

BOND DISPUTE RESOLUTION NEWS

Volume 20 August 2005

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Recent Activities of Bond University Dispute Resolution Centre	Recent and Forthcoming Publications NEW BOOK	Forthcoming Courses of Bond Dispute Resolution Centre
Thoughts & Themes		Bonding to Bond

Recent Activities of Bond University Dispute Resolution Centre

28-30 July 2005

Basic Mediation Course – Sofitel Gold Coast, Broadbeach, presenters, Professors Laurence Boulle, John Wade and Pat Cavanagh

LAURENCE BOULLE

26-28 May	Presentation at the Institute of Arbitrators and Mediators Australia 30th Anniversary Conference, Canberra, on 'On-line ADR'.
20-24 June	Worked on a Guide to Inter-Governmental Dispute Resolution with Professor Nico Steytler, Cape Town, for the South African Department of Provincial and Local Government.
12-15 July	Attended a training course on the Native Title legislation for members of the National Native Title Tribunal, Cairns.
8 July	Gave keynote address at the Australasian Law Teachers Association Conference in Hamilton, New Zealand, on 'Educating Lawyers in ADR'.
23 July	Presentation to Law Faculty, Law Experience on ' <i>Alternative Forms of Sentencing</i> '.
9 August	Attended a liaison committee meeting for the National Accreditation project which Laurence will be facilitating over the next five months, Sydney.

JOHN WADE

4-12 May	Delivered negotiation workshops for Blakes lawyers in Canberra, Sydney, Brisbane and Melbourne
20 May	Montgomery, Alabama, DR Conference at Jones Law School, delivered paper on "Duelling Experts".
21-22 May	Visited in LA with mediator Professor Woody Mosten.

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23-27 May	Taught five-day mediation course at Pepperdine.
26 May & 30 May	Visited mediators Nina Mierding in LA; Deb Zutter and Michelle Le Baron in Vancouver.
7-8 July	Delivered papers on "Preparing for Negotiation and Mediation", and on "The Future of Legal Education" at ALTA Conference, Waikato University, Hamilton, NZ.
18 July	Workshop on Negotiation Behaviour at Hopgood Ganim Lawyers, Brisbane.
July-August	Completed four chapters for <i>Negotiator's Fieldbook</i> American Bar Association: 2006 forthcoming.
5 August	One day Negotiation workshop for Hunt and Hunt, Lawyers, Brisbane.
22-27 August	Five day mediation course, SMU, Dallas, Texas.

BEE CHEN GOH

July	Published 'Ideas of Peace and Cross-Cultural Dispute Resolution', (2005) <i>Bond Law Review</i> 49
31 July	Convened 'Peace and Inter-faith Symposium and Peace Workshop', Bond University.

Laurence Boule, John Wade and Avrom Sherr, Director of Institute of Advanced Legal Studies, University of London, presented a plenary workshop on the "Future of Lawyering and Legal Education" at ALTA, Hamilton New Zealand, July 2005.



*Finished Rowling on Potter?
Try Boulle on Mediation next.*

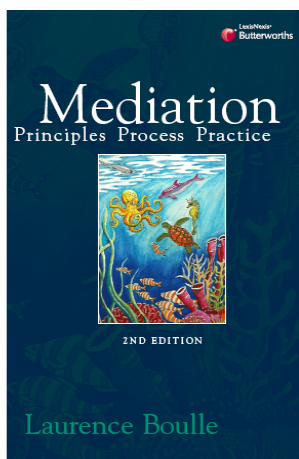
628 pages of intrigue, magic and enlightenment, all within the bounds of the law. Be fascinated by the art work, spell bound by the prose. Look for the ever-lurking danger of a hanging participle or a split infinitive. See if you will be sighted [geddit?] in the under-passages. Decide for yourself if good does triumph in the end.

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Recent and Forthcoming Publications



Laurence Boule

Mediation: Principles Process Practice
(2ed LexisNexis Butterworths Sydney 2005).

This book has been written for teachers and students of mediation theory and principles, for those who practice in the field, and for judges, lawyers and other law officials who are involved in the consideration of the many legal facets of mediation practice.

Part I elucidates the historical foundations of mediation in different contexts and the theories and values underlying its modern applications.

Part II describes the modern practice of mediation, in Australia and abroad, and analyses the numerous laws and cases that regulate aspects of the mediation process. Attention is given to the important issues of quality, standards and accountability in mediation and to the empirical knowledge of its operation and effectiveness.

This book builds on the foundations of its predecessor, which was the pre-eminent mediation text in Australia and was published in local editions in New Zealand, Canada, South Africa, Singapore and the United Kingdom. It is a complement to the author's *Butterworths Skills Series – Mediation Skills and Techniques*.

The author is Professor of Law at Bond University, Gold Coast, and Adjunct Professor, Australian Centre for Peace and Conflict Studies, University of Queensland. He is a part-time member of the National Native Title Tribunal, a member of the Law Council of Australia ADR committee, former chair of NADRAC, and a trainer, practitioner and consultant in mediation and dispute resolution.

