Foreword

by Michael McIlwrath

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A decade ago, I interviewed Michael Leathes for a podcast that I was hosting at the time called International Dispute Negotiation. It consisted of interviews with leaders in dispute resolution around the world. Unlike most of my other guests, who were happy to speak about themselves and their practices, Michael turned the tables on the interviewer.

He started *his* interview by asking me why my employer, General Electric, stood behind mediation as a form of dispute resolution, and why we had decided to invest both effort and money into the International Mediation Institute. IMI is a non-profit based in the Netherlands that Michael himself had co-founded to promote high standards of mediation around the world. I fumbled an answer on the spur of the moment about what mediation offers as a mechanism for resolving disputes.

But the real answer to Michael's question was actually much deeper, and it is only with the benefit of having read his book on negotiation these many years later that I can provide a fuller, better answer: traditional methods of resolving conflict are profoundly unsatisfactory and out of sync with the way business is conducted in the modern world. The speed of commerce, and the fluidity with which borders and time zones are crossed, and the virtual marketplaces where business is conducted, have long surpassed the ability of even the most efficient courts and arbitrators to keep up with the disputes that arise from them. And the gap is only getting greater with the passage of time.

Within this gap is a vast need for lawyers and business leaders to find solutions that may not be perfect, but that keep their deals moving instead of getting bogged down with the costs, distraction and uncertainty of litigation and arbitration. And they must do this while working seamlessly with counterparties from cultures and legal systems that may be identical one day and entirely alien the next.

What mediation offers is the opportunity to negotiate and find solutions for disputes and deals that rapidly and flexibly, allow businesses to keep moving. Through negotiation, mediation mirrors what already makes businesses thrive. I am sure this is why Michael ultimately found mediation so suitable for the businesses whose legal departments he successfully led over the years, and it is why we at GE have had such success in encouraging its use.

And yet negotiation, the core of mediation, is also a learned skill that is undervalued and underappreciated by both businesses and the legal community. When, nearly twenty years ago, I went about looking for negotiation training materials for myself and my colleagues, I assumed that law firms would have plenty for us to borrow. Instead, I could not find a single law firm where negotiation is systemically taught, and only one or two firms where any of the lawyers had even attended an external training.

This was confounding. As much as negotiation is a core skill in business, it is the foundation of what lawyers do. It is obviously called upon when we are in a "contract negotiation." But we are also in a negotiation when we appear in front of a judge or arbitrator, or at a mediation, or even when writing a letter to opposing counsel. We can never assume that our business partners will receive 100% of what they want, which is why they hire us lawyers. In fact, this was the reason I titled my podcast, "International Dispute Negotiation" because, at the end of the day, negotiation is deeply embedded in all forms of resolving disputes.

This is also the gap in skills that Michael's book begins to fill. I say *begins* because negotiation and by extension negotiation training are fields in their own rights that are not only rich, vast in their applications, but are also in rapid development and expansion as science reveals more about how people process information and reach decisions. It is probably a good thing that the "canon" of negotiation has yet to be written.

Therefore, while Michael's book aims to provide skills to the in-house counsel, it will also find a natural home in the offices of any law firm. In fact, lawyers who discover this book and embrace its teachings are bound to find they are more at ease in meetings with their business colleagues and more successful at their jobs, because negotiation is a language the business speaks.

To say that this book begins to fill a significant gap should not understate the breadth covered in the pages that follow, which is considerable. Michael provides insight on the importance of preparation, recent discoveries in neuroscience, problems that frequently arise in cross-cultural situations, and the ethical challenges that lawyer-negotiators face. He covers useful negotiation techniques and innovative methods that can yield high impacts, such as the use of impartial deal facilitators to aid in deal negotiations and not just to help parties resolve disputes.

And he also preaches to this choir when he writes about the low-hanging fruit by which in-house counsel can add enormous value to their businesses by promoting negotiating training. Indeed, the in-house lawyer imagined by this book is a true business leader who is fully engaged in the process of identifying and adding value, not just a lawyer

relegated to the tasks of *docugotiation* or *litigotiation*, terms Michael has used for those who spend their time drafting terms in agreements and supervising disputes. The lawyer who reads this book should be one who wants to lead, innovate, inspire and increase value for their business or their client.

