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Michelin II or the Regulatory Robustness Rating: Part 2

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy)/August 19, 2016

What makes good mediation law?

For those of you who have been following the plot, you will recognise this as the second in a series of three posts introducing what is now called the RRR — Regulatory Robustness Rating for mediation jurisdictions. You may also notice the name change. Yes, what originated as the Mediation Friendly Star System has transformed into the Regulatory Robustness Rating. Why? Simply because it's more accurate. I have amended my **previous post** to reflect this new language and there is also a more detailed explanation of the reasons to be found there.

Now, to Part 2 of the Triology.

Previously, I introduced the 12 criteria upon which the RRR System is based. Together they form the foundations of the RRR System and inform the ratings given to each jurisdiction. The purpose of this post is to explain the thinking, assumptions and value judgments underpinning each criterion. After all, the rating indicates the extent to which a given jurisdiction offers a robust regulatory regime for cross-border mediation, or not.

Each criterion is given a rating of up to five stars, five being the highest score possible and one being the lowest. In addition, the criteria are weighted according to their importance from a user perspective. The weighting scale is one to three, with the higher number providing a higher weight. So if the ranking of each category is one to five, then a ranking of five:

- on weighting of three would result in 15 points;
- on a weighting of two would result in 10 points;
- on a weighting of one would result in five points.

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I have set out the RRR criteria, weightings and underlying principles in tabular form for ease of reference. So when you click on the link below you will get a pdf with the RRR in tabular form.

Criterion No.	Descriptor	Underlying Principles	Weight-ing
1	Congruence of domestic and international legal frameworks	Here the view is taken that domestic and international legal frameworks for cross-border mediation are useful and robust if they are congruent rather than wholly or partially separate. In disputing situations where domestic and cross-border elements are present in the same dispute or in related disputes, it would make mediation potentially difficult if different floor was applicable to domestic and cross-border aspects in the same mediation. Mediation promises users the flexibility to address related disputes together in one mediation process and to address issues which may not technically form part of the legal statement of claim. This aspect of mediation is made significantly easier if domestic international mediation legal frameworks are identical or harmonized.	1
2	Transparency and clarity of content of mediation laws in relation to: 1. how mediation is triggered; 2. the internal process of mediation; 3. standards and qualifications for mediators; 4. rights and obligations of participants in mediation	A robust legal framework is considered to be one, which contains mediation law that is readily identifiable and accessible for local and foreign lawyers and users in all four listed content areas.	2
3	Mediation infrastructure and services: quality and access	The greater the access to quality mediation services and information, the more attractive the jurisdiction is considered as a mediation venue in terms of ability of a wide range of users to access, and to be able to afford, suitable mediation services of a high quality. Relevant factors here include: • the regulatory regime around standards and qualifications for mediators; • the existence of feedback and complaints systems for mediation services. • the offering of mediation services both independently and also as part of existing dispute resolution structures such as courts and arbitration centers. • the ability to access to mediation services including for those with limited financial capacity; limited technological literacy; and significant geographical distance to mediation service centers.	3

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4	Access to internationally recognized and skilled local and foreign mediators	Cross-border mediation comes in all shapes and forms and the needs of its users will vary from case to case. Sometimes parties will select the venue and applicable law from jurisdiction A and the mediator from jurisdiction B. The question may then arise: to what extent can foreign mediators selected by the parties practise in the jurisdiction of the mediation and be recognized under its legal framework? This can be important in jurisdictions in which certain aspects of mediation legislation (such as MSA enforceability options or confidentiality provisions) only apply to mediations conducted by a recognized mediator. According to the RRR system, best practice mediation means that users mediating a given jurisdiction have access to an internationally recognized pool of local and foreign mediators, who are: • both appropriately qualified and skilled; and • who are permitted to work across mediation services in the jurisdiction. This criterion is often achieved through recognition of prior (foreign) mediator qualification and/or through is a system of mutual recognition among jurisdictions. Business leaders such as Deborah Masucci, former Head of American International Group Inc's (AIG) Employment Dispute Resolution Program, have publicly endorsed the need for a pool of internationally recognized mediators who carry with them a trust mark of competence, skill and experience and the backing of reputable organizations.[1]	2
5	Enforceability of mediation and MDR (multi-tiered dispute resolution) clauses	A robust regulatory framework in relation to mediation and MDR clauses typically features: • formal generally applicable regulation (e.g. legislation) specifically supporting the enforceability of mediation and MDR clauses, as is the norm in relation to arbitration clauses; • clear, consistent jurisprudence supportive of the enforceability of mediation and MDR clauses.	3

