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Symposium Transcript: Pepperdine DRLJ Symposium 2018

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Symposium Transcript: Pepperdine DRLJ Symposium 2018

Jenna:

Alright hey everybody thanks so much for coming. For those who don't know me I am Jenna King, the associate editor for this year's edition of the dispute resolution journal. I want to thank you for coming here on a Tuesday night and those of you who are required to come here, thank you. Thank you for taking time out of your schedule for this. I am really excited for the panels that we have. I think in the world and climate that were in there is nothing more important than talking about the power of diversity and how we can approach it with grace in ways that could actually empower people rather than breaking groups apart. So, I'm really excited to hear what the speakers have to say tonight. But real quick I want to thank you who are on the journal, I want to thank the editorial board. It's been an incredible year. I've had a blast being on the fun journal and I'm super proud to be a part of the dispute journal. Thanks for Nicole Hogan our editor in chief (clapping) and a huge round of applause for Jessica Becerra who has handled all the logistic (clapping) incredible work this year and a huge thank you to all of you. So, without further ado I'd like to invite Franco Shapiro. Did I. I've been practicing all night, but I'm going to invite him up and He is going to moderate our first panel. So, thank you guys

Franco:

So Good evening everyone, first of all I'd like to thank Dispute Resolution Law Journal for the invitation for being here and especially Nicole, Jess and Jenna. For me it is an honor to be here and to introduce to you three personalities who have inspired me as a person and as well as a professional, they serve as a role model not only for me, but for most of you here today. So, without further ado I will start with the introductions.

I will start with Professor Sukhsimranjit Singh. Professor, would you please come here and please take a seat right next to me. (clapping) Professor Singh, most of you already know him, but I'd like to quickly introduce you. Professor Singh is the managing director of the Straus Institute for Dispute Resolution Institute.

He is also a very experienced professor of law for, mediation arbitration, negotiation, cross-cultural dispute resolutions. In fact, he is a leading scholar in the cross-cultural resolution, and he gives lectures all around the world. Dispute all around the world, including TED talks and also, he received his LLM by Missouri University, not as good as Pepperdine, (laughing) but very

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good also. And he has a JD with gold medals and honors. So, professor, thank you very much for being here today.

(clapping)

Now I'd like to introduce one of the first person that I met before coming to Straus, Professor Marcelo. I bet most of you also know Professor Marcelo Rosadilla, he has a lot of famous people are hime (mumbling) He is the assistant Director of Straus Institute Dispute Resolution, he is also Professor of cross cultural Dispute resolution at the Straus program and LLM. He is an experienced mediator and attorney. And the biggest fact about Professor Marcel, he is a twice pepperdine alumni He has an LLM in Dispute Resolution from Straus institute and he also has an MBA from the Pepperdine School of Business.

Marcel:

That's not true, Actually I didn't finish my MBA.

(laughter)

Franco:

Oh, this is the Brazilian way, (mumbling.....as we just talk.) (laughter)
Professor Marcel thank you very much for being here.

(clapping)

Not but not least, I'd like to introduce to you all my dear friend and an inspiration for me. This guy Marcio Vasconcellos please come here and sit. Mr. Marcio Vasconcellos is an inspiration for me because the way that he became passionate about dispute resolution was exactly the way that I did. He likes to say that he was bit by the bug, right? (mumbling ... something about competitions it's almost like seeing a beautiful woman, falling in love for the first time at first view)

Marcio he is an associate for garrisons at the Los Angeles office. His area of practice includes international arbitration, International mediation in commercial law, particularly in the technological and construction sectors. Before moving to the USA Marcio Vasconcellos

practiced law in brazil for several years in a legal firm (in Brazil mumbling at headquarter). He also is a Pepperdine alumni, he has a LLM in international commercial arbitration from the Straus institute dispute resolution and He also has a LLD and master's degrees in international

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commercial contract (from the federal university)? Please join me in welcoming him here.

Clapping

So here we are to talk about perspectives, how culture influences ADR in general. So, in this regard I'd like to start with a very broad question and focus firstly in consensual dispute resolution. Negotiation, arbitration and other matters. So, in consensual dispute resolutions how do you think culture diversity plays a role in communicating? How does it help the mediator, or the attorney or the parties, or if they don't have the necessary cross-cultural dispute, how can it be a problem in the negotiation? Prof Singh if you don't mind starting please?

