Book Review[1]

NEGOTIATION
Things Corporate Counsel Need to Know but Were Not Taught

Donna Ross[2]

In "NEGOTIATION Things Corporate Counsel Need to Know but Were Not Taught" [3] Michael Leathes shares his vast experience as corporate counsel and mediator and offers us, under the cover of one book, a treasure trove of knowledge and references to a wealth of leading works and studies. The bibliography and the appendices alone constitute an invaluable resource.

While aimed at corporate counsel, the book, which provides detailed descriptions of negotiation methods for deal-making and dispute resolution is a must read not only for in-house counsel, but for external counsel, mediators, business owners and anyone interested in learning or honing negotiation, deal-making and dispute resolution techniques.

The author, laments, and rightly so, that law schools do not offer negotiation courses: the assumption is that negotiation is a soft skill that, unlike hard skills, cannot be taught. Yet this book is peppered with references, tools, guidelines for choosing appropriate techniques and practical, commercial examples making it extremely valuable as a didactic tool and proof that these are hard skills that can be learned.

This view may explain why many lawyers approach negotiation with little preparation, the key factor to a successful outcome. Preparing for the negotiation involves a number of steps, enumerated in Chapter Two, but as important, is preparing yourself. The latter includes what Leathes refers to as a *brand essence*, which is supported by your on-line persona. All-important first impressions of a negotiator or mediator may be forged prior to the first handshake or telephone call. Preparing the other side, as well as counsel for a dialogue or *thinking together* rather than positional sparring is also part of this process.

One of the highlights is the definitions found in Chapter 8 on Disputes. First, that mediation is "negotiation facilitated by a trusted neutral person". And that negotiation and mediation are not "alternative", but should be the prime method of resolving disputes with litigation and arbitration being the alternative means when negotiations fail. Having heard the various definitions of ADR, from alternative to appropriate to amicable, this is by far the most logical in my opinion.

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[1] This review was first published in the Resolution Institute's journal, *The Arbitrator & Mediator,* in June 2017. The Resolution Institute, has over 4,500 members and offices in Sydney and Wellington, is the largest dispute resolution body in the Southern Hemisphere. www.resolution.institute

[2] Principal of Donna Ross Dispute Resolution, LL.M., *Maîtrise en droit* (Hons); Nationally-Accredited Mediator, Arbitrator (FCIArb), Attorney-at-Law, www.DonnaRossDisputeResolution.com.

[3] Michael Leathes, NEGOTIATION Things Corporate Counsel Need to Know but Were Not Taught, (Kluwer Law International B.V., 2017) www.michaelleathes.com

Thus, Leathes refers to negotiation and mediation almost interchangeably. As a rule, he favors the use of a neutral to handle the process, including in deal facilitation as he terms it. In the same Chapter 7 on Process, he also states that among the prime reasons negotiators are reluctant to use a neutral are habit, fear and ego.

Chapter 3 on Neuroscience gives a fascinating overview of the brain's three 'operating systems' and how they can be used to control emotional reactions and improve negotiating skills, including the impact of eating schedules on decision-making due to glucose and oxygen requirements of different parts of the brain.

One recurrent theme is early relationship building. This is elucidated in Chapter 4 on Culture, which is devoted to cultural understanding, models and to some extent the East-West divide, although in my opinion, many of the tools used and described by Leathes reflect a combination of cultures or at times are low context in nature. The section entitled Facework, on saving and restoring face is particularly informative.

No negotiation book would be complete without mentioning BATNAs, ATNAs and the techniques promulgated by Fisher and Ury in Getting to Yes. However, in addition to the usual suspects, which also include ZOPA (Zone of Potential Agreement), anchoring and reality testing, Chapter 10 on Techniques introduces us to defrosting, contra-flow, low hanging fruit, reciprocity and parking. I would urge all to read this book to uncover the meaning of these seemingly esoteric but extremely useful tools.

