INTENTIONAL CONVERSATIONS ABOUT THE GLOBALIZATION OF ADR

By James R. Coben

On October 28-29, 2005, the Dispute Resolution Institute at Hamline University School of Law hosted “Intentional Conversations about Globalization of ADR,” its fourth biennial Symposium on Advanced Issues in Dispute Resolution. The symposium series brings together scholars and professionals to engage in purposeful conversation around critical issues in the field of conflict studies and dispute resolution. To this end, the format of the Symposium gatherings is different from most academic conferences. No papers are presented and, although certain individuals are given responsibility as theme leaders to frame, open up, and promote the dialogue, the active participation of all attendees is encouraged by the use of intimate in-the-round seating.

The choice of the October 2005 Symposium theme was based on recognition that globalization makes our world smaller and increasingly inter-connected. Yet, we are still a planet populated by countless different social worlds. As ADR goes global, its spread and movement carries the values, beliefs, and cultural assumptions of one social world to another. Thus, we thought the time was right for a symposium designed to examine both practical and theoretical issues that arise as mediation practices and programs spread across the globe, with a particular focus on the challenges of institutionalizing mediation in new social contexts.

Participants included representatives from fourteen countries, including Australia, Canada, Costa Rica, Germany,
India, Israel, Italy, Japan, Jordan, Peru, the Phillipines, United Kingdom, Ukraine, and the United States. The group included active exporters and importers of ADR processes, funders, anthropologists, law and graduate professors and students, researchers, lawyers, full-time neutrals, ADR skeptics, and institutional providers. The conversation was divided into four sessions, each addressing a particular set of questions designed as a launching point:

I. Session One
Building a Context for Conversation – Understanding the “Globalization” Phenomenon

- What do we mean by the “globalization” of mediation?
- Where and in what ways is mediation practice being introduced and institutionalized?
- What is being “imported” and from where? From whom?
- What are the factors that drive this phenomenon?
- Who benefits and in what ways?
- In what ways is this globalization a new form of imperialism or political, intellectual and cultural colonization?

II. Session Two
Examining the Social and Cultural Challenges of Globalization

- In what ways does this movement of ideas take into account the social and cultural contexts from which and to which the movement occurs?
- What are the challenges of moving from one legal culture to another?
- How does the dissonance between “theory” and “practice” distort/impact/affect the import/export process?

III. Session Three
The Globalization of Mediation as a Systems Design Challenge
From the perspective of both the importer and exporter, what are the key questions that must be addressed in designing and implementing a mediation program in new or different social/cultural/legal settings?

In what ways should/can this design process respond/adapt to the social and cultural context in which the program is being introduced?

What should be the measure of “accountability” for social and cultural consequences of this movement? What special obligations do funders have to promote such accountability?

What should teachers, trainers and consultants in the field know/incorporate regarding globalization and development?

IV. Session Four

Synthesis: What are the Implications of our Conversation on the Further Development of Mediation in a Global Context (with respect to research, theory-building, policy, and practice)?

- What is missing from our understanding of the phenomenon of mediation globalization?
- How can scholars and practitioners work together to advance thinking and practice in globalization of mediation?
- How does globalization of mediation impact the evolution of mediation theory and practice?
- Can we articulate “best practices” when mediation processes/models are introduced into new contexts?
- How do we establish useful criteria for measuring the success of import/export efforts?

The two day dialogue was hardly as organized as this outline appears. For one thing, we continuously and contentiously grappled with terminology – ranging from a search for a common definition of globalization to trying to articulate a shared set of
values underlying mediation. Threads of the conversation were punctuated with powerful, but often inconsistent metaphors. The spread of mediation was often referred to as virus-like, or infectious. Later, mediation was described as a bridge or ladder between past, present, and future, and as a tool for eliminating court backlogs and improving the quality of democracy. ADR promoters were sometimes described as pioneers, architects, or farmers spreading seeds of needed change. But the same actors also were condemned as shameless, suitcase-carrying salespeople foisting products that could not be sold in home markets to new communities abroad.

