FOCUS: IMPORTING AND EXPORTING ADR

5 Importing and Exporting ADR
“I’ve looked at life from both sides now”
By Carrie Menkel-Meadow

9 Resolving Public Conflicts in Developing Countries
From experiments to institutions
By David Fairman

13 ADR Missionaries
Developing countries import, adapt Western methods
By Michael Palmer

17 ADR in Paraguay
By Carlos Dario Ruffinelli Cespedes

19 The South African Truth and Reconciliation Commission
Is it relevant to the United States?
By Richard J. Goldstone

23 Comparative Considerations
Toward the global transfer of ideas about dispute system design
By Amy J. Cohen and Ellen E. Deason

27 Lessons Learned
Challenges in the export of ADR
By Lukasz Rozdeiczer

DEBATE

31 The Wrong Model, Again
Why the devil is not in the details of the New Model Standards of Conduct for Mediators
By Michael L. Moffitt

34 The Model Standards of Conduct
A reply to Professor Moffitt
By Joseph B. Stulberg

DEPARTMENTS

3 From the Chair

36 ADR News

38 State and Federal Cases

39 ADR Calendar

40 The Lighter Side

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One of the difficulties in our complex and diverse field is the extent to which we understand the expectations of our customers: the parties who use alternative dispute resolution processes to resolve disputes.

Whether pre-litigation, during litigation, post-litigation or appeal, how well does the neutral understand what the parties expect in terms of the process and the outcome?

Arbitrators, mediators and other neutrals are experts in a given process and often assume that the parties also understand the steps of a process after a quick introduction. But how often is a mediator asked by a party at some point in the dispute to “make a ruling” or “tell us your decision”?

Perhaps even more common than failing to understand what customers expect of the process, many neutrals do not question the parties’ stated expectations of outcome—usually money, vindication or perhaps an apology. Parties often have unstated expectations of the outcome, including protecting or augmenting their reputations, increasing shareholder value in a corporation, helping a party overcome a feeling of being the victim, saving a party’s job or just plain wreaking revenge on adversaries.

Understanding expectations of the parties should be somewhere around the core of elements required to reach a resolution.

This is what I usually see in a mediation.

The neutral asks the parties what their expectations are and then informs the parties what the process is designed to do—or what the process is. Rarely does the neutral truly search deeper to find the true expectations of the parties—about either how the process works or what they expect the outcome to be. I think this happens because the neutral does not connect the “expected goal” (say, to settle for less than $100,000) with the collateral impacts that often are the party’s true motivators (such as “shareholders will be OK with that” or “this should help save my job” or “that should be enough to exact revenge or payback”).

Would understanding the process expectations and outcome motivators improve the number of resolutions, would it improve the experience for the parties, would it improve the skills of the neutral? I believe it would do all that and more.

Robyn C. Mitchell is President and CEO of Compliance Builders, Inc., a firm that specializes in consulting and strategic partnering to build world-class compliance programs. She can be reached at robyn.mitchell@compliancebuildersinc.com.
Taking the Next Step

The Master of Laws (LL.M.) in Dispute Resolution degree program provides students with the resources of a major university to design a program of study according to their particular interests in the dispute resolution field. LL.M. graduates are now working in the U.S. and abroad in a variety of positions.

I have started a firm I call Conflict Management Systems with a focus on mediation, facilitation, and organizational conflict management. The LL.M. degree has provided me with a tremendous amount of recognition and credibility in the dispute resolution field in St. Louis, both among lawyers and non-lawyers.

Jim Reeves, LL.M. ’04
Conflict Management Systems
St. Louis, Missouri

My LL.M. education influenced my current job because I started a practice in mediation and arbitration, and I was able to join the Center of Arbitration and Mediation of the Chamber of Commerce of Quito, the most important center of this kind in Ecuador. I discovered a new world for my professional activities, which I expect to share with others in my country.

Maria Elena Jara Vasquez, LL.M. ’04
Associate Lawyer, Peña, Larrea, Torres & Asociados Cia. Ltda.
Quito, Ecuador

When I enrolled in the LL.M. Program, all I wanted was a jump start on an ADR career. I found a discipline far richer than I thought, a faculty that challenged and sharpened my analytical abilities, and the opportunity to make significant contributions to a burgeoning field. My time at Missouri not only opened a new career path, it led me places I never thought possible.

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EXPORTING AND IMPORTING ADR

“‘I’ve Looked at Life From Both Sides Now’”

BY CARRIE MENKEL-MEADOW

When exportation of our theories and practices of alternative dispute resolution first began in the late 1970s, I was a skeptic. I feared what others called imperialism and colonialism in larger governmental and cultural terms would also be true of our efforts to take what is essentially an ethnocentric practice—a “talking cure”—to other lands where “talking through problems to uncover underlying needs, interests and purposes” was not necessarily compatible with the social and legal norms. (Initially, of course, many in the United States thought that most ADR theories and practices were not suited to our adversarial culture either.)

Early skepticism

My early skepticism has been shared more recently with a variety of internationalist professionals—anthropologists like Laura Nader and Kevin Avruch, and development and aid practitioners and scholars like Thomas Carothers—all of whom are concerned that even good intentions can harm those presumed to be beneficiaries of knowledge transfer. Even negotiation theorist Robert Mnookin has asked us to think long and hard about when to negotiate with untrustworthy international bargaining partners.

Critiques of using modern American-style modes of negotiation, mediation and other forms of “consensual” dispute settlement focus on such issues as whether we make assumptions about the trustworthiness of parties engaged in the process, whether interest-based bargaining has a certain Western utilitarian or pragmatic cultural bias that ignores other bases of disputing behavior (such as honor, status, or moral beliefs), and whether “alternatives” to formal modes of dispute resolution can thrive in contexts where formal institutions may be distrusted, or worse, corrupted. In short, can more informal, consensual, participatory forms of dispute settlement, decision-making and political participation flourish on their own, regardless of culture, regardless of formal institutional performance?

Early exporters of ADR knowledge and human technology traveled to the Soviet Union, Eastern Europe, the Caribbean, Africa and other “developing” areas. I personally resisted my first invitations to teach, train and lecture in any place where I did not feel knowledgeable about “local culture” (meaning both social culture and legal practice). Others happily made those first forays into distant legal systems and disputing cultures hoping to encourage better local dispute resolution institutions and practices and also to create more universal and peace-seeking practices.

So, early exportation of ADR had both a local purpose and a larger internationalist hope for the development of what could be called a lingua franca of international dispute resolution practices. Indeed, scholars and practitioners such as John Burton, Herbert Kelman, Christopher Mitchell, Christopher Moore, Lawrence Susskind, Ray Shonholtz, and Jacob Bercovitch developed a rich body of theory and practice regarding international dispute resolution, while practitioners of international diplomacy, like Henry Kissinger and Jimmy Carter, put notions of mediation and shuttle diplomacy on the front pages of the newspapers, encouraging both professionals and the polity to talk about different kinds of dispute resolution techniques. Kissinger used the “international caucus” by traveling between parties kept separate from each other, while Jimmy Carter used the “one-text” procedure described by Roger Fisher to facilitate peace talks at Camp David.

In those heady, if complex, days, theory and practice were emerging together as Americans (mostly) plied their trade, taught their skills and argued for “a better way” to resolve all kinds of disputes. At George Mason University in Virginia the first graduate program in International Conflict Resolution was established to teach, study and spread the word—others followed, both individually and programmatically.

During this period ADR training also became part of more formal governmental efforts in development and technology transfer. The State Department, USAID, the Federal Judicial Center, the World Bank and other multinational banks and development organizations began to support conflict-resolution training and system design.

So, with all the best intentions, practitioners, scholars, trainers, teachers and entrepreneurial consultants traveled far and wide to encourage

The learning is always two-way. In virtually every consultation I have done, I have learned something that has changed how I look at our own dispute resolution programs and practices.
people to focus on their underlying needs and interests, to look for Pareto-optimizing solutions, and to consider the needs and interests of the other. In addition, these travelers hoped to craft new ways of resolving conflicts and disputes at all levels of human interaction, and to create new kinds of professionals—mediators; commercial arbitrators; system designers; multiparty, complex dispute and policy facilitators.

At the same time, as trade with China and other parts of Asia increased, another band of process imperialists were trying to sell Western forms of legality (more judges, trial lawyer training, adjudication, formal regulation and “rule of law” initiatives) to nations that actually invented mediation—China, Japan, and parts of Africa.

This attempt might look like what critics such as Laura Nader have described as advising about or “imposing” processes that would be most effective at benefiting the powerful. ADR (or “harmony ideology” as Nader calls it) is used to pacify some people; formal legal institutions and systems can be manipulated by well-trained lawyers to benefit those who know how to use them. Both are forms of social control, not “empowerment.”

Thus, my early skepticism, rooted in some cultural humility, was now joined to a more global political analysis, informed both by my personal history (I was brought up in European, as well as American, culture by refugee parents and educated in Ethical Culture religious beliefs) and scholarship.

**Culture is not some stereotypic, monolithic, reified ‘thing’ that can be learned by reading a few books, watching a few movies or having a few meals—then managed as a communication or translation problem.**

ADR might contribute to the redevelopment of legal and dispute practices on some very particular ground.

My experiences have varied. I have consulted on the now-enacted Woolf procedural reforms in England and Wales (tracking cases and encouraging various forms of settlement activities); I have trained lawyers, social workers, and diplomats in negotiation, mediation and arbitration practices; and I have engaged in system design in Canada, Australia, Paraguay, Africa, and Japan (yes, there is vast continuing interest in mediation in Japan—their own and our forms of it).

I am now skeptical about my earlier skepticism. The reason lies in the second part of the title of this article—“importing” knowledge about ADR, as well as exporting it. When asked “in” to another legal system or culture by someone who knows what they are interested in (and also understands what the outside consultant brings), the learning is always two-way.

As a legal comparativist I have always known that our own legal practices (whether formal or informal) are chosen, not given, and that we don’t always do things the best or only way (yes, even our Constitution could benefit from the teachings of the new Constitutions being written around the world). In virtually every consultation I have done, I have learned something that has changed how I look at our own dispute resolution programs and practices.

**What importing teaches exporters**

I have commented at greater length elsewhere on what commonalities and differences exist in the domestic and international uses of dispute resolution, so I will just review a few here.

1. **What does “culture” mean when transporting legal, social or psychological processes?** On the one hand, we are all human; on the other hand, we live in a world of amazingly different cultural beliefs, understandings and practices. I have long abhorred those popular books on “how to negotiate with the … (Japanese, Chinese, Russians, New Yorkers,” fill in the blanks with your favorites).

   More recently, radical differences have been the vogue, such as in Samuel Huntington’s famous “Clash of Civilizations” argument. My own views are closer to those of Kevin Avruch and Frank Sander and Jeff Rubin. Culture is not some stereotypic, monolithic, reified “thing” out there which can be learned by reading a few books, watching a few movies, or having a few meals and then “technically” managed as a communication or translation problem.

   Rather, people make cultures, and people form institutions, and there may be as much variability within “national” or “group” cultures as between them. For example, the increasing numbers of foreign lawyers and businesspeople who study for LL.Ms or MBAs in American institutions, where interest-based negotiation is taught, may create an international cosmopolitan “negotiation” culture that will transcend national boundaries, but probably not class boundaries.

   Professional culture (lawyer, international businessperson) may trump many of the stereotypic indicators of “culture” (e.g., low-high context, direct versus indirect communication, or ascribed versus achieved
status). Every individual belongs to many cultures, so it is dangerous to make assumptions about individuals and the groups they form (especially where age and educational training may trump more “traditional” aspects of culture).

Consider these stereotypes of “national culture.” The Scandinavians might be assumed to be more like us (industrialized, middle-class, educated, well-developed democracies and legal systems) and (some) South Americans more different from us (many nations with bloody histories of despots and dictatorships, more religious).

My own experience was the opposite. (Some) Scandinavian cultures are more reticent, less verbal, and more indirect in communication, with very formal legal systems, making use of the interpersonally “forward” and direct form of legal mediation potentially suspect. In contrast, in Argentina, with the largest per capita number of psychiatrists (at least in Buenos Aires), volatile and direct forms of self-examination and communication are common and may have less difficulty affecting the formal legal system. Argentina has been one of the leading nations in South American use of ADR.

And what cultural explanations are there for rapid changes in law or politics? Chile has recently legalized divorce and adopted new legislative schemes for the use of mediation in family and commercial disputes. And how will Chile change further under its newly elected regime (the first female President)?

Culture is not out there—it is in all of us. So crude cultural assumptions should be avoided, and that includes thinking about one’s own “culture.” (Consider our regional differences and federal or state variations on the uptake of ADR processes and institutions.) What works here may not work elsewhere. At the same time we may see some new forms of dispute resolution with applicability to issues in the United States (such as the use of Truth and Reconciliation Commissions for slavery or for governmental failure to adequately respond to Katrina) from cultures and places which appear quite “different” from our own. To be “culturally sensitive” is to be an open citizen and student of the world and its processes—to be wary of cultural attributions and open to the failings of one’s own “culture.”

2. Can ADR be based on a legitimating value other than the rule of law? In the United States, ADR developed in reaction to something—the conventional and time-consuming legal adversary system. Some (and I am among them) have argued that unless there is some recourse to a rule of law and appropriate legal institutions (such as the International Criminal Court or the European Human Rights

International work has caused many ADR exporters to import new practices—new rituals, new forms of consciousness or spirituality in our work—and new actors such as family members, not just principal disputants.

Court in the international arena), “alternative” systems of justice may have no norm-creating or norm-enforcing mechanisms and thus may be difficult to legitimate and institutionalize. This would seem to be the case where distrust or corruption has paralyzed the formal legal system (think post-Soviet Russia) and where attempts to create alternative systems, such as arbitration, may fall subject to the same (or different forms of) corruption or control by the powerful.

On the other hand, where new forms of dispute resolution are being created as tabulae rasa for new legal structures (e.g., the Dispute Settlement Procedures for the WTO), other forms of legitimacy (treaties, consent, economic and trade values) may substitute for the rule of law (how heretical to Americans!) and also open up the possibilities for different forms of dispute resolution.

In my work with international organizations like the World Bank, I have seen how new entities or organizations not subject to sovereign law still create dispute-resolution systems with conceptions of fairness, equity and appeals to “core” human values. (Consider that some multinational organizations continue to have ombuds, mediation, or grievance procedures in employment settings where they are not subject to the labor laws of any sovereign power.)

Those who come to ADR “later” or for different reasons than we have may produce different (and potentially better) “alternatives” because they have studied the first generation of innovation. As with new products and ideas, second-generation ADR may be better, learning from errors and improving on design. Later model calculators, computers, and plumbing technologies were all better than the earliest prototypes and models.

