The IIADRA Interview

Michael McIlwrath
Chief Global Counsel -
GE Oil & Gas
Director -
International Mediation Institute

Q. *Mike, do you think the evolution of dispute resolution from litigation to arbitration and from there to mediation is just a natural phenomenon or a cultural evolution, where people are matured to take charge of decision making rather than delegating it to a third party to impose the decision on them?*

Michael: Anil, the question reminds me of a discussion I had with a senior manager, an engineer by training, about 15 years ago here in Italy. We were facing a large arbitration filed by an important customer. He and his team had tried everything to settle, but still the parties were far apart. I suggested we try mediation. He said, "I don't understand. Are we settling or are we arbitrating?" I explained again what mediation was, and he repeated his question, more slowly and emphatically this time.

It took me some years to understand the source of our miscommunication. In his world, disputes were black and white. You either settled, or you went to court or arbitration. There was no in-between. In the lawyer's world – mine – we tend to think of procedures as a workman thinks of tools, i.e., using one tool does not exclude the use of others to resolve a problem. There are times something new can appear. I had mistakenly assumed the manager saw legal procedures as I did, but in fact we saw the world in very different ways. This is a long way of answering, sorry…. I agree with your phrasing this as a question of cultural evolution. As you know, sometimes evolution works so that something new takes the place of a traditional way of doing things, like the automobile displacing the horse and carriage.

Other times, evolution can produce something that is complementary, so that the new and the traditional are coterminous, like shaving. Electric razors are a successful modern invention, but did not displace the blades that have been used for centuries. Both exist today, and often both are even used by the same people. And, by the way, we did succeed in taking that case I mentioned to mediation. The senior manager was very pleased with the settlement that was reached, both financially and in preserving the customer relationship, and also that we did not spend years in arbitration. In fact, some years later he had another large dispute, and this time he was the one who said, "arbitration might take a long time. Should we try mediation first?"

***Q.** As the Chief Global Counsel of GE Oil & Gas, a large division of one of the world's largest companies, do you think mediation makes a better business sense in dispute resolution for companies?*

Michael: On this, I would go back to my answer above. "Better" is a term that implies a comparison with something else, and this is not an answer I can give in the abstract. I would say that mediation is almost always our preferred option when there are concerns about time, cost, and commercial relationships. It is also a preferred option when the goal is something that a judge or arbitrator simply cannot deliver, such as a restructured commercial relationship such as an outcome based on discounts or new orders.

***Q.** When we talk about the advantages of mediation, don't you feel there is a lack of transparency with respect to the availability and credibility of efficient mediators and uniformity of the mediation process?*

Michael: First, the lack of transparency is not as big a problem in mediation as it is in arbitration. Mediators tend to be, as a class, generally better about disclosing how they manage cases and how they get results. Arbitrators tend not to disclose this sort of information, and rarely do they given details about how they conducted past cases or how long they took. Perhaps arbitrators believe that giving more information will tend to "define" them, and make them less appealing to many parties.

Second, the problem of transparency and competency in mediation is much less today, and also less controversial than when the International Mediation Institute (IMI) was created eight years ago. We have since then seen many countries beginning to enact certification requirements. There seems to be a general consensus building that if you are going to have lots of mediations in a country, then you should make sure the mediators are trained and subject to reasonably high ethical standards and disciplinary codes, as with any other profession.

***Q.** Another important complaint raised by lawyers regarding mediation, especially international mediation is that the outcome is not enforceable and the better option of ADR is still arbitration as an arbitral award is internationally recognized and is enforceable in courts of law. Don't you think this is a major hurdle in the business community not accepting it?*

Michael: Well, I think it's a misunderstanding on the part of the business community. It's also dead wrong. The outcome of a mediation is of course enforceable. A settlement is a contract, a concept that business people are intimately familiar with. Whoever has been going around saying that mediation doesn't produce binding and enforceable outcomes needs to go re-read their Contracts textbook from their first year of law school.

In any event, UNCITRAL is currently exploring the possibility of an international convention for the recognition and enforceable of mediated settlement agreements, but them on par with the NY Convention with respect to

international enforceability. I think this would be terrific, and certainly help dispel the common misunderstanding about enforceability.

Q. *How could International Mediation Institute (IMI) contribute in creating the credibility and acceptance of mediation?*

Michael: Probably the greatest contribution from IMI to date has been the idea that standards can be developed and applied to mediation, transforming the practice into a genuine profession. Few reasonable people would ask an unlicensed physician to treat their children or themselves for a major problem, but until recently even leading companies were taking their largest cases to essentially unlicensed mediators. And I have some brutal experiences where a mediator was not competent or experienced and actually did more harm than good. Part of IMI's mission now is promoting standards, helping them get more traction in different legal systems.

Q. *To commemorate the 40th anniversary of the 1976 Global Pound Conference at Minnesota, the IMI is initiating a second Global Pound Conference series across various cities in the world in 2016. You being the Chair of the GPC organizing committee, can you please tell me the object of the GPC series?*

Michael: Is there a word limit for this interview? On a serious note, the GPC's dedicated website will have just launched by the time this interview. http://globalpoundconference.org . I would urge your readers to check the site and see how to get involved. At this moment we have 35 cities in 26 countries that will host conferences based on common "core" themes about many aspects of dispute resolution, not just mediation. The conference will kick off with a two-day event in Singapore on 17-18 March 2016 (http://singapore2016.globalpoundconference.org) and will conclude in London in July 2017. In all the conferences we will have broad stakeholder participation – users, counsel, mediators, judges, arbitrators, academics, government – and will gather information that can be used to shape the future of dispute resolution. It will be an amazing conversation. If you are involved in commercial dispute resolution, you will want to be involved in the GPC Series.

