Leiden Journal of International Law (2021), **34**, 783–786
doi:10.1017/S0922156521000248

BOOK REVIEW

Catharine Titi and Katia Fach Gómez (eds.), *Mediation in International Commercial and Investment Disputes*, Oxford University Press, 2019, 408 pp, £84.00, ISBN 9780198827955 doi: 10.1093/law/9780198827955.001.0001
doi:10.1017/S0922156521000248

Interest in mediation in the context of commercial dispute resolution keeps growing. Governments, arbitral institutions, and international organizations alike continue to explore the advantages and disadvantages of mediation as a form of dispute settlement.[1] the editors of the volume, Catharine Titi and Katia Fach Gómez, assembled various contributions on mediation that speak precisely to this very matter. Catharine Titi warns against both underestimating and overestimating the potential of mediation as a form of dispute resolution.[2] As she explains, mediation offers many significant advantages; for example, the flexibility of procedure, relatively lower costs, non-adversarial settings. However, it can also be 'unworkable' for certain types of dispute.[3] For example, in the circumstances when the relations between a state and an investor have broken down beyond repair.[4]

The volume approaches the conversation on the advantages and disadvantages of mediation in a distinctive way. Specifically, it offers an analysis of mediation as a form of dispute resolution from a comparative perspective. By 'comparative perspective' here, I mean the methodology of selecting and uniting the contributions with the full view of understanding the roles that mediation plays in the various fields of law. For editors, comparativism is not a final declared destination but rather a guidebook to fully explore unique features of mediation, its continuing relevance across the different legal fields, and its possible role in the future of dispute resolution.

Structurally, the volume includes four parts that explore various aspects of mediation as a procedure for resolving disputes. Part I focuses on the role of mediation in settling commercial and investment disputes. Part II examines different mediation rules available for the participants of the commercial and investment disputes. Part III delves into specific features of mediation in the context of different industries, including energy, intellectual property, construction and finance. Part IV explores special topics in the field, such as codes of conduct, selection of mediators, confidentiality, and transparency. The volume's structure appears conventional; however,

[1]E.g., F. Nitschke, 'A Preview of ICSID's New Investor-State Mediation Rules', *Kluwer Mediation Blog*, 10 January 2020, available at mediationblog.kluwerarbitration.com/2020/01/10/a-preview-of-icsids-new-investor-state-mediation-rules/.

[2]C. Titi, 'Mediation and the Settlement of International Investment Disputes, Between Utopia and Realism', in C. Titi and K. Fach Gómez (eds.), *Mediation in International Commercial and Investment Disputes* (2019), 21, at 24–6.

[3]Ibid., at 24.

[4]Ibid.

its internal organization reveals four interconnected themes, which conceptually cut across the edited volume. This review will highlight these themes in the context of the authors' contributions.

First is the role of culture in the process of mediation. Second is the existing tension between transparency and confidentiality. The third is a matter of enforceability. Fourth is 'collaboration' as a value that mediation prioritizes through its very process. These four themes reveal that the volume looks beyond a formalistic discussion of the 'black-letter rules' on mediation but instead maps these rules in the relevant contexts, including but not limited to structural, cultural, and ethical.

Culture remains an essential contextual element in many forms of dispute resolution, including mediation.[5] This volume analyses culture in the context of mediation in three ways. First, the contributions speak about culture as a relevant factor informing the rules on conducting the process and appointing the mediators. According to Charles Brower, knowledge of the culture informs the understanding of the parties' values.[6] Cultural sensitivity can enhance the possibility of achieving a successful settlement.[7] Second, it captures the tensions existing in the field of legal practitioners. Specifically, the volume highlights the attitudes of the legal practitioners who may prioritize adversarial forms of dispute resolution subconsciously and, thus, limit the reach of mediation as a type of dispute resolution. For example, in his contribution, Jack Coe signals the need to foster attitudinal changes. As Coe puts it, the mediator's main challenge is for the parties 'to convene at the first instance'.[8] To achieve it, the parties (and their counsels) need to view mediation a feasible option for resolving the dispute. Third, this volume demonstrates how different jurisdictions have developed distinctive techniques and approaches to the process of mediation under influence their cultural approaches to dispute resolution generally.[9] For example, Danny McFadden discusses the cross-fertilization that had continuously occurred in the field of mediation when, for example, Singapore modified the Western-style mediation to 'develop a model that suits our culture and diverse ethnic backgrounds'.[10]