The post-conflict developments in countries split apart by ethnic violence or political brutality have led to the flowering of old, indigenous, and new creative forms of dispute resolution which attempt to deal with both the past and future. Consider gacaca in Rwanda and Truth and Reconciliation Commissions in South Africa, Guatemala and elsewhere.

Conflict resolution practices with indigenous groups in Canada and Australia are, in many ways, more advanced than in the United States, which is why I have advised countries with disputes between indigenous peoples and national governments or private companies (e.g., Indian groups’ disputes about land and natural resources in Chile, Ecuador and Peru) to look elsewhere for guidance on newer, multicultural forms of dispute resolution, rather than think that the United States has cornered the knowledge market.

More than the rule of law is at stake here. References to community, healing, co-existence and other values motivate different forms of process and remedies (apology, confession,
Conflict resolution theory and practice offer hope of creating a process lingua franca to which we can all contribute as we seek more peace, less violence and more understanding in the world.

should be central to our field’s knowledge building. Here we can learn by “importing” rather than assuming that “exporting” our own rule of law is the only way.

3. How does exporting and importing ADR knowledge and technology teach us new theories and practices? Working in multiple locations in the world exposes the importance of contextuality in our theory building and practice. As some examples, consider how such concepts as “deadlines,” “ripeness,” “interests” or “caucus” have been defined in conflict resolution theory and practice domestically. These concepts all have different meanings in other sites. Putting “settlement pressure” on parties who do not “have to get something done” may backfire. As John Paul Lederach has eloquently told us, peacebuilding is not a single dispute resolution event, but rather multidisciplinary work for many generations.18

International work has caused many of us ADR exporters to import new practices—new rituals, new forms of consciousness or spirituality in our work (yes, even in complex multiparty lawsuit mediation), and new actors (family members, not just principal disputants). Increased consciousness about the cultural (mis)understandings of our own words and concepts will cause us to think more critically about our own practices and terms.

So, as Judy Collins sang in my formative years, “I’ve looked at life from both sides now,” as a skeptic and as a participant in the international ADR import-export business. And from this vantage point I have concluded that being paid to cultural contextuality, the role of a new form of “international ethics” in international work19 and “local conditions,” I do believe that the aspirational aspects of conflict resolution theory and practice offer some hope of creating a process lingua franca to which we can all contribute as we seek more peace, less violence, and more human understanding in the world.

I’m sure my Esperanto-promoting grandfather would approve, for he was against war and thought that if we could combine languages and create one for all, we could speak to each other across national and cultural divides and we would be more likely to understand each other and live in peace.

ENDNOTES

1 Apologies to Joni Mitchell, songwriter, and Judy Collins, singer, of Both Sides Now, on Wildflowers (Judy Collins, 1967).
3 Carrie Menkel-Meadow, Is the Adversary System Really Dead?: Dilemmas of Legal Ethics as Legal Institutions and Rules Evolve, in CURRENT LEGAL PROBLEMS (Jane Holder, Colm O’Cinneide & Michael Freeman, eds. 2004).
6 THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD (1999).
9 For an excellent discussion of how American adversarial litigation practices are “infecting” and transforming international commercial arbitration, see YVES DEZALAY AND BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).
10 If you are interested in my intellectual and spiritual background, see Carrie Menkel-Meadow, And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution, 28 FORDHAM Urb. L. J. 1073 (2001).
11 See VICKI JACKSON AND MARK TURNER, COMPARATIVE CONSTITUTIONAL LAW (2nd ed. 2006).
13 For one popular example, see FRANK ACUFF, HOW TO NEGOTIATE ANYTHING WITH ANYONE ANYWHERE IN THE WORLD (1997). For a more informed and empirical version of this genre, see JEANNE BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES (2001).
15 KEVIN AVRUCH, CULTURE AND CONFLICT RESOLUTION (1998) (culture is variable, and multi-faceted even within cultures).
17 Halliburton, for example, extends its tiered system of employee dispute resolution to those working outside of the United States, where many American labor and employee protective laws do not apply.
19 See e.g., ETHICS AND INTERNATIONAL AFFAIRS: EXTENT AND LIMITS (Jean-Marc COICAUD and Daniel WARNER, eds. 2001).
A cross the developing world, political and civic leaders are experimenting with strategies for resolving public conflicts over major development challenges. The stakes are high. Though the rule of law and democratic elections reduce the risk of large-scale political violence, there remains a significant danger that unresolved conflicts will destabilize a new government, delay much-needed economic or social development, or worse, undermine the commitment to democracy among major political actors (e.g., the military, ethno-national movements, former revolutionaries).

Through the MIT-Harvard Public Disputes Program and the Consensus Building Institute, my colleagues and I have had the opportunity to assist leaders and influential organizations in countries such as Azerbaijan, Brazil, Israel, the Philippines and South Korea to develop new institutions and capacities for managing and resolving public conflicts. Along the way, we have learned a few lessons about what it takes to set up an effective partnership for public conflict resolution in an emerging democracy, and about ways to build both the demand for collaborative conflict resolution and the supply of qualified public conflict resolvers.¹

Protracted, divisive conflicts
American media coverage of politics in developing countries often portrays authoritarian regimes, failing states and civil wars. Less often, the media capture the dramatic moments when peace agreements are signed, constitutions are enacted, or “people power” leads to the ouster of autocrats. Ironically, Americans may know the least about the kinds of public conflicts that are typical front page news in the majority of countries in the developing world.

In any country, the range of potential public conflicts is vast, covering everything from specific governmental agency actions (whether an environmental agency should require a company to clean up a contaminated site) to conflicts among public agencies (which agency should lead a new rural development program), to societal debates (whether the country should adopt an affirmative action program for a disadvantaged minority group).

For example, what should Brazil do to reform a public pension system that is becoming a major drain on the national budget? How can South Korea prevent serious floods and protect its water supply in the face of determined local opposition to most infrastructure projects? How far should the Philippines re-open its mining and forest sectors to foreign investment? Is there a way for the government of Israel to resolve longstanding Bedouin land claims, while leaving open the option to build new towns in the region?

As in the United States, elected officials, agency heads, business, advocacy and community stakeholders use political lobbying, the courts and demonstrations to advance their goals. In many ways, their contestation is a sign of healthy democratic process. It shows that a wide range of organized groups can publicly express and advocate for their interests. On the other hand, the political and economic cost of protracted conflict on major public issues can be very high.

In a newly emerging democracy, unresolved conflicts among polarized political groups may destabilize a new government, delay economic and social development, or worse, undermine the country’s commitment to democracy.

Given the stakes, political and civic leaders are experimenting with strategies for resolving public conflicts in less adversarial ways. They are drawing both on their own national and cultural traditions, and on models for public conflict resolution and consensus building developed in the United States.

Supplement existing processes
When we refer to public conflicts, we are talking primarily about conflicts in which many governmental and non-governmental actors have legitimate interests, and where there is not one overriding public interest or decision rule sufficient to resolve the conflict to the satisfaction of all stakeholders. Public conflicts therefore require some process of direct dialogue, negotiation and adjudication among many concerned stakeholders.

For many of these conflicts, there is likely to be both a formal, institutionalized method for decision-making (e.g., agency adjudication, interagency committee agreement, parliamentary legislation) and a range of formal and informal opportunities for stakeholders to influence the ultimate decision-makers. What we call “public conflict resolution” is a way to supplement formal decision-making and informal influence with a structured, voluntary process of dialogue and agreement seeking among interested stakeholders.

Public conflict resolution is likely to be useful when the issues are complex; when there is a large number of legitimate, competing stakeholders and interests; and when effective resolution depends on the willing partici-
Public conflict resolution processes generally include the following elements:

- **stakeholders represent to the fullest extent possible the range of affected interests** (government agencies mandated to deal with the issues, concerned public interest groups, civic, business and community associations, ethnic groups, etc.)
- **stakeholders participate voluntarily and directly**
- **a qualified, neutral person or organization assists the stakeholders in seeking a mutually acceptable resolution** (qualified neutrals do not have a direct interest in the outcome, are viewed as legitimate by the stakeholders, are skilled in process design and facilitation and are familiar with the substantive issues)
- **the stakeholders go through a carefully designed sequence of goal framing, dialogue, joint fact-finding and option development, and interest-based negotiation to seek a mutually acceptable resolution to the conflict**
- **stakeholders can withdraw from the process if they feel it is not meeting their interests or has lost legitimacy, and**
- **stakeholder agreements have a direct relationship to governmental decision-making, either by binding governmental participants to a policy or course of action, or by providing recommendations to government decision-makers to adopt in whole or in part.**

**Improve participation, transparency**

Public conflict resolution processes, even when well designed and implemented, do not always produce a consensus that meets the interests of all stakeholders. Nevertheless, they are often more transparent, representative and well informed than traditional lobbying or adjudicatory decision-making. They are also more likely to produce solutions that creatively integrate many stakeholder interests and capacities, rather than lowest-common-denominator political compromises.²

In a developing democracy, public conflict resolution can be a particularly useful supplement to formal governmental decision-making. Because power and resources tend to be more unequally distributed in developing countries, public conflict resolution processes can offer a forum for disadvantaged constituencies that have difficulty participating effectively in formal decision-making. They may also help increase the transparency and accountability of public agencies in a context where formal checks and balances are not well established.

Finally, and perhaps most importantly, public conflict resolution processes can break deadlocks on critical development issues. In Brazil, the National Economic and Social Development Council was able to create the base of public support that the Lula Administration needed to make significant changes in the public pension and tax laws. In Israel, successful mediation of a land dispute between Arab landowners and the National Parks Department created a powerful precedent for negotiated resolution of conflicts that could otherwise escalate to violence and heighten tension between Israeli Arabs and Jews. In South Korea, consensus-building on regulations and incentives for control of water pollution safeguarded the river that supplies water to 40 percent of the country’s population.

**Most importantly, public conflict resolution processes can break deadlocks on critical development issues.**

Effective conflict resolution may contribute to change in those relationships over time, but we should be modest in our ambitions for fundamental transformation given the parties’ deep ambivalence and mistrust.

Similarly, Azerbaijan’s authoritarian political culture makes political cooperation at the national level between Azerbaijan’s ruling and opposition parties unlikely for the foreseeable future. However, there are stronger incentives for cooperation at the local level, where elected officials with no party affiliation hold the balance of power.

In the Philippines, a long history of adversarial relationships between advocates for the poor and government land and resource agencies has made consensus building on resource management and economic development policies very challenging.
Nevertheless, the convening of many multi-stakeholder bodies on these issues over the past fifteen years has created a climate in which constructive dialogue is often possible.

The second challenge, unclear governmental authority or mandate, can often be finessed by senior officials with relatively wide discretion in the decision-making process, but there are some countries for which formal authority does need to be granted in order for experimentation to begin.

In South Korea, for example, President Roh has initiated the drafting of a law to authorize all public agencies to use public consultation and conflict resolution in project and policy decision-making. In Brazil, President Lula convened the National Economic and Social Development Council as an ad hoc but formally authorized multistakeholder body for consultation on major changes to the public pension and tax laws. In the Philippines, where the political culture is very much oriented toward stakeholder participation (albeit more often symbolic than substantive), senior officials in a variety of agencies have frequently used their discretion to convene multistakeholder conflict resolution groups.

Managing supply, demand

The third, fourth and fifth problems are more tractable than the first two. Through a process of deliberate, selective capacity building and experimentation, it is possible to expose government and civil society stakeholders in key sectors to public conflict resolution approaches, using trained facilitators and mediators.

International partners may play important roles in the first few experiments, by building awareness of and interest in public conflict resolution among national leaders in government and civil society, training for facilitators and mediators, and guidance and coaching on stakeholder assessment, process design and facilitation. If the experiments go well and the approach is more widely adapted and institutionalized, the role of international partners decreases over time.

We conceptualize this process as building the demand for and supply of public conflict resolution services and institutions. In practice, we and our national partners usually take six steps, with substantial adaptation for national context.

1. Develop the supply side, by identifying and building the capacity of a partner with institutional credibility, staff backgrounds and skills appropriate to the national context.

2. Develop the demand side, by stimulating interest among public officials, civil society and business leaders in public conflict resolution.

3. Assess a number of public policy conflicts to determine which may be appropriate for a conflict resolution approach.

4. Assist qualified neutrals to convene, facilitate, document and evaluate several public conflict resolution efforts.

5. Based on results, further develop supply and demand.

6. Over time, institutionalize the market for public conflict resolution by creating a stable, diverse supply of conflict resolution providers, and a way for those with a need for their services to find them easily, such as through public mediator organizations, associations or rosters.

Working with local partners

The Consensus Building Institute and the MIT-Harvard Public Disputes Program generally do not pick conflicts and start trying to work there. In most cases, we have been approached by potential partners, usually academic institutions (e.g., public policy graduate schools in Brazil and South Korea, a university-affiliated arbitration center in Peru), think tanks or “action tanks” (e.g., a joint Israeli-Palestinian action research organization; a network of local conflict mediators in the Philippines) who wish to promote public conflict resolution.

We go through a fairly extensive process of assessing the partner’s current capacity and institutional goals, understanding the national sectoral political contexts, and building the partner’s capacity in stakeholder analysis, process design, facilitation, mediation and negotiation. Jointly with our partner, we then seek to raise awareness among potential users of public conflict resolution services, often through multistakeholder workshops targeting a particular sector (e.g. land claims in Israel, environment and natural resource conflicts in the Philippines). Through these events and conversations, we identify a number of important and potentially resolvable public conflicts.

Our partners (with assistance from us) narrow the list to a set of conflicts of sectoral or national significance and good potential for resolution of key issues. We generally advise our partners not to pick the highest profile or most urgent conflict in the country or sector as a first target for intervention. Instead, we usually aim for substantial but tractable conflicts at a scale that the partner feels confident in addressing and where the chances for some success are good.

As the partner proceeds with an intervention, the roles of the Institute and Program have ranged from direct management of a team of mediators over a period of years to informal e-mail and telephone conversations with a partner over a period of weeks. Our goal is to provide what the partner needs, and that is invariably a highly case-specific judgment.

Whatever the goals of the process, we and our partners endeavor to document it thoroughly in order to provide a basis for evaluation, learning and further awareness raising. To continue building awareness and demand, our partners may provide training in public conflict resolution, negotiation and convening skills.

After a series of projects or activities that may last a few months or several years, we collaborate with our
partners to assess the long-term prospects for institutionalizing supply of and demand for public conflict resolution services. We may assist them in writing grant proposals, developing formal understandings or rosters with governmental and international agencies, and establishing free-standing conflict resolution organizations.

Lessons learned
Having worked with a wide range of national partners and contexts, we have few sweeping statements to make about the process of building institutions for public conflict resolution. Still, with the strong caveat that every situation is different and requires a tailored approach, some lessons do emerge.

