Ulla Gläßer, Lin Adrian and Nadja Alexander (Eds.)

mediation moves –

concepts. systems. people.

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This anthology was inspired by the international conference “mediation moves”, which took place in October 2018 at the European University Viadrina Frankfurt (Oder) (see also http://mediation-moves.eu).

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Introduction

Over the past four decades, mediation has increasingly gained traction across the globe. It continues to move into new areas of conflict and fields of practice. As a professional service, mediation enriches the spectrum of conflict resolution approaches and decision-making processes. Mediation is culturally agile. Mediative methods are adapted according to conflict resolution practices and procedural designs. The positive conception of human beings that underlies the basic principles, communication models and aspired attitude in mediation touches and moves us to our core.

These diverse aspects of mediation were centre stage at the international conference *»mediation moves«* that took place at the European University Viadrina in Frankfurt (Oder)/Germany in November 2018.[1] The *»mediation moves«* event sought to explore the experience that mediation is alive and moving in many directions. Thus, mediation promises potential for life-long learning.

The event consisted of two parts: a pre-conference expert workshop and a full-day conference open to the public. The expert workshop provided room for an open, productive exchange on mediation theory and practice in addition to reflective discussions on the personal values and motivation of those experts with longstanding engagement in the field. The rich and creative discourse of the pre-conference workshop informed and enhanced the contributions on the subsequent conference day.

Both the pre-conference expert meeting and the conference itself went well beyond the content and style of »classical« mediation conferences. Both event elements were designed and conducted to facilitate an ongoing reflective focus on the key questions *»What is really important to me? Why do I care? What do I want to ›move‹ further?«* in the area of mediation. Participants were encouraged to authentically pursue these questions, share thoughts and experiences, and generate ideas together.

1 See the documentation on the conference website www.mediation-moves.eu. The conference was initiated and organized by Prof. Dr. Ulla Gläßer from the European University Viadrina Frankfurt (Oder), and conducted in collaboration with Prof. Dr. Lin Adrian from the University of Copenhagen and Prof. Dr. Nadja Alexander from the Singapore Management University.

This volume presents the kaleidoscope of contributions to the conference. Based in four continents[2], the authors view mediation through different lenses – some theoretical and conceptual, others very practical and personal. We hope that this vibrant and eclectic composition will inspire the readers' own journeys through the worlds of mediation.

The volume is structured in five sections. The thematic focus moves from mediation regulation (section 1) to the role mediation can play in societal change (section 2) before reaching the intersection of mediation, organisational development, and the labour market (section 3). After that it shifts to the impact of increased digitalization of mediation (section 4) and finally arrives at the potential of mediation training and innovative mediation approaches (section 5).

Section 1: Mediation Moves ... into Legal Systems

Over the last three decades, mediation has moved from the sidelines of justice systems to a widely acknowledged, and in numerous jurisdictions, mainstream dispute resolution procedure alongside litigation and arbitration. National and supra-national regulation of mediation has played a crucial role in this development by incentivising the use of mediation and introducing quality assurance and protective measures for users of the procedure.

In the first chapter of this section, *Nancy Welsh* examines the extent to which mediation should be subject to formal regulation, and the significance of data collection and reporting for effective policy and law-making. The author focusses her lens on mediation contexts that invoke the power of the state in their occurrence or the enforcement of their outcomes (such as court or agency-directed mediation). Adopting a comparative analysis, she draws upon the Singapore experience and highlights potential lessons for the United States.

Subsequently, *Jonathan Rodrigues* presents the work of a Scottish expert group, which identified several hurdles to comprehensive and systematic referral and mediation practice – in particular, lack of information on the availability and benefits of ADR, inconsistency in the provision and funding of ADR and inconsistent rules and policies. On this basis, the expert

2 The contributing authors are based in Europe, North America, Africa and Asia; see the profiles of the editors and authors at the end of the book. Some of the contributions were written in intercontinental co-authorship. According to the authors' diversity in origin, some contributions are written in British English, others in American English.

group has developed numerous recommendations for viable pathways to ›normalise‹ mediation as a key part of the civil justice system.

Georgios Karamanidis and *Bernadette Papawassiliou-Schreckenberg* explain how the evolution of mandatory mediation in Greece can be understood as a reaction to longstanding deficits in the Greek justice system. They describe the three phases of regulation towards the introduction of the Mandatory Initial Mediation Session (MIMS) and the different influences that shaped the development of mediation in Greece from a mostly unknown informal process to a strictly regulated complementary procedure with important interfaces to the Greek Code of Civil Procedure.

Nadja Alexander wraps up this section with a glimpse into the future with a piece entitled, »The Singapore Convention Moves …«. Her contribution offers essential insights into the first United Nations treaty on the recognition and enforcement of international mediated settlement agreements. The Convention has the potential to springboard mediation into the main arena of international commercial dispute resolution.

Section 2: Mediation Moves … into Society

In this section, three case studies demonstrate creative strategies to establish mediation in different areas of society, and – at the same time – utilizing mediation in the service of desired societal change.

The first case study is from Ukraine. *Tetiana Kyselova* has conducted individual and focus group interviews with mediators, dialogue facilitators, lawyers, judges, local and central government officials, business people and civil society activists. Based on these interviews, she demonstrates and reflects on how mediation and dialogue strengthened social cohesion in local communities, transformed society and promoted individual responsibility, social activism and participatory democracy in the aftermath of the Euromaidan Revolution.

Bettina Knothe follows with a case study on mediation in conflicts involving renewable energy projects and concerns relating to nature conservation in Germany. Her chapter highlights the value of professional coaching, moderation, and mediation as support tools to resolve conflicts of this kind. The case study draws upon the work of the Competency Centre for Nature Conservation and Energy Transition (KNE) established by the German federal government. It demonstrates the benefits of involving professional and civil society stakeholders at an early stage in multi-party public planning processes with a mediative design.

Finally in this section, *Olav Berger* and *Imke Kerber* describe the church-based community mediation project »ZoffOff« which provides low thresh-

old support for conflict scenarios in the diverse neighbourhood of Berlin-Kreuzberg. The project synergetically combines a non-for-profit mediation dissemination strategy with possibilities of training on the job for newcomer mediators who co-mediate with experienced colleagues.

Section 3: Mediation Moves ... Organisational (Conflict) Culture

Mediation is often considered an intervention that resolves disputes between individuals. However, as demonstrated in Section 2, mediation can inspire societal change. In a similar vein, it can also be an important tool in organizational development and an effective response to challenges in emerging markets such as the gig-economy.

Katarzyna Antolak-Szymanski's piece discusses how mediation can serve as an important tool in addressing conflict in the developing gig-economy. Traditional labour-market tools are by and large unavailable in this emerging industry, and mediation in new formats may be the answer to the resulting challenges.

In her chapter entitled »The Ecology of Mediation«, *Katarzyna Schubert-Panecka* casts a critical eye on the promise of mediation in a world increasingly characterised by volatility, uncertainty, complexity and ambiguity. She challenges readers to reflect deeply on their identities in mediation settings, and the multiple layers of contextual influence that continually shape and shift who we are and how we see ourselves in mediative contexts. A number of practical case studies effectively illustrate the theoretical concepts introduced.

Monia Ben Larbi explores the specificities of mediating in non-hierarchical systems. As more and more organizations move away from hierarchical structures and adapt a democratic and/or self-organized way of working together, the need for conflict resolution support changes as well. Monia analyzes four different modes of decision-making that are used in non-hierarchical organizations (consensus-based, consent-based, systemic consensing-based and advisory-based systems) – and discusses relevant conclusions for the mediators' work within such organizations.

Section 4: Mediation Moves ... into the Digital World

Over the last decades, the field of mediation has slowly embraced emerging technologies – a development that has accelerated with the advent of COVID-19. Technology brings possibilities for moving mediation practices in new, exciting directions but also calls for critical reflection on the limitations of digitalization in conflict resolution.

Lin Adrian suggests a conceptual framework for understanding the different forms of online dispute resolution as well as the relationship between online dispute resolution and mediation. She outlines the different kinds of online mediation and reflects on how key issues such as communication, self-determination and ethics are affected by the move towards digital mediation activities.

Following Adrian's conceptual framework, the next chapter offers a view of ODR practice. Here, authors *Felix Wendenburg*, *Jörn Gendner*, *Ulrich Hagel*, *Jan Nicolai Hennemann*, and *Mark Zimdars* team up to examine a software-based tool called Dispute Resolution Comparison Tool (DiReCT). DiReCT is tailored to the German legal framework and is designed to help disputing parties choose the most adequate procedure for B2B conflicts. The authors analyse the ODR software and discuss current and potential future applications.

Section 5: Mediation Training Moves ... People (and Politics)

Mediation training provides participants with conflict resolution tools, and it also touches participants in many other ways. In this section, we try to capture the various ways that mediation training moves people in often unexpected directions, on personal as well as professional levels.

In the first chapter of this section, *Lin Adrian*, *Ulla Gläßer* and *Kirsten Schroeter* present the results of a study that explores the impact of mediation training on the lives of executive master-level students. They demonstrate that, in addition to acquiring knowledge and skills, the students experience other positive gains such as personal growth, professional self-confidence and building new networks.

In the next piece, *Greg Bond* explores the impact of mediation training and the resulting transformation through personal narratives. He invited seven colleagues to tell a story about how mediation training changed their lives, whether personal or professional, and received deeply moving and very personal stories about how the training led them somewhere they had not been before.

Juliane Ade and *Theophilus Ekpon's* chapter shows how reflective dialogue and mediation training have had a collective impact on peacebuilding on a communal level in conflict-affected Nigeria. Drawing upon personal experiences and case studies, the authors convincingly demonstrate how implementation of their work in inclusive and sustainable programs embedded in broader societal and governance meta-goals is vital to success.

In her piece »Mediators move Outdoors«, *Silke Amann* examines the potential and practical approaches of incorporating nature into mediation.

Her starting point is the conviction that a profound transformation of the causes of a conflict calls for profound emotional involvement of the parties – and, thus, for a holistic approach. As encounters with nature can touch human beings deeply and bring about authentic emotional movement, she develops a concept of »nature-assisted mediation«.

A big thank you goes to all of our authors for their contributions – and for their patience as we navigated a series of delays in the publishing process due to the pandemic.

In addition, we are grateful to the following people and organisations:

For infrastructural support before and during the conference event, we thank the European University Viadrina Frankfurt (Oder) as well as the conference organizing team Mursel Acikalin, Ellen Birkhahn, Claudia Kück and Dominik Schmitz.

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For sponsorship of the conference and having the vision to publish this innovative volume, we acknowledge the terrific team at Wolfgang Metzner Verlag. Thank you for your patience and belief in the »*mediation moves*« project!

Looking back at the »*mediation moves*« journey, which commenced well before any of us imagined living through a global health pandemic and witnessing a new war, we are moved by the authenticity and positive spirit of the rich professional and personal exchange amongst colleagues.

We anticipate another »*mediation moves*«-event[3] in the not too distant future.[4] Certainly, the world has changed significantly since 2018 and the opportunity to map mediation's movements in response to COVID-19 awaits.

March 2022

Ulla Gläßer	Lin Adrian	Nadja Alexander
Frankfurt (Oder)/Berlin	*Copenhagen*	*Singapore*

3 Such an event was originally been planned for 2020, but the plans had to be put on hold due to the global COVID-19 pandemic.

4 We will announce the event on the mediation moves website www.mediation-moves.eu.

Section 1
Mediation Moves ... into Legal Systems

Data and Regulation

Nancy A. Welsh

1. Data and Regulation

The subject matter of the »Mediation Moves...« conference was very broad. Presentations covered the current state of mediation in a wide swath of nations and contexts. Importantly though, not all of these examples of mediation call for formal regulation, such as statutes or court rules that require mediators to make certain disclosures or specify the conditions under which courts may enforce agreements to mediate or settlement agreements resulting from mediations.

In this Essay, therefore, I will focus on only selected mediation contexts – those that most obviously require consumer protection or public accountability. These are the mediations and mediators that should be subject to some form of formal regulation and necessarily, data collection and reporting.

My focus here therefore is on mediation that is imposed (by a court, agency or the more powerful party in a contract of adhesion) and mediation that is granted either expedited judicial enforcement or very deferential judicial review of its outcomes. These mediations, more than any others, should be regulated because they invoke the power of the state in their occurrence, the enforcement of their outcomes, or both.

2. Lack of Data to Support Regulation

Formal regulation obviously should be responsible, which I understand to mean thoughtful and effective. That implies that the regulation should be evidence-based, not based on normative – and largely unproven – claims. But here is the rub. We have surprisingly little information regarding the use, practices and effects of mediation. In 2017, the American Bar Association Section of Dispute Resolution received a report from its Task Force on Research on Mediator Techniques that comprehensively analyzed empirical research regarding mediation that had been conducted in the U. S.[1] The Task

1 See also Wissler & Weiner (2017), Shack (2017), and Leathes (2019).

Force's goal was to use the research to announce best practices. The Task Force was unable to achieve its goal. Rather, the key takeaways were these:

- We desperately need more current research regarding mediation, and we need enough research focused on particular case types. Nearly two thirds of the research studied by the Task Force took place prior to 2000 – almost a generation ago – and much has changed since then. In addition, these studies involved a variety of contexts and used different language and variables, making it impossible to say anything with absolute certainty (ABA Section of Dispute Resolution, 2017).
- Anyone currently claiming that his or her mediation approach is clearly supported by »the research« as being »best practice« is over-claiming (ABA Section of Dispute Resolution, 2017, p. 4).
- At this point, we can say only that there are certain mediator behaviors that appear more likely than not to be beneficial and other behaviors that appear more likely than not to have a negative effect.
- According to the Task Force, the following behaviors seemed to have a *greater potential* for positive effects than negative effects on settlement and on disputants' relationships and perceptions of mediation:
  - Eliciting disputants' suggestions or solutions.
  - Giving more attention to disputants' emotions, relationship, and sources of conflict.
  - Working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda.
  - Using pre-mediation caucuses focused on establishing trust (ABA Section of Dispute Resolution, 2017).
- Also according to the Task Force, the following mediator behaviors seemed more likely to *negatively affect* disputants' relationships and their perceptions of the mediation process:
  - Mediators' pressing or directive actions have the potential to increase settlement sometimes but *virtually all* studies found mediator pressure on or criticism of disputants either had no effect or had negative effects on disputants' relationships and perceptions of mediation.
  - Caucusing during mediation either has no effect or a negative effect on disputants' relationships, their perceptions of the mediation process, and post-mediation conflict, although it may have a positive effect on attorneys' perceptions of the process.

