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Window Open to the World - International and Comparative Mediation: Legal Perspectives Global Trends in Dispute Resolution series

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Materials — Paradigma, March 2010.

33. Italian Journal Review — Italia Oggi — "La Conciliazione" 3 -14; Special supplement No 8 of 15 March 2010.

34. De Palo, above note 12.

35. For example s 11 (the mediator's proposal), s 5 (mandatory mediation, mediation delegated by judges and mediation by contract).

36. Such as in Switzerland, which offers thorough training in mediation and a number of programs specialising in training commercial mediators. In addition, many international organisations with long histories of dealing with mediation have offices there (see Meieer I, 'Mediation and conciliation in Switzerland' in Alexander, note 1 above) as well as in the Netherlands and Denmark (see De Palo, above note 12).

37. Pompei T, 'La cultura della giustizia e la promozione dell 'ADR' in Bonsignore V, *Secondo Rapporto sulla Diffusione della Giustizia Alternativa in Italia* Camera Arbitrale di Milano 2009 <www.camera-arbitrale.it/Documenti/secondo_rapporto_giustiziaalternativa.pdf

BOOK REVIEW

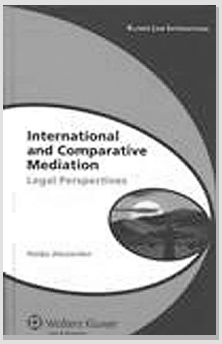
David Bryson

Window Open to the World

Nadja Alexander

International and Comparative Mediation: Legal Perspectives Global Trends in Dispute Resolution series

Wolters Kluwer Law, The Netherlands, 2009



This impressive book, solidly researched and comprehensive in its scope, throws a window open to the world of mediation and light into our own habitation. It makes us think again about how we work locally while existing globally in a fast-expanding and dynamic mediation context. We can forget that mediation is 'at the forefront of contemporary social and legal development and is finding a place in both physical dispute resolution forums and worldwide electronic-based communities'.

What *International and Comparative Mediation* makes clear is that the much-cited reason for the growth of mediation — problems with the legal system — is myopic, both culturally and philosophically. Mediation is a response to the alienation of legal systems and a lack of social cohesion as much as it is about delays and costs associated with litigation. Mediation reflects an increasing plurality of social values and 'the changing face of the international business community to include traditional owners of resources, e-traders, more women and small entrepreneurs'. Its aetiology can be traced in one line through intuitive or information traditions practised in Arab and Muslim countries, Asia, the Pacific and Africa, and emerging in another line via the cognitive scientific or western traditions.

International and Comparative Mediation focuses on three cross-border legal instruments and six national jurisdictions: three countries from the common law tradition (Australia, England and the United States); and three from the civil law tradition (Austria, France and Germany). From regional histories and their interaction with the globalisation of trade and law in the last 30 years, international collaborative initiatives in mediation have grown beyond the borders of nation states and different legal systems have both contributed to and been influenced by the results.

And the results should inform us all, even in relatively 'mature' mediation jurisdictions such as Australia. How many of us know about the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters (2008), the UNCITRAL (United Nations Commission on International Trade Law) Model Law of International Commercial Conciliation (2002) or the International Mediation Institute and its focus on international standards for mediator accreditation and mediation practice? Or the centrality of mediation in law reform projects designed to assist transitional democracies and fragile states to manage disputes?

The book contains an interview between Alexander and Mr Jernej Sekolec, Former Secretary of UNICITRAL. If you do nothing else with this book of over 500 pages, read this interview and discover on the way what 'dinner party mediation' is in the context of voluntary versus mandatory mediation attendance! The interview topics range from how the regulation of mediation should be approached given the civil law and common law traditions; cross-cultural aspects of mediation law encompassing indigenous concepts as well as western notions; mediator training; the balance between facilitative and evaluative models of mediation practice; and international business implications. Sekolec explains the three pillars of the UNCITRAL Model Law — confidentiality, party autonomy and fair treatment — and how different legal and cultural systems were interwoven through the efforts to achieve consistency and certainty. The author makes one of her few didactic points on this subject, defining the fundamental question as neither one of diversity at the expense of consistency nor flexibility over form, but rather decisions about which

aspects of mediation are most usefully standardised and which are best served by more flexible arrangements.