Starting with an established partner is helpful, but the caliber of key individuals is critical. Working with an established national partner is more likely to lead to sustainable institutionalization, but it is not impossible to create a partner organization from a cadre of skilled neutrals.

We have been fortunate to work with highly respected academic institutions that have the standing and legitimacy on a range of public issues to be credible as neutral convenors and facilitators. For these organizations, our primary role is capacity building and strategic analysis of opportunities. They are fully capable of managing their operations and building on their existing networks to expand the reach of their public conflict resolution activities over time.

On the other hand, we have had some partnerships with well-established organizations that in the end were not strongly committed to public conflict resolution. Ultimately, the critical factor in transforming a pilot initiative into a stable center or institution seems to be the drive of one or a few key individuals who are highly skilled and motivated not only to resolve conflicts, but also to build institutions.

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Never assume that you as an international partner have credibility; it is hard to earn and easy to lose. Our engagements in the Bedouin conflict in Israel over the past three years and in Azerbaijan during 2004 have provided many lessons about the potential for miscommunication of an international partner’s role in a highly charged environment with very low levels of trust. We have been tagged as everything from agents of the CIA to officials of international financial institutions.

An enormous amount of effort goes into clarifying our roles and responsibilities with our partners and with stakeholders. We constantly monitor the way we are being perceived and represented, and frequently need to respond in writing or by direct face-to-face interaction to stakeholder concerns about our actions and our motives.

Maintain a dynamic balance between supply and demand. In our work with national partners, we have found that there are risks in pushing very hard, very early to generate stakeholder interest across a wide range of sectors. Conversely, training a large number of mediators (20 or more) in depth at an early stage, before it is clear that there will be a sizeable group of conflicts to assess and potentially facilitate, can generate frustration and lead talented individuals to drop out of the piloting process for lack of work to do.

Over time, quality work in one or two sectors by a relatively small core group of neutrals can lead to a steady increase in demand, driven by a growing network of relationships with key stakeholders. Partners can then branch out into other sectors, bringing in neutrals with backgrounds in those substantive areas, and building up new networks.

Significant contribution
We and our national partners have been very fortunate to have the opportunity to work on issues of national significance in some of the most dynamic developing democracies in the world. We fully recognize the modest impact of our institution-building work given the scale and the diversity of the challenges that their leaders and citizens face.

Nonetheless, we see public conflict resolution as a significant contribution to public participation and democratic public decision-making. We continue to learn by doing, and hope that our lessons learned the hard way will be valuable to others embarking on public conflict resolution around the world.

ENDNOTES
1 We have also learned from our colleagues in other conflict resolution organizations and in the related fields of democracy building and economic development, including the work of the Alliance for International Conflict Prevention and Resolution (www.aicpr.org); the National Endowment for Democracy (www.ned.org) and its Journal of Democracy (www.journalofdemocracy.org); the World Bank Conflict Prevention and Reconstruction Unit (www.worldbank.org); and USAID’s Office of Conflict Management and Mitigation (http://www.usaid.gov/our_work/cross-cutting_programs/conflict).


3 For empirical evidence, see DERICK BRINKERHOFF & BENJAMIN CROSBY, MANAGING POLICY REFORM: CONCEPTS AND TOOLS FOR DECISION-MAKERS IN DEVELOPING AND TRANSITIONING COUNTRIES (2002); THOMAS BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS (2002); LAWRENCE SUSSKIND ET AL., THE CONSENSUS BUILDING HANDBOOK (1999).

A DR MISSIONARIES

BY MICHAEL PALMER

Centuries after the tall ships bearing trappers, traders, Conquistadors and missionaries swept into the New World, bringing with them measles and gun powder, long pants and neckties, international development agencies are bringing Rule of Law projects, including extensive ADR initiatives, to the developing world.1

Ensnared in the 21st Century, we readily condemn the Europeans who swarmed over North America, all but destroying the societies they encountered. But at the time, many of them believed they were bringing the blessings of civilization to the benighted heathen.

Likewise, today’s international development experts are working for noble purposes—to help less developed countries create the legal foundation for economic development and greater participation in the world economy, not to mention democracy. But what responsibilities do these agencies and workers have to the countries and people with whom they interact? And whom are we really helping—the local people, the local power structure, international capital markets, transnational investment machines or the security of donor countries?

And on a broader level, do we have a myopic understanding of mediation and other forms of alternative dispute resolution when we export them to other places? Are we in danger of seeing the Western way as the best way or even the only way? Perhaps “all of the above” is the right answer.

I do not advocate withholding our brand of mediation from others. Interdependence is our destiny. But in helping to build dispute resolution systems in non-Western countries, we must respect local traditions and ensure that we are building the systems that the host country indicates it wants and needs, not the systems that we as Westerners seek to impose upon them.

I have had the privilege of participating in the development of a court-annexed mediation program in Jordan, through the ABA’s Central European and Eurasian Law Initiative.2 In developing its mediation program, Jordan has drawn on its pre-existing dispute resolution traditions to create a system that is a hybrid of both.

Mediation in Jordan

Jordan is aware that corruption and inefficiency in the judicial system discourage investment and entrepreneurial activity. Building on a rich cultural history that includes voluntary dispute resolution practices, Jordan has embarked on an ambitious, but feasible, program of reducing the demand on the court system while improving the level of satisfaction with the resolution of disputes. To that end, the Ministry of Justice has introduced facilitative mediation methods as the cornerstone of a court-annexed ADR program.

ADR programs in Jordan have included:

- training in and use of collaborative problem-solving for stakeholders and mediators working with the Jordanian Ministry of Water and Irrigation and Water Authority of Jordan
- arbitration of international trade disputes using Jordan’s arbitration law as well as private agreements under the United Nations Commission on International Trade Law (UNCITRAL), International Chamber of Commerce and similar organizations
- arbitration of disputes between and among businesses under the auspices of a voluntary mediation/arbitration program administered by the Ministry of Justice

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by the Amman Chamber of Commerce
• the initiation of an ADR program by the Insurance Commission of Jordan
• the inclusion of mediation and arbitration training in the curriculum of the Faculty of Law at Yarmouk University in Irbid, and
• court-annexed mediation as part of Jordan’s new case-management system.

Pre-existing traditions
Before developing this system, however, Jordan already had a long tradition of resolving disputes outside of court. In the pre-Islamic Arab world, disputes within tribes were referred to the leader of the tribe, who mediated a result that would preserve solidarity among members of the tribe as well as his position of honor.3

Flexible dispute resolution was important to commercial activity. From the earliest days, conciliation (Musalaha), mediation (Wasata) and arbitration (Tahkim) have been important institutions in the Arab World.4 This does not mean, however, that Western ADR techniques are readily transferable to Jordan. Wasata, Tahkim and Musalaha are not the exact equivalents of mediation, arbitration and settlement as we understand them.

As George Irani has written, “In assessing the applicability of Western-based conflict resolution models in non-Western societies, theoreticians and practitioners alike have begun to realize the importance of being sensitive to indigenous ways of thinking and feeling, as well as to local rituals for managing and reducing conflicts.”5

Irani explains that “the importance of patrilineal families; the question of ethnicity; the relevance of identity; the nature of tribal and clan solidarity; the key role of patron-client relationships; and the salience of norms concerning honor and shame” are all important considerations.6 Religious beliefs and the relevant provisions of the Qur’an play a role as well.

Religious codes
The Qur’an provides the foundation for the acceptance of Wasata or mediation as an appropriate form of dispute resolution in Islamic culture. The Qu’ran extols the virtues of conciliation and invites the faithful to settle their disputes amicably.7

This disposition to resolution applied to all types of conflict, including those “between a Muslim country and a friendly country, between the authorities and rebels, between an offender and his victim, between a creditor and a debtor, and between spouses.”8

The Majalla, the Ottoman Civil Code of 1877 that substantially codified Islamic Shari’a law, contains an entire book on Aqd Al Solh (Settlement and Conciliation or Release).9 In Article 1850, the Majalla sets up an original institution of Arbitration by Conciliation reminiscent of Surah IV, Verse 35 of the Qur’an:

Legally appointed arbitrators may validly reconcile the parties if the latter have conferred on them that power. Therefore, if each of the parties has given powers to one of the arbitrators to reconcile them and the arbitrators terminate the case by a settlement in accordance with the provisions contained in the Book of Settlements [Aqd Al Solh], the parties may not reject the arrangement.

Twenty-first-Century dispute resolution professionals would call this type of process Med/Arb—a hybrid of mediation and arbitration.

Cultural characteristics
As research shows, one culture can differ from another along a series of dimensions that influence how people deal with each other.10 How people handle power disparities, the relative importance of individuals and collectives, gender roles, the avoidance of uncertainty, and short-term or long-term dispositions all vary from one culture to the next. The standard behavioral styles along each of these dimensions in a given culture affect dispute resolution practices significantly.

High-context culture. In a high-context culture, such as that of Jordan, behavioral norms emerge from kinship networks and other social connections. Low-context cultures, such as those of Canada and the United States, rely more on objective rules than on personalized, reciprocal support systems to govern social behavior.

For example, people in a high-context culture might emphasize personal integrity over written rules or codes to a greater degree than do members of low-context cultures.

Power-distance index. In cultures scoring high on what Geert Hofstede calls the power-distance index (e.g., those in the Arab world) greater deference is shown to people in authority than in cultures where power distance is low (e.g., Sweden and Canada). In a large power-distance society, might tends to prevail over right. Power is based on tradition or family, charisma and the ability to use force. Political change occurs from the top down. And there are large income differences.

In small power-distance cultures, on the other hand, the use of power should be legitimate and follow specified criteria. Power is based on formal position, expertise and ability to give rewards. There is a high value on equal rights for all. And income differentials are smaller and are further reduced by taxes.11 Arab countries, including Jordan, score twice as high on Hofstede’s power-distance index as the United States, Canada and the Netherlands.12

Collectivism. The disparity between collectivist and individualist cultures may be even more significant for the resolution of disputes through mediation and other ADR methods. In the former, people are born into extended families or other in-groups that continue protecting them in exchange for loyalty. Children learn
to think in terms of “we.” Harmony should be maintained and direct confrontation avoided. Resources and the benefits of power should be shared with relatives. And norm violations lead to shame and loss of face for both self and the group.

In individualist cultures, by contrast, people grow up to look after themselves and their immediate families, children learn to think in terms of “I.” Speaking one’s mind is a characteristic of an honest person. There is individual ownership and use of resources. And norm violations lead to guilt and loss of self-respect.13

Conflict type. In collectivist and high-context cultures, the types of conflicts (family, community and state conflicts) and their causes have an impact on the appropriate form of dispute resolution as well. George Irani asks, therefore, to what extent an integration of contemporary and traditional models of conflict reduction and reconciliation is possible.

Relationships. Irani points to “important cultural differences in approaching conflict management, including the role of the individual in society; attitudes towards conflict; styles of communication; expectations of mediators, [and] understandings concerning ‘victimization’ and ‘forgiveness.’” He highlights “the importance of relationships based on family, patriarchy and gender, kinship, and clientism, and … the continuing underlying code of honor (and its counterpart, shame) in conflict and conflict management.”

Ritual. Finally, Irani considers “the concept of ritual and its role in conflict ‘control and reduction’ (as opposed to conflict ‘resolution’) and focuses on the rituals of sulh and musalaha as examples of indigenous Arab modes of settling disputes.”14

A primary difference between traditional Wasata and the emerging court-based mediation system is that the former functioned within the tribe and was not part of a cross-tribal court system. Court-annexed mediation provides an authority figure for the voluntary resolution of disputes who is probably not a member of the group from which either party comes.

Thus, the court-based mediation process could potentially play the role of helping with the transition from tribe-centered dispute resolution to society-wide dispute resolution. Institutions that transcend tribal loyalties may be particularly valuable in Jordan, where a large percentage of citizens are Palestinian refugees whose tribal relationships have been fractured.

Western-based mediation

International development workers, including the hundreds of lawyers and judges who have worked to build ADR systems in developing countries through the ABA, typically bring a Western-based understanding of dispute resolution. The two main disciplines of mediation practice in the West are evaluative mediation and facilitative mediation.

Evaluative mediation. In evaluative forms of mediation, the mediator sometimes will tell one or both parties, separately or together, what the mediator believes is an appropriate resolution of the dispute. This opinion may be limited to one aspect of the conflict or it may extend to every facet of the problem. In unusual cases, the mediator may even draft and propose a complete settlement agreement, leaving the parties with little to do but give or withhold their assent.

Facilitative mediation. Facilitative mediation refers to a process in which the mediator helps the parties bridge communication gaps, discover their respective interests, invent options for satisfying those interests, explore shared standards of judgment and measure proposed outcomes against alternatives the parties might have away from the table. The mediator avoids expressing an opinion about the merits of either side’s case or about the likely outcome should the matter proceed to trial.

Some mediators use both styles as they deem appropriate. In either case, good mediators listen deeply to feelings and other indicators of the real problems at hand.

Proponents of facilitative mediation argue that evaluative mediation tends to neglect the most powerful benefits of mediation. It slights rehabilitation of relationships. If one or both of the parties feels taken or that the deal is somehow illegitimate, resentment may grow. And the possibilities of creating new value, of expanding the pie before dividing it, might be neglected in favor of just getting the immediate dispute over with so that the parties can move on.

Blending ADR traditions

Given the historical and cultural contexts summarized above, it is important to ask how our understanding of mediation as practiced in the United States, Canada and Europe would work in Jordan. Likewise, we must ask how Jordan’s court-annexed ADR programs, which are necessarily grounded in Jordan’s cultural and historical traditions, will come to terms with methods imported from elsewhere.

As we saw it, the Wasata (mediation) tradition in Jordan compared most closely with directive or evaluative mediation styles in the United States. Yet, those judges and lawyers from Jordan who had received mediation training were taught a facilitative approach that emphasized process skills. But is that form likely to take root when introduced broadly in Jordanian culture?

Regardless of the Western-based training provided to mediators, the parties to mediation in Jordan may expect that the mediator will share an opinion about the likely outcome of a case, the relative merits of the parties’ positions, or what a fair resolution might be—especially if the mediator is
also a judge. Indeed, when judges in the small claims and traffic court meet with the parties at the first hearing, they do something similar already.

We repeatedly heard statements from nonmediators that only lawyers or judges with expertise in the subject matter of the dispute would be effective as mediators. This view, which is shared by many lawyers in the United States, reflects an understanding of mediation in the Wasata tradition rather than the facilitative approach.

In the end, Jordan’s mediation law was drafted to specifically permit mediators to “express [an] opinion and submit evidence and display legal grounds and judicial precedents and other procedures that facilitate the mediation.” This law also views the mediator as the person who “solves” the dispute.

In blending the evaluative and facilitative traditions of mediation, Jordan has created a mediation law that is fully consistent with the evaluative tradition of Wasata. It remains to be seen, however, whether Jordanian mediators will be able to realize the full range of benefits that facilitative mediation affords.