And I would be remiss with this introduction not to second Michael's suggestion of a greater emphasis on negotiation in law schools and professional legal development, and for a modern, global accreditation system – supported by businesses, law firms, and academia – for those who achieve objective standards of negotiation skills. It is a big idea, but it is one that would provide a substantial contribution to filling the current gap.

Of course, Michael Leathes has never been someone to traffic in small ideas. If the reader has neither the time nor the inclination to join in future initiatives associated with this big idea, they can rest assured that by the end of this book they will be a far more successful and appreciated counsel by their business colleagues or their clients than when they started reading Chapter 1.

Preface

This book is not a user guide to negotiation. There are exceptional books out there that set out to do that, many of them listed in the bibliography. Rather, it aims to inspire negotiation ideas and concepts from the standpoint of a lawyer employed by a company or other organization.

I have drawn this inspiration from two sources.

First, from the teaching of academics and trainers. In the many places that I have done so in the following pages, I have attributed the points mentioned to the sources I have used. Many of these points are well worth following up in their books.

I have also drawn from what I learned on the job as an internal lawyer for international companies. At an early stage, I was fortunate to be delegated with negotiating assignments. There were few negotiation skill books and courses forty or more years ago. You graduate from that School of Hard Knocks resolving never to make the same mistakes again, but negotiation is not a defined art or science. Never are two experiences the same. You learn as you go, trying not to make the same mistakes more than once.

We all need to make paradigm shifts in fast-changing times. Corporate counsel, whether employed in companies or government, can diversify from legal matters to delivering a wider value as negotiators; from managing to leading; from self-centered positions to mutual interests; from not accepting the inevitability of *Litigation As Usual* to finding creative strategies and processes to secure negotiated outcomes within and beyond the legal arena.

An important inspiration for negotiation is not a negotiation book, but one on team leadership. Getting It Done: How To Lead When You're Not In Charge is a 1998 book by Professor Roger Fisher and management consultant Alan Sharp. It was republished as Lateral Leadership: Getting It Done When You're Not The Boss, in 2004. It remains a great starting point. Fisher and Sharp identify many of the attitudes and skills that cause external deals to be impeded by internal politics and lack of leadership.

Corporate counsel are often in a perfect position to practice what Robert K Greenleaf, drawing on classic texts from the Zhou Dynasty, called *servant leadership,* and what the Danish conflict resolver Tina Monberg calls the Butterfly Effect in Serve to Profit: Butterfly leadership (2014).

Business schools (though, sadly, few law schools) teach negotiation skills and techniques, but more often as an elective than as a core subject. Most people emerge from business schools and law schools as instinctive positional bargainers expressing themselves in the form of wants and demands rather than needs and interests. They tend to be touchy about negotiation. Tunnel vision and a gladiatorial approach can block their ability to explore wider prospects and better opportunities.

Without realizing it, most are doing a disservice to the interests they represent, and to themselves. Today's market is driven more by quick and efficient outcomes. New ways of negotiating are gaining widespread acceptance because they are pragmatic, fast, optimize value and are more sustainable. Business leaders can no longer feel free to take silly risks with shareholders' assets. The premium now is on responsible leadership and management. That includes reputation enhancement, especially in this world where you can be made and destroyed on social media. It includes being a good party to do business with and securing certainty with minimum time, risk, cost and exposure. CEOs increasingly expect creative strategies for managing risks and costs and securing more effective outcomes.

Most of us know that, as corporate counsel, we have a wider responsibility than the one owed to the person or group to whom we report. It extends to our employers' shareholders and other stakeholders beyond the organization.

