2007

Teaching Comparative Perspectives in Mediation: Some Preliminary Reflections Symposium: Transatlantic Perspectives on Alternative Dispute Resolution

Jacqueline Nolan-Haley
Fordham University School of Law, jnolanhaley@law.fordham.edu

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

† Professor of Law, Fordham University School of Law; Director, ADR & Conflict Resolution Program. I would like to thank Devin Tuohey for his valuable research assistance.

[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/cammarle.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,[3] 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.[4] 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").[5] 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.[6]

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."[7]

---

international forum for the resolution of private commercial disputes which inevitably arise.").

[3] *See* CPR: International Institute for Conflict Prevention & Resolution, CPR Clauses, Rules & Procedures (2005), *available at* http://www.cpradr.org/Landing.asp?M=9.0 (describing how "CPR, through its distinguished committees and commissions of practitioners, academics, and neutrals, has crafted detailed ADR clauses, rules, codes, and procedures for business agreements and practices, free of charge to the international legal community.").

[4] *See* World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 5.1, *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (providing that "[g]ood offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.").

[5] UNCITRAL MODEL LAW ON INT'L COM. CONCILIATION (2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf.

[6] *See id.* at v (presenting the model provision as "the subject of due deliberation and extensive consultations with Governments and interested circles"); Eric van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal*, 21 J. INT'L ARB. 1, 1–2 (2004) (noting how alternative dispute resolution's widespread use has led to a desire for universal standards).

[7] *Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, at 5, COM (2002) 196 final (Apr. 19, 2002) [hereinafter *Commission Green Paper*].

The purpose of the paper was to encourage use of ADR as a means of increasing access to justice in cross-border disputes.[8] The paper initiated a wide-spread consultation with Member States and interested parties on possible measures to promote the use of mediation.[9]

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.[10] 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.[11] It was intended to promote the use of mediation in the EU without making it mandatory.[12]

Finally, a Mediator Code of Conduct was developed by the European Commission and finalized in July 2004.[13] The Code sets out a number of principles such as informed consent and impartiality,[14] and covers important mediator practice areas such as fees and advertising.[15] It demonstrates not only a commitment to using mediation but to practicing it with high standards of professional integrity.[16]

---

[8] *See id.* The paper focused on consensual processes and did not include arbitration.

[9] *See* van Ginkel, *supra* note 6, at 4 ("Hearings were held in February 2003 to discuss the more than 160 responses the Commission had received so far to the questions raised in the Green Paper."). There has also been a tremendous amount of activity dealing with the development of online dispute resolution and cross-border commerce in the EU. *See, e.g.*, *Commission Green Paper*, *supra* note 7, at 5.

[10] *Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*, at 2, COM (2004) 718 final (Oct. 22, 2004).

[11] *See id.* at 2–3.

[12] *See id.* at 2 (stating the goal of promoting mediation without rendering it "compulsory or subject to specific sanctions"). For a contemporary analysis of EU mediation practice see JAYNE SINGER, THE EU MEDIATION ATLAS: PRACTICE AND REGULATION (Karl Mackie, Tim Hardy & Graham Massie eds., 2004).

[13] EUROPEAN CODE OF CONDUCT FOR MEDIATORS (Eur. Comm'n Justice Directorate 2004) [hereinafter MEDIATOR CODE], *available at* http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf; *see also* European Judicial Network, Alternative Dispute Resolutions—Community Law, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm (discussing details of launch) (last visited Feb. 11, 2007).

[14] *See* MEDIATOR CODE, *supra* note 13, at 2–3.

[15] *See id.* at 2, 4.

[16] *See id.* at 2 (discussing competence and skills required by mediators); *see also* The International Mediation Services Alliance, http://www.medal-

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.[17] 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.[18] 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.[19] 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.[20]

---

mediation.com/About.html (last visited Mar. 4, 2007) (stating that "[t]he aim of the new Alliance is to meet the needs of the international business and legal communities by providing them with the highest quality commercial mediation and conflict management services to assist in the resolution of disputes wherever they may occur.").

[17] *See* James F. Henry, *Some Reflections on ADR*, 2000 J. DISP. RESOL. 63, 63 ("Twenty years ago the mediation giant was asleep. Today, it is awake, with real prospects for broad, accelerated use by the private sector, courts and government.").

[18] This article is part of a larger research project on comparative mediation tradtions. For an understanding of different mediation approaches in Europe see Nancy Nelson et al., *Better Solutions for Business: Commercial Mediation in Europe*, *in* RESOLVING INTERNATIONAL DISPUTES THROUGH MEDIATION (P.L.I. Litig. & Admin. Prac. Course Handbook Ser. 2006) [hereinafter Nelson, RESOLVING INTERNATIONAL DISPUTES] (discussing some jurisdictional differences in Australia, Belgium, France, Germany, and Italy).

[19] *See* Bryant G. Garth, *Taking Dispute Resolution Theory Seriously at Home and Abroad: Prospects and Limitations*, 2003 J. DISP. RESOL. 377, 377–79 (discussing the necessity of factoring different contexts into a comprehensive understanding of dispute resolution); Nelson, RESOLVING INTERNATIONAL DISPUTES, *supra* note 18, at 528–29 (noting the procedural difficulties in mediation in various countries).

[20] *See* Nadja Alexander, *What's Law Got To Do with It: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 BOND L. REV. 335 (2001).

