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The International Evolution of Mediation: A Call for Dialogue and Deliberation

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The mounting global preoccupation with mediation, reflected in a growing array of institutions, programs, laws and regulations; an international "evangelical" movement; and mounting impetus for an international convention promoting the recognition and enforcement of mediated settlement agreements; should be accompanied by collective reflection, dialogue and discernment regarding present trends. These were the themes of my lectures as New Zealand Law Foundation International Dispute Resolution Scholar, published in expanded form at 46 VICTORIA U. WELLINGTON L. REV. 1191 (2015).

There, I emphasize seven areas of concern, some of which are summarized here.

(1) Divergent perceptions and practice

Throughout the "modern mediation" era there has been debate over the roles and practices of mediators. Mediation's global growth has heightened the debate, and data from studies like the Straus Institute's recent survey of members of the International Academy of Mediators indicate considerable variation in mediators' "default" practices.

Some practices vary from region to region. California mediators are more likely to begin mediation in caucus, meeting privately with the parties in separate rooms, and also to caucus throughout mediation. Mediators practicing outside the U.S. are much less likely to do so, and U.S. mediators practicing outside California tend to fall somewhere in between the other groups. Furthermore, mediators practicing outside the U.S. are more likely to tell parties that all information shared during caucus will be confidential unless they instruct the mediator to share it; California-based mediators are more likely to tell parties that they will share any information learned during caucus with the other party as they see appropriate, unless instructed not to share it.

Divergence is also evident in the realm of mediator evaluation and opinion-giving. Mediators practicing in California are especially likely to "develop and propose potential agreements the parties might all accept as part of a potential settlement", to

"tell parties [their] predictions of how not settling might affect them, including what [they] think may result if the case proceeds to court or arbitration", or "assess, and share [their] opinion regarding, the legal strength of arguments made by parties and/or counsel." As a group, non-U.S. mediators are much less likely to offer evaluations.

Even within regions, of course, the preferred practices of mediators vary greatly. Moreover, many mediators stress the importance of tailoring their approaches to specific circumstances, to remain flexible in their approach. Experience also indicates that mediators' practices often change over time.

A failure to appreciate the diverse spectrum of approaches that prove beneficial in mediation may cause law- or policy-makers to regulate mediation in a way that unduly restricts flexibility and predictability. Although mediation is just emerging in Brazil, the Brazilian Congress recently passed legislation that sets rigid limits on mediation practice. The law establishes detailed requirements for contractual mediation provisions, including "minimum and maximum period for the completion of the first mediation meeting", the site of mediation, and "criteria for choice of mediator." It formally distinguishes mediation from conciliation, thereby raising questions regarding the ability of mediators to engage in evaluation. Furthermore, it requires that "information provided by a party in a private session [caucus] will be confidential, and the mediator cannot reveal it to others, except as expressly authorized."

(2) Lawyers and mediation

The U.S. experience suggests that as attorneys garner experience with mediation, they play more assertive roles in shaping the process for good or ill. They may work strategically with the mediator to ensure that the negotiation "dance" proceeds in a way that best protects their clients' interests while exploring trade-offs and, occasionally, options for value creation.

But attorneys may also contribute to mediation dysfunction by actively misleading the mediator regarding the prospects for settlement and ensuring that the day of resolution is postponed. The vast majority of respondents to the IAM/Straus Survey indicated that attorneys at least sometimes use mediation as a means of dragging out litigation. Moreover, some mediators are expressing growing concern about lawyers taking control of the mediation process, limiting joint sessions and insisting that all communications go directly through them. As one California respondent to the Survey put it:

> In California, counsel seem to have taken over the mediation process, and it is just not possible to have a pure mediation where the parties engage directly. On occasion, I have been specifically instructed that counsel and the parties do not even need to see each other.

Other sources suggest a disconnect between business users and counsel when it comes to commercial mediation. Perspectives obtained at a 2014 London convention on mediation indicated that while many users favor the use of mediation early in the

life of disputes, their external counsel are less enthusiastic. Over three-quarters of business users registered support for early resort to mediation, while less than half of legal advisors agreed. Two-thirds of users supported using dispute resolution provisions that required mediation prior to arbitration or litigation, but few advisors embraced that view. There were also significant disparities in perceptions regarding the need to reduce costs and risks in international dispute resolution – goals often tied to mediation. Many business users conceded that the ineffective use of ADR was attributable to the failure of in-house counsel and senior management to effectively express their needs to outside counsel.

Mediation experience also entails consequences for law practice. While one might expect mediation experience would give attorneys more confidence in their negotiation skills and thereby lessen the need for mediation, it appears instead that over-reliance on mediators has made some U.S. litigators more reluctant to negotiate outside mediation! There are also concerns regarding the impact of diminished trial rates (attributable, it is said, to mediated settlement) on the ability of young lawyers to assess their own chances in court.

As mediation becomes an important element of a justice system and related law practice, lawyers exert their own kind of "gravitational pull" on mediation; conversely, mediation changes the practice of law. More reflective, deliberate practice should include meaningful discussions between client and counsel regarding the use of mediation and their respective roles in that process.

(3) The influence of culture and legal traditions

The Western "modern mediation" model, founded on the primacy and autonomy of individuals, differs markedly from older traditions where mediation is oriented toward social hierarchy, societal harmony and obedience to authority. In China, mediation has a rich history dating back more than two millennia. Submitting disputes to a village elder or authority figure for the purpose of promoting or restoring harmony was consistent with Confucian precepts, and the practice remains an important mechanism for maintaining the social order in China today. These stark differences present challenges for those who promote structures for international mediation.

Community mediators in the People's Republic of China (PRC) as a part of local government, may resolve neighbourhood disputes by investigating, conversing separately with those involved, and proposing a solution—a highly directive but effective approach to keeping the peace in a high-context and hierarchical society. Mediation is also "housed" within institutions of public or private justice, where judges and arbitrators mediate if the parties so agree. These approaches tend to be far different from the U.S. and other countries where mediators are insulated from the judicial process due to concerns about preserving party autonomy and the integrity of judicial decision making.

A survey of Chinese commercial arbitrators provided insights into arbitrators' activities as mediators. Almost two-thirds said they "almost always" or "often" employed caucuses during mediation; they "ha[d] no hesitation in meeting parties privately" as long as both parties agreed. Four-fifths said that when they engaged in

mediation they used evaluative techniques, including "mak[ing an] analysis of the strengths and weaknesses of each party's position" and discussing the risks of an arbitrated outcome. Almost 90 per cent said they would at least sometimes offer a settlement proposal at the parties' request. Such data reflect perspectives which differ radically from prototypical views in the U.S. and some other countries.

Another summary of three court-connected mediations in the PRC raises interesting questions about the interplay between the mediator and the court, the relative confidentiality of the mediation process, and mediator assertiveness. In one of two cases "commissioned" by a court, a major dispute among international companies, both the mediator and a "judicial panel" were actively engaged throughout the mediation process, with the judicial panel apparently meeting with and offering interpretations to the parties. In another mediation, the process was apparently recorded in transcripts along with the final agreement. In the third case, the mediator achieved a resolution by "patiently persuading both parties by explaining the facts according to the actual situation of the parties" – a very traditional directive approach.

Heightened interest among scholars, practitioners and business users affords new opportunities for discussion of the priorities and goals served by mediation, the interplay between adjudication and mediation, the confidentiality of the mediation process and the techniques employed by mediators. It is critical that such discussions precede future law and policy-making in international as well as domestic realms.

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