



## Michael McIlwrath

Interviewed by Bennett Picker and Michael Lewis

**Editors' note:** With this interview, *Dispute Resolution Magazine* is launching a regular feature to introduce readers to people who have compelling insights into ADR.

**Michael McIlwrath** is associate general counsel, litigation, of GE Oil & Gas in Florence, Italy, where he has led the company's global dispute resolution team since 1999. Michael is co-author, with John Savage, of *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010), as well as a contributing editor to the *Kluwer Arbitration Blog*. Michael is a member of the board of directors and past chairman of the International Mediation Institute, a nonprofit based in the Netherlands that promotes quality, transparency and ethics in mediation, and is a member of the board of directors of the National Center for Science Education, in Oakland, California, a nonprofit organization that defends the teaching of science in public schools.



Michael McIlwrath

**Q: Mike, your odyssey over the past 25 years has been quite a journey. Tell us about it.**

**A.** Hah! No great master plan, that's for sure. I grew up in Stockton, an agricultural city in northern California, and wanted to see the world. After graduating from college in 1985, I ended up in Palermo, teaching English, with a vague idea that I'd eventually return to the US to get a PhD in American studies. But Sicily was freeing itself from the Mafia and had this electricity and hope from the work of heroic prosecutors like Giovanni Falcone. I learned Italian while watching the famous Mafia trials from the stands of the "bunker courtroom."

From there I moved to Florence and worked as a writer and editor for a few years, and then to the US to attend law school. During the summer after my first year of law school, I clerked at the DOJ. Because I could understand some Sicilian, they let me help on a letters rogatory Mafia trial. Three Italian judges spent two weeks in a high-security courtroom in Washington, DC, hearing testimony of informants in the federal witness protection program. Falcone had just been assassinated, and during the hearings news arrived that his colleague, Paolo Borsellino, had been killed by a bomb outside his home in Palermo. The Sicilian judges didn't skip a beat. They

went straight on with the hearings.

How can you *not* be inspired by people like that?

After law school, I ended up at Willkie Farr in New York, where I had the good fortune to do a lot of work for Mario Cuomo. One of the lessons of working for the governor was always to dig deep to understand the client's business, so that whatever you do as a lawyer genuinely advances their interests. I think if you get that into your DNA as a litigator, you are bound to gravitate toward mediation eventually.

My leap back to Italy was unromantic. I got a call from a recruiter who was helping GE ramp up the legal team of a recent acquisition in Italy, and they needed a litigator. I've been here in Florence since January 1999.

**Q: Please tell us a little about your company and the kind of conflicts that typically arise.**

**A.** GE Oil & Gas is a global business with headquarters here in Florence. The head office, Nuovo Pignone, began as a foundry on the banks of the Arno river over 170 years ago. It eventually became a manufacturing arm of the ENI group, Italy's state-owned energy giant, which sold it to GE in 1994 during a period of privatization.



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Today, we are nearly a \$20 billion a year division of GE and growing rapidly, providing highly engineered equipment and services to the oil and gas industry around the world. We're building factories in Angola, expanding manufacturing in Brazil, opening a research center in Oklahoma and making some interesting acquisitions, most recently of Lufkin Industries.

In a business this large and globalized, very little is typical. The conflicts are literally all over the map, with resolution methods of all types: direct negotiations, court litigation and domestic and international mediation and arbitration.

**Q. Despite a wide portfolio of diverse businesses, does GE have a systematic approach to conflict management?**

**A.** Yes. Although the businesses range from healthcare and appliances to energy, transportation, banking and financial services, we all have a common focus on the cost of conflict, and we each have metrics that place value on resolving disputes early. We don't mediate disputes because it gives us a warm and fuzzy feeling but because it makes us more competitive.

GE is at heart a technology company, so the litigators tend to share the culture of innovation and problem-solving. If you looked across the company at any given time, you'd find half a dozen or so attempts to use mediation in new ways, from labor cases in other countries to online resolution of small manufacturing disputes.

**Q. How did your own interest in mediation develop?**

**A.** To keep from drowning! When we first counted all of our pending litigations, the total was 143, and they were all over the world, and all types and sizes. It was impossible to stay on top of existing cases and give attention to the new ones that continued to arrive. Late one night at the office, I found materials created by GE's corporate litigation team, at that time headed by Brackett Denniston, and there was a presentation by PD (Elpidio) Villarreal, a litigator in Fairfield, Connecticut.