- The studies support caucusing's ability to increase settlement only in the labor-management context. There was no evidence that caucusing increased settlement in the other contexts studied – i. e., construction, small claims, child custody, and employment. Importantly, however, there were no studies examining the settlement-related effects of caucusing in contexts such as large commercial, civil rights (outside employment) and personal injury (ABA Section of Dispute Resolution, 2017).

– We need to identify funding to jumpstart research regarding current practice and to enable junior researchers to make the dispute resolution field part of their life's work (ABA Section of Dispute Resolution, 2017).

As noted *supra*, the Task Force report surveyed empirical research regarding mediation conducted in the U. S. Of course, this focus on a single nation represents an important limitation of the report. At this point, it is unclear whether research conducted in other parts of the world would buttress some of the findings of research conducted in the U. S. or suggest that such findings are culture-bound. Key challenges in conducting such comparative study include cultural differences among nations; procedural differences among different nations' civil litigation systems; and the lack of translations to make studies fully accessible. Fortunately, researchers are beginning to focus on bridging these divides,[2] but much more could be done.

Meanwhile, there is the larger reality that at least in the U. S., we do not have easy access to the basic data that would make it more feasible to conduct research regarding the best-known forms and uses of mediation. For example, we do not even have data regarding how many mediations are occurring in most U. S. courts, in state and federal agencies, or pursuant to contracts of adhesion. Recently, I conducted a review of the system-wide data available regarding the operations of the federal district courts in the U. S. as well as the courts of several prominent states. My goal was to determine precisely what we really can say that we know about these court-connected mediation programs (Welsh, 2020). Most – although not all – of these courts provide narrative descriptions of their use of mediation and other dispute resolution processes, and these descriptions suggest substantial activity. But more detailed data – actual numbers – is nearly impossible to find. Except for a very few entrepreneurial federal district courts and Florida's state court system, we do not know any of the following regarding U. S. court-connected mediation: how many cases are eligible for mediation each year; how many cases are referred to the process each year; how many mediations actually occur; how many of these mediations re-

2 See e. g., Nylun et al. (2018), Quek Anderson et al. (2018), and Steffek et al. (2013).

sult in settlement; or how parties perceive the mediation process (Welsh, 2020). Beyond this, we generally do not know what settlements have been achieved in mediation. Courts in the U.S. do not require disclosure of settlement terms achieved in court-connected mediation – or as a result of the parties' negotiations for that matter – unless the court must approve such terms (e.g., marital termination agreements in certain states, class action settlements) or will incorporate the settlement terms into a judgment (e.g., consent decree or agreed judgment)[3] (Denlow & Shack, 2004). Not a single court reports aggregate information to indicate the average settlements achieved in specified types of mediation. Not a single court reports aggregate information regarding the average settlements achieved by different demographic groups. Not a single court reports regarding different demographic groups' average perceptions of mediation or their satisfaction with the process. Thus, parties and the public do not have information regarding the »going rate« for the mediated settlement of typical lawsuits – which would then inform their decisions to litigate and to settle. Parties and the public also do not have any sense of whether certain demographic groups systemically do less well or perceive court-connected mediation differently than others.

Without data regarding the extent of the use of mediation and its effects, or empirically-grounded findings regarding the effects of identified practices and behaviors, what do we have that can serve as the basis for thoughtful and effective regulation? We need data at the very least. Greater transparency is a precondition for the regulation of mediation that is court-connected, imposed by agencies or contracts of adhesion, or mediation that will benefit from deferential judicial review or expedited judicial enforcement of mediated settlement agreements.

As noted *supra,* only a very few federal district courts in the U.S. – i.e., the U.S. District Courts of the Northern and Central Districts of California – and Florida's state court system regularly collect and report data regarding the number of referrals to mediation, the number of mediations that occur, and (in the case of the Northern and Central Districts) the number of settlements that result and the perceptions of the parties (Welsh, 2020). Strikingly – and particularly so because we Americans continue to view ourselves as world leaders in the institutionalization of mediation – there is another nation that has been quite aggressive in collecting and reporting data regarding its use of court-connected mediation. This nation is Singapore. Indeed, in a very short period of time, Singapore has achieved a remark-

3 I acknowledge that some courts collect such terms in order to develop internal »settlement logs« then used by their judges to help with the facilitation of settlement discussions.

able degree of institutionalization of mediation in its courts, has become a model for transparency, and has become a leader in the institutionalization of mediation for international disputes. The remainder of this Essay will describe Singapore's institutionalization of and transparency regarding court-connected mediation, consider why Singapore has become a leader in these areas, and briefly reflect on whether Singapore's example (supplemented by the examples of the federal district courts in Northern and Central Districts of California and the state of Florida) may provide clues to encourage greater transparency in other courts.

3. Singapore's Institutionalization of Court-Connected Mediation

Singapore began its institutionalization of court-connected mediation in the mid-1990s, led by the then Chief Justice Yong Pung. Importantly, Chief Justice Yong did not embrace mediation with the narrow goal of reducing the courts' backlog.[4] Rather, he viewed mediation as »a non-confrontational way of resolving disputes to preserve relationships« and as a means to return Singapore to its traditional cultural values.[5] More recently, current Chief Justice Sundaresh Menon (2017a) has described disputants as having a »desire [for] a more ›user-friendly‹ framework of dispute resolution which facilitates greater autonomy over the process and is cheaper, less formal, procedurally simpler, less convoluted by technical language and available with minimal delay.« He has therefore committed Singapore to »overlay[ing] a more user-centric approach on top of the institutional values which have defined the ideals of our legal system« (Menon, 2017a). Ultimately, Chief Justice Menon (2017) has described the »core attributes of such a user-centric approach« as including: »affordability, efficiency, accessibility, flexibility and effectiveness.«

4 Singapore had already resolved this issue in the early 1990s (Low & Quek Anderson, 2017).

5 Joyce Low and Dorcas Quek Anderson (2017, p. 229) explain:

> In his view in an Asian society like Singapore, preserving relationships through conflicts was an important value. Historically, people used to rely on community elders to help them resolve conflicts in a conciliatory manner but with the decline in the importance of clans, people have been turning to the adversarial processes of the courts to deal with disputes. Chief Justice Yong saw the promotion of mediation as a means to reintroduce conciliatory approaches to litigants (citing Yong (2006), Yong (1996), Boulle & Teh (2000), and Lee (1999)).

See also Zhang & Ginsburg (in press).

Singapore's State Courts – their courts of first instance – have a Centre for Dispute Resolution (»SCCDR«) that is a central player in Singapore's court-connected dispute resolution services for non-family civil matters. The SCCDR provides mediation and neutral evaluation[6] for civil claims filed in the District and Magistrates' courts, as well as for minor criminal offenses, harassment complaints, consumer claims of small value, and community disputes. (Low & Quek Anderson, 2017). Parties pay a fee of $250 for District Court cases referred to mediation, while there is no fee for the mediation of the lower-value cases filed in the Magistrates' Courts. (Low & Quek Anderson, 2017)[7]. For family matters, the Family Dispute Resolution (FDR) Division of Singapore's Family Justice provides mediation services with judges serving as mediators.[8] These courts also have been using a co-mediation model involving judges and counselors/psychologists for many years (Singapore Family Justice Courts, 2020).[9] The FDR has its own premises for its divorce and child-related services, separate from the Family Justice Courts building (Low & Quek Anderson, 2017).

Court-connected mediation in Singapore originally involved only senior judges serving as judge-mediators (Low & Quek Anderson, 2017). While Singapore's courts continue to be committed to judges' provision of mediation services, the pool of qualified court-connected mediators has expanded, and so have mediation variations. (Low & Quek Anderson, 2017, describing diversification of mediator pool and Associate Mediator Scheme, a partnership between the State Courts and the Singapore Mediation Centre). For example, the courts sometimes include trained counselors or psychologists in mediation sessions to assist with the facilitation of amicable

6 Neutral evaluation involves parties' and lawyers' presentation of their cases and key evidence to a judge, who then provides his best estimates of parties' likely success at trial (Low & Quek Anderson, 2017).

7 Citing Order 90A, Rule 5A of the Singapore Rules of Court.

8 The FDR is the successor to three formerly separate programs: the Family Relations Centre, Maintenance Mediation Chambers and Child-Focused Resolution Centre. The Family Relations Centre (FRC), located within the Family and Juvenile Justice Division, had a staff of judge-mediators who »provide[d] ›holistic, legal, relational and therapeutic solutions to divorcing couples in custody, matrimonial property and other ancillary matters‹ with the aim of ›transforming the culture of family breakdown from one of acrimony to one of cooperation‹« (Chua, 2019). Maintenance Mediation Chambers provided presumptive mediation for pre-divorce spousal and child maintenance cases as well as pre- and post-divorce enforcement of maintenance. The Child Focused Resolution Centre (CFRC) provided judge-mediators for court-ordered mediation of divorce matters that involved children at the time of divorce (Chua, 2019).

9 Refer specifically to questions 13 and 16, regarding Family Dispute Resolution Conferences and co-mediation, respectively.

resolutions (Low & Quek Anderson, 2017, describing Counsellors@SCCDR Scheme). In addition, Singapore's courts are collaborating with other institutions to encourage pre-filing mediation[10] and are offering local and international training in court-connected ADR (Low & Quek Anderson, 2017; Menon, 2017a).[11] Very recently, the State Courts' Community Justice and Tribunals Division launched a system that provides parties with the option of conducting an online mediation session with the help of a court mediator (Singapore State Courts, 2018b)[12].

Strong relationships and synergistic collaboration with other dispute resolution entities also mark Singapore's approach to institutionalizing mediation.[13] The Singapore Mediation Centre, a private organization established under the Singapore Academy of Law (Low & Quek Anderson, 2017), provides commercial mediation (and other dispute resolution) services (Menon, 2017a) and also receives most of the referrals for mediation of cases filed in Singapore's Supreme Court. Singapore's Family Justice Courts also refer cases to the Singapore Mediation Centre for the mediation of divorces that do not involve contested child issues, as well as contested estate proceedings involving assets with a gross value of $3 million or more (although the parties also may choose a different mediator) (Tan, 2017). Further, the Singapore Mediation Centre serves as a leading provider of mediation training. Community mediation centers, originally led by the Singapore Ministry of Law (Low & Quek Anderson, 2017), assist with the resolution of family and neighbor disputes.[14]

10 Low & Quek Anderson (2017) describe Primary Justice Project and Small Commercial Claims Mediation Scheme, and Menon (2017a) describes Law Society Mediation Scheme.

11 Low & Quek Anderson (2017) cite Menon (2017b, paras 22–24).

12 Using an e-Mediation function, »[p]arties can now mediate in a secure environment and resolve their dispute online« including choosing »a date and time most suitable for both the disputing parties and their mediator« and if they reach settlement »proceed[ing] to withdraw their claim or apply[ing] for an online consent order.«

13 Meanwhile, it is interesting to note that mediation also is provided by public tribunals and governmental agencies (e. g., Ministry of Manpower for labor disputes; Tribunal of Maintenance for Parents for maintenance cases) and trade organizations (e. g., Financial Dispute Resolution Centre for cases involving the financial industry; Singapore Institute of Surveyors and Valuers for real estate disputes) (Low & Quek Anderson, 2017).

14 These centers can be seen as an attempt to replicate or at least invoke the forms of »indigenous mediation« that were used traditionally within the Indian, Malay and Chinese communities in Singapore (Alexander et al., 2019).

Recently, Singapore has established three additional private dispute resolution organizations, but with an explicitly international focus – the Singapore International Mediation Centre (»SIMC«) to assist with the resolution of international commercial disputes; the Singapore International Mediation Institute (»SIMI«) to provide for the accreditation and regulation of mediators; and the Singapore International Dispute Resolution Academy (»SIDRA«) to provide research and development, learning tools, and capacity building for dispute resolution providers, practitioners and users in Asia and internationally. Singapore's courts also appear to be collaborating with these organizations.

The coordination among these various entities has permitted fast and thorough institutionalization of mediation and a focus on the assurance of quality.

Singapore's courts, particularly its Supreme Court, have been active in supporting mediation (Ean, 2018)[15] and have adopted a series of rules over the years in order to encourage greater use of the process. Beginning in the early 2000s, there were amendments to the Subordinate Courts [precursor to State Courts] Practice Directions to provide for automatic referral of certain categories of cases to mediation: non-injury motor accident cases (in 2002), medical negligence cases (in 2006), and then all personal injury cases (in 2011). In each instance, the Practice Directions also permitted parties to opt out. In 2012, the State Court Practice Directions abandoned these special categories and provided for a presumption of ADR for all civil cases filed in the Subordinate Courts; again, opt outs were permitted (Low & Quek Anderson, 2017). Today, in all cases except those involving motor accident and personal injury claims, the parties and their lawyers must complete and sign an »ADR Form« that indicates their decision whether to use ADR and provides the reasons, if any, for choosing to opt out (Low & Quek Anderson, 2017).[16] Singapore's courts require the parties to attend pre-trial or case management conferences to discuss ADR options (Low & Quek Anderson, 2017) and may make adverse costs orders if a party unreasonably refuses to participate in mediation when it was suggested by the court or after receiving an offer of ADR from the other party (Low & Quek

15 Including the most recent details of mediation schemes and legislation in Singapore.

16 Citing Practice Direction 36 (formerly paragraph 25A) of the State Courts Practice Directions, available at http://www.statecourts.gov.sg under »Legislation and Directions.« See also Chief Justice Sundaresh Menon (2017a) describing this system as automatic referral »to the most suitable mode of ADR – whether it is mediation, neutral evaluation or arbitration under the Law Society Arbitration Scheme – unless the parties choose to opt out of the ADR process.«

Anderson, 2017).[17] Additional amendments have been proposed recently to Singapore's rules of civil procedure that, among other things, would permit a court to order parties to engage in a dispute resolution process if the court is not satisfied that the parties gave proper consideration to dispute resolution (Civil Justice Review Committee & Civil Justice Commission, 2018, para. 32).