Morality of cross-cultural interaction

If ever it was possible for cultures and societies to live in isolation, that has not been the case at least since Marco Polo tramped along the Silk Road to China in the 13th Century. We are interlocked together. We interact. And every interaction affects all parties.

There are no easy answers to questions about exporting and importing pieces of another culture, because there is always a mix of interests, an amalgam of benefits and drawbacks. It is easy to say murder and theft are wrong. The morality of cross-cultural interaction is more ambiguous. Interests collide. Actions arising out of seemingly benign motives may nevertheless have negative, even devastating effects. Remember the impact of New England missionaries on Hawaii.

All this leads to two questions:

1. What ethical constraints should govern the design of foreign aid programs, including Rule of Law projects?

2. What ethical considerations should guide the behavior of individuals helping to implement such programs?

There are no easy answers here. But we can proceed with sensitivity and care. It is an obligation that members of the conflict resolution community should take especially seriously.

ENDNOTES


2 Through the ABA, thousands of lawyers and judges have donated their time to help with conflict mitigation and post-conflict transition, anti-corruption/public integrity, gender issues, judicial reform, legal education reform and legal profession reform in more than 20 countries, from Albania to Uzbekistan.


4 Id. “In Islamic jurisprudence, mediation and arbitration are considered preferable to litigation before courts of law. Moreover, arbitration (Tahkim) as sometimes practiced is an alternative that is similar to mediation, in that the arbitrator also assumes the responsibilities of a mediator.”

5 George E. Irani, Islamic Mediation Techniques For Middle East Conflicts, at www.mediate.com/articles/mideast.cfm.

6 Id.


8 Id. See also Sami A. Aldeeb Abu-Salih, La conciliation dans les pays arabes in La Médiation: un mode alternatif de résolution des conflits; Sezai Ozcelik, The Islamic Conflict Resolution in Interpersonal and Intergroup Conflicts: Islamic Mediation (Wasata), Islamic Peace-making (Sulfa), and Islamic Third-Party Role, (draft paper on file with author); Nahla Yassine Hamdan, Al-wasata fi al-khilafat al-arabiyeh al-mua’assera (Mediation in Contemporary Arab Conflicts), Center for Arab Unity, Beirut, Lebanon (2003).

9 Id. Id. See also Sami A. Aldeeb Abu-Salih, La conciliation dans les pays arabes in La Médiation: un mode alternatif de résolution des conflits; Sezai Ozcelik, The Islamic Conflict Resolution in Interpersonal and Intergroup Conflicts: Islamic Mediation (Wasata), Islamic Peace-making (Sulfa), and Islamic Third-Party Role, (draft paper on file with author); Nahla Yassine Hamdan, Al-wasata fi al-khilafat al-arabiyeh al-mua’assera (Mediation in Contemporary Arab Conflicts), Center for Arab Unity, Beirut, Lebanon (2003).

10 Id. Id.

11 Id. at 39-72.

12 Id. at 43.

13 Id. at 92.

14 Id.
In Paraguay, arbitration and mediation were institutionalized by Law 1879/02, effective April 24, 2002, based on the United Nations Commission on International Trade Law’s Model Law on International Commercial Arbitration. As a whole, this comprehensive law is quite similar to the laws on ADR in the United States.

Arbitration

Paraguay’s law seeks to equate its arbitration system with the worldwide trends in arbitration, recognizing the nature of the pact, mandating the election of competent judges and setting out the procedures to be applied.

The law provides the legal framework for national, as well as international, arbitration. For example, if the parties are domiciled in different states, or if the subject matter of the controversy is located in a state outside their domiciles, then the arbitration is defined as international.

The law also defines and clarifies aspects of the process such as initiation of the procedure, venue, composition and jurisdiction of the arbitration court, arbitration procedures including appointment of expert witnesses, the arbitration agreement, costs and legal fees. With respect to the applicable law in the controversy, the law specifies how the arbitral court must adapt its decisions, the form and content of the award, and specifically, how to conclude the arbitration.

Arbitrators can be removed for certain causes—and the procedure for appointing new arbitrators is also set out in the law. In addition, parties can agree on the arbitration rules and even move ahead with the procedures they consider adequate.

In addition, the Paraguay law establishes the acts the arbitral court can perform after an arbitration is concluded—such as correcting, interpreting and issuing an additional award, along with setting out reasons for invalidating an award. The procedures for executing an award are based on Article 2 of the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, as ratified by Law 948/96.

Furthermore, Paraguay has become the venue of the Permanent Arbitration Court as agreed by the members of the Southern Common Market, Mercosur: Brazil, Argentina, Uruguay and Paraguay. The court has five arbitrators. Each country elects one arbitrator and the four of them elect the fifth. All disputes may end up in this court.

Mediation

Paraguay’s law establishes the mediation process as a private method in which trained professionals of the legal community render their services to attain justice through several mediation centers. One of them is the Center of Arbitration and Mediation Paraguay, a division of the Paraguayan Chamber of Commerce. It was originally financed by the International Development Bank (IADB), and has offered its services in arbitration and mediation, advice, training and diffusion of ADR in the community since 1988.

The law also defines the requirements for the mediation centers and the characteristics of the mediators—seeking suitable mediators to fulfill their functions with independence and neutrality.

With the goal of increasing access to justice, the Supreme Court recently created the Office of Mediation through an agreement it entered with the Center of Arbitration and Mediation Paraguay. Mediation services are rendered within the judiciary for civil, commercial and labor cases as well as matters involving minors. The service is voluntary, confidential and free of charge.

Hence, mediation duplicates
the Paraguayan legal system’s capacity for solving controversies without generating greater costs and expenditures on behalf of the state.

The scope of ADR

In Paraguay, the law characterizes mediation as “a voluntary mechanism aimed at dispute resolution, through which two or more people themselves work out a friendly solution to their differences with the assistance of a third neutral and qualified party called a mediator.” The only matters that may be submitted to mediation are those deriving from a contractual relationship or some other type of legal relation, as long as the matters are subject to transactions, conciliation or arbitration.

Article 2 of the law on arbitration prescribes that “every matter upon which settlement can be reached, which has a content of patrimony, may be submitted to arbitration as long as the matter has not yet been the subject of a definitive and executable sentence.” It expressly establishes that “matters which require the intervention of the Office of the Public Prosecutor may not be the subject of arbitration.” In Paraguay, the public prosecutor has jurisdiction of civil as well as penal cases.

The second paragraph of Article 2 stipulates that differences arising between the state, decentralized and autarkic entities, public enterprises, or municipalities and private individuals, national or foreign, may be submitted to arbitration, as long as legal acts or contracts governed by private law arise out of it. This is true progress, since it means that these controversies may be the object of arbitration and consequently, mediation.

Procedural matters

Paraguayan law specifies a number of mediation procedures, most of which will be familiar to American practitioners.

Confidentiality. Mediation is confidential in nature. The formulas proposed for agreement will not have a bearing on a lawsuit that might take place. The mediator may not be called as a witness or as any other figure in any subsequent trial between the same parties or about the same matter.

Request. The parties may initiate mediation jointly or separately by presenting a written request either to a mediator or to the Center for Mediation they choose mutually.

Procedure. Unless the parties specify otherwise, the center will appoint the mediator or mediators and convene the parties at an established date and time to carry out the mediation session within five working days after a request for mediation has been presented.

Agreements. In the course of the hearings, the mediator will collaborate with the parties to clearly determine the alleged facts, as well as the positions and interests upon which they are based, to jointly produce reconciliation formulas that may or may not be approved by the interested parties. The parties are required to collaborate with the mediator in good faith, and in particular, make every effort to comply with the requests he or she may make, including attending hearings.

Effect. The agreement arising out of the mediation binds the parties from the moment they and the mediator sign the mediation memorandum documenting it—and will have the effect of settling the matter by judgment from the moment a competent judge ratifies it.

If the mediation agreement takes place while a lawsuit is pending, the judge of the case will be the competent party to ratify it—and that ratification will serve as an end to the lawsuit. If the mediation agreement is partial, that will be documented in the mediation memorandum and the parties may discuss the nonmediated differences in the trial.

Termination. The mediation procedure concludes when:

- the parties sign a mediation memorandum containing the agreement they reached
- the parties and mediator sign a memorandum documenting that agreement through mediation is not possible, or

- the center certifies that no hearing could be held due to the absence of one or more of the parties.

ADR advances

Paraguay has advanced arbitration and mediation as ways of accessing justice using the most advanced models of legislation and rules based on various examples, specifically on the American model. And the efforts are growing. For example, the United States Agency of International Development (USAID) is financing a mediation program in Paraguay to improve managing social conflicts by promoting community participation in solving controversies.

Thus, in Paraguay, the adversarial method, although appropriate in many cases, is being replaced by more effective and less costly systems such as arbitration and by nonadversarial methods such as mediation.

### Conciliation and Mediation: A Comparison

In Paraguayan doctrine, conciliation is derived from procedural law in which the judge in every civil, labor, or libel or slander case attempts to reconcile the parties to avoid a trial. That is, conciliation remains in the hands of the judge; mediation, by contrast, is voluntary and in general, occurs prior to any trial.

Nonetheless, prior to conciliation, the parties may opt to mediate. There is more leeway in mediation, since it may be performed at any time—before bringing suit, or at any stage of the suit before definitive sentencing. It has the authority of a matter that has been judged, according to the stipulations in the law.

A judge may at any time attempt conciliation with the litigating parties, especially in matters of labor procedural law. Consequently, to determine whether a particular matter is open to conciliation in Paraguay, a mediator will have to review current procedural law and jurisdiction.
Accountability for war crimes and other serious human rights violations is invariably the result of a complex mix of calls from victims for justice and acknowledgment, on the one hand—and political resistance from perpetrators to be held accountable, on the other.

In South Africa, there was a political compromise between Nuremberg-style trials for the leaders of the apartheid government and the grant of blanket amnesties. The compromise was embodied a decade ago in the legislation establishing the Truth and Reconciliation Commission (TRC). Victims were encouraged to tell their stories in public, and discrete amnesties were granted only in return for full and complete confessions by the perpetrators who sought them.

The story of South Africa’s relatively peaceful transition begins with the Anti-Apartheid Movement. Both domestically and internationally, it was in essence a human rights campaign, inspired by the norms contained in the Universal Declaration of Human Rights. This is amply reflected in the Freedom Charter—the blueprint for a future democratic constitution adopted by a mass meeting of supporters of the African National Congress (ANC) in 1956—an avant-garde document calling for a nonracist and nonexist South Africa.

The ANC was consistent in calling for a bill of rights reflecting all modern human rights and civil liberties. On the other hand, the apartheid leaders and their supporters, who had spurned human rights, became instant converts in the early 1990s with the prospect of black majority rule. They saw in a bill of rights their protection from the will of the majority.

Abuses recharging ambivalence

Initially, there was ambivalence with regard to a truth and reconciliation commission. There was no agreement within the ANC and strong opposition from the apartheid leaders. Then there was an unexpected development. During the transition that began in February 1990, charges emerged of serious human rights abuses having been committed by the ANC in its own army camps in Angola, Malawi and Tanzania.

There was a galvanizing development: charges of serious human rights abuses having been committed by the ANC in its own army camps in Angola, Malawi and Tanzania.

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investigate all abuses of human rights and their perpetrators, to propose a future code of conduct for all public servants, to ensure appropriate compensation to the victims and to work out the best basis for reconciliation. In addition, it will provide the moral basis for justice and for preventing any repetition of abuses in the future.

Legislation establishing the TRC

After wide consultation and much debate, parliament passed the Promotion of National Unity and Reconciliation Act 34 of 1995, commonly referred to as the Truth and Reconciliation Act. The object of the Act, as stated in section 3, is to “promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.” It directed “establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights” committed during the period commencing March 1 1960 to the cutoff date that was later agreed to be the day prior to the 1994 elections.

The statute urged regard for “the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.” It also required “the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts with a political objective.” Among the factors to be taken into account were “the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.”

Three committees were established to achieve these objectives:

- The Committee of Reparations and Rehabilitation—which was given similar powers to gather information and receive evidence for the purpose of ultimately recommending to the president suitable reparations for victims of gross violations of human rights, and
- The Committee on Amnesties—to consider applications for amnesty.

A call for amnesty

Some of the victims felt that amnesties would unfairly rob them of justice. They claimed that denying them of both criminal justice and civil claims was inconsistent with the Constitution. The claim was rejected by the Constitutional Court on the ground that the TRC and amnesties were expressly called for in the Interim Constitution. In an emotive opinion, Justice Mohamed wrote:

> Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction.

> Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. . . . Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. . . .

> The Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.

> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. . . .

> The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependents of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active,
full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation.

A promise of reparations

The Constitutional Court also found the denial of a civil remedy to be constitutional. One of the main reasons for that conclusion was the statutory promise of reparations for the victims.

The response to the TRC exceeded the optimistic hopes of its most enthusiastic supporters: testimony from more than 22,000 victims and amnesty applications from some 7,000. The outpouring of information had several important consequences, including:

• ending the denials and fabrications that accompanied the most serious human rights abuses

• recording one history in perpetuity of those most serious consequences of the apartheid regime, and

• facilitating programs of the new democratic government to begin removing some of the imbalances that were a consequence of over three centuries of oppression and discrimination.

There was also a cost. Some victims went away from the TRC angry and frustrated. Like all good compromises, none of the parties was completely satisfied by it. But looking back on the first decade of democracy, I have no doubt at all that South Africa is immeasurably better off than it would have been but for the TRC.

The view from the United States

I turn now to the United States.

I have had the privilege of teaching classes at some middle and high schools in Boston, Los Angeles, Memphis and New York. That came about through the programs of Facing History and Ourselves, a Boston-based nonprofit organization that has school programs teaching understanding of, and tolerance for, “others.” It attempts to teach the prevention of violence and an end to racism. I have spoken of the TRC, and invariably, young school students ask me whether there should be a truth and reconciliation in their own country. The question clearly and visibly finds empathy in black students.

When I have discussed this reaction with white Americans, the answer I usually receive is that the history of slavery and racial discrimination in the United States is amply recorded and that there is thus no point in considering a truth and reconciliation commission. I would suggest that this simplistic response misses the point. Much of the evidence that emerged before the TRC was known to the majority of South Africans and certainly responded with what many considered to be a paltry one-off payment of about $4,200 for each of the victims identified by the TRC, at a total cost of $80 million. South Africa is by no means a wealthy country and there was some sympathy for the assertion of the government that, in light of its limited resources, priority should be given to education, health, housing and the other urgent needs of the majority of the people. There was also the consideration that the violations were not committed by the present government, but rather by an illegitimate predecessor government.