ISBN 0-409-31945-7

For information or ordering email: academic@lexisnexis.com.au or call LexisNexis in Australia 1800 100 161

www.lexisnexis.com.au/academic

For those interested in attending the Melbourne Launch of the book by The Hon Chief Justice Marilyn Warren AC, Supreme Court of Victoria, to be held on 6 September 5.30pm for 6.00pm at CMA Centre, 500 Collins Street, Melbourne, sponsored by Lexis Nexis Butterworths and CMA Centre. RSVP 31 August 2005 drc@bond.edu.au

Laurence Boule published *Mediation Principles Process Practice* (2 ed, 2005).

Produced Issues 7.9, 7.10 and 8.1 of the *ADR Bulletin*.

Brenda Marshall published 'Disputes over access to "Declared Services": Evaluating the negotiate-arbitrate framework in Part III A of the Trade Practices Act' (2005) 16 *Australasian Dispute Resolution Journal* 187.

"The Negotiator's Fieldbook" (American Bar Association, 2006)

The Negotiator's Fieldbook is the working title of a new book edited by Andrea Kupfer Schneider and Christopher Honeyman, to be published January 2006 (approx.) by the book division of the American Bar Association. The book will be the most thorough cross-disciplinary analysis of negotiation yet seen, with sixty contributing authors from a very broad variety of disciplinary and experiential backgrounds.

The Negotiator's Fieldbook originated in the Hewlett Foundation-funded Broad Field project, directed by Christopher Honeyman. In late 2003, in conjunction with Marquette University, the project organized a small conference to re-examine what topics and treatments, in a wide variety of disciplines, were important to a competent understanding of negotiation, but were simply not being taught outside of one narrow domain or another. The conference was designed around the project's discovery that business schools, law schools, and graduate international relations, planning and psychology departments, along with others, were all teaching negotiation---but that each was doing so without any significant effort to determine what was relevant that originated outside the particular field involved. As one result, no student of negotiation was getting the whole picture.

In 2004 the project organized more than sixteen conference sessions, at venues appealing to a variety of disciplines and practice backgrounds, to critique and expand what was beginning to be seen as an interdisciplinary canon of negotiation. The result has been expansion of the list to more than 80 topics. Each element of this list still fits the key screen of the original inquiry: "material established in one domain" that's "also essential to other domains that have never heard of it." The result will be the first truly comprehensive look at negotiation ever published as a single work.

John Wade and Bee Chen Goh from Bond University Law School have written six of the chapters for the book.

This newsletter includes a draft chapter by John Wade and Christopher Honeyman, *Negotiating Beyond Agreement to Commitment: Why Contracts are Breached and How to Make them More Durable*, to be published in the Book.

Forthcoming Courses of the Dispute Resolution Centre

Advanced Mediation Course

22-25 September, 2005

Sunshine Coast, Queensland.

This 4 day course is held at the beautiful Sheraton Resort on Hastings Street, Noosa. The course, held yearly over the last 13 years has attracted diplomats, lawyers, doctors, managers and mediators from around Australia and from overseas. Workshops and role-plays deal with preparation, diagnosis, language, variations of mediation models, negotiation dynamics, common hurdles, and increasing the toolbox of mediation interventions.



Places available – contact drc@bond.edu.au to register

Bond University Short Courses				
22-25 September 2005	Sheraton, Noosa	Short course – 4 days	Advanced Mediation Course Download Registration Form	Boulle, Wade
14-16 October 2005	Melbourne	Short course – 3 days	Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au	Boulle, Wade
3-5 November 2005	Canberra	Short course – 3 days	Family Law Arbitration Workshop – contact AIFLAM Law Council of Australia – kate.bolas@lawcouncil.asn.au or fax: 02 6248 0639	Theobald, Altobelli, Wade
1-3 December 2005	Marriott, Surfers Paradise	Short course – 3 days	Basic Mediation Course* Download Registration Form	Boulle, Wade
* This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)				

IN-HOUSE NEGOTIATION TRAINING

For details of popular individual course outlines on Negotiation see <http://www.bond.edu.au/law/centres/drc/courses/>

Thoughts and Themes

NEGOTIATING BEYOND AGREEMENT TO COMMITMENT: WHY CONTRACTS ARE BREACHED AND HOW TO MAKE THEM MORE DURABLE

By Professor John H. Wade^a and Christopher Honeyman^b

“Peace, peace, they say, when there is no peace” (Jeremiah, Chapter 8, Verse 11)

Summary

This chapter speculates on rates of non-performance of different types of agreements; then sets out reasons for breach; and finally suggests a catalogue of methods to increase the durability of or commitment to negotiated agreements.

Introduction

It is usually a primary goal of a negotiator not merely to reach an agreement, but also create an agreement which is durable, and “contractors” who are committed to its performance.

Contracts, settlements or agreements which are substantially performed by all parties and without abandonment, or resort to enforcement proceedings may be described as “durable”, “final”, “stickable” or “committed”. This working description of a durable agreement attempts to avoid the historic legal debate over whether contracts give each party an election – to perform the primary obligations, or “perform” the secondary obligations, namely by breaching and paying damages (or accepting other consequences of breach). This chapter works on the assumption that choosing secondary damages obligations is not “performance”.

