

Cooperation with a Competitor

Kluwer Mediation Blog

April 12, 2017

Charlie Irvine (University of Strathclyde)

Please refer tot his post as: Charlie Irvine, 'Cooperation with a Competitor', Kluwer Mediation Blog, April 12 2017, <http://mediationblog.kluwerarbitration.com/2017/04/12/competition-and-cooperation-meditation/>

Morton Deutsch, the great social psychologist of common sense, explained the difference between competition and cooperation thus: *"if you're positively linked with another, then you sink or swim together; with negative linkage, if the other sinks, you swim, and if the other swims, you sink."*^[fn] Cooperation and Competition. In M. Deutsch, P. T. Coleman, & E. C. Marcus, eds. (2006) *The Handbook of Conflict Resolution: Theory and Practice*. San: Francisco: Jossey-Bass, pp. 23-42^[/fn]

This elegantly explains the challenge facing young mediators in the INADR International Law Student Mediation Tournament at University of Strathclyde, Glasgow, last week; as host I had the pleasure of welcoming 126 students from 15 countries. The model for this event is different from the ICC competition: not only do students act as mediator, advocate and client, but they must co-mediate with a student from another team. In simple terms they're being asked to cooperate with a competitor. To use Deutsch's language, as co-mediators they are positively linked, both seeking resolution of the dispute, but as competitors the linkage is negative, with both wanting to progress to the next round. If the other sinks, you swim; if the other swims, you sink.

This is tricky indeed. The fact that they pull it off so well suggests that the tournament's format taps into something in human nature. For one thing competition isn't all bad. We love sport and we like winning. The frisson of competing is a fantastic motivator; the levels of preparation and skill on display were evidence of this. Being on home turf I knew most of the judges, who confided how impressed they were by the mediators and advocates. *"I was hard pressed to*

distinguish it from the real thing” said one.

Cooperation and competition

At the same time the students are being scored on cooperation with their co-mediator. Here’s an incentive for qualities that we would hope for in any mediator: organisation, planning, listening and old-fashioned courtesy. Deutsch predicts that cooperative social relations will lead to the following:

- effective communication – ideas are verbalized and group members can influence each other
- friendliness and helpfulness – members are more satisfied with the group and impressed by others’ contributions
- coordination of effort, division of labour and high productivity
- confidence in one’s ideas and the value that others attach to them, and agreement with the ideas of others
- willingness to enhance the other’s power to accomplish group goals
- conflicting interests seen as a mutual problem solvable by collaborative effort.

In effect these novice mediators are being primed to behave cooperatively. And they do. Most synchronise their introductions, take turns at questioning and summarising and listen respectfully while the other speaks.

But what if their competitive instincts gain the upper hand? Put yourself in their shoes. If you make your co-mediator look good by letting them finish their thread rather than inserting your own brilliant question, you run the risk of losing. According to Deutsch, when competitive social relations predominate we can expect:

- impaired communication
- obstructiveness and lack of helpfulness leading to negative attitudes and suspicion
- parties unable to divide their work
- reduced confidence through repeated experience of disagreement and rejection of ideas
- parties seeking to enhance their own power and reduce the other’s
- conflict, now seen as best solved by imposing a solution, leading to coercive tactics. Limited defeat may become less acceptable than mutual disaster.

I’ve occasionally seen ‘mutual disaster’ in these tournaments, but mostly the opposite occurs. Students behave as if they’ve known each other for years,

showing seamless cooperation in the joint quest for resolution.

This has some fascinating implications:

1) **Walking the walk.** These novice mediators are doing exactly what we ask our clients to do in every mediation: cooperate with a competitor. By priming and supporting our clients in cooperative behaviour we can help them reap the benefits claimed by Deutsch. Instead of 'me against you' it's 'together against the problem.'

2) **Regaining civility.** A perennial debate rages about whether, in lawyer negotiation, tough guys win.[fn] See for example: Andrea Kuipfer Schneider (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' Harvard Negotiation Law Review Vol 7 143-234; Nancy A Welsh 'The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students' Negotiation Journal 2012 117-145[/fn] We are a long way from resolving the question, but if lawyers can be equally effective while acting cooperatively it seems healthy for society, and probably for lawyers themselves. Furthermore, if cooperation tends to induce more of the same behaviour, as Deutsch predicts, lawyers making the first move may be serving rather than harming their clients.

3) **Deals that stick.** Scholars have puzzled for years over why respectful treatment matters: *"Those of a tough-minded bent usually find it almost impossible to believe that politeness could possibly approach the impact of the bottom line, be it a tort award, a criminal sentence, or a job layoff."*[fn] Robert J MacCoun (2005) Voice, Control and Belonging: the Double-Edged Sword of Procedural Fairness. *Annual Review of Law and Social Science*, vol. 1, no. 1, pp. 171-201[/fn] The literature on procedural justice tells us that people are more likely to accept a decision they believe was reached using a fair process. The key marks of a fair process are voice (having a chance to speak), being heard (believing your opinion was heard AND taken into account) and treatment that is respectful and even-handed. The hallmarks of cooperation suggested by Deutsch – effective communication, friendliness and helpfulness, coordination of effort – seem likely to enhance parties' perception of fair treatment. This in turn makes settlements less likely to unravel, perhaps explaining the counterintuitive findings that people are more likely to comply with a mediated outcome than a court decree. [fn] Jennie Long (2003) Compliance in small claims court: Exploring the factors associated with defendants' level of compliance with mediated and

adjudicated outcomes. *Conflict Resolution Quarterly*, vol. 21, no. 2, pp. 139-153[/^{fn}]

In this post I've attempted to dissect a small sliver of the complex demands the INADR Tournament makes on law students, particularly the delicate knack of cooperation with a competitor. I've always found mediation like that: deceptively simple from a distance yet almost infinitely complex under the microscope of detailed examination. We still know so little about the impact of a whole range of factors - a smile, a grimace, length of eye contact (or lack of it - note-takers beware!), a choice phrase, tone of voice, how long we speak, how long we wait in silence, how often we interrupt, how plain our language. To heap further praise on our young mediators, many of them were operating in a language and culture not their own, further complicating their task. I can only offer respect and admiration.

(For the sake of completeness, the first placed mediator team was Middlesex University and the first placed advocate/client team was William & Mary Law School, VA).