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# Taking Dispute Resolution Theory Seriously at Home and Abroad: Prospects and Limitations

*Bryant G. Garth\**

Carrie Menkel-Meadow's splendid discussion of dispute resolution theory operates at several levels.<sup>1</sup> One level involves a questioning of the international applicability of U.S. dispute resolution theory. She shows that our theory is in many respects parochial—not necessarily capable of explaining or even contributing to shaping dispute resolution behavior outside the United States. For the theory to make any claim to universality, she suggests, it must take into account very different settings and perhaps even develop counter models applicable to some places but not others. A more context sensitive theory, she argues, can move us beyond concepts and approaches uncritically derived from U.S.-oriented assumptions about the interests and behaviors of parties to a dispute. The article deserves a very careful reading for these and other insights about the current state of dispute resolution theory in the United States and its potential relationship to dispute processes found abroad or in transnational contexts.

There is also a kind of lament and research project connected to the concern with the potential universality of dispute resolution theory. The implicit lament is that, while the theory may not be perfect, it does offer insights that can prevent and mitigate conflict in many cases. With the war in Iraq looming at the time of her writing, Professor Menkel-Meadow naturally wondered what dispute resolution theory and its progress meant as a practical matter in the face of the logic—or lack thereof—that propelled the United States toward the war. She suggests, for example, that policymakers and leaders—including those who negotiated with Iraq—have not really assimilated the “teachings of our field.”<sup>2</sup> If they had, perhaps the war and any potential threat posed by Iraq, might have been avoided.

This implicit lament can be stated more generally. In Professor Menkel-Meadow's words, “the techniques, technology, and apparatus of conflict resolution ‘processes’ are much more professionalized and developed in domestic dispute resolution” than abroad or in transnational situations.<sup>3</sup> Even in the domestic setting, however, there are places where the theory ought to, but does not, play any role. Again, in her words:

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1. See Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319.

2. *Id.* at 327.

3. *Id.* at 336.

[I]ncreasingly, retired judges, elder statesmen, and other “notables” engage in shuttle diplomacy to settle major class action lawsuits, community disputes, and in the case of some politicians, like Jesse Jackson or Jimmy Carter, may intervene in international disputes without formal portfolio, authority, or training.<sup>4</sup>

Similarly,

With the sophisticated debates about “evaluative” vs. “facilitative” mediation and whether “neutrality,” “embedded expertise,” or legal training is required of third party neutrals (whether mediators, arbitrators, facilitators or leaders of public policy consensus processes), the “professionalization” of the role of the third party has led to a robust set of issues for consideration in the practice of third party intervention. In the international arena, by contrast, although there are many sophisticated practitioners with diplomatic portfolios, other qualifications such as education, training on issues of neutrality, practice protocols, and ethics, seem relatively newer and underdeveloped.<sup>5</sup>

This implicit lament is also a research question. Put simply, the question is why and when do the practitioners nationally and internationally come to use dispute resolution theory in their approaches to particular disputes. Drawing in part on some suggestions in her article, I want to explore some aspects of this research question and suggest some expansion of the theory to explore this question more systematically.

One place to start is with the relationship of the law to dispute resolution theory. Dispute resolution theory purports to apply whether the law is involved or not, but Professor Menkel-Meadow notes that the relationship between the law and the theory is more complex. Indeed, she suggests that as part of our research we should develop “‘maps’ of the regime (or absences) of law and legal institutions standing as ‘back-ups’ to the negotiation and mediative processes currently being described.”<sup>6</sup> Comparative work needs to be aware of the place of law. Later in the article, Professor Menkel-Meadow also raises and discusses the question of the impact of the “rule of law” domestically and internationally: “Does the ultimate sanction of ‘the rule of law’ or court decision affect domestic dispute resolution differently than ‘violence’ or economic sanctions affect international disputes?”<sup>7</sup> The theory, in short, must take into account different positions of law. I believe the relationship is even stronger than she posits, as a practical matter. The place of law in any given context is central to the spread of dispute resolution theory and to the ADR practices associated with that theory. The place of law can be seen through an examination of the processes promoting the spread of dispute resolution theory.

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4. *Id.* at 337-38.

