7-2014

Theory and Reality in Regulating Dispute Resolution (Book Review)

Nancy A. Welsh
Texas A&M University School of Law, nwelsh@law.tamu.edu

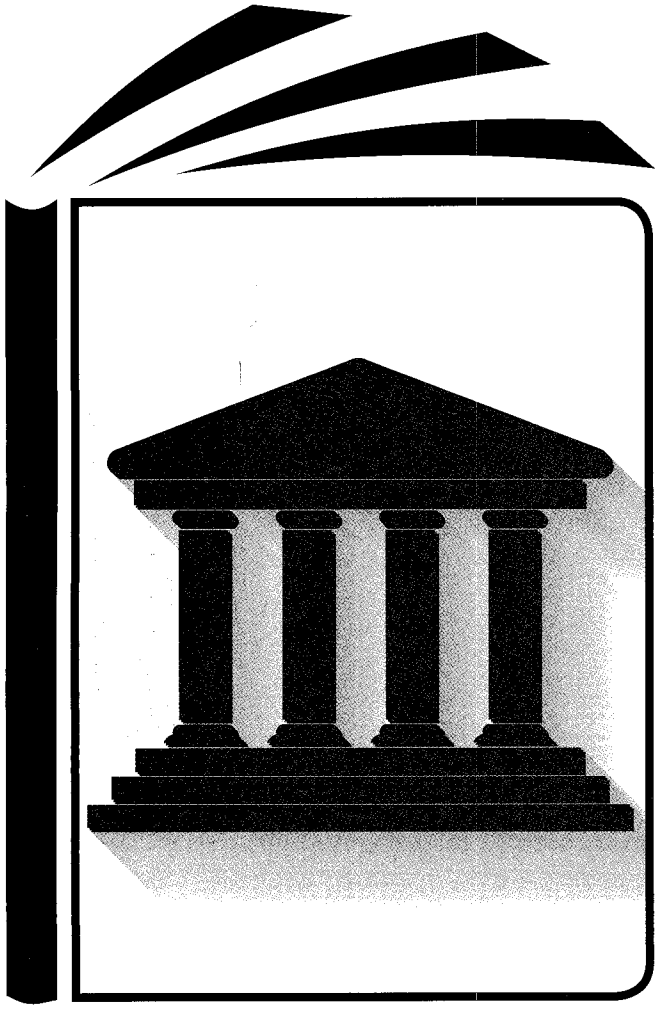
Theory and Reality in Regulating Dispute Resolution

Reviewed by Nancy Welsh

Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads

Edited by Felix Steffek and Hannes Unberath in cooperation with Hazel Genn, Reinhard Greger, and Carrie Menkel-Meadow

Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads has two very ambitious goals. The first is to propose a set of principles that can serve as a transnational "Guide for Regulating Dispute Resolution." The second is to provide an up-to-date description of the status of dispute resolution procedures and their regulation in many European countries, Japan, and the United States. The book thus encourages a targeted "comparative" look at dispute resolution. Although many readers might assume that the book will be relevant only for those with an interest or practice in international dispute resolution, American practitioners and policy makers can just as easily use the book's comparative approach to compare and contrast *domestic* dispute resolution systems and regulation. There are tremendous differences in the use and regulation of ADR from state to state within the United States and even from county to county within a single state. A comparative analysis, like the one undertaken in this book, permits practitioners and policy makers to decide whether such variation is most beneficial to the parties using dispute resolution — or whether some degree of harmonization might be in order.



The book accomplishes its first goal in three introductory chapters that contain the principles, as well as explanatory comments and a taxonomy — a sort of rubric — that operationalizes the application of the principles to a continuum of defined procedures. The authors' proposed principles are comprehensive and cover a wide array of topics, including dispute resolution mechanisms, infrastructure and framework, costs, dispute resolution clauses, choice of dispute resolution procedure, confidentiality, neutrality and qualification of intermediaries, state review of results, enforceability, and transparency.

The subsequent 12 chapters describe the status of arbitration, mediation, and other dispute resolution procedures in Austria, Belgium, Denmark, England and Wales, France, Germany, Italy, Japan, the Netherlands, Norway, Switzerland, and the United States. To facilitate comparison, most of the chapter authors follow a similar format. They begin with a description of the characteristics of ADR used in a country, examine the legislative approach to regulating, incentivizing, or mandating the use of ADR, consider whether the approach has the potential to restrict access to the courts, and end with policy recommendations.

The principles serve as an important introduction and framing device for the country-specific chapters. The authors ground the principles in the ethic of "normative individualism" that "puts the individual at the centre of regulatory questions and requires the state to justify the limitation of individual freedom." This concept should be familiar to any American arbitrator or mediator who values the foundational principle of self-determination. While the principles also acknowledge the need for "just dispute resolution for the parties" and "efficiency," normative individualism and individual choice-making take center stage. The first principle begins, for example, by stating that "the parties and not the state should choose the dispute resolution mechanism" and any regulation of dispute resolution mechanisms should "permit rational choices to be made by the parties and include clear criteria informing that choice." Later, in presenting the taxonomy, co-editor Felix Steffek even urges the potential for merging normative individualism with justice by observing that "just" regulation focuses primarily on fostering "freedom, equality and efficiency."

> A comparative analysis, like the one undertaken in this book, permits practitioners and policy makers to decide whether such variation is most beneficial to the parties using dispute resolution — or whether some degree of harmonization might be in order.

