

Essays on Mediation

Dealing with Disputes in the 21st Century

Edited by
Ian Macduff



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To
Jacob Bercovitch
(1946-2011)

Professor Jacob Bercovitch, University of Canterbury, New Zealand was a pioneer in statistical approaches to international mediation, creating the first database entirely devoted to such efforts. He was a prolific writer, influential thinker and editor publishing sixteen books and 100 scientific articles and book chapters in the field of international relations, mediation and negotiations.

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Summary of Contents

Editors	vii
Contributors	ix
Acknowledgement	xxix
Essays on Mediation: Introduction <i>Ian Macduff</i>	1
CHAPTER 1 ‘Mediation: Elephant or Heffalump?’ <i>Kevin Avruch</i>	5
CHAPTER 2 Remembrance of Pleasures Past: Reflections of a Practitioner <i>Howard Gadlin</i>	13
CHAPTER 3 The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation <i>Carrie Menkel-Meadow</i>	29
CHAPTER 4 Two Failed Mediations and the Lessons Learnt from Them <i>Michael Hwang</i>	47
CHAPTER 5 Challenging the Status Quo <i>John Sturrock QC</i>	53

Summary of Contents

CHAPTER 6

Elder Mediation: Context, Opportunities and Challenges

Dale Bagshaw

63

CHAPTER 7

Munich, Majors and Mediation

Peter Wallensteen

81

CHAPTER 8

Collaborative Dispute Resolution Assistance for Refugees, Internally Displaced Persons and Host Communities

Christopher Moore

89

CHAPTER 9

The Roles of Culture: Muslim Country Leaders, NGOs, and European Small-Country Leaders as International Mediators in Southeast Asia

Bruce E. Barnes

125

CHAPTER 10

Rocks on the Road: Inside the Pandora's Box of Culture

Peter S. Adler

137

CHAPTER 11

Social Mediation Forms in France

J.-P. Bonafé-Schmitt

153

CHAPTER 12

Embedding Mediation and Dispute Resolution into Statutory Civil Law:

The Example of Germany

Thomas Trenckz & Serge Loode

177

CHAPTER 13

The HOW and the WHAT: Precise Conflict Resolution in Complex Processes through the Example of the Mediation, "Zukunft Landwehrkanal Berlin"

(Future Landwehrkanal Berlin)

Beate Voskamp & Stefan Kessen

193

CHAPTER 14

Digital Conflict and Digital Justice

Ethan Katsh & Orna Rabinovich-Einy

205

CHAPTER 15

Leaving Disputants to Their Own Devices: The Vulnerable Potential of Mobile Access to Justice

Ian Macduff

219

CHAPTER 16

The Alchemy of Mediation: Aesthetic Wisdom for a Fragmented Age

Nadja Alexander & Michelle LeBaron

249

Index

271

Table of Contents

Editors	vii
Contributors	ix
Acknowledgement	xxix
Essays on Mediation: Introduction <i>Ian Macduff</i>	1
CHAPTER 1	
‘Mediation: Elephant or Heffalump?’	
<i>Kevin Avruch</i>	5
Bibliography	11
CHAPTER 2	
Remembrance of Pleasures Past: Reflections of a Practitioner	
<i>Howard Gadlin</i>	13
§2.01 Preface	13
§2.02 Doing Good Work	14
§2.03 Art and Tools of the Craft	14
§2.04 <i>Theory versus Practice</i>	15
§2.05 Understanding Effectiveness	16
§2.06 The Workman	17
§2.07 Improvisation	20
§2.08 The Repertoire	22
§2.09 Connections and Grooves	23
§2.10 The Reflective Observer	24
Bibliography	27

Table of Contents

CHAPTER 3

The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation

<i>Carrie Menkel-Meadow</i>	29
§3.01 Legal Variations in the Use of Mediation	35
§3.02 Cultural Factors in the Use of Mediation	39
§3.03 Some Concluding Thoughts	45

CHAPTER 4

Two Failed Mediations and the Lessons Learnt from Them

<i>Michael Hwang</i>	47
§4.01 Case 1	47
§4.02 Case 2	49

CHAPTER 5

Challenging the Status Quo

<i>John Sturrock QC</i>	53
§5.01 Some Questions	54
§5.02 Choosing How We Respond	55
§5.03 Challenges for Mediators?	57
§5.04 Looking Ahead	59
§5.05 A Movement of Mediators?	61

CHAPTER 6

Elder Mediation: Context, Opportunities and Challenges

<i>Dale Bagshaw</i>	63
§6.01 Introduction and Background	63
§6.02 What Is Elder Mediation?	64
§6.03 Challenges for Elder Mediators	66
[A] Ageism	66
[B] Elder Abuse	66
[C] Gender and Power	68
[D] The Issue of Culture	69
§6.04 Guiding Principles and Ethical Issues in Mediation	70
[A] Impartiality	70
[B] Self-determination	70
[C] Where an Older Person has Diminished Capacity	71
[D] The Principle of Affirmation, Encouraging Feelings of Self-Worth	72
[E] The Role of Support Persons	72
[F] Confidentiality	72
[G] Best Interests and 'Substituted Judgment'	73
[H] Mediator Competency	73
§6.05 Determining Whether Elder Mediation Is Appropriate	74

§6.06 Conclusions	75
Bibliography	76
 CHAPTER 7	
Munich, Majors and Mediation	
Peter Wallensteen	81
§7.01 Challenges to Mediation	81
§7.02 Dealing with the Munich Syndrome	82
§7.03 Dealing with the Major Power	83
§7.04 A Final Note on Institution Building	85
Bibliography	86
Electronic Resources	87
 CHAPTER 8	
Collaborative Dispute Resolution Assistance for Refugees, Internally Displaced Persons and Host Communities	
Christopher Moore	89
§8.01 Refugees and Internally Displaced Persons: A Serious Human Cost of Wars	89
§8.02 The Current Refugee and IDP Crisis	90
§8.03 Causes of the Humanitarian Crisis and What Is to Be Done?	91
§8.04 Collaborative Dispute Resolution, Refugees and IDPs and Affected Communities	92
§8.05 Situations and Types of Conflicts Encountered by Refugees, IDPs, and Affected Communities	94
[A] Emergency Situations	94
[B] Transit	95
[C] Brief or Extended “Temporary” Settlement During Protracted Crises	95
[D] Post-conflict Returns	98
[E] Permanent Resettlement	98
[F] Compensation for Losses	99
§8.06 CDR Responses to Humanitarian Crises: Institutional Arrangements, Service Providers, and Procedures	100
[A] Unilateral International Governmental Organization (IGOs) CDR Assistance and Coordination with National Governments	100
[1] UN Habitat and the UNHCR in the Democratic Republic of Congo (DRC)	100
[2] United Nations Development Programme (UNDP) and the Government of Timor Leste’s Ministry of Social Solidarity (MSS)	101
[3] UNHCR, National Governments and NGOs and Dispute Resolution in Refugee Camps	102
[4] UNHCR and the Government of the Islamic Republic of Iran’s Dispute Settlement Committees	104

Table of Contents

[B]	National Governments	105
[1]	The Government of Timor Leste, Ministry of Justice, Land and Property Directorate	105
[2]	The Government of the Democratic Socialist Republic of Sri Lanka and World Bank's North East Housing Reconstruction Program (NEHRP)	106
[C]	International Non-Governmental Organizations (INGOs)	108
[1]	The Norwegian Refugee Council (NRC) in Afghanistan, Liberia, Lebanon and Jordan	108
[2]	Mercy Corps' CDR Assistance in Iraq and Jordan	112
[D]	National NGOs and CBOs	113
[1]	Local Peace Committees in Liberia and the United Nations	113
[2]	<i>Commissions d'Accueil et Reinsertion</i> (CAR) and NRC in the Democratic Republic of Congo (DRC)	114
§8.07	Issues in Providing CDR Assistance	116
[A]	Bargaining in the Shadow of the Law and Substantive and Procedural Justice: But Which Law?	116
[B]	Managing Power Differences between Disputants and Protection of Vulnerable Parties	118
[1]	Legal Status and Enforcement of Agreements	121
[2]	Sustainability—Temporary or Permanent Solutions and Promotion of Ongoing Peace	122
§8.08	The Future of CDR for Displaced Persons and Affected Communities	124
 CHAPTER 9		
The Roles of Culture: Muslim Country Leaders, NGOs, and European Small-Country Leaders as International Mediators in Southeast Asia		
<i>Bruce E. Barnes</i>		125
§9.01	Culture and Muslim Country Leaders, NGOs as International Mediators in Southeast Asia	125
§9.02	The Status of Mindanao Muslims: Population Comparisons and Trends	126
§9.03	The MNLF and MILF: Developments in Mindanao Conflict Resolution, Peace Processes and the Role of Multiparty Mediation	127
§9.04	International Mediation in Aceh, Indonesia	128
§9.05	Southern Mindanao: Mediating Fault Lines?	128
§9.06	Mediator Selection and Cultural Considerations in the Mindanao Conflicts	129
§9.07	Sabah, Malaysia: Connections to the Bangsamoro Conflict	131
§9.08	Mediation Style: Indonesia: Culture, Standing and Informal Diplomacy	132
§9.09	Malaysia's Role Facilitating the GRP/MILF Peace Talks, Ancestral Domain	133

