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REFLECTION, DELIBERATION, AND DIALOGUE: STIPANOWICH'S CONTRIBUTION TO DISPUTE RESOLUTION

by: Jacqueline Nolan-Haley*

I. INTRODUCTION

During the late 70s through the early 21st century, the Modern Progressive Era brought into focus a great concern with the manifest lack of justice in law and society.¹ The urgency of the need for justice spawned multiple reform movements.² Along with feminism, law and economics, and others, dispute resolution (often referred to as Alternative Dispute Resolution (“ADR”)³ or the “Quiet Revolution”⁴) is recognized as a reform movement which lends itself to progressive persuasion.⁵ Professor Thomas Stipanowich is a significant scholar of the Modern Progressive Era.⁶ Professor Stipanowich has shaped and internationalized dispute resolution theory and practice for more than four decades. This article reflects on the impact of his scholarship throughout the Quiet Revolution.

II. THE VOICE OF OPTIMISM

The early ADR movement favored “informalism” to address parties’ needs.⁷ Idealism proved an attractive alternative to formalism, including trials, by addressing the inequities of the traditional adver-

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1. See Jacqueline Nolan-Haley, Book Review, *NEGOT. J.* 137, 137 (2022) (reviewing *DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES* (Art Hinshaw et al. eds. 2021)).

2. *Id.*

3. ADR is also understood as “appropriate dispute resolution.” *Dispute Resolution Processes*, AM. BAR ASS’N, https://www.americanbar.org/groups/dispute_resolution/resources/disputeresolutionprocesses/ [<https://perma.cc/NV5W-5XYR>].

4. See Linda R. Singer, *The Quiet Revolution in Dispute Settlement*, 7 *MEDIATION Q.* 105, 105 (1989).

5. See *id.* at 106–09 (discussing the early ADR movement). The ADR movement was born out of a speech by Professor Frank Sander at the Pound Conference in 1976. See *DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES*, *supra* note 1, at xix.

6. See Nolan-Haley, *supra* note 1 (discussing the Modern Progressive Era); see also Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 *CARDOZO J. CONFLICT RESOL.* 513, 513–14 (2017).

7. Nolan-Haley, *supra* note 1, at 137–38.

sarial system.⁸ There were promises of greater efficiency, satisfaction, creative solutions, and better access to justice.⁹ But, during the Modern Progressive Era, some commentators began to question the validity of these promises.¹⁰ Did mediation really provide greater access to justice?¹¹ Did arbitration deliver on its claims to provide efficiency?¹² Did it provide fairness?¹³ Some claimed that ADR simply failed to deliver on these promises and that informal dispute resolution did little to serve vulnerable parties.¹⁴

Unlike other ADR commentators of the Modern Progressive Era, Professor Stipanowich sees the glass as half-full. He has distinguished himself as the voice of curiosity and optimism.¹⁵ His curious voice searches for data to support new theories.¹⁶ He recognizes that there are challenges arising from this reform movement, about what is really going on in specific dispute resolution processes.¹⁷ What do we know about parties' choices in selecting dispute resolution processes? About how mediation is practiced? About how culture shapes disputing processes? But that is not the only story. His optimistic voice focuses on the opportunities that ADR processes can offer to disputing parties such as creative problem-solving, self-determination, and solutions that respond to specific needs.¹⁸ At the same time, he remains faithful to ADR's foundational value of securing access to justice for all,¹⁹ the "Have Nots" as well as the "Haves."²⁰ Stipanowich's articles are peppered with references to the Quiet Revolution where litigants' frustration with traditional ways of resolving disputes in the adversarial system prompted their move to the informalism of ADR.²¹ Without doubt, he has been a significant player throughout the Quiet Revolution.²²

8. *See id.* at 138.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.,* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1394 (1985).

15. *See* Stipanowich, *supra* note 6, at 514.

16. *See id.* at 514–20.

17. *See id.* at 520–21.

18. *See id.* at 531–32.

19. *See* Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391, 391–92 (2020) (explaining that ADR is a means for accessing justice).

20. *See generally* Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (explaining the "Haves" as those with power, wealth, and status, which give them a legal advantage over the "Have Nots" in various areas).

21. *See* Singer, *supra* note 4, at 105–06.

22. *See* Stipanowich, *supra* note 6, at 514.

