CHAPTER 13

Variations in the Uptake of and Resistance to Mediation Outside of the United States

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1 Introduction

Mediation, as a relatively simple dispute resolution process, of *third party facilitated negotiation to resolve a dispute between or among two or more parties in conflict*, has emerged as a major new method of legal dispute resolution in an ever increasing number of countries, legal systems, case types, and most recently, in the transnational and international arena of disputes involving both public and private parties from different nation-states. Many nations now require or regulate the use of mediation in their legal systems, while private practitioners, trained in a variety of different professional disciplines, now offer services in conflict resolution both inside and outside of formal legal institutions in areas ranging from commercial, civil, criminal, family, labor and employment, community, finance, tax, policy, diplomacy, environmental and governmental arenas. While mediation, as a process, is thousands of years old, finding its origins in Chinese and African dispute resolution processes, in its modern incarnation, the current use of mediation in formal litigation and other disputes is often attributed to the American “A” (alternative/appropriate) dispute resolution revolution of the 1970s and 1980s.¹ In recent years the use of mediation has been differentially accepted and resisted in dozens of countries,


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seeking to promote mediation for different reasons, sometimes with conflicting goals, ideologies and practices – more efficient claim handling or more qualitative human reconciliation and more tailored and flexible outcomes. This paper looks at some of those variations in uptake and resistance and offers some possible explanatory factors in the differential use and acceptance of mediation, at a deeper, not merely legal regulatory, level.

Some thirty years ago I was asked to provide mediation, negotiation and Alternative Dispute Resolution training to a group of law students, lawyers, diplomats and some government officials in Norway. I spent a week using lectures, role-plays, video, discussion groups, and all forms of American teaching innovations to teach these relatively “new” legal dispute resolution processes to a very diligent and polite group of students. Everyone dutifully participated in the learning and teaching sessions and worked hard in the strange form of role-play and simulation instruction so common in American legal education, but still new to most law students in the rest of the world. I closely followed for a few years thereafter the lack of use of mediation in Norway. Shortly thereafter (and before the fall of the Soviet Union) I was asked to undertake a similar exercise in the Soviet Union and I declined on my belief that I did not know enough about Soviet and Russian legal culture to engage in such training. (Other American trainers did not share this concern and I knew many who engaged in mediation training in the former Soviet Union). I had (wrongly, I think) assumed I knew enough about Norwegian legal culture from having worked in Europe, collaborated with my Norwegian law professor colleague in other teaching and scholarly enterprises, spent some time in Denmark, Norway and Sweden before this effort, and worked with many European lawyers (and my own European non-lawyer parents) for some years. I wrote to caution about the dangers of assuming that domestic American concepts of dispute resolution could easily be transferred or “transplanted” to other legal cultures or to “trans-national” legal disputes.2

Some years later (about 15) I began work, first as a law professor/trainer, then as both a Fulbright Scholar (Chile) and practitioner in South America (doing work in Paraguay, Chile, Argentina and Brazil) and found ready

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