ARBITRATION, MEDIATION, CONCILIATION
PITFALLS OF PRESCRIPTION

INTRODUCTION

The thousands who recently thronged London's National Gallery to gaze at Leonardo's portrait of Cecilia Gallerani came from all over the world. No doubt they spoke a hundred languages. Each will have read the caption: 'Lady with a Stoat', or is it 'Lady with an Ermine'? Those whose first language is not English will perhaps have thought the name in their mother tongue. Most will not have had to make a choice between two names for the delightful little animal, familiar to me from my childhood, which in England we call a stoat. We can always call it a stoat but, in the winter when its coat turns white, some people may prefer to call it an ermine, particularly if they are talking about its fur.

That choice is a function of English. Few languages have different nouns for stoat and weasel, let alone stoat and ermine. For example, American English does not use the word stoat, preferring weasel with adjectives attached to differentiate kindred species. French does not offer the distinction, nor do the languages of most of those places where there are neither stoats nor weasels and no winters that whiten fur.

But what if we found ourselves in the Middle Ages, judges having to apply sumptuary laws which made it an offence for anyone other than the nobility to trim their cloaks with ermine? Would the offence be committed by wearing the dull brown fur of summer? The colour changes gradually, except for the tip of the tail, which stays black. What should be the criterion of whiteness?

A new planet or drug is given a name by an internationally recognised authority. That name is at once accepted by scientists everywhere and its translations become standard. For them a stoat is *mustela erminea* summer and winter. Why is there is no such authority for legal terms? What do these words mean: mediation, conciliation, arbitration?

A FABLE

A group of aboriginal people in the far North-East of Australia have had no contact with Western civilisation. They have always used a lot of charcoal which they have learned to refine to a high degree of purity. They call it *jim*.

Explorers find them and within a generation one of their young women, Bella, is studying chemistry. Her teacher tells her that what she calls *jim* is for scientific purposes known as carbon, an element with an atomic number 6, recognised everywhere by the capital letter C, whatever language the scientists are using. He asks her to write an essay on how charcoal is purified by her people and she does so without difficulty, everyone happily assuming that for all practical purposes *jim*=C.

Her brother Bello decides to read law. He attends a modern Australian law school with a module in Dispute Resolution. There he learns about mediation and arbitration. His community have always had to deal with disputes like any other group. If the parties cannot deal with them themselves, they choose a panel of five to help them. Each side chooses two best friends and the four choose one more, who must be a grandparent but not of either party. They call both the panel and the process a *boom*. Bello's professor is fascinated by *boom*. She asks him to write an essay about how it works.

If they possibly can, the *boom* will bring the parties together to an agreed settlement. They may in the process clarify the issues as they see them. They try to establish the relevant facts. They declare what customary law applies. They will, as they go along, separate what the parties can agree on, isolating what remains in issue. They will tease out what concessions the parties are prepared to make. Then, if there are still differences, they will suggest how they can be resolved. If a party still disagrees, the *boom* will state their opinion, by a majority if necessary. Both parties are expected to agree to that. Then they are bound by what all concerned think of as the agreement of the parties themselves. It would be a matter of the greatest shame not to comply. The community has no prison, nor does it use corporal punishment. It just puts the non-complier into a category separate from everybody else. That is the threat but it just does not happen because there is nowhere for an outcast to go.

Bello's first problem is what to call the *boom* in English. He reads the articles his professor recommends and finds some recent ones for himself. What is this process? Mediation, conciliation or arbitration? He decides to stick with *boom*.

THE DEFINITION OF DEFINITION

Is Bello's problem one of definition? If modern legislators, say the European Union, were to have to draft new sumptuary laws, we might expect them to insist that there are two distinct categories of stoat fur, white and non-white, and to provide a definition:

> Section 1 *Definitions*
> A stoat, *mustela erminea*, is an ermine if its fur has changed to white over not less than 50% of its body (excepting the tip of its tail).

Is that is the best we can hope for? How white? We can't easily identify white by wavelength of light, as we could a colour of the spectrum. Or we could argue on a different kind of definition altogether:

> A stoat is an ermine from 1 November to 31 March.

After all, that is when it is cold in North America and Britain. That might have been a problem this year, when the warm winter meant that stoats were slow to change. And what if enterprising Australian entrepreneurs have started to breed stoats for their fur on cold Macquarie Island to exploit the European market?