Professor Stipanowich is one of the leading scholars in dispute resolution today, both nationally and internationally.²³ His scholarship, which addresses historical, jurisprudential, and policy concerns, is informed by his practice experience.²⁴ Few scholars in the field of dispute resolution come even close to the wealth and diversity of his experience, particularly in arbitration and mediation.²⁵ His writings have educated several generations of law students, legal practitioners, mediators, and arbitrators regarding the fundamental norms, challenges, and complexities of dispute resolution processes.²⁶ They demonstrate his care for the field of dispute resolution, for getting it right. They also reflect his care and concern for law students, as he shares his personal history with them to encourage problem solving, listening to clients, and taking ethical obligations seriously.²⁷

Beginning with articles focused on construction arbitration,²⁸ he gradually widened his scholarly lens to include mediation and other forms of dispute resolution. His scholarship is both descriptive and normative and includes empirical studies and comparative analysis.²⁹ He collaborates with others in the field conducting surveys of practitioners and users and then offers detailed analysis of the survey data.³⁰ Working with data from his empirical work, he is poised to raise questions for further research and offer suggestions for best practices.³¹ In short, he pays attention to empirical studies and asks an important question: “Can the outcomes of empirical research on our practical experience be channeled into guidance for improved practice?”³²

Professor Stipanowich brings indefatigable energy and enthusiasm to his scholarship and leadership.³³ He engages with other professionals as a convener of critical conversations and dialogue groups, such as the National Roundtable on Consumer and Employment Dispute

23. Thomas J. Stipanowich, PEPP. CARUSO SCH. L., <https://law.pepperdine.edu/faculty-research/thomas-stipanowich/> [https://perma.cc/8XBC-DQ8M].

24. *See id.*

25. *See id.*

26. Beyond his multiple articles, Professor Stipanowich has co-authored law school texts and treatises. *See, e.g.*, 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT (1994 & Supp. 1999); JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW (4th ed. 2021).

27. *See* Lela P. Love & Thomas J. Stipanowich, *Dear 1L: Five Guideposts for Your Future Professional Practice*, 22 CARDOZO J. DISP. RESOL. 529, 529–30 (2021).

28. *See, e.g.*, Stipanowich, *supra* note 6, at 516–17.

29. *See, e.g., id.* at 521–24.

30. *See, e.g.*, Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators*, 25 COLUM. AM. REV. INT’L ARB. 395 (2014).

31. *See* Stipanowich, *supra* note 6, at 547–49.

32. *Id.* at 522.

33. For example, he served as CEO at the CPR International Institute for Conflict Prevention & Resolution, where he spearheaded several initiatives. Thomas J. Stipanowich, PEPP. CARUSO SCH. L., <https://law.pepperdine.edu/faculty-research/thomas-stipanowich/> [https://perma.cc/8XBC-DQ8M].

Resolution.³⁴ In response to differing views regarding the nature and purpose of conflict resolution due to cultural or systemic factors, he collaborated with two other organizations in establishing the International Task Force on Mixed Mode Dispute Resolution.³⁵

An overarching theme of his scholarship points to the importance of deliberation, dialogue, and reflection by scholars and practitioners before offering authoritative guidance or rules for best practices.³⁶ He adds his voice to significant debates in the field—from the merits of combining ADR processes, mixing modes, and switching hats (from mediator to arbitrator) to the meaning of fairness.³⁷ His is the voice of reason and reflection as dispute resolution processes, particularly mediation, evolve in multiple directions both at the international and domestic levels.³⁸

Over the course of four decades, his scholarship has identified deficiencies in regulating dispute resolution practices.³⁹ But, more importantly, he has proposed solutions—particularly for responding to the problem of regulating arbitration so as to counter broad judicial enforcement of arbitration provisions in standardized adhesion contracts governing employees and consumers.⁴⁰ In response to the problems raised by adhesion in consumer and employment arbitration, he proposed a Fairness Index.⁴¹ To provide meaningful guidance for dealing with the problem of defining dispute resolution processes,⁴² particularly the lack of clarity regarding the definition of arbitration,⁴³ he proposed that a Restatement of Dispute Resolution procedures be de-

34. *Id.* He was a signatory and academic reporter of the Due Process Protocol for Mediation and Arbitration of Consumer disputes in 1997. *Id.* On a different ADR front, he established a court-connected community mediation program in Kentucky. *Id.*; see also Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 857 (1992–93).

35. See Thomas J. Stipanowich & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 FORDHAM INT'L L.J. 839, 843–44 (2017).

