Designing the Gaps in Mediation Architecture

Kluwer Mediation Blog
September 13, 2011

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy)

Please refer to this post as: Nadja Alexander (Editor), 'Designing the Gaps in Mediation Architecture', Kluwer Mediation Blog, September 13 2011, http://mediationblog.kluwerarbitration.com/2011/09/13/designing-the-gaps-in-mediation-architecture/

The other day my friend and fellow mediator, Jill Howieson, was showing me pictures of gaps in buildings. Now, these are neither accidental gaps nor defects in buildings. Rather these gaps are very deliberate; they form an essential element of construction design. They are the famous architectural gaps of architect Carlo Scarpa. Scarpa was well-known for his innovation in architecture including his use of 'gaps'. One of his more notable works, the Fondazione Querini Stampalia, is a testament to the power of designing strategic gaps to create contrasts and tensions, and a different sense of 'space'.
It is enlightening to apply this 'philosophy of gaps' to the world of mediation. In the rush to regulate the practice of mediation, I sometimes feel as if regulators are determined to fill every gap in the developing architecture of mediation. While formal regulation is an essential aspect of developing mediation as a recognised and sustainable profession, Scarpa's work highlights the potential power of using gaps to create regulatory spaces in which both mediation practitioners and mediation practices, relieved of compliance pressure, can explore, innovate and diversify.

So, where are these gaps and how do we create regulatory spaces for mediation?

The first step is to recognise that mediation regulation does not have to be of the formal top-down legislative variety. There are many 'softer', participatory forms of regulation which encourage direct input from industry experts and users of mediation such as mediation codes of conduct, private contractual regulation through agreements to mediate and the ubiquitous market laws of supply and demand. These forms of regulation are more responsive to changing needs in the mediation 'industry' and the marketplace of users and generally tolerate greater elasticity than legislative instruments.

The second step is to think about the different functions of regulation about mediation. There are four primary functions that are relevant here.

1. Triggering mechanisms – how mediation is initiated.
2. Process and procedure – how the mediation process is conducted.
3. Standards for mediator certification – how mediation practitioner standards are measured.
4. Rights and obligations – the legal rights and obligations of participants in mediation.

International experience shows that each functional aspects of mediation must be carefully considered and deliberate regulation choices made for each one. The 'simply organic' approach does not work for all aspects of mediation; neither does the heavy top-down regulatory model. Let me to illustrate with reference to current regulatory activity in Hong Kong. In Hong Kong mediation of litigation matters is triggered by a practice direction which requires parties to mediate where it reasonable to do so. The practice direction has increased the number of mediations taking place, however anecdotal evidence suggests that in many cases parties and their lawyers are only be 'going through the motions' for the sake of compliance. In terms of mediator certification, policy makers are working towards a uniform industry-based accreditation standard without legislative backing; this approach is based on the view that buy-in by mediation stakeholders is necessary to improve current mediation practices and ethics referred to above. Rights and duties relating to confidentiality and admissibility of evidence are said to require uniform regulation with a high degree of clarity, stability and predictability. For this reason they are to be regulated by legislation (currently in draft form). Finally process and procedure is to be left to private agreements and organisational rules. Here diversity is to be encouraged with the marketplace as the ultimate regulator. This overview shows the deliberate attempt in Hong Kong to establish a responsive regulatory structure using a mix of regulatory forms.

On the very political issue of mediator certification, we all know that there are many more certified mediators than there are practicing mediators. While the reasons for this are complex and varied, one part of the answer is that formal regulation of mediator certification is not sufficient. The market remains a powerful source of regulatory power and plays a significant role in terms of who gets work and who doesn't, and also in relation to the models of mediation practiced. Mediator certification bodies need to recognize that they alone cannot shape how mediation is conducted. If these bodies are to remain relevant they must acknowledge and 'factor-in' other regulatory voices such as those of the users of mediation. An illustration of this can be found in the Australian National Mediator Approval Standards. These Standards are based on a facilitative model of mediation; at the same time they recognize that there are many deviations from the facilitative model in practice and make provision for more evaluative processes, referred to as 'blended processes', provided certain conditions are met.

My point, dear reader? Well it is simply that you cannot NOT regulate. Mediators regulate themselves every time they enter into an agreement to mediate. Similarly users subject themselves to regulation the moment they enter into a commercial contract with a mediation clause.

So to those of you involved in policy work, choose your regulatory forms carefully. Consider building a regulatory framework with a design for regulatory spaces in which the practice of mediation can flourish and diversify as the marketplace generates effective responses to needs as yet unidentified. At the same time continue to identify pieces of the structure that require serious legislative infilling.