Too much, too late

I would suggest that it is far too late for reparations in the United States. The identity of victims to-

• It is far too late for reparations in the United States. However, an official public hearing into slavery and racism could bring needed acknowledgment to the descendants of the direct victims.

black South Africans. The victims always know the truth regarding their victimization.

The importance of the TRC was that it was established by a democratic parliament representing all South Africans. Its proceedings were broadcast live on radio and regularly on national television. Crucially, it provided official acknowledgment to the victims. I suggest that kind of acknowledgment has not been a part of the American experience.

Then, there is the current controversy about reparations for the victims of slavery. In South Africa, where the TRC followed within a relatively short time after the end of apartheid, the question of reparations was nonetheless a fraught one. The TRC recommended substantial reparations for the direct victims of serious human rights violations. The recommendation was payment of a quasi-pension for the named victims that would have cost about $400 million.

The South African Parliament, after much delay and public controversy, day would present insurmountable problems. However, an official public hearing into slavery and racism and their legacy could bring much needed acknowledgment to the descendants of the direct victims, many of whom are still suffering their indirect effects. Above all, such proceedings would be an important means for Americans to learn about themselves and especially about the living resentment and concerns of minorities. Americans would then have the opportunity to learn to understand the resentment that is often the consequence of insensitivity and a lack of caring within the majority.

That problems with regard to race and discrimination continue in the United States cannot be denied and even less wished away. In this context, the extent to which the TRC is relevant to the United States is for the people of this country to determine. A serious examination of this possibility would certainly be a useful learning experience at all levels of American society.
CURRENTLY, THE United States is among the primary exporters of dispute resolution concepts and designs. While the United States is regarded as a leader in developing alternative dispute resolution, particularly court-connected programs, other societies afflicted with social divides have long-developed institutionalized responses to conflict that supplement state judicial systems. A comparative analysis of such institutions can help enrich our understanding of foreign and domestic dispute resolution systems as well as expand the functional range of problem-solving techniques we apply to disputes in the United States.

However, as critiques of the export of dispute resolution reveal, few methods exist to transmit ideas about dispute system design across systems and cultures in ways that pay careful attention to context-specific variables. Although there has been a significant amount of scholarship examining how individuals communicate and negotiate differently across contexts, far less attention has been paid to the differences in the legal, political and social norms and processes that shape and are shaped by dispute resolution institutions.

Consider an analogy from the plant kingdom. Surely, for a rainforest plant to survive in the desert it would need to incorporate water-conserving adaptations. Yet if the plant were able to take root, its method of attracting insects for pollination might prove successful among desert fauna.

But plants not only adapt to their ecosystem, they also influence the nature of that ecosystem, altering temperature, humidity and the level of nutrients—possibly even transferring genetic material to existing plants. Thus the new plant must be seen as an integral part of the environment, not as an independent product of environmental factors.

Similarly, although dispute resolutions institutions are socially and culturally embedded, some of their characteristics may spark innovation in other settings. However, to encourage the cross-pollination of ideas about dispute resolution institutions, we need to examine dispute resolution institutions themselves as social and cultural processes. Such analysis would compare how dispute resolution institutions work, why they work the way they do, how they get deployed in the service of ideology or social struggles, how they interact with other institutions to create the political and social conditions to realize their goals and to what distributional ends.

With the aim of comparing functions, context and consequences, we examined several dozen dispute resolution institutions around the globe. To permit comparisons of dissimilar institutions across contexts, we extracted “design elements,” which we describe in generalized terms and organize in series of continua grouped into three schematic categories: (1) goals; (2) structure; and (3) methods. Points along these continua represent idealized possible design choices. We set them forth briefly here.

GOALS

We begin by presenting differing visions of the goals of dispute resolution institutions. We first contrast the extent to which an institution seeks to settle disputes as opposed to fostering social change among individuals and groups. Then we examine the extent to which the procedural and substantive values an institution brings to bear on dispute resolution are fluid and variable or fixed and predetermined.

Settlement/Change

This continuum examines the emphasis an institution places on resolving the immediate conflict, improving underlying relationships, and stimulating social change, along with some blending of these goals. As an overlay, we also consider the extent to which the institution focuses on disputes among individuals, families and social groups, towards the “individual” end of the spectrum and at times leaning toward the “group” end.

Court-annexed mediation in the United States falls at one end of this continuum and tends to be thought...
of as an example of an institution whose aim is limited to settling the immediate dispute. Yet even here, characterization is complex: mediation can also be seen as a way to improve relationships and reduce resort to the courts in the long term rather than as merely a short-term efficiency measure to encourage settlement and control docket.

Other institutions also focus on conflicts among individuals but aim to resolve interpersonal conflicts in a broader social setting than is typical in the United States. Navajo peace courts and ʻHoʻoponopono, a process of family dispute resolution among native Hawaiians, are dispute resolution models that set interpersonal disputes within a web of familial and community relationships.

Some institutions, while still resolving individual disputes, emphasize social change. Community mediation boards in Nepal and Bangladesh combine individual dispute settlement with attention to remedying some of the cultural and class inequalities affecting women and other marginalized groups.

Institutions that explicitly target group relations as the objects of their intervention similarly face competing choices about settlement versus working for social change. For example, a mediation program in West Midlands, United Kingdom, that intervenes in gang conflict aims only to stop violent behavior and explicitly desists from facilitating any sort of deeper reconciliation.

Of course, many institutions do not fit neatly on these continua because both the individual/group nature of the dispute and settlement/change nature of the intervention represent a blend of the categories we have chosen. Truth and Reconciliation Commissions in South Africa and elsewhere grant amnesty to violent offenders not only in exchange for “truth” provided to individual victims, but also for truth provided to society as a whole. Moreover, scholars debate whether these institutions produce change in the form of individual or collective reconciliation and forgiveness or, less ambitiously but still importantly, the conditions for collective coexistence.

Normative content

This second continuum describing the goals of dispute resolution institutions focuses on the values and norms an institution deploys in reaching an outcome. At one end of the spectrum are institutions with “thin,” or very few, prior procedures and substantive principles. At the other end are institutions with “thick,” or detailed and elaborated procedural directives and substantive rules.

Toward the thin end of the spectrum, Bush and Folger’s model of transformative mediation\(^2\) prescribes only minimal process requirements and is largely agnostic in its view of a “good outcome.” Toward the thick end of the spectrum are community-bound institutions such as Navajo peace courts, the renewed Gacaca courts in post-genocide Rwanda, and many dispute resolution institutions driven by Islamic (shari’a) law that embody highly formalized procedures and apply clear social injunctions and legal precepts for proper resolution, remediation, and social relations.

In the middle of the spectrum, court-annexed mediation in the United States tends to proffer formal procedures—most commonly, linear and stepwise methods of communicating and disputing. At the same time, it allows individual disputants to “self-determine” their own principles for resolution and thus resists institutionalizing any set of thick substantive norms. Other institutions assume a more ad hoc or pragmatic approach to the procedures of their interventions yet apply visions of a “good outcome.” Community mediation in China and, at times, Justices of the Peace in Peru are good examples.

STRUCTURE OF THE INSTITUTION

In examining structural variations among dispute system design institutions, we identified two sets of considerations. Our first continuum examines institutions along dimensions of public/private and geographical spheres of operation and influence. The second continuum describes the mode of decision-making involved in reaching a resolution.

Local/International and Public/Private

At the “government” end of the spectrum, public bodies range from international institutions such as the World Trade Organization dispute resolution mechanism to local task forces. At the “private” end, individual operators often act locally, although dispute resolution initiatives spearheaded by George Mitchell and Jimmy Carter illustrate international efforts led by private individuals. Examples of national institutions include public bodies such as the Community Relations Service—a government agency housed in the U.S. Department of Justice—as well as national nongovernment organizations, which in weak states such as Nepal and Bangladesh play increasingly important roles in providing dispute resolution services to rural communities.

Many institutions blend points along this continuum. For example,
in apartheid South Africa, voluntary associational bodies such as the university-based Centre for Conflict Resolution as well as faith-based and market-based associations played a role in facilitating both regional and national conflict resolution interventions. Community mediation in China is practiced by local community members, yet mediators are also recognized as a government service provided by a welfare state. In Cincinnati, Ohio, civic groups, the federal judiciary and the city government joined with a local expert to try and restore police-community relations in the aftermath of rioting and violence.

The placement of an institution on this continuum is relevant to its source of legitimacy, regulatory authority, and its sphere of influence. On the one hand, direct governmental sponsorship is an important source of regulatory power, as when the Parades Commission—a public dispute settlement body in Northern Ireland—makes a decision about a parade route and the terms and conditions for marching. On the other hand, governmental connections can detract from legitimacy by making it difficult to build trust, hence the provision in the legislation that established the Community Relations Service that prohibits its mediators from communicating with the prosecutorial arm of the Justice Department.

It is important to note that these examples are mostly from countries that enjoy a popular perception of a stable and legitimate state. Institutional dispute system design can itself aim to challenge or supplant state control over dispute resolution, such as Maoist People’s Courts in Nepal or examples of Hezbollah interventions in dispute settlement in Lebanon.

**Mode of decision-making**

This continuum represents a range of stakeholder involvement in and control over the resolution of a conflict. We use “horizontal” to signify participatory choices about resolution performed by those with a stake in the conflict. In contrast, “vertical” indicates that stakeholders receive a resolution from “above” from other stakeholders of higher status or authority. In the West, the horizontal mode tends to be associated with “voluntary” resolutions and the vertical with “coerced” resolutions, although we should remain open to a disassociation between these elements; for example, donor-funded mediation projects in Nepal and Bangladesh apply a good dose of community pressure to achieve consensus-based resolutions.

An important overlay, omitted for simplicity, is that an intervener (i.e., someone from outside the conflict) can be added to the resolution process at any point on this continuum as a facilitator or decision-maker.

At the fully participatory end of the spectrum, one might think of a body in which all have an equal voice that reaches a resolution by consensus. An idealized version of a jury might be an example. There simply is no resolution without consensus; in that event the jury is hung. A little further along the spectrum, a body might proceed with the opportunity for full participation of all its members but make the decision without the requirement of consensus. Majoritarian electoral processes fall into this category. Further along the spectrum, opportunities for participation in the resolution become more limited, often with the decision-making authority delegated to a subset of the stakeholders, such as a committee, or, at the extreme, to an individual, such as the father in a patriarchal family.

Hybrid forms abound. The Parades Commission in Northern Ireland illustrates a structure in which the Commission has the ultimate decision-making authority to resolve disputes about parades but which often devolves power more directly to the stakeholders; in practice, the Commission’s rulings often reflect agreements worked out informally between the antagonists with the help of “authorized officers” acting as mediators.

A horizontal or vertical mode of decision-making, just as the local/international and public/private continuum, affects the institution’s
legitimacy and regulatory authority, with both functional and distributional implications. As just one example, horizontal consensus-based processes may bring a rich diversity of voices to bear on a problem yet be too inefficient for situations in which a decision must be made or must be made promptly. Consensus-based processes may foster popular participation and robust solutions yet may also privilege particular methods of speaking and argumentation that are, for example, rational and dispassionate instead of emotional and narrative-based. Finally, consensus-based processes may encourage the suppression of private desires for the “common good” in ways that foster collective responsibility or, alternatively, as some critics of east-Asian dispute resolution programs argue, that are utilized in the service of maintaining social order for a dominant class. Again, the tradeoffs are complex.

**INSTITUTIONAL METHODS DEPLOYED**

A third set of continua explores the “methods” institutions use in dispute resolution interventions. This category is closely related to the first two sets of continua; methods of operation serve to express and to reinforce an institution’s structure and its goals for conflict resolution. For brevity, we set forth, but do not illustrate, seven methodological categories:

1. Kind of harm that triggers an institutional response
2. Mode of stakeholder participation: individual/aggregate
3. Mode of stakeholder communication
4. Role of third-party interveners
5. Sources of intervener legitimacy and effectiveness
6. Treatment of information, and
7. Enforcement mechanisms.

The points of comparison set forth on all these continua illustrate that institutional design represents a series of contingent normative and functional tradeoffs bound by politics, culture and social organization. In addition, they help broaden and enrich the descriptive terms applied to dispute system design in the United States.

At the level of prescription, comparative analysis also highlights the importance of purposeful design: that careful deliberation about an institution’s values and goals should drive choices among competing design elements. Many of the case examples we studied challenge assumptions about, for example, public versus private associations or individual versus group interests. As a result, points along the continua are in fact less discrete and more unstable than they initially appear. For those interested in design, however, it is precisely this multiplicity of possibilities that create new, intentional opportunities for hybrid institution-building, combining methods, functions and goals in ways unconsidered in the United States.

Of course, it will be impossible to know with any degree of certainty how the cross-pollination of dispute system design elements will take root and adapt in new contexts. Yet the comparative study of dispute resolution institutions across diverse forms of social and political organization may offer predictive insight and, we hope, inspire creativity and innovation.

**ENDNOTES**

1. These continua are adapted from Avy J. Cohen and Ellen E. Drason, Comparative Methods for Dispute System Design (manuscript in progress).

LESSONS LEARNED
Challenges in the export of ADR
BY LUKASZ ROZDEICZER

MANY ORGANIZATIONS SUCH as the World Bank Group, USAID, ABA, CPR and other groups and individual experts—the “Assisting Organizations”3—have been assisting other countries to introduce ADR to their jurisdictions. While some of these attempts have been quite successful, many others have failed. The question arises, therefore, as to whether there are any universal factors determining the success or failure of such projects—and if so, what they are.

Over the past year, I had the pleasure of advising the International Finance Corporation (the World Bank Group) on strategies for introducing mediation into their various international projects. This article presents some of the findings and lessons learned, based on examining those mediation projects, interviewing staff members running such projects and analyzing reports and data on some projects supported by other organizations.2 As the project I participated in involved mainly commercial mediation, my conclusions are based primarily on such cases.2 Also, bear in mind that these experiences should always be viewed through the cultural lens presented in a given country. Still, I believe that the conclusions presented have significant application in other mediation contexts.

Introduction complications

Introducing concepts and the practice of mediation is just the first step in “introducing mediation.” In too many cases, although mediation is introduced—that is, laws are passed, mediation centers are established, mediators are trained and money is spent on public relations campaigns, only a handful of cases are actually referred to mediation and the project ultimately fails. Therefore, from the inception of a project, the true goal should not be merely to “introduce mediation,” but to create sufficient incentives, or increase the recognition of existing incentives, for the stakeholders to use mediation with both short and long perspectives.

The goal must also be to build capacity among local stakeholders so that once the Assisting Organization leaves, the effort is self-sustaining. While it may sound simplistic, this approach proves very challenging in practice. To achieve sustainability, projects must be designed with a focus of aligning and fulfilling the interests and building the capacity of key stakeholders—whether prospective parties, mediators, administrators or the judiciary.