§9.10	Lessons for International Mediation in ASEAN and Other Global Fault Lines	135
	Bibliography	135
CHAPTER 10		
Rocks on the Road: Inside the Pandora's Box of Culture		
<i>Peter S. Adler</i>		137
§10.01		137
§10.02		139
§10.03		141
§10.04		144
§10.05		147
§10.06		149
§10.07		150
CHAPTER 11		
Social Mediation Forms in France		
<i>J.-P. Bonafé-Schmitt</i>		153
§11.01	Social Mediation: Conceptual Fuzziness	154
[A]	The Original Conceptual Fuzziness	154
[B]	Maintaining Conceptual Fuzziness	156
§11.02	Social Mediation Related to Dispute Resolution	158
[A]	Para-Judicial and Municipal Neighborhood Mediations: A Rationale of Social Integration	158
[B]	Neighborhood or Community Mediation: A Rationale of Reappropriation	161
§11.03	Social Mediation Related to Communication	163
[A]	The Mediation Activities of "Femmes-Relais" (Relay Women): A Rationale of Intercultural Communication	163
[B]	"PIMMS" Mediation Activities: A Rationale of Instrumental Communication	167
§11.04	Social Mediation Related to a Security Rationale	169
[A]	Mediation Activities in the Public Transportation Sector: The Security Rationale	169
[B]	Mediation Activities in Public Areas: A Rationale of Social Pacification	171
§11.05	Conclusion	174
CHAPTER 12		
Embedding Mediation and Dispute Resolution into Statutory Civil Law: The Example of Germany		
<i>Thomas Trenckz & Serge Loode</i>		177
§12.01	Introduction	177
§12.02	The Constitutional and Legal Context: The German Justice System	178
§12.03	The Development of Mediation in the German Context	180

Table of Contents

§12.04	Definitions and Requirements in Mediation According to the <i>German Mediation Act 2012</i>	182
§12.05	Mediation in Practice in Germany	186
[A]	Access to Mediation Services in Germany	186
[B]	Areas of Mediation Practice	187
[1]	Commercial Mediation	188
[2]	Family Mediation	188
[3]	Victim-Offender Mediation	189
[4]	Community Mediation	189
[C]	Process Considerations	190
[D]	Mediator Qualification and Accreditation	191
§12.06	Conclusion	191
 CHAPTER 13		
The HOW and the WHAT: Precise Conflict Resolution in Complex Processes through the Example of the Mediation, “Zukunft Landwehrkanal Berlin” (Future Landwehrkanal Berlin)		
<i>Beate Voskamp & Stefan Kessen</i>		193
§13.01	Introduction	193
§13.02	Mediation “Zukunft Landwehrkanal Berlin”: The Beginning	194
§13.03	Public Event and Preparation Phase	195
§13.04	The HOW before the WHAT	196
§13.05	Dynamic Multi-level Design	197
§13.06	Precise Clarification of Interests	198
§13.07	Specific Results and Achievements	201
§13.08	Concluding Observations	202
 CHAPTER 14		
Digital Conflict and Digital Justice		
<i>Ethan Katsh & Orna Rabinovich-Einy</i>		205
§14.01	Introduction	205
§14.02	More Disputes: ‘Conflict as a Growth Industry’	207
§14.03	More Resolution: Resolving Disputes through Technology	209
§14.04	More Prevention: Data-Driven Dispute Prevention	213
 CHAPTER 15		
Leaving Disputants to Their Own Devices: The Vulnerable Potential of Mobile Access to Justice		
<i>Ian Macduff</i>		219
§15.01	Context and Provocation	220
§15.02	Foundations	223
§15.03	Current Developments Revisited	226
§15.04	Digital Intermediaries in Crisis and Conflict Setting	233
§15.05	Implications	237

§15.06 Impact	238
§15.07 Conclusion	245
CHAPTER 16	
The Alchemy of Mediation: Aesthetic Wisdom for a Fragmented Age	
Nadja Alexander & Michelle LeBaron	249
§16.01 Introduction	249
§16.02 Preparing the Ground for Mediation: The Element of Earth and the Alchemic Process of <i>Coagulatio</i>	250
[A] <i>Coagulatio</i> in Action: Science and Aesthetics	251
[B] <i>Coagulatio</i> in Mediation Practice	253
§16.03 Flow in Mediation: The Element of Water and the Alchemic Process of <i>Solutio</i>	254
[A] <i>Solutio</i> in Action: Science and Embodied Aesthetics	255
[B] <i>Solutio</i> in Mediation Practice	257
§16.04 Exploring the Space of Identity in Mediation: The Element of Air and the Process of <i>sublimatio</i>	259
[A] <i>Sublimatio</i> in Action: Theory and Practice	259
[B] <i>Sublimatio</i> in Mediation Practice	261
§16.05 Dynamics and Mobilization in Mediation: The Element of Fire and the Process of <i>Calcinatio</i>	262
[A] <i>Calcinatio</i> in Action: Contagion	263
[B] <i>Calcinatio</i> in Action: Embodied Resilience	264
[C] <i>Calcinatio</i> in Mediation Practice	265
§16.06 Alchemy in Conflict Resolution Practice: Systemic Constellations at Work	266
§16.07 Conclusion	269
Index	271

CHAPTER 3

The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation

*Carrie Menkel-Meadow**

Mediation, a relatively simple but age-old dispute resolution process of third-party facilitated negotiation to resolve a dispute between or among two or more parties in conflict, has emerged as a significant new method of dispute resolution in an ever-increasing number of countries, legal systems, case types and most recently, in the transnational and international arena of disputes involving both public and private parties from different nation-states. Many nations now require or regulate the use of mediation in their legal systems, while private practitioners, trained in a variety of different professional disciplines, now offer services in conflict resolution, both inside and outside of formal legal institutions, in areas ranging across commercial, civil, criminal, family, labor and employment, community, finance, tax, policy, diplomacy, environmental and governmental arenas. While mediation, as a process, is thousands of years old – finding its origins in Chinese and African dispute resolution processes – in its modern incarnation, the current use of mediation in formal litigation and other disputes is often attributed to the newer “A” (alternative/appropriate) dispute resolution revolution of the 1970s and 1980s.¹ In recent years, the use of mediation has been

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1. See Carrie Menkel-Meadow, Lela Love, Andrea Kupfer Schneider & Jean Sternlight, *Dispute Resolution: Beyond the Adversarial Method* (2nd ed., Aspen Wolters Kluwer 2011). The “origins” of the modern American movement are often located in the now classic article by Frank Sander,

differentially accepted and resisted in dozens of countries, seeking to promote mediation for different reasons, sometimes with conflicting goals, ideologies and practices – more efficient claim handling or more qualitative human reconciliation and more tailored and flexible outcomes. This essay looks at some of those variations in uptake and resistance and offers some possible explanatory factors, including a taxonomy of different legal-cultural orientations to disputing and conflicts, in the differential use and acceptance of mediation, at a deeper – not merely legal regulatory – level.