DEFINITION: DESCRIPTION AND PRESCRIPTION

It does not matter that the word 'rose' or its equivalent in any language has quite different meanings for an old gardener seeking help from a pruning manual and for a young lover thinking of ways to express feelings to a sweetheart. Most of us will at some time be both lovers and gardeners. 'Rose' will have a range of meanings special to us, to our idiolect, unique but constantly changing, so that a rose will not be the same for us today, when we are happy, as it becomes tomorrow, when our love is gone.

That does not matter at all. It is a glorious aspect of language. The ambiguities would be important only if 'rose' occurred in legislation restricting the importation of flowers from Kenya. Legal definitions are prescriptive. That is why dictionaries are rarely of any help to lawyers in search of meaning, though they desperately reach for them, like a *tabula in naufragio* as English lawyers used to like to say, like a plank in a shipwreck. Dictionaries are not intended to be prescriptive. They can at best be a statement of language use at a chosen time among a preferred group of language users, the highest common factor of a majority of favoured

idiolects.[1] The shortcomings are multiplied if the dictionary is bilingual, trying to help its user in a search for equivalents in different languages.

Prescriptive language of the kind found in legislation is a function of the legal system of a state. Our fictional *boom* was more linguistically scientific. It would seek the meaning of what was communicated between the parties in what was conveyed to the hearer, rather than what the speaker meant. But state law is not like that. The words of legislation mean what the lawgiver wants them to mean, not what in reality the subject understood. Ignorance of the law is no excuse. It is no defence to say: 'I thought stoat meant any old weasel', even if you could prove that. It may be a mitigating factor but those who run the legal system are adamant. Order must prevail over justice. The English Latin betrays the emotion: *ignorantia iuris haud excusat*; *haud* indeed! You can't get more negative than that. And the strength of feeling has prevailed over any nice ethical objections: no one questions any more the morality of punishing the morally guiltless.

So there is magical power in the prescriptive force of legislative provisions. They therefore need to be handled with care, I'm sure you would all agree.

CATEGORIES

Not only legislation but scholarship generally likes to create categories to make it easier to think about phenomena. The categories give names to sets of things in disciplines other than law and linguistics. Let's take medicine as an example. Here the classification may have profound practical consequences. Is breast cancer still breast cancer when after it has been removed from the breast it reappears in the brain? Your answer may determine the availability of funds for research.

Imagine this notice in a clinic when I was a child.

NOTICE TO PATIENTS
HYSTERIA patients will be seen by
Dr Brainstorm on Mondays and Tuesdays,
Professor Doolalli on Wednesdays and Thursdays.

Asti Hustvedt wrote her new book on hysteria because, she says: 'It kept haunting me. What does hysteria mean?'[2] To Hippocrates it was a female

[1] The US Supreme Court has descended to this level. Between October 2000 and October 2010 its justices took 295 definitions from dictionaries: Holmes, Cardozo and Brandeis never once http://www.nytimes.com/2011/06/14/14bar.html.

physical disorder, caused by a 'displaced womb'. For Charcot, in 19th-century Paris, it was a specific condition identifiable by scientific diagnosis. But Hustvedt has an insight:

> All illness is experienced in a specific time and place, and it is classified differently depending on what culture you're from…. There's been a lot of talk about how hysteria has disappeared… it's no longer a medical entity or diagnosis… of course, it hasn't disappeared… it's been broken up and reclassified into other, separate disorders. It's just that the names have shifted.

But with the renaming have come new treatments and drugs specific to the newly differentiated symptoms. We can possibly look forward to such scientific reclassifications for diseases like depression or chronic fatigue syndrome or even autism. Controversies about the classification of all three of these diseases illustrate how much names matter.[3]

DEFINING MEDIATION

Of course, stoats and roses and hysteria will just go on being what they are, doing what they do, ignoring our linguistic labours. So with mediators and arbitrators. We know one when we see one. But the writers on dispute resolution which poor Bello had to read have recently had fun with a diversion, what might be called 'names as toys'. They start with the whole genus of dispute resolution. Should ADR 'mean' Alternative, or Amicable, or Appropriate Dispute Resolution? What is the point of such word play? And what is happening when not the parties but an authority lays down for others the law that 'mediators shall not become arbitrators in the same dispute without the consent of the parties', or 'mediation is facilitative; if the mediator suggests solutions it is not mediation but conciliation'?

During the processes by which the parties and their advisers try to settle a dispute, what they are doing may at different times take on the character of any or all of those three As and many other activities as well. What they call it is not likely to affect the negotiations. Of course, if you are thinking in Arabic or Chinese, you will have to find different toys. You are less likely to have lots of adjectives beginning with the same letter. Alliteration may not have the same ring.

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[2] Asti Hustvedt *Medical Muses: Hysteria in Nineteenth-Century Paris* London, Bloomsbury 2011.