For specified types of cases, parties do not have the ability to opt out of court-ordered mediation. For these case types, Singapore's courts have found »a social policy and public interest« that is strong enough to overcome the parties' preferences. Examples include mandatory mediation for cases filed in the Small Claims Tribunal (in which the amount in controversy is less than $10,000 and lawyers' appearance is not permitted), divorce cases involving minor children of a marriage (Low & Quek Anderson, 2017),[18] and claims brought to the Employment Claims Tribunal (Singapore State Courts, 2017).[19]

Singapore's courts also require lawyers to assume responsibility for encouraging the use of mediation. In 2010, the Subordinate Courts Practice Directions were amended to require lawyers to advise their clients regarding the potential use of ADR procedures, including mediation, to resolve their disputes. In 2016, the Practice Directions for the Singapore Supreme Court were similarly amended (Tan, 2017).

Parties reaching settlement agreements in court-connected mediations (whether conducted by judge-mediators or by volunteers) have long been able to have their agreements recorded as court orders (*Lock v. Goh*, 2008;

17 Citing paragraph 35C of the Supreme Court Practice Directions, available at http://www.supcourt.gov.sg under »Legislation and Directions,« and Order 59, rule 5(1)(c) of the Singapore Rules of Court. Paragraph 35C provides that »An ADR Offer may be made by any party at any time of the proceedings and shall be valid for a period of 14 days after its service.« Form 28 of Appendix A of the Supreme Court Practice Directions must be used for the ADR Offer and requires the party making the offer to indicate »willing[ness] to attempt mediation/ neutral evaluation/ others (please state)« and to propose various terms – e. g., potential dates, referral to a particular ADR body, appointment of a particular ADR neutral, venue, etc. The ADR Offer is only available in the Supreme Court (Ean, 2018).

18 Also noting that such »power has been given to the Court under Order 108 of the Singapore Rules of Court to order parties in civil suits before the Magistrate's Court to use ADR.«

19 Courts also may order appropriate civil disputes under the Magistrate Courts' jurisdiction to use ADR. See Order 108, Rule 3(3) of the Singapore Rules of Court (»The court may make an order directing that a case be referred for resolution by an ADR process if…«).

Low & Quek Anderson, 2017[20]). Such agreements are then entitled to expedited judicial enforcement. In 2017, Singapore passed groundbreaking legislation, the Mediation Act, dramatically expanding the privately mediated settlement agreements that may be enforced as court orders.[21] Pursuant to this Act, if all parties involved in a private mediation agree and have not previously commenced a court action, they may apply to the court to record their mediated settlement agreement as an order of the court and then enforce the agreement in the same manner as a judgment or a court order. The parties must satisfy several additional requirements: the application to the court must occur within a limited time; a designated mediation service provider must administer the mediation or a certified mediator must conduct the mediation; the agreement must be in writing and signed; and the agreement must contain prescribed information. The court retains the power to refuse to record a mediated settlement agreement as a court order, but appears to be limited to a list of specified reasons (Mediation Act 2017).[22]

In 2019, Singapore became the site of an important development in the evolution of international mediation. The United Nations General Assembly had adopted an international convention for the expedited enforcement of mediated settlement agreements in the international commercial context, and the convention was signed in Singapore. Since then, Singapore

20 Citing *Jaswant v. Singh* (2013). Settlement agreement is only one factor considered by the court in determining whether the division of matrimonial assets is just and equitable.

21 Somewhat counterintuitively, the Mediation Act does not apply to court-connected or court-ordered mediations. It also does not apply to mediated settlement agreements reached in mediations conducted under »written law« (e. g., mediations provided by the Community Mediation Centres or Small Claims Tribunals).

22 Section 12(4) of the Mediation Act provides:
The court may refuse to record a mediated settlement agreement as an order of court if –

(a) the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract;

(b) the subject matter of the agreement is not capable of settlement;

(c) any term of the agreement is not capable of enforcement as an order of court;

(d) where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child; or

(e) the recording of the agreement as an order of court is contrary to public policy.(Mediation Act 2017).

See also Sim (2017) and Quek Anderson (2017).

has ratified the convention, which is now known as the »Singapore Convention on Mediation.«[23]

As evidenced by this brief summary, the relatively small city-state of Singapore has enthusiastically embraced mediation and other forms of dispute resolution. There is a tremendous amount of activity and a sense of both mission and synergy. And Singapore has gained international attention for its initiatives. Each of the component parts in Singapore works with the others, and the sum certainly is greater than the individual parts.

In the U.S., in contrast, my review of the federal courts' and selected state courts' court-connected mediation revealed that the period of dramatic innovation is generally in the past. Court-connected programs have experienced setbacks over the years in some jurisdictions – California most notably – as judicial systems suffered financial cuts.[24] In some American states, innovation continues but at a much slower pace. The one exception in this

23 The formal name of this convention is the United Nations Convention on International Settlement Agreements Resulting from Mediation (United Nations Information Service, 2018). The Singapore Convention is modeled upon the New York Convention, which requires signatory nations' courts to recognize and enforce international commercial arbitration awards with only narrow grounds for the denial of such enforcement. Article 1 of the Singapore Convention specifically excludes employment, family, and consumer matters (United Nations General Assembly, 2018). See also Abramson (2019), Strong (2016), and Deason (2015).

24 Professors Lela Love and Ellen Waldman (2016) recently commented on the cutbacks in California as well as those affecting dispute resolution programs in other states:

> This dependence on public monies has presented serious challenges as state courts and agencies have been subject to deep budget cuts. In 2011, the New York State Unified Courts System lost $140 million in government funds, resulting in a 41 percent decrease in funding for statewide community mediation programs. During the three year period from 2008–2011, the California court system saw more than a 30% reduction in state general funds. This funding crisis has shuttered small claims and family courts throughout the state and eviscerated staffing for mediation trainers and providers as well as legal advisers' offices for small claims disputants. In North Carolina, community mediation centers handling court-referred juvenile and criminal cases lost the entirety of their judicial funding, nearly 20% of their operating budget. To make up the shortfall, centers cut staff and began charging for services that had previously been offered without charge. Kentucky's Court-Annexed Mediation Program, which had handled thousands of small claims and misdemeanor cases for the Kentucky Courts, lost funding in 2009 and shut down entirely. A ten million dollar budget cut in judicial funding in Connecticut similarly led to the closure of community mediation centers around the state. What does this mean for a tenant trying to recover her security deposit from an unresponsive landlord, a consumer seeking compensation for a car repair negligently performed, or a patron injured by a slip and

picture may be New York due to its recent adoption of a »presumptive ADR« initiative (ADR Advisory Committee, 2019; Bleemer, 2019; Clark, 2019; New York Unified Court System, 2018, 2019). It is also important to acknowledge that online dispute resolution (ODR) – especially online negotiation, facilitation, mediation and evaluation – may be understood as mediation's successor and thus as the current dispute resolution-related channel for innovation. Ironically, many mediation proponents view ODR with some suspicion and as a bit of an interloper. Such views may be changing somewhat as a result of practice changes necessitated by the COVID-19 pandemic.

4. Singapore's Collection and Reporting of Data Regarding Court-Connected Mediation

What about a more granular, quantitative description of court-connected mediation in Singapore? The nation's courts do not disappoint. First, Singapore's publications convey the message that mediation is embedded firmly and prominently in its courts. The mission statement for Singapore's Family Justice Courts specifically mentions mediation: »Making justice accessible to families and youth through effective counseling, *mediation* and adjudication« (Singapore Family Justice Courts, 2017, p. 3). Even in the non-family civil context, the current Chief Justice describes mediation in Singapore's State Courts as a »parallel process to court litigation« (Menon, 2017). Indeed, in its annual report, Singapore's State Courts have chosen to highlight Singapore's international leadership in the field of dispute resolution. This chapter will return to the importance of Singapore's commitment to being a leader in international dispute resolution.

Further, Singapore's annual reports regarding its courts include specific information regarding the extent of the use of mediation. According to the State Courts' 2016 Annual Report, for example, SCCDR handled 6,439 »fresh« cases in 2015 and projected handling 6,340 in 2016. The majority of these cases originated in the Civil Justice Division. Approximately 5% were Magistrate's Complaints, and a small number originated in the Community Justice and Tribunals Division (Singapore State Courts, 2017, p. 36).[25] In 1995, Court Dispute Resolution (a precursor to SCCDR, but relying on se-

fall in a neighborhood bodega? It means that mediation services that may have once existed may no longer be available. If the service still exists, it is likely thinly staffed by over-stretched providers and lacks the assistance of necessary ancillary services, such as court translators and security personnel.

25 Reporting mediation of 373 Magistrate's Complaints in 2015 and 410 projected in 2016; also reporting 22 mediations originating from the Community Justice and Tribunals Division in 2015, and 30 projected for 2016; also noting that mediation at

nior judges to serve as judge-mediators) handled 1,133 cases. By 1999, that number had reached 4,640 cases per year (Low & Quek Anderson, 2017;[26] see also Boulle & Teh, 2000). Settlement of these cases, meanwhile, exceeded 85% (Low & Quek Anderson, 2017). Notably, settlement rates are not generally reported in the State Courts' annual reports. Rather, Singapore's judges periodically share these statistics in speeches or at other events.[27]

As described supra, the Singapore Mediation Centre also plays an integral role with the nation's courts, and the Centre reports annually regarding its caseload. In 2016, the organization handled 499 commercial matters, most of which involved construction or company/shareholder disputes. This caseload represented a 72% increase over 2015, and the amounts at issue totaled $775 million (Tan, 2017).

On a periodic basis, Singapore's courts also make information available regarding parties' – particularly lawyers' – perceptions of mediation. Regarding the early years of the mediation program:

> ...[U]ser surveys showed a very high level of satisfaction with the CDR processes, evidencing the strong, positive impact that mediation had with lawyers and parties. For example, in a survey in 1997, the results showed that for cases that settled, 98% of the lawyers indicated that the process helped their clients to save legal costs, 97% thought it narrowed the issues in dispute, 99% thought the settlement was fair and 93% thought the settlement matched the expected outcome at trial. Even for cases that were not resolved, lawyers indicated a high level of satisfaction with the result of the process. Ninety four percent felt that the process helped to narrow the issues and 86% felt that there was a positive impact in the relationship of the disputants. (Low & Quek Anderson, 2017)[28]

According to the more recent 2013 Court Users Survey, 94.5% of the respondents perceived that the Singapore courts' mediation services had con-

SCCDR for Community Disputes Resolution Tribunals Claims commenced in January 2016.

26 Citing Subordinate Courts Annual Reports 1996, 1997 and 1998.

27 It should be noted, of course, that there is an obvious danger in focusing on settlement rates only and not considering parties' perceptions of their experience in mediation. In Singapore, there has been some effort to institutionalize practices that are consistent with procedural justice through the establishment of a code of ethics for court mediation in the State Courts (Singapore State Courts, n. d.). Even better would be consistent collection and annual reporting of post-mediation survey results.

28 Citing Subordinate Courts Research Bulletin Issue No. 8, Oct–Dec 1997. Court Dispute Resolution – Lawyers' Views of the CDR Process.

tributed to early case settlement while 94.9% perceived that mediation in civil disputes resulted in costs savings for litigants (Low & Quek Anderson, 2017).[29] The even more recent 2015 Bi-Annual Court Users Survey, reports a 96% satisfaction rate with mediation (Menon, 2017a).[30]

Singapore clearly is demonstrating that it is possible to collect and produce data regarding courts' use of mediation and other dispute resolution processes. Scholars like Dorcas Quek Anderson are using such data to conduct empirical analyses and inform court procedures.[31] Outside the court context, Singapore's Ministry of Law has commissioned SIDRA to conduct empirical research regarding users' experience and perspectives on international mediation, arbitration and hybrids. SIDRA's findings will be translated into Chinese for international circulation beyond the English-speaking world.

But why is Singapore doing so much to report its use of mediation, while other courts do so little? Many courts in the U.S. have long viewed themselves as pioneers and leaders in the field of dispute resolution. Why do so few courts in the U.S. collect and report the data to demonstrate their use of dispute resolution?

5. Incentives for Courts' Collection and Reporting of Data

Part of the reason that Singapore stands out for its data collection and transparency probably lies in the relative newness of Singapore's institutionalization of mediation and ADR. American courts were pioneers in developing court-connected dispute resolution, but that was in the 1980s and 1990s. At that time, American courts also conducted and published evaluations of court-connected mediation (ABA Section of Dispute Resolution, 2017). Importantly, these evaluations were short-term; they often reported on pilot projects. As noted, supra, most American courts have now reached a sort of plateau. Mediation and most dispute resolution are institutionalized, part of normal procedures, no longer »the shiny new thing.«

29 Citing »Overall Report on Court Users Survey« prepared for the Subordinate Courts by Forbes Research Pte Ltd August, 2013.

