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Views from ADR practice

Interview with Michael Leathes, UK Mediator

> If at first an idea is not absurd, there is no hope for it.
>
> Albert Einstein

Nadja Alexander interviews Michael Leathes, a corporate ADR proponent.

Can you describe your professional role and how it relates to international mediation?

I have been an in-house counsel for most of my 36-year career, including general counsel of Pfizer International and of International Distillers & Vintners and general manager of BAT's intellectual property company. In all these roles I have been responsible for litigation portfolios internationally — in total, thousands of cases. Before I figured out a better way, I'm certain that I must have been responsible for about as many losses as wins. Then, in the late 80s, I discovered mediation …

And what happened?

Together with the teams of people I was leading, we resolved the majority of our cases through negotiation, assisted by a neutral or, more frequently, through the application of interest-based negotiation techniques. Often, we proposed settlement talks. This reduced our risk profile considerably and saved a lot of cost. It also earned us a reputation of being people who want to resolve, people you can talk to.

Tell me about the changes that you have seen in international dispute resolution during the past five years.

On the positive side, the experience, quality and skill of mediators has gradually improved and people are engaging them directly, as well as through mediation bodies which can administer the more complex issues. But there is little evidence of the widespread mindset change among those responsible for managing conflict to see mediation as the natural way to procure outcomes. There remains a low level of real appreciation and acceptance within most companies of the value of mediation and how and why it works. In blame cultures, people tend to act through habit, because it's safer. They often ignore opportunity and experimentation because that's risky. It's amazing, when mediation has an 80 per cent success rate!

What would you say has been your most difficult experience in an international ADR context?

Getting the other side to the table in the right frame of mind. Recently, persuading a negotiating party to use a mediator to help us arrive at an interest-based deal where there was no conflict — just one party, me, who wanted to sell an asset, another who wanted to buy it, but failure to agree on a value through conventional negotiation! Most people see mediation as an ADR tool and don't look beyond. And most people consider as failure the use of a mediator to help them make a deal. What a shame!

How did you deal with it?

We eventually opted for an arb–med process. The neutral first acted as an arbitrator, determined an appropriate value after a short arbitration process, wrote that value on paper and sealed it in an envelope without disclosing it. The neutral then changed hats and became a mediator. We had agreed in advance that if we could not reach a negotiated value during the mediation phase, we would open the envelope and accept the number inside. We did agree a number in the mediation.

Is there a highlight that comes to mind?

Despite the temptation, we never opened the envelope! Those of us involved were so impressed by the process that we wrote up the experience in an article. ACB Mediation in The Hague, the MEDAL[1] Alliance member which administered the issue, put the article on its website: <www.mediation-bedrijfsleven.nl/docs/miparticle_jul_aug06_medal.pdf>.

If there was one lesson you have learnt over the years, what would it be?

Experiment, dare, and believe in the power of transparency, honesty and reciprocity.

What is the most influential insight you have found from the literature on ADR or from the conference circuit?

I continue to be inspired by the numerous exceptional people around the world who find themselves operating as professional mediators, as leaders of mediation bodies, and as academics in the field, and also by peacemakers in history who have helped shape the world. I will mention just one of many sources of fundamental wisdom — Albert Einstein — who made many remarks which can be applied directly by dispute resolvers, such as:

- 'Imagination is more important than knowledge.'
- 'The significant problems we face cannot be solved with the same thinking that applied when they arose.'
- 'Try not to be driven by success. Be driven by value.'
- 'Many of the things you can count, don't count. Many of the things you can't count, really count.'

Does mediation have anything in common with tennis?

'Amateurs practice until they get it right; professionals practice until they can't get it wrong.' This is one of the favourite quotes of Bill Marsh, an international mediator.

How do you see mediation developing in the next five years?

It depends on whether someone, or a group, is able to take the global leadership initiative and drive home that vital change in mindset among

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those who are engaged in conflict. There is no shortage of talent in the delivery of mediation services. But there is no funding to enable a successful leadership to be taken on a global scale, one which inspires people to adapt their mindsets and follow the example. But if it happens, then I believe there will be a very strong uptake. The entire dynamic of negotiation would improve dramatically. It just requires inspirational leadership.

