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Regulatory Robustness Rating (RRR): A Michelin guide to mediation regulatory regimes

Nadja ALEXANDER
Singapore Management University, nadjaa@smu.edu.sg

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Previously I posted some musings about a **Mediation Friendly Star Rating System**. Sort of like a Michelin Guide on the robustness of a jurisdictions regulatory framework in relation to mediation. In this post, I'd like to revisit the topic and take the idea a little further. Before I start, let me say thank you to many colleagues who commented on the earlier ideas especially Sabine Walsh, Martin Svatos, Geoff Sharp and Michael McIlwrath.

So in terms of developing the Rating System, the first thing I have done is change the name from Mediation Friendly Star Rating System to **Regulatory Robustness Rating (RRR)** for Mediation. While 'Mediation Friendly' is a catchy title, it does not accurately capture the purpose of the rating. Apart from the nice alliterative effect of 'Regulatory Robustness Rating', the new title more accurately reflects what the rating is about.

As the title suggests, the RRR focuses on regulatory criteria to determine the robustness of a jurisdictions regulatory framework in relation to cross-border mediation.

Certainly, there will be other non-regulatory factors — inter alia economic, behavioural psychological, cultural, policy and so on — that will influence the choice of law and jurisdiction for mediation. The RRR does not deal with these.

In essence the RRR offers a way to:
• analyse the quality and robustness of a jurisdiction's legal framework for cross-border mediation;
• factor such an analysis into choices about governing law in mediation clauses and

other agreements;
• inform law and policy making in relation to cross-border mediation.

The RRR aims to support legal advisers and other users of mediation to make informed choices about the type of regulatory frameworks that support best practice mediation and where to find them. In addition, the RRR can be used as a design guide for law and policy makers seeking to improve the regulatory attractiveness of their jurisdiction in relation to mediation. To this end the RRR is based on a set of assumptions about what makes good mediation law and what makes a jurisdiction attractive for mediation purposes in terms of its regulatory framework.

In the RRR, the term "law" is understood broadly to encompass diverse regulatory forms beyond legislation. It extends to soft law options and private contracting (for example, agreements to mediate and mediation clauses) and industry norms (for example, codes of conduct, practice standards, and accreditation standards). This broad understanding of law is consistent with contemporary regulatory theory, which has shifted its focus from government rule-making to the context of institutions and interest groups. Moreover, it is also consistent with the EU Directive, which envisages compliance by EU member states through a wide range of regulatory forms.

The 12 criteria upon which the RRR System is based are set out below. Together they form the foundations of the RRR and inform the ratings given to each jurisdiction.

For each criteria a rating of up to five stars may be given with 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. If this sounds too complicated, don't worry for now. Let me set out the 12 criteria for the Regulatory Robustness Rating in this posting (you will they have undergone further refinement since my initial post) and follow up with a more detailed explanation and some examples during the next few weeks.

Here they are.

Criterion 1: Congruence of domestic and international legal frameworks

Criterion 2: Transparency and clarity of content of mediation laws in relation to:
i. how mediation is triggered;
ii. the internal process of mediation;
iii. standards and qualifications for mediators;
iv. rights and obligations of participants in mediation

Criterion 3: Mediation infrastructure and services: quality and access

Criterion 4: Access to internationally recognised and skilled local and foreign mediators

Criterion 5: Enforceability of mediation and MDR (multi-tiered dispute resolution) clauses

Criterion 6: Certain, predictable regulation of:
i. insider/outsider confidentiality with some flexibility
ii. insider/court confidentiality

Criterion 7: Responsive informed self-regulation of insider/insider confidentiality

Criterion 8: . Enforceability of MSAs (mediated settlement agreements) and iMSAs (international mediated settlement agreements)

Criterion 9: Impact of commencement of mediation on litigation limitation periods

Criterion 10: Relationship of the courts to mediation

Criterion 11: Regulatory incentives for legal advisers to engage in mediation

Criterion 12: Attitude of courts to mediation (based on case law/jurisprudence).

So there you go. And just to ensure that you are not bored during the summer month of August, next week I will follow up with some of the assumptions underlying the criteria and the different weightings given to each. Yes, I bet you can't wait ☺