Mediation as a Technique of Alternate Dispute Resolution: A Conceptual Overview

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Introduction: Alternative dispute resolution (ADR) encompasses both the formal and informal mechanisms that are designed to resolve disputes in more private, flexible, and efficient ways that are generally less painful than full-scale litigation. Parties may use numerous alternatives to litigation to resolve disputed matters. Some of these methods are designed to replace litigation and lead to a resolution. These methods include negotiation and settlement, arbitration, mediation, and the use of private judges. Other methods are designed to streamline litigation and to facilitate an eventual settlement of some or all of the matters at issue. These include early neutral evaluations, mini-trials, summary jury trials, court-appointed committees, and informal conferences with the judge.[1]

Mediation is the ADR process in which a neutral third party works with the disputants to reach a mutually agreeable resolution. Mediation is arguably the oldest and most popular ADR technique in use today.The word 'mediation' comes from the Latin root "mediare"meansto halve. In Chinese it means to step between two parties and solve their problem, and in Arabic it indicates manipulation. For Westerners "mediation" is a procedure that is used increasingly for conflict resolution.[2] Early mediation of disputes also allows the parties a non confrontational forum to discuss a variety of matters that may otherwise fester. The fiduciary may find that a simple modification of procedures will go a long way toward preventing future upsets[3].

Succinctly defined, mediation is third-party assistance to two or more interacting parties the process is probably one of the oldest forms of conflict resolution. No doubt it predates recorded history, and in early times we find ample evidence of its usage. For instance, in China administrators during the Ming dynasty (1368-1644) actively encouraged village elders-li-lao-to solve petty disputes within the community[4].

Framework for Mediation

In our framework, the beginning point of the mediation process is an interaction between two or more. Typically, we think of the parties as disputants or negotiators,

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[1]Robert M. Ackerman, "Introduction: ADR: An Appropriate Alternative", *Willamette L. Review*, 1997, pp. 497-498.

[2]James A. Wall Jr., Ann Lynn, "Mediation: A Current Review", *Journal of Conflict Resolution,* 1993, p. 160.

[3]Mary F. Radford, "An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters", *Real Property, Probate and Trust Journal*, 2000, p. 666.

[4]James A. Wall Jr., Ann Lynn, "Mediation: A Current Review", *Journal of Conflict Resolution,* 1993, p. 161.

but they also may be individuals whose interaction could be improved by the mediator's intervention. Under certain circumstances (Mediation Determinants), a third (usually with less power than the disputants) decides to mediate the interaction. After he or she does so, the mediator chooses from of available techniques and strategies. The choice is influenced by the part by the mediator's past experience, instruction as a mediator, explain about the probable success of different techniques, and so on[5].Mediation does not have a required set of procedures. However, attendance by the appropriate individuals is vital to ultimate success. All parties and any others who may be important to a settlement should attend the hearing. The mediation may or may not include the parties' attorneys. The mediator may discover early in the process that a settlement is not possible without the presence of other nonparties[6].

Under what circumstances does a third party answer the call and agree to mediate? One primary condition is whether the mediation has been structured into the parties' interaction. Mediators who are bound by agreement to assist or are "on call" do so as part of their job responsibility. Many such mediators are found in the ranks of the National Mediation Conciliation Services alternative dispute resolution centers, community mediation center many similar institutions.

Although prior agreements and job requirements dictate mediation some third parties, others intervene because they feel their assistance useful to the parties or because mediation offers an approach superior to the alternatives.

Some mediators assist because that is their profession; mediation profession remuneration, a reputation, and future business.

A mediator might actually take steps to set up the interaction (or negotiation) between the parties and then pressure them to accept mediation. Having done so or having entered an ongoing negotiation, the mediator establishes and enforces a protocol for the negotiation and applies techniques that control the relationship-the perceptions as well as the communications.

In coordination with techniques that alter the parties' perceptions and communications, the mediator manages their power-usually attempting to strike a power balance-and proposes or dictates specific agreement points. At times the mediator separates the parties and develops ways to expand the negotiation agenda such that negotiators will explore agreements that yield high benefits to both sides. In addition to the above tactics, mediators can determine what points are negotiable, reframe the dispute, bring pressures to bear from other third parties, use personal power to exact an agreement and, in general, fine-tune various approaches to fit the particular negotiation.[7]

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[5]James A. Wall Jr., Ann Lynn, "Mediation: A Current Review", *Journal of Conflict Resolution,* 1993, p. 162.
[6]Nadine DeLuca Elder, "A Mediation Primer for the Solo or Small Firm Practitioner", *Ga. Bar Journal*, 1998, pp. 38-40.

[7]James A. Wall Jr., Ann Lynn, "Mediation: A Current Review", *Journal of Conflict Resolution,* 1993, p. 165.

The mediator sets ground rules for the participants. Typical ground rules include:
1. Do not interrupt the other party.
2. Be respectful of the other party.
3. Maintain flexibility.
4. Retain confidentiality.
The mediator emphasizes that the mediator's role is not to be a judge, but to help the parties reach an agreeable outcome. The parties may also have prepared written opening statements which the mediator reads[8].

