# RECENSION

## Felix Steffek, Hannes Unberath *et al.*, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* Oxford, Hart Publishings, 2013, 454 pages

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In 2009, the editors and authors of this book began laying the grounds for this ambitious project with the aim of contributing to the understanding and development of the legal framework governing national and international dispute resolution in civil and commercial matters. They surrounded themselves with a select group of law-makers, professionals and academics and discussed structures and principles of dispute resolution based on the theory, empirical research and regulatory models stemming from the wealth of experience in 12 jurisdictions: Austria, Belgium, Denmark, England and Wales, France, Germany, Italy, Japan, the Netherlands, Norway, Switzerland and the United States of America.

Four years later, the 24 high-profile contributors delivered a compelling transnational *Guide for Regulating Dispute Resolution* (GRDR) that covers dispute resolution mechanisms in all their various forms, including negotiation, mediation, conciliation, expert opinion, mini-trial, ombud procedures, arbitration and court adjudication.

Curiously, the first part of this two-part book begins by putting the reader face to face with the end result, namely the Guide for Regulating

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Dispute Resolution (GRDR), in its purest, most concise and laconic form. This choice of presentation order might seem rather abrupt at first because of the apparent simplicity of the GRDR, leaving one with a thirst for more explanation and intellectual understanding. Luckily, it is then followed by a reproduction of the exact same Guide, but every principle is now preceded by a sound explanation as to the relevance of such simple but profound choice of wording, which makes it much more reader-friendly. The first part ends with an impressive 25 page demonstration by M. Felix Steffek which sheds light on the philosophy behind the taxonomy, policies and topics presented in the Guide.

The second part is an in-depth immersion into the dispute resolution realities of the twelve countries mentioned above, each one having its own chapter averaging 25 pages. Experts with a background in academia, practice and law-making describe and analyse the regulatory framework and social reality of dispute resolution in these countries. By employing a comparative, interdisciplinary method, oriented towards an integration of theory and practice and supported by empirical and documentary research, the authors draw conclusions regarding policy choices, regulatory strategies and the practice of conflict resolution.

It is interesting to note that all texts are up-to-date as of 1st March 2013, and often even later.

In the first part, the goal of the authors is to overcome the challenges of diversity and complexity associated to the different dispute resolution mechanisms both at the national and international levels by proposing a systematic approach to law-making and standard-setting. By doing so, they also try to answer the question about the lack of convergence in the rules and practices of conflict resolution existing worldwide. They note that "since this is a Herculean task, the principles suggested are only a first starting point to inspire further development. They are not comprehensive, and instead, aim to encourage further discussion."[1]

Nevertheless, the authors accomplish a commendable feat by effectively capturing and transposing the essence of every dispute resolution mechanism through the perspective of a functional taxonomy, while leaving an open normative framework that allows for regional and local adaptations, all of which is presented in a modular, highly flexible structure of regulatory topics. The result is an astounding effort in synthe-

1. F. Steffek, H. Unberath *et al.*, *Regulating Dispute Resolution: Access to Justice and ADR at the Crossroads*, Oxford, Hart Publishings, 2013 at p. 3.

sis, comprising about 32 principles covering 17 topics on only 7 pages, from general issues such as infrastructure and framework to more specific ones such as confidentiality. It is important to note that the GRDR recommends structures and principles concerning regulation only. Therefore, topics that are important in practice, such as methods of dispute resolution, but that the authors believe should not be regulated are not mentioned for the sake of clarity and the avoidance of over-regulation.

Instead of trying to summarize all the various principles presented in this book, which would be yet another Herculean task, the focus of this review will be on conveying the sound intrinsic logic that gave birth to these principles and illustrate its application via examples from the book.

At the root of all the principles proposed in the first part is the concept of normative individualism, the generally accepted legal ethics position, which is also the basis of human rights in international conventions and national constitutions. This position rests upon the statement that fair law requires justification in relation to the individual concerned. Building from there, the authors argue that:

> At the centre of dispute resolution are the individuals who are party to and affected by the dispute. These individuals know the dispute and their interests best; hence, they should be the starting point and focus of designing dispute resolution mechanisms. It follows that – as a starting point – the parties and not the state should choose the resolution mechanism. [...] It follows from the normative individualism that the self-determined individual is primarily responsible for dealing with his or her conflicts.[2]

It is interesting to mention that Steffek stresses the fact that individual interests can be directed towards social betterment and are not fundamentally egotistical. That being said, all the principles are articulated around the individual and seen through his or her perspective. This concept is well illustrated in the infrastructure and framework principle. Since the individual is primarily responsible for dealing with his or her conflicts, the authors argue that from the perspective of infrastructure and framework, it is not the state's duty to organise and finance an institutional infrastructure that comprises all alternative dispute resolution mechanisms. The state is only responsible for providing a reliable legal framework for alternative dispute resolution mechanisms. However, due to the state monopoly on the enforcement of rights, the state is responsible not only for providing a normative framework, but also for organising and

2. *Ibid.* at p. 15.

financing an accessible judicial court system, suggesting that ADR mechanisms should not be used by the state as a substitute for an adequate and comprehensive court and enforcement system.