36. See *id.* at 866–86.

37. See *id.* (discussing how the International Task Force on Mixed Mode Dispute Resolution plans to incorporate a mixed mode approach to ADR processes).

38. See Thomas J. Stipanowich, *The International Evolution of Mediation: A Call for Dialogue and Deliberation*, 46 VICTORIA U. WELLINGTON L. REV. 1191, 1192–1200 (2015) (N.Z.).

39. Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985, 985–91 (2012).

40. *Id.* at 991–92.

41. See *id.*

42. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 473 (2007).

43. Arbitration is not defined in the Federal Arbitration Act. *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n*, 218 F.3d 1085, 1089 (9th Cir. 2000) (“[T]he FAA does not define ‘arbitration.’”).

veloped, modeled on the Federal Arbitration Act (“FAA”) or the Uniform Arbitration Agreement (“UAA”).⁴⁴

III. ARBITRATION

His arbitration writings focus broadly on the struggle to shape American arbitration law. In his analysis of evolving Supreme Court arbitration jurisprudence, he has not been shy in criticizing what he considers the Court’s aggressive expansion of new federal substantive law under the FAA—its decisions that make the U.S. an outlier in the international landscape,⁴⁵ its “extreme pro-arbitration slant,”⁴⁶ and its “muscular wielding of ‘revealed’ federal arbitration precepts.”⁴⁷ All of this has resulted in limiting the power of arbitrators and courts to promote public policies supporting class actions. He is critical of the Court’s reinforcing limitations on judicial review and its zeal in making arbitration agreements a vehicle for undercutting the ability of consumers and employees to take collective action through class arbitration.⁴⁸

He joins his voice to those of other reformers calling for rules to limit the use of arbitration agreements in adhesion contracts in consumer and employment disputes and establishing due process standards for such agreements. He argues for the justice value of binding arbitration:

Given the fact that binding arbitration serves as the adjudicative backdrop for consumer disputes or employer-employee conflict, the choice of arbitration and the kind of justice available under arbitration agreements may be every bit as important as consumer warranties and other substantive rights and remedies set forth in the contract.⁴⁹

However, consumers and employees are often ignorant about the workings of arbitration.⁵⁰ He bemoans the fact that the Court’s jurisprudence has strengthened this situation and that politics have made change almost impossible.⁵¹ To provide consumers and workers with a greater understanding of the arbitration process, he proposed an Arbitration Fairness Index and explored several norms that could provide a foundation for the Index.⁵²

44. See Stipanowich, *supra* note 42, at 470.

45. See Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 408–21 (2011).

46. See *id.* at 325.

47. See *id.*

48. See Stipanowich, *supra* note 39, at 987.

49. *Id.* at 1069.

50. *Id.*

51. See *id.*

52. See *id.*

He strives to rehabilitate arbitration from its growing negative image arising from the Court's sanctioning of standardized contracts of adhesion binding employees and consumers.⁵³ A self-identified legal realist,⁵⁴ he attempts to dispel the myth that arbitration is a "one size fits all" process. Not so, he reminds us. Arbitration has many forms and practice variations, including labor, commercial, international, sports, court-connected, online dispute resolution ("ODR"), and domain name.⁵⁵ He would not want disputing parties to miss the opportunities that arbitration provides in these areas.

From a broader perspective, he joins with international scholars in observing international arbitration's drift towards the litigation arena due to the influence of Anglo-American adversarial behaviors.⁵⁶ In *Arbitration: The New Litigation*, he acknowledges that the growing popularity and effectiveness of mediation and other dispute resolution processes have raised serious questions about the value of arbitration and its on-going place in the conflict resolution landscape.⁵⁷ These developments suggest to him the importance of a more effective exercise of choice by users of arbitration and a recognition that the fundamental value of arbitration is the ability of users to tailor processes to serve particular needs.⁵⁸ To fully appreciate what arbitration has to offer, he argues that we "must move beyond a monolithic one-size-fits-all view of arbitration and make deliberate process choices based on client goals and priorities."⁵⁹

This article has been influential not only in shaping how we think about arbitration, but how we think about and even define the mediation process. It inspired me to think more deeply about what remained from the gap left by arbitration's move to the litigation arena and resulted in my article, *Mediation: The New Arbitration*, in which I argue that, in many situations, mediation has become transformed into what looks like a traditional arbitration process.⁶⁰ This limits parties' disputing options to variations of adjudication.

