

TABLE OF CONTENTS

INTRODUCTION	11
--------------	----

PART I. GENERAL OVERVIEW OF MEDIATION

MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION METHOD	15
---	----

Alessandro Bruni

I. Mediation: A Brief Definition	15
II. Differences Between Mediation, Litigation, and Other ADR Methods	17
III. The Role of a Mediator and Required Skills	19
IV. The Place of Mediation in Resolving Business and Organizational Disputes	23

INTERNATIONAL MEDIATION	27
-------------------------	----

Paul R. Gibson

I. Introduction	27
II. Social and Anthropological Aspects	27
2.1. Sense of Identity – Individualistic or Collectivist	30
2.2. Rules – Universalist or Particularistic	30
2.3. Status and Power – Low-Power Distance or High-Power Distance	30
2.4. Use of Language – Low Context or High Context	30
2.5. Structure and Time – Mono-Chronic or Poly-Chronic	31
2.6. Attitude to Ambiguity – Low Uncertainty Avoidance or High Uncertainty Avoidance	31
2.7. Attitude to Different Laws – Native or Indigenous Law, or Government or Statute Law	31
2.8. Attitude to Gender – Masculinity or Femininity	32
III. Rules and Codes of Conduct	34
IV. Legal and Strategic Considerations	35
4.1. Certainty of Agreement	35
4.2. Place of Mediation	35
4.3. Enforcement of Settlements	36
V. Conclusion	38

PART II. MEDIATION AND LAW

THE ROLE OF LAW IN INTERACTION: MEDIATION, ADR AND LEGAL THINKING	39
---	----

Frank Fleerackers

I. Introduction	39
II. Mediation, ADR and Legal Thinking	40
III. Conclusion	48

THEORY AND PRACTICE OF CONTRACT LAW IN EUROPE	51
<i>Andrew Colvin</i>	
I. Introduction	51
II. Principles	52
III. Freedom of Contract	52
IV. Canons of Construction	53
V. Common European Sales Law (CESL)	54
VI. Reviewing the Armoury	54
6.1. European instruments	55
6.1.1. Brussels I Regulation	55
6.1.2. Rome I Regulation	57
6.1.3. Other European Instruments	61
6.2. International Instruments	62
6.2.1. UNIDROIT Principles of Commercial Contract Law	62
6.2.2. Vienna Convention	63
6.2.3. Hague Convention on Choice of Court Agreements	64
6.3. Common European Sales Law (CESL)	65
RECENT DEVELOPMENTS IN EUROPEAN MEDIATION AND ADR	69
<i>Johan Billiet & Dilyara Nigmatullina</i>	
I. Introduction	69
II. European Mediation	70
2.1. Mediation Directive	70
2.1.1. Scope of the Mediation Directive's Application	70
2.1.2. Compliance with the Mediation Directive	70
2.1.3. Three Objectives of the Mediation Directive	71
2.1.3.1. Reinforcing the Quality and Security of Mediation	71
2.1.3.2. Promoting Mediation as an Autonomous Dispute Resolution Process	74
2.1.3.3. The Effect of Mediation on Limitation and Prescription Periods	75
2.2. Mediation and Regulation of the EU Internal Market in Services	75
2.2.1. Application of the Services Directive to Mediation	75
2.2.2. Application of the Services Directive to Third Country Nationals	77
2.2.3. Application of the Services Directive to Notaries	79
2.2.4. Mediator Qualification Requirements and Freedom to Provide Services	80

2.2.5. The Services Directive and Professional Insurance Requirement	81
2.2.6. Requirements to Nationality of a Mediator or Parties and the EU Law	83
2.2.7. Comment of the Commission of 8 June 2012 on the Implementation of the Services Directive	84
III. European ADR	86
3.1. Proposal for a Directive on ADR	88
3.2. Proposal for a Regulation on ODR	91
3.3. Draft Report of the IMCO Committee on Regulation on the ODR	93
3.4. Draft Report of the IMCO Committee on the Directive on ADR	94
3.5. Opinion of the Committee on Legal Affairs on the Directive on ADR and the Regulation on ODR	95

REFUSING TO MEDIATE: A SELECTION OF EVOLUTIONS IN EUROPE **97**

Philippe Billiet

I. Introduction	97
II. Obligation to Mediate in Italy	98
2.1. Italian Mandatory Mediation	98
2.2. Mandatory Mediation – the Lawyers’ Perspective	99
III. Abusive Refusal to Mediate in England	100
3.1. Encouraging of Mediation by English Courts	100
3.2. Evolutions in Case Law	101
IV. Abusive Refusal to Mediate in the Netherlands	106
4.1. Comparison with English System	106
4.2. Evolutions in Case Law	106
V. Conclusion	108

PART III. PROCESS, ETHICS AND EMOTIONS IN MEDIATION

MEDIATION PROCESS **109**

Linda Reijerkerk & Marga Schreuder

I. Introduction	109
II. The Harvard rules	109
2.1. Separate the people from the problem	110
2.2. Focus on interests, not positions	111
2.3. Invent options for mutual gain	111
2.4. Insist on Using Objective Criteria	112
2.5. When the Other Party Is More Powerful	113
2.6. What if...	113
2.7. When the Other Party Uses Dirty Tricks	114
III. The mediation circle	115