The second theme demonstrates an existing tension between the competing values of transparency and confidentiality. This theme is particularly prominent in the contributions on the current and future role of mediation in resolving investment disputes. For example, Katia Fach Gómez observes that confidentiality of procedure has been a significant 'asset' of mediation.[11] Chester Brown and Phoebe Winch highlight the importance of transparency in the context of investment arbitration.[12] Specifically, they acknowledge that transparency plays an essential role in ensuring the integrity of the proceedings given that the investment disputes can involve matters of public interest.[13] Brown and Winch indicate that some level of transparency in the context of investment mediation is necessary, but it cannot reach 'the same level' as in investment arbitration, not to jeopardize the value of mediation as a procedure.[14] While the contributions meaningfully engage with the tension, they do not seem to develop a framework under which this tension can be potentially reconciled.

[5]Admittedly, the term 'culture', its scope and relevance remain a subject-matter of scholarly debate. E.g., W. L. Kidane, *The Culture of International Arbitration* (2017), 9–16.

[6]C. H. Brower, 'Selection of Mediators', in Titi and Gómez, *supra* note 2, 301, at 310.

[7]Ibid.

[8]J. J. Coe, 'Concurrent Co-Mediation: Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution', in ibid., 61, at 78.

[9]J. Tirado and E. Vicente Maravall, 'Codes of Conduct for Commercial and Investment Mediators: Striving for Consistency and a Common Global Approach', in ibid., 342, at 346.

[10]D. McFadden, 'The Growing Importance of Regional Mediation Centres in Asia', in ibid., 160, at 160.

[11]K. Fach Gómez, 'The Role of Mediation in International Commercial Disputes: Reflections on some Technological, Ethical and Educational Challenges', in ibid., 3, at 10.

[12]C. Brown and P. Winch, 'The Confidentiality and Transparency Debate in Commercial and Investment Mediation', in ibid., 321, at 321.

[13]Ibid., at 324.

[14]Ibid., at 330.

https://doi.org/10.1017/S0922156521000248 Published online by Cambridge University Press

Enforceability remains one of the most critical factors in the discussions on mediation across different fields. As Karen Vandekerckhove observes, enforceability plays a prominent role in the EU Directive on the cross-broader regulation of the commercial disputes within the EU.[15] S. I. Strong explains that potential difficulties with enforceability can structurally discourage the parties from choosing mediation as a form of dispute resolution.[16] Frauke Nitschke indicates that enforceability remains a priority for the participants of the investment disputes. With this priority in view, the ICSID Centre revised the conciliation rules to make 'the process even more flexible'.[17] Specifically, the Centre examined a possibility to 'integrate the Conciliation Rules on the Recognition and Enforcement for Mediated Settlements (Singapore Convention)'.[18] Hal Abramson's contribution discusses the Convention and its potential for addressing the enforceability conundrum, specifically by providing the framework for recognition and enforcement of the settlements.[19] The question, however, remains whether the Convention will influence the parties of the disputes and their attitudes towards mediation.

The next theme concerns 'collaboration' or 'co-operation' as an underlying value of mediation.[20] In contrast to adversarial forms of dispute settlement, mediation offers the flexibility of procedure to inform collaborative search of the solutions among parties in the dispute.[21] The flexibility of the procedure is as important as the flexibility of the outcome. The mediators can develop a solution to uphold and foster the parties' long-term relationships instead of rendering an award on damages.[22] For example, Heike Wollgast and Ignacio de Castro highlight that preservation of the long-term relations remains important in the context of intellectual property and related disputes.[23] The arbitration institutions can play a significant role in ensuring that the parties of the dispute co-operate. For instance, Alina Leoveanu and Andrija Erac highlight the 'instrumental' role of the International Chamber of Commerce in providing guidance to the participants of the disputes and maintaining close contact with the parties and the mediator.[24] It demonstrates that mediation requires careful management to be successful for the parties.