While some modern law and social reformers sought to increase the use of mediation to improve methods of human communication and legal problem solving and to permit more tailored outcomes to recognize a different form of “justice,” others sought to employ mediation techniques to reduce the work of formal courts or to make dispute processing more “efficient” – what I have called the “qualitative” versus “quantitative” differences in values promoting the use of mediation. These different values or motivations for mediation have now produced great variation in the desire for regulation of mediation, whether to encourage and incentivize the use of mediation, protect or inform consumers and users of the process, control and limit the kinds of professionals who may engage in such practices, or to make what was a more private process, somehow accountable and more publically transparent to avoid the “privatization of justice.”

There is implicit in all regulation of mediation and its uses a tension between individual party choice and control over process and outcome and the need of any legal system to decide when and how the state may intervene in and control the ways in which society’s disputes are resolved. Concrete incentives for the use or non-use of mediation include a variety of practical issues such as requiring “mandatory” mediation, fee structures, cost sharing, location of mediation, confidentiality rules, monitoring of and penalties for “good faith” behavior in mediation, variations in behavior of the mediator (facilitative or evaluative, caucus or no caucus), individual or aggregate parties, variations in enforcement of mediation agreements (simple contract or state or notarized settlement order), sanctions or taxes on failed settlements, ethical rules, information sharing (discovery) requirements and obligations. These concrete policy choices and regulations are expressions of significant issues of jurisprudence, political and legal legitimacy, and legal and social practice, and they vary within different legal and social cultures. How these values are expressed formally in legal policy will and does affect whether and how mediation is used and practiced in different legal cultures.

There clearly is some resistance to the use of mediation in many parts of the world, as recently documented in the European Parliament report, “Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU.”² There is great variation in the use of mediation in Asia where, for example, it is used for more commercial

Varieties of Dispute Processing, 70 F.R.D. 111 (1976). See also Richard Abel, ed., *The Politics of Informal Justice, Vols 1 and 2, the American and the Comparative Experience* (Academic Press 1982) and Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (Ashgate 2003).

2. Study prepared for Legal and Parliamentary Affairs, European Parliament, Policy Department C, Citizens’ Rights and Constitutional Affairs (Directorate General for Internal Policies) by Giuseppe

matters in China and for more domestic-family relations and conciliation matters in Japan;³ in South America where Argentina has made mediation mandatory in many civil law settings and other countries continue to resist both mediation and arbitration; and even in different provinces and states in Australia and Canada. It is also true that, although so many claim that mediation is now “mainstream” in the United States and there is quite variable uptake of mediation at the present time in the United States (by both state and case type variations),⁴ there has clearly been a temporal (now thirty-year) period of initial resistance to and now greater acceptance (but not without its continuing skeptics and critics⁵) of mediation in the United States.

Resistance to mediation is, in my view, a product of many different forces and variables including both social and legal culture, history (or time in conventional terms), economics and legalism or legality. The interesting question is whether the historical trajectory of mediation acceptability in different sectors of any legal system will take, or has taken, a similar course in different countries and “transnationally,” or whether the acceptability of mediation is itself likely to remain culturally differentiated, even as the world becomes legally “globalized.”⁶

Unlike arbitration, which is typically subject to more formal rules, laws, and treaties and increasingly, international administrative institutions that monitor or administer arbitral processes, mediation offers the possibilities of being both more informal and more sensitive to intercultural differences. Mediation allows greater process, procedural rule and outcome control by the parties⁷ because of its flexibility in design and practice, but it also has risks of social and legal cultural “colonization”⁸ and

De Palo, Leonardo D’Urso, Mary Trevor, Bryan Branon, Romina Canessa, Beverly Cawyer, L. Reagan Florence, 2014 [hereinafter *Rebooting EU Mediation Report*].

3. Klaus J. Hopt & Felix Steffek, eds. *Mediation: Principles and Regulation in Comparative Perspective*, 94 (Oxford Univ Press 2013).
4. Carrie Menkel-Meadow, *Informal, Formal and Semi-Formal Justice in the United States in Civil Procedure in Cross-Cultural Dialogue: Eurasia Context* (Dmitry Maleshin, International Association Of Procedural Law, World Conference on Civil Procedure, Statut Publ. Moscow 2012); Carrie Menkel-Meadow, *Alternative/Appropriate Dispute Resolution in Context: Informal, Formal and Semi-Formal Legal Processes*, in *Handbook of Conflict Resolution* (3d ed., Peter Coleman and Morton Deutsch, Jossey Bass Wiley 2014).
5. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 *Ohio St. J. of Disp. Resol.* 211 (1995). At the international level, this critique has expanded to a concern that the use of too much exportation of ADR will harm or impede the “rule of Law” in a variety of transitional or development contexts, see e.g., Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm the Rule of Law Development*, *J. of Disp. Resol.* 1 (2011); Jean Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 *DePaul L. Rev.* 569 (2007).
6. Carrie Menkel-Meadow, *Why and How to Study Transnational Law*, 1 *University of California, Irvine Law Review* 97 (2011).
7. Hal I. Abramson, *Mediation Representation: Advocating as Problem Solver* (3d ed., National Institute for Trial Advocacy 2013).
8. See e.g., *Mediating Multi-culturally: Culture and the Ethical Mediator*, (ch. 12) in *Mediation Ethics* (Ellen Waldman, Jossey Bass 2011) (Hal Abramson & Carrie Menkel-Meadow, commentators); see also, Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Practices and Paradigms*, 11 *Negotiation Journal* 217 (1995) (suggesting that mediation draws on ethnocentric models of a “talking cure” process for pragmatic problem-solving, not always useful in cultures that value different things or that do not have an “equality” or horizontal model of verbalization and joint, rather than hierarchical, problem solving).

at present, it operates in a less clearly legally articulated global system.⁹ Where mediation's purpose is to provide a third party (neutral)¹⁰ to facilitate negotiation of jointly and consensually arrived at solutions to legal disputes or transactions, using processes developed by and agreed to by the parties themselves, it assumes (or can assume) that the parties share enough legal cultural understandings that they can make both process and outcome decisions together with somewhat varied forms of assistance, ranging from purely facilitative to more evaluative forms. In this, mediation's advantage is its flexibility, self-determination and voluntariness to enter into and conclude the process as the parties wish, especially when dealing with ongoing or future relations. Its disadvantage is precisely in its openness, its potential formless and rootless connections to particular legal systems. That it should at least be a viable and well-considered choice by all disputants in the modern world, should go without saying in our currently "process plural" world, but it appears to be true that mediation is still not used as much as it might be, both in different domestic legal systems and in international disputes.¹¹

Whether mediation is perceived as a better quality process by allowing the parties to craft their own solutions to problems, disputes and transactions (the "qualitative" argument for mediation) or a more efficient one (the "quantitative" argument for mediation as saving both litigants and the larger legal system time and money), what constitutes an "optimal" amount of mediation in any domestic or international legal system remains unclear. In its recent deliberations about whether the EU Directive on Mediation (2008) has had appropriate results for transborder dispute resolution, commentators, using the language of the Directive, have argued for an appropriate "balance of mediation to litigation" to maximize cost reductions in litigation that could stem from even a settlement rate as low as 9%.¹² Authors of the EU Parliament report

9. Mediation agreements do not have the enforceability reliability guaranteed by the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, see S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 42 Wash. U. J. of Law & Policy (2014). The United Nations Commission on International Trade Law (UNCITRAL) has recently begun an effort to consider whether a treaty, paralleling the NY Convention for Recognition and Enforcement of Foreign Arbitral Awards, should be drafted and adopted for recognition of mediation agreements in international commercial matters, see UN General Assembly UNCITRAL Planned and Possible Future Work Part III, A/CN.9/822 New York, 7-18 July 2014 and Department of State, US Department of State Advisory Committee on Private International Law (ACPIL); *Public Meeting on Conciliated Settlement Agreements*, 79 Fed. Reg. No. 130, at 38642 (2014).
10. The concept of the mediator as "neutral" rather than as a wise elder or one who is not neutral at all, but deeply embedded in the relationship of the disputants is itself culturally variable, see Menkel-Meadow, *supra* n. 8 and Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981).
11. Years ago James Henry, founder and President of the Center for Public Resources, suggested that mediation was still a "sleeping giant" in the American business community's use of dispute resolution processes. James Henry & Jethro Lieberman, *The Manager's Guide to Resolving Legal Disputes: Better Results Without Litigation* (Harper Collins 1985). In the early days of mediation in the US, it was not uncommon to see demands for mediation, "I am instituting a mediation *against* you," in demand letters or Continuing Legal Education programs labeled, "How to Win Your Mediation" demonstrating great misunderstandings of the process itself.
12. EU Rebooting Report, *supra* n. 2, 163-64.

have urged the adoption of “mitigated mandatory mediation” as a method of encouraging the use of mediation,¹³ a suggestion that has met with concern and criticism by those who seek to keep mediation a more “pure” voluntary and consensual process.¹⁴

Several important cleavages mark the acceptability of mediation in different national legal systems and the larger world of “trans-” or “international” dispute resolution. We could begin with a glance at how major public international state-to-state disputes are handled, and the great resistance, until relatively recently, to efforts of mediation in international diplomacy,¹⁵ whether the “shuttle diplomacy” or “muscle mediation” (like private caucusing) of Henry Kissinger and other international interveners,¹⁶ or the more formal attempts at negotiating and mediating disputes and transactions and contracts (through treaties or ceasefires)¹⁷ which now characterize some of our global political regime.

