

Mediation: International and Comparative Perspectives

Fordham University School of Law

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Room 4-05

Monday 2:00 p.m.—3:50 p.m.

This seminar will introduce you to the wide variety of contexts in which mediation is practiced in public and private settings, from commercial disputes to United Nations peacemaking efforts. You will study theories of mediation and explore how different mediation models operate under various cultures, institutions and codes of ethics. The course is conducted through lectures, selected readings and simulations. A final research paper is required.

Course Requirements:

1. Attendance at class and participation in class discussions.
2. Be prepared to discuss readings on your assigned date, raise two questions for class discussion based on readings, and submit questions in advance to the professor. This accounts for 25% of your grade.
3. Research paper, between 20 and 25 pages (including footnotes) double-spaced. This accounts for 75% of your grade.
4. Brief presentation to the class based on research paper.

Week 1

1. Basic Understandings and Definitions
 - A. The meaning of conflict

 - B. Models of mediation
 - a. Evaluative
 - b. Facilitative
 - c. Transformative
 - d. Narrative
 - e. Understanding-based

 - C. How mediation differs from other consensual problem-solving processes
 - a. Good offices
 - b. Inquiry and Conciliation
 - c. Negotiation and Consultation
 - d. Med-Arb
 - e. Consensus building

2. Specific Understandings
 - a. International mediation
 - b. Comparative mediation
 - c. Transnational mediation

3. Barriers to the mediated resolution of disputes

Suggested Readings

Dominic Bryan, *Parading Protestants and Consenting Catholics in Northern Ireland: Communal Conflict, Contested Public Space and Group Rights*, 5 Chicago Journal of International Law 233, 241-42 (2004)

Steven J. Burton, *Combining Conciliation With Arbitration of International Commercial Disputes*, 18 Hastings Int'l & Comp. L. Rev. 637 (1995)

Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 Ohio State Journal on Dispute Resolution 235 (1993)

Nolan-Haley et al, *International Conflict Resolution: Consensual ADR Processes* pp.20-23; 31-36 (2005)

Week 2

The role of culture in international and comparative mediation

- a. Cross-cultural issues
- b. Differences in legal systems
- c. Differences in definition of mediation

Suggested Readings

John Barkai, “*What’s a Cross-Cultural Mediator To Do? A Low–Context Solution for a High Context Problem,*” 10 *Cardozo J. Conflict Resol.* 43, (2008)

Julia Gold, “*ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Process,*” *J. Disp. Resol.* 289 (2005)

Hephzibah Levine, *Mediating the War of Olives and Pines: Consensus-Based Land-Use Planning in a Multicultural Setting,* *Negotiation Journal* pp. 29-69 (January 2005)

Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments,* 23 *Negotiation Journal* 219 (2007)

Ellen Waldman, “*Mediating Multiculturally: Culture and the Ethical Mediator,*” 305 -337 in *Mediation Ethics: Cases and Commentaries* (2011)

IMI Cultural Competency Scheme--<https://imimediation.org/intercultural-certification-criteria>

Week 3

Ethical Issues in International and Comparative Mediation

1. Ethics/truth-telling
2. The transition from mediation to arbitration
3. Mediation providers
 - a. Regulating the providers
 - b. Credentialing
4. Sample of relevant ethical codes

- a. International Mediation Institute (IMI) - <http://www.imimediation.org/imi-code-of-professional-conduct>
- b. European Code of Conduct for Mediators - http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf
- c. Model Standards of Practice for Mediators - <http://www.mediate.com/pdf/ModelStandardsOfConductforMediatorsfinal05.pdf>

Suggested Readings

Laurence Boulle and Miryanna Nestic, Mediator Skills and Techniques: Triangles of Influence (2010) Appendix 8 Ethical Standards, pp. 605-42

Noone et al, *Ethical Challenges for Mediators around the Globe*, 45 Washington University Journal of Law Policy, 145 (2014).

Cheryl Rivers, *Lying, Cheating Foreigners!! Negotiation Ethics across Cultures*, 12 Int'l Negotiation 1 (2007)

Donna Ross , *Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?* in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers pp. 352-66 (2012), editor Arthur W. Rovine.

Week 4

Legal Issues

1. The role of government/legislating bodies
 - a. EU Initiative
 - b. The Italian experiment
2. Enforcing the mediated agreement
3. Enforcing the agreement to mediate
4. Confidentiality
5. Informed Consent
6. Good faith participation requirement
7. Mandatory mediation requirements

Suggested Readings

Halsey v. Milton Keynes General NHS Trust and Steel v. Joy [2004] EWCA (Civ) 576 (Eng.).