[3] As the doctors will confirm who are responsible for the production of DSM-5, the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* due for publication in May 2013.

Moreover, categories in different languages may not have the same criteria or boundaries, let alone penumbra. Many who should know better have succumbed to the temptation to create categories first and then to force reality into them, most recently the manufactured definitions of 'mediation' and 'conciliation' and to distinguish both of them from 'arbitration'.

THE EUROPEAN MEDIATION DIRECTIVE

Apparently oblivious of any concern that control may hamper natural development, the European Mediation Directive would try to codify the meaning and limit the usage of some basic terms.[4]

> Article 3(a) 'Mediation' means a structured process… whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

What helpful meaning can possibly be attached to the word 'structured' here? All attempts to mediate a settlement have a structure. That structure – perhaps better thought of as a process – must be specific to the dispute and exist within a particular culture. What restrictions would these would-be lawgivers like to impose to make the process fit their Procrustean bed? They are not alone. The Hong Kong legislature is considering a bill with a similar requirement of 'structure'.

And the European Mediation Directive article 3(b) defines 'mediator' as:

> any third person who is asked to conduct a mediation in an effective, impartial and competent way.

What if the appointment says 'unbiased' rather than 'impartial'. Does that prevent the third person from being a mediator? How? Why? And how often will the appointment bother to state the obvious: that the parties require the mediator to be competent and effective? If it does not, is the third person not a mediator for the purposes of the Directive?

Of course the Directive is not itself legislation. It needs national legislation to incorporate it into local law. But France has already incorporated a straight translation into the French Civil Code.[5] In the United Kingdom we have our own regulations.[6] The Italian legislation introduces a linguistic

[4] 24/5/2008 Directive 2008/52/EC.
[5] Decret no2012-66 of 20/1/2011.
[6] Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133).

distinction: *mediazione* is used for the process and *conciliazione* for the product.

The EU works in 23 official and five semi-official languages. Further research is needed to show how those languages use their words for what happens in private dispute management; and further thought about the nature of dispute resolution, with recognition of its variations in cultures different in time and space. No legislation will control those usages and it takes little imagination to foresee unintended consequences of trying to do so.

Article 1 shows how ill thought out the Directive is: 'The objective is… ensuring a balanced relationship between mediation and judicial proceedings'. Why? Balance has nothing to do with it. The metaphor of the scales betrays the clumsy thinking of the politician, who may be defined as 'someone who professionally strives to maintain a balance between good and evil'. Even if that metaphor of the balance could be given any meaning, what value would it serve? What is wanted is perfectly clear: the best possible working relations between the courts and private dispute management in the provision of the best possible means of disposing appropriately of those differences between parties which become disputes they cannot settle themselves.[7]

Litigation and its alternatives are not competing *interests* to be weighed against each other. Of course that may be how they are seen by lawyers and others who make their living from them.

MEDIATION AND CONCILIATION

In ordinary English, mediation and conciliation have the same meaning. They are synonymous and interchangeable. This linguistic reality is recognised in the UNCITRAL Model Law on International Commercial Conciliation,[8] which is intended to provide uniform rules for the conciliation process, to encourage the use of conciliation, and to ensure greater predictability and certainty in its use. Article 3 defines 'conciliation' to include both processes:

[7] As Rix LJ said in *Rolf v De Guerin* [2011] EWCA Civ 78: 'As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate; but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle.'

[8] Adopted by UNCITRAL 24 June 2002.

> 3. 'Conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement.

But brave efforts have been made to insist on a distinction between mediation and conciliation. The Swiss Rules of Commercial Mediation proclaim, in their English version:

> Mediation is an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the parties…. The mediator does not make proposals like a conciliator.

So at first sight there appear to be three current usages: 1. 'conciliation' includes both; or 2. 'mediation' includes both; or 3. a distinction is made. The choice between 1 and 2 is unimportant. Of course it would be pleasanter and give us greater self-respect, no doubt, if we could all agree to one or the other, as chemists do with sulphur dioxide. But the practical problems arise when we create two categories and have to choose into which we put phenomena, when that allocation has practical effect.

Unless the categories are both comprehensive of all relevant phenomena and are mutually exclusive, and the criteria for allocation of all the phenomena between them are not only clear but agreed, the process is not only flawed but dangerous. It is easy to show that distinctions are culturally specific.[9]

A good example comes from Sanja Tseveenjav's article 'Mediation in Mongolia', which makes this suggestion:[10]

> Conciliation and mediation can be differentiated – the former referring to settlement efforts made during the court proceedings, whereas the latter refers to out-of-court settlement processes, i.e. mediation in its classical sense as employed, for example, in the United Kingdom.