Regarding the distinction between the various dispute resolution mechanisms, the individual's perspective is coupled with a functional taxonomy that focuses on the intrinsic characteristics and differences of the dispute resolution mechanisms. Therefore, this approach is characterised by the following central functional features, which all relate to the control or choice of the individuals:

– initiation control (is the parties' consent needed to initiate the procedure?);

– procedure control (do the parties choose the procedure?);

– result-content control (do the parties determine the content of the result or is it an evaluative process done by a third person?);

– result-effect control (is the parties' consent needed for the result to be binding?)

– neutral choice control (do the parties choose the neutral?);

– information (privacy) control, (is the procedure and the information obtained during the procedure private?);

– interest-based or right-based (is the procedure interest or right-based?);

– and intermediation (do the procedures include intermediation by a third person?).

The strength of this taxonomy is that it is less concerned with rules and more with their effects, namely on an ethical, economical, sociological and psychological level. Analysed through this perspective, the authors offer us a very useful matrix[3] built from the description and analysis of the twelve countries' dispute resolution realities found in the second part of the book.

3. *Ibid.* at p. 37.

**Table 1**

| | Parties Together Have... | | | | | |
|---|---|---|---|---|---|---|
| | Initiation Control | Procedure Control | Result-Content Control | Result-Effect Control | Neutral Choice Control | Information Control |
| Negotiation | Yes | Yes | Yes | Yes | N/A | Yes |
| Mediation | Yes | Yes | Yes | Yes | Yes | Yes |
| Conciliation | Yes | Yes | No | Yes | Yes | Yes |
| Arbitration | Yes | Yes | No | No | Yes | Yes |
| Adjudication | No | No | No | No | No | No |

They push their idea even further by presenting a much more intricate matrix a few pages further that encompasses a greater number of dispute resolution mechanisms and intrinsic features. This kind of all-encompassing, yet easy to read and understandable tool could constitute the basis of analysis user-friendly questionnaire that citizens would be able to answer in order to assess which dispute resolution mechanism best fits their needs. Needless to say that it might prove very useful as an educational and ADR advertisement tool.

Guided by the normative individualism concept dictating that the individual and his or her interests should be at the heart of the legal system, the authors suggest various principles mainly designed to inform, protect and empower the parties. For example, they note that an early, informed and undistorted choice of the adequate dispute resolution procedure by the parties is essential. Moreover, the means for acquiring the necessary information and understanding of the resolution mechanisms available should be as affordable as possible. Also, the counsel and the involved neutral should be under a duty to constantly monitor the appropriateness of the choice taken and mention to the parties if their choice turns out to be questionable. The authors go even further by suggesting that instead of having a general duty to inform the client about various ADR mechanisms, lawyers should have a concrete duty which not only specifies what information is to be acquired and when, but also that requires documentation to be submitted to court.

Concerning the second part of the book, authors analyze more or less the same set of topics, namely:

I. Characteristics of ADR

II. General Approach of the Legislator as Regards the Regulation of ADR and Adjudication

III. Approach towards Specific ADR Instruments

  A. Negotiation

  B. Mediation

  C. Conciliation

  D. Expert Opinion

  E. Arbitration

IV. Policy Recommendations/Questions

This country by country information organisation approach offers a systematic, in-depth view of the respective realities of every country. However, it does not provide the reader with a comprehensive overview of the general trends or similarities and differences between the realities of those countries. The rather arduous task of synthesizing and comparing all the information is thus left to the reader, who then has to peruse the entire book if he or she wants to acquire a global vision of dispute resolution realities.

