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*by
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Commentary

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[Editor's Note: Ellen Bass is the Director of the Weinstein JAMS International Fellowship Program. She is located in the JAMS San Francisco Resolution Center. Any commentary or opinions do not reflect the opinions of JAMS or LexisNexis®, Mealey Publications™. Copyright © 2018 by Ellen Bass. Responses are welcome.]

China has a surprisingly long history of alternative dispute resolution. “We don’t even call it ‘alternative’ dispute resolution; it’s just dispute resolution and there are reports of early versions of mediation going back more than 3,000 years,” explains Andrew Wei-Min Lee, who previously served as a senior lecturer at Peking University Law School, where he taught classes on mediation, arbitration and other forms of ADR.

Yet despite the millennia of experience, China still does not have a thriving or lucrative commercial mediation industry. Arbitration in China is more developed and practiced more regularly than mediation. Today, there are over 250 domestic arbitral institutions, with the five largest operating out of Beijing, Shanghai, Shenzhen and Hong Kong. Lee, a former corporate lawyer, found himself frustrated by the overshadowing of mediation because he has a “deep passion for mediation as an excellent means of resolving social and commercial disputes in Chinese society.” So to help change that, Lee turned to the Weinstein JAMS International Fellowship program.

Lee had heard about the Weinstein JAMS Fellowship through his contacts at International Bridges to Justice [a Geneva-based NGO] and an academic program connected to Peking University Law School. A Weinstein JAMS International Fellow in 2011, Lee spent

three months in the United States shadowing senior mediators and facilitating workshops on Chinese ADR at law firms and law schools.

Yet as Lee’s experience indicates, in many countries, passionate ADR practitioners may not receive support or have access to ADR training. The Weinstein JAMS International Fellowship program seeks to address that. The initiative was launched 10 years ago by the JAMS Foundation, whose mission is to provide financial assistance for conflict resolution initiatives and to share its dispute resolution experience and expertise for the benefit of the public interest. Named to honor the contributions of JAMS neutral Judge Daniel Weinstein (Ret.), the program enables mediation and arbitration enthusiasts to pursue projects of their own design that advance ADR practices in their home countries. Applicants to the Fellowship program are required to submit a proposed project as part of the application process which is very competitive with a typical selection rate of 10%.

Since its inception in 2008, the Weinstein JAMS Fellowship program has successfully supported more than 100 Fellows in over 70 countries over the last ten years. Many of the Fellows are actively engaged in drafting legislation favoring mediation in their countries, recommending ADR policies, working in the field of community mediation to increase access to justice for those unable to access the courts, designing, implementing and establishing court-connected ADR programs as well as developing their own ADR training and education service providers. The growth of this expanding global network of ADR leaders has far surpassed the expectations the JAMS Foundation team set forth in the early years.

Fellowships are given to individuals like Lee, who have demonstrated a commitment to ADR and who seek to increase the availability of dispute resolution education, training and services in their home countries. They come both from countries with established legal systems and those transitioning to the rule of law. Fellows stay in the US from one to four months, are granted up to \$20,000, and study under the guidance of the JAMS Foundation and seasoned JAMS panelists. During the Fellowship, they observe how JAMS administers and resolves cases, and often participate in university-based programs. The first class, inaugurated in 2009, was composed of seven Fellows. The most recent class contained nine ADR enthusiasts from Kosovo, Pakistan, Bangladesh, Uzbekistan and Rwanda, among other countries.

“It can be daunting and financially challenging to give up a stable career path in corporate law and instead forge an uncertain journey in dispute resolution,” says Lee, 40, who continues to raise awareness for alternative dispute resolution in China. “These are challenges similarly faced by other Weinstein JAMS Fellows from other countries, who are doing work very similar to my own. The Weinstein JAMS Fellows are an extended family fighting the same fight around the world. We have come to lean on and encourage each other. Fellows from Russia, Greece and India have come to China to support my projects, and I have similarly visited Fellows in other countries to help in their work. This makes each of us stronger.”

Ivana Ninčić, a lawyer and mediator from Serbia, applied for the Weinstein JAMS Fellowship after the European Union Common Position on Judiciary and Fundamental Rights in 2016 encouraged Serbia to reduce judicial backlog in part through ADR. She wanted to gain practical and theoretical knowledge from renowned authorities in alternative dispute resolution, and to become a stronger mediation ambassador in her own country to help carry out policy and system reforms.

During her Fellowship in 2017, she participated in ADR training programs at Pepperdine University School of Law and UC Hastings College of Law. In both programs, Ninčić analyzed challenges and strategies for sustaining mediation and examined the cultural aspects of mediation. She also explored court ADR programs, including the US District Court ADR

Program in Los Angeles and the Superior Court of California’s program in San Francisco.

“An integral part of the Fellowship was having the privilege to shadow some of JAMS’s finest neutrals. I learned how important pre-mediation preparation is, including exchanging briefs, structuring the process for the particular case and parties, and building relationships, as well as the importance of post-mediation communication,” she recalls. “I was likewise impressed by the mediation culture in the United States. At the JAMS office in San Francisco, we were given a wealth of additional resources, including books, publications and training manuals, and the opportunity to talk to professionals, including case managers, who enable the center to function smoothly.”

