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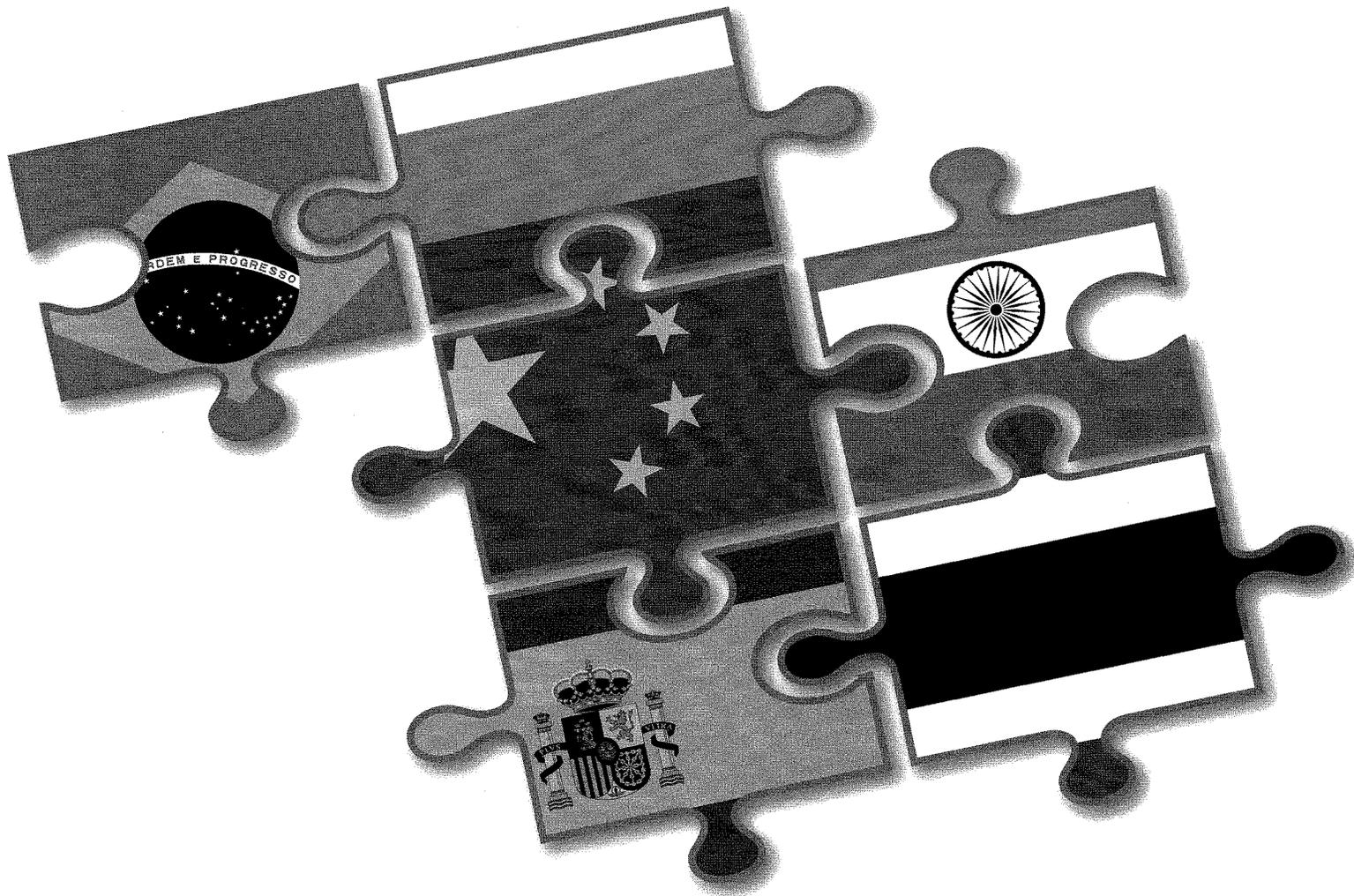
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Mediators in the Field: Experiences Around the Globe

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Mediators in the Field: Experiences Around the Globe

By Sheila Purcell and Janet Martinez

How do courts, as systems of dispute resolution, compare in their development of court-connected mediation programs? How do practitioners in various countries lay the groundwork for a successful court-based ADR (alternative or appropriate dispute resolution) program? How do they select and train their neutrals, and how do they implement their visions and evaluate their programs?¹

To start looking at these questions, we decided to go beyond the institutional structure of court-connected mediation programs and see what a brief survey might tell us about the perspectives and experiences of mediators themselves.² The goal of our survey was to learn a bit about the mediators, the nature of their practice, the source of their referrals, and how deeply people in their communities accept mediation as a dispute resolution option. A preliminary understanding of these issues, we believe, might guide ADR policymaking and prompt future research efforts.

