



# Beyond getting the deal done...

## Deal Mediator vs. Deal Maker



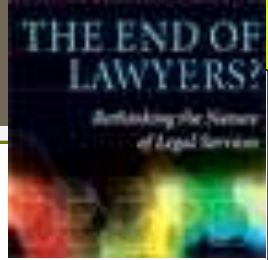
ISBM workshop by

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- Alternative
- Appropriate
- Effective
- Alarming Drop in Revenues .....

Always: DISPUTE RESOLUTION

AND in the context of litigation  
SO ...



*“... [we mediators] need to think more creatively, imaginatively and entrepreneurially about the way in which we can (and should) contribute to the real needs of our clients and our rapidly changing economy and society”*

\*( free interpretation of a quote of Prof Richard Susskind:  
The End of Lawyers Re-thinking the nature of legal services 2008)

(Why) Must there be a dispute before we become active?

Do clients like or need disputes?

Can we add most value if we wait until an actual dispute has arisen?

Do we like disputes or do we maybe need to be a rescuer?

*All human actions have one or more of these seven causes:*

*Chance, Nature, Compassion, Habit, Reason, Passion and Desire*

**Aristotle**

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**Habit**, Reason, Passion and  
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**Aristotle**

- What is our profession really about?
- What needs to happen to improve it?
- Why do we want/need this?

*“What do we hope to achieve?”*

*“Is this really what our clients want?”*

- What is the point of view of our clients, his interests?
- *“What if ...?”*

For example ...

- Applying mediators' special proficiency & skills to other processes, e.g.
  - Facilitate and improve communication and understanding
  - Improve outcomes, adding value, expanding the pie
  - Building relationships
  - Structuralizing chaos
  - Manage a process
  
- Applying mediators' tools to other processes, e.g.
  - Listen for things behind content, asking questions
  - Reality testing
  - Brainstorm, stimulate out of the box thinking

- **Negotiation** (deal-making)
  - being the lead negotiator + delivering the outcome
  - not a neutral 3<sup>rd</sup> and not an advisor.
- **Mediation Advocacy/Coaching**
  - representing/coaching a party in mediation / ADR (is this task limited to lawyers??!)
- **Dispute Consultancy**
  - *really* fit the forum to the fuss and be creative about it:  
Med-Arb, Arb-Med, Fact Finding-Mediation, forensic mediation, collaborative lawyering, mediation-litigation, negotiation-litigation.
- **Deal facilitation (transactional mediation)**
  - 3<sup>rd</sup> party helping to reach a lasting negotiated outcome

- Deal-mediation is mediation without a dispute (v Wassenaar 2006).
- International: deal-mediation or transactional mediation, because of use of mediation techniques
- Often engaged informally **or during negotiation**.  
=> Practice: one of the parties concerned or advisor becomes *de facto* deal-facilitator.
- Deal-facilitator is **not** a **deal-maker!!**

## Deal facilitation

- Neutral 3rd for all parties.
- **Making & sustaining deal**
  - Early exploration ZOPA, BATNA, leverage, options.
  - More pro-active role, content and options dealt with in early stage.
- **No apparant conflict**, parties seem on friendly terms and attentive. Communication usually quite good. Open minds: searching opportunities / consider options.

## Mediation

- Neutral 3rd for all parties.
- **Dispute resolution**
  - Focus at the outset on (re)establishing communication, interests, dealing with emotions.
  - Facilitative role, content aspects, negotiation/ generating options in later stage.
- **Apparant conflict**, distrust, parties more open about things they disagree on.

## Deal facilitation

- Many alternatives
- Not regulated, parties and neutral totally free in designing process
- Less process guarantess necessary because business transaction ipv 'shadow of' litigation.

## Mediation

- Limited alternatives
- Rules. Code of conduct, mediation agreement, etc.
- Structured process and securities important.
- => Checklist  
[www.toolkitcompany.com](http://www.toolkitcompany.com)

CASE  
Global Warming

Can BSG acquire  
Ozone Agence?

Ozone Agence SA, Luxembourg

Blue Sky Green, New York City

Axel&Marie-Claire

Marta & Martin

**TOOLKIT** COMPANY

Merging science & commercial practice

- 5-10 minutes preparation
- Max 30 minutes negotiaton, one-on-one or under guidance of deal-facilitator
- 5 minutes debrief in own group + fill in feedback form
- In total 45 minutes, of which approx. 30 minutes negotiation
- Plenary debrief
  
- TRY TO COME BACK WITH A RESULT!!

