

Brevity

Brevity (and focus) is often a forgotten virtue when it comes to dispute resolution, let alone the papers and submissions lawyers tend to produce for any dispute resolution process. Whether it be mediation, early neutral evaluation, arbitration or court, breaching the virtue of brevity is a mistake. In fact, if you cannot state your overriding message in a sentence, then the message is probably going to be lost.[11] Therefore as a guide, if you cannot reduce the essence of your message or argument down to a persuasive sentence, the message is either invalid or requires further thought and analysis. It is far better to give your argument further thought and consideration, than thinking the point can be made good by extra words.[12] The same is true of the dispute. If you cannot reduce the nature of the dispute and difference between the parties down to several elements or points (both as to the content of the dispute and at a persona/commercial level), then your understanding or analysis of both parties' perspectives and interests probably requires more information and/or considered thought.[13]

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[9] For a more detailed comparative analysis of the main features of these dispute resolution processes, see the tables in Goldberg, Sander, Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes* (2nd ed, 1992) pp 3-5 and N Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2009) pp 29-37.

[10] Drawn from an as yet unpublished survey of litigation "rates" in New York between 2004 - 2013 – specifically New York Southern District Court for Manhattan/Bronx regions. Adjudication at trial includes any resolution post selection of jury duty and therefore excludes any agreement on the issues in dispute reached with the assistance/guidance of a judge ("judicial settlement").

[11] To partly adapt famous Australian advertising man Bill Muirhead's comment about the discipline of political advertising and posters: 'It's a bit like headline writing – if you can't state your message in a sentence, you'll lose.': J Chessell, 'The Fine Art of Persuasion', *Australian Financial Review Magazine*, p 72, September 2015. The more contemporary example is: what "is your elevator pitch"?

[12] A famous Australian Queen's Counsel, Peter Hely, regularly observed: 'There is no case or argument that cannot be improved by reducing it to no more than one and a half pages.' Another famous Senior Counsel, this time from South Africa, similarly noted that the 'first rule of practice for the beginner … [and] golden rule for the leader at the Bar is to look for one issue of law or fact which determines the matter. In every case, the successful lawyer is he [or she] who can recognise this essence, can pursue…' and realise it. If you cannot, 'Settle; and settle fast!': E Morris, *Technique of Persuasion* (2nd ed, Juta Publishing, 1975) pp 11 and 13.

[13] To paraphrase E Morris QC – see footnote 10.

Effective communication

Unlike how it is often taught at law schools, the persuasive and social importance of effective communication is quite complex. It is a skill and mode of successful dispute resolution, which begins far earlier, and involves a much deeper skill set, than the oratory and advocacy-style communication used by practitioners before an adjudicator or even during a negotiation. Effective communication is a foundational skill and often the means to understanding and resolving a dispute. First and foremost, effective communication requires the ability to listen carefully and actively, in such a manner that involves patience, objectivity and the capacity to develop empathy.

Objectivity is important because we all have human foibles and prejudices, even before the misunderstandings in a dispute begin to emerge. Attribution bias regularly arises as a matter of human nature, as we tend to attribute incorrect or exaggerated intentions and characteristics to the other party. Attribution bias also works in reverse. For example, a party may think: 'the other party was so lucky to have developed such a quick rapport with the mediator around their love of sailing', in contrast to; 'of course our own recognition of the mediator's preference for polite, respectful dialogue was due to our masterful preparation and attention to detail!' The solution to misunderstanding, miscommunication and bias is to listen, ask questions and develop understanding.[14] This can be done in countless different ways, but an objective perspective of the other person's point of view is often best achieved through demonstrating an understanding of the other person's needs and interests.

Psychologists talk about the science and art of persuasion around our thoughts and feelings and how this is done through two different neural pathways: (1) surface structure, which conveys what we observe through our five senses; and (2) deep structure, which 'contains a person's experiences, values, biases, prejudices, dreams, fears and beliefs.'[15] The successful resolution of even the simplest distributive dispute will almost always involve some aspect of one or more parties' values, biases and beliefs, let alone other types of disputes! This is why seeking to understand each party's interests can be so invaluable; as a point of reference, they are much broader, relevant and instructive than the other party's stated case or position.