Which group or groups could most have a positive influence on the development of mediation?

There isn't one. I think there are six wheels of traction. As on an all-terrain vehicle, none is more significant than the others. But they do need to be synchronised to leverage their collective power. These wheels of traction, in my view, are:

- businesses
- governments and NGOs
- judiciary
- academics and others contributing to the advance of knowledge and skills
- ADR bodies and ADR practitioners
- professional people who advise those who manage conflict.

Should mediation be a profession?

Yes, I believe so. It needs international structure and standards, a consistent code of ethics and a lot more transparency than the profession has at present. This will help inject confidence and respect into the field. I think some great work has been done in Australia and in The Netherlands on certifying mediators. These efforts need to be elevated to a global level, and of course to do that requires structure and funding.

Do you agree with the Mediators' Statement signed by well over 100 mediators on <www.concernedmediators.org.pg9.cfm>?

I have not signed it, mainly because I only subscribe to something like this if it will make a real difference. But, yes, I sympathise with the frustration being expressed. Years ago, our car broke down in the middle of nowhere with three impatient children on the rear seat and I gazed at the engine with my head under the hood contemplating my misfortune. My wife said, 'Let's not just complain, let's fix it!' What's needed to 'fix it' for mediation is for the six wheels of traction to be synchronised and driven.

Is that realistic?

Yes! Margaret Mead, President of the American Association of the Advancement of Science and a prominent cultural anthropologist, observed some decades ago: 'Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it's the only thing that ever has'.

Margaret Mead … prominent cultural anthropologist, observed some decades ago: 'Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it's the only thing that ever has'.

You recently retired from your last role at BAT at the age of 58. What are you going to do now?

I'm going to join some amazing people to help try and prove the wisdom in Margaret Mead's words. It sounds grand, pioneering and aspirational, and some would say unrealistic. I disagree. It really can be done!

You recently won the CEDR Award for Excellence in ADR in the Business category. Were you surprised, and did you deserve it?

I didn't win it personally, my team at BAT won it! I just collected the Award as the team's leader. Yes, I was surprised, because we were one of seven being considered by the judges, and one of three nominees. The other candidates had all done great things in the field. I felt my team did deserve some outside recognition for their versatility in changing their own mindsets from 'win' to 'resolve' and in recognising the power of creativity in finding solutions beyond the obvious. We had proved year after year that, with a resolve mindset, proactively implemented, you can significantly reduce risk, contain cost and increase the fun factor in a professional career!

What would you say is your single most significant contribution so far to the development of mediation?

As a member of the ADR Committee of the International Trademark Association (INTA), I had the opportunity to lead an initiative to capture on camera a dispute being resolved. Few mediation videos are available yet people generally need to experience mediation before they can understand not only how but why it works. The video is available from INTA at <www.inta.org> or CPR Institute at <www.cpradr.org>. It is also viewable on any PC at: <www.inta.org/index.php?option=com_content&getcontent=3&id=695&task=view&Itemid=171&getcontent=3>.

What was your first mediation experience?

It was in the US in the 1980s. I had inherited a long-standing dispute; the lawyer on the case proposed mediation and had persuaded the other side to agree. I was the negotiator on my side. The mediator called me to explain the process and we agreed a time and place. But the mediator also invited me, and my lawyer, to dinner in his club on the evening before the mediation with my counter-party and his lawyer. He imposed one rule — that over dinner we would not discuss the case. We would just get to know one another. We got on very well over dinner, then the other side broke the rule by starting to discuss the case. I responded, with positive noises, the mediator asked if we both wanted to discuss the case, and we both agreed. We settled the case during that dinner! I settled well within my negotiating mandate. Eureka!

Are you a fan of arbitration?

Yes, I am. I've experienced awful arbitrations but I can say the same for mediations. There is a substantial and vital place for arbitration in the dispute resolution spectrum.

Can you tell us more about arbitration's place in international dispute resolution? Whereas there is an effective international legal framework for arbitration, the same does not exist in relation to mediation. How does this affect the attractiveness of mediation in international dispute resolution; and how does it affect its practice?

