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Globalisation and ADR

Can mediation evolve into a global profession?

Michael McIlwrath

This year, 2009, celebrates the 200th anniversary of the birth of Charles Darwin, whose theory about how change occurs over time in organisms has had an impact far beyond the biological sciences. Variations on Darwin's theory of evolution through the process of natural selection are used to explain how changes occur in the formation of culture and societies, companies, technology, and so on.

The same thinking has been applied to methods of dispute resolution, which over time adapt to changes in their surrounding environments. In fact, I recently had the privilege of interviewing cultural anthropologist Robert Carniero, curator of South American ethology at the American Museum of Natural History in New York, who explained his experiences living for periods with different tribes in the Amazon basin, and their approaches to dispute resolution.¹ As Dr Carniero explains it, primitive and rather brutal forms of dispute resolution — such as beating each other with heavy wooden clubs — work just fine when the groups consist of no more than 50 or 100 people and those not content with the outcome can just move away.

Things get more complicated, however, as societies grow in size and complexity, and so far all large societies have evolved within them formal justice systems. In fact, it appears that societies cannot grow larger in size and complexity without first having evolved a system of resolving disputes that can keep the peace between the citizenry and ensure that markets function efficiently.

Which leads naturally to consideration of the future of private dispute resolution in a global, interconnected marketplace, and in particular the potential for mediation

as an enabler for more efficient global commercial activities. Today, mediation is an organism that thrives in particular niche ecosystems like the UK, Australia, and North America. The question is whether it can thrive in other locations, and whether it can be used to resolve cross-border disputes. Anyone who has experienced mediation will understand its potential to grow and flourish as a critical part of a globally inter-connected economy, but it would be folly to ignore the challenges in breaking out of a local niche practice.

Origin of the mediation species

Although mediation traces its origin to the great cultures of Confucian Asia, the Middle-East and Africa, the modern notion was born when US Chief Justice Warren Burger invited Harvard Professor Frank Sander to present a paper at the Roscoe Pound Conference of 1976, a historic gathering of legal scholars and jurists brought together to address dissatisfaction with the American legal system. Professor Sander's paper *Perspectives on Justice in the Future* provoked a radical change in thinking. As Justice Sandra Day O'Connor explained:

The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.

Thus, modern mediation is at most 33 years old. Even in places, like my home state of California where mediation is commonly used, it really would not be fair to say that in this short span of time it has matured to the same level of, say, the medical or legal professions, which have

hundreds of years behind them. In many places around the world, in fact, mediation is struggling to gain any traction at all. It has gained a strong foothold in a few countries, such as Canada, the UK and the Netherlands, but in most places it is virtually unknown. It is rarely promoted and often misunderstood, causing lack of respect and acceptance.

In many legal environments, mediation has found itself in a bit of a rut, experiencing only very marginal growth. Where mediators are plentiful, they tend to be in chronic over-supply. In the view of many consumers of dispute services, this is not a problem of mediation but of the way it is presented within these particular markets.

Take the UK for example. Having developed initial techniques and training from the US, there are now thousands of trained mediators. However, it is claimed that only about 20 people practice as full-time mediators, with perhaps 50 conducting 80% of the country's mediations. Thousands of others struggle to gain experience and practical skills. And this is in the one place in Europe where mediation is sometimes claimed to be 'mature'.

The fact that change must occur at an unprecedented level in order for mediation to rapidly grow is hardly debatable. In a poignant article last month 'A perfect storm is gathering',² a dozen current and former in-house legal counsel, including one of my senior GE colleagues, pointed out how a triple convergence of economic turbulence, vital needs of corporate counsel and information and communications technology are overturning the role of the litigator and demanding they metamorphose into resolvers and, more broadly, outcome generators.



At one and the same time, mediation is being presented with an opportunity to leave its status quo as a local niche activity and become a truly global profession. But the question is: are the mediators and service providers in this field sufficiently responsive to the current environment to make it happen?

To put it bluntly, mediation needs to emerge globally as a profession that is widely understood and accepted, and where competent, trained mediators are instinctively regarded as professionals regardless of their background. Where parties see mediation as an opportunity to come to a conclusion and are much more inclined to accept, rather than reject, a proposal to engage a mediator. Where there are enough competent mediators from all cultures and technical fields that the most suitable can easily be identified.

Mediation as a potentially migratory species

The most vocal supporters of mediation tend to be those of us responsible for disputes; we see directly (and are held accountable for) the failure to resolve them. Given that so many of us believe mediation represents a generally superior form of dispute resolution, we are bound to ask why it has not become more popular around the world. There may be many factors preventing a more rapid spread of the practice of mediation beyond its core jurisdictions.

One possibility is that the cost of litigation in North America, the UK, and Australia makes the search for an alternative that leads to settlement more pressing. That may certainly be the case, but it is not a completely satisfying explanation. In Italy where I live, for example, court proceedings may cost the typical litigant a fraction of what a similar action would cost in the US, but the case will still take some years to work its way through the courts. Parties want resolution sooner rather than later, and one would think that inefficiency of dispute resolution would be a fertile environment for mediation. Yet it is little practiced in Italy, despite efforts over the past decade to promote it,

including legislation imposing an obligation to mediate certain types of disputes. And there are countries like India that make Italy a shining example of judicial efficiency, and where mediation is even less known and practiced.