Complexity of planning

Most lawyers and social scientists would agree that different legal systems require different institutions. Yet in practice, ADR concepts are too often automatically exported abroad without a thorough assessment of the legal needs or cultural consequences of such a “copy-and-paste” exercise. Therefore, a detailed assessment of the importing country—its legal framework, cultural characteristics, and primary stakeholders—should be conducted before deciding to implement an ADR system.4

Only after this data is gathered is it possible to plan for the multiple steps necessary to implement the mediation project. Every staff member I interviewed indicated that planning and coordinating these various aspects of a project were far more challenging and time-consuming than they had anticipated. Some noted that the success of the project depended on carefully sequencing the plan to account for tasks that needed to be accomplished simultaneously or in a distinct order. Some of these tasks include: selecting, contacting and coordinating key stakeholders and identifying their roles in the project; planning legislative campaigns; selecting courts associated with the project; establishing a mediation center; conducting public awareness campaigns; training mediators, judges and other stakeholders; creating an evaluation system and evaluating the project; providing a detailed cost estimate for each recommended action and budget implications for consideration; defining development targets that can be monitored to measure the potential impact on introducing each recommended option; cooperating with nongovernmental organizations (NGOs) and other organizations interested in developing ADR.

It is essential to involve the key stakeholders in the planning process as early as possible and to the extent possible. Once involved in the design of the process, they will likely feel the ownership of a project and be more likely to accept and more eagerly execute the underlying plan.

Long-term planning is crucial for success of a project and particularly crucial for attracting good leaders. Business cycles of the Assisting Organization and donors should be synchronized with the needs of stakeholders who want to see a long-term plan, not only annual budgets of certain tasks.

Act like a mediator

While working with the World Bank in introducing ADR and reforming court systems, it struck me that Assisting Organizations actually play the role of mediator and facilitator. An expert or organization helping to introduce mediation should be a nonpartisan third party facilitating negotiation between interested parties with the goal of reaching
an outcome—that is, developing a mediation practice—that will best satisfy their interests.

The essential tasks of such organizations are to:

- listen to the parties or stakeholders
- recognize different interests and incentives, and align them to create value
- manage the process, leaving the ownership of the problem to the stakeholders
- bring value to the table—mostly know-how and financial resources
- teach the mediative approach by serving as examples, and
- do all the above with an eye to creating value for the parties or stakeholders.

All the above goals and roles of a mediator are perfectly aligned with the roles and values of Assisting Organizations, particularly in getting the most value for local stakeholders. Too often, however, these basic tasks are not apparent to Assisting Organizations or other experts, many of whom are tempted to “export through imposing universal standards” rather than to “export through listening.”

Like mediators, Assisting Organizations come to the table with knowledge of the process—and as good mediators, they ought to let parties decide what solution works best for them. After all, the mediator will leave within a couple of months or years, while the local parties will remain with their own problems in their own country.

Creating demand

As indicated earlier, quantitative data on ADR in developing countries is difficult to find. Even where it exists, it’s often hard to compare, since various projects measure different impacts or outcomes and the multitude of legal and cultural criteria make such comparisons imprecise and often inconclusive.3

The table above compares three projects from the same region and legal culture—each established roughly at the same time, but each having a unique design. Albania hosted a private mediation and arbitration center that had no links to the courts. Bosnia and Herzegovina created a court-connected mediation center that had a cooperative agreement with a local court. In Serbia and Montenegro, a court-annexed mediation program was run primarily by judges who also served as mediators. Although mediators in Bosnia and Serbia went through the same mediation training, Bosnian mediators developed more facilitative style than judges in Serbia, who settled 89% of the cases referred. The projects in Bosnia and Serbia were led by International Finance Corporation (Private Enterprise Partnership for Southeast Europe) and were both successful and well documented.

Only in Bosnia was the satisfaction of the parties measured by a post-mediation survey—revealing a very high level satisfaction with the mediation process. Ninety-eight percent of the parties who went through mediation there reported they were satisfied or highly satisfied and would recommend the process to others. In Serbia, Albania and most other counties, there is strong anecdotal evidence of high levels of satisfaction among parties as well as high marks given to mediators by mediation trainers and supervisors, which together suggest the existence of an effective cadre of mediators.

Why potential customers don’t buy

Surprisingly, even though those who experienced mediation overwhelmingly appreciated it and would recommend it to others—98 percent in Bosnia—the vast majority did not see the need or have the desire to use it. In Bosnia, for example, the parties agreed to participate in mediation in only 13 percent of cases pre-selected by judges—and only 8 percent of the cases referred to mediation by judges were settled. Similarly, in many counties where private mediation services were established—for example, Albania, Poland, West Bank, Gaza—there was very little interest in mediation and very few cases were mediated. Mediation centers that were able to attract cases were either connected to the court system or cases were referred from local chambers of commerce. Chamber of commerce referrals are particularly evident in many Latin American countries, where chambers of commerce tend to be very strong and have almost monopolistic status—including projects in Argentina, Ecuador and Chile.

Generally, I found that mediation projects achieved a high quality: mediators were well trained, centers worked well and the parties were generally satisfied with the services.

<table>
<thead>
<tr>
<th>CASES HANDLED IN THREE PROJECTS IN SOUTHEASTERN EUROPE</th>
<th>Albania (Private)</th>
<th>Bosnia &amp; Herzegovina (Court-connected)</th>
<th>Serbia &amp; Montenegro (Court-annexed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases referred</td>
<td>0</td>
<td>2,632</td>
<td>N/A</td>
</tr>
<tr>
<td>Mediations held</td>
<td>3</td>
<td>345 (13%)</td>
<td>1,289</td>
</tr>
<tr>
<td>Cases settled</td>
<td>2 (66%)</td>
<td>213 (62%)</td>
<td>1,154 (89%)</td>
</tr>
<tr>
<td>Satisfaction</td>
<td>N/A</td>
<td>98%</td>
<td>N/A</td>
</tr>
</tbody>
</table>
The biggest problem in most countries was low demand—or rather low perceived demand—for mediation services. Thus, in designing and executing a project, more attention and resources should be directed at creating greater incentives to participate in mediation, selecting appropriate cases, informing parties of potential benefits and limited risks of mediation, and other approaches that might increase demand for mediation.

Assuming court connections

Since the low volume of cases represents the greatest challenge for many mediation programs, establishing court-connected mediation systems is more efficient than supporting private mediation providers. In the first place, court-connected systems permit admitting cases both from within and outside of the court system. Second, a court can most effectively provide a steady flow of cases. A fairly predictable inflow of cases is very important at the beginning of a project for many reasons, including the needs to: supply examples of successful cases, providing financial support for the nascent mediation center, provide practice opportunities for mediators and test the law.

Finally, it is crucial to remember that introducing mediation is not only a goal itself, but a means to achieving other goals for the entire justice system—many of which would not be possible with private mediation centers, such as: reducing court backlogs, increasing the level of in-court settlements, introducing change to civil procedure and legal culture and teaching judges some of the elements of case management.

Some disadvantages or difficulties in establishing court-connected or court-annexed mediation centers include necessary approval and support of the judges, parties’ perceptions that mediation is a part of the court system and litigation process, and geographical limitations to locales where courts exist.

Court-connected mediation will usually be more beneficial than court-annexed mediation due to the ability to admit cases from outside the court system and to operate with a less rigid legal framework. Court-connected mediation easily permits establishing centers and fostering competition among them. On the other hand, in some cases, judges may prefer to have mediation entirely under their control—as, for example, in Uganda, Serbia, Montenegro and Slovakia. In such cases, court-annexed mediation may be the only viable option.

Creating strong stakeholders

Both my interviews and archival research point to the existence of strong local partners as the most important factor in determining the success of the project. Creating a strong stakeholder or leader group is not only a means to introducing mediation, but also a prerequisite for achieving its long-term sustainability in any country. Therefore, one of the most important tasks of an Assisting Organization is to identify the key stakeholders and help them increase their capacity to support mediation—and particularly to attract cases.

All groups involved in a project’s matter, but some will be more important than others, and one of the crucial decisions at the early stage of the project is choosing the key stakeholders.

In many countries, where creating demand may be harder than achieving fairly high quality mediation services, judges will often be one of such key groups. Judges play a crucial role in the court-connected and court-annexed projects through:

- selecting appropriate cases for mediation
- explaining mediation to the parties
- encouraging parties to participate, and
- enforcing settlement agreements.

Unless there are other ways to channel disputes to mediation, it hardly seems possible to mediate a significant number of cases without the support of the judiciary. In many countries, it is particularly important to get the support of the president of the cooperating court, who can encourage other justices and effectively has veto power. For example, in Slovenia, the mediation project lacked the support of the Ministry of Justice, the bar and almost every other important stakeholder. However, the president of one of the courts had a vision, and was able to allocate his own budget and time to making the project work. He also encouraged judges in his court to pursue mediation. In spite of the lack of support and absence of laws on mediation, the president was able to collaborate with other judges to create a successful mediation practice.

Leading with pilots

One of the key strategic questions faced by incipient mediation projects is whether to test the waters with a pilot project or to roll out a national effort from the start. My research suggests that starting with the pilot project is usually preferable. For even a single pilot project, establishing a mediation center and performing all the associated tasks described above, coupled with additional activities at the national level—including gathering national champions and support and passing the law—is a formidable challenge. A pilot approach should also limit the risks and costs of some unavoidable mistakes and allow appropriate focus on both the local and national levels.

Moreover, pilot projects permit:

- training mediators and trainers gradually so that experienced mediators from the pilot project may become mentors and trainers to subsequent “generations” and locations
- selecting and focusing on a court with a higher probability of producing a “success story”
- establishing high standards in a single jurisdiction as a model for future projects
learning from mistakes and constantly improving design and execution, and

- rolling out slowly depending on developments, while also capitalizing on the resources and experiences associated with the pilot project.

**Awareness and evaluation**

The wheels of the project must be greased by systematic, ongoing evaluation and public awareness campaigning. Although these actions are directed at all stakeholders groups, the intended, key messages they provide for each group may differ. It is therefore crucial to identify key target audiences, the message each needs to hear—and whether data from the evaluation process can support this message. An example of such identification is presented in the table below.

### Exporting through listening

Data on mediation is often confusing and controversial—even in such well-researched and well-funded contexts as the American judicial system. To advance our knowledge of importing and exporting ADR, we need more data from other countries and cultures. We also need not only to “export through speaking,” but also to “export through listening.”

**ENDNOTES**

1. For the purpose of this article, “Assisting Organization” refers to any institution or expert involved in advising or coordinating projects on introducing mediation to a foreign jurisdiction. Typically, an Assisting Organization provides mediation expertise, funds and sometimes also coordinates introducing mediation.

2. There is a significant problem with assessing and comparing these projects, as many have no systematic way of measuring impact and outcome.

3. A more comprehensive account can be found in the “Mediation Guide,” forthcoming as a World Bank publication.

4. Some of the research areas include: existing laws, practice and culture of dispute resolution, perceived need of mediation, experience with traditional and contemporary ADR institutions in the country and the region, key stakeholders, NGOs and international organizations, and sustainable financing.

5. Various projects focus on different questions and measure different outcomes. Some projects evaluate different kinds of ADR processes without really distinguishing between them. Another problem is the variety of legal areas in which mediation can be used: commercial, divorce, criminal, and so on.

6. The most obvious choices include: the Ministry of Justice, judges, and particularly presidents of the courts, companies and business community—or other groups of potential clients, chamber of commerce and other business organizations, bar associations, mediators and the existing ADR community, Ministry of Finance (particularly if government funds are to be involved), NGOs and international organizations interested in ADR and the project and academic representatives.

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**Target Audiences, Data Required, Desired Messages**

<table>
<thead>
<tr>
<th>STAKEHOLDERS</th>
<th>DATA TO BE COLLECTED IN EVALUATION</th>
<th>DESIRED MESSAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediators</td>
<td>Feedback on mediator’s performance. Effectiveness of mediation.</td>
<td>Mediation is working. Mediating is a noble thing to do. We are doing a good job.</td>
</tr>
<tr>
<td>Judges</td>
<td>Does mediation save the time and funds of the court?</td>
<td>Mediation is worth supporting. It reduces judges’ workload.</td>
</tr>
<tr>
<td>Counsel and other legal professionals</td>
<td>Is mediation working for the parties? Will mediation reduce my income?</td>
<td>Mediation is not threatening to my profession. Clients appreciate and give more work to lawyers who offer mediation.</td>
</tr>
<tr>
<td>Government officials, lawmakers</td>
<td>Effectiveness of mediation. Does mediation save time and funds of the court system?</td>
<td>Mediation is worth supporting. It improved the justice system and can lead to further reforms.</td>
</tr>
<tr>
<td>Business community and companies, end users</td>
<td>Can mediation save funds and time of companies, and lead to value-creating resolution?</td>
<td>Mediation saves funds and time of companies and may lead to value-creating resolution.</td>
</tr>
<tr>
<td>Internal audiences of assisting organization</td>
<td>What are quantitative and qualitative results of our work? What works and what should be improved?</td>
<td>What we do is important and worth supporting. Some elements of the mediation project work well, while others can be improved.</td>
</tr>
<tr>
<td>Donors</td>
<td>How are funds spent, and what is their impact? How does this accomplish donors’ objectives?</td>
<td>Our funds are well spent, and the project achieves our objectives.</td>
</tr>
<tr>
<td>Media</td>
<td>Is mediation effective for the parties and the legal system? Examples of successful cases.</td>
<td>Mediation is hot and worth the media’s interest.</td>
</tr>
</tbody>
</table>
The Wrong Model, Again
Why the devil is not in the details
of the New Model Standards of Conduct for Mediators

BY MICHAEL L. MOFFITT

The Model Standards of Conduct for Mediators have been revived. To be certain, all of us who care about mediation should be interested in finding ways to promote high-quality, ethical practices. The current version of the Model Standards, however, is more harmful than helpful.

A joint committee of the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution recently redrafted the ethical framework originally crafted and promulgated in 1994. As with the earlier version of the Model Standards, the 2005 version’s explicit aim is to guide mediators’ conduct, to inform mediation parties and to promote public confidence in mediation. Wayne Thorpe and Susan Yates provided a comprehensive survey of the new Model Standards in the Winter 2006 issue of Dispute Resolution Magazine.

I offer this critique with great respect for those who drafted the Revised Model Standards, and in particular for Professor Stulberg, whose accompanying article makes it clear that he and I disagree on at least some aspects of how best to assure the quality of mediation services. I sincerely hope that we in the mediation community will continue our conversations about mediators’ standards of practice, with the shared aim of improving the articulation of mediation’s foundational ethics.

It would be easy to pick at some of the details of the Model Standards because they form a complex document, drafted by a committee of talented but disparate members. I am confident that most practitioners would look at the Model Standards and find at least a few things with which to quibble.