What percentage of negotiated agreements in various types of transactions, or types of conflict, or in various “cultures”, are actually performed as agreed? For how long do agreements in these varieties of areas “endure” or “stick”? To use narrower legal language, what percentage of negotiated agreements in these various areas are seriously “breached”, or allegedly seriously “breached”?

Various levels of courts ask similar questions about consent or litigated orders. What percentage of judicial orders are complied with, and for how long, in different areas of culture and conflict?

With only anecdotal evidence to rely upon, it is probable that the actual durability rate of agreements varies enormously across class, culture, wealth, and type of transaction or conflict. With extensive research, these patterns of breach could be made visible by “durability graphs” or “performance rates” which may assist to change people’s expectations of finality.

For example, low rates of durability (only 10%-20% lasting more than 12 months?) would possibly attach to child visitation agreements in certain categories of families. Conversely, high rates of vendor-purchaser durability (85%-90% lasting indefinitely?) would possibly attach to house purchases in Australia or America. Purchaser - bank mortgage contracts may also have high rates of performance amongst the middle class, until recession and job losses escalate. Again such studies of performance and non-performance would assist to modify expectations of “finality” of negotiated agreements.

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^b Christopher Honeyman is president of Convenor, a dispute resolution consulting firm and is project director of Theory to Practice, a national project funded by the William and Flora Hewlett Foundation to develop better linkages between people who study conflict resolution and those who practise it.

Many of the factors which hinder *initial* commitment to reaching an agreement also contribute to undermining *ongoing* commitment to performance. Set out below are some of the anecdotal reasons why negotiated agreements are “breached”, or are not durable.

1. Cultural Expectations of Flexibility

In some cultural groups, a written or oral contract is perceived to be only an agreement to work together in the future. It is a symbol of a relationship, not of obligation to perform its detailed terms.¹ The agreement has implied terms that if any party has difficulties in performing then everyone will assemble again and negotiate ways to preserve the relationship, and vary the “obligations”.

This interpretation of the impermanence of a contract or agreement may come as a shock to an inexperienced person from a Western culture where legal finality is assumed, and where relationship does not trump commercial certainty.

This leads to the predictable pattern of the economically more powerful party attempting to negotiate that all breaches or variations will be dealt with ultimately by courts or arbitrators from their own culture, and applying their own cultural and legal rules.

2. Complexity of Ongoing Obligations

The more complex are the terms of any negotiated agreement, then the higher the likelihood that various obligations will “break down” with the passage of time and circumstance. The fragility of an agreement increases with multiplication of parties, vague language, period of performance, and number of obligations on human behavior (eg “use best endeavors”; “take reasonable steps to refer customers”; “delays caused by inclement weather or unforeseen circumstances”).

Of course, many negotiators attempt to reduce ongoing complexity by lengthy definition of vague terms, reference to industry standards, self-enforcing arbitration clauses or decisions by a specified “authority”, liquidated damages clauses, and clean break swaps of money for a defined act.

3. Shallow Peace

Agreements, treaties or litigation may momentarily give an outcome, while the underlying causes of conflict remain, together with the emotional and structural changes associated with escalation.² The parties achieve shallow “settlement”, but not deep “resolution”. In those circumstances, the agreement is unlikely to endure. The aggrieved party will find a moral or legal justification to breach in the next week or decade. Successive agreements may be entered into and breached many times during ongoing family, international or tribal disputes.³ Eventually, if underlying causes of conflict, emotional and structural changes are addressed satisfactorily, one of these agreements may be substantially performed by all the involved and still surviving parties.

The same reasons which cause conflict also cause the collapse of settlements; it is therefore worth reviewing them here. Christopher Moore has categorized the five causes of conflict as data, interest, structural, value and relationship conflicts.⁴