Singh:

I'd be happy to. Thank you for inviting me, and the entire board and Journal thank you for inviting us for this important topic. The question is how does diversity impact the practice of as negotiators and mediators. Now right on, my answer would be it does in a very important way. I think as humans we need to be humble to be better in mediation and negotiation. What diversity does to us, it challenges our thinking, because diverse perspective, not just in diversity in terms of-- not just diversity, which includes race, your nationality, gender, language sexual orientation but all the above, but it also includes diversity of thought. I think as mediator or a negotiator, what I've come to learn is that when different people challenge my thought I become better, it makes me more flexible, more accommodating, it makes me a better person. If there is no pluralism and only oneism, then I'm not that good. So absolutely as a negotiator as mediator. I've done mediations in the US New Zealand India and Canada. I've seen that different cultures have impacted and shaped the way I think about conflict resolution not just as a mediation but also as thinker, because it gives you humility because your challenged by amazing thinkers from around the world. So, I'll stop with that thought and here my colleagues and come back if there is more the time.

Marcio:

Yes of course I absolutely agree. First also Thank you Jenna for putting this together and inviting us. it's a pleasure coming back here. I'd like to preface this a little bit. I take a little issue with the question. I don't think it's appropriate to talk about the impact of diversity in international arbitration because international arbitration in a sense by its definition is diverse, as

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international as it may be. So as a general proposition you are going to be exposed to different countries who are more likely than not going to have different legal systems. Even if it is the difference between the US and England or US and New Zealand, you will still have a difference in the form of law. I just had a case from a corporation from California and corporation from New Zealand and they differed in their approach in the parole evidence rule, and that difference impacts because it was determining if breach of contract. Even if you when you talk about similar countries like Australia and New Zealand versus if you are talking want to talk about the difference between Brazil and China for example. By its very definition you are working with had different approaches more likely than not take legal systems even if it's the differences between the US and England or US and New Zealand. I just had a case and there was a huge difference. Even when you talk about countries like the US like Australia or New Zealand, by its very definition you are dealing with something different, you are dealing with the other, that thought that you are the other is, imperative on how arbitration works. The approach to is going to be completely different because you are going to have two different views, the approach to contracts are completely different, some of the concepts that for you that are absolutely normal would not even be part of the lexicon. So, by the very definition of what international arbitration is, it is a compromise between all the different cultural elements. So, it's not just a matter of how it impacts, but actually how it makes the field what it is.

Marcel:

I'm also being a little reluctant when talking about diversity and the impact that it has for the fact that we are all very different. If we look at how cultural helps for the fact that we are all very different we think about culture or diversity in a micro or macro level it doesn't make a difference but then again if we go that route then there is no reason to be here talking about diversity as it is. So, I think that you see it everywhere. You can see it here. The culture here represented has a way of dealing with. It has to do with formalities for, there's something that is characteristic about the culture that are represented so when you deal with dispute resolution in general whether it's international or national, you have to think about that micro macro level and therefore diversity and culture play a huge role whether or not you are an arbitrator or mediator, creating your own bias to a mediation, you bring your bias as an arbitrator you have a bias of what the parties are like, you have to be attentive of the biases the parties have about you. And so on and so forth... so you have to have the awareness and as a lawyer, we have a specific culture as

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group and the biggest challenge for our lawyers is changing our culture, and think about resolving disputes in a different way. So, I think diversity and the culture plays a huge aspect on how dispute is resolved, but however I don't want to bring down by that, because that might all incur the error of stereotypes and false expectation. So, we have to be aware of that

Franco

Thank you very much, so as I'm hearing from all of you, it's not about the impact, it's about the process that encompasses diversity. Even if we're talking about a level of domestic mediation and international arbitration, as you know Los Angeles it is a very cosmopolitan, with this in mind I'd like to form a different question.

Singh

There is somewhat of a disagreement, which is healthy. I will respectfully disagree on the point, whether diversity does or doesn't impact or we shouldn't discuss it or not. I think it is crucial we have to talk about diversity the topic of the night and here is the reason why. Let me ask you the question; who are the top mediators who are the top arbitrators. Look at international arbitration, how many people, give me 25 people right now in international arbitration and there are thousands of men who are in commercial arbitration. Give me one name of an arbitrator in the world let me ask you that is a woman. Women, there are so many conservative estimates is that there is less than 5% of top highly achievable capable highly sought-after women arbitrators in the world so yes, it is a diverse, but even though we reflect on diversity, the question is being we including diversity in the practice or are we stumbling back to the majority versus the minority. How can we make it more open to diverse candidates and including women, just a little part I want to put into the discussion? It impacts us all. It impacts minorities. It also impacts the majority, and how we think about them. It creates stereotypes with minorities and majorities.