Survey Methodology

We reached out to highly experienced mediators³ whom we know personally in a dozen countries, most of whom work in court or court-related programs or academia, asking whether they would be willing to answer a questionnaire to describe mediation practice in their country.⁴ We received positive responses from our contacts in 11 countries: Australia, Brazil, China, Bulgaria, Hong Kong, India, Israel, the Netherlands, Singapore, Slovenia, and Spain.⁵ Each contact then disseminated a short online survey to mediators – ideally, 15 others – in his or her country. The survey was distributed to a total of 154 mediators, 113 of whom (73%) completed it, although not every mediator responded to every question. Our aim was not to achieve a random data set with statistically significant results but to get a basic sense of who is mediating and what their experiences have been.

Survey Results

Our respondent mediators came from a variety of professional backgrounds. They include a very small number of judges; the rest are nearly equally split between attorneys and other professionals. There are interesting variations by country: None of the respondents from Australia, Hong Kong, India, Israel, or Singapore were judges. All the respondents from India were attorney-mediators. Given that our primary overseas contacts were court-based or court-affiliated and that in many US courts with ADR programs attorney-mediators frequently outnumber non-attorney mediators, we expected to see more respondents who were attorneys.

More than half of Brazil's respondents were "other professionals," and 94% of the respondents from Brazil handled family cases. In China, non-lawyer mediators may be specialized in medical, traffic, labor, or insurance matters.

Singapore has emphasized community mediation, where mediators are community leaders and volunteers, but court ADR there is also well established.

Training hours varied widely from country to country. More than 80% of respondents had at least 40 hours of mediation training (see Table 1). In Spain, which has promoted mediation in labor and family cases for more than a decade, mediators who handle these cases had an average of 250 training hours and have all had individual assessments. Respondents from Brazil reported that their country has launched online distance learning for mediators. Respondents from Brazil, Bulgaria, India, the Netherlands, Singapore, Slovenia, and Spain all had more than 40 hours of training.

When asked whether they considered their training sufficient preparation to conduct mediations, 70% of respondents said yes. Most respondents who had more than 40 hours of training (about 66%) deemed it sufficient to mediate, but that also means that one-third with

more than 40 hours of training felt that was insufficient. Conversely, some respondents who had less than 40 hours of training deemed it sufficient.

On the topic of training, our survey asked whether people were conducting mediation trainings as well as maintaining active mediation practices. Nearly three-quarters of the respondents were trainers, including virtually all respondents in Australia, Brazil, China, India, the Netherlands, and Spain. We speculate that some of these mediators may be working as trainers to earn

money, keep their skills active, and have their names in the public eye while they help design and start court programs and encourage people to see mediation as a viable option. The survey also asked about the variety of available training providers. In Brazil, China, and Singapore, court training was dominant, while private in-country training provided by a non-governmental entity prevailed in Bulgaria,

Israel, the Netherlands, and Spain. Indian and Spanish mediators were trained equally by in-country and out-of-country private providers. In fact, two respondents noted that training has become a competitive business, so much so that they often see recently trained mediators offering instruction. Overall, private training providers in the domestic country were the most common source of training, something aspiring mediators appear to be willing to pay for (although we did not ask for specifics). As often happens, some mediators reported attending more than one type of training.

How experienced are most mediators who work in court programs? How busy are they? The answers varied from country to country (although not much within specific countries). Most respondents had worked on at least 100 cases, although a majority of respondents in Bulgaria and China reported mediating fewer than 100. Mediators in Australia, Brazil, India, and Israel were especially experienced and busy: most had mediated more than 100

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Table 1: Mediator Training – Number of Hours

Number of respondents = 110

<i>Number of Training Hours</i>	<i>Number of Respondents</i>	<i>Percentage of Respondents</i>
1-10	8	7%
11-40	11	10%
> 40	91	83%

Table 2: Mediated Cases – Types

Number of respondents = 110

<i>Types of Cases Mediated</i>	<i>Number of Respondents</i>	<i>Percentage of Respondents</i>
Community disputes	34	31%
Commercial	74	67%
Consumer	36	32%
Criminal	13	12%
Employment	56	50%
Family	70	63%
General civil	66	59%
Land claims	27	24%
Money claims	47	42%
Neighbor claims	47	42%
Personal injury	29	26%

cases and reported mediating more than 20 hours per month (which we estimate to be more than two or three cases a month).