Impassioned calls by “unabashed ADR imperialists” for universal advocacy of democracy and reconciliation were countered by more cynical suggestions to “follow the money” to understand whose interests were being served. Some questioned whether we were moving toward a global dispute hierarchy favoring arbitration for the rich and mediation for the poor.

There also was considerable focus on process, ranging from one participant’s blithe characterization of exporters as “ready, shoot, aim” experts, to more detailed critiques by others of “fly-in, stay-at-the-Hilton” trainers and consultants. At the same time, we were cautioned against minimizing our expertise, especially in historically disenfranchised communities. There was a common call to examine assumptions, encouragement for appreciative inquiry, and a challenge to ensure accountability by being honest in matching the content of our exports with the reality of the product we deliver at home.

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4 For two wonderful articles exploring these themes, see Douglas H. Yarn, *Transnational Conflict Resolution Practice: A Brief Introduction to the Context, Issues, and Search for Best Practice in Exporting Conflict Resolution*, 19 CONFLICT RESOLUTION QUARTERLY 303 (Spring 2002) and Christopher Honeyman and Sandra I. Cheldelin, *Have Gavel, Will Travel: Dispute Resolution’s Innocents Abroad*, 19 CONFLICT RESOLUTION QUARTERLY 363 (Spring 2002).
Into this chaos of ideas, life intruded with the sudden and critical illness of one of our colleagues, who was rushed from a small group session to the hospital — leaving many to ponder whether the conversation should go forward at all. It did, but with the added edge of how fragile life can be and how trivial academic debates can seem.

Many things could be emphasized out of such a volatile mix. I want to focus on just three points. First, early on in the event, Amr Abdulla succinctly summarized the export-import phenomenon by observing that when ideas move east, they are used to modernize and transform. In contrast, when ideas move west, he argued, they are seized upon not for their utility and implementation but instead examined for their “quaintness,” — a matter of detached academic examination rather than application. This one-way street surely must and can be changed. One starting point is to focus on the merits of “wise elder” models of conflict resolution, which are a distinct counterpoint to the American deification of the detached, process expert. As eloquently detailed by Christopher Honeyman, Bee Chen Goh, and Loretta Kelly in a recent article examining case studies from Australia and Malaysia, distinctly eastern concepts of authority and connectedness may help explain why American consumers choose retired judge mediators over those trained in facilitative process.

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5 Tanya Forte, Assistant Professor of Interdisciplinary Studies, Hamline University, later died. Her intensity and wisdom were apparent to all. She is sorely missed.
6 Amr Abdalla, Professor and Dean for Academic Programs, University for Peace, Costa Rica.
7 A notable exception is the practice of restorative justice, where there arguably has been much more explicit acknowledgement of the “indigenous” roots of practice, and significant cross-cultural dialogue and cross-fertilization. See generally, James Coben and Penelope Harley, Intentional Conversations about Restorative Justice, Mediation and the Practice of Law, 25 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY 235 (Spring 2004).
8 Christopher Honeyman, Bee Chen Goh, and Loretta Kelly, Skill is Not Enough: Seeking Connectedness and Authority in Mediation, 20 NEGOTIATION JOURNAL 489 (October 2004).
9 Id. at 502-504.
Goh, and Kelly convincingly argue that rethinking connectedness and impartiality may lead to needed evolution in both mediation training and dispute system design.\textsuperscript{10}

Second, a one-size-fits-all approach is obviously problematic. In part, this is an ethics issue. As Tim Hedeen\textsuperscript{11} noted early during the second day, the loss of conflict resolution process diversity is no different than the loss/extinction of the world’s languages. Moreover, our rush to standardize global practice is fraught with unintended consequences. For one thing, standardization is not the same thing as harmonization. When processes are standardized for ease of global adoption, there is certainly no guarantee of local relevance and ease of assimilation. And, standardization is inevitably powerfully influenced by international commercial practice. In other words, law, rules, ethics standards, and best practice guidelines tend to come first from the business world. Yet, we all know that the norms of this highly specialized sub-category of disputing are not particularly relevant to the diverse array of community, family, and religious conflicts that emerge in daily life throughout the world.