- Ozone Agence is in Executive Recruitment
- Climate change, corporate responsibility
- Operates in Germany, France, Benelux
- Database of 10,000 professionals
- Turnover increasing by 20% per annum
- Annual Billings now at €20 million
- 10% gross profit margin
- Axel/Marie-Claire each get €1m in dividends

- BSG is a US recruitment company
- Run by Marta & Martin
- Specialize in placing senior executives
- Corporate affairs, PR and Lobbying experts
- Expanding by 50% per annum
- Have assets exceeding €2 billion
- Many investments in the service fields

- M&M want to get into Ozone's fields
- And expand the geographic reach
- Asked A&M-C if they would sell Ozone to BSG
- M-C's response - we will listen, but no plans to sell
- M&M proposed a Deal Facilitator
- A&M-C agreed and costs to be shared
- There is no dispute - No obvious prospect of a dispute
- Discussion about a possible deal whether BSG will acquire Ozone Agency

# Debrief global warming

18

	One-on-one negotiation	Negotiation with Deal-Facilitator
Deal Yes/No		
Substantive outcome	1:	1:
	2:	2:
	3:	3:
	4:	4:
	5:	5:
	6:	6:
Time		
Negotiation style		
Quality proces		

- Parties often **hostile & emotional**
- Poor or non-existent **communication**
- Closed minds
  - Fixed ideas, focused on **wants, not needs**
  - Unwillingness/inability to be **creative**
  - Blindness to options for **mutual gain**

- Parties usually on **friendly** terms
- **Communications** usually quite good
- Open minds – searching for opportunities
- Willingness to consider **options**
- Everyone apparently attentive, **positive**

But ...

- **Distrust** is never far below surface
- Everyone wants the **biggest** slice (of fixed pie)
- Most negotiations highly **positional**
- Friendships usually **superficial**
- **Hidden agendas** remain concealed

- Bargaining issues & misunderstandings arise during negotiation + implementation =>  
**common causes of conflict are ...**
- **cross-cultural** issues
- Establishing/recording principles not easy.
- And: who is responsible for **managing** the **process** and **SMART** deal?

## Deal-facilitation Advantages 1

- A **optimal** and **fast** deal.
- Potential problems during negotiation process **prevented**.
- **SMART** agreement prevents potential implementation problems.
- Follow-up **clear**, implementation better, deal-facilitator remains available.
- In deal underlying interests, objectives and potential blockings taken in account.  
Confidential exploration of **underlying interests** and **options**..

- Efficiency through professional management of negotiation process (=> checklist).
- Clarify perceptions, prevent or solve miscommunication.
- Breaking impasse, f.e. reality testing and risk analysis.
- Substantive optimal outcome:  
'Out of the box' thinking stimulating creativity.  
Outcomes based on interests  
Substance separated from emotions/relationship issues

- **Mindset clients**

- *“I know how to negotiate”*
- *“I don’t need a facilitator to show me how”*

- **‘Unnecessary’ costs facilitator**

- In disputes: mediation saves money compared to litigation
- In deal making, at first sight just additional costs

- **Little knowledge of advantages**

# A real life example

Welcome to  
the world of ...

- BAT owned trademarks used by P MEC
- P MEC was the exclusive licensee
- BAT wanted to sell the trademarks
- P MEC wanted to buy the trademarks
- No other party was in the frame



So ...

- **PMEC**

- Limited financial resources to spend
- Alternatives
  - But with a price ...

- **BAT**

- Shareholders demand value for money
- Responsibility towards smaller company that is not a competitor
  - Without suffering commercially/financially