Marcio:

I didn't mean to say diversity is not important, I'm just emphasizing the importance of it, we are not in disagreement, I just want to highlight the point (laughter), but I do have a follow up on your comment and it's interesting that particularly in arbitration where I focus my practice on it, I'd say 99.99% of the arbitrators are old white western men, but I think it is healthy to find humor in things that don't deserve humor. But arbitration is the only place where the ladies line is shorter. I have arbitrators in the 50s and 60s and the

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client would say... he is too young. So absolutely we have to invest in diversity, and while you were asking number of female arbitrators, but I can't point you five or ten who are women arbitrators who are in the highest possible level

Franco:

Both of you touch on an interesting question, it makes me wonder that with this importance of diversity, what I'm wondering here is what can we do to promote more diversity in arbitration through panels and in these institutions and mediation, what can we do? Does anyone have a suggestion or thought about this?

Singh:

I can start with two comments, there is a Ted Talk and she talks about how we all have frames in our mind that creates simple stories about people and how it can limit and strip people of their identities. So, I will go to a quick story about while in Singapore the practice. There is a kind of statement before attorney is hired, it's amazing because both men and women in New York times, you notice that it was bias and you go deeper, and you, think huh maybe I should have considered women arbitration that I could hire, which I thought was one step in Asia it became a success story that in America we can copy from. In fact, but it's going to be a longer, there is no short cut this will take decade we are at a place where commercial sectors are supposed to be a certain gender age or color of skin, which is unfortunate because it strips a profession from amazing diversity. For example, I grew up in India and I understand the US. I grew up with Muslims Christians and views, the way that I see life is very different from person who grew up in a monotheistic culture sees life. If you break that set up to the table, one has to break the single story, the single story is that the arbitrator or mediator need to follow the steps to success story. I will conclude with this eight years ago before I was at this institute, I remember a woman came to me she was as an attorney my JD student. She told me she wanted to be a fulltime mediator but she heard she couldn't do it so I had a short conversation with her and she said she met all these people and they said it was impossible because I'm a woman, I can't do it. So, I told her to prove them wrong. I'm so proud she has four practices in different states and she is a full-time mediator I don't think she is even forty now and she is very successful. I told her I was behind her and she could do it, but how many of these law students have I met? But those are three things that I would think about making small changes in

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Franco:

So, if you don't mind, I remember the women in the class including Karina was sharing with us in certain situations, she didn't feel comfortable and we notice unfortunately this was a little more common with women in the room than the man, I would like, but I can't talk for you, can you share your experiences what happened to you in dispute resolution where you felt uncomfortable?

Karina:

I don't know what you want me talk about? I'd be happy to share, but there have been so many stories as a woman. Well, being uncomfortable is kind of like a matter that doesn't happen all time because I'm solid in my feet, but maybe this is what you are referring to. I remember for example I had two parties, that had a dispute about a scratch on a car a little scratch like this. And they had nothing else better to do but shout at each other and spend time with a woman during this dispute. The judge imposed them to mediate so the parties didn't take it seriously but I took it seriously, I arrived in the mediation that the judge imposed and they didn't want to settle. It was strange dynamic, because you are aware that these two big gentlemen from very different backgrounds and different religious. Although I'm powerful, sometimes, you shake a little bit. There is a dynamic that is subconscious that you can give in a little bit like you're not good enough. I don't know how to describe it. In the way I was in control but there is a pressure.

Franco:

We had this discussion in class

Karina:

I think a lot of women experience this pressure but its about how you handle it you have to be trained and better. You have to be ten times better in my profession than a man because this is the way it is. You're always going to have different signals that try to control you

It doesn't matter how smart you are. There is a subconscious bias and you do feel it and we have to talk about it because for us, you can always feel isolated and say it's me maybe I'm not handling it very well, but no its good to know that this is happening to all the women in the mediation clinic and also through culturally, it took me a while to talk on a first name basis. It took me a while to adjust, again the dynamic, older younger, they're different so we need to put it out. I think people in their twenties and thirties don't have

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the same bias? But I see the world is changing. The people in the forties are very aggressive especially women. Sorry ladies, its very different and visible that I literally can't work and stereotyping and bias working with people from that generation because I just can't do my work. It's very distracting. So, we must clean out the air.