5. *Id.* at 347 (citations omitted).

6. *Id.* at 335.

7. *Id.* at 349.

It would be relatively easy to argue that the dispute resolution theory, almost by definition, should make sense only for the United States. It was developed in response to particular U.S. problems and came to U.S. law schools because of the role of law and litigation in U.S. social and economic life. Whatever we think about the origins and potential local biases of the theory, however, there are also potential competitive advantages for U.S. dispute resolution theory abroad. It does have some potential as an export. We can see this potential by considering the export of neo-liberal economic orthodoxy produced initially in the 1950s at the University of Chicago, for example, which was built on theories of monetary policy derived from U.S. economic history. Nevertheless, these economic theories became universal enough to provide the recipes for economic reform in much of the world in the 1980s.<sup>8</sup> One of the reasons for this diffusion of ideas is that the prestige of the U.S. universities abroad, combined with U.S.-provided scholarships, attracted talented and ambitious students to the universities and the ideas. The students learned U.S. economics, applied that learning in places like the World Bank and the International Monetary Fund (IMF), and also took that learning back home. Once at home, the students naturally invested their own expertise into their local contexts.<sup>9</sup>

The question is whether similar dynamics will apply to U.S. dispute resolution theory. There are reasons to expect the same diffusion of ideas. In particular, in contrast to the situation a generation ago with U.S. economic theory, law graduates and others from around the world come to the United States in rather large numbers to seek graduate degrees and take advantage of other learning programs. Here they become quite familiar with the tenets of U.S. dispute resolution theory because that theory has come to occupy a very strong place in U.S. law schools. These students from abroad may not question the theory as much as they should, but the point is that it has a strong appeal.

For example, the mandatory mediation program enacted into law in Argentina in the early 1990s was a direct result of the work of two judges who attended dispute resolution programs at the National Judicial College in Reno, Nevada.<sup>10</sup> Similarly, a young Chilean lawyer in the late 1990s stated that in the midst of a negotiation with another young Chilean lawyer, one said to the other: "Harvard Negotiation Project, when were you there?"<sup>11</sup> They each recognized the vocabulary and negotiation approach that the other had learned at Harvard. Chilean and Argentinian law schools, especially the major public ones, remain relatively formal, but many individuals are taking the prestige and credibility of the U.S. theory and using it in their own local contexts. Lawyers and judges use the theory as a basis to argue for reform in the judiciary and in legal procedures.

These importers can, of course, be criticized locally for promoting a foreign-based expertise, but efforts to make dispute resolution theory in the United States

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8. See DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998).

9. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 143-44 (2002).

10. *Id.* at 242-45.

11. YVES DEZALAY & BRYANT G. GARTH, *CHILE: LAW AND THE LEGITIMATION OF TRANSITIONS. FROM THE PATRIMONIAL STATE TO THE INTERNATIONAL NEO-LIBERAL STATE* 81 (Am. B. Found., Working Paper No. 9709, 1998).

more open and aware of other places and processes will make it easier to combat such charges. In any event, there is momentum behind dispute resolution theory and processes that can be traced into other continents, as well as transnational arenas such as international commercial arbitration. That does not mean, of course, that the theory's impact in different arenas and settings will be the same as in the United States, but it has the capacity to provide the standard by which local and transnational practices are measured.

Therefore, it is possible to imagine a cadre of young professionals personally investing in dispute resolution theory and then taking it into new places and substantive areas. Professor Menkel-Meadow makes the point that the theory ought to be good enough to merit such universalization.<sup>12</sup> Although that is correct, the process of importing and exporting can continue indefinitely even if the theory might be considered flawed and parochial.

Professor Menkel-Meadow's observations about the relationship between dispute resolution and the law highlight the potential importance of legal sanctions backing up mediation processes. She contrasts the field of international relations, which, at this point, is not very "legalized," with U.S. domestic dispute resolution.<sup>13</sup> Another way to ask the question of the relationship between law and dispute resolution theory, however, is to ask who the carriers of that theory will be: who will learn it in the first place, who will try to put it into practice in new domains, and what strategies will be available to generate a demand for the new technologies. In my experience to date, as the preceding paragraphs suggest, the international carriers of dispute resolution theory have been lawyers, and their preferred method for building demand for their dispute resolution processes has been to enact court-annexed mediation programs (e.g., Sri Lanka, Ecuador, Argentina). From this perspective, the "law" has been crucial to the spread of dispute resolution theory outside the United States and into other settings.