Not surprisingly, effective communication is a matter of good people skills and sense. You seek to communicate effectively, which requires you to listen, understand and obtain information. Typically, this best occurs when you are respectful and sincere. With the benefit of a proper understanding and perspective, you are then much better placed – both as a matter of process and content – to advocate your own needs, interests and perspective. Indeed, effective communication (and what constitutes it) is often the foundation stone, if not the key, to successful persuasion and resolution.

Barriers to dispute resolution

Why is it that resolving commercial disputes (for disputes over personal, relationship and family issues are quite a different species of dispute altogether) are still not occurring as quickly and effectively as they should? Or to be more precise - what are the barriers and the solutions? There are many and multi-faceted barriers to dispute resolution**.** It is a complex topic and one which is often very fact/circumstance dependent. One of the explanations commonly given is the belief that you cannot speak to or reason with the other party, so as to reach a mutually satisfactory resolution. Hence the constant emphasis on the many communication and understanding barriers which can arise and how to overcome them. Misunderstanding and/or misinformation is a common problem. So too is attribution bias. The cure:

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[14] Or "put yourself in the other person's shoes" as it is regularly described.

[15] See for example, RC Waites and JE Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' ' in D Bishop and EG Kehoe (eds), *The Art of Advocacy in International Arbitration*, (2nd ed, JurisNet, 2010) p 76.

(a) Be patient and persistent;
(b) Always treat the other person as you will want to be treated;[16]
(c) Your credibility as a person and the communicator is critically important – don't waste it;
(d) Listen more than you talk. If you don't understand, ask. But ask politely, openly and objectively; and
(e) Understanding does not equal agreeing. You can easily understand someone else's point of view and acknowledge it – 'so I understand you are angry because ...' – without necessarily agreeing with it. However, if the other party knows you understand their point of view (even though you do not agree with it), it is much more likely they will then listen to your reasoning more openly than they otherwise would.

As mentioned previously, another barrier to successful dispute resolution is misunderstanding. When you and I communicate about whether to go for a coffee, there are six dimensions to our conversation: (1) what I intend to say in my mind (the internal neural/intellectual process); (2) how I say it (what words I use to convey my thoughts and equally important, with what tone and body language I express it); and (3) what you hear (a combination of my words, tone/body language and your past experience/prejudice of me and/or the beliefs and experiences which you bring to the topic under discussion). When you reply, the same three dimensions apply in reverse. As a result, the scope for misunderstanding of a simple conversation is enormous. In a complex factual dispute with all the emotions and beliefs which it can involve, the risks for misunderstanding multiply exponentially. In other words, if persuasion simply consisted of relating the facts of the dispute at hand, there would be no need for legal or other advisers. We would simply type the facts of the case into some 'justice' computer and it would decide on the outcome. Human beings, however, are much more complex.[17] This is why the study of human psychology is so central to the comprehension and mastery of successful persuasion and dispute resolution. One of its lessons is that human decision making involves a constantly shifting tension between the reasoning (neo-cortex) and emotional/instinctive (amygdala) parts of the brain. How we communicate and process information therefore depends on what we think and how we feel. This means that decision-making is not only a fact and intellectual process. It is also why many advocacy texts now stress that 'a cautious and thoughtful advocate should identify both the emotional and rational appeal' of the case.[18] A process of logical reasoning and research is important. But alone it might not be enough. For example, the use of a narrative story as the mode of communicating the essential facts (and hopefully intuitive appeal) of the case or argument can be very persuasive. The story is cast so it seems instinctively 'fair', 'just', consistent with community standards or, as it is sometimes described by lawyers, 'equitable' and as such, is more likely to appeal to the emotional-rational duality of the human thought process.

Thus, at its heart, you will generally be most persuasive when you communicate effectively and recognise that as human beings, we and the other party are motivated by far more than what may be described as the objective facts and rational/legal outcome of the dispute. Rather, the drivers of a dispute and its resolution can revolve around our feelings and how we think we have been treated, not just in terms of the facts of the dispute, but the process of resolution.