Mediation differs enormously in legal cultures of common law, as in the United States, United Kingdom, Canada and Australia, where much mediation law is crafted through case-by-case decisions, with little formal regulation in both the public and private sectors, as contrasted to the much more formal regulation of mediation in most civil law regimes with dense regulation (if still sporadic use; see the case study of Italy, discussed more fully below).¹⁸ Separate from legal traditions are the structures of

13. *Id.* The recommendations of the report actually go so far as to suggest possible “quotas” or specific guidelines for ratios of mediated cases to litigated cases within any legal system. I am deeply opposed to and skeptical of these suggestions.
14. Jacqueline Nolan-Haley, *Is Europe Heading Down the Primrose Path with Mandatory Mediation*, 37 N. Carolina J. of Int'l L & Commercial Reg. 981 (2012).
15. See generally J.G. Merrills, *International Dispute Settlement* (5th ed., Cambridge 2011).
16. See e.g., the contrasts of mediation styles and processes of Richard Holbrooke and George Mitchell described in Daniel Curran, James K. Sebenius & Michael Watkins, *Case Analysis: Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina*, 20(4) Negotiation J. 513 (2004).
17. Such as George Mitchell’s seeming so far success in the Easter Peace Accords in Northern Ireland, see George Mitchell, *Making Peace* (1999); see also Jimmy Carter’s successes and failures as a third party “mediator” in Northern Korea and Israel-Palestine; Michael Watkins & Susan Rosegrant, *Breakthrough International Negotiation: How great Negotiators Transformed the World’s Toughest Cold War Conflicts* (Jossey Bass 2001); Jimmy Carter, *Palestine: Peace Not Apartheid* (Simon & Shuster 2007); Jimmy Carter, *Keeping Faith* (University of Arkansas Press 1995); Lawrence Wright, *Thirteen Days in September* (2014).
18. *Regulating Dispute Resolution – ADR and Access to Justice at the Crossroads* (Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger & Carried Menkel-Meadow, Hart Publishing 2013) [hereinafter Steffek et al.]; Giuseppe De Palo & Ashley E. Oleson, *Regulation of Dispute Regulation in Italy: The Bumps in the Road to Successful ADR*, in Steffek et al., *Id.*; Giuseppe de Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, Negotiation J. 469 (2005). In my frequent participation in international conferences on dispute resolution, such as those sponsored by the Max Planck Institute’s meetings on Comparative Law (Private) or Mediation and Dispute Resolution, I am struck by the civil law world’s desire to codify and regulate dispute resolution’s goals, principles, best practices, processes and rules, see Steffek et al. *Id.*, Ch. 2, compared to more open common law and decisional development with more tolerance of diverse practices and innovations in the common law worlds of the UK, US, Canada, Australia and New Zealand. The latter are perhaps more affected by their “ambivalent” or conflicting motives of both efficient and more humanistic dispute resolution, see discussion later in this paper. Where the justification for use of mediation is “efficient” case processing or party autonomy and control there might be a need for more regulation and uniform standards but I think this remains a contestable point.

nation-states, whether centralized or federalized, which affect both the variation of use and regulation of mediation (with differential autonomy in states as in Germany and the United States) and the possibility of capturing and controlling use and data (e.g., more centralized Ministries of Justice tend to both regulate and “count” the number of mediators and/or mediations, if not actually monitoring quality or uniformity in service provision).

In addition to the formal differences of types of mediation or legal regimes in which they operate, it is never quite clear whether choices about dispute resolution fora (and whether or not to seek or use mediation) are being made by the parties to a dispute or by their professional advisors (whether lawyers, business executives, managers or others).¹⁹ And awaiting future usage and analysis is the new world of online dispute resolution (ODR)²⁰ which transcends national and legal sovereignties and raises a continuing set of issues about usage, level of regulation, and the possibility of globalization of mediation and other forms of dispute resolution.

Finally, while assessments of the use of mediation or resistance to it often focus on legal contexts, in actuality, it is the larger social culture, and its interaction with the legal culture, that probably has the greatest impact on the type of dispute resolution methods that are chosen in particular societies²¹ (varied as well, by case type, economic and personal access to services²² and cross-cultural variables when choices are made in international or transnational disputes).

Mediative approaches have also been used in criminal matters domestically (e.g., victim-offender mediation and restorative justice), with great nation-state variation, and are now utilized as well in international criminal and human rights matters, as in truth and reconciliation commissions, both the European and Inter-American Courts of Human Rights (“amicable settlement” procedures), and some forms of hybrid and indigenous courts.

19. Recent empirical work on understandings of expectations of dispute resolution processes have exposed gaps of preferences and knowledge between clients and lawyers and mediators or other decision makers, see e.g., Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge Univ Press 2009); David Lipsky, *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals* (Ronald L. Seeber and Richard D. Fincher, Jossey-Bass 2003).
20. Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2012).
21. Kevin Avruch, *Context and Pretext in Conflict Resolution: Culture, Identity, Power and Practice* (Paradigm Publishers 2012); Joel Lee & Hwee Hwee The, *An Asian Perspective on Mediation* (Academy Publishing 2009); Oscar Chase & Jerome Bruner, *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context* (NYU Press 2007).
22. Mauro Cappelletti & Bryant Garth, *Access to Justice: A World Survey* (Giuffrè Editore/Sijthoff/Noordhoff 1979); Mauro Cappelletti, *Alternative Dispute Resolution Processes within the framework of the World-Wide Access to Justice Movement*, 56 *Modern Law Review* 287 (1993).

§3.01 LEGAL VARIATIONS IN THE USE OF MEDIATION

In recent years, several comprehensive efforts to study and account for the use of mediation in some parts of the world have demonstrated great variety of mediation regulation and usage and a less than optimistic view of the relationship between enabling or encouraging legislation or procedural rule drafting and the actual usage of mediation.²³

In a very comprehensive study of the usage of mediation in the EU, following the European Directive on Mediation (2008/52/EC), Giuseppe De Palo and his team of analysts found that there was great divergence in how the twenty-eight Member States of the European Union have legislated about mediation in cross-border disputes as mandated by the Directive. While some countries have used the Directive's mandate to become "unitary" or "monist" states by simultaneously providing rules and procedures for both cross-border and domestic mediation, many states remain "dualist" regimes, passing legislation to provide for mediation of cross-border commercial disputes as required by the Directive and either passing separate or no rules at all for domestic mediation.²⁴

The EU Report, which documents the great resistance to mediation by analyzing low usage rates of mediation in most countries now three years after full effect of the Directive,²⁵ does provide some interesting data and other observations. Notably, Italy has had the most mediation regulation with a tapestry of statutes and amendments beginning before the Directive in the 1990s; and Italy seems to have the highest number of "documented" mediations – over 200,000 in recent years, compared to the next biggest users, the UK (60,000) and Germany and the Netherlands (over 10,000 each) as reported by expert country informants. Ironically, however, when mediation was made mandatory for certain classes of civil cases in Italy, the Italian bar famously went out on strike in 2011 against the use of mediation (fearing loss of litigation fees), which was followed by a December 2012 Constitutional Court ruling that the mandatory mediation program violated the Italian Constitution, calling a halt to already much delayed civil actions in courts. The lawyer strike and the Constitutional decision, which received international attention, resulted in a renegotiated mediation law and mediations have once again begun in Italy.²⁶ Low usage rates are also reported for France,

23. See e.g., *Regulating Dispute Resolution*, *supra* n. 18, EU Report *Retooling the EU Directive on Mediation*, *supra* n. 3; Klaus Hopt & Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford Univ. Press 2013); Giuseppe De Palo & Sara Carmeli, *Mediation in Continental Europe: a Meandering Path Toward Efficient Regulation*, in Butterworths Mediators on Mediation: Leading Mediator Perspectives on the Practice of Commercial Mediation (Christopher Newmark & Anthony Monaghan, Tottel 2005); Giuseppe de Palo & Mary Trevor, *EU Mediation Law and Practice* (Oxford University Press 2012); Manon Schonewille & Fred Schonewille, *The Variegated Landscape of Mediation Regulation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* (Eleven International Publ. 2014); Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer 2009).