As anyone who has ever mediated in a court or court-connected program knows, the source of case referrals is important. Do most cases get sent to mediation by a judge or court official? Staff from a court-connected program? A majority of respondents (64%) reported that they receive referrals from the court staff or staff of a mediation center affiliated with the court, which underscores the central role

that court and court-affiliated ADR play in building mediation into the legal systems of these varied countries. The second-most common referral source was the parties themselves, which suggests that users of mediation have had positive mediation experiences or have

been exposed to successful public awareness efforts about mediation's benefits. More specifically, party referrals comprise more than half of the respondents' cases in Australia, the Netherlands, and Spain, while in Brazil, Bulgaria, China, India, Israel, and Slovenia, court referrals account for that same amount.

Like many of their court-affiliated counterparts in the United States, the overseas respondents mediated a wide array of case types (see Table 2). Most respondents indicated that they mediate more than one type, which suggests they do not choose to – or maybe cannot afford to – specialize in a single kind of case. Commercial, general civil, and family law cases predominate, with employment close behind.

More than half of those who completed the survey reported that they are paid, but that means that nearly half provide their services pro bono.

We also analyzed how case types get referred to mediators. In Australia, where mediation is often mandatory, most cases are personal referrals for commercial, employment, and general civil cases. In China, all case referrals were by the court and were equally distributed among commercial, employment, family, and general civil cases. In Brazil, most cases are court referrals for commercial, family, general civil, and neighbor cases. In India, most cases are referred by the court for family, general civil, land, and money disputes. In Israel, most are court

referrals for commercial and family cases. In the Netherlands, most cases are party referrals for commercial and general civil cases. In Spain, employment and family cases are primarily generated by personal and party referrals. Other countries in our survey showed less marked patterns.

Touching on a subject important to mediators in the United States as well as abroad, the survey asked about mediator compensation. More than half of those who completed the survey reported that they are paid, but that means that nearly half provide their services pro bono. Most respondents in Australia, Hong Kong, India, Israel, the Netherlands, Singapore, Slovenia, and Spain were paid; most respondents in Brazil, Bulgaria, and China were not. From private conversations with some respondents, our understanding is that many newly trained mediators have difficulty getting experience, so pro bono cases may be their only option.

Continuing on this topic, the survey asked about the source of compensation for those respondents (roughly

half) who are usually or sometimes compensated (see Table 3). (To fully understand Table 3, it helps to know that 47 respondents indicated they were usually not compensated for their mediations, but some of those 47 also answered the source-of-compensation question, presumably accounting for the small number of cases for which they were compensated.)

Of those who were compensated, more than half were paid by the parties, with a quarter paid by the court and another 20% paid by another source. In India, most of the respondents were paid by the court; in Israel, the Netherlands, and Spain, most of the respondent mediators were paid by the parties.

Nearly half of respondents who are paid for their mediation services considered their compensation adequate, but slightly more than half did not. In

particular, mediators in Australia, Hong Kong, Israel, the Netherlands, and Spain deemed their compensation adequate.

Knowing that many mediators do not work only within court settings, we also asked respondents whether they have opportunities to build a mediation practice. Nearly two-thirds of respondents said that they had adequate opportunities. Interestingly, while respondents from Brazil and China did not consider their compensation adequate, they were the most optimistic about future opportunities for mediation practice. Perhaps their job satisfaction is significant, or maybe they anticipate that combining mediation practice with mediation training and law or other professional practice can sustain them.

As Table 4 indicates, when asked what percentage of their mediation cases reached settlement, nearly half of the responding mediators reported a settlement rate

of at least 60%, with another third between 40% and 60%. Those who settled less than 20% of their cases had less case experience. A more marked pattern was noted with settlement rates and compensation. Generally, a higher number of hours mediated, a greater number of cases mediated, and compensation all correlated with

higher settlement rates in Australia, Hong Kong, India, Israel, the Netherlands, and Singapore. A medium number of hours mediated, a medium number of cases, and compensation correlated with medium range of settlement in Slovenia and Spain. Respondents in Brazil had a high number of mediated cases and high settlement rates, without regard to case type or the absence of compensation, although the comments noted a waning willingness to continue mediating

without compensation. Case types were usually diverse across the experience range, and specific types did not seem to markedly correlate with settlement. Fewer respondents answered this question, perhaps because they were reluctant to do so or because they do not keep such records.