The same process can be seen in international commercial arbitration, where a number of arbitrators and practitioners have led the charge to bring U.S.-style mediation (and the theories that go with it) into international commercial arbitration. As Yves Dezalay and I suggested in our book several years ago, the relatively younger and more U.S.-oriented generation promoted their position against the "grand old men" by asserting their superiority in technical matters<sup>14</sup>—their "professionalization" in the words of Professor Menkel-Meadow. Dispute resolution theory fits their orientation both to the United States and to technical sophistication.

It is not difficult to imagine a course of events whereby law graduates, foreign and domestic, of U.S. law schools and other programs learn dispute resolution theory and bring it back into their own countries and practices. It provides a way for them to assert their expertise and ability to handle disputes efficiently and effectively. Increasingly, we could also see greater numbers of international conferences where dispute resolution theories are debated, modified, and made more universal in their applicability and theoretical concerns.

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12. Menkel-Meadow, *supra* note 1, at 349-52.

13. *Id.* at 329-36.

14. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996) [hereinafter DEZALAY & GARTH, *DEALING IN VIRTUE*].

Before suggesting that such developments will necessarily occur, it is important to revisit the link between dispute resolution theory and the law. For most legal scholars in the United States, it is almost axiomatic that disputants will turn to the law and legal machinery to handle their problems. Law is considered the default mode. This assumption may not be warranted in many instances, but it accurately reflects the strong position of law in the United States, compared to its position in other countries. In contrast, other forms of authority and legitimacy outside of the United States compete with and often dominate the law. The authority might be that of religion, family, political party, or state power. Those who resolve disputes bring their authority to the table and use it to find a resolution that draws on, or is consistent with, some plausible interpretation of the dominant texts or understandings, and the legitimacy of that interpretation persuades the parties to submit. Law must compete for that position of authority and legitimacy.

The increase in global trade and communication, the growth of transnational law firms and local corporate law firms, the increased numbers of non-U.S. residents seeking U.S. law degrees, and the activities of development institutions, including the IMF and the World Bank, are promoting the idea of the “rule of law” and an increased prominence to law and legal institutions in dispute resolution.<sup>15</sup> The process is slow and the results far from inevitable, but the point is that the success or failure of dispute resolution theory depends ultimately on a process that not only trains law graduates from foreign countries in the U.S. technology but also gives them some power and prestige to apply their acquired knowledge in dispute resolution at home. If their credentials and training gain little recognition at home, their expertise will also not be taken very seriously.

The same basic insights about the role of law and competing forms of authority apply to Professor Menkel-Meadow’s implicit lament. Professor Menkel-Meadow notes several times, as quoted above, that “notables,” including diplomats and retired judges, have not fully embraced the importance of knowing, understanding, or implementing dispute resolution theory. Yet, the “amateurs” continue to play a very large role in high stakes dispute resolution in business, including international commercial arbitration, and in international relations. Will these notable amateurs learn dispute resolution theory and apply that theory for the benefit of the parties to a dispute? Will the cadre of graduates armed with cutting edge theory finally transform the approaches of these notable amateurs who still dominate high stakes disputes at home and abroad?<sup>16</sup>

We should begin by noting that the amateurs typically have at least one recognized expertise for dispute resolution, the law. Yet, as Professor Menkel-Meadow understands, the amateurs do not invest very much of their legal expertise in resolving the dispute. One of the leading international commercial arbitrators and an expert in the so-called *Lex Mercatoria*,<sup>17</sup> for example, stated that the *Lex Mercatoria* could always be interpreted to find the correct business resolu-

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15. *Id.*

16. See Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37 (1996).

17. See generally LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Carbonneau ed., 1990).

tion.<sup>18</sup> It was not that the legal expertise dictated the result, but that the appropriate result was found to be consistent with the *Lex Mercatoria*. This "reasonableness" aspect to dispute resolution helps explain why high stakes disputes are typically handled by these amateurs rather than the learned "experts" in dispute resolution theory. The logic of this apparent paradox (amateurs thrive by providing legal results that are dictated largely by an economic logic) merits some elaboration.