24. Denmark is not party to the Directive at all, having opted out of all EU Legal Affairs regulation.

25. Estimated at no more than 1% of all litigated cases in the EU, *EU Rebooting Report*, *supra* n. 2, 162.

26. Giuseppe de Palo & Ashely Oleson, *Regulation of Dispute Resolution in Italy: Bumps in the Road to Successful ADR*, in Steffek et al., *supra* n. 18.

Belgium, Spain and other countries with legislation providing for mediation training, mediator registration, and some substantive rule-making, e.g., with respect to confidentiality and enforceability. The Netherlands reports a much more comprehensive court-based system of ADR usage, in part because of the championing of mediation and other forms of ADR by prominent judges and legal officials²⁷ (a story similar to that in Argentina, see below, suggesting that personal commitments and charisma can be as important in mediation development as more formal legal reforms). Switzerland (not a member of the EU) has similarly low usage rates though it has many arbitration and dispute resolution programs and institutions operating within its borders (including not only many commercial arbitration centers and programs, but the International Court of Arbitration for Sport in Lausanne, as well as housing many international organizations, with dispute settlement portfolios, in Geneva, such as the International Labor Organization, World Intellectual Property Organization and the World Trade Organization.

Civil law countries, of course, must “codify” their laws and procedures in substantive provisions of law and civil procedure. The European nations have passed some fairly diverse laws, especially with respect to confidentiality and enforceability. For example, some countries protect only the mediator from subsequent testimony and allocate privilege and other countries make the entire proceeding confidential. In a few nations, mediation agreements can become automatically enforceable, if properly notarized. In some other nations, mediation agreements become enforceable after judicial approval or other formalities and still others treat mediation agreements, as we do in the US, as enforceable “contracts.” The EU Report concludes that the depth or extent of confidentiality protection has had no discernible effects on mediation usage so far, challenging the claims of some that mediation is most beneficial when the parties seek confidential proceedings or outcomes.²⁸ The use and regulation of mediation also varies by case type – many countries have been using mediation primarily in family and domestic disputes (e.g., UK, France, Netherlands) and labor

27. Machteld Pel, *Regulation of Dispute Resolution in the Netherlands: Does Regulation Support or Hinder the Use of ADR in Regulating Dispute Resolution*, *supra* n. 18.

28. When I was a mediator in the US Wellington Agreement for mediation of major asbestos lawsuits, I was often chosen as a mediator because my state (California) then had one of the strongest mediation confidentiality statutes in the country (mid 1980s to 1990s). Despite efforts to unify confidentiality rules in the United States through the Uniform Mediation Act (2003), at this date only thirteen states have passed the UMA. So far as I can tell, state variation in confidentiality protections has not affected mediation usage. An interesting empirical question is whether the states with the most ADR or mediation regulation (certification, mandatory court programs or referrals, ethics rules, etc., e.g., Massachusetts, New York, Florida, Texas and others) have any greater usage of mediation or not. I was unable to study this when analyzing data on empirical measures of ADR usage in the US because of the unavailability, not only of public data from court programs, but because mediation in private settings is unreported in any systematic way, see Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the Semi-Formal*, in *Regulation of Dispute Resolution –ADR and Access to Justice at the Crossroads* (F. Steffek, H. Unberath, R. Greger, H. Genn, C. Menkel-Meadow, Hart Publishing 2013); Carrie Menkel-Meadow, *Empirical Studies of ADR: The Baseline Problem of What ADR Is and What It Is Compared to*, in *Oxford Handbook of Empirical Legal Research* (paperback ed. 2013, Peter Cane and Herbert Kritzer, Oxford University Press 2010).

disputes (e.g., France, Spain, Portugal, Chile) for some time and regulation of such matters can be found both in substantive laws and procedural rules.²⁹ Other factors thought to affect mediation usage in Europe (certain incentives, such as reduced fees or taxes in litigation, following mediation use, informational programs for lawyers and litigants) all were found to have no correlational effects on rates of mediation usage.³⁰

Other countries have used both legislation and mandatory program designs to encourage the use of mediation. In the United Kingdom, major revisions to the Rules of Civil Procedure in the late 1990s, following the Woolf Report,³¹ were intended to “front load” case management and encourage use of mediation and other forms of ADR in the public justice system. Mandatory assignment of smaller claims and domestic relations cases were intended to provide cheaper, better and faster access to justice.³² At the same time that the formal court rules underwent change, organizations such as the Centre for Effective Dispute Resolution (CEDR) developed a successful market in larger scale commercial disputes (including both international and domestic cases) in one of the largest financial centers of the world. While the private sector extolled the virtues of mediation for large commercial cases, early enthusiasts of mediation changed their tune, mostly notably Dame Hazel Genn, whose 2008 Hamlyn Lectures³³ decried the “privatization of justice” (echoing similar critiques made in the United States by such ADR critics as Yale Professors, Owen Fiss³⁴ and Judith Resnik³⁵). Like in the United States (and Canada and Australia and other common law systems), the regulation of mediation has been more complex as courts decide on a case-by-case basis what rules, duties, obligations and requirements to make of parties in litigation. The United Kingdom, for example, concerned that Article 6 of the European Charter of Human Rights, which guarantees certain rights to hearings and due process, might prohibit mandatory assignment to mediation or other forms of ADR, has somewhat softened the mandatory referral, through court decision, while at the same time providing that in a “loser pays” system, a party who unreasonably refuses to go to mediation might be taxed by paying or not receiving costs according to the cost rules.³⁶ In recent rulings, English courts have also required recipients of legal aid to utilize methods of ADR before they can go to court.³⁷ Thus, analyzing and measuring the effects of different

29. Indeed, for one researching the formal law on mediation, it is necessary in most legal systems to look at both substantive regulation and civil procedure and other process rules, especially in such regimes, which include both civil and common law systems, where allocation of some substantive rights are referred to particular tribunals, e.g., labor in most civil law countries and the UK.

30. *EU Rebooting Report*, *supra* n. 2.

31. Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1995).

32. Hazel Genn, Shiva Riahi & Katherine Pleming, *Regulation of Dispute Resolution in England and Wales: A Skeptical Analysis of Government and Judicial Promotion of Private Mediation*, in *Regulating Dispute Resolution*, *supra* n. 18.

33. Hazel Genn, *Hamlyn Lectures on Judging Civil Justice* (Cambridge University Press 2009).

34. Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

35. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. Disp. Res. 211 (1995).

36. *Dunnett v. Railtrack plc* [2002] EWCA (Civ) 2003. Cf. *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576.

37. Genn, *supra* n. 33, 145.

forms of legal requirements on the use of mediation is complicated in common law systems where case law can modify the more codified statutory or civil procedural rules. Beyond the UK, consider the complexity of common law federal systems like Canada and Australia where some provinces (Ontario) and states (New South Wales and Victoria) have developed pro-ADR or mediation policies and law that vary from other jurisdictions.