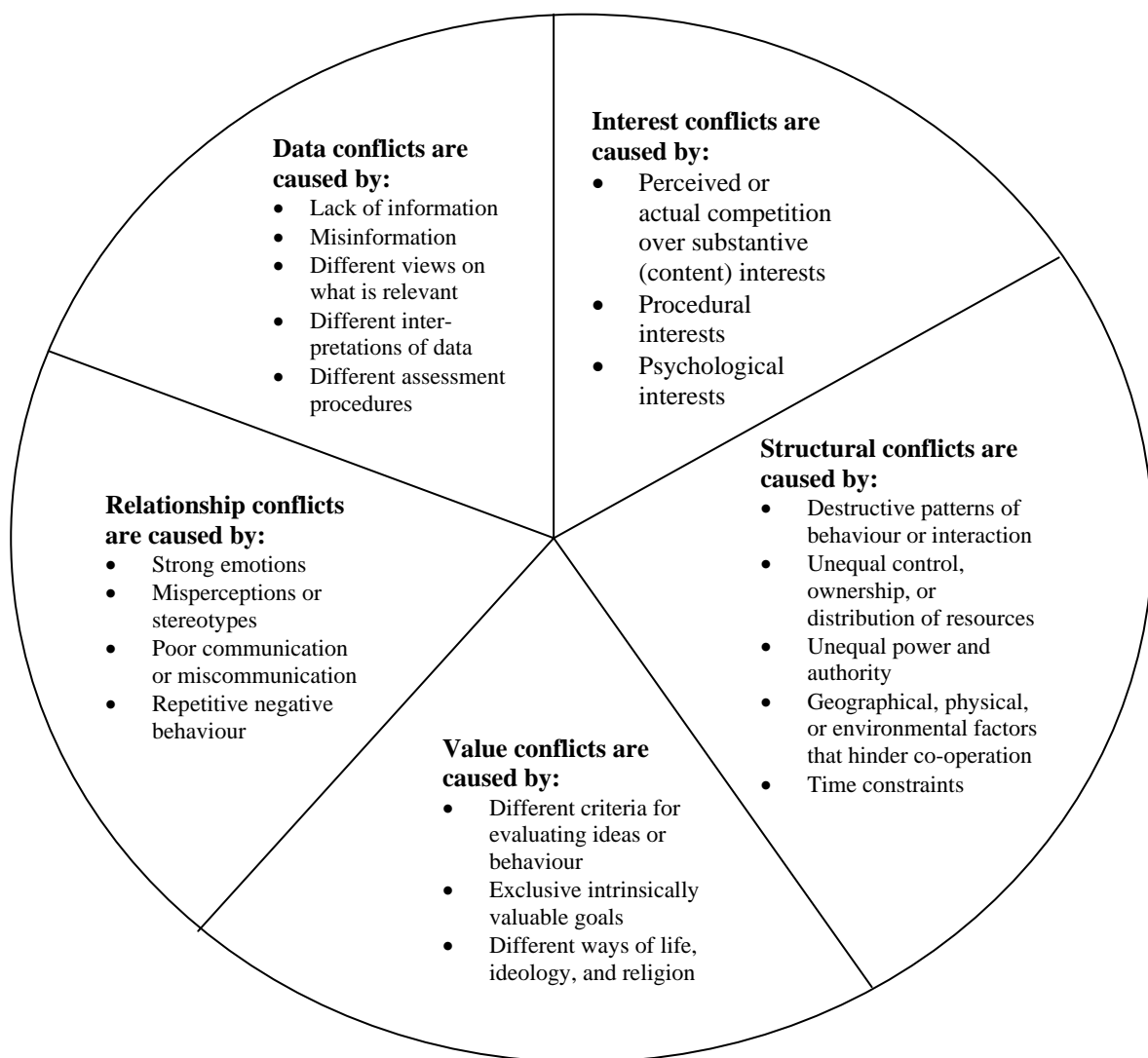
These are represented by the following chart:

¹ Roy J. Lewicki, Bruce Barry, David M. Saunders & John W. Minton, *NEGOTIATION* (2003) Ch 11; *CULTURE, CONFLICT MANAGEMENT AND NATIVE TITLE: AN EMERGING BIBLIOGRAPHY*, www.aiatsis.gov.au/rsrch/ntru/ifamp/index.html

² See Dean G. Pruitt & Sung Hee Kim, *SOCIAL CONFLICT* (2004); Sandra Cheldelin, Daniel Druckman & Larissa Fast (eds), *CONFLICT: FROM ANALYSIS TO INTERVENTION* (2003).

³ See examples in Christopher Honeyman, *The Wrong Mental Image of Settlement* 17 *NEGOTIATION J* 25 (2001); John H. Wade, *Representing Clients Effectively in Negotiation, Conciliation and Mediation of Family Disputes* 18 *AUSTRALIAN J. OF FAMILY L.* 283, 299, 302 (2004).

⁴ Christopher W. Moore, *THE MEDIATION PROCESS* 64 (2003).



In the comparatively well researched area of family disputes, many reasons have been identified for the particular difficulties of responding constructively to serious interspousal conflict. Kressel has commented:

[No] single person and no single thing is likely to be to blame if settlement negotiations are frustrating and difficult; all of the parties, including highly experienced and competent professionals, are contending with many forces not of their making and by no means under their control.

If we restate the views of our expert divorce practitioners in language applicable to other domains of conflict, nine shared obstacles to a constructive negotiating experience can be identified:

1. *High levels of intraparty conflict*
2. *Well-established and rigid patterns of destructive interaction*
3. *Inexperience in the art of negotiating*
4. *Scarcity of divisible resources*
5. *Complex issues which threaten loss of face or self-esteem*
6. *Elevated levels of stress and tension*
7. *Social norms and institutions for conflict management that are weak or that unintentionally provoke destructive interaction*
8. *Disparities in the parties' relative power*
9. *Disparities in the parties' degree of interpersonal sensitivity*

The last two of these obstacles are closely associated with the male-female context in which divorce negotiations occur.⁵

4. Buyer's Remorse

There is a well researched post-agreement emotional state sometimes labeled "buyer's remorse", or "post-settlement blues", or the "winner's curse".⁶ This is a state of regret and even depression which strikes many (not all) negotiators who have "lost" an actual or imagined better deal, for a perceived ordinary deal. "What if we had held out for longer, would we have received more?"

This personal sense of loss and regret can be reinforced by armchair critics.⁷ Someone experiencing buyer's (or seller's) remorse may refuse to perform the agreement, and can readily create a list of moral and legal justifications for this withdrawal.