J. Liang, *The Enforcement of Mediation Settlement Agreements in China*, 19 Am. Rev. Int'l Arb. 489 (2008).

J. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent*, Yearbook on Arbitration and Mediation, Penn State The Dickinson School of Law 152 (2013)

Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation, UNCITRAL Working Group II, November 27, 2014

Strong, Stacie, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 42 Wash. U. J. of Law & Policy (2014)

Giuseppe dePalo, *A False Prince Charming Keeps Sleeping Beauty in a Coma: On Voluntary Mediation Being the True Oxymoron of Dispute Resolution Policy*, <http://www.mediate.com/articles/PaloResponse.cfm>

Week 5

Mediation in Context--Private Commercial Mediation

1. Cross Border Mediation- EU Mediation Directive
 - a. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>
2. UNCITRAL Model Law on Conciliation
 - a. http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

Institutional Rules

WIPO Mediation Rules - <http://www.wipo.int/amc/en/mediation/rules/newrules.html>

ICC Mediation Rules, International Chamber of Commerce (January 1, 2014) - <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>

CEDR Rules on Mediation - http://www.cedr.com/about_us/modeldocs/?id=21

ICDR Mediation Rules (2010) - <https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased>

Suggested Readings

Rebooting the Mediation Directive,

[http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

Giuseppe dePalo, *A False Prince Charming Keeps Sleeping Beauty in a Coma: On Voluntary Mediation Being the True Oxymoron of Dispute Resolution Policy*,

<http://www.mediate.com/articles/PaloResponse.cfm>

Constantin-Adi Gavrilă and Christian Radu Chereji, *What Went Wrong with Mediation?*

<http://www.mediate.com/mobile/article.cfm?id=10603>

Strong, Stacie, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, SSRN November 17, 2014.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302

WIPO Case examples on the website - <http://www.wipo.int/amc/en/mediation/case-example.html>

Week 6

Mediation in Context--Trade and Investment Mediation

1. World Trade Organization (WTO) -

http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

2. International Center for the Settlement of Investment Disputes (ICSID) -

<https://icsid.worldbank.org/ICSID/Index.jsp>

Institutional Rules

IBA Mediation Rules for Investor State Mediation -

http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx

NAFTA - <https://www.nafta-sec-alena.org/Default.aspx?tabid=106&language=en-US>

Suggested Readings

Carlo Osi, *Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution Cultivating Culturally Appropriate Methods In Lieu of Litigation*, 10

Cardozo J. Conflict Resol. 163 (2008) (WIPO)

Welsh & Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 Harv. Neg. L. Rev. 71 (2013).

Note, *Mediation of Investor-State Conflict*, 127 Har. L Rev. 2543 (2014)

Week 7

Mediation in Context-Peacemaking Mediation

1. Understanding peacemaking mediation
2. Role of the United Nations

Suggested Readings

Jacob Bercovitch, *Theory and Practice of International Mediation*, Ch.7 A case study of mediation as a method of international conflict resolution: The Camp David Experience p. 107-32 (2011)

Bolger et al, *International Peace Mediators and Codes of Conduct: An Analysis*, Journal of Humanitarian Assistance (August 2010), available at <http://sites.tufts.edu/jha/archives/756>

Lakhdar Brahimi and S. Ahmed, *In Pursuit of Sustainable Peace: The Seven Deadly Sins of Mediation* (Center on International Cooperation New York University May 2008).

John D. Feerick, *The Peace-Making Role of a Mediator*, 19 Ohio State Journal on Dispute Resolution 229 (2003)

Dale E. Spencer & Honggang Yang, *Lessons from the Field of Intra-National Conflict Resolution*, 67 Notre Dame L. Rev. 1495 (1992).

Melanie Greenberg, *Mediating Massacres: When "Neutral, Low-Power" Models of Mediation Cannot and Should not Work*, 19 Ohio St. Journal on Dispute Resolution 185 (2003).

Guidance for Effective Mediation (United Nations 2012)

Report of the Secretary-General on enhancing mediation and its support activities, S/2009/189 (United Nations 2009)

Paul Wehr and John Paul Lederach, *Mediating Conflict in Latin America* in *Resolving International Conflicts: The Theory and Practice of Mediation*, Jacob Bercovitch ed.pp. 55-74 (1996)

Week 8

Systems Design

Guest speaker Kathy Costantino

Student presentations

Suggested Reading

Rogers et al, *Designing Systems and Processes for Managing Disputes* (2013)

Chapter 1, pp. 3-7 Introduction

Chapter 2, pp. 2-40 Overview of the Design Process

Chapter 8, pp. 201-216 Seeking Justice, Safety and Reconciliation

Chapter 9, pp. 225-243 Enhancing Relationships

Week 9

Comparative Mediation

1. U.S. and English Court-Connected Mediation
2. Student presentations

Suggested Reading

J. Nolan-Haley, *Mediation Exceptionality*, 78 Ford. L. Rev.1247 (2009)

Week 10

Student presentations

Week 11

Student presentations

Week 12

Student presentations

Week 13

The Story of Qui Ju (1993). Submit written responses to questions distributed in class.

Bibliography

Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (2009)

Jacob Bercovitch, *The Theory and Practice of International Mediation* (2011).

Carlos Esplugues et al Editors, *Civil and Commercial Mediation in Europe: Rules and Procedures* (2012) (comparative study)

Giuseppe de Palo and Mary B. Trevor, *EU Mediation: Law and Practice* (2012) (comparative study)

John Paul Lederach, *Preparing for Peace: Conflict Transformation across Cultures* (1995)

George Mitchell, *Making Peace* (1999)