Having learned about mediation system design, Ninčić returned to Serbia better able to implement mediation reform. A consultant to the Ministry of Justice for legal profession reform, Ninčić recently attended a meeting of the Network of Mediators from South East Europe, where she discussed dispute resolution laws, public awareness of mediation, and the potential for improving investment climate in the region through promotion of mediation. She has also been appointed on the first board for promotion and training of mediation of the Arbitration Association in Serbia.

“The most important take-away from observing dispute resolution processes in the US and from having the opportunity to learn from the experiences of professionals in the field is the decisive conclusion that no one size fits all, and that the new regulatory model, which we should devise in Serbia, should allow for ‘fitting the forum to the fuss,’” Ninčić says.

Ecuadorian lawyer Ximena Bustamante, who was in the very first class of Weinstein JAMS International Fellows, dreamed of becoming a peacemaker since law school.

“I wanted to become a mediator who could help parties resolve their disputes with a much more realistic view of the conflict than the mere application of the law to the specific facts,” explains Bustamante, 34, now a professor at San Francisco de Quito University in Ecuador.

Ecuador has witnessed important developments in ADR during the past twenty years. Mediation is more

broadly used for the resolution of legal disputes. Two specific features distinguish mediation, including the strength of the mediated settlement agreement, as well as the ability of the state to reach settlement through mediation. Other ADR mechanisms have also grown in these decades, including arbitration and dispute boards. But back in 2009, mediation was not yet developed in Ecuador. Most mediators were practicing attorneys and mediation was seen as a social service rather than a professional service. And most mediated cases had small interests at stake, Bustamante recalls.

During her Fellowship, Bustamante shadowed 18 mediators and 26 cases. She recalls one most important lesson she learned was that mediation is not only a good idea, it is systematic hard work. She realized that for mediation to work in Ecuador, two things have to be proven. The first is that mediation is useful for highly complex cases. The second is that mediation can be a profession that will provide for the mediator and his or her family.

After the Fellowship, Bustamante returned to Ecuador and served as the National Director of the Attorney General Office's Mediation Center, which settled complex cases involving a government institution and a private party. "I don't think there is anything more challenging, from a legal perspective, than to settle with a government institution in a civil law system. We have proven that mediation is useful in highly complex cases."

Last year, Bustamante established PACTUM Dispute Resolution Consulting Cía. Ltda, a for-profit law firm whose attorneys are dedicated to collaborative law. "We mediate in most ADR centers in Ecuador and also assist in negotiations. There is not another law firm like this in Ecuador and I hope that this business model will help prove that mediation can be a profession and a full-time job."

Fernando Navarro-Sánchez was working as a transactional lawyer in Mexico City when his boss, an ADR enthusiast, encouraged him to apply for the Weinstein JAMS International Fellowship. "Mediation was just taking off in Mexico," Navarro-Sánchez recalls.

A member of the class of 2013, Navarro-Sánchez spent 10 months earning an LLM at Pepperdine University

and working as a volunteer mediator in Los Angeles. He also shadowed a dozen of commercial mediators and externed with the then general counsel at JAMS.

Today, Navarro-Sánchez works as a commercial mediator in Mexico, where the practice is gaining traction. "My career was extraordinarily enhanced by the program. On a practical side, I increased my dispute resolution skills, met people doing similar things around the world and learned – and continue to learn – from them. The Fellowship gave me the extraordinary opportunity to witness first hand how mediation works from some of the world's mediation leaders."

Fellows agree on the importance of sharing ADR experiences with practitioners around the world. "Both from a quantitative and a qualitative standpoint, ADR allows people to have better and more adequate means to solve disputes," Navarro-Sánchez explains. "And that is true for the human condition, not just for one legal system or culture."

The benefits of mediation are well known to those who have used it, Bustamante says. "The possibility to control the result of the dispute and the destiny of the disputants, the reduced costs compared to litigation, the opportunity to create a custom-made resolution, the ability to look into the future with optimism instead of preparing for years-long litigation, the chance to forgive and let go of resentment and hate – all of these are benefits that should be available to all."

Ninčić adds that shared cross-cultural experiences can show policymakers that adopting a dispute resolution culture will likely stimulate economic growth and encourage healthy interpersonal relationships. She believes that with the increase of international trade, especially global online businesses, it will be more essential than ever to promote efficient, effective dispute resolution solutions, both internationally and domestically, which ultimately will improve business relationships instead of severing them.

Collaborating with each other is one of the primary benefits of the program, former Fellows uniformly report. "There are things you do in America that we should adopt overseas, and there are things we are doing overseas that could help America," Lee says. "So the Weinstein JAMS International Fellowship program is one where Fellows can both learn and teach."

Indeed, for Ninčić, the Fellowship will be a lifelong engagement. “The wealth of knowledge shared with other Fellows of their respective mediation and legal systems has been priceless,” she says. “The lasting

network formed between the Fellows, JAMS neutrals and others enhanced both my professional and personal life. JAMS is facilitating the creation of bonds of mediation ambassadors throughout the world.” ■

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