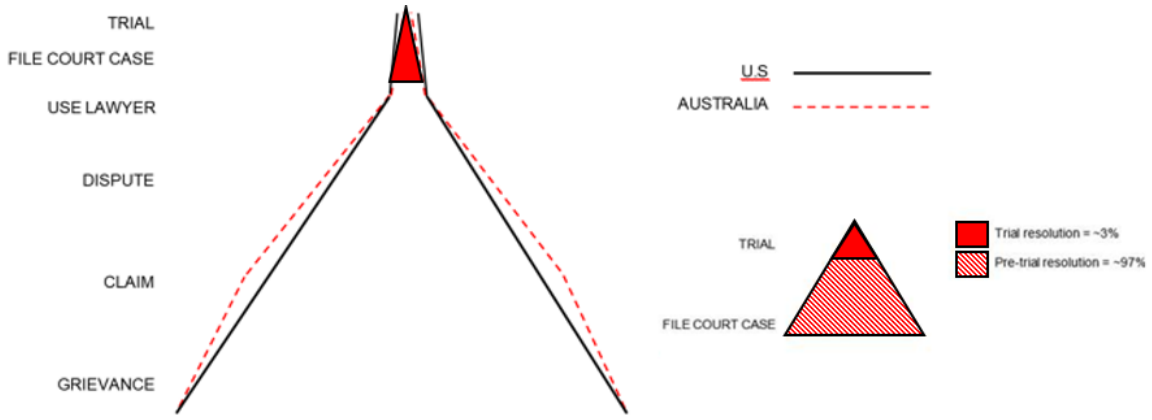
Which dispute resolution process when?

I have often observed that the practitioners of each process (whether it be mediation, arbitration or litigation for example) tend to espouse a singular and biased preference for the process in which they are a specialist. For example, the reaction of today's commercial litigation lawyer to ADR is no different to

[16] I appreciate this is probably the 5th time I have mentioned "respectful" and "polite" communication and interaction. From my experience as a litigation lawyer and mediator, the benefits of doing so cannot be emphasised too much.
[17] RC Waites and JE Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' in D Bishop and EG Kehoe (eds), *The Art of Advocacy in International Arbitration*, (2nd ed, JurisNet, 2010) p 96.
[18] RC Waites and JE Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' in D Bishop and EG Kehoe (eds), *The Art of Advocacy in International Arbitration*, (2nd ed, JurisNet, 2010) p 6.

what it was twenty years ago: 'I think mediation (or pick any other ADR process) has real merit, but just not for this case.'[19] Psychologists and economists suggest that this is a perfectly understandable and rational response. True. But it is still extraordinarily unhelpful to the client if the adviser's specialty process (in this case litigation before a court) is ill-suited to the dispute being encountered or more to the point, the solution which is sought. Hence the oft-repeated advice: the best dispute resolution advisers, like any other top technician, should come to the problem equipped with a full tool box and expertise for each process option.

It is easy to illustrate why. ADR purists may be appalled, but one of the valid processes for dispute resolution is adjudication. However, the vast majority of matters commenced in court, are resolved prior to trial, as illustrated below[20] .

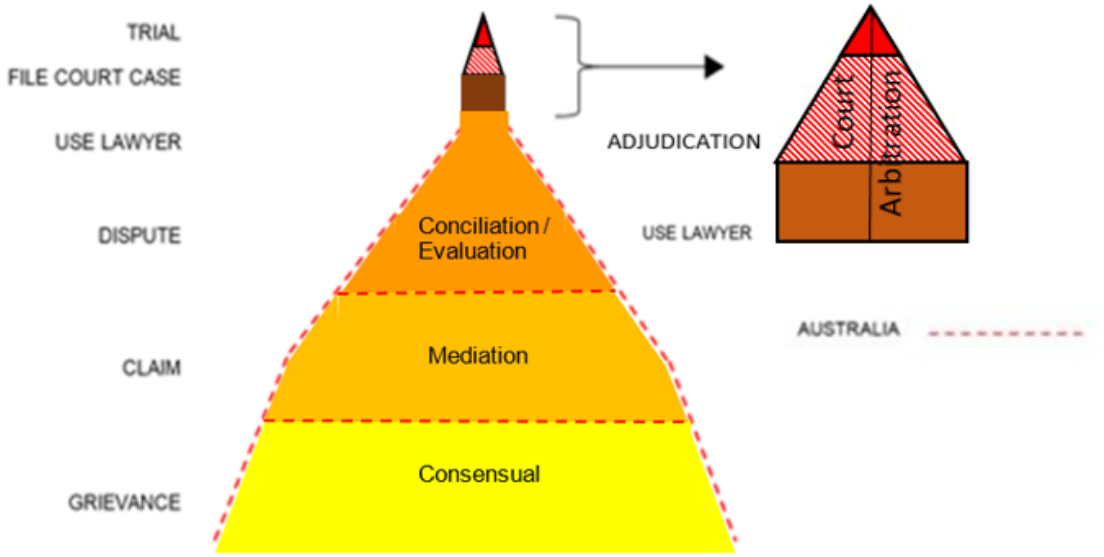


Or combining the dispute resolution spectrum and dispute pyramid, it looks something like this[21]:

[19] Twenty years is probably an underestimate, but it was around this time when LEADR (Lawyers Engaged in Alternative Dispute Resolution) was getting started in Australia and I (and many others) were giving seminars to commercial law firms on the benefits of ADR and mediation. The audience and their reactions were very polite, but the take up initially was very poor.