Some law firms and other service professionals, unconsciously or not, prioritize their income over a client's outcome. Realizing that this outmoded attitude has no viable future, many have moved on. Discerning external counsel, accountants and consultants know that to retain their ever more astute and demanding customer base, and to gain new business, they need to prove themselves as achievers of early results, as dealmakers, dispute avoiders and solution providers, and not just as good advisers, processors and litigators even if that means losing billings per case. This is also consistent with many modern Bar Rules.[1]

So the expectations on corporate lawyers have changed. The term *general counsel (GC)* implies the broader nature of the role, and not only of the most senior in-house lawyer. We are expected to be business and operational people who are lawyers, not lawyers with a business orientation.

I felt there was no point writing another negotiation book unless it makes an important point for internal counsel. Actually, seven important points, all of which emerge in more detail in the pages that follow. They are:

- Corporate and other internal counsel should not confine themselves to *docugotiation* and *litigotiation* – negotiating terms in agreements and settlements. Those who diversify as commercial negotiators outside the legal frame become true *general* counsel, empowered to lead, innovate, inspire and increase their value.
- Cross-cultural negotiations would lead to more effective outcomes if negotiators take more time to listen and truly understand the other party. Even though most people are not entirely stereotypical, understanding cultural frameworks is essential.
- Prepare better and faster by using openly available e-tools. Preparation is key, and the preparer is at the center of negotiations.
- The dynamics of neuroscience may make your eyes glaze over, but understanding the basics of brain science improves negotiation.
- Using a neutral facilitator to help the parties forge a more effective deal is a greatly under-used opportunity. By having a trusted impartial person take charge of the process frees everyone up to negotiate better. It should not be confined to dispute settlement.
- Legal education needs to include negotiation skills. Negotiation is a hard, not soft, set of skills and can be assessed. Accreditation should be offered to those who pass negotiation skills assessments.
- It is time for an international initiative, backed by top educators, businesses, professional service firms and professional bodies to set high-level global negotiation knowledge and skills standards, as well as an international code of negotiation ethics. An international negotiation institute would not provide training or other services but promote and encourage more and better education on negotiation in all main languages and cultures, treat negotiation as a hard skill, inspire more people to take negotiation courses and improve the quality and effectiveness of negotiated outcomes.

Michael Leathes, January 2017

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Tomorrow

Many of the things you can count, don't count;
many of the things you can't count, really count

Albert Einstein

The Danish physicist Niels Bohr was awarded the Nobel Prize for Physics in 1922, the year after Einstein. He warned that *prediction is difficult, especially if it is about the future*. It may seem like a malapropism when related as a soundbite, but he was emphasizing that, to predict, you need to identify both the elements of the past that cannot be expected to continue, and the new factors that are likely to fundamentally change existing dynamics. And then connect them. One person who has done just that in recent years in relation to legal practice and the role of lawyers is Professor Richard Susskind.

In The Future of the Professions (2015) Richard Susskind and Daniel Susskind emphasize that: "*clients of the future will be inclined to pay for output rather than input, for the value delivered rather than the effort expended.*" Richard Susskind has written several books about the future of lawyering, many of them international bestsellers. They explain why and how the demand side's needs and expectations are rapidly changing for both internal and external counsel, and what must happen if you are to add continuing value. In The End of Lawyers? Re-Thinking the Nature of Legal Services (2010) and in Tomorrow's Lawyers: An Introduction to Your Future (2013, 2017), both of them controversial, well-argued and credible, Susskind predicts that many traditional sources of work for lawyers will become redundant, replaced by technology, done by others, or simply not needed. Rather than become unemployable, Susskind says lawyers will redeploy. In Tomorrow's Lawyers, Susskind suggests that it is possible to break down, or as he calls it, *decompose* the lawyer's work on deals and disputes into a set of constituent tasks. He identifies nine areas in which lawyers will need to apply existing and new skills in order to survive. Transactional work will revolve around *negotiation*, research, legal advice, due diligence, transactional management, template selection, one-off drafting, document management and risk

assessment. Dispute resolution will call for skills in *negotiation*, strategy, tactics, project management, advocacy, document review, research and disclosure.

