

The mediation export explosion and the 'hidden' drive towards harmonisation

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As I write these lines, I am working on a commercial mediation project in the Pacific nation of Samoa - yes the one that has just jumped across the international dateline. My blog post today is a reflection on an aspect of this work that is relevant, not just to me, but to any of you who find yourself giving advice about ADR to public or private institutions in transitional, reforming and developing countries.

Mediation programs for the third-world are increasingly funded through first-world aid institutions as part of economic and legal reform. Here mediation is presented as a means to various ends: to enhance access to justice, to release back into economies money tied-up in litigation, to reduce court backlogs, to enhance confidence in the court system, to increase foreign investment and cross-border trade. Hidden within and among these goals is a common theme — one rarely articulated as a project focus, yet one that is quietly and ever-so-gradually having an enormous impact on the practice and regulation of mediation around the world.

Hopefully you are now in a state of some suspense. For those who have not guessed it from the title, the 'hidden theme' to which I am referring is the cross-border harmonisation of mediation and the role of international ADR consultants in this process. Here harmonisation means the process of creating compatible regulatory systems in different jurisdictions so that the impact of laws, rules, standards and other norms in each jurisdiction has a similar effect. Whether or not they are aware of it, ADR consultants working in different locations across the globe contribute to mediation harmonisation in one way or another. It is inherent in the very nature of the work they do and more specifically in the processes and resources they use.

On an organisational level, donor agencies manage their resources for maximum impact. It comes as no surprise therefore that these bodies may from time to time ask consultants to provide proposals for regional multiple-country projects based on one mediation model and one training manual. While mention may be made of cultural variation, the basic structural model and approach generally remain uniform. As a result, the structural parameters for a project establish a framework for harmonised mediation training and practice and, depending on the terms of reference, for accompanying mediator codes of conduct, accreditation standards, and rules and legislation relating to other aspects of mediation practice such as confidentiality and admissibility of mediation evidence.

In taking on these projects, ADR consultants draw on multiple resources, both local and international. Invariably they will also draw upon their own knowledge, training, skill, experience and personal connections. For example they may refer to or make use of documentation they have produced or used in previous projects, programs and organisations — training manuals, codes of conduct, accreditation standards, policy statements, research questionnaires, rules, legislation and so on. Exchanges with other ADR consultants involved in similar projects in different parts of the world provide another ready resource made all the more available by virtue of internet technology.

In my current role in Samoa I am able to draw upon a rich array of resources, some local and others sourced from my personal history of mediation know-how and know-why. This past week I have been emailing with an ADR consultant based in another Pacific country (let's call her P) and we have been sharing information related to all manner of mediation resources: codes of conduct, standard mediation clauses, agreements to mediate, mediation pledges, models for referral, mediation rules and legislation, training approaches and court certificates. P and I also exchange vitally important gossip about personalities and politics in the region — that's the fun part of course. Where appropriate, we make recommendations with a view to future collaboration and/or mutual recognition between the emerging ADR institutions with which we are working.

Of course we also keep up to date with international developments through our networks. We draw on international texts such as the [UNCITRAL Model Law on International Commercial Conciliation](#) and the [EU Directive](#). We access documents such as the [World Bank Group's Alternative Dispute Resolution Guidelines](#) and other documents.

After all our clients want us to provide them with the most up-to-date knowledge and skills from around the world.

So guess what? P and I are actively engaged in harmonising the law and practice of mediation internationally.

Is this what we signed up for?

No.

Was this is the terms of reference?

Certainly not.

Why on earth are we doing it?

Well, we can't not do it. It's how we and all ADR consultants do our job. It has a lot to do with cross-border mobility, client and contractor expectations, and the ubiquitous presence of the world wide web which seems to expand space while compressing time so that we can have everything, and sometimes too much, at the touch of a key. In so far as we share resources and make decisions about how to regulate mediation mindful of what other nations are doing, we naturally contribute to the drive towards regulatory systems that are compatible, that is harmonised.

In reflecting on this aspect of the work I do, I have made a New Year's resolution to be more mindful of how each small contribution we make as ADR advisers and consultants matters. Taken collectively the consultancy work that many of us engage in on an ad hoc or part time basis is shaping the local and global conditions for what mediation will look, sound and feel like in the future. That's a huge responsibility and a daunting privilege.

Wishing you all a stunning 2012.