30 Citing State Courts' Bi-annual Court-Users Survey 2015. Chief Justice Menon reports a 92% satisfaction rate for 2013. See also Alexander et al. (2019), summarizing the results of surveys of lawyers and parties using mediation and identifying the following themes in terms of the objectives of mediation practice: »service–delivery; access to justice; interpersonal relations transformation; social transformation; and client satisfaction.«

31 See e.g., Quek Anderson et al. (2018).

Singapore also may have an advantage as a result of its cultural openness to mediation, its relative smallness as a city-state, the camaraderie of those who have played pivotal roles in institutionalizing mediation, and the nation's top-down approach in such institutionalization (Low & Quek Anderson, 2009). Indeed, it is noteworthy that Singapore and the American state of Florida share the characteristic of truly unified courts, with unified funding of mediation and dispute resolution services, and units within the court that are responsible for mediation and dispute resolution. This may explain why Singapore and Florida are among the best in providing accessible system-wide summary information regarding the dispute resolution services their courts offer while other less-unified courts in the U. S. require users to look for information on a court-by-court or county-by-county basis. After all, it is very difficult to write a coherent description of the services available – or to provide »the big picture« – when services vary widely from municipality to municipality, court to court, and even judge to judge.

Singapore's annual reports, coupled with its recent groundbreaking Mediation Act, also may hint at its reasons for counting and publicizing its use of mediation. In its 2016 annual report, Singapore's State Courts highlighted their leading role in hosting the first Global Pound Conference, an international effort that solicited input from a range of stakeholders regarding how dispute resolution »processes can be better shaped to provide commercial disputants with effective access to civil justice« and ultimately involved 36 locally-organized events in 26 different countries (Masucci et al., 2016; see also Masucci, 2018; Branon & Pierz, 2018; Deason et al., 2018).[32] In that same report, Singapore described its organization of the 2016 International Conference on Court Excellence, its role in the launch of the International Framework for Court Excellence, and the awards it had won for innovative processes (i. e., GovInsider Innovation Award and World Information Technology and Services Alliance Award) (Singapore State Courts, 2017, pp. 47–48). In its 2017 annual report, Singapore's State Courts used an entire page of graphics to present its international profile – i. e., how it ranked in the World Economic Forum's Global Competitiveness Report (1st for efficiency of legal framework in settling disputes); International Institute for Management Development's World Competitiveness Yearbook (2nd for legal and regulatory framework, 11th for justice); World Bank's Doing Business (2nd for enforcing contracts); Fraser Institute's Economic Freedom of the World (8th for legal system and property rights); World Bank's Worldwide Governance Indicators (9th for rule of law); and Heritage Foundation's

32 Emphasizing stakeholders' interest in more education regarding dispute resolution options, availability of pre-dispute or early-stage case evaluation or assessment systems, and required consideration or participation in non-adjudicative processes before parties may initiate adjudicative processes.

Index of Economic Freedom (1st for property rights; 3rd for judicial effectiveness; and 4th for government integrity) (Singapore State Courts, 2018a, p. 35). As noted supra, Singapore was also the site for the signing of the Singapore Convention on Mediation. These activities and awards indicate Singapore's drive to achieve recognition for its courts' quality and leadership and its dispute resolution processes (Nottage, 2014, p. 213).[33]

Singapore cares about such recognition because it strongly supports multi-lateral activity *and* seeks to attract certain markets to its courts and other dispute resolution venues (Rajah, 2016).[34] Multilateralism is central to the role that Singapore has carved for itself on the world stage. Singapore's government also recognizes that reliable, high quality dispute resolution is an integral part of keeping multilateralism alive.

Consistent with this emphasis on the desire to support multilateralism and effective dispute resolution, an increasing variety of metrics now permit comparisons among nations for the quality of their governance and their commitment to the rule of law (Ali, 2019).[35] There is also an increasing interest in comparing nations' judiciaries. Among the available metrics are:

– World Justice Project's (n. d.) Rule of Law Index[36]

33 Observing that Singapore has »resolutely and successfully advertised itself as a regional hub for ICA [international commercial arbitration] and promoting itself as a venue and centre of excellence for ISA [investor state arbitration].«

34 It is important to remember that Singapore is a small nation, with no natural resources beyond its people, and thus must remain competitive in order to ensure its survival.

35 Using measures from the World Bank Group's Worldwide Governance Indicators (»WGI«), the World Economic Forum's Global Competitiveness Report (»GCR«) and the World Justice Project's Rule of Law Index (»ROI«) to assess how mediation referral schemes (i. e., mandatory vs. voluntary), as one factor, affect variation in judicial efficiency, confidence in courts and perceptions of justice.

36 Civil Justice is Factor 7 of the WJP Rule of Law Index. It measures:
... whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system. The delivery of effective civil justice requires that the system be accessible and affordable (7.1), free of discrimination (7.2), free of corruption (7.3), and without improper influence by public officials (7.4). The delivery of effective civil justice also necessitates that court proceedings are conducted in a timely manner and not subject to unreasonable delays (7.5). Finally, recognizing the value of Alternative Dispute Resolution mechanisms (ADRs), this factor also measures the accessibility, impartiality, and efficiency of mediation and arbitration systems that enable parties to resolve civil disputes (7.7). (World Justice Project, n. d.).

- World Economic Forum (n. d.a; n. d.b) Global Competitiveness Index[37]
- World Bank's Worldwide Governance Indicators (n. d.)[38]
- World Bank's Doing Business Project (Enforcing contracts: What is measured, n. d.)[39]
- International Consortium for Court Excellence's (2020) International Framework for Court Excellence[40]
- Fraser Institute's Economic Freedom of the World Annual Report (Gwartney et al., 2018)[41]
- Heritage Foundation's (2020) Index of Economic Freedom[42]

37 Global Competitiveness Index 4.0, Judicial Independence (available scores 1–7; U. S. ranked 15 with score of 5.7; Singapore ranked 19, with score of 5.7) and Efficiency of Legal Framework in Settling Disputes (available scores of 1–7; U. S. ranked 3, with score of 5.9; Singapore ranked 1, with score of 6.2).

38 Based on the following six dimensions of governance: voice and accountability; political stability and absence of violence; government effectiveness; regulatory quality; rule of law; and control of corruption. The rule of law dimension includes consideration of the following variables from various data sources: fairness of the judicial process, speediness of the judicial process, judicial independence, confidence in the judicial system, and trust in the judiciary (Worldwide governance indicators, n. d.).

39 Providing objective measures of business regulations and their enforcement, particularly focusing on domestic small and medium-size companies. »The enforcing contracts indicator measures the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system« (Enforcing contracts: What is measured, n. d.). One of the areas included in the quality of judicial processes index is alternative dispute resolution, specifically whether the economy has »adopted a series of good practices in its court system« in the area of ADR as well as the areas of court structure and proceedings, case management, and court automation (Enforcing contracts: What is measured, n. d.).

40 This quality management system for courts consists of three parts: the Framework, a self-evaluation process, and Global Measures of Court Performance (International Consortium for Court Excellence, 2020).

41 The index uses 42 data points to measure the degree of economic freedom in the following five areas: size of government, legal system and property rights, sound money, freedom to trade internationally, and regulation. The area regarding the legal system and property rights includes consideration of judicial independence, impartial courts, integrity of the legal system, and legal enforcement of contracts (Gwartney et al., 2018).

42 Measuring economic freedom based on 12 quantitative and qualitative factors, grouped into four categories: »rule of law (property rights, government integrity, judicial effectiveness); government size (government spending, tax burden, fis-

– International Institute for Management Development's World Competitiveness Annual Yearbook (IMD, n. d.)[43]

– Transparency International's Corruption Perceptions Index

The Singapore courts' commitment to providing data appears to be part of this bigger picture. The nation has gained attention for the breadth, quality and trustworthiness of its dispute resolution services, all supporting multilateralism. Singapore also seeks to attract desirable dispute resolution users who have many choices in deciding where to bring their disputes. Most attractive would be the multi-national corporations involved in international commerce that may need international commercial mediation or arbitration as well as access to the nation's courts. In this environment, the simultaneous development of a healthy *domestic* mediation culture fits quite nicely with the overall picture of a nation known historically for its receptivity to mediation, its strong pro-business culture, and now, increasingly, its strength in and commitment to international dispute resolution (Rajah, 2016).

This same reasoning does not seem to explain why the U. S. District Courts of the Northern and Central Districts of California or the Florida court system collect and regularly publish data regarding their dispute resolution programs. Admittedly, the founders of the Northern District and Florida programs institutionalized a certain degree of data collection and reporting from the very beginning (Welsh, 2020).[44] But there are also hints that these programs began to receive frequent requests for information from constituents – i. e., judges, court officials and other proponents of court-connected mediation who viewed these particular federal and state courts as pioneers, visionaries, leaders. The court systems then started compiling and regularly reporting their results in order to respond to these requests and continue to provide leadership and guidance.

Others are also beginning to ask for data. In the private sector, non-profit and for-profit dispute resolution organizations are making use of their own metrics to enable comparisons of the private arbitrations and media-

cal health); regulatory efficiency (business freedom, labor freedom, monetary freedom); and open markets (trade freedom, investment freedom, financial freedom).« Singapore ranks 2 (Free); the U. S. ranks 12 (Mostly Free) (The Heritage Foundation, 2020).

43 Based on four competitiveness factors: economic performance, government efficiency, business efficiency and infrastructure. The government efficiency factor includes a sub-factor of institutional framework (IMD, n. d.).

44 Describing the history of the Northern District's and the Florida courts' collection and reporting of data.

tions occurring in different nations and geographic regions (Norton Rose Fulbright, 2017).[45] It seems inevitable that such metrics will be used in the future to compare (and facilitate competition) between public dispute resolution systems (i. e., the courts) and private ones. Indeed, in some states in the U. S., legislators have begun to ask courts for more information regarding the incidence and effects of court-connected mediation.[46] Courts may decide to take the initiative to collect and report more data on their own. New York may do this – and then advertise its new embrace of dispute resolution to domestic and international constituents. Alternatively, courts may wait for legislative mandates to report regarding their use of dispute resolution.

6. Conclusion

The relevant bottom lines here are several. First, it is possible to collect and report data regarding court-connected mediation that will then support regulation. Singapore, a few federal district courts in the U. S. and the state of Florida have demonstrated this. Second, though, such collection and reporting of data is relatively rare. Third, the collection and reporting of data are much more likely when an external constituency cares about the information. Fourth, responsible regulation requires data.

What is the external constituency that is most interested in the regulation of mediation? In Singapore, it seems to be the government and some me-

45 See also Dispute Resolution Data (n. d.) *(»[D]ispute Resolution Data* (DRD) is receiving data from 17 international entities and then aggregating the data by case type (28 different) and seven geographic regions. In this process, each closed international commercial arbitration provides information for up to 100 data fields and each closed international mediation up to 45 data fields. Presently, over 1,000 cases have provided information, in excess of, 40,000 data fields.«) and Canada et al., (2018) at (reporting, based on »approximately 216,000 data points, collected across 4,100 alternative dispute resolution cases,« that for three of the top four arbitral case types – commercial contracts, hospitality and travel, and wholesale and retail trade – the most frequent outcome was settlement or withdrawal, while awards were the outcome 50% of the time for the case type of financial services and banking; also noting plans to »examine both case type (including more specific subtypes) and case region (that is, where arbitration took place) as factors potentially affecting arbitration outcomes, the time required to reach those outcomes, and the associated costs of achieving those outcomes.«),

46 Such a question led to a 2016 report on the impact of »expedited actions« rules in Texas (Welsh, 2020, describing the report and resulting information regarding the use and impacts of court-connected mediation). See also Hannaford-Agor & Graves (2016) and Volpe (2019) (describing a legislator's question about the effectiveness of mediation – and the lack of data available to answer the question).

diation advocates. In some parts of the U. S., it sometimes seems that current mediators feel most strongly that regulation is needed – in order to bar unqualified others from becoming mediators. This may be because those others do not possess the necessary qualifications or do not subscribe to the »right« vision of mediation.

The question for current mediators who support responsible regulation, though, is whether we are also willing to submit *ourselves* and *our own* practices to the demands of transparency now – in order to ensure that regulation of *future* mediation is grounded in real results not just our hunches about best practice.

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Mediation Moves into the Scottish Civil Justice System – An Expert Group Report

Jonathan Rodrigues

Fewer people are turning to the courts in Scotland, with research (Scotish Government, 2019) indicating a general downward trend in the numbers of civil actions initiated over the last decade. There is evidence that people generally prefer to avoid becoming involved in legal and court processes as they are apprehensive about involvement with lawyers and the potential costs, formality, delay and trauma associated with legal processes (Scottish Consumer Council, 1997) (Genn & Paterson, 2001) (Consumner Focus Scotland, 2012). Although recent civil justice reform has created more opportunities for mediation, its use remains limited, even where objectively it might appear that parties' interests would be better served by mediating their dispute.

The mere hope that things will change is not a sustainable policy. Scotland needs to adopt a more proactive approach. Acknowledging that there is a need to change the ›one size fits all‹ model of litigation and that the necessary infrastructure to support the delivery of mediation has not been provided by the civil justice system, *Scottish Mediation*[1], with support from the Scottish Government, undertook a short-term research project to identify ways in which the use of mediation in resolving civil disputes can become more central to Scotland's civil justice system. It established an Expert Group, with the aim of reviewing the current provision of mediation in the civil justice system, considering evidence of effective use of mediation in other jurisdictions, and formulating proposals to enhance the use of mediation in resolving civil disputes in Scotland.

The Expert Group comprised representatives from the judiciary, the Law Society of Scotland, the third sector, mediation services, consumer interest, the small business community and unofficial participation from a member of the Faculty of Advocates. After spending some months in research, internal deliberations and consultations with peers from the international mediation community, in June 2019, the Expert Group presented an ex-

1 Scottish Mediation was set up in 1990 to raise the profile of mediation in Scotland. The organization acts as a professional body for mediators in Scotland and maintains the Scottish Mediation Register of mediators. Scottish Mediation continues to push the boundaries with the Scottish Mediation Charter. https://www.scottishmediation.org.uk/scottish-mediation-charter/

tensive report (Scottish Mediation, 2019), with proposals to deliver a viable pathway to ensure that more people in Scotland are enabled to mediate their civil disputes.

1. Brief History and Present Challenges

Before making recommendations, the Expert Group traced back the roots of mediation in Scotland to understand the current status of mediation in the country's civil justice system.