Third, Howard Bellman\textsuperscript{12} challenged the group to acknowledge the tremendous gap between typical mediation training and the actual practice of conflict management intervention. What does it mean, he queried, when much of the exporting is done by trainers and academics, not by employed intervenors? For one thing, this pattern in training delivery mirrors the disconnect between the prevailing rigid formalism of training models and the inherent flexibility that actual mediators use in practice. At a more fundamental level, Bellman’s question highlights the dissonance between theory and practice in contemporary American mediation.\textsuperscript{13}

\textsuperscript{10} Honeyman, supra note 8, at 506-508.

\textsuperscript{11} Tim Hedeen, Assistant Professor, Kennesaw State University.

\textsuperscript{12} Howard Bellman, Mediator and Adjunct Professor, Center for Dispute Resolution Education, Marquette University.

This latter theme was brought home to me in stark clarity during debriefings with two of my Hamline LL.M. students from India who finished internships several months after the symposium was over. During their internship placements, they had the opportunity to observe a number of commercial mediations with some of the Twin Cities’ most highly regarded neutrals. Why, the students asked me, did we teach facilitative mediation in our diploma program in Cochin with an emphasis on managing joint session communications, when the mediators in Minnesota declined to ever have the parties in the same room? Ouch.

In the collection of post-symposium essays to follow, you will find a number of these themes explored, but also some new ones. Alexandra Crampton confronts the question of whether globalization of mediation is a form of imperialism. Her nuanced answer flows from her observation as an anthropologist that in much of the symposium conversation, participants discussed culture and social practice as objects to be manipulated by experts, rather than lived out and experienced in a complex interaction of norms, values, and philosophies embedded in everyday behavior. She convincingly argues that sustained development of ADR practices, regardless of the imperialistic or other intent of the exporter, simply will not happen unless the practices are assimilated into social reality.

Nadja Alexander examines the impact of technology on the globalization of ADR – a topic that she points out “with amazement” was not raised during the two days of discussion. She forcefully argues that online dispute resolution (“ODR”) technology has both hindered and facilitated the push toward a “globalized dispute resolution marketplace.” Among other themes,

(identification disparities “between conventional explanations of mediation and certain common mediator beliefs and behaviors”). See also, Julie MacFarlane and Bernie Mayer, What Theory? How Collaborative Problem-Solving Trainers Use Theory and Research in Training and Teaching, 23 CONFLICT RESOLUTION QUARTERLY 259 (Winter 2005) (reporting little use of theory and academic research in mediation training programs).
she explores how the dominance for PC-based ODR in the “Global North” is a significant obstacle to ODR development in many parts of the world, where other forms of e-technology such as community radio and mobile telephones are much more accessible and culturally appropriate.

John Conbere and Alla Heorhiadi write from the perspective of their joint research in the Ukraine examining attitudes to change and conflict among Ukranian employees in modern entrepeneurial companies. They explore how aspects of contempy Ukranian culture -- high power distance relationships between leaders and subordinates, collectivism, particularism, and high uncertainty avoidance -- dramatically distinguish Ukranian experience from the American one. In their view, asking how to adapt mediation and interest-based problem solving to the Ukranian workplace, is simply too premature a question to pose.

Anil Xavier gives an overview of the origin and growth of mediation in India, starting from its deep roots in traditional “wise elder” models of dispute resolution to the 2005 pronouncement of the India Supreme Court mandating referrals to mediation, conciliation, and arbitration.

Penelope Harley posits that the dynamics and interactions between participants at the symposium presented a microcosm and mirror of disturbing dynamics and interactions of the mediation field. She eloquently rails against being labeled and dismissed as a “female, peace-building interested, and restorative justice oriented...flake.” The process of co-creation of mediation models, she asserts, will succeed or fail, only to the degree that every “voice” is heard “in equal measure, with equal weight.”