The paradox is a result of the need to create a demand for law as the legitimating authority for dispute resolution. The demand, as I have noted, is not inevitable, and we can see the need to build that demand in the history of international commercial arbitration. Business disputes are now routinely submitted to international commercial arbitration, but that was not always the case. It was necessary for the potential arbitrators to demonstrate to businesses that they should substitute a legally-oriented arbitration for negotiation handled under the shadow of diplomacy, economic coercion, and pressures to maintain the working relationship. What that meant was that the lawyers, and the law they promoted, had to be generally brought into alignment with prevailing understandings of political and economic power.

As with respect to any legitimating ideology and set of institutions used to decide or resolve a dispute, those who hold economic and political power will submit to a decision only if they feel that it serves their long-term interests. The holders of economic power tend to submit to the law because it protects their property and allows them to enforce contracts that reflect their economic power. They may lose cases from time to time—or negotiate settlements that give up something of substance—but the system provides the huge benefit of legitimating and protecting their power.

There is another aspect to the willingness to submit to authority, legal or otherwise. There are often many ways that a dispute can be handled that will be more or less consistent with the prevailing rules. Those who submit their disputes to a particular authority and set of institutions—and have choices of where to take the dispute—want some assurance that the result will be something with which they can live. The assurance might come through confidence that the person charged with resolving the dispute is well-trained and an expert in the relevant technology, such as having expertise in the law or in dispute resolution theory. It might also come from the position of the person resolving the dispute, such as a retired judge, notable academic, or former government official. For high stakes disputes, in particular, our research strongly suggests that the parties with power will seek to entrust their dispute to someone in whom they have confidence borne of personal experience. They want to know that the individual will understand subtle issues of power, know what kinds of outcomes are plausible (and acceptable) and which ones are not, and have an ability to rationalize that outcome in the relevant legitimating language (which might be law). In addition, for transnational disputes, the parties want to be sure that the individual is not too connected with one state or its businesses. The individual third party must, in other words, be sufficiently cosmopolitan.

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18. DEZALAY & GARTH, DEALING IN VIRTUE, *supra* note 14.

The potential number of individuals who might fit the bill for high stakes national and transnational disputes is relatively small, but the actual number of individuals who handle the disputes is much smaller still. One reason is that the lawyers or other agents who pick the third parties must be able to tell their clients that they have picked the best person available. If, by chance, the client does not like the results, the lawyer or agent can say that it was the product of the best choice possible. The process of selecting third parties then tends to reward those who are already well known, and makes it difficult for outsiders to gain a portfolio of cases to resolve.

The question behind Professor Menkel-Meadow's lament then is whether the notables of dispute resolution will be persuaded to embrace dispute resolution theory as a guide to the processes in which they serve, or whether they will make places for other experts in that field. The starting point is that the demand for third parties for high stakes or sensitive disputes is driven more by the people than by the expertise. The ticket for admission into the club of high profile dispute resolvers is the combination of a distinguished name and an earned reputation for sensitivity in handling highly charged or high stakes disputes.<sup>19</sup> Even though most arbitrators and representatives in arbitration are lawyers, they are not necessarily adversarial. They are skilled in reducing conflict even when they have stirred it up themselves. There is some competition within the group of individuals in this elite club, but the competition is not such that outsiders are welcome based on superior expertise. As with many monopoly, or quasi-monopoly, situations, there is no great pressure to innovate. The elite group, in my experience, will address the dispute resolution theory at their own conferences and in their publications, but they will only use what they choose to apply; true experts in dispute resolution theory will not be in the position to assess the uses of the theories. From the perspective of an expert such as Professor Menkel-Meadow, in fact, it will probably appear as if the theories do not have influence on the amateurs.