Conspicuously, negotiation features in both of Susskind's decomposed lists of transactional and dispute resolution legal competencies. Many, including negotiation, are not widely taught as part of law courses. Law, like finance, has always been viewed as a "hard" skill. But negotiation is generally considered a "soft" skill, and so rarely taught in law courses. The pernicious categorization of knowledge and skills as "hard" and "soft" has had a pejorative effect on negotiation education, for lawyers and for others.

Hard skills are generally considered to be those for which knowledge and practice can be effectively learned through teaching, not just acquired by experience, and can readily be independently and objectively assessed using objective measurement criteria. All traditional professional practices for which competency can be credentialed are regarded as hard skills, as well as foreign language fluency and anything requiring detailed factual knowledge.

Soft skills are generally a function of personality and experience in which competency is more subjective and can only be taught to a limited extent. Competency in soft skills is difficult to assess independently owing to a lack of consistent objective measurement criteria. Leadership, positivity, self-confidence, persuasion, teamwork and work ethic are widely considered to be soft skills.

Of course, real-world competency in most activities is a combination of hard and soft skills. To be an effective lawyer, you must possess the knowledge that makes law a hard skill, and you also need soft skills to apply and leverage that knowledge. The reverse is also true: to be an effective leader, which is considered a soft skill, you also need hard skills both to do the right things and to inspire others to do them right.

NEGOTIATION IS MAINLY A HARD SKILL

I have asked scores of people from different countries and cultures whether they consider negotiation to be a hard skill or a soft one. Almost everyone's immediate reaction when presented with this question viewed negotiation as a soft skill. Perhaps they had been subliminally influenced by popular assumptions. For example, the Division of Graduate Studies at Brandeis University seems to classify negotiation as a soft skill.[70] The same conclusion is assumed in the subtitle of Simon Horton's book The Leader's Guide to Negotiation: How to Use Soft Skills to Get Hard Results (2016). These, and many other examples can unwittingly convey a mildly derogatory connotation to negotiation – that it is somehow less tangible, substantial and definable than traditionally-taught abilities, and somehow less capable of being appraised.

To a second and equally international group, I put the question differently. I asked whether they considered negotiation to be a skill that can be taught and assessed. Interestingly, almost everyone I asked considered that negotiation could indeed be

taught and assessed, and when I asked if they would therefore classify negotiation as a hard skill, all said yes. It all goes to show that the answer you get depends on the question you ask.

The differences between the two questions were clear. I defined hard and soft in terms of ability to teach the skills and assess competency, and the word "predominantly" hinted that negotiation was a combination of hard and soft skills.

There are many negotiation skills that are teachable and objectively assessable. The ability to prepare effectively is one. So is knowledge and application of culture, leverage, communication abilities, process options, dispute management skills, ethics and negotiation techniques. Various systems, checklists and other technical applications can be used to enhance this bank of knowledge and skills. There are soft skills that also need to be deployed: the ability to persuade, to listen actively to what is being said, to understand correctly and reframe appropriately, EQ, adaptability, teamwork and many others. These can all be tested and assessed in role play scenarios.

Both hard and soft negotiation skills are needed in the appropriate proportion depending on the situation. Excellence in all the hard negotiation skills and many of the soft ones can be gained by being taught effectively in classes, role plays and other behavioral learning activities. These skills can also be assessed against pre-set objective competency criteria that cross language, cultural and other boundaries.

Yes, competency as a negotiator can be taught and objectively assessed. Negotiation, unquestionably, is a hard skill.

TEACHING AND ASSESSMENT

The proof can be found in the many outstanding negotiation courses and workshops around the world, usually lasting between three and five days, that teach the basics and many advanced skills. Most provide a certificate of completion and professional development credits. The Harvard Program on Negotiation's (PoN) regular Negotiation and Leadership course has over 35,000 alumni. It lasts three intensive days, with an add-on one-day in-depth treatment of a specific area, such as dealing with difficult people and problems, or conflict negotiation. Many faculty members are world leaders in negotiation. The PoN also holds a three-day Negotiation Master Class and periodic one-day author seminars. Many business schools, professional organizations, negotiation trainers and dispute resolution programs around the world offer executive education courses on negotiation skills. A few law schools do, too.