So there must be other factors stalling the growth of mediation. One in particular appears to be variability in the quality of the services that are called 'mediation' in different places. Mediation's ability over time to be recognised as a true profession depends on a certain degree of consistency in delivering a quality product. Standards must be high, and also transparent and credible.

Another impediment to progress is the patchy development of mediation on a global scale. Here and there, excellent but isolated initiatives exist in this regard. I am on the Board of the Indian Institute for Arbitration and Mediation, which is urging progress for the development of the practice, especially in the community area, but it is not something that one institution can accomplish alone.

That is not to say that educational and best practice sharing does not happen; it does, but it is unfortunate such efforts are done in isolation and without connecting them with a broader, more global initiative.

These impediments take their toll on the potential for mediation to truly develop. I once had a discussion with Michael Leathes, formerly head of intellectual property of British American Tobacco (and now Executive Director of the International Mediation Institute (IMI)), about how many offers to mediate a dispute actually lead to a mediation. I estimated the number might be one in 10 to 20 in my industry. Michael felt it might have been closer to 1 in 50 or even fewer in his experience.

While both of us believe that the results of the few mediations that actually take place make proposing mediation worth the candle, we have always been surprised how mediators (and mediation institutions) have failed to appreciate how hard it is to get an opposing party to accept mediation in the first instance.

IMI: adapting to globalisation

For these reasons, I accepted an invitation from Michael and the former Chair of IMI, Wolf von Kumberg (assistant general counsel of Northrup Grumman Corp), to be the 2009 Chair of IMI.

The empty space that IMI is designed to occupy is that of a global convenor. Because IMI is not a service provider in any sense, it does not compete with any mediator, provider, trainer or any other. Its role is to promote excellence and overcome the huge variations in standards. But it goes well beyond that, to inspire the development and use of mediation in all its forms worldwide and help address the prospect of regulatory initiatives affecting mediation.

This notion of *convening* is critical. The founders of IMI specifically sought to avoid establishing a new entity, specifying a role for it, and then assuming it could make change happen alone. Instead, the idea for IMI was to rely on wide support from the field's leaders across all stakeholders, and across many countries.

The desire is to draw out and build upon the methods and schemes developed by practitioners in the field worldwide, for example by inviting mediators to gain experience through shadowing and assistantships; sponsoring programs for getting trained; surfacing named examples of where and how mediation worked; publicising statistics; sharing articles and expertise like role plays in copyright-free environments; inspiring appreciation for the use of a neutral as part of the deal-making process outside the dispute context; promoting better availability of model clauses; promoting the use of credible codes of conduct and complaints processes; encouraging governments to set examples and to provide promotional funding; using of new processes and techniques from other fields ...

The remarkable thing is that none of these things (or the many other possibilities) is particularly difficult to deliver, locally and internationally. The challenge is to harness these collective efforts for the benefit of mediation generally and all its stakeholders.



The mission of IMI

IMI's mission is to convene, enable, encourage, celebrate, explain, simplify and above all to inspire. To succeed properly, it requires everyone in the field, and those who care about it, to work more proactively together and aim for that common goal. Setting aside some time each day or week to make the earth move is important if we are to leave the field to our successors in a better condition than when we entered it.

I appeal to all serious mediators and provider institutions to get involved and perceive IMI as an opportunity: a vehicle that, with your active involvement, can drive progress locally and right around the world. I appeal to experienced mediators to become IMI Certified quickly and to share their ideas and insights for promoting and developing the field more effectively. Governments and other benefactors will support financially convened initiatives that will produce positive and measurable change.

In his day, Charles Darwin encountered a great deal of scepticism in propounding what has been called his 'dangerous idea': dangerous because it so radically challenged the way that we humans previously saw ourselves, and our place in the universe.

Modern mediation may be just three decades old, but already it is challenging notions about the cost and practicality of litigation. Where mediation has taken hold, it has been

able to adapt well to different environments, and has even developed specialised practice areas. The dangerous idea facing mediation today is whether it can be transformed into a credible, free-standing profession that challenges basic notions of justice, and what a legal system can and should deliver. A vehicle with which to achieve this — the only one I know right now — is IMI.

If experienced mediators act now to become IMI Certified, and if we users seize the opportunity to apply the IMI portal as leverage to send more of our disputes to mediation (and away from litigation), significant positive change is within reach.

Let's grab this dangerous idea and make it work. ●

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Endnotes

1 Episodes IDN 26 and IDN 45 of *International Dispute Negotiation*, a podcast published by the International Center for Conflict Prevention and Resolution (CPR) and available for free at <www.cpradr.org>.

2 Available at <www.imimmediation.org/macro-perspectives.html>.

ADR DEVELOPMENTS

A global profession?

Michael McIlwrath's article, 'Can mediation evolve into a global profession?', published in this issue of the *ADR Bulletin*, is just one of the many interesting articles on the IMI's (International Mediation Institute) website. The article discussed the current need for mediation services in light of recent changes in our rapidly changing world.

Other articles include a piece written by 12 current and former corporate users of mediation services. Other articles include 'The unique value of becoming IMI certified' and 'The 7 keys to mediation as a global profession.'

To access the articles and for more information on the IMI go to <www.imimmediation.org/macro-perspectives.html>. ●