Comments from Mediators

The last question in the survey invited general remarks. Respondents' observations often spoke to their goals; their work in reaching out to, identifying, and educating stakeholders; and the need to expand resources devoted to ADR development and practice.⁷ Of the 113 respondents, 43 offered comments on various mediation issues. In order of frequency, the issues mentioned were: compensation, training (and regulation), benefits, and public education. For each of these issues, we note key points the respondents conveyed and share select quotes.

A majority of respondents (64%) reported that they receive referrals from the court staff or staff of a mediation center affiliated with the court, which underscores the central role that court and court-affiliated ADR play in building mediation into the legal systems of these varied countries.

Table 3: Compensation for Mediation – Sources

Number of respondents = 84

Compensation Source (if any)	Number of Respondents	Percentage of Respondents
Court	23	27%
Parties	44	52%
Other	17	20%
Usually uncompensated	47	

Table 4: Mediation Cases – Settlement Rates

Number of respondents = 90

Percentage of Cases Settled ⁶	Number of Respondents	Percentage of Respondents
0-20	11	12%
21-40	8	9%
41-60	27	30%
61-80	33	36%
>80	11	12%

On Compensation

Resource availability affects two aspects of mediation: whether there is enough training and adequate compensation for mediators to sustain a livelihood and garner respect for the process. The issue of compensation received the most comments.

Brazil: “I really hope that we can be recognized for our job as soon as possible.”

Bulgaria: “I am a very good mediator with years of experience and more than 500 agreements and am grateful for being part of mediation development ... but I am sure that mediation free of charge is not a good way.”

Hong Kong: “Too many trained mediators and too few cases; there is a tendency to cannibalize the profession – people are willing to provide too much pro bono service, even for legally represented commercial cases. If lawyers are paid, why can’t mediators be paid for the same case?”

On Mediator Education

Training was the second-most mentioned issue. Many commented on the critical elements of high-quality training: not only technique but interpersonal skills, observation of experienced mediators, and coaching. A challenge in many countries is the shortage of opportunities to obtain practical experience, mentoring, and feedback from experienced practitioners. The result is a variance in mediator competence, which can be exacerbated by different standards of accreditation. A few participants specifically pointed to the need for some regulatory governance, including some in Spain, where up to 250 hours of mediation training may be required for new mediators, but some trainers have not had any mediation experience.

Spain: “The most important thing that I miss in the trainings is the personal work that mediators need to do to be a good mediator. Techniques and methods are learned, but the personal qualities and habits are absolutely missed.”

Spain: “There is a need to develop good, and not only more, “mediation culture” among judges and lawyers. The training is deficient; excess of hours, most of them useless, and most trainers have never conducted or even shadowed a mediation.”⁸

China: “To be an excellent mediator, you must have social knowledge such as psychology and find parties’ issues; you also [must] have good verbal communication skills.”

On the Benefits of Mediating and Mediation

While savings for the court, in both time and money, are often central to development of a court-connected mediation program, many courts have realized that improving the public’s trust in and satisfaction with dispute resolution options is a powerful parallel goal. Through ADR, people feel that they have a voice and that they are being treated fairly. The mediators observed that hostility can be reduced and that resolution can come more quickly and less expensively than it would in a courtroom. In short, mediation increases people’s satisfaction with the system of justice. In addition to mentioning these benefits for society and individuals, a few respondents noted their own personal and professional growth through mediation.

China: “The goal of mediation is to help parties find and realize their issues through the perspective of the third party (mediator).”

Singapore: “I find the greatest benefit in being trained as a mediator is actually the changes it has brought about in myself – the ability to do active listening and to see other people’s viewpoints before saying anything.”

Brazil: “Mediation is a marvelous social practice ... must be amplified and mediators must be recognized.”

On Educating the Public

A court system has many stakeholders: the people who are in conflict, their counsel, the court itself, its

staff, and even the citizens within the court's jurisdiction. How does the introduction of a new process option meet different stakeholders' interests? Most of the mediators who responded to the online survey highlighted ongoing public education efforts directed toward the bench, the bar, disputants, and their counsel in their countries.

India: "A lot of work is required to be done in simplifying and translating awareness materials."

Spain: "The culture of labor/employment mediation has been developing in Spain for the last two decades, and it has become more effective and professional through time and the development of training programs enhancing good practices."

Spain: "On the other hand ... I understand that it is essential to educate society and the professionals (lawyers, judges, etc.) on the benefits of mediation, because often it is the legal technicians themselves who have greater reluctance or distrust thereof."