However, although most courses are costly in terms of fees and time, most people walk away with little more than a certificate of attendance. There are a few exceptions, such as TNI The Negotiation Institute in New York. If negotiation courses offered a skills assessment and a negotiation competency accreditation, providing evidence of having achieved a visible high standard, participants would have something that others would

recognize and respect. It would help corporate counsel to be admitted to the business front line, to be more readily trusted as the lead negotiator for their organizations.

Some mediation skills courses long ago recognized the need to qualify people formally as accredited or certified mediators. Mediation knowledge and skills that a participant acquires during the course, which usually lasts three to five days, can be assessed at the end, usually in a role play setting. Those that pass the assessment are awarded a formal accreditation. For example, mediator training courses run by some professional bodies and training institutions, such as the Chartered Institute of Arbitrators and the Centre for Effective Dispute Resolution CEDR in the UK, the ADR Institute of Canada and the Maryland Center for Dispute Resolution in the US, all set high level competency criteria for mediation skills and offer assessments leading to accreditations for those who pass. In Australia, the National Mediator Assessment Standards are applied by Recognized Mediation Accreditation Bodies. The Singapore International Mediation Institute (SIMI) and The Hong Kong Mediation Accreditation Association Limited (HKMAAL) have published mediator competency criteria that enable trainers to grant assessed accreditations. Similar competency criteria for mediators apply in the Netherlands, Argentina, Nigeria and Austria. The International Mediation Institute has developed internationally-applicable competency criteria for mediators and for mediation advocates and has developed inter-cultural competency criteria for mediators. These assessments cover hard skills and also those considered soft, such as empathy, listening, emotion and persuasion.

The Singapore International Dispute Resolution Academy (SIDRA), launched by the Chief Justice of Singapore in March 2016, has an integrated program of training, research and consultancy that provides thought leadership in both negotiation and dispute resolution. These, and other initiatives need strong encouragement and support. Looping back to the very start of Chapter 1, and the Dell Technologies slogan, they give us The Power To Do More.

If knowledge and skills competency criteria can be a success in mediation, which is merely assisted negotiation, one has to ask: why have negotiation courses not done the same?

THE NEED FOR AN INTERNATIONAL NEGOTIATION INSTITUTE

When it was created in 1983 as a research project, the Program on Negotiation was a collaboration of several leading US-based educational institutions, initiated by Harvard and MIT, in which several others now participate. The PoN quickly inspired numerous negotiation teaching and training courses around the world.

Negotiation needs to be recognized as a vital skill required by everyone, regardless of their professional focus, to enable deals and settlements to be conducted and concluded more efficiently and effectively.

As negotiation is a post-qualification discipline, the key to encouraging more people to become trained in negotiation is to give them a recognizable global qualification that

can, over time, be widely respected and valued. This will vest us with the trust of our stakeholders and the respect of our negotiating partners. It will empower us to negotiate effectively.

Now is the time for the world's leading negotiation skills educators, in partnership with major companies, law and consulting firms, professional bodies and business associations, to give birth to a new initiative, a platform that builds upon the value that has already been created. It would be born international and not have a national identity or a specific national culture. While not providing training or any other services, it would have a very clear main mission: *to convene stakeholders worldwide to develop and publish high level assessable criteria for advanced interest-based negotiation skills that are globally applicable*. This platform could develop the assessment methodology that could be used by educators and trainers around the world as a common basis for negotiation skills accreditation. With input from all the outstanding institutions that back its mission, it could also prepare and publish an International Code of Negotiation Ethics to serve as a guide for responsible negotiators worldwide.

This new entity would need a small inter-cultural staff but need have no single physical office. It would have an inspiring multilingual interactive web portal. Its governing body would be drawn from the institutions and organizations that support and fund its work.

It could attract funding for a scholarship program for critical candidates, especially in developing countries, to enable them to be trained in world class negotiation knowledge and skills in the top negotiation training programs, and return home with an internationally-recognised qualification.

It could simply be called the *International Negotiation Institute*.