In addition to its direct impact, culture influences mediators' tactics via the training they receive. For example, in China mediators use tactics (e.g., highlighting the cost of the dispute to a third party) that emphasize restoring harmony in society. These techniques come from a society that long has embraced the Confucian ideal of societal harmony, and they are pressed on the mediators in their training. Specifically, the Army-People's Liberation Army-trains the community mediators to emphasize social harmony. Consequently, Chinese mediators adopt this approach when encountering any dispute. The effect of training is also seen in the United States. The community mediators they had been trained to approach their disputes democratically-to emphasize disputant consensus. Consequently, they followed this approach even when given the power to be heavy-handed.[9]

The article focuses on key characteristics of mediation processes, Communication, punishment, and mediator interest- the interaction between these characteristics, and their net and combined effects on conflict prevention.Recent studies have shown that mediation efforts are indeed a factor for successful crises management and agreement between conflict parties. However, which characteristics of the mediation process are exactly conducive to conflict prevention (and which lead to failure) is still part of an ongoing controversy.

With regard to communication, there is a debate about the effectiveness in producing cooperativeoutcomes.Inthemediation literature, some scholars have argued that information provision is an effective mediation tool. Theprimeroleofinformation is reducing uncertainty. Moreover, byproviding the disputants with information about each other's reservation points, mediators may also help the disputants locate the bargaining set. Other scholars have argued that information provided by mediators may not be sufficient to achieve cooperative outcomes. This view is consistent with an understanding of communication as cheap talk. In a social dilemma, self-interested players are expected to use communication to try to convinceothers to cooperate, but then choose the Nash equilibrium strategy when they make their private decisions.

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[8]Mary F. Radford, "An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters", *Real Property, Probate and Trust Journal*, 2000, p. 626.
[9]James A. Wall Jr., Ann Lynn, "Mediation: A Current Review", *Journal of Conflict Resolution,* 1993, p. 169.

Thus, communication should not make a difference in the outcomes achieved in social dilemma.[10]

Moreover, there is a controversy in the literature about mediator power in particular about punishment capabilities. The question is whether mediators should use soft mediation tools or whether they should be able to carry a "hard stick" (in the form of punishment for uncooperativebehavior) as well. On one hand, some authors have argued that punishment strategies may damage the atmosphere of good will, trust, and joint problem solving. Indeed, punishment and the threat of force can lead to an escalation of conflict. Last but not least, there is also a controversy about the mediator's interests. Mediators are often thought to be more effective if they are unbiased or impartial or have no preferences over the issue in dispute.

International Mediation

International mediation is conceived to be a complex phenomenon. Fortunately, for our theoretical and investigatory purposes, mediation is also an idea and practice which is held together by certain family resemblances. These family resemblances are commonly recognized to be divided into two main sub-groups. A first approach emphasizes manipulation, forms of power, processes of bar gaining, coercion, the ideas of quid pro quo, leverage and compromise. This is called a 'bargaining' or 'power-political' approach to international mediation This tradition locates mediation within a neo positivist social scientific framework that conceives the theory and practice of mediation as aiming at the manipulation of the social environment largely via state centered executive and administrative power.

A second approach emphasizes the qualities of neutrality, consensus and impartiality and is called third-party facilitation or consultation. This tradition emphasizes a different set of characteristics: facilitation, communication, social psychology, the symbolic constitution of the social world, the role of non-state and individual interaction in the problem-solving workshop, the need for a genuine resolution, and the qualitative nature of issues and outcomes. This approach emphasizes how social-psychological perceptions, which are obstacles to more deep and meaningful negotiations, can be broken down by a facilitator working within the intimate setting of a small group of key decision-makers. Some facilitation theorists, most prominently John Burton, even argue that this type of conflict resolution, through the tool of the problem-solving workshop, can penetrate the fundamental reality and causal power of human need.

The two approaches rest, fundamentally, upon well-known sociological categorizations of action. The power-political approach uses the idea of strategic

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[10]Gerald Eisenkopf and André Bächtiger, "Mediation and Conflict Prevention", *The Journal of Conflict Resolution,* 2013, pp. 571-574.

action effectively summarized by Stephen White. As White puts it, within the concept of strategic rationality: Action is conceptualized as the intentional, self-interested behavior of individuals in an objective world, that is, one in which objects and other individuals are related to in terms of their possible manipulation. The rationality of action is correspondingly conceptualized as the efficient linking of actions seen as the means to the attainment of individual goals.[11]

Mediation research focus on three characteristics of the dispute mediation outcomes[12]:
(a) conflict ripeness,
(b) the level of conflict intensity and
(c)nature of the issue(s) in conflict.