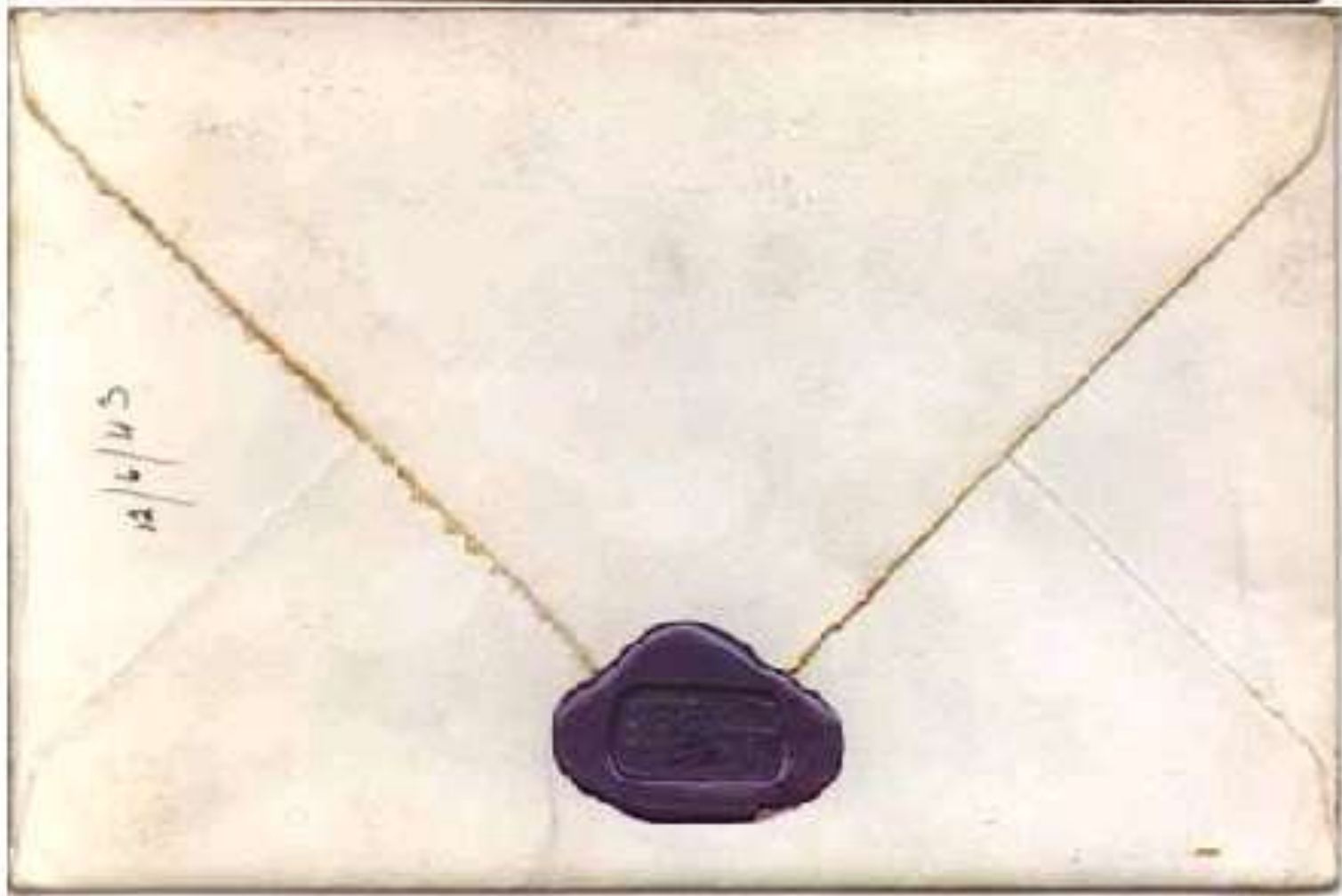
- **Both**

- Close the gap within one day

- Huge gap in perceived valuation
  - Apparently unbridgable
- Negotiation needed a different approach
  - Creative approach
  - Arbitration discussed – and rejected
  - Mediation discussed – and rejected
  - Med-Arb discussed – and rejected
- Arb-Med was the promising alternative

# Arb-Med Process olv Deal-Facilitator

- ACB recommended 3 arb-facilitators
  - BAT asked P MEC to choose
  - **Morning: informal Arbitration**
    - During lunch, arbitrator made descision
    - in closed envelope
  - **Afternoon: Deal-Mediation**
    - Neutral changed roles to facilitator



**If no agreed outcome by 4pm – open envelope  
And both parties would be bound by the result**

- Arbitration stage completed by lunch
- Outcome (sealed in envelope) during lunch
- Mediation stage began after lunch
- Numerous caucus sessions
- Verbal agreement reached by 3.30pm: **multi-dimensional** deal, **more than** just a **number**.
- Heads of Agreement initialled by 4pm

- Without neutral, deal would have failed => according to parties!
- Would have failed v.v. (ie as Med-Arb)
- No dispute – it was about asset valuation
- The psychology of the envelope
- Seen as the ultimate WATNA for both parties
- Human instinct to control one's own destiny
- Levelling the playing field