Outcomes are more interesting than frameworks. Yes, we need to think about what's the right resolution strategy for any given issue, and not just pitch for what a contract clause might say. There are no accepted international frameworks for baseball arbitration, or mini-trial and many other tried and tested mechanisms. Sadly they don't get taught in law school. People are unfamiliar with them and they seem disinclined to educate themselves. Given the talented people who practice law and work as in-house counsel, this is perplexing. I think these attitudes block the growth of all alternative dispute resolution processes. Perhaps we have ourselves to blame. We called them 'alternative', even I just called them 'alternative, and without a Herculean effort, they will remain just that. Alternative! We all need to shake ourselves from time to time and sparkle with ideas.

If you were a cheese, which would it be?

Dutch 'Boeren Leidse Kaas'. It is a Gouda-style cheese, coming from the farm in huge thick discs with a resilient wax shell, is normally bought in chunky triangular wedges, and is laced with cumin seeds. The cheese is firm, healthy (usually made with skimmed milk), versatile and retains its excitement and appeal when aged. In Holland, it is considered as 'a twinkle on the tongue'. Now, that's the way to be! ●

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Endnote

1. MEDAL is the International Mediation Service Alliance.

developments in ADR

- The recent case of ***CJ Redman Constructions Pty Ltd v Tarnap Pty Ltd*** [2006] NSWSC 173 serves as an interesting reminder of the need for caution in communications relating to a dispute. In that case a communication headed '**Without Prejudice Save as to Costs**' was sent by the solicitor for the defendant to the solicitor for the plaintiff. Upon examining the correspondence, the Court allowed the communication to be used in the hearing as it did not possess the requisite character of being connected to the negotiation of a settlement dispute. This decision shows that in all cases the determining factor will be the relevance of the connection between the statements made and the attempts to negotiate the settlement of a dispute, not merely the words 'Without Prejudice'. It may be a fine distinction, but one worth remembering when issuing documents. For more analysis on this issue consult Nathan Cecil's article, '*Without Prejudice — Are your communications protected?*': <www.mondaq.com>.
- In many jurisdictions, court caseloads have significantly increased in the last decade. In Butler County, Ohio USA, court caseloads have tripled in the last decade. However, the increase in cases is primarily being handled through more mediation of civil cases, and more plea bargains and careful selection of cases on the criminal side. As more cases are mediated and settled, the jury trials that remain tend to be more complex and for higher stakes. For more information consult Mary Lolli's article, '*Where have all the juries gone?*' in the Middletown Journal: <www.middletownjournal.com>.
- A new international mediation panel for shipping disputes was convened in London on 13 October 2006 by 40 shipping experts from 26 countries. Spanish lawyer Jose Maria Alcantara initiated the panel due to the increasing number of disputes and the costs and time requirements of both litigation and arbitration. While the panel has not yet been named, it emphasises its diverse international membership and range of mediation styles, along with its use of respected industry experts as mediators.
- With arbitration moving towards a litigious style, more reinsurers in Australia are turning to clauses in their contracts with insurers that require disputes to be resolved through mediation or expert determination. The trend is toward including both mediation and arbitration clauses in reinsurance contracts, with arbitration occurring only if mediation fails to fully resolve a dispute. Australian courts are supporting parties using mediation, which influences the way contracts are drafted. However, parties need to understand the benefits and limitations of mediation and other forms of ADR before incorporating them into contracts. For more information consult Peter Mann and Raymond Giblett's article, '*Mediation- A Rival to Arbitration in Reinsurance Disputes?*' from Clayton-Utz: <www.claytonutz.com>.
- The American Bar Association has released a new book entitled *The Negotiator's Fieldbook* (Washington: 2006). Edited by Andrea Kupser Schneider and Christopher Honeyman, it is a compilation of articles written on negotiation and mediation by a variety of noted ADR scholars and practitioners. These include Australians Bee Chen Goh and John Wade. Also by an Australian author is the second edition of *Global Trends in Mediation*, edited by Nadja Alexander and containing articles on ADR by national authors in European, North American and African countries, as well as from Australia. Global Trends is published by Wolters Kluwer Law & Business.