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

---

[21] There are some notable exceptions. *See, e.g.*, Alexander, *supra* note 20 (comparing Germany and Australia); Katja Funken, *Comparative Dispute Management: Court-connected Mediation in Japan and Germany* 3–4 (Univ. of Queensl. Sch. of Law, Working Paper No. 867, 2001), *available at* http://papers.ssrn.com/abstract=293495 (analyzing mediation in Germany and Japan); Kimberly A. Klock, Note, *Resolution of Domestic Disputes Through Extra-Judicial Mechanisms in the United States and Asia: Neighborhood Justice Centers, the Panchayat, and the Mahalla*, 15 TEMP. INT'L & COMP. L.J. 275, 275–77 (2001) (comparing the use of alternative dispute resolution in both western and non-western countries); Timothy K. Kuhner, *Court-connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. INT'L & COMP. L. 519, 520–22 (2005) (analyzing data regarding the development of court-connected mediation in the United States and Argentina); *see also* LAURENCE BOULLE & MIRYANA NESIC, MEDIATION: PRINCIPLES, PROCESS, PRACTICE (2001) (discussing mediation practice and developing legal issues in the United Kingdom and in Australia).

[22] *See, e.g.*, GLOBAL TRENDS IN MEDIATION (Nadja Alexander ed., 2003); Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 PEPP. DISP. RESOL. L.J. 161, 161–67 (2005) (comparing the development of ADR movements in the United Kingdom with those in the United States); Philip Bryden & William Black, *Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project*, 37 U. BRIT. COLUM. L. REV. 73, 73–76 (2004) (discussing the development of mediation in British Columbia as a tool for resolution in human rights disputes); Kevin C. Clark, *The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP. DISP. RESOL. L.J. 117, 127–34 (2002) (describing the development of Chinese mediation adapting to changing cultural circumstances); Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 319–26 (2006) (describing the developments of ADR in Nepal as a result of both grassroots and political stimulation); Michael T. Colatrella, Jr., *"Court-Performed" Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs*, 15 OHIO ST. J. DISP. RESOL. 391, 391–95 (2000) (comparing Chinese and American mediation systems and their development in different cultural settings); Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 HARV. NEGOT. L. REV. 151, 151–60 (1998) (summarizing the changing circumstances that ADR continues to address); Julie Macfarlane & Michaela Keet, *Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program*, 42 ALTA. L. REV. 677, 697–702 (2005) (describing the characteristics of modern mediation in Saskatchewan); Simon

governments.[23] Case law developments provide some good data in countries where mediation is more fully institutionalized.[24]

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.[25] In

---

Roberts, *Institutionalized Settlement in England: A Contemporary Panorama*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 17, 27–31 (2002) (looking forward at the future role of mediators in England in light of developments in ADR); Deborah Chow, Note, *Development of China's Legal System Will Strengthen Its Mediation Programs*, 3 CARDOZO J. CONFLICT RESOL. 1, 2–4 (2002) (discussing the various forms and developments of China's mediation process). There is substantial literature on the development of ADR programs in various countries. *See, e.g.*, Ann Brady, *Alternative Dispute Resolution (ADR) Developments Within the European Union*, 71 ARB.: J. CHARTERED INST. ARB. 318 (2005); Jose Alberto Ramirez Leon, *Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model*, 2005 J. DISP. RESOL. 399, 399–400 (arguing that the political climate of Venezuela promotes further development of ADR).

[23] *See, e.g.*, Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339, 339–41 (2000) (describing the practical problems of ADR's implementation in developing states); Ellen Yamshon & Daniel Yamshon, *Transfer, Adaptation, and Success of the CRI Mediation Model in Post-Communist Russia*, 3 HARV. NEGOT. L. REV. 123, 123–49 (1998) (describing the implementation of the CRI Mediation Model in post-communist Russia); Minh Day, Note, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, a Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235, 247–56 (2001) (proposing an ADR system in post-genocide Rwanda based on current models in other post-conflict countries); Emily Stewart Haynes, Note, *Mediation as an Alternative to Emerging Postsocialist Legal Institutions in Central and Eastern Europe*, 15 OHIO ST. J. DISP. RESOL. 257, 266–69 (1999) (discussing the genesis of mediation movements in post-socialist Eastern Europe).

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

[25] *See* Clark Freshman, *The Promise and Perils of "Our" Justice: Psychological, Critical and Economic Perspectives on Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1, 1–2 (2004) (discussing the importance of factoring in characteristics of the community to which mediation serves); Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 317–20 (arguing the importance of recognizing cultural contexts in the development of ADR by giving practical examples); *see also* Jacqueline Nolan-Haley, Harold Abramson & Pat K. Chew, *The Role of Culture in Transborder Conflict Resolution*, *in* INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES (2005) [hereinafter Nolan-Haley, INTERNATIONAL CONFLICT RESOLUTION].

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).

[29] *Compare* HAZEL GENN ET AL., PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999) (discussing the civil justice system in England and Wales), *with* HAZEL GENN & ALAN PATERSON, PATHS TO JUSTICE SCOTLAND: WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO LAW (2001).

[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.[32] 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.[33]

III. CHOICES FOR COMPARISON

A foundational question that arises in teaching comparative perspectives in mediation is: compared to what?[34] 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;[35] (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.

---

[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.[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.[37]

[36] Emeritus Professor of Law, University of Oxford.

[37] Professor Sir Roy Goode Q.C., Freshfields Lecture (1991). *See* HENRY BROWN & ARTHUR MARRIOTT, ADR PRINCIPLES AND PRACTICE xii–xiii (1993).