5. Changed Circumstances

There are some agreements which due to custom or market pressure will be renegotiated regularly because "things change". This is similar to the previous discussion of "cultural expectations of flexibility". However, that heading related to national or regional culture, whereas this category relates to common industrial practices, or common practices of flexibility in particular transactions. One example is an agreement between separated parents about times of access or visitation with their children. A carefully negotiated schedule always is varied/breached/not performed as a child is busy, sick, away on an excursion; or a parent is busy, sick, or sent away by an employer. Another example is employment contracts in research, exporting, military and technological industries. The original "understandings" or contracts for both employer and employee may be subject to constant renegotiation in order to adapt mandated behavior in competitive fields.

⁵ Kenneth Kressel, *THE PROCESS OF DIVORCE- HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* 31 (1985); see also Janet R. Johnson & Linda E.G. Campbell, *IMPASSES OF DIVORCE* (1988); Elisabeth Kubler-Ross, *ON DEATH AND DYING* (1969); Robert S. Weiss, *MARITAL SEPARATION* (1975); Peter Jordan, *THE EFFECTS OF MARITAL SEPARATION ON MEN* (1985).

⁶ See Roy J. Lewicki, Bruce Barry, David M. Saunders & John W. Minton, *NEGOTIATION* 157 (2003).

⁷ See John H. Wade, *Bargaining in the Shadow of the Tribe* (2003) 15 *BOND L. REV.* 115.

6. Legal Rules Allow Variation Due to Changed Circumstances

Different legal rules exist in every country which enable contracts to be set aside or varied, based on a limited range of events which occur *after* the negotiated agreement.

So the phrase “But I thought we have concluded agreement”, is met by “We did, but we are legally justified in setting it aside because X (a fire, war, death, strike etc) has occurred”.

The list of legal exceptions to finality of contracts varies from one jurisdiction to another, and is often placed under the label “frustration of contracts”. These lists are studied assiduously by national and international lawyers and insurers who are trying to define the risks of non performance in each country. Then these lawyers engage in an ongoing industry of drafting standard clauses which narrow or expand those legal loopholes.

The broad cross cultural legal exceptions to finality based on post-agreement events include:

- the doctrine of frustration
- protection of the public purse. For example, child support agreements in some jurisdictions can or must be re-opened once a child is receiving state welfare payments.
- legislative destabilization based on a new “public policy”

There are many examples where a class of contracts is rendered invalid or unenforceable due to retrospective legislation which is purporting to protect some version of the “public good”. For example, legislation invalidating existing contracts with certain classes of people or businesses considered at various times of history to be “the enemy” or “needing protection”, such as German, American, aboriginal, Roman Catholic, Protestant or female!; or contracts which involve exportation of diminishing timber stocks, whales, or native animals; or contracts for the sale of newly discovered “dangers” – such as certain drugs, asbestos materials, explosive fertilizers, politically incorrect films or literature, off-shore tax evasion schemes.

7. Legal Rules Which Allow for Setting Aside a Contract Due to Pre-Agreement Events

Following the previous legal exceptions to finality based on *post-agreement* events, there are many categories of legal rules (which again vary from country to country) which allow contracts to be challenged based on *pre-agreement* factors.

Once again, these lists of fluctuating rules are studied and systematized daily by armies of lawyers around the planet. These workers are attempting to give some clarity to the loopholes to finality in a wide range of transactions and disputes. These loopholes and attendant risks can then be partly closed by careful drafting of contracts; by insurance; and by adjusting price in favor of the risk-taker. There are some pre-agreement legal loopholes, such as lying, which are difficult to close by drafting or insurance in most countries. For example, a clause which tries to enhance finality by stating to the effect that “one or both parties are free to lie overtly during negotiations with no consequential legal liability” is unlikely to reduce the legal risks attached to overt lying.

Broad cross-cultural legal exceptions to the finality of agreements, based on pre-agreement events include:

- Innocent, negligent and fraudulent misrepresentation⁸
- A limited range of mistakes, or unconscionable dealings
- Non-disclosure of “material” facts in certain classes of agreements such as insurance or family property contracts

⁸ Russell Korobkin, NEGOTIATION THEORY AND STRATEGY CH. 13 (2002); Nadja M. Spiegel, Bernadette Rogers & Ross P. Buckley, NEGOTIATION THEORY AND TECHNIQUES (1998) ch. 10.

- Entering contracts at a time when such arrangements are illegal by statute (eg sale of weapons, drugs, state secrets, or unduly monopolistic sales, as well as import contracts which prejudice protected farming industries) or against fluctuating public policy at that time.⁹
- Entering negotiations and a resulting contract at a time when one of the parties does not have sufficient *capacity* to consent due to youthfulness, junior status, depression, undue market pressure, inexperience, lack of information, lack of independent advice, haste, inappropriate threats, undue influence.
- Consumer protection laws in some countries give consumers mandatory cooling off periods; warranties which enable return of defective products; independent financial and legal advice; criminal sanctions against marketing tricks such as switching and bait-and-switch advertising; mandatory disclosures and information.