Israel presents another interesting case of mediation legal ambivalence. In a nation with the greatest per capita rate of lawyers to population³⁸ (and a concomitant amount of litigation), Israel also provides both for court-mandated and private mediation.³⁹ As part of an effort to affect change in a highly disputatious legal system, then President of the Israeli Supreme Court, Ahron Barak, encouraged the use of mediation, not to control the efficiency of the system (with many cases and not enough judges in the 1990s) but to attempt to change the legal culture toward a more conciliatory one. Yet, even with laws to require mediation and attempted incentive structures and much mediation training, commentators, like Moti Mironi, the former head of the Israeli Mediator's Association and a distinguished international labor mediator, have noted that use of mediation has regressed to mechanistic case settlement meetings, as provided for by civil procedural rules which, in his view, drain mediation of its more consensual, party-oriented and true conflict-resolving attributes.⁴⁰ This pattern of legal encouragement, much professional training, initial enthusiasm and then regression to conventional legal processes is notable in many other countries.

While Israel represents a country with clear policy discussions of the purposes of mediation (whether to encourage “qualitative” mediation or deploy it for “efficiency” and docket-clearing purposes), many other countries adopt laws and regulations without clear indications of which purpose(s) are to be served. Motivations for mediation use—to better solve problems or recraft future relations versus efficient docket-clearing purposes—are different and can (and perhaps should) result in different legal frameworks. Belgium, for example, has had a relatively efficient legal system with less delay in litigation time and has been able to structure mediation programs around the values of promoting good legal solutions.⁴¹ Singapore is another country with a Janus two-faced approach to mediation—both seeking to be a center of more

38. D. Barak-Erez, E. Katyal & T. Rostain, *Too Many Lawyers? Fact, Reasons, Consequences and Solutions*, 3 Onati Socio-Legal Series n. 3 (2013).

39. Mediation is called “*gishur*” in many contexts, which actually translates to “bridge” – the mediator serves as a metaphorical and actual bridge between the parties. See Moti Mordehai Mironi, *Mediation and Strategic Change* (Hamilton Books 2008); Moti Mordehai Mironi, *Mediation v. Case Settlement: The Unsettling Relations Between Courts and Mediation in Israel*, 19 Harv. Neg. L. Rev. (2014).

40. *Ibid.*

41. See Ivan Verougstraete, *Regulation of Dispute Resolution in Belgium*, in *Regulating Dispute Resolution*, *supra* n 18. Belgium and the Netherlands have both had significant leadership in ADR and mediation sponsorship from the judiciary. It is not surprising therefore, that in such countries (and especially in civil law countries), there has been much advocacy for incorporating all mediation within the judicial and court system. The common law countries, notably the US and the UK have seemingly been much more comfortable with letting mediation remain primarily market based, especially in large commercial litigation.

evaluative and enforceable international commercial mediation, as well as to encourage mediation internally as “primary justice” in order to promote a warmer, more courteous, and kinder society within its multicultural population.⁴² Singapore, as a multi-cultural society, seeks to partner with the International Mediation Institute to become a center of mediation practice, with training and formal credentialing of “intercultural” mediation.

Argentina, in the Southern Cone, became one of the early adopters of mediation after several prominent judges and lawyers received training in the United States and invited ADR consultants to Argentina at a time of great legal change. Following the democratic recovery of the Constitution, after the military dictatorship of the Dirty War period (1976–1983), Argentina also began to mandate mediation in certain kinds of civil cases and Casas de Justicia (Houses of Justice) providing mediation services were established in some of the more remote provinces of the nation.⁴³ More recently, Chile (a more arbitration-based and formal legal culture in its alternatives to litigation) and Brazil (with an enormous population and rapidly growing commercial disputes⁴⁴) and Paraguay—all members of Mercosur—have passed UNCITRAL-based model rules for arbitration and other forms of dispute resolution while increasing programs of mediation training within various professions. As discussed more fully below, different nations now vie in South America, as in Asia (Singapore, Hong Kong and Shanghai competitions), to become “dispute resolution centers” by passing laws to make their capitals “dispute resolution friendly” (usually involving choice of neutrals, confidentiality and enforceability provisions), illustrating what some scholars have called a “competition for dispute resolution services.”⁴⁵

§3.02 CULTURAL FACTORS IN THE USE OF MEDIATION

It is ironic to note that often countries right next to each other or with remarkably similar legal systems will have radically different uptake of legal system innovations (this can apply to constitutions, statutory and administrative developments, just as

42. In Singapore, the Mediation Center is housed in the same building as the Supreme Court. Singapore seeks to become a centre of transnational and particularly trans-Asian commercial mediation, while at the same time it encourages the use of internal mediation for settlement of common civil disputes, what one commentator has called the “ambivalent rationale of mediation” (Ian Macduff, communication Jun. 8, 2014), see https://app.supremecourts.gov.sg/Data/Files/file/InforBooklet_Brochures/Newsletter_Dec2013.pdf (accessed Jan. 22, 2016).
43. See e.g., Timothy K. Kuhner, *Court Connected Mediation Compared: The Case of Argentina and the United States*, 11 ILSA J. of Int'l & Comp. Law 8 (2013). One of the judges to train in mediation Gladys Alvarez not only innovated in-court mediation but also founded Fondacion Libre, the leading training institution for mediation in Argentina. These early initiatives in Argentina did not necessarily travel to neighbors Chile and Brazil, though the latter now has a vibrant and large mediation professional base, with an annual national Congress on mediacion.
44. As well as what I have referred to in other contexts, as *A2 DR* (alternative alternative dispute resolution) – largely effective “mediation” by threat of force in gang leader-favela informal justice. This occurs in the United States as well, see Sudhir Venkatesh, *Gang Leader for a Day: A Rogue Sociologist Takes to the Streets* (Penguin Books 2011).
45. Bryant Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 Stud. L. Pol & Socy. 367 (1992).

much as ADR implementation). Yet, broad comparative law groupings (civil law, common law, post-colonial, Shari'a), legal hybrids (e.g., Scotland, Israel, Japan, China), and now regional legal systems (like the EU) also show some cultural regularity with respect to certain legal institutions and processes.

As mediation is less formally rule and procedure based than litigation or arbitration, less homogenization of the rules and processes is required. Nevertheless, the use of mediation remains somewhat dependent on the specifics of local legal and social culture and also dependent on the charismatic leadership of various legal innovators in particular systems.

From my own experience in mediating or teaching in many different countries (now over twenty-five countries on six continents), it might be somewhat useful (if a bit arbitrary) to characterize some social-legal cultures as more or less likely to use mediation as a dispute resolution mode, depending on whether they are more or less “argumentative,” “adversarial,” “conversational or dialogic,” “face saving” or “hybrid-cosmopolitan” cultures. Ordinarily I quite deplore the systematic and stereotypic descriptions of “civilizations”⁴⁶ or cultures and even so-called elements of “disputing cultures”⁴⁷ that tend to homogenize and reify what may be quite complex and varied combinations of cultural factors (professional status, class, education, function, etc.),⁴⁸ but in viewing the variations of mediation usage around the world, I have come to believe that something like these cultural formations deeply influence both legislation-rule-making and the actual practice of mediation as a form of dispute resolution (while in turn being affected by case types within particular legal systems). Thus, both “law on the books” and “law in practice” in the ADR arena are quite variably dependent on social, not only legal, factors.

Thus, I suggest here that the uptake of mediation will not likely be a unitary development or follow a clear trajectory throughout the world. Different forms of mediation have been and will be developed within and across different legal systems and types of disputes, often responding to different motivations and goals. In describing recent developments in the use of ADR in the United States, I have described forms of dispute resolution as formal (full-dress litigation and its ancillary discovery and court-based processes), informal (more of the private and flexible forms of mediation and like processes that have developed away from courts, e.g., private commercial and domestic relations disputes) and the semi-formal (use of informal processes like mediation in the courts, without much supervision or more formal rules, and adjudication-like processes in the private sector, like commercial or labor arbitration).⁴⁹ These categories might ultimately be helpful in considering what is occurring in

46. See e.g., Samuel Huntington, *Clash of Civilizations and the Remaking of World Order* (Simon & Schuster 1994); Edward H. Hall, *Understanding Cultural Differences: Germans, French and Americans* (Intercultural Press 1990).