The last essay, authored by Ken Fox, is a highly personal reflection on reconciling the high expectations created during symposium planning and preparation with the reality, limitations, and unexpected turns of the event itself. Recognizing the dissonance between intentions and expectations on the one hand, and actions and results on the other, seems a perfect way to end what we all hope is only the very beginning of a rich and ongoing discussion about the globalization of ADR.
APPENDIX A

LIST OF SYMPOSIUM THEME LEADERS

Amr Abdalla, Professor and Dean for Academic Programs, University for Peace, Costa Rica

Hal Abramson, Professor of Law, Jacob D. Fuchsberg Law Center, Touro College, New York

Nadja Alexander, Professor of Dispute Resolution and Director of Practice, Australian Center for Peace and Conflict Studies, University of Queensland, Australia

Jim Coben, Associate Professor of Law and Director, Dispute Resolution Institute, Hamline University School of Law, Minnesota

Leonardo D’Urso, Principal, ADR Center, Rome, Italy

Ken Fox, Associate Professor and Director, Conflict Studies, Hamline University, Minnesota

Michelle LeBaron, Professor of Law and Director, Program on Dispute Resolution, University of British Columbia, Canada

Carol Mercado, Senior Program Officer, Asia Foundation, Philippines

Yoshitaka Wada, Professor of Law, Waseda University and Kyushu University, Japan

Anil Xavier, Director, Indian Institute of Arbitration and Mediation, Kochi, India

Doug Yarn, Professor of Law and Executive Director, Consortium on Negotiation and Dispute Resolution, Georgia State University
APPENDIX B

SYMPOSIUM PARTICIPANT LIST

Amr Abdalla (San Jose, Costa Rica)
Alma Jadallah (Fairfax, VA)
Hal Abramson (Huntington, NY)
Nadja Alexander (Queensland, Australia)
Kitty Atkins (St. Paul, MN)
Howard Bellman (Milwaukee, WI)
Ruslan Bocancea (Saint Paul, MN)
Kristine Bolander (Saint Paul, MN)
Jose Luis Caceres (Lima, Peru)
Carolyn Chalmers (Minneapolis, MN)
James Coben (St. Paul, MN)
John Conbere (Minneapolis, MN)
Alexandra Crampton (Chelsea, MI)
Daniele Cutolo (Napoli, Italy)
Usha Devarajan (Cochin, India)
Leonardo D’Urso (Rome, Italy)
Thomas Fiutak (Minneaplis, MN)
Robert Foose (South Royalton, VT)
Tanya Forte (Saint Paul, MN)
Ken Fox (Saint Paul, MN)
Jean Greenwood (Minneapolis, MN)
Michelle Gullickson Moore (Minneapolis, MN)
Penelope Harley (Boulder, CO)
Timothy Hedeen (Kennesaw, GA)
Alla Heorhiadi (Minneapolis, MN)
Christopher Honeyman (Madison, WI)
Suda Ishida (Saint Paul, MN)
Mary Kearney (Saint Paul, MN)
Karen Kozen (Minneapolis, MN)
Michelle LeBaron (Vancouver, BC)
Sia Lo (Oakdale, MN)
Manoj Madhavan (Cochin, India)
Lynn Malley (Carbondale, IL)
Mark McCrea (Saint Paul, MN)
Carol Mercado (Manila, Philippines)
Loukas Mistelis (London, UK)
Bindu Nair (Cochin, India)
Salvador Panga, Jr. (Manila, Philippines)
Nilushi Ranaweera (Cochin, India)
Jack Schaffer (Saint Paul, MN)
Eva Soeka (Milwaukee, WI)
Peter Tochtermann (Heidelberg, Germany)
Gopu VR Nair (Cochin, India)
George Varghese (Cochin, India)
Yoshitaka Wada (Tokyo, Japan)
Eduardo Wolle (Northfield, MN)
Anil Xavier (Cochin, India)
Doug Yarn (Atlanta, GA)
Meerza Zaheer (Cochin, India)