Community Mediation schemes have been operating in Scotland since the 1990s, while Family Mediation emerged in Scotland from the mid-1980s, with evidence of a court rule for discretionary referral to mediation by the sheriff being in existence since 1990. The benefits of mediation as a way of resolving non-family civil disputes began to be recognised in Scotland in the late 1990s and early 2000s, with the Scottish Consumer Council calling for greater use of mediation in resolving civil disputes. In 1998, an in-court mediation service was introduced at the Edinburgh Sheriff Court; and in four years' time, the service reported a huge demand, with high success rates, as well as high rates of mediation agreements being honoured (Samuel, 2002). Further in-court mediation pilots were run in Glasgow and Aberdeen Sheriff Courts between 2006 and 2008 (sheriff courts being courts of first instance throughout Scotland). An evaluation concluded that the projects were effective in resolving disputes, reducing court time, and providing a valued service to parties.[2]

In the mid-2000s, both the Sheriff Court Rules Council (SCRC) and the Court of Session Rules Council (CSRC) considered whether, and how, mediation might be encouraged through court rules. While the SCRC was reluctant to consider any changes to the courts' existing practices, the CSRC was more proactive in the endorsement of new ideas. Both, however, fell short of making changes in their rules, being aware of the 2009 Scottish Civil Courts Review looming on the horizon. The review, led by the then Lord Justice Clerk, Lord Gill, left the question of the role of mediation in civil justice unanswered. Lord Gill's review recognised the benefits of mediation for parties and courts, but it did not articulate how these benefits could be delivered in practice. This resulted in a gradual opening up to me-

2 Further in-court mediation pilots were run in Glasgow and Aberdeen Sheriff Courts between 2006 and 2008 An evaluation concluded that the projects were effective in resolving disputes, reducing court time, and providing a valued service to parties.

diation, without any accompanying development of the necessary infrastructure to make it a viable alternative to litigation.

The current landscape of mediation in the Scottish civil justice system is promising, but not sufficient to ›normalise‹ mediation in society. Inclusion of ADR in Simple Procedure rules obliged sheriffs to encourage mediation, but only seven of 39 sheriff courts have arrangements in place to refer parties to mediation. Rule 33-22 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 provides for referral to mediation in family cases; similarly under Rule 40-12 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, there exists a provision for the sheriff to make an order relating to ADR in commercial cases. In 2018, Relationships Scotland (RS), an umbrella organisation for relationship counselling and family mediation services, reported mediating in approximately 2,000 cases a year, with approximately 15% of RS's cases being referred by the courts. However, RS reports that there is considerable variability in referral rates across Sheriff Courts (Relationships Scotland, 2018), confirming that mediation is not yet widely accepted by the legal community.

From 2017, a practice note (Court of Session, 2004) for Commercial Actions in the Court of Session was issued by the Lord President, which introduced consideration of ADR at the preliminary stage and procedural hearing stage, empowering judges to compel parties to meet and discuss alternative methods of resolving the dispute. While the practice note encourages ADR to help resolve or reduce the scope of parties' disputes, there is no publicly available data to establish how often it is used or if the joint meetings are effective. Anecdotally, it has been suggested that joint meetings can replicate the adversarial positions parties are expecting to take in court, thus failing to establish an environment conducive to considering alternatives to litigation.

The Employment Tribunal provides for Early Conciliation Service via ACAS[3]. And, despite high success rates, judicial mediation, due to lack of resources, has been reserved for serious cases of discrimination or those with significant cost or a ticking time-bomb in subsisting relationships. In 2014, a free mediation service was piloted in the Homeowner Housing Panel (HOHP), a tribunal dealing with disputes between homeowners and property factors. Unfortunately, just as its success rates began to rise (2015 Annual Report of Private Rented Housing Panel / Homeowner Housing Panel), the mediation service was discontinued. Since becoming part of the First-tier

3 ACAS provides employees an opportunity to resolve disputes through early conciliation before filing an employment tribunal claim. https://www.acas.org.uk/early-conciliation

Tribunal for Scotland (Housing and Property Chamber) in December 2016, the chamber no longer provides a mediation service: while its current rules allow it to inform parties about the availability of mediation, it cannot refer parties to mediation or facilitate mediation.

In other avenues, The Scottish Legal Complaints Commission (Scottish Legal Complaints Commission, 2020) provides a free mediation service for complaints, while The Education (Additional Support for Learning) (Scotland) Act 2004 identifies mediation as a primary method for attempting to resolve disputes arising between parents, young people and local educational authorities[4]. In the health sector, Section 15(5) of The Patient Rights[5] (Scotland) Act (2011) includes provisions for the use of mediation in resolving patient complaints, but the percentage of mediated cases continues to be extremely low. The Scottish Land Commission was noted to be running a pilot mediation scheme for disputes between tenant farmers and landlords. While this programme is still developing, and the number of mediations to date is small, the indications so far are that it is proving successful[6], and this may be an area for future potential development.

In summary, there have been plenty of visionary projects initiated to enhance mediation services in Scotland, but inconsistent rules and policies have denied comprehensive and systematic referral and mediation practice. The Justice Committee report on ADR stated that the main challenges facing ADR in Scotland include *»lack of information on the availability and benefits of ADR, inconsistency in the provision and funding of ADR and inconsistency in referrals to ADR from the courts.«* (Scottish Parliament Justice Committee, 2018). Consequent to highlighting these challenges, the Expert Group outlined its recommendations.

2. Recommendations

As more and more countries across the world are promoting greater use of mediation, the time is now right for Scotland to take necessary steps to ›normalise‹ mediation as a key part of the civil justice system. To operate effectively ›in the shadow of the court‹, mediation must have the backing of the civil justice system. The Scottish Parliament's Justice Committee noted, in its recent report on ADR, that society benefits when there are more informal, timely, and affordable ways to resolve civil disputes. There is a growing

4 Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4).

5 The Patient Rights (Scotland) Act 2011 (asp 5) S 15(5).

6 https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Jutsice-In-Scotland.pdf

political interest in broadening dispute resolution beyond litigation, bringing with it real opportunities for change. In its vision for justice in Scotland, the Scottish Government commits to *»empowering... communities to exercise their rights and responsibilities, to resolve disputes and other civil justice problems at the earliest opportunity.«* (Scottish Government, 2017)

Having identified a number of structural and cultural challenges to be overcome – in terms of availability, awareness and encouragement of mediation in the civil justice system in Scotland – the Expert Group proposes a cost-effective, coordinated strategy, summarised as follows:

1) Coordinating uniform implementation of mediation services – case management via capable administrative staff – across Scotland is necessary, even if it means introducing a minimal degree of compulsion in cases where mediation is appropriate. Establishing an ›Early Dispute Resolution Office‹ (EDRO) and maintaining an online mediator ›roster‹ is the first step. The EDRO would function in a similar way to the American concept of a ›multi-door courthouse‹ – reviewing all cases received by the relevant court or tribunal, and then identifying and directing appropriate cases toward mediation (or another appropriate form of dispute resolution).

This mandatory referral approach, encouraged by judges and sheriffs through re-written SCJC court rules or statutorily prescribed by legislation, namely that parties attend an initial mediation session, should be subject to a ›special cause exemption‹ on reasonable grounds, including the following exemptions: mediation has already taken place, existence of a time-bar, contractual clause that stipulates a specific ADR method, the case involves a protective/enforcement order, there is danger of domestic, sexual abuse or gender-based violence. These situations could be outlined informally as court guidelines, but need not be defined in the statute itself. It is important that unrepresented parties have access to legal advice before agreeing to mediate, through in-court advice services.

It is proposed that a Mediation Report be submitted to the EDRO after the initial meeting, which must be basic – whether the mediation took place and what was the final outcome; the report should not include observations about the conduct of parties or the content of discussions. Finally, an appropriate data collection mechanism should be introduced to evaluate and review the benefits and limitations of this mediation service.

2) Proportionate cost/incentivising mediation is essential to ensuring that all parties, regardless of their financial resources, are able to participate in mediation. Those involved in small-claim disputes must have access to publicly-funded and free or very low cost mediation services. The pro bono approach has been workable to date because it has provided an opportunity

for qualified mediators to gain practical experience. If, however, court-connected services were to be rolled out across Scotland, there will be much greater demand and there are unlikely to be sufficient volunteer mediators to meet this on an unpaid basis (Clark, 2019, p. 185). Cost can be further reduced by considering the employment of salaried mediators, operating across multiple sheriff courts, and/or adopting an online/telephone mediation model, similar to the Small Claims Mediation Service in England and Wales (Civil Justice Council ADR Working Group, 2017). In ordinary cause (medium to higher value claims) and Court of Session actions[7], a suitable price point should be identified, above which parties should pay commercial rates agreed with the mediator. Tribunals – whether dealing with party-vs-state or party-vs-party disputes – are publicly funded. It would therefore be appropriate, as a general principle, for any mediation service dealing with tribunal disputes also to be paid for through public funds.

Whatever funding model is chosen, the mediators providing the mediation services must be paid fairly and appropriately for their services. This is important for two main reasons: Firstly, if mediation is to be widely adopted as a key part of the civil justice system, there will need to be a sufficient number of appropriately qualified and experienced mediators to meet the demand of consistent and high quality services. Secondly, paying mediators appropriately is important in achieving the cultural shift required. It signals that mediation is seen by the courts and by wider society as a legitimate, important and valuable way of resolving disputes, and that mediators are skilled, regulated professionals, who deserve to be paid at a level that acknowledges and reflects this.

3) Clearer signalling of quality standards is crucial to establishing the credibility and legitimacy of a mediation pathway in civil justice. An online roster of mediators must be created and managed by a regulatory body, which will be responsible for

- setting and keeping under review the standards, training and accreditation requirements for entry to the roster,
- admitting mediators who satisfy those requirements to the roster,
- developing and overseeing a code of practice for roster mediators and

7 The Court of Sessions is Scotland's supreme civil court. The court deals with a wide range of cases including high value claims for more than £100,000. The range of cases include personal injury claims, breaches of contract or of duty of care, family law such as divorce, child abduction or adoptions. The commercial court hears cases such as disputes over insurance transactions, or the supply of goods and intellectual property.

– dealing with complaints about roster mediators, including disciplinary issues.

The online roster will be available to the public, and will include information about all approved roster mediators, including their experience, geographical location and areas of expertise. It will be important to take steps to ensure that, as far as possible, there are sufficient mediators on the roster who will provide services in remote and rural areas. It will also be important that the mediators on the roster are seen to reflect the diversity and make-up of the general population as far as possible, helping to instil both understanding for certain conflict situations/constellations and confidence in mediation among the general public.

Solicitors and advocates play a critical role in the civil justice system, providing advice and guidance for parties seeking to resolve disputes. In addition to education and training, it is important that there should be a requirement on lawyers to advise their clients about mediation and other forms of dispute resolution. The Scottish Parliament Justice Committee 2018 report recommends that such a requirement should be introduced by the Faculty of Advocates in relation to advocates.

4) Consistent messaging in rules and legislation will portray commitment from the civil justice system to resolving appropriate cases through mediation. As part of the SCJC rewrite of court rules, provision should be made to place a duty on sheriffs and judges to encourage mediation in appropriate cases. Introduction of a Mediation Act would require endorsement from Scottish legislators, formalise principles and secure confidentiality in mediation, besides defining a code of practice for mediators in Scotland.

5) Changing professional receptiveness is necessary to ensure that mediation becomes a normal way to resolve disputes in Scotland. It is proposed that mediation must become a core part of education and training for solicitors and advocates, besides considering training and opportunities for non-lawyer advisors who could play a crucial role in steering clients with appropriate cases towards mediation. Sheriffs, judges and tribunal members should be trained in the mediation process, and in the EDRO and its functions.

6) Building wider awareness in society about the benefits of mediation is key to its acceptance by individuals, businesses and public bodies. Businesses and public bodies should be targeted directly through sector-led initiatives to build awareness of mediation as a rational choice for dispute resolution. The Scottish Government and other public bodies should commit to including mediation in dispute resolution clauses in their own contracts. The Scottish Government should consider carrying out research into pub-

lic awareness of mediation prior to implementation of the measures proposed in this report. It has been proposed that an online self-help ›portal‹ could be of assistance in creating awareness about mediation and directing people towards possible options for resolving their disputes.

The Expert Group clarifies that, while they outline some changes, it is important to remember that mediation is informal and flexible, unlike many other more costly processes. Therefore, care must be taken to encourage and enable, with a light touch, and not to over-regulate, lest the whole point of it is lost. The Expert Group particularly notes that mediation is consistent with the aspirations of Scotland's National Performance Framework[8] and, more generally, with a society in which people are valued, relationships are enhanced, choices are made by those most affected, constructive solutions are sought for difficult problems and financial and other resources are wisely deployed.

Overall, the Expert Group believes that its proposals will lead to the embodiment of a new dispute resolution culture across Scotland and towards a society in which disputes and differences can be resolved, wherever possible, consensually. »We have no doubt that the recommendations in this report sit well with a civilised and forward-looking approach to our country's future,« write John Sturrock QC and Alun Thomas, chairpersons of the Expert Group.

3. The Scottish Government Response to the Expert Group Report on Mediation in Scotland

The Scottish Government acknowledged the proposals of Scottish Mediation and the Expert Group for a significant package of reforms aimed at »normalising« the use of mediation in the civil justice system in Scotland (Scottish Government, 2019). The Scottish Government also paid due recognition to the significant work done by a member of the Scottish Parliament, Margaret Mitchell MSP, in developing ideas to encourage the greater use of mediation in the civil justice system in Scotland.

Suggesting the need for systematic reform in a number of areas to overcome the structural and cultural challenges currently preventing the normalisation of mediation in the civil justice system in Scotland, the Scot-

8 The framework tracks Scotland's progress in meeting its national outcomes. The framework uses data to understand how well Scotland is doing and helps the government focus policies and resources to meet challenges. COVID-19 has brought in unanticipated challenges and these are reported and analysed here: https://nationalperformance.gov.scot/how-it-works

tish Government intends to examine the Expert Group proposals. The proposals contained in Margaret Mitchell's Private Member's Mediation (Scotland) Bill would be a suitable reference point for the government as it assesses the impact on the general public, businesses, the legal profession, and the overall justice system.