That should not be assumed to be an oriental aberration. A Dutch mediator has made a similar suggestion. John M Bosnak cites the European Mediation Directive art3(a):[11]

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[9] For a quite different approach: The People's Mediation Law of the People's Republic of China 2011.
[10] Sanja Tseveenjav 'Mediation in Mongolia' (2011) 77 *Arbitration* 332-336, 332.
[11] John M Bosnak 'The European Mediation Directive: More Questions than Answers' in Arnold Ingen-Housz ed *ADR in Business II* Alphen aan den Rijn, Wolters Kluwer 2011 pp625-657, 642. All of this article and, indeed, all of this collection of essays, repay careful reading.

> [Conciliation] includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

And he suggests that: 'maybe mediation practitioners and scholars should agree that the word "conciliation" should be exclusively allocated to this type of judicial settlement activity'.

There would appear to be no obvious direct route for cross-fertilisation between Mongolia and The Netherlands. How could what seems to be an idiosyncratic definition sprout in such different climates? Was it born in the European Mediation Directive or has it a history? Why should it matter whether or not the mediation process is carried on by a judge during the litigation? An answer may be found in the separate histories of the *compromissum* in practice in France and England and in the quite different influence which the jurists had.

ARBITER, ARBITRATOR SEU AMICABILIS COMPOSITOR

It all starts with Justinian's *Digest*:[12]

> The Lex Julia prohibits a *iudex* from accepting appointment as *arbiter* in a matter in which he is *iudex*.

The *iudex* was a person appointed by the praetor, by the State, to try a case to a conclusion according to law. An *arbiter* was appointed by the parties and had discretions which a *iudex* did not. Both *iudex* and *arbiter* were private persons. They needed no legal qualifications. Neither can be called a judge. But it would be a contempt for a *iudex* to prefer his own opinion of what was just over the outcome prescribed by the law of the State.

That prohibition never applied in England. There judges commonly took a matter away to handle it privately as arbitrator, which included attempting mediation. In France the prohibition continued; but was not what the parties wanted so a way round it was invented. First in Bourgogne in AD1249 and then commonly in the fourteenth century the parties' lawyers would draft the *compromissum* so that the dispute was submitted to an *arbiter, arbitrator*

[12] D.4.8.9.2.

seu amicabilis compositor.[13] Huguccio had pointed out at the end of the twelfth century that there was a difference between an *arbiter* and an *arbitrator*.[14]

> So he is not an *arbiter* but an *arbitrans* or *arbitrator* and it is not called an award, *arbitrium*, but a settlement, *arbitratus*, a kind of agreement.

That is the point to keep in mind. The result of the process is not a judgment imposed on the parties but the product of their own agreement. It follows logically that the product of an agreement cannot be appealed against. The parties are stuck with it because that is what they have declared to one another that they wanted.

Of course, the parties might want to leave open the possibilities of an appeal. If they say so, they can make that part of their agreement. It is just a matter of careful drafting. So lawyers invented the phrase *arbiter, arbitrator seu amicabilis compositor* and inserted it into the standard form of *compromissum*. They invented another phrase, too, *in alto et basso* in Latin and its equivalents in other languages, 'in high and low' in English, to indicate that all forms of dispute resolution were included.

Jurists both civil and canon might argue that a submission must be one thing or the other but the parties were not concerned with such theoretical niceties. Their culture had always known the inclusive process whereby the 'arbitrators', call them what you will, had used every means they could to arrive at a settlement. 'Bottom up' custom prevailed over 'top down' law. They produced a process almost as good as a boom.

ARBITRATION IN ENGLAND IN THE MIDDLE AGES

For us today a process has to be either mediation, where a third party is agreed on by the parties to try to bring them to a settlement, whose only force comes from their subsequent agreement, or arbitration, where the third party adjudicates and the parties are bound by their previous agreement to abide by the award. But, in the Middle Ages in England, there was one routine process which everybody then called arbitration, in which the parties asked third parties to help them resolve the dispute by whatever means they could.

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[13] The story is fully told by Anne Lefèbvre-Teillard '*Arbiter, Arbitrator seu Amicabilis Compositor*' (2008) *Revue de l'Arbitrage* pp369-387 [Lefèbvre-Teillard].
[14] Lefèbvre-Teillard pp372-373.