But this is a case in which the devil is not in the details. Instead, the problem with the Model Standards is the very framework they adopt as their basis. The template for the Model Standards is so fundamentally flawed that no matter how the drafters filled it in, the final product was bound to be problematic.

The 2005 version of the Model Standards not only fails to correct the mistakes of the first effort, it also compounds those errors by inviting the establishment of a dangerous standard of practice. I hope that at some point, one or more of the sponsoring organizations will reconsider its support for this document. After careful consideration, I reluctantly conclude that it would be better for practitioners, the Model Standards not only fails to correct the mistakes of the first effort, it also compounds those errors by inviting the establishment of a dangerous standard of practice. I hope that at some point, one or more of the sponsoring organizations will reconsider its support for this document. After careful consideration, I reluctantly conclude that it would be better for mediation to be a practice with no articulation of ethical principles than to have this document be perceived as our shared statement of ethical parameters.

Problem #1: The Model Standards ignore ethical tensions.

Ironically, for a document that purports to provide ethical guidelines for practitioners, the Model Standards ignore the very prospect of any ethical tensions in the practice of mediation. Instead, they merely set out a series of absolute, hortative prescriptions, such as the following: “Mediators shall conduct a mediation based on the principle of party self-determination.” “A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.” “A mediator shall conduct a mediation in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.” And the list goes on.

Most mediators would agree that an ideal mediation would include each of the values articulated above. An ideal mediation would be one in which a mediator protected participants’ ability to decide for themselves, did so in a way that appeared impartial and promoted the appropriate participation of every interested party.

But the reality of mediation practice makes these ideals just that—ideals. Complex cases and the reality of human interaction produce instances in which ethical tensions arise, circumstances in which two or more competing values are pitted against one another. It is no ethical tension for a mediator to sit and wonder, “Should I protect party self-determination?” The answer is clearly yes. We need no standards of practice to tell us that.

We need ethical guidelines precisely when ethical challenges arise. And a case produces an ethical tension when a mediator’s action to support one value may risk some other value. In other words, ethical dilemmas arise when there is some acknowledged tension between competing values. If I value self-determination and informed consent, I should be concerned that the plaintiff appears to be settling this claim in complete ignorance of the relief the law would. And yet if I value the appearance of impartiality, I cannot intervene in any way that would appear to have me favoring the plaintiff’s interests over those of the defendant. It is no answer to say that I should advise the plaintiff to seek an attorney’s help, because the very act of doing so, particularly if it comes precisely at the moment just before settlement, will reasonably
be perceived by the defendant as conduct favoring the plaintiff. That is an ethical tension—a real world occurrence in which two or more of the important values may not be perfectly preserved simultaneously. And the practice of mediation is filled with such moments.

The first failing of the Model Standards is that their structure suggests that such tensions do not arise. Within the entirety of the Model Standards, in only one instance do they acknowledge even the possibility of a tension—between “informed consent” and “quality of the process.” Instead, the standards tell us, in absolute terms, that we who mediate are simply to uphold every one of these standards at an absolute level. According to the Model Standards, mediators shall maintain impartiality and self-determination and procedural fairness and mutual respect, to name a few. “Just do it” is the unarticulated guidance the standards offer mediators. As sources of insight into the ethical realities of mediation, therefore, the standards fall woefully short.

I can imagine a set of practice descriptions that would make important ethical tensions explicit. The community of mediators could articulate a set of values it considers fundamental to the integrity of mediation practice, and then acknowledge the circumstances in which some of these values may come into tension in practice. The community could demand a certain minimum fidelity to these principles, without suggesting that a mediator can necessarily perfectly adhere to these aspirational goals at all times. Following the adoption of the first set of Model Standards of Practice in 1994, I co-authored a law review article suggesting that the original version of the Model Standards failed for this very reason—because they failed to acknowledge or deal with ethical tensions.

If I am correct in my assertion that practicing mediators experience circumstances in which two or more of the values articulated in the Model Standards come into tension, then the structure of the Model Standards is unhelpful. To assert simply that mediators must adhere absolutely to every value is misleading and unhelpful. As a description of the ethical landscape for mediators, therefore, the Model Standards fall short.

**Problem #2: The Model Standards create no hierarchy of ethical concerns, providing no guidance to practitioners.**

I am not suggesting that idealized principles have no possible role in ethical standards. I could imagine a very helpful document laying out a handful of aspirational standards—but only on one of two conditions. Either the document must explicitly name the standards as aspirational or it must set out a hierarchy among the standards it articulates. The Model Standards do neither.

In lawyers’ ethics, we see a model of hierarchical values. Lawyers have a duty to protect a client’s interests and confidences. They owe a duty of candor to the court. They have a duty to provide pro bono legal services to those who cannot afford to pay. In an idealized setting, an attorney can accomplish each of these to an absolute level. But when push comes to shove, in the moment of greatest ethical tension, attorneys’ ethical codes provide guidance about which of these ideals trumps. An attorney’s duty to provide competent service to existing clients trumps the duty to provide pro bono services. And an attorney’s duty of candor to the court trumps even the duty of client loyalty.4

Perhaps the Model Standards could maintain their current structure if the sponsoring organizations were willing to articulate an overarching ethical norm—a single value that would trump others. But that’s not what the Model Standards include—probably because there is nothing close to a consensus among mediation practitioners about which values should be seen as highest. Is impartiality more important than party self-determination? More important than informed consent? More important than “procedural fairness”? Lawyers may be able to say that they are foremost officers of the court. Doctors may be able to say that they first ought to do no harm. Mediators, at the moment at least, have yet to articulate such an overarching ethic.

The Model Standards structure themselves in a way that demands some sort of hierarchy, but they provide none. In the one place where they acknowledge the possibility of a tension, the Model Standards simply say that “a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.” What guidance can we take from this? Not much. Only that, apparently, neither of these two values stands reliably above the other in terms of a hierarchy of ethical considerations for mediators. As a result, mediators must balance them. As a source of guidance, therefore, the Model Standards fall short.

**Problem #3: Despite these shortcomings, the Model Standards purport to establish a standard of practice.**

The most significant addition to the latest version of the Model Standards is probably also its most troublesome feature. Buried at the bottom of a new section inconspicuously labeled “Note on Construction” sits this paragraph:

_These Standards, unless and until adopted by a court or other regulatory authority, do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators._

What a casual reader may miss in the standards is that they are no longer simply a collection of aspirations. The very terms of the standards seem to invite others to view them as establishing a standard of care—or at the very least do not discourage others.
from reading them that way.

Why does this matter? In short, it matters because it signals the prospect that these flawed standards may be used as the basis of a malpractice action against a mediator.

I have spent much of the past several years examining the question of mediator misbehavior and the prospect of mediator liability. Part of the reason we see so few successful judgments against mediators for malpractice is that mediation practices are so varied that it is difficult for a prospective plaintiff to demonstrate that a mediator has breached some noncontractual duty. In other words, part of the reason mediators have enjoyed de facto immunity from lawsuits is that it is difficult to say which mediator behaviors have fallen below the standard of care reasonably expected within the community of mediation practitioners.

As I have articulated in other articles, I think malpractice liability may be an important and underused vehicle for curtailing truly awful mediator misbehavior. But exposing mediators to liability for breaching unattainable standards makes no sense. In short, the Model Standards set up a fictitious standard of care—one that I would expect responsible practicing mediators to oppose.

I wonder how practicing mediators would feel if the Model Standards were articulated differently (but to the same effect). As a mental exercise, when you reread the Model Standards, in lieu of the phrase “A mediator shall,” substitute the phrase, “It shall be professional misconduct tantamount to negligence for a mediator not to…” Mediators are negligent if they conduct a mediation in which the basis is not self-determination, but potential at the expense of perceived impartiality? Should I make a suggestion I genuinely believe will move the discussions forward, even though I think that one side may be offended at my suggestion? In these situations, mediators will find no guidance from the Model Standards. Instead, what they will find is that whatever they decide, they may face the prospect of liability for having failed to live up to one of the multiple, absolute, unattainable ideals articulated as ethical baselines.

Problem #4: The Model Standards are descriptively inaccurate, prescriptively inadequate and unjustifiably expansive.

The Model Standards could have been helpful. They could have helped to articulate the circumstances in which various of mediation’s primary values come into tension with one another. But that’s not what the Model Standards do. Instead, they treat mediation ethics as if they were simply an exercise in good care—as though mediators who behave well never see these values in tension.

The Model Standards could have taken a first step at articulating an overarching value for mediation or a hierarchy of values. But that’s not what the Model Standards do. Instead, they treat each of the many values that make up some visions of mediation as an absolute, inviolate, co-equal principle—providing no guidance to those who feel they are forced to choose.

The Model Standards could have been careful to describe the ideals they articulate as aspirational, and therefore, not as standards of care. But that’s not what the Model Standards do. Instead, they explicitly invite others to consider their poorly articulated guidelines as establishing a standard of care for liability purposes. The Model Standards are no model of how mediators’ ethics should be conceived.

ENDNOTES

1 For a current version of the Model Standards of Conduct for Mediators, see www.abanet.org/dispute.


4 Compare Model Rules of Professional Responsibility 1.1, 1.6, 3.3, and 6.1.

The Model Standards of Conduct
A reply to Professor Moffitt

BY JOSEPH B. STULBERG

The adoption of the Model Standards of Conduct for Mediators (September 2005) signals an important development in the dispute resolution field. Promoting their broad-based understanding is a significant, continuing responsibility of their sponsoring organizations and those involved in their development. In that spirit, I welcome the opportunity to respond to Professor Michael Moffitt’s provocative critique and rejection of the Model Standards.

Professor Moffitt makes three central claims. He asserts that the Model Standards (a) erroneously suggest that tensions among the standards do not arise; (b) fail to articulate an overarching value for mediation or a hierarchy of values, thereby providing no definitive guidance to practitioners; and (c) disserve practitioners by suggesting the Model Standards establish a standard of care on which someone could predicate mediator liability, when they are, according to Moffitt, “unattainable standards” with which a practitioner could not comply. Those claims are both descriptively inaccurate and conceptually unpersuasive; I hope that by showing why that is so, we gain an enriched understanding of the Model Standards.

Interplay among the standards

Professor Moffitt believes that for the Model Standards to provide guidance in their current structure, they need two features that he claims are absent: (1) They must acknowledge that ethical tensions for mediators arise when two or more values of the mediation process conflict, and (2) Unless merely aspirational in purpose, the Model Standards must evidence a hierarchy among them, thereby crystallizing “an overarching ethical norm—a single value that would trump others.”

Professor Moffitt’s first claim is wrong descriptively. As for his second claim, the Model Standards do identify a hierarchy among some standards, but do not embrace his suggestion that there is one single value (or standard) that trumps all others. By not embracing Professor Moffitt’s call for a “single value that trumps all others,” the Model Standards take the more desirable conceptual approach.

The Model Standards recognize the possibility of conflict among standards in multiple areas and suggest how those conflicts should be handled. Professor Moffitt claims that the drafters view each standard as “an absolute, inviolate, co-equal principle—providing no guidance to those who feel they are forced to choose.” That claim is importantly wrong—the drafters were much more nuanced—and the following provisions are illustrative. After each example I explain how a practicing mediator might interpret the language.

Standard III: Conflicts of Interest

(E) If a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

Mediator’s Response: “My obligation to be impartial, set out in Standard II, and my obligation to conduct a quality mediation process, set out in Standard VI, trump my duty to promote party self-determination (Standard I(A)) as to mediator selection.”

Standard IV. Competence

(A) A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectation of the parties.

(B) If a mediator, during the course of a mediation, determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including but not limited to, withdrawing or requesting appropriate assistance.

Mediator’s Response: “My obligation is to mediate only if I have the competence to do so. Even if the parties believe I am competent (Standard IV (A)), I may realize that I am not (Standard IV (B)). In that instance, (B) takes priority over (A), and I must take some action—bring in a co-mediator or withdraw—to address the matter.”

Standard VI. Quality of the Process

(A)/(5) [A] mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Mediator’s Response: “If a party or counsel ask me for my assessment of the law governing a contested matter, I can respect that exercise of party self-determination (Standard I(A)) and, if qualified, provide that information (Standard VI(A)(5)), but I can do so only if I can remain impartial (Standard II(B)), so Standard II takes priority.”

Standard VIII. Fees and Other Charges

VIII (B)(2): While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee ar-

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rangement to adversely impact the mediator’s ability to conduct a mediation in an impartial manner.

Mediator’s Response: “If the plaintiff contributes nothing to the payment of my fee and the defendant pays the entire fee, that is acceptable (Standard VIII (B) (2)) as long as it does not undermine my ability to conduct the mediation impartially (Standard II (B)). In assessing the appropriate balance, Standard II (B) trumps.”

The possibility of multiple answers

Professor Moffitt lauds documents such as the lawyers’ Model Rules of Professional Responsibility because he claims that they provide clear, unequivocal answers. “When push comes to shove, in the moment of greatest ethical tension, attorneys’ ethical codes provide guidance about which of these ideals trumps.”

He criticizes the Model Standards for not providing similar certainty, given that the standards are designed to guide mediator conduct. While there is much to commend the approach Professor Moffitt endorses, and it is one that lawyers particularly might find appealing, it strikes me there is ample room for differences of opinion regarding the degree of guidance a governing document ought to provide.

In my judgment, an approach that embraces a desire for certainty, even if conceptually plausible (which I do not believe it is), is purchased at the cost of underestimating and disregarding the richness and unpredictability of the human experience, including mediation sessions. In his earlier work criticizing the original Model Standards, Professor Moffitt offers a framework for analyzing mediator ethical dilemmas and walks through an example where considerations of self-determination, impartiality and informed consent clash. That is a wonderful exercise—for a classroom or practitioner discussion. Such an approach does not translate into a viable “Code;” more importantly, it does not negate the value of articulating standards of practice.

Yes, one consequence of providing guidance at a more general level than the exhaustive, answer-book approach that Professor Moffitt appears to endorse is that it leaves open the possibility that there might be two or more compelling interpretations that generate different results when deciding how best to resolve a given dilemma. It does not follow from that, however, that “any rationalization” is compelling. I think that this general mode of guidance and interpretation is more desirable and appropriate—and akin to how we use and interpret the U.S. Constitution, for example—than is the call for a mechanical application of one supreme value. Does that mean that the Model Standards might be “ambiguous” on various questions? Yes. But that certainly does not entail that the standards, because of ambiguity in the hard case, are “structurally deficient.”

Performance standards

The Model Standards reflect important, considerable changes in format from the 1994 version. One significant structural change is to target the statement and application of the standards to mediators. Another change is the addition of a statement in the introductory paragraphs that explicitly indicates that a practicing mediator should be aware that some court or regulatory authority might look to these standards as establishing a standard of care for mediators.

Professor Moffitt criticizes the latter language because he asserts that the Model Standards lack sufficient clarity to guide mediator conduct.