The Scottish Government announced a Scottish Dispute Resolution Delivery Group, to meet early in 2020 with representatives from key organisations, including Scottish Mediation and the Scottish Courts and Tribunal Service, to develop and shape an evidence-based package of reform.

When announced, the work of this Group was expected to focus on:

- consideration of how the Early Dispute Resolution Office would work in practice,
- consideration of the wider dispute resolution infrastructure to ensure that the provision of advice, assistance and representation for resolving civil disputes is co-ordinated, seamless, effective and efficient,
- consideration of the standards required for mediators and complaints process,
- consideration of the possible financial model for mediation and other forms of dispute resolution in the civil justice system in Scotland,
- consideration of the need for raising public awareness about the range of options available for resolving disputes effectively and within a reasonable timeframe,
- consideration of what training is required for the legal profession on dispute resolution, ensuring that victims of domestic abuse and children are not put at risk,
- consideration of whether legislation is required and to what extent amendments can be made to the current system of dispute resolution without the need for a legislation,
- consideration of implementation arrangements (for example, whether the approach would be phased in initially through particular courts or tribunals).

Following initial discussions with the Delivery Group and the Collaborative Partnership in 2020, the Scottish Government undertook to issue a public consultation to seek the views of the general public, stakeholders and other interested parties on the proposed package of reform for dispute resolution and to seek to build consensus on the way forward for mediation and wider dispute resolution reforms in the civil justice system in Scot-

land. Unfortunately, with the pandemic dominating the work of government officials and changes in staffing, this consultation has not been held, reported as of August 2021.

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The Evolution of Mandatory Mediation in Greece as a Paradigm for the Concept of Learning Legislation

Bernadette Papawassiliou-Schreckenberg, Georgios Karamanidis

1. Longstanding Deficits of the Greek Legal System

On November 29, 2019 the Greek Parliament ratified the latest Mediation Act, hereinafter referred to as Law 4640/2019, regulating three phases of the introduction of the Mandatory Initial Mediation Session (MIMS) in accordance with the categories defined respectively (Goverment Gazette, 2019).

The beginning of the third phase for the implementation of the MIMS, which concerned a vast number of disputes of the so-called »standard civil procedure«, coincided with the general lockdown due to COVID-19 on March 15, 2020 in Greece.

Once society begins to return to normality after the imposed lockdown regulations, the Greek economy (which prior to the pandemic catastrophe had shown modest signs of growth after almost a decade of financial crisis), will need to cope with severe setbacks.

Will the broad scale implementation of »mandatory mediation« at this crucial point of time become a vehicle offering new chances for the transition to a modern, efficient legal system in Greece? Does the upsurge in digitalization observed since the beginning of the pandemic provide tools for the acceptance of mediation into legal everyday life and thus finally evoke a change of the legal culture in Greece?

The dysfunctional judicial system had contributed in various ways to the economic crisis in Greece. Tremendous delays in the administration of justice together with overcrowded courts were the result of an exorbitant number of lawyers and consequently inexpensive legal services, even in relation to the low average income in comparison to the rest of the EU (Gläßer, Karamanidis, Papawassiliou-Schreckenberg, 2018). For example, in 2016 the average time needed until the promulgation of a ruling on the merits in civil and commercial cases at the Courts of First Instance reached a peak of 670 days (The 2018 EU Justice Scoreboard, 2018).

On the one hand, the financial crisis itself de-escalated the aforementioned procedural delays, as many people simply could not finance costly legal proceedings anymore. Furthermore, the reform of the Greek Civil Code of Procedure (CCP) (LAW 4335/2015, 2015), introduced on January 1, 2016, aimed at the acceleration of litigation.

On the other hand, the tendency to postpone the fulfillment of financial obligations by delaying them through time-consuming litigation could be observed as common practice. Furthermore, the excessive indebtedness of an enormous number of Greek households (Naftemporiki, 2011) produced an extremely heavy workload, especially for the Magistrate Courts, who were called upon for judicial decisions on the terms of repayment, including sometimes even generous »haircuts« of the total amounts from their non-performing loans (To xrima, 2019).

Due to the deficits of effective legal protection, which were destructive for the cohesion of the Greek society and disastrous for the Greek economy (especially as a hurdle for attracting foreign investors (doingbusiness.org, 2019)), a notion for change developed gradually amongst legal professionals. This notion is based on the firm conviction that the fundamental civil right of access to justice could be safeguarded through an »opening« towards alternative (or complementary) dispute resolution means.

2. The Three Steps of Mediation Regulation towards the Evolution of a Concept of Mandatory Mediation in Greece

Almost simultaneously with the enactment of *Directive 2008/52/EC on certain aspects of mediation on civil and commercial matters* (EUROPEAN PARLIAMENT, 2008), the first group of 15 mediators was trained by the Chartered Institute of Arbitrators (CIArb), sponsored by the Greek Ministry of Development. In addition, some more people were trained to be mediators by CEDR or ADR International (Meidanis, 2020).

Two years later, in December 2010, Directive 2008/52/EC, Law 3890/2010 (Government Gazette, 2010) became the first legal framework of mediation in Greece regulating mediation in cross-border as well as in domestic civil and commercial disputes. According to the explanatory memorandum, the abovementioned law was targeted at the introduction of modern dispute resolution methods, the enforcement of private autonomy, as well as relieving the congested conditions of the judicial system (justice.gr, 2019).

The following provisions consistently form the »nucleus« of the mediation regulations by Greek law through three subsequent stages of regulation; they are still valid up to the present day:

– Each party has the right to initiate the submission of the Minutes of Mediation, including the Mediation Agreement as well as the Mediation Settlement Agreement, to the competent Single-Member Court of First Instance, for the order of enforcement (exequatur) for the relevant settlement provisions to be appended. This procedure is strictly a formality, as the competent Judge has no authority to check the content of the Mediation Settlement Agreement for consistency with the law (Law 3898/2010, 2010) (Law 4512/2018, 2018) (Law 4640/2019, 2019).
– In order to safeguard the legal quality of the mediation agreements and thus the enforceability of the Minutes of Mediation, the representation of the parties by legal counsels is mandatory throughout the entire mediation procedure, except for certain cases (of minor value in dispute).
– The mediator, the parties, their representatives and all the other participants in the mediation procedure cannot testify in future trials as witnesses, apart from cases where there are compelling reasons such as public security, protection of minors or the mental and physical health of individuals.

The legislator's first approach of implementing mediation as a purely non-obligatory tool encountered an extraordinarily poor resonance within the legal society and the Greek public in general (Schubert-Panecka, Papawassiliou-Schreckenberg, 2016). Since the first few individual provisions were introduced into the Greek CCP with the aim of integrating mediation into the existing procedural framework with a non-compulsory character, the actual use of mediation had not yet been consolidated on the part of the legislator. The notion of voluntary private mediation had started to become only a pipe dream, since it had been met with bias and opposition from almost all major players and institutions within the legal system (Karamanidis, 2014).

In January 2018, seven years after the enactment of Law 3898/2010, Law 4512/2018 was introduced (Government Gazette, 2018), codifying and unifying the various features of the pre-existing legal framework together with some major innovations, i. e.

a) the Central Mediation Committee (Government Gazette, 2018),

b) the MIMS (Government Gazette, 2018) for a casuistry of disputes as follows:

– disputes between landlords, and between the administrators of condominium and landlords,
– disputes concerning neighbouring properties,

- disputes relating to compensation claims resulting from road traffic accidents and from claims arising from insurance contracts (unless the harmful event resulted in death or personal injury),
- disputes concerning professional fees,
- family law disputes (e. g. care of child, alimony, participation in acquisitions),
- intellectual property disputes,
- disputes concerning stock exchange contracts.

c) The legal counsels' duty to inform their clients in writing about mediation as a dispute resolution mechanism in general and the eventuality of the *in concreto* application of the provisions concerning the MIMS on the respective case, into a standardized text (Law 4512/2018).

The realm of the above listed cases resulted into reasonable criticism due to its arguable (in)consistency (e. g. including malpractice claims but excluding claims for compensation in case of serious, even lethal traffic accidents), to the rather limited application in the field of litigation of some categories (e. g. stock exchange contracts), and to the lack of an overall rationale (e. g. failing to include disputes of major incidences such as succession cases) (Meidanis, 2018).

The new law which now constituted the first step towards mandatory mediation, encountered the opposition of the vast majority of the local bar associations who saw themselves exposed to a future loss of work and income. The judges' union was also skeptical fearing that the role of the judges would be undermined by removing court cases from the overburdened court system (Meidanis, 2018).

Furthermore, the bar associations focused mainly on an ›incompliance‹ with the Greek Constitution and the European Convention on Human Rights, inasmuch as the assumed excessive cost of mediation inhibits the access to the ›natural judge‹. Therefore after their request, the Administrative Plenary of the Supreme Court *(Areios Pagos)* came to the conclusion that these provisions of Law 4512/2018 did in fact constitute a deprivation of the right of free access to justice for all citizens (Minutes, 2018).

Finally, after the Greek Minister of Justice was replaced, the application of the provisions concerning the MIMS was suspended ›for reconsideration‹ until September 16, 2019 – and finally until November 30, 2019.

The change of the Government in July 2019 led to a fresh boost in the field of mediation, as on November 30, 2019, Law 4640/2019 was promulgated,

which abolished the whole of the previous legislation and constituted a new, holistic and exclusive legal framework for mediation in Greece.

The Court of Justice of the European Union (CJEU) had acknowledged in 2010 in its preliminary rulings in the joined cases C-317/08 to C-320/08 (Rosalba Alassini v Telecom Italia SpA, 2010) (Filomena Califano v Wind SpA, 2010) (Lucia Anna Giorgia Iacono v Telecom Italia SpA, 2010) (Multiservice Srl v Telecom Italia SpA, 2010) and in 2017 in the case C-75/016 (Menini, Livio and Rampanelli, Maria Antonia v Banco Polpulare – Societa Cooperativa, 2017) the compatibility of the MIMS with the parties' fundamental right of recourse to justice and considered the benefit of the general interest being proportionate to the imposed restriction on the aforementioned right (Koumpli, 2019).

Although the respective provisions of Law 4512/2018 had already been based on same preliminary rulings, only in 2019 the Administrative Plenary of the Supreme Court gave an expert opinion on the draft of the new mediation act. It subsequently came to the conclusion that its provisions concerning the MIMS significantly differ from the previous ones, in as much as a) the subject of the disputes to be submitted to the MIMS had been changed and b) the costs incurred by the MIMS were considered to be almost negligible.

3. The Basic Procedural Features of the Mandatory Initial Mediation Session within the Framework of Law 4640/2019

In Law 4640/2019 (Goverment Gazette, 2019), the legislator changed the casuistry of cases for which a MIMS is required as follows:

a) Family disputes (except for matrimonial disputes, relating to divorce, annulment of marriage, recognition of the existence or non-existence of marriage and disputes in parent/child relationships, e.g. paternity), concerning lawsuits filed as of January 15, 2020.

b) Disputes concerning lawsuits, filed as of March 15, 2020 which are subject to the standard civil procedure and fall within the jurisdiction of the Single-Member Court of First Instance, in case the value in dispute exceeds the amount of € 30,000, as well as all disputes subject to the standard civil procedure falling within the jurisdiction of the Multi-Member Court of First Instance, filed as per the aforementioned date.

c) Disputes arising from written contracts containing a valid mediation clause, concerning lawsuits filed as of November 30, 2019. The implementation of the latter provision amended in the new law created some aston-

ishment as it elevates the character of the mediation clause from being just a notion into becoming a binding innovative feature.

The disputes that are explicitly excluded from the MIMS according to Law 4640/2019 are those in which one of the parties involved is the State (independently from whether it is acting in its capacity as either as the *fiscus* or as the *imperium)*, a local and regional authority or a legal entity under Public Law.

Furthermore, similar to the provisions concerning voluntary mediation, in disputes subject to the MIMS, parties do not relinquish their ability to file an application for an injunction via the interim measures proceedings in case of »imminent danger« or »urgency«, pursuant to the Code of Civil Procedure.

Only with the enactment of Law 4640/2019 were the legal counsels required to inform their clients in writing of the possibility to mediate the dispute and of the obligation to take recourse to the MIMS (provided that the case belongs to one of the categories enumerated hereinabove), although their duty to inform had been already regulated by Law 4512/2018. Together with their clients, the attorneys have to complete and sign an information notice about the possibility to mediate their dispute before filing the notice together with the writ initiating proceedings (usually the lawsuit). The legal consequence in case of non-compliance is that the court hearing would be inadmissible.

The same legal consequence of procedural inadmissibility occurs also in case the MIMS is omitted, although the dispute falls into one of the aforementioned categories, as pursuant to the provisions of Law 4640/2019, the MIMS constitutes a condition for the admissibility of the hearing of the case before the competent court (Koumpli, 2019).

The proceedings of the MIMS start with the appointment of the mediator by mutual consent of the parties. The mediator must be accredited at the Greek Ministry of Justice.

The claimant has the possibility to either communicate with the other party/parties or address a mediator of her/his choice directly. In the latter case, the mediator contacts the other party/parties in order to find out whether the parties agree on her/his person.

Should there be any disagreement or inability to communicate with the respondent(s), a mediator from the special registry of mediators is appointed by the Central Mediation Committee of the Ministry of Justice. Subsequent to the mediator's appointment, the claimant submits the request

for the recourse of the dispute to mediation to the mediator, who notifies the other party/parties and arranges the date and place of the MIMS.

The MIMS has to take place within twenty days from the day following the aforementioned request of the claimant to the mediator (an extension up to thirty days is possible, if any of the parties resides abroad).

