Kluwer Mediation Blog

A message from Michael Leathes

Alan Limbury (Strategic Resolution) · Wednesday, January 22nd, 2025

The late Michael Leathes' enormous contribution to the development and uptake of non-determinative dispute resolution processes will be celebrated at and long after his memorial service in Oxford in March of this year. I recently found an email I received from him dated May 18, 2014.

Michael's message

"It has to be said that while the 1976 Pound Conference undoubtedly got things moving in terms of the development of mediation and other forms of early dispute resolution, it had its unfortunate aspects. It was a conference of jurists, educators and practitioners – with not a single user being heard or apparently consulted. Not surprisingly, the core solution it tabled lay firmly within the framework of established legal process – the multi-door courthouse. Any process that was not adjudicative was labelled "alternative". The user perspective perceives the courthouse and the tribunal as the alternative method to resolve disputes. So this extremely unfortunate characterisation of anything non-adjudicatorial as "alternative" stuck – and stuck to this day, generating a sort of homeopathic feel to negotiation, whether assisted by a neutral or not. More than anything else, I believe this has restrained the development of mediation over the past 35+ years.

"Negotiation within the framework of an extant court or tribunal proceeding tends to be led by lawyers. When outside counsel negotiate, they tend, as Professor Marc Galanter observed, to "litigotiate" – i.e. their solutions and options tend to be confined to the positional issues and trade-offs, or at least to the litigation framework – i.e. their comfort zone. Mediation breaks those conventional positional chains and gets the parties to consider their needs rather than just their

expressed wants, so the option field expands way beyond the litigation framework. Moreover, mediation should be seen as a way to avoid and prevent disputes from crystallising, and not just resolving them once in the court or tribunal docket. Lawyers favour mediation – but tend to do so only at the tail end of the standard litigious process (by when they have earned the vast bulk of their fees), not at the start of a dispute, when ADR is perceived by them as an acronym for Alarming Drop in Revenue. A telling statistic is that, of 76 in-house counsel polled last year, almost half felt that outside counsel were an impediment to mediation, and only 15% felt that they were not (with the remainder unsure or ambivalent).

"There seems to be confusion over whether arbitration is ADR. I don't think it is. Arbitration is a standard, conventional dispute resolution process that sits alongside litigation. I define ADR (if I have to, because I very much dislike the term) as any non-binding dispute resolution process.

"Lawyers react to the expressed needs of the market. Users' needs have to be expressed in terms of hard, incontrovertible data before they will listen. Only then will private practitioners adapt and mediation will cease being reliant on court-annexed schemes and start to become the spontaneous, natural and prime way to resolve conflicts and shake off the unfortunate "alternative" legacy of the 1976 Pound Conference. That's the intention behind the 2015 Pound – which, by the way, needs to be global."

Michael's contributions

Michael's last comment was a reference to what started as a gathering that he arranged on October 29, 2014, at the Guildhall in London, of users of mediation, lawyers, mediators, academics and others involved in dispute resolution processes, to answer questions aimed at finding out to what extent the various participants held common or different views. At Michael's instigation, the Guildhall meeting led, in turn, to the 2016-2017 Global Pound Conference, in which a similar process was repeated in 28 venues across 24 countries, resulting in actionable data contained in a series of reports. A summary of the overall outcome of the series, identifying global data trends and regional differences is here.

Michael was a co-founder of the International Mediation Institute and also conceived and was the driving force behind the numerous contributions to Seven Keys to Unlock Mediation's Golden Age, a series of 25 peer reviewed articles accompanied by videos with the authors.

Thanks to Michael's enormous contributions to the development of mediation worldwide, the situation has improved (a bit) since 2014 but there's still more to be done for mediation to become the "spontaneous, natural and prime way to resolve conflicts".

Let's keep trying.

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