The principles consistently provide that state roles in dispute resolution procedures should be limited and supportive of party self-determination rather than prescriptive. For example, the state should provide a framework for dispute resolution and should facilitate parties' early and informed choices among procedures. States may even incentivize parties and neutrals, by granting the privilege of state enforcement only to those who engage in best practices. The principles do not, however, favor state-mandated procedures or state infrastructure or funding. Perhaps as a reaction to the European Union Directive on Mediation, the principles specifically note that states should not try to use dispute resolution as a substitute for the courts or for existing enforcement procedures.

Not surprisingly, however, the principles must also acknowledge exceptions to their general support of normative individualism, and these exceptions have the potential to be quite substantial. For example, the principles provide that the state may limit parties' control over the choice of a dispute resolution mechanism when vulnerable third parties — e.g., children in divorce — may be affected by such choice or in cases involving constitutional challenges. State infrastructure and funding may be appropriate when private dispute resolution procedures require public enforcement or when there are concerns about access to justice. Finally, American readers will note with interest that the principles offer special treatment for consumers.

The principles' primary allegiance to normative individualism nonetheless leads the Guide to detail the many points at which parties have the potential to exercise some level of control over the resolution of their disputes — e.g., in deciding to initiate a dispute resolution procedure, choosing the particular procedure to be used, selecting the neutral, determining whether the neutral will be permitted to influence the content of the result, deciding whether the result will be enforceable by a court (described here as "binding"), etc. This exhaustive list of choice points is quite helpful and builds on work that has been done by Lisa Blomgren Amsler and Herbert Kritzer in broadening our understanding of the application of self-determination.[1]

Indeed, the clarity and logic of this book's principled, civil law approach to regulation are both appealing and helpful. The principles, comments, and taxonomy of the Guide serve as a useful starting place for any individual who must make choices among different dispute resolution procedures. But the Guide's clarity and logic also reveal how reality — especially a common law country's reality — can refuse to stay within prescribed and narrow classifications. For example, the authors indicate that two key choices are whether the neutral will be allowed to influence the result and whether a process will be interest-based or rights-based. The authors conclude that in terms of its intrinsic characteristics, mediation is both non-evaluative and interest-based. In the United States, however, mediation often is as much rights-based as it is interest-based — and mediators often offer their assessments of parties' cases in order to influence outcomes. Thus, the principles and taxonomy represent useful vehicles for taking a first step in making choices and regulating dispute resolution, but it is clear that they

Nancy Welsh *is the William Trickett Faculty Scholar and Professor of Law at Penn State University, Dickinson School of Law. She is also co-chair of the Editorial Board of the* Dispute Resolution Magazine. *Her e-mail address is nxw10@dsl.psu.edu.*

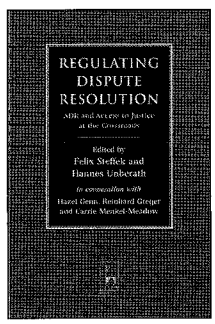
[T]he principles and taxonomy represent useful vehicles for taking a first step in making choices and regulating dispute resolution, but it is clear that they must also be adapted to the reality of a country's dispute resolution procedures.

must also be adapted to the reality of a country's dispute resolution procedures.

The country-specific chapters offer many insights regarding arbitration, mediation, judges' role in settlement, and the relationship between the courts and dispute resolution. The chapter regarding dispute resolution in Italy, for example, provides considerable detail regarding that country's dramatic experiment with mandatory mediation and notes that with recent legislation, the use of mediation far outstripped the use of arbitration. The chapter on England and Wales describes these countries' evolving use of court-imposed sanctions to encourage appropriate early use of mediation and includes the authors' recommendation that if courts make the use of mediation mandatory, they must also find a means to hold the process and individual mediators accountable. The chapter on the Netherlands details the use of a "self-test" to enable individual parties to determine whether their dispute is best resolved with the assistance of a judge or mediator. Many of the chapter authors observe that actual voluntary use of ADR has failed to meet the expectations raised by the theoretical appropriateness of ADR for all sorts of disputes. In fact, in several countries, use of ADR is largely reliant on courts' mandating or strongly encouraging the procedures' use.

The chapters also introduce the reader to unfamiliar dispute resolution procedures that might merit investigation and broader application. Austria, for example, has a procedure called "expert opinion," which may or may not be binding. Denmark uses government-approved private boards to resolve particular types of disputes. The Netherlands has dispute committees to resolve consumer and landlord-tenant matters.

Ultimately, *Regulating Dispute Resolution* is a useful, comprehensive, and thought-provoking book. To paraphrase one of the chapter authors, Machteld Pel, the principles and country-specific descriptions offer interesting ideas for "seducing" people to use ADR and neutrals to use best practices. The principles also are admirable in their commitment to helping parties make informed and rational choices, while recognizing that some situations justify state limitations on party choice or state-imposed forms of accountability. Finally, the country-specific chapters allow very helpful comparisons and reveal the challenges of applying the theory of dispute resolution to the more complicated reality of human, governmental, and institutional relations. ◆



Endnotes

1 *See e.g.*, Lisa B. Bingham, *Control Over Dispute System Design and Mandatory Commercial Arbitration*, 67 Law & Contemp. Probs. 221 (2004), Herbert M. Kritzer, *To Regulate or Not to Regulate, or (Better Still) When to Regulate*, Dispute Resolution Magazine, Volume 19, No. 3, p. 12 (part of "Considering Regulation of ADR" theme).