While the scholar/practitioner Stipanowich criticizes many aspects of arbitration practice and evolving jurisprudence, the law school professor Stipanowich has definite views on what students should be learning about arbitration. He is critical of law school casebooks that

53. See *id.* at 985–91.

54. Stipanowich, *supra* note 45, at 325 n.4.

55. See, e.g., THOMAS J. STIPANOWICH & AMY J. SCHMITZ, *ARBITRATION: PRACTICE, POLICY, AND LAW* (2022).

56. Klaus Peter Berger, *Integration of Mediation Elements into Arbitration: "Hybrid" Procedures and "Intuitive" Mediation by International Arbitrators*, 19 *ARB. INT'L* 387, 390 (2003).

57. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 *U. ILL. L. REV.* 1, 7 (2010).

58. See *id.* at 50–56.

59. *Id.* at 2.

60. See Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 *HARV. NEGOT. L. REV.* 61, 73–74 (2012).

portray arbitration clauses as nothing more than a vehicle for imposing unfair procedures on unknowing parties. This negative view is not helpful to students, he argues, who would be better served with more balanced and “nuanced” discussions which offer an understanding of the significant role of arbitration in both domestic and international settings.⁶¹ In *Dear 1L: Five Guideposts for Your Future Professional Practice*, he continues with his concern for law students and reminds them that the ethical obligations governing arbitration practice may vary depending upon legal culture and context.⁶²

IV. MEDIATION

Many lawyers today practice in legal environments that have both cross-cultural and cross-border dimensions.⁶³ They find themselves in a world of increasing economic globalization where conflict is inevitable and attempting to manage it can be costly.⁶⁴ It is not surprising then that mediation has grown in popularity as a response to the growing demand for efficient, consensual-based methods of dispute resolution.⁶⁵ In fact, mediation plays a significant role in contemporary transnational dispute resolution⁶⁶ while some studies show a decline in arbitration use.⁶⁷ There is a general trend toward settlement

61. See Stipanowich, *supra* note 57, at 50.

62. See Love & Stipanowich, *supra* note 27, at 540–41.

63. Robert L. Gegios & Stephen D. R. Taylor, *Cross-Cultural Competency: A Non-Negotiable Skill for Lawyers Involved in International Commerce*, PRIMERUS, <https://www.primerus.com/business-law-articles/cross-cultural-competency-a-non-negotiable-skill-for-lawyers-involved-in-international-commerce-624201.htm> [https://perma.cc/VT3T-ZBS4].

64. See *id.*

65. His study of Fortune 1000 companies in 2011 showed strong use of mediation by hundreds of corporate counsels. See Stipanowich, *supra* note 38, at 1194–95; see also JACQUELINE NOLAN-HALEY ET AL., *GLOBAL ISSUES IN MEDIATION* 1–2 (2019) (describing mediation “as a confidential, efficient process that saves costs, preserves on-going relationships, gives parties control over their disputes, provides transparency and creative solutions, and often results in greater levels of satisfaction than litigation”).

66. Jacqueline Nolan-Haley, *Mediators in Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION* 283, 283 (Thomas Schultz & Federico Ortino eds., 2020).

67. See Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 51 (2014). In 2011, Professor Stipanowich was involved with groups that sponsored a survey of Fortune 1000 corporate counsel regarding their use of mediation, arbitration, and other ADR processes. *Id.* at 2. His analysis of the survey data shows new insights regarding the way large companies handle conflict. See *id.* at 5–6. We learn that mediation was growing in popularity while, except for consumer and product liability cases, arbitration use was declining. *Id.* at 6. Half of the survey respondents thought it unlikely that their company would use arbitration in the future. *Id.* at 51, 63. Why the decline in arbitration? Professor Stipanowich opines that it is related to the lack of control that comes with arbitration. See *id.* at 63. The growth of mediation can also be seen in the number of private

facilitation in international arbitration practice, and mediators are giving shape and structure to that facilitation.⁶⁸

But mediation is not so easily defined. It takes multiple shapes and forms and can be combined or blended with adjudicative dispute resolution processes such as Med-Arb, Arb-Med, or Arb-Med-Arb.⁶⁹ It may be labeled conciliation, settlement, or neutral evaluation depending on where it occurs.⁷⁰ Context and culture make all the difference.⁷¹ Given this reality, Professor Stipanowich urges that thoughtful conversation and intentional reflection about where we are going with mediation are necessary. If we are successful in this initiative, there will be more reflective behavior by dispute resolution practitioners and lawyers, and better-informed public policy. On the other hand, the failure to engage in this conversation, he warns, increases the likelihood that we will find ourselves floundering or in what he calls “behavioral drift.”⁷² He challenges us to think about the future direction of mediation:

Why has “modern” mediation been broadly embraced in some cultures and systems but not others? . . . What is the appropriate relationship between the activities of mediators and adjudicators? As greater reliance is placed on mediation in the resolution of domestic and international disputes, what, if any, impact will there be on the rendition of justice (from the standpoint of perceived fairness or effectiveness of the process, and the result, cost and time-savings, and other parameters)?⁷³

In *The International Evolution of Mediation: A Call for Dialogue and Deliberation* (2015), he urges that our conversations about mediation taking place on the international landscape be infused with “more active mutual engagement and discernment.”⁷⁴ Again, respect for dialogue, deliberation, and reflection continues to animate his scholarship. This article can be seen, in a sense, as a precursor to his

provider organizations, formerly devoted to arbitration, that now promote mediation. Nolan-Haley, *supra* note 66, at 291.

68. His empirical study with Zachary Ulrich showed that mediation and other forms of settlement are becoming common in commercial arbitral proceedings. Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 Y.B. ON ARB. & MEDIATION 1, 25–27 (2014).

69. *See id.* at 10.

70. *See id.* at 6–7.

71. NOLAN-HALEY ET AL., *supra* note 65, at 64. The IAM and Straus Institute Survey of Mediator Practices and Perceptions demonstrates “that the diversity of mediation practice appears to be [supported] by regional differences that may reflect differences in systems of law or national or local cultures.” Stipanowich, *supra* note 38, at 1213.

72. Stipanowich, *supra* note 38, at 1200 (describing “reflexive” as opposed to “deliberate” action).

73. *Id.* at 1201 (quotation formatting modified slightly from source).

74. *Id.* at 1192–93.

involvement with the development of the International Task Force on Mixed Mode Dispute Resolution.⁷⁵

Professor Stipanowich questions whether lawyers, who have exerted considerable influence on mediation practice, “effectively serv[e] the clients who are the true ‘owners’ of ADR processes.”⁷⁶ And so, he asks in *Living the Dream of ADR*, “Can we achieve a more appropriate balance between the goals and needs of client and counsel in dispute resolution?”⁷⁷

V. MEDIATION AND ARBITRATION: MIXED MODES OF DISPUTE RESOLUTION

In recent years, there has been a growing interest in and conversation about the use of mixed mode models of dispute resolution where “both settlement-oriented and adjudicative approaches are employed.”⁷⁸ Professor Stipanowich has been at the forefront of these discussions. Using the analogy of drivers on a multi-lane highway shifting from lane to lane to reach their destination, he observes that, so too, disputing parties move from settlement modes to adjudicative modes and back—“Switching hats” by neutrals is just like drivers “switching” lanes.⁷⁹

Professor Stipanowich’s mixed mode scholarship joins two conversations, arbitration and mediation, and suggests that both processes are a distinct part of a systems design framework.⁸⁰ His involvement in the International Task Force on Mixed Mode Dispute Resolution⁸¹ informed his scholarship in *Arbitration, Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators*.⁸² This article provides a critical overview of the international commercial dispute

75. See Stipanowich & Fraser, *supra* note 35, at 845.

76. Stipanowich, *supra* note 6, at 525.

77. *Id.*

78. See Thomas J. Stipanowich & Mordehai Mironi, “Switching Hats”: *Developing International Practice Guidance for Single-Neutral Med-Arb, Arb-Med, and Arb-Med-Arb*, 14 N.Y. DISP. RESOL. LAW. 29, 29 (2021).

79. See Thomas J. Stipanowich, *Arbitration, Mediation, and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators*, 26 HARV. NEGOT. L. REV. 265, 267–68 (2021).

80. See *id.* at 268–69; see generally NANCY ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2d ed. 2019) (discussing dispute resolution processes as part of a system); LISA BLOMGREN AMSLER ET AL., *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 7* (2020) (“Dispute System Design (DSD) is the applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict.”).

81. See Stipanowich, *supra* note 79, at 275; see generally Stipanowich & Mironi, *supra* note 78 (discussing how the International Task Force on Mixed Mode Dispute Resolution plans to improve dispute resolution processes); Stipanowich & Fraser, *supra* note 35 (discussing the international role of mixed mode dispute resolution).