Will the amateurs ever truly embrace dispute resolution theory in their practices? As those trained in the United States grow older and become notables themselves, perhaps, the theory will gain a stronger place. However, the selection of individuals for the high stakes disputes will never be based on their theoretical sophistication. Instead, those who make the selection will continue to choose individuals who have personal access to the reputations for discretion and responsibility of the potential third parties. My conclusion, therefore, is that the theory will gain adherents for high stakes claims at home and abroad, but that the actual role of dispute resolution theory will remain relatively small. Put another way, here, as in many areas of the "law," personal relations are more important than knowledge of legal theory. As academics, for example, we may think that law firms are above all collections of legal experts. What clients look for, however, is not just expertise, but personal connections and contacts that can help clients accomplish their goals under a respectable legal umbrella.

I would like to see contributions to dispute resolution theory that examine what third parties bring to the table, in relation to their legal expertise or sophistication in dispute resolution theory. Much of the theory reads as if it is simply a technology that anyone can apply. The analogue in the law more generally is the

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19. *Id.*



assumption in the legal academy that only the legal argument counts, not who makes the argument. Even in the United States, the success or failure of legal arguments and dispute resolution processes, at certain levels, depends on factors other than expertise. I think that most practitioners recognize this fact, but I do not think that academic theories have accepted this insight. Professor Menkel-Meadow is correct to dramatize the contrast between amateurs and dispute resolution “professionals,” and to lament the amateurs’ ignorance of the dispute resolution technology known to and utilized by the professionals. But we also need a theory that explains what processes, techniques, and technology different kinds of amateurs have and use in different settings.

There is one final point to make about the demand for the law and dispute resolution theories. As noted before, the willingness to entrust a dispute to a third party depends on a calculation about the risks and benefits of submission of the dispute. There are ways, as I have suggested, to minimize that risk when the stakes are high, including the entrustment only to third parties who are known and trusted to behave responsibly—meaning that they also behave with a recognition of the parties’ powers and positions. When the stakes are relatively small, it may be sufficient simply to entrust the dispute to the legal system or someone theoretically sophisticated. There are issues involved in the assignment of disputes to one or another forum.<sup>20</sup> A key component to any process, however, is that the benefit sought by the more powerful party is more than an outcome that favors that party. Much of the time the favorable outcome could have been obtainable simply through the use of superior economic or political power. Powerful parties who submit to legal processes also seek the legitimacy that comes from following an acceptable process and set of governing rules. Submitting to a legitimate process always runs some risk, even though the rules tend to be generally in alignment with economic and political power. The demands of the more powerful party may be questioned or modified, or perhaps even rejected in some instances.

We come now to the war in Iraq. Professor Menkel-Meadow wondered why there was not more investment in dispute resolution. Perhaps the failure of negotiation represented the extreme version of the powerful party anxious to avoid the questioning of its goals and actions. It may be that the U.S. government, led by President George W. Bush, simply did not want to run any risk that there would be an outcome or potential outcome inconsistent with victory on their terms. Put another way, the ever more super-powerful party did not believe that the potential gains in legitimacy were worth the potential costs. I am not sure that further developments in dispute resolution theory will help solve this kind of situation, but it is worth-while to consider what could have resulted by using a strategy more dependent on legitimacy. Maybe an investment in legitimacy might have precluded some U.S. options, but the benefits from that investment may not have been sufficiently appreciated.

Professor Menkel-Meadow reminds us of the progress of dispute resolution theory in the legal academy in the past several decades. It is fascinating to see the way students from abroad embrace the theory and seek to apply it in their own settings. There is strong momentum for U.S. dispute resolution theory abroad, but

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20. I explored this problem in part in Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002).

it is coming in behind U.S. law. The theory must be strengthened and made more relevant to different settings and persons. That is a key point of Professor Menkel-Meadow's article, but the theory may spread in any event. The power and prestige of U.S. law abroad, however, will also depend on the position it occupies at home. Law depends on a willingness to give up some power in order to gain legitimacy. Since September 11, 2001, the willingness of the executive branch to trade power for legitimacy has diminished considerably at home and abroad. At the core of Professor Menkel-Meadow's lament, therefore, is a concern and desire to find dispute resolution approaches and processes that will bring dignity and potential benefits to both weak and strong parties. We continue to search for such processes and to encourage powerful parties to find it in their interests to adopt them.