It was all about measuring cost avoidance by resolving conflict early, with a strong emphasis on mediation. It was an epiphany. The ideas just made sense. The next morning I came in early and literally started implementing Early Dispute Resolution immediately.

In case any of your readers is unconvinced of the business case for mediation, they should ask where the originators of GE's EDR program are today. In 2004, Brackett was promoted to general counsel for all of GE and last month was named one of the 100 most influential lawyers in America. PD is now the head of litigation at GlaxoSmithKline.

**Q. What was the most difficult challenge you faced as you implemented your EDR program at a former state-owned company?**

**A.** What I did not expect, to be candid, was a fight from our own outside counsel. Karl Mackie (of CEDR) once told me the most common excuse for rejecting an offer to mediate is, "sounds like a good idea, just not for this case." Karl was on the money. But this resistance also helped weed out law firms. The ones that didn't get with our program did not last.

Overcoming internal resistance was not difficult because this was something that had the support of Brackett, as well as my boss, our company general counsel. And very quickly we had the data, too.

By the end of the first year, our caseload was cut by half, and then halved again the following year. Our general counsel had these nice charts he could use to show our CEO the legal team's financial contributions. The business teams began to seek us out as partners in achieving common goals.

**Q. Is it more difficult to propose mediation in countries where it is not broadly used?**

**A.** Mediation is always easy to propose; you just have to accept that a lot of offers will be rejected. The benefits may not be obvious to a party that has only one or two disputes or that manages conflict in an ad hoc fashion in a place where mediation is poorly understood. The consequences sometimes seem like they are lifted from *Bleak House*.

One of the cases we first tried to mediate was a litigation filed in 1998 in Bari, a southern Italian city where we have one of our factories. The plaintiff was a local construction company. Our outside counsel and I went to Bari to see if we could settle. The other side was emotional, and said they "didn't want to show their cards" early. I suggested mediation.

They looked at me like I was from outer space. I awkwardly explained how a neutral third party could help us reach agreement. This just irritated the other side's lawyer further. He dismissed me by saying, "We already have a neutral third party: the judge!"

The case is still pending, on appeal 14 years after they could have settled in mediation, or it should have been decided instead in arbitration. I'm not sure that will ever happen. Both the owner of the company and his lawyer passed away several years ago.

**Q. What are some of the emerging issues internationally where ADR is used or needed?**

**A.** When I joined the company in 1999, the industry buzzword was globalization, which meant buying and selling in different countries. You could mitigate the risk of courts you did not like or did not know by including arbitration clauses in contracts.

International arbitration has become so expensive that parties are adopting new strategies. Some increasingly employ Med-Arb clauses, using mediation to avoid the cost of arbitration. Others are avoiding arbitration altogether.

The more recent trend of localization makes it more difficult for companies to avoid foreign courts. When you have 500 or 1,000 or more employees and a network of suppliers in a country, you're going to deal with the local courts whether you like it or not.

With localization, you face the same problems with access to justice as any other citizen of a country. That's one reason GE has been supportive of initiatives that sponsor the growth of mediation around the world, like the International Mediation Institute.

Organizations like the World Bank and the IMF also see mediation as playing an important role in improving the business climate.

**Q. We are experiencing rapid growth in the use of arbitration under investment treaties. What is GE's perspective on this process?**

**A.** For technology companies, arbitration can only be an option of last resort in disputes with government or state-owned entities. Yet settling is often impossible because officials lack empowerment. This is especially true where corruption is perceived to be a problem, and you face the bleak extremes of either starting an arbitration or walking away from a meritorious claim.

For example, we once had a dispute with a state-owned refinery over the cost of a bridge we had to build to transport our equipment to site. The general manager of the refinery told me that settlement was simply not possible, despite the merits of our claim, because he could later face a criminal investigation of whether he had accepted a bribe. By contrast, losing an arbitration would bring only minor criticism that he could manage.

This is why one innovation we could get behind is investment mediation, i.e., a transparent negotiation structure for companies and countries to work out their disputes. It was discussed a few years ago at a United Nations Conference on Trade and Development meeting, and an International Bar Association subcommittee issued Investor-State Mediation Rules last year. You would need mediators with a special set of skills, and the International Mediation Institute is developing criteria with this in mind. The idea seems promising and hopefully has a future.