8. Efficiency and Accessibility of the Legal “System”

The previous two exceptions to finality of agreements concentrated on legal rules. However, rule analysis is unhelpful alone. It should be complemented by a cultural study of the “law in action”. Obviously, access to efficient lawyers, courts and judges differs dramatically across the world, and within countries. There are gradations of expense, uncertainty, delay, and corruption. For example, one yearly study of large international businesses, indicates that currently these businesses perceive Finland and New Zealand to have the least corrupt, and China and Indonesia to have substantially more corrupt, court systems and judiciary.¹⁰

Accordingly, where the legal (as compared to market) enforceability of a contract is unpredictable and/or unavailable, then finality of agreements due to “the law” diminishes.

On a shifting scale, where law enforcement is weak, delayed, uncertain, clumsy, or corrupt, then relationships and market power become more influential in either encouraging or diminishing finality. A subcontractor on a large building site will probably acquiesce when his/her boss reneges on the employment contract and hopes for a job on the next construction site. Even where legal enforceability is accessible, many “innocent” contractors do not bother with the delay and expense of enforcement proceedings. They prefer to invest their time and money in other business ventures, and punish the party allegedly in breach with business isolation.

Nevertheless, it is predictable that China will work hard to improve the image, rule of law, accessibility and independence of its own courts; and that meanwhile foreign businesses will attempt to add legal finality and western values to Chinese trade agreements by negotiating for off-shore arbitration or litigation enforcement clauses.

9. Lack of Informed Consent

Many agreements, notably settlements at the door of a court, are entered into under pressures of limited time, money, exhaustion, and exhortations to settle from lawyers and some tribal¹¹ members. Accordingly, some negotiators look back in anger at their confused state, chaotic information, and the pressure-cooker negotiating environment.

This sense of grievance may erupt later by a search for legal or moral justification to “get out of” the deal. For example:

- “My lawyer failed to explain the meaning of that clause”
- “I didn’t know that the terms of the agreement were final”

⁹ WILLISTON ON CONTRACTS Vol 14 (1957); J.W. Carter & D.J. Harland, CONTRACT LAW IN AUSTRALIA, Chs 16, 17 (2002).

¹⁰ THE 2004 TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX, <http://www.transparency.org/cpi/2004/cpi2004.en.html>

¹¹ “Tribal” is used here in the sense of relationship to a negotiator’s constituents or supporters, not to ethnicity. See Wade, *supra* note 7.

- “I was so confused and distressed on that day that eventually I signed anything put in front of me”
- “My lawyer pressured me into signing by a barrage of threats about court costs and the uncertainty of litigation”

A landmark study in Australia has recorded the early distress of 723 separated spouses:

Property applications can now be made....during the first year of separation. This may have unfortunate repercussions for those who are so distressed about the event that they can't think rationally, or for those whose animosity towards their spouses or whose guilt influences their decisions.

When the marriage first breaks down, you're not in a proper frame of mind to face the Court etc. One is at a disadvantage. It's not the best time for making decisions. (man)

People are so mixed up after separation. The settlement should be decided by independent people. (man)

I signed away custody of the children while under stress and medication. I have no chance at present of getting them back. (woman)

The process of separation and divorce were depressing. I couldn't think straight about making decisions about property settlements. (man)

At first I didn't know what I was doing – where I was going. (man)

Because of the shock nature of our marriage break-up I was unable to emotionally love my last child. I had to give her up for adoption as I looked on her as an unhappy memory of our marriage break-up. I was worried how I cared for her. I now feel an emotional void about her and my feelings for her. I was unable to project how I'd be in five to ten years' time. That annoys me in general about our system – I think decree nisi should be issued only after say five years time. (woman)

I went through a great deal of stress and strain. It wasn't a good period to know my own mind. Even though I made the decision to break up, my husband brought the divorce proceedings against me. If he had wanted, we might have reconciled. (woman)

The hassles of delaying make you reach a point where you can't bear to fight. Because of the emotional drain on you, you just want to get out no matter what the cost. (woman)¹²

These grievances sometimes trigger refusal to comply with the terms of family property settlements. As a matter of legal principle, they rarely are successful as a defense to an enforcement action.¹³ However, this begs the question whether the “successful” enforcement litigation eventually actually produced promised dollars or performance in the hand.

Judges have consistently taken the view that a client advised by a lawyer is strongly presumed both to have a basic understanding of legal principle, and to have given consent.¹⁴

In Australia, the most notorious documented “misunderstanding” of family clients occurred in the early 1980's. A survey conducted by the Australian Institute of Family Studies

¹² Peter McDonald (ed), *SETTLING UP: PROPERTY AND INCOME DISTRIBUTION IN AUSTRALIA* (1986) 295.

¹³ *Public Trustee v Gilbert* (1991) FLC 92-211.

¹⁴ For example, *Holland and Holland* (1982) FLC 91-243; *Gerbert and Gerbert* (1990) FLC 92-137 (husband settled for 10% of assets against his probable entitlement to 40%; held that there was no miscarriage of justice as the husband acted freely and was advised to seek legal advice).

showed that the majority of family clients had settled without a proper understanding of the relevance of superannuation and pension entitlements to the division of property.¹⁵

10. All Drafting has Loopholes

This is particularly apparent where agreements are drafted late at night, or under severe time pressures – smaller time, bigger loopholes. Those professionals who draft agreements regularly, know that there are no watertight documents. Even encyclopedic contracts do not allow for every exigency in human affairs as many words are capable of multiple interpretations. Of course, most negotiators do not have the time, patience, money or inclination to negotiate multi-page documents. They perhaps realistically hope that goodwill, reputation and (“cheap”) short documents will encourage performance of 90% of agreements, and tolerate the risk that the other 10% may not be performed when the unexpected occurs.