An official notice has to be given on the date and place of the session by registered mail or electronically at least five days prior to the session date. From the date of the notification on, the deadlines regarding the exercise of claims and rights under dispute as well as the procedural deadlines are suspended for the time of the mediation procedure. Starting after the stipulation of the Mediation Agreement, the mediation procedure has to be completed within forty days, starting from the expiration of the period of twenty days (or thirty days respectively) mentioned hereinabove. With agreement of the parties, an extension of the 40-days-deadline for the completion of the mediation is possible.

Deadlines commence again the day after

a) the drafting of the Minutes of Mediation stating the parties' failure to reach an agreement;

b) the declaration of withdrawal from the mediation procedure by any of the parties;

c) the conclusion or annulment of the mediation procedure in any way.

In case the parties choose at the MIMS not to continue with mediation, deadlines re-initiate the day after the drafting of the Minutes of the MIMS proving their respective decision.

It is worth mentioning that in case the parties decide to submit their dispute to mediation (the legal wording is »to continue mediation proceedings«), and as long as they stipulate the respective mediation agreement, they are able to continue either with the same mediator or appoint a different one.

The essential requirement for the MIMS to be fulfilled is that the parties must present themselves before the mediator regardless of their final decision to subsequently enter into mediation (and to sign a mediation agreement) or not. Thus, the parties must either attend the MIMS session in person or go through an appointed representative in case of legal entities. As in voluntary mediation proceedings, the attendance of legal counsels during the MIMS is compulsory (with the respective fees freely agreed), except for consumer disputes and small claims with a value up to € 5,000 –

a provision which was obviously designed in line with the case law of the CJEU (Koumpli, 2019).

Under exceptional circumstances whereby a person cannot be present, due to a mobility problem, no access to teleconferencing or residency abroad, a party may be represented by its legal counsel only if duly authorized (Law 4640/2019).

If, when summoned, a party fails to participate in the MIMS, then the competent Court judging the case can impose a pecuniary sentence between € 100 and € 500 on the respective party, »taking into account the behaviour [of the party] in general and the reasons for non-appearance« (Goverment Gazette, 2019).

There are special provisions concerning the mediator's remuneration for her/his services rendered in the context of the MIMS. In absence of a (different) written agreement, the claimant is obliged to pay in advance a fee of € 50 for the session. If subsequently the mediation proceeds, a minimum fee of € 80 per hour is charged by the mediator. Both fees are shared equally by the parties (Goverment Gazette, 2019).

4. The Hybrid Character of the MIMS

The MIMS can be considered as an additional – *ex lege* – recourse to mediation, constitutionalized by the Greek legislator in full compliance with the EU legislation and case-law of the CJEU (Coltsaki, Haralambidou, 2021).

According to Article 2 Paragraph 5 of Law 4640/2019: »During the mandatory initial mediation session the mediator informs the parties about the procedure of the mediation and its basic principles, as well as the possibility of an extra-judicial resolution of their dispute based on its specific features and its nature.«

Although opinions about the legal nature of the MIMS session might vary, either deeming it to be a part of the mediation procedure itself or considering that it consists of an independent pre-phase of it, the question about its scopes and usefulness in practice is answered unanimously.

As the scope of the MIMS is to induce the parties to choose mediation for the resolution of their dispute, it practically provides a »golden« opportunity for the mediator to gain the parties' trust, to generate a rapport and to explore together with the parties the suitability of the procedure as well as her/his own suitability for the resolution of their dispute (Coltsaki, Haralambidou, 2021).

Focusing not on the resolution of the dispute, but on the suitability of the procedure for the specific conflict, it depends to some extent on the mediator's skills to essentially use this chance by offering the parties a first »taste« of mediation (Coltsaki, Haralambidou, 2021). However, it should not be discounted that part of the mediator's role at this stage is also to evaluate whether the parties themselves are capable of using this chance to reach a settlement to their dispute. To this end the mediator has to assess if the parties are capable to function in a positive and constructive manner within a mediation procedure. This assessment, in turn, significantly increases the chances for a subsequent mediation process to succeed (Angelidis, 2020). According to the saying *»finis origine pendet«* (the end depends on the beginning), after having done her/his assessment diligently during the MIMS, the mediator should prepare carefully the next step, which is the commencement of the actual mediation procedure, instead of »rushing« into it (Angelidis, 2020).

5. The Friction between the MIMS and other ADR Procedures in Greece, especially Judicial Mediation

As has already been mentioned, one of the main reasons for the introduction of mediation into the Greek legal system has been to alleviate the congestion in the civil courts. In view of the various forms of institutionalized ADR in Greece (e. g. judicial mediation, regulated in Art. 214B of the Greek CCP, Arbitration or the State Ombudsman), the question arises as to whether the MIMS is still necessary, if the parties have already made the attempt to resolve their dispute by using one of these other ADR institutions.

On the basis of a harmonized interpretation of the new means in compliance with the constitutionally granted »Access to Justice« (Article 6 Paragraph 2 of the European Convention on Human Rights, Art. 20 of the Greek Constitution), it could be assumed that the field of application of the provisions for the MIMS should be construed rather restrictively. As a consequence, the parties are exempted from the session, in case other attempts have been already undertaken to resolve the dispute via judicial mediation or facilitated by other authorities whose task is the institutionalized, extra-judicial dispute resolution before the beginning of proceedings (Yiannopoulos, 2020). In particular, since April, 2012, judicial mediation has been regulated in Art. 214 B of the Greek Code of Civil Procedure (Law 4055/2012), pursuant to which presiding judges at the Courts of First Instance or the Courts of Appeal are appointed in order to act in the capacity of a mediator. The main principles of private mediation are applied, with the difference that the mediator-judge is entitled to offer the parties non-binding

propositions for the resolution of the dispute, whereas in private mediation, the mediator is allowed to do so only when the parties explicitly require it (Goverment Gazette, 2019).

However, according to the specific provisions of Article 6 Paragraph 3 of Law 4640/2019, the recourse to judicial mediation does not liberate the parties from the obligation of participating in the MIMS. The rationale of this provision remains unclarified, as there is no reference made to any other motives of the legislator in the Explanatory Memorandum, and the provision itself is of questionable compliance with the principle of proportionality (Yiannopoulos, 2020).

6. Conclusion and Outlook

In the past decade, mediation has gradually gained ground in Greek legal reality due to its transformation by the Legislator from an unknown, initially quite informal procedure with meager demand into a strictly regulated complementary procedure. Basic regulations have become important interfaces to the Greek Code of Civil Procedure, such as the enforceability of the Mediation Settlement Agreement and the MIMS. Thus, mediation law is evolving gradually by the continuing amendment of its casuistry in accordance with the needs of the Greek legal system as well as of society and economy in general. Although the impact of the MIMS on the reduction of pending court cases may so far be more limited than assumed (Yiannopoulos, 2020), there is hope that – like a snowball effect – the acquaintance with the process and successful outcomes of mediations might incentivize legal counsels as well as parties to choose mediation in other cases in the future (Coltsaki, Haralambidou, 2021).

For the future institutionalization of mediation, further adaptations will be necessary in order to include the Public Sector, adjusting the relevant legislative requirements for its involvement (Mastroperrou, Anestis, 2020).

In view of the signs of a new economic crisis, the inclusion of banking issues (especially concerning debts from loans and credit cards) into the casuistry might be of critical importance.

Additionally, after the sudden corona-induced boost of digitalization in Greece, online-mediation is about to become a tool especially suitable for the mandatory initial mediation session due to its hybrid character.

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The Singapore Convention Moves ...

Nadja Alexander

1. The Singapore Convention Moves ...

The Singapore Convention (United Nations Commission on International Trade Law [UNCITRAL], 2018, annex) has the potential to *move* mediation into mainstream international dispute resolution practice. As it does so, it will generate movement in the fields of international arbitration and litigation, for example, through the increased use of mediation windows in arbitration procedures. Beyond this, the flow of trade and investment is likely to be influenced by shifts in dispute resolution practices as they increasingly embrace mediation.

With this contribution to the *Mediation Moves* volume, I offer a glimpse into the idea behind the Singapore Convention and the system of recognition and enforcement of international mediated settlement agreements that it offers. My comments are based on my participation in UNCITRAL Working Group II discussions and related policy-advising roles. But first, a few words on the current state of mediation play.

Prior to the entry into force of the Singapore Convention, empirical evidence confirmed the widespread perception that the practice of international mediation would increase with the introduction of a multilateral treaty on recognition and enforcement of mediated outcomes (Strong, 2016, p. 2031). Further, statistics from a number of international surveys indicate an increasing use of mediation windows in international arbitration practice[1] (Alexander et al., 2020, para 9.1.1; Queen Mary University of London & White & Case, 2021, p. 5). Although the use of international commercial mediation – unsurprisingly – falls behind that of international arbitration and litigation, when combined with the use of mediation win-

1 For example, the SIDRA International Dispute Resolution Survey 2020 revealed that from 2016 to 2018, more respondents used hybrid mechanisms involving a combination of mediation and arbitration (27%) compared to standalone mediation (26%), while the Queen Mary-White & Case International Arbitration Survey 2021 revealed a noticeable increase in the overall popularity of arbitration used in conjunction with alternative dispute resolution mechanisms including mediation, with 50% of respondents expressing their preference for this combination in 2021, as opposed to 49% in 2018 and only 34% in 2015.

dows, it has been shown – perhaps surprisingly – to equal, or even surpass, the level at which international commercial litigation is employed (Alexander et al., 2020, para 9.1.1). Therefore, when examining international mediation practice, it is important to consider the use of mediation not only as a standalone process but also as a part of mixed mode procedures. It seems that where dispute resolution users lack confidence in mediation due to its lack of direct enforcement mechanisms, they may turn to mixed mode procedures featuring mediation and arbitration. Collectively, the aforementioned empirical findings suggest that a significant number of international dispute resolution users lack confidence in mediation as a standalone process; however they would likely embrace standalone mediation if it had the benefit of a direct enforcement mechanism – something like the New York Convention for Foreign Arbitral Awards (1958). Enter, the Singapore Convention on Mediation.

2. What's the Big Idea?

The Singapore Convention on Mediation (UNCITRAL, 2018)[2] is a multilateral treaty which offers a legal framework to facilitate the circulation of international mediated settlement agreements (iMSAs) across national and other territorial borders. The Singapore Convention achieves this by elevating iMSAs to the status of a new type of legal instrument recognised in international law: neither a contract nor a consent arbitral award, iMSAs that fall within the scope of and that satisfy the conditions within the Singapore Convention enjoy this unique status. As outlined below, the new Convention establishes a system for the recognition and enforcement of commercial iMSAs.

The Singapore Convention promises to leave a significant impact on international dispute resolution practices and, beyond that, on trade and investment flows (Sussman, 2018, p. 53). It has the capacity to enhance the attractiveness of mediation within regional initiatives, such as the Belt and Road Initiative (The World Bank, 2018),[3] and to support the regulatory ro-

2 A detailed treatment of the Singapore Convention can be found in Alexander & Chong (2019).

3 According to the World Bank, the Belt and Road Initiative (BRI) is an effort initiated by China to improve regional cooperation and connectivity between continents. It endeavours to build robust infrastructure, trade and investment ties between China and at least 70 other countries which, together, account for over one-third of world trade and GDP and over 60% of the world's population.

bustness of crossborder online dispute resolution (ODR) initiatives.[4] All this will, in turn, enhance access to justice and the efficacy of dispute resolution for users across borders. From a user perspective, the Singapore Convention offers a risk management mechanism accessible in terms of its flexibility and affordability to cross-border business players, whether they are multi-national corporations, publicly listed corporations, traditional incorporated limited entities, sole traders, or start-ups.

3. How Does It Work?

With its 16 articles, the drafters of the Singapore Convention intended to create a minimalist and efficient framework for the recognition and enforcement of iMSAs internationally. Here, I present a summary of how the Convention's direct enforcement mechanism works.[5] I then outline five points of compromise that underpin the Convention which are essential to understanding its formulation.

In most cases, once parties have reached an iMSA, they comply with their obligations. Where this is not the case, the Convention offers to parties of iMSAs that fall within its scope (Article 1) the possibility to proceed to a relevant court of a State to seek relief (Article 3). The party seeking relief will file an application before that court and submit as evidence the iMSA containing parties' signatures and an attestation by the mediator or mediation institution that the settlement resulted from mediation (Article 4).[6] Provided the iMSA does not fall foul of any the grounds for refusal defined in Article 5, it will be directly enforced. Alternatively, issues resolved and contained in the iMSA may be raised as a complete defence to the commencement of litigation or arbitral proceedings where parties seek to contest issues already resolved and contained in the iMSA. Key to the direct en-

4 See, for example, the APEC Draft Collaborative Framework for Online Dispute Resolution of Cross-Border E-Commerce Business to Business Disputes (2018), a proposed APEC-wide ODR framework that is set to provide access to commercial justice for micro, small and medium enterprises (MSMEs) in cross-border B2B disputes. APEC is the Asia Pacific Economic Council. ODR is discussed in the commentary to Art. 2(2).

5 Here it is assumed that the state at which enforcement is sought has not lodged an Art. 8(1)(b) reservation, requiring parties who endeavour to enforce their iMSAs under the Singapore Convention to opt in to its applicability if it is brought to its competent authorities for enforcement.

6 Article 4 further provides that other forms of suitable evidence may be submitted in the absence of the mediator's signature on the iMSA or an attestation by the mediator or mediation institution that the settlement agreement resulted from mediation.

forcement method is that there is no requirement for an iMSA to undergo a review process at the place where it was concluded (the State of origin). In other words, there is no »seat« of mediation in the sense that there is a »seat« of arbitration. Court review in terms of the Convention only occurs in the State of enforcement.