India: "India is a country with diverse social, religious, cultural, and economic backgrounds. There is an urgent need to spread the benefits of mediation at the grassroots level, preferably by the locals of a particular community. It is therefore necessary to impart training to the locals of a particular region to accomplish said task."

Spain: "Many attorneys and judges are gaining skills and knowledge, which are beneficial personally and professionally – whether as an advocate or a neutral."

What We Don't Know

This survey was a very brief attempt to obtain some basic information about mediation practice in the represented countries. In future research, we would ask about many additional subjects:

- Non-attorney mediators' background and professions: What did they do before mediating?
- Mediator training: What was its structure and content? How long did it last? How much did it cost?
- On-the-job training and other training modalities: What do they look like?

- Referrals: What kinds of cases come from what sources?
- Case screening: Are mediators trained on screening and selection? Is there discussion about what kinds of cases are appropriate for mediation?

Policy Trends Affecting Mediation Practice

Our survey respondents work around the world in a variety of settings, some of them in contexts that include legislative and policy frameworks. Governments, courts, and international organizations, from the United Nations Commission on International Trade Law (UNCITRAL) to the American Arbitration Association, are increasingly seeing the value of varied dispute resolution options, especially mediation. The European Directive and

UNCITRAL are but two examples in which the introduction of mediation is explicitly encouraged and institutionally fostered. See article on the European Union and mediation by Machteld de Hoon on page 23.

Although in a number of countries ADR started as a way of meeting local needs, today there appears to

be a gradual convergence of practices, an effort to set some common standards and, in some places, regulate mediation practice. As we see more institutionalization of ADR globally, both within countries and through global organizations such as the International Mediation Institute, we may see the field strengthened and professionalized by the common drive to promote transparent standards and practices.

At its heart, mediation offers a voluntary, confidential, neutral-facilitated process to resolve a broad array of disputes. As mediators around the world have exchanged experiences through cross-training and conferences, we have learned anecdotally that the voluntary, confidential, and neutral components of mediation take different forms according to local history, needs, and resources. We will all benefit from learning more about each other's training and practice and from allowing different approaches to blend and breathe or be recognized as distinct for a purpose. This study is a first step in that direction. ♦

Endnotes

1 We described three varied examples in a recent article on programs in India, Israel, and California. Janet Martinez, Sheila Purcell, Hagit Shaked-Gvili, & Mohan Mehta, *Dispute System Design: A Comparative Study of India, Israel and California*, 14 CARDOZO J. CONFLICT RESOL. 807 (2013).

Most of the mediators who responded to the online survey highlighted ongoing public education efforts directed toward the bench, the bar, disputants, and their counsel in their countries.

2 We are grateful for two programs funded by the JAMS Foundation that provided contacts and content for this article: the University of California Hastings College of Law Summer Legal Institute's Envisioning, Designing and Implementing Court ADR program and the JAMS Foundation Weinstein International Fellowship.

3 The authors extend our deep thanks to the following colleagues in many countries for describing how mediation is practiced in each jurisdiction and connecting us to respondents for the survey: Judge Maria del Rosario Garcia Alvarez, Mr. Marcelo Girade, Judge Jiang (Michael) Heping, Judge Joyce Low, Mr. Lachezar Nasvadi, Ms. Laila Ollapally, Judge Dorcas Quek, Mr. David Sandborg, Ms. Hagit Shaked-Gvili, Ms. Tania Sourdin, and Mr. Ales Zalar.

4 The questionnaire, which was sent only to our lead contacts, included questions on the history of court-connected mediation (impetus, number of years), public education, cultural traditions, training, non-court mediation options, evaluation, and general observations on factors that have promoted and inhibited use of mediation. The online survey had 16 questions: country of practice, professional position, number of cases mediated, hours mediated per month, where trained, hours of training, whether training adequate, source of case referrals, kinds of cases mediated, opportunities to develop a mediation practice, percentage of cases settled, compensation (whether, by whom, if adequate), and an invitation to comment.

5 While many jurisdictions struggle with political instability, civil unrest, and corruption, this survey is not representative of those systems and we did not try to account for the range of issues surrounding the rule of law in each country.

6 The mean settlement rate for 90 respondents is 59; the median value is 60.

7 These concepts will be very recognizable to those who study and teach dispute resolution system design. See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

8 As noted earlier, in Spain up to 250 hours of training may be required, and there are a number of training providers who have only recently completed their own training and have not had any case experience.



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