47. See e.g., Jeanne Brett, *Negotiating Globally: How to Negotiate Deals Resolve Disputes and Make Decisions Across Boundaries* (Jossey-Bass 2001); Jeswald Salacuse, *The Global Negotiator: Making, Managing and Mending Deals Around the World in the 21st Century* (St. Martin's Press 2003).

48. See Kevin Avruch, *Culture and Conflict Resolution* (USIP Press 1999).

49. See Menkel-Meadow, *supra* n. 4.

international mediation and dispute resolution as well, as transnational litigation and its alternatives increasingly occur in so many different countries, tribunals and venues.⁵⁰ I give some illustrative examples from my own experience below.

Argumentative cultures⁵¹ include not only the United States, but others that are comfortable with both public and private disputes (some might call us the more “volute” cultures) and include such places as Italy, Israel, India, to some extent Australia and Canada, Argentina⁵² and more recently the UK.⁵³ Such dynamic and some would say “conflictual” societies are actually often home to the most plural and diverse set of dispute resolution options. Thus, mediation has often been taken up enthusiastically while more conventional litigation procedures exist side by side. The US, Canada⁵⁴ and Australia and, to some extent, the UK, have formally attached more informal processes to the courts, all while maintaining less formal and private forms of mediation and dispute resolution in parallel, but sometimes separate “markets” (e.g., labor arbitration, construction disputes, specific industry dispute resolution programs).⁵⁵ These societies are also increasingly multi-cultural so in addition to formal dispute resolution, there are also dispute resolution processes used for specific community, religious⁵⁶ and commercial groups.

Argumentative legal and social cultures have developed and tolerated a wide variety of dispute resolution fora and processes. Mediation exists in the courts and out of them, used by public bodies and private disputants. Because many, if not most, of these countries are also common-law based, they actually may have fewer legal regulations, a more porous and flexible legal system and can adapt legalities and legal doctrines to actual use and practice as it occurs, rather than *a priori*.

If the domain of international legal disputing can be seen to be like this “argumentative” culture then it too will continue to evolve with process pluralism. Mediation use should increase with more international and transnational interactions and needs for more flexible and party-tailored solutions to legal issues. As we watch the ad hoc quality of mediated ceasefires in the many recent international and intra-national conflicts in the world, we see some evidence that these informal processes are

50. It is beyond the scope of this paper to reflect on the scholarly and practical debate about whether the plethora of international legal tribunals is a good thing or is fracturing and fractionalizing our international legal order. See e.g. Robert Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 NYU L. Rev. 2029 (2004); Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003).
51. See Deborah Tannen, *The Argument Culture* (Random House 1998).
52. I will have more to say about Argentina below, but in a multi-cultural immigrant based society with the highest per capita presence of psychiatrists, arguments and self-reflection, complexity and disputes are endemic, even if military dictatorships often threw Argentina into a more hierachal and authoritarian camp.
53. Compare Parliamentary debates (even with rules) to Congressional debates!
54. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press 2008).
55. See both Center for Public Resources Industry specific dispute resolution programs (e.g., energy, franchising, banking, health, etc., and Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Studies 115 (1992).
56. See e.g., Michael Helfand, *Religious Arbitration and the New Multi-Culturalism: Negotiating Conflicting Legal Orders*, 86 NYU L. Rev. 1231 (2011); *Id. Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 Chicago-Kent L. Rev. (2014).

being used more than the many formal international courts and tribunals we have established to deal with such conflicts, perhaps echoing the way in which informal dispute processes, though operating in the “shadows” of courts domestically, might actually be more effective at resolving disputes.

Adversarial cultures, of which the US is also a part (as are virtually all of the common law countries), are committed to court (and debating and political democracy) processes as the primary method for resolving legal claims, especially when a definitive ruling is necessary. Philosopher Stuart Hampshire has noted the importance of adversarial processes for exposing competing claims and principles, but then allowing for definitive decisions to be made so that diverse parties (and nations?) can move on productively.⁵⁷ In some sense, the international commercial arbitration community can be assimilated to the practice of this legal culture by virtue of its adoption of hybrid legal rules to provide evidence and arguments to a party-chosen panel when the need to “resolve” a dispute and compensate for it is deemed necessary, with a formal award and legal enforceability. Many civil law countries would likely see their so-called inquisitorial system producing similar results with slightly different process rules. At the same time, the excessive “formalism” of code or statutory regimes may actually inhibit the use of mediation.⁵⁸ The question of whether truly international or transnational disputes are best served with formalized rules and arguments, followed by authoritative decisions remains to be seen. As I have argued in many domestic and international contexts, less formal, more contingent and open-ended processes allowing party tailoring and revisiting of outcomes may actually be more appropriate.⁵⁹

Legal orders, which include both nation-states and more regional regimes (EU, Mercosur, Association of South East Asian Nations (ASEAN), North American Free Trade Association (NAFTA)), which are newly developing or are reconsidering their forms of legal, economic and political order (Eastern Europe after the fall of the Berlin Wall, South Africa, other “transitional” societies, post conflict, colonialism or dictatorship), may be more “*dialogic*” or “*conversational*,” about deciding how they will resolve their legal and political disputes, trying out hybrid institutions (new forms of courts and tribunals) and processes (indigenous processes like Rwanda’s *gacaca* or Southern Africa’s *ubuntu*) and thus may also be open to more pluralistic and participatory forms of dispute resolution. Some of the Southern Cone falls into this category. In my work in Argentina, Chile, Paraguay and Brazil, I have seen new

57. Stuart Hampshire, *Justice is Conflict* (Princeton University Press 2000); “*audi alterum partem*” (hear the other side as the guiding principle of adversarial and democratic decision-making).
58. In our recent multi-national efforts to prepare some model standards, principles, and approaches to regulation of mediation at a Max Planck comparative law hosted conference, German co-hosts and their European colleagues created a formalistic document called “Guide for Regulating Dispute Resolution: Principles,” involving taxonomies and definitions of dispute resolution processes to produce efficiency and enable party choice. The British and the American participants (including this author) did not sign on to these principles as being too formalistic for our more complex definitions and principles of dispute resolution, see *Regulating Dispute Resolution* (F. Steffek et al. eds, *supra* n. 18, Ch. 1 and 2).
59. Carrie Menkel-Meadow, *Complex Dispute Resolution, Foundations, Multi-Party and Democratic Decision Making, and International Dispute Resolution*, Introductions (Ashgate 2012).

generations of legal professionals seek to take up mediation as a way of softening the hard edges of corrupt courts and even conventional arbitration, often still seen as a product of the various “colonizers.” In transitional societies (as with our “transitional” international legal order) the question remains how much pluralism and variety can exist within new, untried legal and political structures when issues of fairness, access and resources still abound (not to mention possible corruption of old regimes as they meet up with new ones). This category of dispute resolution culture also includes those cultures, like many in Africa, which are either still using traditional forms of communitarian dispute resolution (e.g., *ubuntu, gacaca*) or adapting these old traditional practices to newer hybridized versions. Some of these nations formally recognize such forms of dispute resolution in statutes, some even allowing enforcement of agreements.⁶⁰

In so-called *face-saving or* harmony cultures,⁶¹ mediation or some form of conciliation may actually be the preferred method of dispute resolution. In such cultures, zero-sum or binary conceptions of what is at stake or ordered in a winner-take-all arbitration award is less likely to be acceptable to many parties. Future, rather than past, orientation to the dispute and preservation of the community or family or relationship, rather than individual justice, may offer alternative goals for a dispute resolution system. So, controversially and stereotypically, many assume Asian cultures (itself an essentialized and homogenized assumption about quite different legal regimes) will choose mediation. As mediation and conciliation are often used for domestic relations and labor disputes in many western nations, scholarly debates rage about whether there is too little recourse to formal courts in Japan⁶² or co-optation of legal rights in China by uses of both traditional and more modern forms of mediation.⁶³ Now that Hong Kong is formally part of China and Shanghai has become a major commercial center of both Chinese and international development, both of those cities are more likely to be part of the hybrid-cosmopolitan dispute resolution culture described in the next paragraph, raising interesting questions about decentralization of dispute resolution preferences within nations, depending on the context of international disputes.