With respect to both negotiation and anchoring, Leathes calls upon his extensive experience to disprove the myth that making the first overture is a sign of weakness. Throughout the book he offers tips on how to do this wisely. Although counsel is often of the view that it is better to react to an offer from the other side, anchoring (described in detail in Chapter 5 on Leverage) can have subconscious effects and provide leverage to the party making the first offer.

Negotiation and communication - that is communication for understanding - are inseparably intertwined. Chapter 6 on Communicating provides precious tips and tools with concrete examples of how to build trust and create bonds, and discusses in depth non-verbal signals and EI or emotional intelligence. The takeaways of this chapter are the sections on apologizing, framing to appeal to the "safe mode" of a risk-adverse party and having meals together and walking, an exercise that has the parties moving together in the same direction.

Although the majority of lawyers pay little attention to process, it is important to select the right process as well as the right neutral for each negotiation. Chapter 7 deals primarily with deal facilitation and through commercial examples focuses on how to get the other party's agreement to engage a deal facilitator. One rationale for this is that dispute-wise companies are seemingly more profitable and successful.

Another recurrent theme is early dispute resolution through negotiation, before an adversarial process has begun and disputants lose control as the lawyers,

judges or arbitrators take over and opportunities for consensus-building and dialogue are lost.

One example of this in Chapter 8 is the Glasl Escalator, which illustrates the phases of conflict escalation. A win-win outcome can usually be achieved in the first phase, when negotiation is still possible. As the dispute advances it becomes harder and harder to deescalate the conflict, after which win-lose or even lose-lose outcomes are more probable. However, often external counsel's only *modus operandi* is what has been coined Litigation as Usual or LAU. Lawyers of this type are referred to as 'warriors'. At times the reason for refusing negotiation is the alleged need for more information to assess settlement options, yet the delay itself can thwart the process. Other times the reason is less lofty, as it is just to keep the fee clock ticking. Or it can be simply that lawyers are not versed in true advocacy, defined as the ability to effectively represent parties in assisted or one-on-one negotiation. And then there are of course cases in which litigation or arbitration might be the necessary choice, for instance if a legal right or precedent needs to be established or the other party simply refuses to negotiate despite all efforts.

As a strong proponent of multi-step clauses, I couldn't agree more with the proposition that the most effective way to bring the other party to the negotiating table is to include a multi-step dispute resolution clause. Outside counsel, who often provide DR clauses, tend to prefer court or arbitration. I have heard many say that the parties can always mediate or negotiate if they want. I wholeheartedly agree with Leathes that once a dispute has arisen, parties become entrenched in their positions and make emotional, rather than rational decisions. Hence the value of having a formal dispute resolution process early in the life cycle of a dispute. The smart approach is to use step clauses in all contracts, according to the author who proffers several novel ideas for particular circumstances, such as a collaborative law 'step', a *guanxi* clause entitled Amicable Resolution from the Chinese concept of reciprocity (described more fully in Chapter 4 on Culture) or, for example, the Singapore Arb-Med-Arb Clause and Protocol (found in Appendix 5).

Last, but far from least, a constant thread in this book is the importance of ethics and integrity. Chapter 9 on Ethics includes strategies to avoid crossing the line between accepted forms of bluffing and misrepresentation and the need for ethical courage, defined as the willpower to do the right thing despite the consequences. Leathes shares with the reader his seven principles for achieving this and proposes the creation of an International Code of Negotiation Ethics.

With the roles of lawyers changing and companies taking a more hands-on approach to deal-making and dispute resolution, the days of external counsel dictating strategy and tactics directly to the client or to corporate counsel will soon be gone.

This book is a clarion call to litigators to learn to work with corporate counsel to find creative strategies and processes for successful outcomes, and to corporate counsel to retain or regain control of the negotiation process. Not only would this be in line with their respective ethical duties, but it would be a perfect example of a win-win situation.