

University of Missouri School of Law

University of Missouri School of Law Scholarship Repository

Faculty Blogs

Faculty Scholarship

3-11-2021

ANNA HOWARD'S NEW BOOK EXAMINES WHY BUSINESSES DON'T USE MEDIATION – AND OTHER ISSUES

John Lande

Follow this and additional works at: https://scholarship.law.missouri.edu/fac_blogs



Part of the [Dispute Resolution and Arbitration Commons](#)

ANNA HOWARD'S NEW BOOK EXAMINES WHY BUSINESSES DON'T USE MEDIATION – AND OTHER ISSUES

MARCH 11, 2021 | JOHN LANDE | LEAVE A COMMENT



Anna Howard's new book, *EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes*, provides valuable insights about business disputing. It reports the findings of her study about mediation of EU cross-border commercial disputes, but the dynamics she describes occur in the US and probably many other countries as well.

Anna is a post-doctoral research assistant at the Centre for Commercial Law Studies, Queen Mary University of London. She qualified as a solicitor in England & Wales, practiced EU and UK competition law, and trained as a mediator.

Her study is based on 21 semi-structured interviews of senior in-house counsel in multi-national companies operating in Europe. Her research demonstrates the [value of qualitative methods in providing deep insights](#) into dispute resolution phenomena.

Where Mediation Fits In

Anna's study shows that lawyers think about disputes from the outset of problems, not simply at the later stages of cases, which is the focus of many folks in our field. This perspective of the lawyers profoundly affects their attitudes and behavior about mediation. They generally don't consider mediation unless and until they have tried (or at least considered) unassisted negotiation. And when considering mediation, they generally compare it to negotiation, not litigation or adjudication. She writes:

For those disputants who do not want to use mediation because of their doubts as to what mediation can add to their own negotiation efforts, information on mediation's usefulness in terms of time and cost savings determined by reference to litigation will not address their specific concerns. Indeed, mediation would require those who have not been able to resolve their disputes by negotiation to spend more time and money in negotiations, albeit assisted negotiations.

The Critical Role of Organizational Culture

The study pays particular attention to why businesses **don't** use mediation. It highlights internal organizational dynamics affecting these decisions. When businesspeople have disputes, they may perceive use of mediation as their failure. Business people (as well as in-house counsel) negotiate deals and disputes all the time, and if they can't resolve a problem, it can reflect poorly on them. One lawyer said:

I think [there] will be much more usage if there is a general change – and I see that coming – in a change in company culture. Resolving by mediation rather than non-consensual methods requires a certain amount of accountability and let's say a certain management type.

Anna's findings are consistent with my research (which she cites and, *ipso facto*, enhances the value of her study). In my study, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, I interviewed business executives, inside counsel, and outside counsel. In a statistical regression analysis, I found that, for all three types of respondents, the most significant factors related to belief in using mediation were beliefs that mediation helps preserve business relationships and that business' top executives are often satisfied with the results of mediation. In other words, the respondents were very sensitive to whether the superiors were likely to be pleased or not – and thus whether use of mediation would present a career risk.

Similarly, in *Why and How Businesses Use Planned Early Dispute Resolution*, Peter Benner and I found that in deciding whether to adopt planned early dispute resolution systems, inside counsel we interviewed suggested that business executives were very sensitive to the risk of failure and how it would affect them in their companies.

One lawyer said that business people have a “general aversion” to litigators, who are the “last [people] you want in your door.” By the time a problem becomes a dispute, they think, “What happens when it goes to legal?” Business people generally feel that it is their job to resolve problems every day, and they normally do not want litigators to do their job. They consider it almost as an insult: “What do you mean that we don't know how to solve this problem?” When disputes arise, they are embarrassed because it reflects poorly on them and it is not good for their careers.

Promoting Mediation – and, More Importantly, Parties' Interests

Anna's research suggests that efforts to increase use of mediation may be most successful by focusing on how executives and lawyers can use it to add value to their negotiation ef-

forts and roles in their companies. Thus proponents of greater use of mediation should frame mediation positively in organizational culture. Some companies do have positive mediation cultures, and we should concentrate on factors that promote and maintain that culture.

More fundamentally, we should consider mediation as a means not an end in itself. Mediation, like all dispute resolution processes, should be designed and used to satisfy parties' needs and interests.

In Conclusion

The US has played a leading role in the ADR movement in recent decades, and American law professors have provided valuable ideas and energy in the process. In the future, it seems likely that American legal education will provide a [shrinking contribution](#) to the field. Fortunately, academics and practitioners from all over the world are producing major developments to the field. Anna is a reflection of things to come.

If I have whetted your appetite to read her book, you (or your library) can get a 25% discount using the code 25EUCM21.

And if I haven't convinced you, read [John Sturrock's review](#).

[◀ DID YOU HEAR ABOUT?](#) [◀ DISPUTE RESOLUTION PRACTICE](#) [◀ INTERNATIONAL DISPUTE RESOLUTION](#) [◀ MEDIATION](#)
[◀ RECENT SCHOLARSHIP](#)

This site uses Akismet to reduce spam. [Learn how your comment data is processed.](#)