Franco:

Thank you for sharing, sorry to put you. I forgot to mention at the beginning that the intention of the panel is to be interactive, so if anyone has question pleas raise your hand. So, we talk about diversity but everyone is diverse here, so if you'd like to share then please raise your hand and make a comment

Marcio:

Sorry to interrupt you but I want to piggy back something you said and prof Singh comment. Perhaps I have an over layered simplistic approach, but if you want more women in arbitration then find women, so it seems we are in the position to appoint arbitration, you are all about to graduate you are all going to be in law firms, so when clients ask who should I appoint? Appoint a woman, appoint an attorney from Brazil.

Marcel

I may sound abrasive but the way that I see diversity too is that (of course I'm not talking about the extreme with what the Jews with Nazis someone has to do something) it depends on each one of us to make sure that we create the realities that we wat to create. There is a story that I like, but I don't know If it's true, but I like it anyways, it's about Christopher Columbus arriving in the Americas and they anchor their ships far from the shore just to check out how the Caribbean's looked like. They stayed there for a couple of days and the natives couldn't see the ship because they never seen a ship in their lives so there was no concept of ship in their brains so thy literally couldn't see the ship until one of the natives so ripples in the waves even though there was no rain or wave, so he brought everyone and then everyone saw he ship. But what it illustrates is that we tend to be limited by paradigms established to us and it depends on us to break those paradigms especially us lawyers, we have to help one another and if we know more than person across the table form us then we have to make sure that happens because it is very difficult, I've been through difficulties' just like you but its difficult to accept being a victim. Accept blaming something else or everybody else that I am short towards or I have shortcoming so it's kind of like what Morgan Freeman talks about

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racism. If you want to end racism let's stop talking about it. Let's stop talking to each other about blacks or yellow. Let's just be. That's why I have problem with diversity. There are people who abuse diversity that women are not hired, let us be the voice for that issue, but until then let's not be bogged down. Revolution.

Franco:

This is a fascinating topic it can go on a while in this discussion but as we have time constrained I like to look about other aspects of diversity in ADR. I like to talk about how culture influences the legal system and how the legal system plays a role in international arbitration even mediation. For example, cross examination and taking of evidence, is it the same as US discovery for instance Brazilian, there is no discovery. Would you mind explaining to us how it plays a role in international arbitration and how the lawyers in common and civil law communicate between these systems.

Marcio:

That can take an entire semester to explain but I won't take anywhere near that time. I'm going to use Brazil as an example because that's where I am licensed but I will try to apply other countries. But in Brazil we do not have juries for civil disputes, juries are limited to crime against life, which part of the criminal procedure, which is complete different from civil, were all our commercial matters will be resolved. So, with that, the code of civil procedure in Brazil does not take account of a jury, there is no jury, just a judge in resolving commercial dispute, if there is no jury so then there is no jury to protect, for example there is no rule for hearsay because that is a rule to protect the jury who is not sophisticated and trained in the law. The judge in Brazil is sophisticated to separate what is admissible and what is not. Or we go to arbitration. Another significant distinction, because you don't have jury for the finder of fact or and the judge is therefore a trier of fact and apply the law. Our code of civil procedure is more straightforward, o we don't have the process of discovery and interrogatories. That simply does not exist in Brazil. Our witnesses, are expected to have a different treatment because an attorney does not cross a witness. The judge would ask questions to the witness, an attorney conducts the litigation, in Brazil, the Judge conducts the litigation. The judge guides the process. Your process is adversarial. Because that is the case, you don't get to train your witness and you don't have moments to discuss the case with your witness. For some attorney who do that, it's an ethical violation. When it comes to document production, I am not allowed to provide documents against my client or I will be disbarred, as you know in

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the US, it is very necessary. I don't know which rule to follow sometimes. These are some differences to consider when you have an adjudication process with parties from Brazil or the US. Which kind of discovery is going to happen? Mine or yours what kind of code of evidence are we going to use? Mine or yours? I'd say insist on mine, and you would insist on yours. But if we do that then we don't trade and we both loose, so that is the case, everything that exist in international arbitration, it is some kind of concession, since that is the case, you can't bring your code of civil procedure in your backpack. We have a mix of rules of common and civil law. Although you still do get discovery, it is a process closer to civil versus common. Again, you don't have a jury and the rules are far more streamline. And there is a middle ground. There is a way to ask for documents from the other side as long as it is relevant, but it's a narrow standard. So today we have a mix. That why I was talking about diversity is a part of the very concepts of what arbitration is. It is not only influenced by diversity. It is diversity. There is not international arbitration without diversity because to resolve these problems its almost a trade