**Q. In your experience, how much, and how effectively, is ADR being embraced outside the US, and how good is mediation advocacy?**

**A.** As you know, in North America there are many neutrals who are adept at both mediation and arbitration. In other places, arbitrators and mediators tend to be two distinct populations, and the acronym ADR refers only to mediation.

Globally, mediation is definitely growing, helped by the fact that international arbitration institutions now offer a mediation service, so parties can include seamless Med-Arb clauses in contracts.

Unfortunately, I'd say the quality of mediation advocacy, at least for commercial disputes, is not great anywhere. It's a shame how often lawyers miss the opportunities, or even advise their clients against mediating. But I'm not sure how much advocacy matters if the mediator is competent, although mediator competency is another big variable.

I used to think a mediator could do no harm since the process is non-binding. I was wrong. There are many who call themselves mediators who really shouldn't.

**Q. Your job involves conflict resolution in legal systems around the world. What are the differences in culture and mediation styles that you see being used?**

**A.** You know, I wish everyone had the chance to see mediators from different countries in action. That's why I started doing podcasts for CPR [the International Institute for Conflict Prevention & Resolution], to share this privilege.

I'm going to go out on a limb and say that cultural differences pale in comparison with what great mediators seem to share: an ability to convey they understand the parties' conflict and their interests. They are not overly protective of their appearance of neutrality. On the contrary, they're firmly on the side of reality. This is especially relevant in cross-border disputes. The best mediators manage to transcend borders and cultures, because they are dealing with basic human nature.

**Q. What do you look for when selecting mediators throughout the world?**

**A.** Finding a good mediator is not difficult if the parties are all from London, Oslo or New York. The challenge is in places where mediation is not broadly adopted, or when the parties are from different countries.

Before IMI, it could be a real grab bag. Obviously, you want someone who has skills and experience as a mediator, but often all you had was a line on a candidate's CV showing they had once taken a course on mediation.

Now that we have IMI it's all much easier, with a database of hundreds of certified mediators from different countries. It is also used by arbitration institutions. Mediation institutions use a closed pool of mediators as a means of quality assurance; arbitration institutions do not have access to a closed pool and therefore have quality concerns when seeking a mediator. We're also having more success getting disputes to mediation by letting the other side choose from IMI-listed profiles.

**Q. Does knowledge of local law and custom matter when appointing a mediator for an international dispute?**

**A.** I think it matters even less than in international arbitration, where parties, law and place of dispute resolution can all be different and arbitrators can be from still other countries.

For a cross-border dispute you can choose among the world's best mediators, and I have not seen a strong correlation between familiarity with local law and successful outcomes. We've had cases resolved with German and English mediators when all of the parties were from other countries, and other settlements where the mediator was the same nationality as one side.

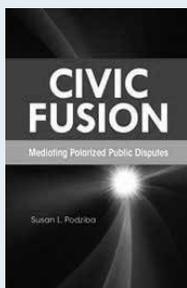
**Q. You have been active in promoting ADR around the world. You're a board member of IMI, you do a podcast for CPR on international dispute resolution, you've written a book on international mediation and arbitration and you post regularly on the Kluwer Arbitration blog. Where do you find the time?**

**A.** It's impossible to answer this without being mindful of my interviewers, our commitment to ADR. We could spend all day talking about settlement techniques or dispute resolution methods of indigenous peoples around the world. Finding time isn't a problem for something we feel passionate about. So I suppose what you are really asking is, why are people like us so passionate about dispute resolution?

I think the answer is simply that we want to leave the world a better place, with less damage from conflict. I hope changing the world doesn't sound too pretentious. ♦

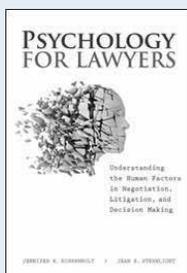
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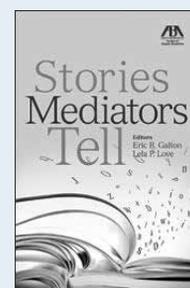
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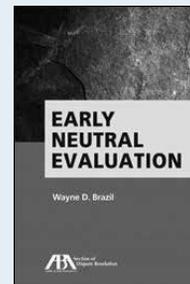
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