[20] This comparative dispute pyramid is drawn from M Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about our Allegedly Contentious and Litigious Society" (1983) 31 *UCLA Law Review* 4 and J FitzGerald, "Grievances, Disputes & Outcomes: A Comparison of Australia and the United States" (1983) 1 *Law in Context* 15 at 30. In "Landscape of Disputes" Galanter at 63 makes the point that sociologically and litigiously Australia provides a comparative example to America – a perspective which FitzGerald then proved, certainly so far as tortious disputing patterns went.

[21] This diagram simply reflects the consensual processes which could be involved prior to instructing a lawyer and/or instituting arbitration/court proceedings. It is not intended to be exhaustive or accurate as to type of process or percentage of use.



In other words, dispute resolution occurs across a continuum of dispute resolution processes - consensual and adjudicative. These processes and their practitioners are not in competition. Rather, they are complementary. They are all processes with the same objective, dealing with the same problem, but bringing different approaches. In turn this means the different process options can be symbiotic, rather than competitive, in seeking to achieve the optimum resolution of the dispute for the benefit of the parties. However, what is required to achieve this is a mindset change to adopt a holistic approach. This way each dispute lawyer/professional having assessed the dispute at hand then utilises the most suitable resolution process.

By way of example: just as a barrier to resolution can be poor communication and/or misunderstanding between the parties to the dispute, so it can be that the parties actually fully understand each other – they just have a different view or need. On these occasions, the best process to resolve this difference or dispute can be adjudication – whether expert determination, case appraisal, arbitration or court. However, consensual and adjudicative dispute resolution are not as mutually exclusive as some practitioners and advocates tend to make out. Hybrid models of the two, such as mediation-arbitration, have proven quite successful. The skills, lessons and outlook for each also draw on many common elements and practices. This should not be a surprise. Ultimately, they all (currently) involve humans trying to persuade humans to reach a conclusion or decision which favours the party making the assertions. The complexity comes from the detail of both the process involved and the manner and content of advocacy most suited to the dispute resolution process being utilised.

Successful dispute solutions and strategy

Another similarity is that a key aspect of successful dispute resolution, whether consensual or adjudicative, is developing and applying an appropriate dispute resolution strategy**.** Disputes and litigation are not a thing of beauty to 'lo and behold' – as shocking a concept as this may be to lawyers given the huge amounts of time, thought and attention which they devote to advance their client's case or litigation strategy. Rather, conflict and disputes make people fearful, confused and often hostile.[22] Disputes take up considerable time, emotional energy and cost. Clients are rarely please to be involved in a dispute. Rather they only become involved because they feel there is no other way to resolve the

[22] RA Baruch Bush and JP Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, 1994) p 191.

undesirable situation before them. For example, a party might say: 'I fully understand the other party's interests, commercial drivers and preferred outcome – it is just that the outcome the other party wants is contrary to my interests and views.' Even then, most parties who trigger a dispute for reasons which are considered valid and/or commercially rational, still wish it was not so. Rather, their strong preference is that the disagreeable situation or circumstance can be as quickly and successfully resolved as possible. This is even more so when a party or parties are involved in a dispute which they consider invalid and/or has arisen through misunderstanding. The core query should then become: How can a resolution be achieved which produces the desired outcome? This in turn raises a crucial commercial query: 'what constitutes a successful resolution?' The answer will often extend to much more than 'I want to win' or 'I want them to lose'. Rather it will usually extend to a multitude of factors involving time, cost, relationships and often, other commercial and possibly personal issues and interests. Drawing these issues out (for one's self and/or client) may take some discussion and evaluation – but will eventually prove worthwhile.