Conflict ripens: Analysts have frequently highlighted the importance of proper timing of mediation initiatives for achieving successful outcomes. It is assumed that conflicts pass through a life cycle that encompasses a number of distinguishable phases, and that certain stages are more amenable to outside intervention than others. Some analysts believe that conflicts follow the logic of "clock time." The duration of conflict in terms of days, months, or years is linked to the persistence or change of attitudes of the adversaries toward the conflict. The "classical" position supports late entry, is based on the thesis that mediation is most fruitful when failure to reach an agreement is precipitating an emergency. A feeling of emergency will strongly increase the disputant's motivation to moderate their intransigence revise their expectations. Other analyst claim, however, that mediation needs to be initiated at an early stage, those is, well before the adversaries cross a threshold of violence and begin to inflict heavy losses on each other.

Level of Intensity: Some indicate that the greater the intensity, the more polarized the positions of the disputants will become resulting in a greater inclination to reject any mediation effort. Instead they will try to "win" at all cost. Other analysts argue instead that the greater the intensity of a conflict, the higher the likelihood that mediation will be both accepted and successful as a method of minimizing losses.

The nature of Issues:

A final characteristic of the dispute thought to have an important bearing on the outcomes of mediation concerns the nature of the issue(s) in conflict.Bercovitch,Anagnoson, and Wille, for example, distinguish between five types of conflict issues: (1) sovereignty issues involving adversaries with incompatible claims to a specific piece of territory; (2) ideology issues focusing on the nature of a political system, basic values, or beliefs; (3) security issues concerning

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[11] S. White, *The Recent Work of JurgenHabermas: Reason, Justice and Modernity*, Cambridge University Press, Cambridge, 1988, p. 10.

[12]MariekeKleiboer, "Understanding Success and Failure of International Mediation", *The Journal of Conflict Resolution,* 1996, pp. 363-364.

frontiers, borders, and territories; (4) issues of self-determination and national selfhood in independence conflicts; and (5) a residual category of other types of conflict. Using their database, they find that disputes involving territorial or security issues are far more amenable to successful mediation than are issues of ideology or independence.

International mediation is considered as a form of domination, a tool used by rich and powerful states for preventing fundamental changes in the structure of the international system that some forms of conflict might enable. Its main captured in the following propositions[13]:

1. International conflict is endemic to the current structure of the international capitalist system that, through its international division of labor, has led to institutionalized inequality and dependency between centers and peripheries, both within and between states. The economic structure of world society generates specific patterns of interests governing which groups dispute and which cooperate. Conflicts become manifest when deprived groups seek to set themselves free from exploitative relationships.

2. Conflict is a first and necessary impetus to foster structural change. However, not all forms of conflict serve this purpose. Manifest conflict between elites and masses within periphery states distracts energy and attention from the more important, mostly latent, conflict between center and periphery states within the world system. Only through the escalation of the latter type of conflict will it become possible to expose the exploitative nature of relationships within the international system, and become possible for attempts be made to change them.

3. Conflict resolution in terms of structural changes can be achieved only when peripheries can be moved to join forces to redress the balance of global economic power. At the same time, however, ruling classes and dominant states will not voluntarily agree to end their own privileged positions. This leads into a paradox of international conflict resolution: true resolution of international conflict is only possible through a global strategy of conflict escalation on the part of periphery groups and states. International mediation has no role to play in resolving this paradox, or in bringing about true resolution of the fundamental sources of international conflict. There exists no mediator independent of the center who has the overwhelming economic and political power required to force structural change and who is not committed to the preservation of the global status quo. In contrast, the existing practice of international mediation is one of domination: a practice initiated or supported by powers from the center to protect and maintain the international economic and political status quopowers.Third-party intervention therefore remains limited to conflict settlement used to reduce or suppress conflicts within or between the periphery stat these conflicts become too intense and costly to status quo powers.

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[13]MariekeKleiboer, "Understanding Success and Failure of International Mediation", *The Journal of Conflict Resolution,* 1996, pp. 376-389.

4. Dominant powers are the most likely candidates for a role as mediator settlement. They will be motivated to become mediators or will endorse other parties (e.g., international organizations) primarily to protect their position in the capitalist world system.

5. In many cases, the parties in conflict (ruling classes versus deprived the periphery states, or competing elites of different periphery states) have but to accept the initiation of mediation efforts on the part of powerful status In practice, they may obstruct the settlement process when they expect short term gains from continued confrontation, but they will try to avoid compromising their relationship with the mediator.

Conclusion
The formalized use of mediation and other forms of alternative dispute resolution has developed slowly. Mediation, despite its importance and seeming ubiquity, remains understudied, less than understood, and unrefined. The opportunities for lawyers to learn about mediation and other forms of ADR are numerous. Estate planning and elder law lawyers may choose merely to become familiar with these techniques, or they may opt to be trained as mediators or arbitrators. However, lawyers no longer have the option to ignore that alternative forms of dispute resolution have become part of the fabric of our legal system. Finally the multimodel approach to mediation analysis is also advantageous from the perspective of the policy relevance of research findings. By comparing and contrasting different ways of understanding conflict episodes and assessing the prospects for mediation success, mediators and other stakeholders in these conflicts may be offered a richer, more cognitively complex menu of policy options.