While the book focuses strongly on mediation, it also provides a good overview of the use of other types of ADR mechanisms, such as arbitration and more administrative mechanisms such as specialized tribunals and ombud procedures. In the vast majority of countries, the arbitration regulation is heavily inspired by the UNCITRAL Model Law on International Commercial Arbitration. The very high cost of arbitration restrains its use almost exclusively to high-profile commercial international disputes as well as to heavy industry sectors such as ship building, oil and construction. As for specialized boards, tribunals and ombud procedures, they are mainly used in labour or consumer conflicts, with generally good degrees of success. Regarding conciliation, it is interesting to note that some countries use the term interchangeably with mediation, while other countries make a clear differentiation in theory and in practice. Finally, expert opinion is closely associated with arbitration procedures most of the time, while some countries institutionalize its practice via boards or tribunals.

Despite the obvious lack of statistical data, which is easily explained by the fact that most alternative dispute resolution mechanisms are confidential by nature, their use is undoubtedly on the rise worldwide over the last two decades, especially in the case of mediation. However, while agreeing on the overwhelming advantages of ADR mechanisms as providing a better, cheaper, faster solution to conflicts, the authors note that these mechanisms are still not used to their full potential in practice. In other words, if we only look at the high quality results that these mechanisms promise to deliver, one would expect to see these mechanisms being used profusely in practice; this is still not the case. Many reasons have been identified by the authors for this situation, among which are the lack of comprehensive regulation on ADR and the lack of official quality standards regarding the qualification of neutrals. A large majority of authors agree that regulation on alternative dispute resolution mechanisms has an encouraging effect by providing publicity and legitimacy.

However, they also note that regulation alone is not sufficient. There must be a fundamental shift in public opinion and legal culture. Indeed, litigation as the primary means to solving conflicts is strongly engrained in the legal culture of the majority of the countries analysed. Only the Netherlands and the Scandinavian countries have a long history of using alternative dispute resolution mechanisms, dating back to the middle-ages. Still, even in those countries where ADR is somewhat part of the legal culture, a lot of work remains to be done before ADR becomes the standard and courts become an option of last resort.

This can be partly explained by the fact that in almost all the countries, lawyers only have a general, somewhat indirect, duty to advise or inform their clients about the possibility of choosing ADR mechanisms instead of going to court. Indeed, lawyers do not have a "concrete" duty to advise their clients, which would not only specify what information has to be transmitted to the client and when, but would also require proof to be submitted to court. It is interesting to note that for now the province of Québec has opted for a general duty to inform as proposed in the draft version of the new regulation respecting the *Code of the Ethics of Advocates*.[4] Also, the *Civil Code of Procedure* has undergone a profound reform which promotes the use of alternative dispute resolution methods, especially negotiation, mediation and arbitration, and which stipu-

4. "45. Throughout the course of a mandate, the advocate must inform and advise the client about all available means for settling his dispute, including dispute prevention and resolution methods." – Draft regulation respecting the *Code of Ethics of Advocates* published in *Journal du Barreau du Québec*, May 2013, vol. 45, nº 5.

lates that from now on, parties shall have the obligation to consider their use before turning to the courts.[5] It will be interesting to see to what extent this legislation will be applied in practice and whether it will have the intended impact of promoting the use of ADR in Québec.

The authors view this book as an invitation for further research, as the discussion of transnational principles of regulating dispute resolution has just begun. Perhaps most importantly, what stems from the experience of the countries analysed is that while regulation of dispute resolution mechanisms per se is a positive step forward, it is not enough to cause a profound shift in legal culture, since compulsory ADR generally provides insufficient positive results. Luckily, the primary incentive for the use of ADR is the results that they promise to deliver: better, faster, cheaper access to justice. It is therefore necessary to persuade rather than impose. Research shows that it is essential to incentivise lawyers, judges, accountants, notaries, tax advisers, insurance companies and other gatekeepers to act in the parties' interest. It is also essential to implement other measures, such as information campaigns, institutionalised information boards and mandatory dispute resolution training within the university and education sector.

In conclusion, while offering an in-depth analysis of each country's dispute resolution reality, the book does not provide a comprehensive overview of the general trends or similarities and differences across borders. Nevertheless, this book offers a wealth of information and ideas useful not only for legislators in their quest of delivering justice through the regulation of the legal system, but also for all policy-makers, professional associations, practitioners and academics in thinking about the best ways to contribute to this noble goal. Perhaps the most striking aspect of this book is the contextualisation of the individual and his interests as the source and focus of justice. This idea originates from the simple fact that the individual is the sole reason for the existence, and the ultimate beneficiary of, the economy, the state and the legal system. It gave rise to an exceptionally pragmatic and efficient array of regulatory principles, which aim to address many aspects of the human experience.

5. Section 1, *Bill 28 – An Act to establish the new Code of civil procedure*.