Essays on Mediation

Dealing with Disputes in the 21st Century

Edited by
Ian Macduff

© Wolters Kluwer
# Table of Contents

**Editor** vii

**Contributors** ix

**Acknowledgement** xxix

**Essays on Mediation: Introduction**

*Ian Macduff* 1

**CHAPTER 1**

'Mediation: Elephant or Heffalump?'

*Kevin Avruch* 5

**Bibliography** 11

**CHAPTER 2**

Remembrance of Pleasures Past: Reflections of a Practitioner

*Howard Gadlin* 13

§2.01 Preface 13

§2.02 Doing Good Work 14

§2.03 Art and Tools of the Craft 14

§2.04 Theory versus Practice 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

xxi
Table of Contents

CHAPTER 3
The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation
Carrie Menkel-Meadow 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
Michael Hwang 47
§4.01 Case 1 47
§4.02 Case 2 49

CHAPTER 5
Challenging the Status Quo
John Sturrock QC 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
Dale Bagshaw 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
Table of Contents

[B] National Governments  

[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] Commissions d’Accueil et Reinsertion (CAR) and NRC in the Democratic Republic of Congo (DRC) 114

§8.07 Issues in Providing CDR Assistance 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  
Bruce E. Barnes 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

xxiv
<table>
<thead>
<tr>
<th>§9.10 Lessons for International Mediation in ASEAN and Other Global Fault Lines</th>
<th>135</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bibliography</td>
<td>135</td>
</tr>
</tbody>
</table>

**CHAPTER 10**
Rocks on the Road: Inside the Pandora’s Box of Culture
*Peter S. Adler*

| §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
*J.-P. Bonafé-Schmitt*

<table>
<thead>
<tr>
<th>§11.01 Social Mediation: Conceptual Fuzziness</th>
<th>154</th>
</tr>
</thead>
<tbody>
<tr>
<td>[A] The Original Conceptual Fuzziness</td>
<td>154</td>
</tr>
<tr>
<td>[B] Maintaining Conceptual Fuzziness</td>
<td>156</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§11.02 Social Mediation Related to Dispute Resolution</th>
<th>158</th>
</tr>
</thead>
<tbody>
<tr>
<td>[B] Neighborhood or Community Mediation: A Rationale of Reappropriation</td>
<td>161</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§11.03 Social Mediation Related to Communication</th>
<th>163</th>
</tr>
</thead>
<tbody>
<tr>
<td>[B] “PIMMS” Mediation Activities: A Rationale of Instrumental Communication</td>
<td>167</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>§11.04 Social Mediation Related to a Security Rationale</th>
<th>169</th>
</tr>
</thead>
<tbody>
<tr>
<td>[B] Mediation Activities in Public Areas: A Rationale of Social Pacification</td>
<td>171</td>
</tr>
</tbody>
</table>

| §11.05 Conclusion | 174 |

**CHAPTER 12**
Embedding Mediation and Dispute Resolution into Statutory Civil Law: The Example of Germany
*Thomas Trenczek & Serge Loode*

| §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 *German Mediation Act 2012* 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
    [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)
*Beate Voskamp & Stefan Kessen*

§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
*Ethan Katsh & Orna Rabinovich-Einy*

§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
*Ian Macduff*

§15.01 Context and Provocation 219

§15.02 Foundations 220

§15.03 Current Developments Revisited 223

§15.04 Digital Intermediaries in Crisis and Conflict Setting 226

§15.05 Implications 233

xxvi
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§16.01</td>
<td>Introduction</td>
<td>249</td>
</tr>
<tr>
<td>§16.02</td>
<td>Preparing the Ground for Mediation: The Element of Earth and the</td>
<td>250</td>
</tr>
<tr>
<td></td>
<td>Alchemic Process of <em>Coagulatio</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[A] <em>Coagulatio</em> in Action: Science and Aesthetics</td>
<td>251</td>
</tr>
<tr>
<td></td>
<td>[B] <em>Coagulatio</em> in Mediation Practice</td>
<td>253</td>
</tr>
<tr>
<td>§16.03</td>
<td>Flow in Mediation: The Element of Water and the Alchemic Process of</td>
<td>254</td>
</tr>
<tr>
<td></td>
<td><em>Solutio</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[A] <em>Solutio</em> in Action: Science and Embodied Aesthetics</td>
<td>255</td>
</tr>
<tr>
<td></td>
<td>[B] <em>Solutio</em> in Mediation Practice</td>
<td>257</td>
</tr>
<tr>
<td>§16.04</td>
<td>Exploring the Space of Identity in Mediation: The Element of Air and</td>
<td>259</td>
</tr>
<tr>
<td></td>
<td>the Process of <em>sublimatio</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[A] <em>Sublimatio</em> in Action: Theory and Practice</td>
<td>259</td>
</tr>
<tr>
<td></td>
<td>[B] <em>Sublimatio</em> in Mediation Practice</td>
<td>261</td>
</tr>
<tr>
<td>§16.05</td>
<td>Dynamics and Mobilization in Mediation: The Element of Fire and the</td>
<td>262</td>
</tr>
<tr>
<td></td>
<td>Process of <em>Ccalcinitio</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[A] <em>Calcinitio</em> in Action: Contagion</td>
<td>263</td>
</tr>
<tr>
<td></td>
<td>[B] <em>Calcinitio</em> in Action: Embodied Resilience</td>
<td>264</td>
</tr>
<tr>
<td></td>
<td>[C] <em>Calcinitio</em> in Mediation Practice</td>
<td>265</td>
</tr>
<tr>
<td>§16.06</td>
<td>Alchemy in Conflict Resolution Practice: Systemic Constellations at</td>
<td>266</td>
</tr>
<tr>
<td></td>
<td>Work</td>
<td></td>
</tr>
<tr>
<td>§16.07</td>
<td>Conclusion</td>
<td>269</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Index</td>
<td>271</td>
</tr>
</tbody>
</table>