For example, Company A's business objectives may revolve around balancing the preservation of a traditionally valuable trading relationship with Company B, while at the same time, maintaining a strong profit margin. In addition, Company A is keen to achieve these objectives as quickly and cost efficiently as possible, while also preserving the pre-existing mutual respect between it and Company B. Achieving these potentially competing, but nonetheless crucial, commercial objectives requires careful (and sometimes innovative) thought to craft. As well as skill and discipline to achieve – often by both the client and their lawyer/adviser. The key to both the creation and effective implementation of a successful approach is often the dispute resolution strategy (or case theory or plan). Namely, how the client's commercial objectives can be best achieved.[23] Such a plan (and/or strategy) for how the dispute can be successfully resolved should be the centerpiece of any good dispute lawyer/advisor's advice. Indeed, this advice can be the biggest contribution and help the lawyer/advisor provides to their client in a dispute.[24] Of course, to most usefully perform this role, the plan/strategy should be developed as early in the dispute as possible, subject to the party and their lawyer/advisor being properly informed. It then needs to be objectively reviewed on a regular basis. It follows this is quite different to simply being reactive to the other party and their strategy.

The potential benefit and importance of developing and applying a tailored dispute resolution strategy as soon as possible, is highlighted by the accompanying inverse dispute pyramids[25] and the potential for costs (personal and financial) to blow out as the dispute and time drags on.

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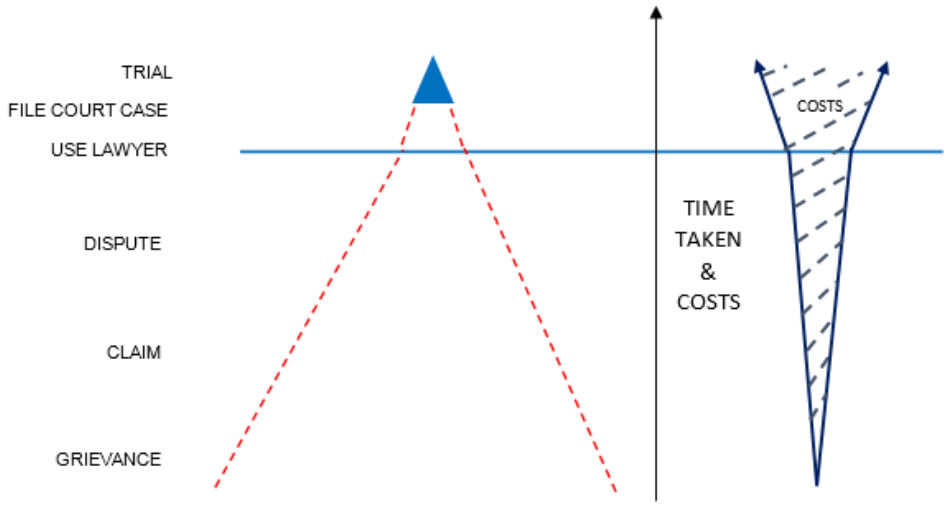
[23] As with all good techniques and strategies, ultimately success often depends on how well it is implemented.

[24] The importance of careful strategic and tactical planning in all types of conflict has been well known throughout the ages:

- 'The general who wins the battle makes many calculations in his temple before the battle is fought. The general who loses makes but few calculations beforehand.'
- 'All men can see these tactics whereby I conquer, but what none can see is the strategy out of which victory is evolved.'
- 'Strategy without tactics is the slowest route to victory. Tactics without strategy is the noise before defeat.'
- 'To rely on rustics and not prepare is the greatest of crimes; to be prepared beforehand for any contingency is the greatest of virtues.'

  All drawn from Sun Tzu, *The Art of War*: M McNeilly, *Sun Tzu and the Art of Modern Warfare* (Oxford University Press, 2001) p 106.

[25] This comparative pyramid is drawn from MA Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about our Allegedly Contentious and Litigious Society' (1983) 31 *UCLA Law Review* 4 and J FitzGerald, 'Grievances, Disputes & Outcomes: A Comparison of Australia and the United States' (1983) 1 *Law in Context* 15 at 30. In 'Landscape of Disputes' Galanter at 63 makes the point that sociologically and litigiously Australia provides a very comparative example to America – a perspective which FitzGerald then proved, certainly so far as tortious disputing patterns went.