Nowadays much is made of the need for mediators and arbitrators to be neutral and impartial. In the United States there are elaborate rules which discourage the appointment of those with previous acquaintance of either party.[15] There is nothing God-given about this. It was not always so. Many societies have preferred what the Greeks called a *koinē*, someone common to both parties, equally the friend of both, or, as in 1344 Pope Clement VI declared himself to be, when acting as mediator between Edward III of England and Philip VI of France: *persona privata et amicus communis*, acting in a private capacity and as a friend of both sides.[16] In the Middle Ages in England it was usually clear by implication and often expressed that the third parties were chosen just because they were already 'friends to both sides'.

Most often, each side appointed two such 'friends'. The four then got together and discussed everything they thought was relevant, not only what we would now divide into matters of fact and law but also anything they knew about the background of the dispute, including the reputations of the parties generally and their families and what was being said in the community about the dispute. They argued and did deals, consulting their parties as appropriate. If they could come to an agreement, they submitted it to the parties. If the parties accepted it, well and good. If not, the 'arbitrators' might make an award.

If the arbitrators were equally divided, with the parties' agreement they would add a fifth arbitrator and try again to come to an agreed award or consent to the determination of the majority. Alternatively, the parties might, at the time of deadlock, or even perhaps by prior agreement when the dispute was first submitted to them, provide for the appointment of an umpire, a single decision-maker substituted for the arbitrators.

However agreement was achieved, the record commonly says that the parties then agreed on the award - with a kiss or a feast - but, if one was not happy with the award, it depended on the power of the arbitrators to enforce it. Of course, people then knew the difference between the concepts of mediation and arbitration but the *process* they used did not keep them separate. That explains the even number of arbitrators and the potential need for an umpire.

[15] The law is more practical in England, e.g. *A & Ors v B & Anor* [2011] EWHC 2345 (Comm).
[16] Eugène Déprez 'La Conférence d'Avignon (1344)' p304.

As was said in a great land dispute between Burton Abbey and Thomas Okeover in 1418:[17] 'The arbitrators having the great desire and goodwill, from the affection they have for the parties, to make a final accord between them.' To improve the chances of success, even when the rights were plainly all on one side, arbitrators would give something to the loser, to assuage ill-feeling and wounded pride, if nothing else. As in this case: the abbey got the lands, Okeover had to pay rent for them; but the abbey was to pay him five marks for a general release of any claims he might have. Not because there was evidence of any claims but because the abbey's concession to that token payment would increase the chances of a successful settlement. It was the restoration of peace that mattered.

THE SCOPE OF ARBITRATION

Arbitration in England long predates the Common Law. Its roots are deep in custom. It grew from below with little help from legislation or even much from case law until the end of the sixteenth century. In medieval England the word 'arbitration' was used for the whole range of dispute resolution outside litigation. Arbitration in this wider sense was the usual method of resolving disputes. The records show that litigation, even when it was used, rarely concluded a dispute.

Arbitration was readily available to all kinds of people. Kings submitted their differences to other kings or the pope. The records of the city of York show that a labourer, Aynour Johnson, was a party to an arbitration arranged by the municipal authorities in 1484, a few months before the end of the Wars of the Roses. Foreign merchants brought their disputes to the Mayor of London's arbitration scheme, even when there was no English element. If one party was English and the other foreign, an arbitration was arranged with two English and two foreign arbitrators.

The scope of arbitration had few limits. None of the Roman Law restrictions applied. Questions of ownership of land, of status – free or servile, criminal charges including murder and rape, were all resolved by arbitration without their arbitrability being questioned. Arbitrators even decided questions of church law. Treason and blasphemy seem to have been the only substantial exceptions.

[17] Edward Powell 'Settlement of Disputes by Arbitration in Fifteenth-Century England' (1984) 2 *Law and History R* 21-43, pp29-30, citing Burton-on Trent Public Library D27.

The resolution of a dispute by arbitration was not primarily a legal outcome. It was more real than that. The parties had publicly acknowledged that their dispute was over.

MEDIEVAL OXFORD

The most compelling evidence of the differences between Civil Law arbitration *ex compromisso* and the reality in England comes from an award in a thoroughly English jurisdiction which was nevertheless governed by the Civil Law. The University of Oxford in the fifteenth century had wide jurisdiction over both civil and criminal matters, not restricted to members of the University. No Common Law was taught there, only Civil Law and Canon Law. The University's courts applied the Civil Law in a society imbued with traditional English values and ways.