11. Fine Tuning “Later”

The dynamics of some negotiations include – late night deadlines; presence of tired leaders; hurried general “heads of agreement” drafted and signed, so that important people can go elsewhere; delegation to lawyers or junior bureaucrats to “fill in the detail” or “complete the technicalities”, sometime in the future.

This common and allegedly “efficient” process, obviously leads to some apparently almost “finalized” treaties, litigation settlements and commercial leases not being actually finalized. This is at least because the devil is in the detail, the junior delegates are competitive and fearful for their own reputation, new key unresolved interests arise during drafting, and hawks use the drafting meetings as opportunities to re-open even the “settled” principles.¹⁶

12. Any Agreement is Better Than None

Related to the previous point, is that sometimes negotiators’ goals evolve towards a “quick fix”; or any signed document; or any agreement is better than none. They realize that fine tuning will take too much time; that constituents are becoming restless; that their short-term reputation needs a signed document, even if performance will probably not happen. Managers sometimes sign off on unrealistic agreements with employees as they want to pay attention to other impending crises; peace treaties are often signed even though key clauses are missing, or unrealistic. After the First World War, the Treaty of Versailles agreement was eventually signed in 1919 despite obviously unworkable realignment of borders for many minority groups in Europe and Asia. Signing something was considered essential as negotiators were exhausted, political leaders needed to get home for forthcoming elections, anxious electorates wanted to celebrate “the” peace, militia were engaging in violent self help, and creating some stable buffers against Bolshevism had become a priority.¹⁷

13. Conditional Agreements Subject to State Ratification

Some agreements require ratification, not only by constituents or tribes, but also by the state. This is because government policy or legislation has declared that certain “private ordering” affects important public interests. Therefore a right to veto exists until a public official is convinced that the private agreement has recognized community interests.

Sometimes, this community oversight reduces to a mindless routine rubber stamping by a state official or judge. But such low hurdles climb gradually towards expensive, time-consuming and uncertain hearings before an aggressive state judge, tribunal or official who is vigorously protecting actual or perceived public interests. Necessarily, any agreement lives in precarious limbo, subject to buyer’s remorse, vengeful hawks, tactical manoeuvres, and evidentiary uncertainty while waiting for this second round of public approval.

¹⁵ Peter McDonald (ed) *SETTLING UP*, *supra* note 11 at 199-200. See also John H. Wade, *Deals Which Come Unstuck: Reasons for the Breakdown of Family Settlements* (1993) 9 AUSTRALIAN FAMILY LAWYER 14.

¹⁶ See Honeyman, *WRONG MENTAL IMAGE*, *supra* note 3.

¹⁷ See Margaret MacMillan, *PARIS 1919* (2003) 181, 192, 254.

Examples of private agreements which need court or “official” approval to become relatively “final” or “binding” include:

- building or forestry contracts which affect the environment
- child support agreements which affect the amount of social welfare paid to a custodial parent
- media, film, or literature contracts which import racist or pornographic views into the community
- private family agreements for the use of finances of a mentally disabled person
- international treaties entered into by the executive, which legally require ratification by the legislature
- family property settlements which intentionally (a “sweetheart deal”) or otherwise may result in a spouse becoming dependent on state welfare payments
- mergers of large corporations which potentially create monopolies of supply to the public.

14. Wealth

Wealth of one or both parties may destabilize an agreement. Money and the chance of “success” gives an aggrieved person the capacity and willingness to allege various legal justifications for breach when a future dispute occurs. A few years of legal expenses may only represent 1% of the aggrieved person’s empire, and the resulting attrition and disparate investment in the conflict may eventually encourage other parties to renegotiate the now disputed clauses.

Lawyers are instinctively aware of this pattern and that they may also become the target for the subsequent grievance. Accordingly considerable time and consultation occurs when drafting contracts for the wealthy in order to minimize the chances of a subsequent professional negligence claim (as well as attempting to close loopholes and thereby discourage subsequent legal sorties by an affluent party).

How to Increase the Durability of Negotiated Agreements?

If the above is a catalogue of hypothesized and anecdotally observed reasons for agreements being “breached”, or being less than durable, how then to make negotiated agreements more durable?

In simplistic terms, as with the original perceived incentives to *enter* the agreement, *performance* can also be made attractive, and non-performance made unattractive via economics, emotion, various versions of morality, reputation, legal rules, and accessible, affordable and honest legal enforcement mechanisms applying to the various contracting parties.

If some of the “durability” or “stickability” elements cannot be added to the dynamics of the agreement, then expectations should be lowered. The parties may have achieved one “success” criteria, namely a (signed) agreement. But they may only have a low or moderate chance of another measure of “success”, namely performance. Many risk-taking negotiators are willing to buy the chance of performance, and then experience the rollercoaster of performance and breach as the predicted ratio of performed to non-performed agreements is still considered to be a worthwhile investment.