82. See Stipanowich, *supra* note 79, at 275.

resolution landscape.⁸³ Created as a white paper for the International Task Force's work, it examines the interplay between mixed mode processes.⁸⁴ In the article, he returns once again to the familiar theme of his work that calls for a focus on deliberation before action and offers what he refers to as "a blueprint for reflection and action affecting international commercial dispute resolution in countries worldwide."⁸⁵ With meticulous detail, he offers a roadmap for understanding the multiple variations in mixed mode processes—Med-Arb, Arb-Med, Arb-Med-Arb, and 11th hour Arb-Med are just a few examples.⁸⁶ While he gives cautious guidance for moving ahead, in many areas he calls for more evidence to evaluate the mixed processes.⁸⁷

A valuable aspect of the article is its comparative perspective on mixed mode processes as practiced in divergent legal and cultural traditions.⁸⁸ Some countries prohibit the practice, some favor it, and some allow but regulate it.⁸⁹ U.S. practitioners engage in mixed mode arbitration "some of the time."⁹⁰ As Professor Stipanowich correctly observes, these cultural and legal traditions may influence perspectives on what is feasible in practice.⁹¹

Professor Stipanowich rightfully observes that the increased use of mixed mode practices and the cultural differences in our perspectives raise significant practice and policy issues both internationally and domestically.⁹² His response to the need for clearer guidance is to advocate for collecting and sharing good data regarding our experiences with mixed modes. Professor Stipanowich further encourages offering practice guidelines for the range of players in the field, including parties and counsel, arbitrators and mediators, dispute resolution provider institutions, and policymakers.⁹³ Supporting these guidelines are key principles: "encouraging amicable settlement, party autonomy and self-determination, procedural fairness and transparency . . . and fair outcomes."⁹⁴

83. *See id.* at 269–72.

84. *See id.* at 274–75.

85. *See id.* at 275.

86. *See id.* at 267–69.

87. *See id.* at 269.

88. *See id.* at 298–317.

89. *Id.*

90. *Id.* at 303.

91. *See id.* at 276. For example, "[t]he UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements from Mediation, 2018 . . . permits parties to agree . . . [to] switch[ing] hats." *Id.* at 272–73. However, there is still much debate about the propriety of the practice. *Id.* at 273–76.

92. *See id.* at 274.

93. *See id.* at 274, 361.

94. *Id.* at 339.

VI. CONCLUSION

An ADR scholar from the Modern Progressive Era, Professor Stipanowich has significantly influenced the field of dispute resolution. He has been concerned with issues of justice and fairness, not only for commercial business entities, but also for the little person who is forced into arbitration and for the consumers and employees who are victims of standardized contracts of adhesion. He has developed a jurisprudence of dispute resolution that prioritizes deliberation and reflection over “behavioral drift” as an important value in securing justice.

Long an admirer of Lincoln, Professor Stipanowich brings Lincoln’s wise advice to law students⁹⁵ and practitioners⁹⁶ alike:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has superior opportunity of being a good man. There will still be business enough.⁹⁷

Scholars have described Lincoln as having a moral universe governed by “what was right and what was practical.”⁹⁸ The same can be said of Professor Stipanowich. With all the new learning from the Modern Progressive Era, including Professor Stipanowich’s substantial contributions to justice and fairness for all participants in dispute resolution and his supporting jurisprudence of deliberation and reflection, the dispute resolution community should be able to build on these contributions to improve the field even more swiftly in the coming decades.

95. See Love & Stipanowich, *supra* note 27, at 534.

96. See generally Thomas J. Stipanowich, *Lincoln’s Lessons for Lawyers*, DISP. RESOL. MAG., Winter 2010, at 18 (explaining that modern lawyers could benefit from abiding by President Lincoln’s practices and policies).

97. *Abraham Lincoln’s Notes for a Law Lecture*, ABRAHAM LINCOLN ONLINE, <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm> [https://perma.cc/M2QF-2ASY].

98. *Abraham Lincoln’s Values and Philosophy*, ABRAHAM LINCOLN’S CLASSROOM (May 22, 2014, 3:53 PM), <http://www.abrahamlincolnclassroom.org/abraham-lincoln-in-depth/abraham-lincolns-values-and-philosophy/> [https://perma.cc/6WSG-PTSD].