The interview confirms what the author contends: 'you cannot not regulate' and 'deregulated spaces are not empty'. Internationally, as well as locally, regulatory forms do not operate in isolation but are bundled together in various ways depending on government policy, legal tradition and local culture. The Anglo-American jurisdictions follow a mixed regulatory approach with significant legislative, self-regulatory and market elements. In Europe there has been a discernable trend towards a formal legislative approach, especially in eastern and central Europe. In Slovenia and the Netherlands, a well-developed self-regulatory practice operated before the introduction of broad national legislation to regulate mediation in line with the EU directive on mediation referred to above.

As in local practice, so too internationally the key issues arise about the risks and limitations of mediation: how to achieve effective finality and reduce uncertainty in relation to enforceability issues; how to deal with the tension of diversity and consistency of practice. The book therefore includes international perspectives and current case law in relation to pre-mediation selection and referral, mediation clauses and agreements to mediate, conduct of mediators and participants, confidentiality and post-mediation issues (rights and remedies, enforceability of agreements, mediator reporting and so on). On all these topics the breadth of international responses, filtered through different systems of law and culture, are detailed with clarity and precision.

I found the chapter on confidentiality particularly instructive. We think of confidentiality as that essential quality of mediation ensuring the integrity of the process and protection of the interests of all mediation participants. Or this is the western construct of the concept? What of other ethno-cultural contexts in which confidentiality is not the norm and mediation takes place in a group forum with elements of public symbolism? The author touches on legal systems where such cultural factors influence the development of legal policy on mediation confidentiality. She makes a useful distinction in the categorisation of confidentiality as *insider/outsider* confidentiality (vis-à-vis outside parties), *insider/insider* confidentiality (flow of information within mediation), and *insider/court* confidentiality (subsequent proceedings) — the last being the most controversial and generating the most litigation.

After an exhaustive exploration of the international case law in relation to confidentiality, Alexander provides a useful checklist for the choice of law for parties and lawyers facing the prospect of cross-border mediation: What is the scope of the confidentiality provision? Who holds obligations or rights in relation to confidentiality? What is protected by confidentiality? To which parts of the mediation do the various obligations of confidentiality attach? Are there any exceptions to the confidentiality provisions? The author makes a similar contribution to the issues facing parties post mediation: limitation periods, enforceability of possible outcomes and costs arrangements.

Alexander is right to give so much space to the legal context of mediation. The volume of judicial determinations now available provides a signpost of potential pitfalls and risks when mediation is cross-border in nature. She usefully differentiates between the law *in* mediation (relevant laws relating to the substance of the dispute) and the law *of* mediation (the legal framework for mediation), which assists in making strategic choices about regulation design. The simple act of drafting a mediation clause masks a plethora of legal issues when the clause is to function internationally: What is the law governing the parties' capacity to agree to a dispute resolution clause and enter into an agreement to mediate? Or what is the law governing the agreement to mediate, the process and the conduct of the mediator, the legal representatives and other participants in the mediation? What are the laws of the jurisdictions in which the mediated outcome is sought to be recognised and enforced, or set aside? Or the law of the jurisdiction in which competing judicial or arbitral proceedings are initiated? Or the law applicable to the subject matter of the mediation?

While the United States has sought through the Uniform Mediation Act to reduce this complexity across states, the UNCITRAL Model Law is an attempt to do so internationally. This book is therefore an enabler for legal practitioners, academics and global business operators who work *sans frontières*. The Appendix B is a culmination point for these readers because it provides a comparative table of international mediation rules and their key function areas:

- *triggering* or initiating rules for the mediation process;
- *procedural* rules dealing with internal matters;
- *standard-setting* rules for the mediator; and
- *beneficial* rules that traverse the interface between the mediation process and the legal system — rights and obligations of those involved in mediation.

International and Comparative Mediation is much more than a guide for those who work on the international stage. It is a resource for each of us in our particular cultural setting, responding to the increasing complexity, expense and anonymity of litigation, or, if we are in fragile societies, exploring the capacity of mediation to establish pathways for community cohesion.

Mediation will be formative in the kind of world that our children will inhabit after us, globally, in ways which we are only beginning to understand. Alexander's excellent scholarship brings together key legal issues surrounding mediation developments in the modern world, and in so doing points toward the likely form and nature of what is to come. ●