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TEACHING COMPARATIVE PERSPECTIVES IN MEDIATION: SOME PRELIMINARY REFLECTIONS

JACQUELINE NOLAN-HALEY†

INTRODUCTION

Mediation is no longer the stepchild of international dispute resolution practice. Scholars and practitioners recognize its enormous potential as a confidential, cost-saving, time-saving, relationship-enhancing process that gives control over disputes to the affected parties and often results in greater levels of satisfaction than litigation. Whether its appeal has peaked because of growing disenchantment with commercial arbitration or the perception that international arbitration has become like U.S. litigation,1 mediation is beginning to blossom on the international dispute resolution landscape.

The growing interest in mediation at the international level is reflected in numerous international and regional organizations, laws and protocols. Notable examples include organizations such as the Commercial Arbitration and Mediation Centre of the Americas ("CAMCA"),2 the CPR International

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1 See Ellen E. Deason, Procedural Rules for Complementary Systems of Litigation and Mediation-Worldwide, 80 NOTRE DAME L. REV. 553, 572 (2005) ("[T]he perception [is] that international arbitration has taken on some of the procedural characteristics of... U.S. litigation."); Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 55 (1996) ("The large American law firms continue to consider international arbitration as but one kind of 'litigation'... among others.").

2 See Foreign Trade Information System, Commercial Arbitration and Mediation Center for the Americas, Mediation and Arbitration Rules (1996), available at http://www.sice.oas.org/dispute/comarb/camca/cammar1e.asp (explaining that "[c]onsistent with the objectives of NAFTA, the Commercial Arbitration and Mediation Center for the Americas ("CAMCA")... [was] designed to provide commercial parties involved in the free trade area with an efficient,
Institute for Conflict Prevention & Resolution, and the International Chamber of Commerce ("ICC") that offer rules and procedures to resolve private commercial disputes through mediation. The World Trade Organization's ("WTO") dispute settlement system offers mediation as one method of resolving trade disputes between members. And, a primary example of legislation is the Model Law on International Commercial Conciliation that was developed by the United Nations Commission on International Trade Law ("UNCITRAL"). The Model Law, which was recommended by the United Nations for adoption by member states in 2002, suggests an international consensus on the value of mediation as a mainstream method of resolving disputes.

While mediation programs are developing rapidly across the globe, given the transatlantic focus of this conference—Transatlantic Perspectives on ADR—and its London location, it is useful to consider some recent examples of mediation's growth in Europe. In 2002, the European Commission issued a Green Paper that identified ADR as a "political priority" for all "European Union institutions, whose task it is to promote these alternative techniques, to ensure an environment propitious to their development and to do what it can to guarantee quality."
The purpose of the paper was to encourage use of ADR as a means of increasing access to justice in cross-border disputes. The paper initiated a wide-spread consultation with Member States and interested parties on possible measures to promote the use of mediation.

Following positive responses to the Green Paper, the Commission of the European Communities issued a proposal for a Directive on mediation in civil and commercial matters in October 2004. The proposed EU Directive focuses on cross-border disputes and was intended to further the EU goal of increasing access to justice by providing private parties and businesses with an additional mechanism for resolving disputes. It was intended to promote the use of mediation in the EU without making it mandatory.

Finally, a Mediator Code of Conduct was developed by the European Commission and finalized in July 2004. The Code sets out a number of principles such as informed consent and impartiality, and covers important mediator practice areas such as fees and advertising. It demonstrates not only a commitment to using mediation but to practicing it with high standards of professional integrity.
I. WHY TEACH COMPARATIVE PERSPECTIVES IN MEDIATION?

The study of comparative law and legal process in any subject area offers the usual advantages of learning about other countries' legal cultures and developing a deeper understanding of one's own legal tradition. In the case of mediation, it is important to evaluate critically what is learned through comparative analysis. Mediation is still developing as a profession; it is newly institutionalized in legal cultures; and, it is relatively new to the canon of legal education. National legal traditions have responded differently to the implementation of mediation. Thus, lawyers must have an understanding of the differences and nuances in mediation law and practice in multiple legal traditions if they are to be players in the transnational dispute resolution arena. They must also understand how the law and legal institutions relate to mediation practice in other countries because regulatory approaches vary from country to country. For example, mediation is emerging differently in common law jurisdictions than in civil law jurisdictions, which have been much slower at adopting court-connected mediation programs.
II. CHALLENGES OF INCLUDING COMPARATIVE PERSPECTIVES