60. See e.g., *Ghana Alternative Dispute Resolution Act of 2010*. Jacqueline-Nolan Haley & James Kwasi Annor-Ohene, *Procedural Justice Beyond Borders: Mediation in Ghana*, Harvard Negotiation Law Review Online (2014); Janine Ubink, *Access v. Justice: Customary Courts and Political Abuse, Lessons from Malawi's Local Courts Act*, American Journal of Comparative Law (2015).

61. Anthropologist Laura Nader's somewhat derisive critique of American uses and exportation of mediation models is called “harmony” culture, where she suggests values of peace and conflict avoidance can lead to pacification and compromise and the absence of “justice” when parties (often of unequal power) are coerced or encouraged to settle their claims, see Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management in Africa and Elsewhere*, 27 Law & Soc. Inquiry 573 (2002).

62. See e.g., Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. Japanese Stud. 111 (1988); Frank Upham, *Law and Social Change in Postwar Japan* (Harvard University Press 1987); John Haley, *The Spirit of Japanese Law* (University of Georgia Press 2006) (debates on Japanese litigation and conflict avoidance culture).

63. Benjamin L. Liebman, *Professionals and Populists: The Paradoxes of China's Legal Reforms, in China Behind the Headlines* (3d ed., Timothy Weston & Lionel Jensen, Rowman & Littlefield 2012); Stanley Lubman, *Dispute Resolution in China After Deng Xiaoping: Mao and Mediation Revisited*, 11 Colum. J. of Asian law 229 (1997).

In analyzing the use of mediation in any legal regime, it is useful to study how preferences and rules may differ for domestic and international disputes – what is now recognized in the European environment as unitary or dualistic mediation regimes. Here, a controversial literature debates whether social cultures of collectivism or individualism affects the choices and legitimacy of different collectivist or individual forms of dispute resolution, with controversies about whether dispute resolution is individualized, past-fact settling, truth finding and compensatory, or collectivist, future-focused, peace seeking and restorative,⁶⁴ and whether preferences for “in-country” dispute resolution processes are the same or different for inter-country disputes.

Finally, a number of legal commercial dispute resolution centers have emerged to demonstrate a hybrid or cosmopolitan dispute resolution culture. The great commercial arbitration centers hosting arbitration tribunals, e.g., Cairo, Stockholm, Geneva, Paris, London, New York and Hong Kong are now meeting with competition from newer centers in Singapore, Santiago, Buenos Aires (all establishing new quasi private-public Arbitration and Mediation Centers) so that all private tribunals are now seeking to offer a greater array of dispute resolution processes. The relationship of these international centers within their larger national culture remains an interesting, if understudied phenomenon. In Singapore, for example, the domestic Singapore Mediation Center is located in the same building as the Supreme Court and as Singapore attempts to build a Pacific Rim “gateway to Asia” arbitration center, courses and efforts to add mediation to international options sit parallel to an institutionalized domestic mediation program.⁶⁵ As international disputes appear to be on the increase with respect to traditional land (and island) and environmental claims in the China Sea and elsewhere in Asia (e.g., the “grey haze” dispute between Indonesia and its neighbors Singapore and Malaysia) members of ASEAN have been promoting international diplomatic mediation as a preferred method of dispute resolution for internal ASEAN disputes.

In addition to geographic hybridity, new international legal claims, such as human rights, law of the sea, international custody and child abduction treaties, have spawned new consideration of other forms of dispute resolution, including mediation. More modern treaties are more likely to provide a menu of dispute resolution options, now often including mediation (even if, once again, legal authority for transborder

64. See e.g., Walter A. Wright, *Cultural Issues in Mediation: Individualist and Collective Paradigms*, mediate.com (Jan. 2000), <http://www.mediate.com/articles/wright.cfm> (accessed Jan. 22, 2016); Ian Macduff, *Contradictions and Conflict: High and Low Context Communication in Mediation*, in Joel Lee & Teh Hwee Hwee, *An Asian Perspective on Mediation* (Academy Publishing 2009); Edward T. Hall, *Understanding Cultural Differences: Germans, French and Americans* (Intercultural Press 1990) (more focused on high and low context cultural differences); H.C. Triandis, *Individualism and Collectivism* (Westview Press 1995).

65. When I taught at the National University of Singapore a few years ago, hundreds of blog comments followed a controversial mediation of housing complaints about spicy food cooking in the multi-ethnic state-supported housing developments. Citizens felt quite free to comment robustly about the nature of the mediation, the “decision” of the mediator (sic), and whether the mediation was resolving a single issue between two families or a much larger societal issue about multi-cultural living and underlying ethnic tensions. All this in a country often accused of suppressing speech and political dissent!

mediation of such disputes remains somewhat problematic). Those engaged in international public law claims argue for complex forms of global governance that often are intended to create their own legal authority, as well as their own legal processes. In such contexts, international mediation, with all of the complexities of intercultural mediation, may establish itself as its own legitimate form of public international dispute resolution, but these are still relatively early days.

§3.03 SOME CONCLUDING THOUGHTS

In my view, there is still resistance to mediation in many kinds of disputes, ranging from the continued preference for established international commercial arbitration in most private, and much public, economic dispute resolution to diplomatic matters, and to transborder and internal disputes in many of the world's legal systems. But modern mediation did not come to easy and ready acceptance in the United States either and many would still claim it has a secondary or tertiary place, behind conventional litigation (and unassisted dyadic negotiated dispute settlement) and arbitration. Unlike others who may seek to expand mediation usage primarily as a method of efficiency (either for the parties or for legal systems generally),⁶⁶ in my view, mediation usage should be encouraged and expanded when it is the most appropriate process for dispute resolution – when flexible, future-oriented, party tailored, creative, resource-expanding solutions are sought, or the relations of the parties are to be continued in some form (or should not be made worse by brittle and binary decisions).⁶⁷ If parties seek to control the process of their dispute resolution, choose to pick their helpers, want to frame their own solutions, prefer some confidentiality to protect their business or personal interests (when public transparency is not otherwise required), then mediation may be the most appropriate way to resolve particular matters.

To reduce inappropriate or ignorant resistance to mediation, we must clearly educate lawyers, clients, parties, governments, bar and regulatory bodies, and diplomats and national leaders about what mediation can (and cannot) do. We must also, in my view, study and deal adequately with at least two major issues: potential issues and difficulties in trans-cultural issues in mediation and appropriate international legal authority for enforcement of decisions to mediate and ultimately, of mediated agreements themselves, provided such agreements meet the standards of internationally accepted notions of consensually arrived at mediated solutions.

I have long suggested that we take the long view of dispute resolution. Trial by ordeal and combat were replaced by the more civilized trial by evidence hundreds of years ago in most legal cultures. At the present time, we are observing the many

66. See recommendations of *Rebooting Report*, *supra* n. 2.

67. Lon Fuller, among other “jurisprudents” of legal process, reminds us that each process has its own integrity and reasons for use; no one process is appropriate for all the variations human disputing, see Lon Fuller, *Mediation: Its Form and Its Functions*, 44 So. Cal. L. Rev. 305 (1971) and Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Plural Legal Processes*, 94 Geo. L. J. 553 (2006). See also Orna Rabinovich-Einy, *The Legitimacy of ADR* (forthcoming); Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 Ohio St. J. Disp. Resol. 321 (2007).

deficiencies of conventional litigation (both domestically and internationally) and I prefer to take the long view that human legal processes are evolving to consider other ways of resolving disputes.⁶⁸ (Is truth always necessary; can we create better solutions together, without a commanded, ordered and hierarchical process, can parties productively participate in their own solutions?) Mediation is one step on that international and temporal road of evolution. In the international arena, we have clear evidence of that evolution as the growth of more mediative institutions and processes, like truth and reconciliation commissions,⁶⁹ supplementing or substituting for some forms of more adjudicative human rights and international criminal justice processes, demonstrate a growing recognition that there may be more complex and sensitive ways to manage and handle, if not totally resolve, disputes about the past, in order to move more productively into the future. Mediative approaches to legal, political and social disputes are growing, even as conflict, both violent and legal, continues to challenge our abilities to peacefully resolve issues among us, while also pursuing just results.

68. Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 57 *Current Legal Problems* 85 (Jane Holder, Oxford University Press 2005).
69. Patricia Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed., Routledge 2011); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 *Annual Review of Law and Social Science* 10.1-10.27 (Annual Reviews 2007).