In sum, the volume masterfully situates the reader within the existing discourse in the field of mediation. It is useful for academics and practitioners alike who look for a study to delve deeper into the nature of mediation. The volume's contributors invite further discussion on the future role of mediation in the context of particular disputes. For instance, can mediation become a default option for resolving disputes on sovereign bond restructuring? What is the future of mediation in the context of investment disputes? For example, can mediation substitute arbitration for particular types of investment disputes, such as those where the government measures address climate change? The answers to these questions do not simply constitute a matter of an academic curiosity; rather, they have significant practical implications for the future of dispute resolution. The investment arbitration undergoes the process of reform under the umbrella of United Nations Commission on International Trade Law. Many governments are keenly interested in the

[15]K. Vandekerckhove, 'Mediation of Cross-Border Commercial Disputes in the European Union', in ibid., 182 at 184.

[16]S. I. Strong, 'Applying the Lessons of International Commercial Arbitration to International Commercial Mediation: A Dispute System Design Analysis', in ibid., 39, at 54–5.

[17]F. Nitschke, 'The ICSID Conciliation Rules in Practice', in ibid., 121, at 141.

[18]Ibid.

[19]H. Abramson, 'New Singapore Convention on Cross-Border Mediated Settlements: Key Choices', in ibid., 360, at 377.

[20]E. P. Tuchmann et al., 'The International Centre for Dispute Resolution's Mediation Practice and Experience', in ibid., 101, at 114.

[21]Brower, *supra* note 6, at 320; Tuchmann et al., ibid., at 102.

[22]Coe, *supra* note 8, at 70.

[23]H. Wollgast and I. de Castro, 'WIPO Mediation: Resolving International Intellectual Property and Technology Disputes Outside the Courts', in ibid., 259, at 261.

[24]A. Leoveanu and A. Erac, 'ICC Mediation: Paving the Way Forward', in ibid., 81, at 98.

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alternatives to arbitration, in part because it can address the concerns over the costs and duration of the arbitration process.[25]

Other fields are not an exception, for example, given technological progress, the number of disputes over intellectual property assets will likely keep growing. How can mediation procedures evolve to meet the growing demand? What role would Artificial Intelligence play in the future of mediation? What should be the legal limits of its role(s)? Perhaps, as Katia Fach Gómez explains, with time Artificial Intelligence will not substitute but 'complement' human participation in mediation.[26]

The answers to these questions may vary depending on the readers' approaches and experiences with mediation. And, the answers are, of course, important but not less than the analytical pathway to these answers. As editors, Catharine Titi and Katia Fach Gómez have shown that a comparative approach for thinking about possible developments in the field of mediation can provide useful insights. Specifically, this analytical path requires a careful comparative assessment of the advantages and disadvantages of mediation within a particular legal field and across different fields. The benefits of such an approach to future studies on mediation are twofold. First (as the volume demonstrates), there is an opportunity to advance a meaningful conversation between the experts to exchange knowledge about the persisting challenges and diverse solutions to such challenges across the fields. Second, comparative analysis in studying, learning and teaching mediation can produce greater possibilities for awareness, an essential factor in changing attitudinal barriers that may privilege more adversarial forms of dispute resolution over mediation.

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[25]UN Commission on International Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS) - Dispute Prevention and Mitigation - Means of Alternative Dispute Resolution, A/CN.9/WG.III/WP.190 (2020), para. 29.

[26]Fach Gómez, *supra* note 11, at 10.

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https://doi.org/10.1017/S0922156521000248 Published online by Cambridge University Press