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6	Certain, predictable regulation of: • insider/outsider confidentiality with some flexibility • insider/court confidentiality	Both insider/outsider confidentiality and insider/court confidentiality traverse the interface between the mediation process and the broader legal system. The former deals with the extent to which participants in mediation (insiders) can share information from the mediation with people who did not attend the mediation (outsiders); the latter deals with the issue of admissibility of evidence from the mediation session in subsequent proceedings. The underlying assumption for criterion 6 is that it desirable to have a uniform approach to people's rights and obligations in relation to confidentiality while at the same time respecting the principle of party autonomy. Furthermore, the integrity of the mediation process requires that participants be held accountable for their behavior in mediation – for example, that parties participate in good faith and do not engage in behavior such as misrepresentation or other conduct amounting to a contract defence. To this end confidentiality provisions must be balanced with certain exceptions. Further, it is important that regulation covers all relevant mediation participants and not just the mediators. In relation to insider/outsider confidentiality, best practice can be achieved by a uniform default approach. A default generally applicable standard (e.g. legislation) generates certainty and uniformity, while allowing parties to make an informed choice to opt out and make their own variations. Variations can be reflected in the terms of parties' mediation agreements and these are recognized and enforced by the courts. In relation to insider/court confidentiality, there is an overarching need for predictability and certainty in relation to the (non-)admissibility of evidence. For this reason formal generally applicable mandatory regulation (e.g. legislation) is desirable. Parties cannot opt out of the general rule. However, certain exceptions provide for accountability of those who participate in mediation processes including mediators, lawyers and parties.	2

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7	Responsive informed self-regulation of insider/insider confidentiality	Insider/insider confidentiality relates to the internal conduct of the mediation process and therefore party autonomy and flexibility are higher order principles than uniform regulation. This differs from insider/outsider confidentiality and insider/court confidentiality. For criterion 7 responsive regulatory policy permits parties to tailor insider/insider confidentiality to meet their procedural needs. In so far as there are formal regulations on insider/insider confidentiality in legislation, court rules or other regulatory forms, these are default in nature i.e. subject to different arrangements by the parties. It is considered good practice to draw on institutional "standard" provisions on insider/insider confidentiality that can be included, and adapted for, written mediation agreements. It is also considered good practice that written mediation agreements expressly provide for insider/insider confidentiality on a case by case basis.	1
8	Enforceability of MSAs (mediated settlement agreements) and iMSAs (international mediated settlement agreements)	There is a range of legal forms for MSAs / iMSAs e.g. contract, settlement deed, arbitral consent award, court order. A robust regulatory system is one, which offers users a real choice about the legal form of their mediated settlement agreement and effective options for enforceability. To this end, there are clear and transparent criteria that apply for the recognition and enforcement of MSAs / iMSAs in their various forms. When documented in the appropriate legal form, MSAs / iMSAs are recognized by the law and, depending on the choice of legal form, can be directly enforceable in the courts without further preconditions needing to be met or demonstrated. When documented in the directly enforceable form, the ability to challenge is restricted.	3

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9	Impact of commencement of mediation on litigation limitation periods	Mediation is often recommended to parties on the basis that they have nothing to lose in terms of their legal rights and remedies – aggrieved parties can always pursue their rights in court should mediation not result in resolution. Such promises assume, *inter alia*, that permitted time periods for parties to lodge their claims do not expire during the course of the mediation with the result that the claim cannot be heard in post-mediation proceedings. In addition where parties are compelled to comply with mediation clauses, there is a strong argument that this compliance should not prejudice them in terms of the time available to prepare and lodge documents to initiate legal proceedings and comply with other relevant time periods. Finally allowing limitation periods to run during mediation could have the effect of encouraging respondent parties to participate in, or even initiate, mediation for the primary purpose of delaying initiation of court proceedings in the hope that the limitation period expires before the mediation does. For these reasons, robust regulatory regimes will provide for the efficient and effective suspension or interruption of legal proceedings /litigation limitation periods without detriment to the rights of the parties once mediation has commenced. Suspension occurs either automatically or with a simple notification procedure.	1
10	Relationship of the courts to mediation	Where courts support mediation programs, judges tend to understand the nature of the mediation process well and this is likely to be reflected in judicial decisions on mediation issues from enforceability to confidentiality. Accordingly, the relationship of the courts to mediation is relevant to the overall Robust Regulatory Rating. Jurisdictions rate well on this criterion where mediation is integrated with, or aligned to, the court system so that most courts have mediation programmes with a formal, effective and transparent referral process to mediation.	2
11	Regulatory incentives for legal advisers to engage in mediation	Legal advisers play a key gatekeeper role in the development of mediation practice and mediation law. The more experience lawyers have with mediation, the better placed they are to competently draft and interpret mediation clauses, agreements and MSAs and advise clients in relation to mediation law. To this end a robust regulatory regime offers a range of transparent, highly effective regulatory incentives for legal advisers to inform clients about, and engage with, the mediation process. Incentives comprise both soft and hard regulatory forms and some incentives include sanctions for breach.	1

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12	Attitude of courts to mediation (based on case law/jurisprudence).	Regulation is much more than provisions written into a law, a code or a contract. Regulation comes to life through its application by parties, lawyers, and the courts. This criterion considers the extent to which the courts of a given jurisdiction support mediation in terms of: • a clear line of decision-making in cases brought before them; • recognition of properly drafted mediation and multi-tiered dispute resolution clauses, mediated settlement agreements and other contractual documents; • recognition of the importance of confidentiality as a central tenet of the mediation process, and • other mediation factors. Here a high regulatory robustness rating, reflects a court system that uniformly recognizes and is prepared to enforce mediation agreements, MSAs/iMSAs and other mediation protocols and processes. It is difficult to achieve a high score on this criterion in jurisdictions with little or no jurisprudence on mediation issues. To some extent this reflects the nascent nature of mediation law and the uncertainty that this stage of the development of the field necessarily brings with it.	3

The next and final post in the RRR triology will deal with how to apply the Regulatory Robustness Rating to any legal jurisdiction. Watch out for this next week.

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