Marcel

We have to think as a lawyer educated in the common law system but think about international area, don't be as adversarial as you are here in the US you would look uncool. Theoretically or not civil law system tends to be a bit civilized in the way lawyers deal with one another not as aggressive in the sense behind doors, that's all I have to say in terms of that when you think about international arena, it's very difficult for us to see internationality from the US perspective and the we are the most powerful country in the world so we don't see internationality, once you get in that arena try to act more civilized than you will in the US. To prove my point there was a study I think in a law firm who wanted to know how many of their lawyers were settling cases. They saw that lawyers who had prior conversations before court who called opposing counsel and did normal chit chat about family etc., (mumbling) normal human interaction they found out lawyers who practiced that prior interaction and saw each other before court, they reached over 80% of settlement in their cases compared to 20% of lawyers who didn't do that. You guys are lucky seeing a more civilized way to negotiate and practice law, I hope you don't take civilized the wrong way, I'm saying there are different different ways of seeing right and wrong.

Singh,

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For me culture is what we are practicing. Culture is everywhere to a part that we are enslaved to our cultural thinking so if you want to know a different culture get out of here. Culture is comfort. I'm going to give you two examples which are very common in arbitration from India and the US. One thing I learned from India, people approach conflict resolutions different. The idea of compromised in India its very interesting. For many cultures they don't like compromise because they would think it is defeat like they lost something. So, they go to court to fight and supplement their ego, so the adversarial to compromise is very different. If you look at different countries like Spain and China, it takes a lot longer than in the US to compromise. So, the power of culture and what is expected and accepted from you despite the process of compromising. In the US we (mumbling) I am not a judge I am not going to lead discussion. You are leaders you are going to resolved this. In India this would never help. In India if a judge said this and sad the parties would wonder why you're are here. So now I just tell them who is wrong or right and that is how I do it. So, culture is power. Now in terms of the legal system, how we see history. America is different from many cultures, there is a nice philosopher who said something beautiful, sometimes we do a disservice not justice when we compare the US and India. We see history very differently in India, under the India Constitutional law, glad you are not learning Indian law. The customary practices have been around for centuries and it gives them sanctity like practices where marriage and exception to the marital age, its very fascinating without judging the law. For example, it can be a bias like child marriages. But child marriages are more like if Marcelo had a son and I had a daughter, then when they reached 25 that is marriage, that is what would be called a child marriage. So, culture affects legal systems and I wanted to bring those two examples

Franco

Thank you all for your insights and great explanations. I'd like to talk about cross cultural dispute resolution and it is the last topic. So, I'm just giving you a heads up If anyone has a question. So, talking about cross cultural resolution, we know that there are different concepts of time. We in Brazil are bit more relaxed (mumbling) for instance when it comes to communication or the way we see power or the way we connect with people. This is also all about cross cultural negotiation. I want to ask a panel for an example when this may happen and how would you deal with this. How do you fight your stereotypes and bias? How do you see other culture? What are the key comments on fighting this bias, if we can start with Marcel, you are a distinguished scholar, what will you share with this regard?

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Marcelo

Do we have two more hours? (laughter). Let's start with examples I have mediation where the collective aspects of the culture played a huge part. High power dissonant perception as well. For example, I was in mediation where there was a multi-party mediation and there was one plaintiff and many defendants. All defendants wanted to be in their favor and there was no agreement until I tried something. I knew the culture and knew how authority was important. And how prestigious was authority. So, I tried something that I shouldn't do as a mediator. I went to another party who had connection with the other parties to the plaintiffs, and the way I saw it is that all the other defendants look up to you and see you as their boss and although they are independent contractors, they see you as the main link between the plaintiff, so I think the way you can do this is take responsibility for what happened and try to come to an agreement, then we will follow suit. We will try to make some kind of payment plan arrangement and Immediately I saw this guy look powerful and he said, I will do it and everyone thought it was great that their boss would take responsibility so they were all willing to apply this much, because of that dynamic they finally had a figure they could call superior and he felt superior, he felt like he had a reputation now and so we solved the problems. There are a lot of examples like that.

End 1:00:11