A. Materials

A review of the literature shows a general scarcity of true comparative mediation studies. This may be due to the scarcity of empirical research on mediation at the national level.21 What exists are books and articles describing the development of mediation in various countries,22 and by transitional


governments.\textsuperscript{23} Case law developments provide some good data in countries where mediation is more fully institutionalized.\textsuperscript{24}

\textbf{B. Cultural Context}

Mediation practice does not exist in a vacuum. It is important to appreciate the cultural context in which mediation programs begin to develop and the extent to which dominant cultural values influence its growth in any given country.\textsuperscript{25} In

\begin{quote}


\textsuperscript{24} These countries include Australia, Canada, England, and the United States. For a discussion of recent English cases see Arthur Marriott, \textit{Mandatory ADR and Access to Justice}, 71 ARB.: J. CHARTERED INST. ARB. 307 (2005).

this regard, there are a number of significant questions that can be developed for class discussion:

   a) What are the major differences between civil and common law jurisdictions and, how do they influence mediation's development?26

   b) To what extent do political and religious interests shape mediation's development?27

   c) How do cultural differences among groups impact the development of mediation?28

   d) Which needs of the justice system drive efforts to develop ADR and mediation programs in any given country?29

   e) Within the context of teaching comparative mediation in American law schools, how does the international community perceive Americans? What are common stereotypes and images of Americans and how do these perceptions impact on international mediation practice?

C. Terminology

Mediation terminology can be confusing in the international arena. One example that has generated much debate is the meaning of the term “conciliation.”30 While it is often used interchangeably to mean mediation, as in the UNCITRAL Model Law on International Conciliation,31 some commentators argue that conciliation is a separate process that should be positioned

26 See Alexander, supra note 20.
27 See Gold, supra note 25, at 302.
28 Dutch social psychologist Geert Hofstede has identified four aspects of cultural difference: power distance; collectivism versus individualism; femininity versus masculinity; and uncertainty avoidance. See GEERT HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 23 (1997).
30 See, e.g., BOULLE & NESIC, supra note 21, at 78–80.
31 The Model Law defines conciliation as “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person...to assist them in their attempt to reach an amicable settlement of their dispute....” UNCITRAL MODEL LAW ON INT'L COM. CONCILIATION art. 1, § 3.
between mediation and arbitration. The term "ADR" can also be confusing as it is used interchangeably to mean mediation; it is also used as both a noun and a verb. Even the word "mediation" may be interpreted differently in various countries depending upon the understanding of the mediator's role and the value of neutrality.

III. CHOICES FOR COMPARISON

A foundational question that arises in teaching comparative perspectives in mediation is: compared to what? Mediation is developing in multiple countries and contexts, from private commercial practice to court-connected programs, and in the public as well as in the political sphere. Some suggested areas to consider for comparison include: (1) Distinction between public and private law; (2) Distinction between civil and common law; (3) Comparison within either civil law or common law jurisdictions; (4) Focus on specific usages such as in court-connected, family, community, labor, and employment mediation; (5) Focus on function—advocate's role in mediation, third party neutral role, institutional providers; (6) Focus on how specific issues such as confidentiality, mediator neutrality, role of judges, informed consent, and enforceability are treated in different jurisdictions; (7) Differences in development of rules and professional norms.

CONCLUSION

When it comes to the search for peaceful and effective methods of dispute resolution, no single legal tradition can or should claim the upper hand. Comparative study is essential.

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32 Boulle & Nesic, supra note 21, at 79.
33 For example, the role of the mediator in court-connected mediation in China is more evaluative than would be accepted in the United States. See Carlos de Vera, Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China, 18 Colum. J. Asian L. 149, 183–87 (2004).
34 Comparative perspectives in mediation can be taught as a stand alone course or as part of an existing ADR or International Conflict Resolution course. My practice has been to incorporate comparative aspects into my domestic and international ADR courses.
35 This is the approach that I have taken in a book I recently co-authored with Professors Harold Abramson and Pat Chew on international dispute resolution. See Nolan-Haley, INTERNATIONAL CONFLICT RESOLUTION, supra note 25.
We are all students in a global village where mediation has gained in significance and stature as an effective process for managing and resolving international commercial disputes. The following comments of Sir Roy Goode Q.C.\textsuperscript{36} emphasize the importance of looking outwards to understand how mediation practice is evolving so that it can continue to be refined and used successfully by disputing parties throughout the world—even beyond commercial disputes:

We may feel that our laws and procedures are superior to those of other States. But if we cut ourselves off from outside influence we may discover sooner than we think that our ideas become outmoded, that they no longer seem to be responsive to the needs of the international business community. . . . So while others might look to us for leadership we are all too often followers rather than leaders.\textsuperscript{37}

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