In 1446 two halls, the forerunners of colleges, were in dispute. There had been violence between their fellows. Each party appointed two arbitrators, by a deed which has every appearance of a Civil Law *compromissum*. The award of 7 July 1446 ended the dispute. Here it is in full:[18]

> *In God's name, Amen*. We, John Scelott and John Snawdone, on behalf of the Principal and Fellows of Broadgates Hall in the parish of St Aldate's in Oxford; and Richard Pede and Thomas Ashfeld, on behalf of the Principal of Pauline Hall in Oxford and the Fellows of that hall, and their supporters, having been chosen to be arbiters or arbitrators and mediators, *arbitri* ***seu*** *arbitratores* ***et*** *amicabiles compositores*, and having unanimously assumed office with the common agreement and consent of the parties, having been appointed over each and every of the actions, suits, controversies, wrongs, complaints, attacks and whatsoever causes between the parties, from the beginning of the world to this day, in whatever right it has been brought, upon due deliberation,
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> *We arbitrate, award, pronounce and decide*: that the Principal of Pauline Hall shall ask and beg, in his own name and that of all his Fellows, that the Principal of Broadgates Hall, out of his own goodwill, friendship, love, and so that peace may prevail in future as far as he himself and the Fellows, present and future and his supporters are concerned;
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> *And that* the Principal of Broadgates Hall shall make a similar request, for himself and his Fellows, of the Principal of Pauline Hall.
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> *Item* that Owyn Lloyde shall say to the Principal of Broadgates Hall that, if and to the extent that he, Owyn, has caused any harm to the Principal or his people, by his submission he asks the Principal's forgiveness, without artifice and with good will;
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> *Next* Master John Olney, priest, and Owyn shall first give each other the kiss of peace and then, with their hands on the sacred gospels, each shall swear the corporeal oath that, as much as it lies in him, he will keep fraternal peace with the

[18] Anstey II pp552-554.

> other in future; for the observance of which they bind themselves by their mutual written bonds in 100s sterling; these bonds shall remain in the custody of the Chancellor of the University; and, if it should happen (God forbid) that Owyn should in future be legally convicted of any wrong or offence against Master John Olney, then the bond shall be handed over and released to Master John… [and vice versa];
> *Item* We arbitrate and award that all and every of the Fellows of these halls shall keep and make to be kept the peace in regard to the Fellows of these halls;
> *Item* that David Philipe, who is said to have struck John Olney, shall on bended knees and humbly seek the pardon of Master John, and Master John shall grant him forgiveness and pardon.
> All these things, each and every, we award and arbitrate to be done, kept and fulfilled and we order it under the penalty contained in the *compromissum*.
> This award or arbitration, *laudum sive arbitrium*, was made and pronounced on 7 July 1446, in the church of St Frideswide, Oxford, next to its saint, the parties being present and confirming the award.

Each side had appointed two arbitrators and charged them to bring a violent dispute to an end, by an agreed settlement as mediators, *amicabiles compositores*, if they could, or if not as arbiters by an award, *laudum* or *arbitrium.* They formulated an award which both sides then *agreed* to.

I believe that the choice of language in this document is significant. In England 566 years ago it followed the precedent of awards upon a *compromissum* already two centuries old in other parts of Western Europe, but with a tiny difference. The Latin copulative *seu*, like the English word 'or', is as often found between near synonyms as opposites, as in *laudum seu arbitrium*. The standard phrase in the appointment clause of a *compromissum* in all times and places is *arbiter, arbitrator vel amicabilis compositor*, in which each noun is an equal alternative.[19] Why then would the creator of this document write *arbiter* ***seu*** *arbitrator* ***et*** *amicabilis compositor*? Because in his English mind he wanted to distinguish clearly the role of an *arbiter* who adjudicated from an *arbitrator* and an *amicabilis compositor* who did not. I believe this to be reliable and sufficient evidence of what is otherwise implicit in these records: third parties first (and continuously throughout the proceedings) tried to bring the parties to agree to a settlement and imposed a decision upon them only as a last resort. The arbitrators in this case worked out a settlement which the parties are recorded as then having agreed to. That was what they had anticipated when they made the submission and together agreed to abide by what the arbitrators, the friends of both sides, agreed on. It was not imposed against

[19] Karl-Heinz Ziegler 'Arbiter, Arbitrator und Amicabilis Compositor' (1967) 84 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanische Abteilung* 376-81.

their will, or willy-nilly by the powers bestowed on the arbitrators in their submission. The parties had stayed in charge throughout. They had got what they wanted. Peace had been restored by an agreed settlement.