Reversing the above list of factors which encourage breach, the chances of performance of an agreement are enhanced by the following:

- try to enter contracts with people, groups or nations with whom there are strong long term *relationships*. This provides a layer of incentives to perform promises rather than alienate friends and future business.
- If not prepared for seemingly endless negotiation in exchange for the promise of a long term relationship, *avoid* negotiating with cultural groups which perceive an agreement as mainly the beginning of a relationship.

- attempt to *clarify* across cultures whether “yes” means “maybe” or even “no”, and whether signed and detailed documents are considered to be “binding”, morally, legally and/or in reputation, or just amount to the declaration that a working relationship now exists, with actual commitments subject to continuous renegotiation.
- include a serious discussion and contractual clauses (more than boilerplate) on how future misunderstandings and problems will be addressed procedurally and emotionally by skilled people (“*dispute resolution*” clauses).
- attempt to agree early on that final determination of any future “problems” with performance will be in an accessible court or arbitration venue which is first, *not corrupt*, and secondly, governed by stable and *clear legal precedents*; and thirdly, by legal precedents which have *minimal scope for varying* or setting aside the particular type of agreement.
- where possible, convert a negotiated agreement into a court order so that any breach of the agreement immediately opens additional enforcement mechanisms.
- draft the agreement in *detail*, if possible, in accordance with standard industry practices.
- contract with “*stable*” countries and people, and take out insurance as risk management for non-performance or currency fluctuations.
- include carefully planned procedures for managing, including or marginalizing *hawks* and armchair critics in the background.¹⁸
- *lower* expectations where there is long term escalated conflict with some of the emotional and structural changes attached to such entrenched conflict.¹⁹ This particularly applies to tribal conflicts in Northern Ireland, the Balkans, Rwanda, Israel and parts of Africa, but also within many families and businesses. The first year decade or century of agreements will undoubtedly not be durable with such dynamics in the background.
- attempt to enter agreements which recognize *procedural, emotional and substantive needs* of all parties. An aggrieved negotiator at any of those levels will probably be looking for payback or exit at a strategic moment.
- where a negotiator is on an emotional rollercoaster, try to *include her/his long-term friends*, doves, moderates, associates, allies or business partners in the negotiations. For years after the initial agreement is signed, they will exert pressure (ongoing negotiations) on the wavering party to “honor his/her commitments”, or risk losing their friendship.²⁰
- do not walk *close to the line* on any of the legal rules, such as duress, deceit, vague terminology or illegality, any of which gives other parties opportunity to allege a loophole to finality.
- *use experienced wordsmiths* (aka lawyers) to include a range of standard clauses which attempt to negate duress, misrepresentation, illegality, and which make specific allowances for future contingencies.
- try to *avoid complex agreements* with multiple long term obligations of performance; try to create “clean-break” obligations where one performance is swapped for another (eg bank cheque upon delivery of goods); try to include self-enforcing clauses so that the transaction costs of enforcement are reduced (eg interest of 12% runs on payments in default; security is held by a bank or by one party until performance occurs; payments are released upon progressive certification by an architect; liquidated damages; 1% extra for each day early; 1% less for each day late etc).

¹⁸ See for example, Wade, *supra* note 7.

¹⁹ See Dean G. Pruitt & Sung Hee Kim, SOCIAL CONFLICT (2004); Sandra Cheldelin, Daniel Druckman & Larissa Fast (eds), CONFLICT: FROM ANALYSIS TO INTERVENTION (2003).

²⁰ See Wade *supra* note 7.

- discover and perform an appropriate *ritual* of commitment – in some places, it is eye contact and a handshake. In others it may be an alcoholic celebration, or a vow in the presence of a holy book or priest.
- attempt to *reduce buyer's remorse* by making congratulatory speeches about the benefits of the agreement; and the list of risks which would follow no agreement; and by never agreeing quickly to any clauses; and by theatrical displays of anguish and pained speeches about the “tough terms”, “special deal” or “hard bargain” which is being imposed; and by adding post-agreement gifts and bonuses (corner office, luggage racks, set of steak knives, 12 months' free warranty).
- *publicize* the deal by mutual agreement. Then a wider audience places an expectation on all parties that they should perform, or lose face and credibility in future arrangements. Most people have a strong desire to act consistently with their own clear commitments.²¹ Thus a media announcement of a treaty, a takeover, or a trade agreement is more than a celebration. It is aimed at moving at least the visible parties from agreement to a deeper level of commitment.

Conclusion

Most negotiators want more than an agreement. They want commitment and performance. It is helpful for negotiators firstly, to be aware of the smorgasbord of factors which present warning signs of impending breaches; and secondly, to be aware of, and skilled at working on, those factors which increase the likelihood of commitment and performance.

Bonding to Bond

If you have any suggestions about this newsletter; *OR* if you or your colleagues would like to be included on, or excluded from receiving this occasional newsletter, **please send us a message** with your e.mail address to:

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J H WADE
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²¹ See G. Richard Shell, *BARGAINING FOR ADVANTAGE* (1999) 196-199; Robert B. Cialdini, *INFLUENCE: SCIENCE AND PRACTICE*, ch. 3 (1984).