Preparation

I will now end where I should have begun: preparation. So many disputes could be resolved much more quickly and successfully if proper and informed thought had been given to the dispute at the outset. It is critical for ADR practitioners to invest time and thought into the issues of the dispute, its human dynamics, what is known and not known, and the best process to resolve it. At the outset, you also need to carefully consider and reflect on what your and your client's needs and objectives are. In other words, you get the agreement you want by starting with an understanding of what you or your client wants.[26] Disputes by their nature are competitive (if not combative). It is quite natural (and in a commercial dispute, economically rational) to say, 'I want to win', or the more polite version, 'I want to resolve this dispute successfully'. Instead, it is important to consider what this 'win' will look like. What are the needs you are trying to meet and why? With a bit of objective thought and care, undertaking such a fundamental question and answer analysis can sow the seeds for a successful dispute resolution.

In all types of competition, it is well recognised that the key to success is preparation. Successful dispute resolution is no different. Preparation is critical in respect of the content of the dispute, the preferable process and the human angle. Problematically, parties to a dispute sometimes confuse wanting to win and doing so in a competitive, if not combative manner (whether consciously or sub-consciously). Confusing objective and approach is often a mistake and quickly becomes a barrier to successful conflict resolution. This is one of the many tensions and barriers to successful dispute resolution. It is far better to recognise at the outset the process and content dimensions to any dispute solution, as well as what is trying to be achieved. This all flows from proper preparation and analysis (including establishing and then monitoring your resolution strategy).

The science, art and technique of persuasion calls for all the communication, listening and people skills which have been described above. Being successful in the context of a dispute also requires careful attention to the relevant facts, the issues which they raise and therefore an appreciation of the rights and wrongs of the dispute. From this, you construct a case story (or case theory or trial narrative) which appeals to the listener's sense of what is fair. If you like, what is right or wrong or 'just'. In this process of analysis and distilling the essence, it is the facts which are most important. A sound narrative around the facts will usually have intuitive appeal to the audience of what is just and fair. The distinction in preparation between process and content is a useful one. However, they are ultimately inter-related, and

[26] D Lax and JK Sebenius, *3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals* (Harvard Business Review Press, 2006) p 21.

no more so than in forming an explanation of the dispute and your case story or narrative. If you are involved in a consensual dispute process and therefore require the other party's consent for any resolution, you will alter your advocacy, communication and case story accordingly. You will focus more on persuasive communication, empathy and relationship, and perhaps less on the rights or wrongs of the matter. Certainly, you will focus less on what 'you' did. In an arbitration (or other adjudication) the focus of the persuasive communication will be much more the arbitral panel, your case story and what you need to prove by admissible evidence to establish it. In this way, what is required for success can differ quite markedly in practice depending on the audience and the process/forum in which you are operating. In saying this, both the inherent simplicity and complexity of successful dispute resolution is neatly illustrated. How you should approach a negotiation in terms of manner, communication, emphasis and content, will be quite different to how you will do so for the same dispute in an arbitration. Yet, similar elements of persuasion apply to both.

The last words

There is no one key technique, golden rule or practice which delivers successful dispute resolution. The infinite number of facts, circumstances, human personalities and behaviour which make up the disputes of life and commerce make arriving at such a singular solution impossible. However, there are a number of practices and approaches which you should usually follow. Yet, life experience teaches us that there is almost always an exception to every good rule or practice.[27] Accordingly, it is correct that much of successful dispute resolution stems from good people and communication skills, combined with thorough preparation, strategy and the use of various approaches, principles and tips depending on the dispute and process by which it is sought to be resolved. This is why people continue to find themselves mired in unproductive and unwelcome disputes, and why with careful, considered thought and analysis, there is such an opportunity for them to more successfully resolve their disputes and for lawyers/advisers to help them do so.

[27] My personal favourites are that:
(i) we have all learnt that persuasive advocacy requires us to recognize that information exchange includes both cognitive (what we think) and affective (what we feel) information. Okay – so when should I or my client be calmly rational and when should we show and express our emotions? The answer, well certainly for those of us from English stock, is if in doubt, don't show or express your feelings. However, although a matter of common social practice, it is not always a practice for the most effective advocacy; and
(ii) It is widely reported and quoted – I do not know if accurately, but as I like the story, I do likewise – that when Confucius was asked, 'Is there one word that can serve as a principle of conduct for life?' he replied: 'It is the word 'shu' – reciprocity. Do not impose on others what you yourself do not desire.' This is, of course, the basis for empathy, the golden rule and many moral codes and religions. Still, reciprocation, as much of a sound tenet as it is, can also be the very reason why some disputes escalate out of control, as each party responds in kind to bad behaviour of the other, with an inevitable downward conflict spiral.