The arbitrators described themselves as acting 'on behalf of' their respective parties. However partisan they may have been, they worked out a settlement between them without the help of any objective outsider. They expected to. The parties expected them to. However much the parties, the lawyers who drafted the *compromissum*, and the arbitrators were influenced by and followed the forms of the Civil Law, they were English and their culture prevailed.[20]

THE LINGUISTIC REALITIES

We must remember that UNCITRAL and the New York Convention are not confined to Common Law and Civil Law jurisdictions, or those which use European languages. Even different EU countries look at all this in quite different ways. Greece intends to implement the Directive through legislation which would require all mediators – and perhaps even those appearing as advocates before them – to be lawyers. Greek lawyers use a range of words for mediation, usually μεσολαβηση, but sometimes συνδιαλλαξη, συμβιβασμος, συμφιλιωση and maybe others.[21] Do any of them fit the Directive's definition exactly? Will one be chosen and artificially made to take on the EU's definition? I am sure there are Greek experts here who can tell me later which it is. I wonder whether they will agree with one another.

The confusion does not arise from reality but from an insistence on forcing language into unnatural shapes. In reality, in all our cultures, those we now call mediators have commonly moved backwards and forwards, using whatever skills they had to help to bring about a settlement. In many

[20] Of course the English had no monopoly of even-numbered tribunals. They are found in the multicultural jurisdiction of Cretan Candia in 1305, where Venetian, Greek and Jew lived and worked in harmony, AM Stahl ed *The Documents of Angelo de Cartura and Donato Fontanella Venetian Notaries in Fourteenth-Century Crete* Washington, Dumbarton Oaks 2000 p14 no36 and p191 no492. About the same time, in Venice itself, two arbitrators were common, Fabrizio Marrella and Andrea Mozzato eds *Alle Origini dell'Arbitrato Commerciale Internazionale: L'Arbitrato a Venezia tra Medioevo ed Età Moderna* Milan, Cedam 2001, who at p57 say that 'some modern jurists – perhaps wrongly - call the umpire a British invention'. And even as late as 1785 in Geneva Jacques Drouin *Catalogue des Factums Judiciaires Genèvois sous L'Ancien Régime* Geneva, Société d'Histoire et d'Archéologie de Genève 1988 p84 no274. But not in Louis XIV's Paris, Derek Roebuck *The Charitable Arbitrator: How to Mediate and Arbitrate in Louis XIV's France* Oxford HOLO Books 2002 p194.

[21] I thank Zafeirenia Proestaki for her advice on the subtle distinctions in the mind of a contemporary Greek non-lawyer.

attempts to mediate, you would have to film what happens, to be able to spot when the mediator moves from one mode to another, perhaps by no more than a slight hint. The commentator would be saying, stopping the playback: 'Ah, that's mediation there – whoops, nearly slipped into conciliation, there's she's gone, over the line, back again but, of course, all is now tainted with conciliation'.

No agreement on meaning is likely that makes that kind of distinction, even in English, whether English English, American or reduced. And every flourishing language is historically and potentially a language of ADR. How are prescriptive definitions going to work in Chinese or Arabic – not unimportant languages of international commerce? No legislation can control the developments, not even Swiss Rules or EU Directives, which can only define for the purposes of their own rules. In something so consensual as alternative dispute resolution, what the parties want and what they think their community should offer them will prevail over any top-down prescriptions.

The slightest difference of wording may have the most terrible unforeseen consequences. It is often said that Roger Casement, Irish hero and English traitor, was hanged by a comma. That argument may be over now but few disputes are of more immediate consequence than that about the withdrawal of Israeli forces from the West Bank. No determination has yet been agreed of the differing interpretations of UN Resolution 242 of 1967. The English version calls for 'the withdrawal of Israeli forces from territories occupied in the recent conflict'. The US and Israeli Governments argue that the lack of a definite article before 'territories' means that Israel is not required to give *all* the territories back. In English there is at least an argument that the words are amibiguous. But all the other official languages of the United Nations – Arabic, Chinese, French, Russian and Spanish – use the definite form unambiguously. The potential consequences of this linguistic argument are unthinkable.

One thing is integral to every one's definition of mediation, isn't it? That is that mediation is voluntary, at least in the sense that either party may walk away from the mediator and is not bound by anything a mediator determines. That would not be true of my fictional aboriginal society. And try telling that to a Korean, where the culture still provides a process of dispute resolution – usually translated into English without more as 'mediation' - which, once the parties have chosen to use it, cannot be escaped without unbearable

social pressure – a present-day true-life example of the sanctions which were used in our fictional *boom*.