Q. *Do you think the GPC series would be a turning point in the shaping the future dispute resolution culture?*

Michael: Yes. In fact, even at this early stage in the organization of the GPC we are seeing people making new connections and talking about how disputes are conducted in their countries compared with others, and how things could be improved. The results of this conversation will be difficult to ignore.

Q. *The global arbitration community often says arbitration is different in India and rest of the world. To overcome this criticism the Arbitration Act is being amended based on the recommendation of the Law Commission of India,*

do you think just by amending the law, the arbitration process and culture in India can be improved or is there anything further that we need to do for improving it?

Michael: Here, I speak as a frustrated in-house lawyer with some experience with arbitration in India. There are a number of issues we could discuss, but there are two main ones from my point of view.
The first is that India's legal culture is relatively isolated from other parts of the world. Perhaps because foreign lawyers and firms cannot practice in India, innovation just seems to come slower. Local traditions tend to dominate, and still in India we see practices that disappeared decades ago in other countries, if they ever existed at all, such as the appointment of retired judges as arbitrators, or government-owned companies keeping their own lists of arbitrators that they require parties to accept. These practices are short-sighted, because they make resolving disputes in India look riskier to a foreign party, and companies expect to be compensated for taking increased risk, ie, what you get are higher prices.

I will give you an example of the problem of a local legal culture that I am talking about. Some years ago we were in the seventh or eighth year of an arbitration taking place in Calcutta. The arbitrators were all retired Indian judges, which was also my own fault for having agreed to appoint one of them. I would never do that again today, and would probably appoint someone from outside of India in most cases. But then I was naïve. At one of the many many "sittings" which took place over the course of several years, I stated that my company felt the proceedings were taking very long and we wondered if it would be possible to conclude them soon. One of the arbitrators scolded me and pointed out that while the arbitration might end in 10 years, this was much better than the 20 years it would take us in the Indian courts.

While I did not respond, I found his answer to insensitive and off-putting. We were not in the Indian courts. We had chosen arbitration. The comparison for us, an international company, was not the time it would take in an Indian court, but the 18 months to two years that comparable arbitrations take in other parts of the world, such as Singapore or Hong Kong. But there was no point in arguing. I was speaking to a retired Indian judge, and we had different baselines against which we measured our sense of a reasonable time to resolve things.

The second problem is simply the Indian courts and the inconsistency and at times poor treatment given to arbitration. We had a 1998 award from an ICC tribunal that we tried to get recognized in Delhi court against an Indian company. In 2013, after 15 years and having produced the available record from the arbitration (far more than other countries require), the court declined to allow enforcement to occur, a decision that was based on the judge's assessment of the merits addressed by the arbitrators.

Our counterpart in that particular case had a reputation of entering into many international commercial contracts to buy expensive equipment, and then refusing payment on baseless grounds. They lost all the arbitrations… I think I was told they something like 36 decided against them… but they kept the cases tied up in the courts, avoiding any enforcement of them. Similarly, we know of many privately held Indian companies that are

happy to accept arbitration in Singapore and elsewhere because they need to be able to enforce their own contracts.

When a company can make the inefficiency of the courts part of a business strategy of avoiding payments or domestic companies feel that going outside is the only way to have enforceable contracts, then just reforming a law or two is only a fraction of the work that will need to be done for India's courts to acquire a reputation for reliability.

***Q.** The Government of India is planning to open up the legal sector and foreign law firms are eagerly waiting to open up their offices in India. Do you think this would enhance the quality of ADR practice in India?*

Michael: Yes. I think India will see many benefits from increased competition. It will take some years for the full benefits to be realized, but I suspect that even in the short term there will be more legal work moved to India as a result.

***Anil :** Thank you Mike for talking about the latest trends in ADR happening worldwide. It was great talking to you.*

Michael: Anil, thanks for listening, and thank you ever more for all your hard work over the years to raise awareness about ADR, and to improve the quality of justice and access to it.

The People —

Michael McIlwrath is Global Chief Litigation Counsel, Litigation, for the GE& Gas division in Florence, Italy. His experience in international arbitration includes representing the company in disputes under the rules of various international and regional arbitrationand under ad hoc procedures around the world, and in coordinating the activities of outside counsel in domestic court and arbitral proceedings. He was Chair of the International Mediation Institute (IMI), in 2009. In addition, he was the co-vice chair with mediator Judith Meyer (and chair, Singapore ambassador at large Tommy Koh) of the IMI independent Standards Committee. He is also a member of the board of directors of the National Center for Science Education, in Oakland, California. Michael is a member of the European Advisory Committee of CPR, and acted as an industry representative to the European Commission (Justice) in the creation of a European ADR Code of Conduct. He can be contacted at michael.mcilwrath@ge.com

Anil Xavier is an advocate practicing in India. He is the President of Indian Institute of Arbitration & Mediation and the Vice-President of the India International ADR Association. He is an Executive Committee member of the ADR Law Section of the Indian National Bar Association. Xavier is the Chairman of the Accreditation Committee of the Asian Mediation Association (AMA) and a member of the Independent Standards Commission and Ethics Committee of the International Mediation Institute (IMI), at the Hague, Netherlands and the first IMI Certified Mediator from India. Xavier is a member of the International Advisory Board (IAB) of the Afghanistan Centre for Commercial Dispute Resolution (ACDR) and a member of the Advisory Council of Global Mediators Network, UK. He can be contacted at anilxavierindia@gmail.com