I do not believe that Professor Moffitt’s substantive critique is accurate—i.e. that the standards are so “incoherent” or non-sensible that an individual could not comply with them and that, therefore, predating liability on such standards violates the morally important ought-implies-can thesis. But, more to the point, Professor Moffitt’s criticism is misguided, for the question this introductory language addresses is how other people or agencies, not mediators, might view the Model Standards. During Committee deliberations, there was evidence that a substantial number of court systems in various states had adopted, either verbatim or in substantial measure, the 1994 version as governing norms for their programs. So, as a matter of alerting colleagues to potential developments, this new paragraph is important empirically.

I applaud Professor Moffitt for constructively suggesting alternative ways to approach the challenges that confronted the drafters. However, I personally find each of his proposed options unhelpful for guiding mediator conduct and unpersuasive conceptually. Professor Moffitt reluctantly concludes that mediation practice is better off without an articulation of principles than it is having the Model Standards perceived as a shared statement of ethical parameters. I could not disagree more.

ENDNOTES

1 The author served as the Reporter to the Joint Committee that developed the Model Standards of Conduct for Mediators (September 2005). The views expressed here represent those of the author and do not constitute an official statement of the Committee.

2 Michael L. Moffitt, The Wrong Model, Again: Why the devil is not in the details of the New Model Standards of Conduct for Mediators, Disr. Resol., Mag., 31 (Spring 2006).

3 The Model Standards also recognize that the application of a standard may be affected by sources other than competing standards; these would include applicable law, court rules, regulations, and other applicable professional rules. See “Note on Construction,” ¶ 5.

4 Moffitt, supra note 2.

5 Moffitt, supra note 2.


8 See “Note on Construction,” ¶ 6.

9 See Reporter Notes (Sept. 9, 2005), n.2, and research materials on file with Author.
U.S. Supreme Court upholds key arbitration doctrine

The U.S. Supreme Court in February reaffirmed the arbitration doctrine of separability, and extended its application from federal to state courts, a decision that drew a mixed early reaction from the arbitration community.

Under the doctrine, announced in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), arbitration clauses are to be treated as separate contracts under the Federal Arbitration Act, and arguments that a contract including an arbitration clause is unenforceable are to be decided by the arbitrator.

Several states had carved out an exception to the doctrine, holding that it only applied to contracts that were “voidable” under state law, such as those induced by fraud, but did not apply to claims that the contracts were void as a matter of state law, such as illegal contracts.

But the Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 163 L. Ed. 2d 1038, rejected that argument in a 7-1 vote, reversing a Florida Supreme Court decision that refused to enforce an arbitration provision in a payday loan contract because the contract was void as a violation of state usury law.

“*Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration proceedings,” Justice Antonin Scalia wrote for the Court. “Regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”

Paul Bland, a staff attorney for Trial Lawyers for Public Justice who served as lead counsel for Cardegna before the Supreme Court, suggested that practical implications, such as concerns about differing state and federal laws leading to forum-shopping by those hoping to challenge arbitration clauses, help to explain the way the Court decided.

“I think the business community did a good job of convincing the Court to look at this as sort of a general referendum of whether arbitration is a good idea, rather than as a question of what do the words of this particular statute mean as applied to this specific case,” Bland said.

Bland noted that the Court’s decision is narrow but could have an effect on future challenges to arbitration agreements. Richard Chernick, managing director of JAMS and former chair of the ABA Section of Dispute Resolution, agreed, saying the Court limited one avenue of appeal by rejecting the distinction between void and voidable contracts.

“It makes the arbitration process more reliable,” Chernick said. “You can define what you want in your agreement and have confidence that a court will follow that and compel arbitration if the other side is not willing to submit.”

However, the Supreme Court left some areas regarding void contracts open for future consideration. Scalia’s opinion only addressed contracts later deemed void for illegality not aimed at the arbitration agreement itself, such as the usury alleged in this case, said Amy Schmitz, a professor at the University of Colorado School of Law who teaches commercial arbitration.

“If you are arguing that a contract is void because it never really existed, because it was a forgery or because a party lacked the mental capacity to agree, the first footnote in the opinion indicates that these questions would still be for a court to decide,” Schmitz said. “Then you are challenging not only the underlying contract, but also the arbitration agreement itself.”

Bland expressed disappointment that the court was not more respectful of state law.

“*Prima Paint* was a fairly explicit discussion of the sections of the (FAA) that don’t relate to state courts, so the court had to go back and reread, and rewrite, *Prima Paint* as if it came out of Section 2, which is a tricky affair,” Bland said. “The language the Court had focused on in *Prima Paint* just isn’t in Section 2. *Southland* was about Section 2.”

Section 2 of the FAA, in which Congress established a national policy favoring the enforcement of arbitration agreements, was held to apply to the states in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a decision that has long drawn Scalia’s ire. In the 1995 case, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, Scalia wrote in his dissent that he would respect *Southland* as precedent, but would also “stand ready to join four other Justices in overruling it.”

Stephen Hayford, an arbitrator and professor of business law at Indiana University’s Kelley School of Business, said the fact that Scalia wrote the majority opinion is significant.

“He saw no ambiguity in *Prima Paint*, and he believed that the rule of *Southland* is black-letter law,” Hayford said. “*Buckeye* demonstrates that he meant what he said in *Terminix*. I also think it’s significant that only Clarence Thomas remains on the outside of this very consistent and established body of preemptive federal law strongly favoring otherwise enforceable, valid commercial arbitration agreements.”

Thomas wrote a brief dissent in *Buckeye* arguing that *Southland* was wrongly decided.

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Class arbitration bans face fights in state high courts

The high courts of Washington and New Jersey are considering whether arbitration clauses that ban class actions in consumer cases are unconscionable, while California’s Supreme Court may hear a similar challenge in the employment context.

In Washington, attorneys challenging class action bans in Scott v. Cingular Wireless, No. 77406-4, argued in February that a pair of 2004 decisions by the state’s highest court should render class action waivers unenforceable because they are one-sided or otherwise unconscionable. In Scott, the trial court ordered the parties to arbitration after plaintiffs filed a class action seeking to remedy alleged overcharges by Cingular.

The New Jersey case, Muhammad v. County Bank of Rehoboth Beach, No. 58,430, stems from an attempt to file a class action suit against a payday loan company that charged more than 600 percent interest on a loan, which the plaintiffs claim violates state usury laws. The loan agreement included a mandatory arbitration clause that banned class actions.

“This case is part of a dangerous trend where companies are seeking to insulate themselves from the law by sticking class action bans in their form customer contracts,” said Michael Quirk, staff attorney for Trial Lawyers for Public Justice, who argued the case on appeal in February for Muhammad. “This effectively gives companies a free pass out of New Jersey’s consumer protection laws.”

Less than a year after ruling in Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005), that arbitration clauses that bar class actions are unconscionable if consumers have no opportunity to reject them and if the potential claims involve individually small dollar amounts, the California Supreme Court is being asked to extend a similar rule to employment cases.

Attorneys for Circuit City employees who challenged a mandatory arbitration clause in their employment contracts say they plan to appeal the 2nd District Court of Appeal ruling in Gentry v. Superior Court, 135 Cal. App. 4th 944 (2006). The appeal court held in January that the class-action ban in the arbitration clause was neither procedurally nor substantively unconscionable, particularly because it was not an adhesion contract and because the damages in the case had the potential to be substantially large.

Survey finds equal employment opportunity officers prefer mandatory mediation

A survey of federal equal employment opportunity and civil rights executives found that agencies overwhelmingly support making ADR mandatory for management if a complainant requests it to resolve a discrimination complaint.

Jorge Ponce, co-chair of the Council of Federal EEO and Civil Rights Executives, said the survey was conducted to help make the Equal Employment Opportunity Commission aware of some of the changes that equal employment opportunity professionals say they need to decrease the time it takes to process EEO complaints at the agency level.

“The members of the executive board of the council thought it would be very helpful if we gauged the council members on the issues regarding their views on reforming the current discrimination complaints process,” Ponce said.

Thirty-nine federal agencies, including 11 cabinet-level agencies, participated in the survey. In the section on ADR, 97 percent of respondents thought that ADR should be mandatory for management if requested by a complainant. A smaller majority of respondents, 58 percent, said the EEOC should mandate ADR at the hearing stage of a complaint.

As is the case in most federal agencies, the ADR programs in the EEOC focus on mediation, Ponce said.

The survey, which also included several questions about how the EEOC should handle dismissal of discrimination claims, was released in January and posted on the council’s Web site (www.fedcivilrights.org).

Utah legislature passes Uniform Mediation Act

Utah is on track to become the seventh state to pass a form of the Uniform Mediation Act.

A bill to enact the Utah Uniform Mediation Act passed both houses of the legislature in February and awaited the governor’s signature in early March. The bill was introduced by Sen. Lyle Hillyard, one of Utah’s commissioners on the National Conference of Commissioners of Uniform State Laws, which drafted the Uniform Arbitration Act in 2001.

Senate Bill 61, however, differs from the uniform act in a few areas. For example, the bill adds a neutrality requirement in the definition of mediator, which would define mediator as “an individual who is neutral and conducts a mediation.”

The bill also would adopt the changes that NC-USL made to the UMA in 2003, which include provisions of the Model Law on International Commercial Conciliation that would apply to disputes regarding international commercial disputes.

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New Jersey appeals court upholds privilege in mediation

Mediation confidentiality in New Jersey received further support in January after a state appeals court held that a mediator should not have been ordered to testify in a hearing about a divorce agreement.

Judge Robert A. Fall, writing for the New Jersey Superior Court’s Appellate Division in Lehr v. Afflitto, 382 N.J. Super. 376, called the subpoenaing of mediator Sanford Kahan “troubling.”

Kahan testified about whether an agreement was reached between the parties as a result of a pair of mediation sessions. His letter summarizing the areas of agreement, as well as three unresolved areas including the amount of child support, was also introduced into evidence in a plenary hearing.

Fall referenced the New Jersey Supreme Court’s holding last year in State v. Williams, 184 N.J. 432, a criminal case in which the court established the heightened importance of confidentiality in the mediation process.

“Underpinning the success of mediation in our court system is the assurance that what is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the need for disclosure is so great that it substantially outweighs the need for confidentiality,” Fall wrote.

The Appellate Division held that the confidentiality privilege must be “expressly waived by all parties to the mediation” under New Jersey law, and it further said that the mediator’s privilege not to testify must also be “expressly waived.” In this case, Kahan had told the parties before both mediation sessions that the sessions were confidential and without prejudice, and no party was found to have expressly waived the privilege.

Automatic stay in bankruptcy cases may be lifted for arbitration of adversary claims

The automatic stay granted under the bankruptcy code does not automatically prohibit claims related to the bankruptcy from going to arbitration, the U.S. Circuit Court of Appeals for the Second Circuit ruled in January.

Circuit Judge John R. Gibson wrote in MBNA America Bank v. Hill, 436 F.3d 104, that even if the claim is deemed to be a “core” bankruptcy proceeding, which would normally be conducted in bankruptcy court, circumstances can allow lifting the stay and permitting the claim to go to arbitration.

In this case, the debtor’s Chapter 7 proceedings were complete. But she had filed an adversary claim, a class action against MBNA accusing the company of violating the stay against her and other debtors, when the bankruptcy case was still active. The Second Circuit held that because the adversary claim would no longer affect an ongoing reorganization, the claim could proceed to arbitration pursuant to the loan contract.

Fifth Circuit requires demanding disclosure rule for arbitrators

Arbitrators must disclose facts that might convey possible partiality, even if no actual bias is shown, to avoid vacatur on grounds of “evident impartiality,” the 5th U.S. Circuit Court of Appeals ruled in January.

In Positive Software Solutions, Inc. v. New Century Mortgage Corp., 436 F.3d 495, Circuit Judge Thomas M. Reavley held that an arbitrator’s failure to disclose that he had served as co-counsel from 1990 to 1996 with an attorney and firm involved in the present case was enough to establish “evident partiality.”

“(A)n arbitrator selected by the parties displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator’s partiality,” Reavley wrote. “The evident partiality is demonstrated from the nondisclosure, regardless of whether actual bias is established.”

Using the American Arbitration Association’s Code of Ethics for Arbitrators in Commercial Disputes as a model, the 5th Circuit fashioned a standard in which evident partiality can be established if the nondisclosure “might have conveyed an impression of possible partiality to a reasonable person.”

Ninth Circuit says ERISA plan nonsignatories don’t have to arbitrate claims

A nonsignatory participant in an Employment Retirement Income Security Act (ERISA) plan should not be forced to arbitrate a claim against the plan’s operators and investment advisors, according to a ruling by the 9th U.S. Court of Appeals in February.

In Comer v. Micor, Inc., 436 F.3d 1098 (2006), Circuit Judge Alex Kozinski relied on the U.S. Supreme Court’s 2002 holding in EEOC v. Waffle House, Inc., 534 U.S. 279, in which the EEOC was not required to arbitrate when it sued on behalf of a Waffle House employee. Kozinski wrote that the case at hand was “materially indistinguishable” from Waffle House.

The case reflected a split of opinion in the circuit courts on the issue of nonsignatories. The 9th Circuit declined to follow a ruling by the 3rd Circuit in 2001 that held nonsignatories could be subject to arbitration clauses for claims “arising out of” the underlying contract. Kozinski wrote that such a test is “not grounded in any principle of agency or contract law.”
Compiled by Chip Stewart. Forward information about your organization’s regional, national or international conferences to cstewart72@aol.com for publication in a future issue.
SPRING 2006 CAPTIONING CONTEST

Because most agree that creativity and humor are effective in resolving disputes, we test our readers’ mettle with an occasional cartoon captioning contest. Submit as many captions for this illustration as you wish. All entries are judged by Professor John Barkai of the University of Hawaii School of Law, and the winners will be published in the next edition of Dispute Resolution Magazine.

Mail, fax or e-mail your entries to:

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I Just Called to Say Let’s Settle
By Andrew Taylor Call

[To be sung to the melody of “I Just Called to Say I Love You,” by Stevie Wonder]

No lawsuits here
No WATNA fear
Just candy hearts to help the mediation cheer
No twelve-b-six
No claims to fix
Responsive pleadings, no not even just for kicks
No first of trial
No motions filed
In fact it’s just another mediation mile
Positions to hear
Use the conflict sphere
It’s just possible that resolution’s near

(Chorus)
I just called to say let’s settle
I just called to say the ZOPA’s fair
I just called to say let’s settle
And it’s based upon the interests that we share

No counterclaim
No litigious blame
Party joinder, no but thank you just the same
No jury room
No verdict of doom
No writs of certiorari to delay the gloom
Criteria, objective should be
Let’s mediate and watch the WATNAS flee
Joint session will end
Issues we contend
And bring us right around the mediation bend

(Repeat Chorus 2x)