CONCLUSIONS

I hope I have shown that prescription is misplaced unless it has an acceptable purpose. We will all continue to use words as best we can to communicate what we hope to get the recipient to understand. Of course, there is nothing wrong with defining your terms for scholarly purposes and sometimes lawyers need to when drafting a contract – as long as you don't let the categories determine your thinking, as long as you say what you mean and are sure that the other side accepts that meaning.[22]

Lawyers are skilled users of language. They always have been. Now more than ever, though, their world is multilingual. The paradox is that the more the use of English dominates business and its law, the more diverse the influences on that English are and the more pervasive are the forces which push towards the creation and use of a new language, a reduced language for non-native speakers of English. With the spread of this new apparently simplified language come increased dangers of partial comprehension and blurring of necessary distinctions.

The more I try to understand how people – individuals and communities – have managed their disputes, the more I am convinced that the answers must be sought by interdisciplinary enquiry. Comparative research is essential. It has already been justified by the insights that have come from working out why processes are alike or different in communities separated by time or space. But comparative research is richer and has more colour if it is viewed not through the monocular microscope, however powerful, of a single discipline, whether law, history, anthropology, psychology or even language. If we are to work most effectively, we shall not only have to draw on every obviously relevant discipline but also constantly keep an eye out for developments in those we have not yet recognised as potentially fruitful.

How much more shall we learn if we try to use together the tools and skills and experience of all those arts and sciences we have not yet explored. And how much more rigorously shall we be able to test and so rely on the results of one another's work.

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[22] Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929 (2003-2004). | Hein | LexisNexis | Westlaw

I end with a challenge to those who want to define mediation and thereby control it and limit those who may act as mediators.[23]

On 11 November 2006 the BBC's 'From Our Own Correspondent' programme was from Sarah Rainsford in Turkey. Her story was beautifully told, so here are her own words.

> I met Metin in a funeral parlour in Diyarbakir. He looked like he wanted to shrivel up and disappear. His head sagged sheepishly low and he had somehow twisted his upper body, like he was trying to take up as little space as possible. Metin was in his twenties - and in serious trouble. He had violated the strict code of honour that rules much of south-eastern Turkey, and he knew he was lucky to be alive.
>
> Eighteen months ago, Metin married. He had kidnapped the girl he loved because he could not afford a dowry. The couple have since had a baby but the bride's brothers are after them. They believe killing the couple will cleanse the family honour. As he told me his sorry tale, Metin's eyes brimmed with tears of desperation. At one point he rounded on his elderly father, half deaf and stooped over a walking stick. "I had to steal her," Metin wailed in accusation. "You never gave me any money for a dowry - you never even sent me to school!" His poor father looked like he had been punched in the stomach - and I gulped back a lump in my own throat. "I have not got any money," he protested, "or I'd have given it to you."
>
> Luckily for Metin, what his father did have was an idea. He brought his son into town to visit the man locals here have nicknamed the "President of Peace". Sait is a tiny old man, with a face heavy with wrinkles. But he is full of energy. The district funeral parlour is now an unofficial headquarters for his peace missions: a spacious hall lined with sofas, and with a never-ending supply of sweet, soothing tea. Sait is actually a butcher by trade, but he handed his shops over to his sons six years ago to devote himself full-time to peace. Since then he says he has resolved more than 400 feuds…. The sofas in Sait's office were filled with men, seeking his mediation.
>
> Sait told me he sees little sign that modernisation is having much impact on attitudes in this neglected, mainly Kurdish corner of the country. It is a place where social pressure is nothing to do with having the latest gadget or label. Here it can be a matter of life or death….
>
> It could have been a deeply depressing visit to Diyarbakir - but before I left, there was one uplifting moment. Sait invited us to watch as the hapless Metin was reconciled with the father of his stolen bride. The peacemaker had promised to find funds himself to help Metin make his bride an honest wife. As that news sunk in - young Metin's whole body seemed to unwind. He smiled for the first time since we had met and happily pulled out a photograph of his baby boy. The truce will remain

[23] Sir Vivian Ramsey, an English judge, has recently spoken of the dangers of regulation: 'Mediation 2020' (2012) 78 *Arbitration* 159-162.

> precarious until the day the money comes through. But for Metin it does seem that the patient negotiations of Sait's President of Peace may have just paid off.

Sait has no formal education, let alone qualifications. He is too old, too poor, too unlettered to acquire any. We should do nothing by defining away reality that would inhibit interventions like Sait's. And the last point is the most telling. We an learn from the Saits of this world. He is successful in a much harder milieu than international commercial arbitration. If we are scientists searching for ways to improve dispute resolution, to bring peace to conflicts about the custody of a child or between nations at war, we should look for insights and expertise to what is going on in our own world now, at Sait in Turkey and the women who brought peace to Sierra Leone, and perhaps even at our own histories before our ways of restoring peace became the work of lawyers.