Stages in the mediation process	115
3.1. The first phase, the intake	116
3.2. The Exploration Phase	118
3.2.1. Communication issues	118
3.2.2 Dealing with emotions	119
3.2.3 Focus on interests instead of positions	119
3.3. The Negotiation Phase	120
3.4. Closing Phase	122
IV. Levels of Settlement	124
Level 1: stop fighting	124
Level 2: agree	124
Level 3: resolving the underlying causes of the dispute	124
Level 4: release	125
Level 5: reconciliation	126
V. Conclusion	126
EU ETHICS IN MEDIATION: SOFT SKILLS HARD FACTS	129
<i>Arthur Trossen</i>	
I. Introduction	129
II. What is Mediation?	130
III. Principles of mediation	131
3.1. Valuing the Mediation	131
3.2. The Meaning of Ethics in Mediation	132
3.2.1. The Mediator's Toolkit	133
3.3. How Goals Impact Attitude?	136
3.3.1. The Different Ways of Mediation	136
3.3.2. Attitude Indicated by the Goal	137
3.4. How Processing Impacts Attitude	139
3.4.1. Attitude Indicated by the Principles	140
3.4.2. Attitude Indicated by the Structure	143
3.4.3. Attitude Indicated by Thinking	145
3.5. How Methods Impact the Attitude	146
3.6. How Techniques Impact the Attitude	146
3.7. Mediator's Attitude, Character and Skills	147
3.7.1. Mediation Styles	147
3.7.2. Mediator's Character	148
3.7.3. Mediator's Skills	148
3.7.4. Mediator's Profile	149
3.8. The Use of Ethics	150
3.8.1. The State of the Art	151
3.8.2. What Is Allowed and What Is Not?	151
3.8.3. How to Behave as a Mediator?	152
IV. European Code of Conduct for Mediators	152
4.1. Competence and Appointment of Mediators	152
4.1.1. Competence	152

4.1.2. Appointment	152
4.1.3. Advertising/Promotion of the Mediator's Services	152
4.2. Independence and Impartiality	152
4.2.1. Independence and Neutrality	152
4.2.2. Impartiality	153
4.3. The Mediation Agreement, Process, Settlement and Fees	153
4.3.1. Procedure	153
4.3.2. Fairness of the Process	153
4.3.3. Fees	154
4.4. Confidentiality	154
NO FEELINGS PLEASE, WE ARE EXECUTIVES: "EMOTIONS DO NOT PLAY A ROLE IN THIS"	155
<i>Theo M. Van Dijk</i>	
I. Introduction	155
II. Emotions	155
III. Effects of Feelings and Behaviours	156
IV. The Roots of Our Behaviour	157
V. The Role of Emotions in a Conflict	158
VI. Interventions and Techniques	159
VII. Conclusion	161
PART IV. SPECIFIC ISSUES IN MEDIATION	
PERSISTENT POSITIONS	163
<i>Jacques De Waart</i>	
I. Introduction	163
II. The Layers	164
III. The Peeling	165
IV. Emotional Layering	166
V. Moving Emotions	167
VI. Peeling the Layers	167
FINDING A SUCCESSFUL CONCLUSION AND, IN PARTICULAR, HOW TO DEAL WITH DEADLOCK SO AS TO ARRIVE AT SETTLEMENT IN MEDIATION	169
<i>Phillip Howell-Richardson</i>	
I. Introduction	169
II. Why Does Impasse Happen?	169
III. Dealing with the Deadlock	170
MULTIPARTY AND GROUP MEDIATION	173
<i>Linda Reijerkerk</i>	
I. Three Dimensions of Mediation	173
1.1. Numbers and Relations Count	174
1.2. The Roles of Those Who Are Involved	175

1.3. Conflict Domains	177
II. Group Dynamics	178
III. Process Design	180
3.1. Structure	181
3.2. Time Frames	181
3.3. Methods	181
IV. Conclusion	183
THE FUNCTION OF PARTY EXPERTS AND PARTY COUNSEL IN CIVIL AND COMMERCIAL MEDIATION	185
<i>Willem Meuwissen</i>	
I. Introduction	185
II. The Principal and the Qualifications of the Members of His Negotiation Team	186
III. The Confidentiality in Mediation and the Party Expert and Party Counsel	188
IV. Voluntariness of Mediation and the Party Experts and Party Counsel	190
V. When Advise Mediation?	190
VI. Explain Mediation to the Client	192
VII. Introduce the Other Side to the Idea of Mediation	193
VIII. Where to Find a Mediator ?	194
IX. How to Select a Mediator ?	194
X. The Mediation Agreement	195
XI. The Mediator Is Also to Fix Together with the Parties and Their Experts and Counsel the Venue of the Mediation	196
XII. The Preparation with the Client	197
XIII. At the Table	198
XIV. Settlement	198
XV. Conclusion	199

ANNEXES

ANNEX I. DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 MAY 2008 ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS	201
ANNEX II. PART SEVEN OF THE BELGIAN JUDICIAL CODE – MEDIATION	211
ANNEX III. DECISION OF OCTOBER 18, 2007 REGARDING THE CODE OF CONDUCT FOR A MEDIATOR ACCREDITED IN BELGIUM	219
ANNEX IV. EXAMPLE OF A MEDIATION EXERCISE	225
LIST OF CONTRIBUTORS	229