4. Five Points Key to Understanding the Convention

Five key issues were negotiated during what has become known as the »Breakthrough Session« of Working Group II (WG II). First, while members of WG II were generally aligned in relation to the enforcement of iMSAs, there were divergent views on the use of the term »recognition« in relation to iMSAs being used as a defence to legal or arbitral proceedings on the same issues. Much of the debate centred on the meaning of the term »recognition« in different legal systems. The solution reached by WG II was to avoid the use of the term »recognition« altogether and instead describe it in a functional manner.[7]

Next, there was much debate about the extent to which iMSAs enforceable as court judgments or consent arbitral awards ought to be included in a possible convention or model law. Certain WG II members sought to exclude iMSAs already subject to expedited enforcement opportunities through existing multilateral treaties, such as the Hague Convention on Choice of Court Agreements and the New York Convention on Arbitration. Other members of WG II considered that any potential overlap would simply provide parties seeking relief with greater choices in terms of the number of enforcement mechanisms available to them, and that not excluding these types of iMSAs would not lead to any inconsistency with existing treaties. Eventually, the argument for exclusion prevailed.[8]

The third contentious issue related to the degree of consent required of parties to an iMSA to trigger the applicability of a multilateral convention or model law. In line with the New York Convention, one view was that the application of the proposed convention should be mandatory regardless of parties' choice, as this would minimise potential disputes between parties about the applicable enforcement regime. It would also lead to more widespread application of the proposed convention and thereby align with its object and purpose to encourage the use of international commercial

7 See the commentary to Article 3 in Alexander & Chong (2019) for a detailed discussion on the extent and basis of the compromise.

8 See the commentary to Article 1(3) in in Alexander & Chong (2019) for a detailed discussion on the exclusions.

mediation. Proponents of the other view argued that parties to an iMSA ought to have a choice about the applicability of the proposed convention – the opt-in approach. In the final compromise, both opt-in and opt-out approaches were accommodated. The default regime of the Convention adopts an opt-out approach, so that parties to an iMSA may expressly opt-out of the enforceability regime under the Convention (see Article 5(1)(d)). At the same time, States preferring an opt-in regime may declare a reservation to this effect in accordance with Article 8(1)(b) with the effect that parties to an iMSA must expressly opt-in to the Convention for its terms to apply.

The fourth compromise point relates to the grounds for refusal of relief in relation to an iMSA brought to a relevant competent authority for enforcement. WG II agreed to identify an exhaustive and limited list of grounds for refusal that would be permissive in nature, meaning that courts may choose to provide enforcement relief despite the fact that an Article 5 defence has been proven. Further, the defences would be broadly worded to accommodate diverse interpretations in different legal systems. There was, however, considerable disagreement in relation to the mediator misconduct defences in Articles 5(1)(e) and 5(1)(f). These provisions focus on the impact of a mediator's conduct on the resulting iMSA. One view was that these issues were adequately covered by other defences, such as the »null and void« defence (Article 5(1)(b)(i)) and the public policy defence (Article 5(2)), and were therefore unnecessary. Furthermore, it was felt by some that the inclusion of these defences would encourage additional disputes related to mediator conduct. However, the prevailing view was that the mediator-related defences were worthwhile as they drew attention to the critical importance of ethical mediation practice and provided a review mechanism to protect parties. The compromise involved framing these two defences narrowly, and also setting a very high bar[9] to prove either of them.

Finally, the form of the instrument to be drafted to address enforcement of iMSAs was the source of some debate. Some delegations were in favour of a model law as they considered it more suitable for states with less developed mediation systems; others considered that a multilateral convention would more effectively and efficiently serve to facilitate the international circulation of iMSAs and promote the use of cross-border commercial mediation. The compromise was a first in UNCITRAL's history, with the Working Group electing to move forward with the parallel drafting of a convention (which became the Singapore Convention), as well as a model

9 For example, a causal link between the mediator's conduct and the decision by at least one party to enter into the iMSA must be established.

law which would amend the 2002 Model Law on Conciliation. Both instruments were prepared to be complementary with each other.

Understanding the five issues of compromise achieved during its drafting helps us better appreciate the overall function of the Singapore Convention.

5. What Happens After the Ink Has Dried?

What happens, therefore, after the ink has dried on the paper of this new Convention? There remains much work to be done by professional mediation and dispute resolution communities internationally. Legal practitioners will need to adapt their practices to numerous issues that the terms of the Convention raise. For example, there are likely to be conflicting jurisdictional approaches (and potential satellite litigation) in relation to whether or not certain iMSAs meet the requirements of the consent arbitral award exception in Article 1(3)(b), which would effectively exclude an iMSA from the scope of the Convention. A similar issue may arise in relation to iMSAs enforceable as court orders as defined in Article 1(3)(b) given that different national practices have developed. This will have implications for the drafting of dispute resolution clauses and court-related mediation policy. Some commentators, especially arbitrators familiar with principles such as the seat of arbitration and reciprocity in international arbitration, may be concerned with the absence of a seat of mediation and the absence of reciprocity that follows – although it is hard to see how this would impede the technical legal operation of the Convention. As with all new international treaties, there will be teething problems as courts, lawyers, mediators and other dispute resolution professionals familiarize themselves with the Convention and its implications. There will be disputes on interpretation on a range of provisions including the Article 5 grounds of refusal; courts in some jurisdictions may struggle because of a lack of familiarity with international commercial mediation. There is a real risk that less-developed mediation jurisdictions will adopt the more familiar litigation and arbitration lenses to interpret the provisions of Singapore Convention if professional mediation communities fail to step up to the challenges of implementing it in practice. For these reasons it is vital to pay attention to what happens next.

The Singapore Convention is likely to encourage states to develop their regulatory and institutional capacity to serve as an international hub for the mediation of commercial disputes. Developing capacity for international mediation practice requires engagement that goes beyond the minimalist requirements of becoming a State or party to the Singapore Convention. It could, for instance, involve consultation with the professional mediation

community and other stakeholders to further develop institutional mediation in a coordinated manner. Attention would wisely be directed towards reviewing and clarifying norms and standards for mediator credentialing and ethical practice, especially given the focus of Articles 5(1)(e) and 5(1)(f) of the Singapore Convention on mediator (mis)conduct as grounds for refusal of relief. In addition, States desiring to enact comprehensive mediation legislation may look to the UNCITRAL Model Law on Mediation (UNCITRAL, n. d.) for inspiration. Other considerations include the establishment of institutional frameworks for mediation service providers, professional mediator associations, and the development of mediation infrastructure including the appropriate integration of technology into mediation services, specifically in respect to online dispute resolution platforms as anticipated by the Singapore Convention (Alexander, 2020).

6. A New York Convention for Mediation?

So, now the international mediation community has its very own »New York Convention« – an international treaty that promises to *move* mediation onto the global map and change the landscape of international dispute resolution. But as the previous section suggests, this is just the beginning. The New York Convention has been in force for more than 60 years, and continues to attract new signatories. Today, it has almost 170 state party signatories, but it is important to remember that it began with only 10 ratifying States. By comparison, 46 States signed the Singapore Convention at the opening ceremony in August 2019, and at the time of writing the number is over 50. The Convention came into force six months after the third ratification in September 2020. So it is off to a flying start and will certainly lend to cross-border mediation practice the regulatory robustness, visibility and credibility needed for it to become a long-term player in the international dispute resolution arena. At the same time, experience with the New York Convention caveats against the expectation that this will occur overnight.

Looking forward, the Singapore Convention represents the dawn of a new era. It is an invitation to *move* the culture of dispute resolution and, with it, business practices at an international level.

Author Note

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Section 2
Mediation Moves ... into Society

Mediation and Revolutions: The Case Study of Ukraine

Tetiana Kyselova

1. Introduction

The paradox of mediation – its apparent ideological attractiveness and low practical use – has long been the central issues in mediation research (Imperati & Maser, 2014; McEwen & Milburn, 1993; Monahan, 2008). Although mediation in the US and EU countries has been claimed to result in an »ADR revolution« that has substantially reshaped court systems and reformed the attitudes to conflict, this revolution turned out to be limited to the upper class of legal elites without permeating wider society (Macfarlane, 2002). Wider masses of population, even in the most advanced ADR countries like the US or Italy, do not use mediation on a regular basis in considerable numbers (De Palo et al., 2014). Furthermore, mediation, as a social movement, may be co-opted by the state that manipulates it to cure ills of its court system and to keep the court loads low (Coy & Hedeen, 2005; Mironi, 2014). The connection of mediation to the court system has been seen both as a problem and as a solution to the low use of mediation. The latter was, for example, put forward by De Palo in his forceful claim that »only mandatory consideration of mediation [through courts] can awake »sleeping beauty« of mediation« (De Palo & Canessa, 2014). This chapter suggests an alternative scenario of boosting mediation through wider societal engagement, by taking it out of court box and restraining courts' control over mediation. The aim of the paper is to offer some hypothesis as to whether and under what conditions this can be possible.

The chapter answers this question based on the case-study of Ukraine – the country where mediation has been brought in early 90-ies, at the same time as to the most places in Europe. And similarly to the many other places, mediation largely remained a »sleeping beauty« in terms of its use for around twenty years. This led some experts to conclude that mediation in Ukraine is a »ghostly phenomenon« that has been promoted by donors but failed to materialize into a functional system (Vasylyev, 2013). Yet, the year 2014 became a turning point in mediation development.

In winter 2013–2014 mass citizens protests in Kyiv – called Euromaidan Revolution – resulted in the change of government. In spring 2014, the

Ukrainian peninsula in the Black Sea – Crimea – was illegally annexed by the Russian Federation and two parts of the Eastern Ukrainian regions formed self-proclaimed unrecognized separatist entities, the so-called »Luhansk People's Republic«/»Donetsk People's Republic«. Around 8% of Ukrainian territory is currently not controlled by the Ukrainian government. Most researchers agree that without the external intervention of Russia to instigate, direct and support the uprising the armed conflict could not have happened (Malyarenko & Wolff, 2018; Wilson, 2016). The conflict has claimed more than 13,000 lives and caused the displacement of several million people. While two ceasefire agreements were signed in Minsk under mediation of the OSCE and high-power diplomacy in the Normandy format, they remain unimplemented and low intensity shelling continues from both sides.[1]

The Euromaidan Revolution and the armed conflict have dramatically influenced the life of Ukrainian people. After 2014 Ukraine has experienced a rise in civil society and volunteer activity not seen before (Burlyuk, Shapovalova, & Zarembo, 2017). Dubrovskiy and his colleagues have also demonstrated that Euromaidan Revolution has resulted in five other societal changes: reorientation of the Ukrainian economy away from Russia and cementing of fundamental geopolitical choice towards Europe; strengthening the system of political checks and balances due to constitutional processes and decentralization; change of societal cleavages from traditional ethno-linguistic to class factors; formation of national identities within a notion of political nation; increased support to modernization coming from civil society (Dubrovskiy et al., 2020).

These societal changes caused by the Euromaidan Revolution have apparently also influenced mediation growth discussed by this chapter. Although the causal link between Euromaidan Revolution and the war, on the one hand, and growth of mediation after 2014, on the other hand, is not possible to establish with the data obtained in this study and more research is required, this study relies on the intuitive responses by the interviewees suggesting that some link exists. As put by one of the interviewees: »Something happened to Ukrainian society after 2014 and to mediation as well, but we do not quite know what«.[2]

Provided there is a link, the question addressed in this chapter is how this link can be explained. The post-2014 rise of mediation cannot be explained

1 More detailed explanations of the root causes and drivers of the conflict depend heavily on the respective narrative of the conflict (e. g. official Ukrainian, official Russian, geopolitical) (Lazarenko, 2018).

2 Interview with Ukrainian mediator, Kyiv, December 13, 2019.

by conventional factors that boosted mediation in other countries such as adoption of the law on mediation (up until August 2021 the law has not been adopted) or large grants from international donors (which was also not the case in Ukraine) (Kyselova, 2017a). This study suggests a preliminary hypothesis that three factors have contributed to the post-2014 rise of mediation and dialogue in Ukraine: (1) the organic fit between values of mediation and the 2014 Euromaidan Revolution; (2) inability of the court system to co-opt mediation in Ukraine; (3) maturity of mediation leadership and their internalization of the »agents of change« ideology.

In terms of methodology, this chapter relied on the findings of the qualitative study on impediments to mediation and dialogue in Ukraine, which was conducted by the author in 2016–2017 in Kyiv, Odesa, Lviv and Kramatorsk and consisted of five focus-group discussions, and 63 in-depths interviews with mediators, dialogue facilitators, lawyers, judges, local and central government officials, business people and civil society activists (Kyselova, 2017b, 2018a). Nine follow-up interviews were conducted with Ukrainian mediators and dialogue facilitators in Kyiv and Odesa in 2019. Where possible, empirical data is triangulated with the secondary sources – academic literature and data from Internet. Methodological limitations suggest that conclusions resulting from this highly qualitative empirical work should be treated as hypothesis for further investigation rather than definitive conclusions.

The chapter is structured as follows: Following the introduction, it starts with exploration of the post-2014 landscape of mediation in Ukraine and the strategies to strengthen social cohesion and to promote individual responsibility, social activism and participatory democracy through mediation and dialogue. The second part of the chapter analyses societal conditions that made such rise possible. First, it looks at the values that underpin mediation development in Ukraine and compare them to the values of the Euromaidan Revolution. Second, it analyses relationship between mediation and courts. Third, it explores the quantitative and qualitative characteristics of professional mediation community and their ideological orientations. Concluding chapter summarizes the arguments and suggests that although mediation on its own does not seem to be able to transform societies, it might still hold a potential to contribute to development of post-totalitarian countries provided local mediators, civil society and international donor community think more broadly and creatively and encompass the logic of mediation as a societal tool rather than just a supplement to courts.

2. Rise of Mediation and Dialogue after 2014: Social Activism beyond Courts

The post-2014 rise of mediation in Ukraine proved itself in multiple ways: increased demand for training, mediation services, institutionalization, and regulation and self-regulation of mediation. Just a few facts:

- The number of trainees for various mediation and negotiation programs increased several times after 2014;[3]
- National associations of mediators were registered after 2014;[4]
- Most mediation providers were established after 2014.[5]
- All nation-wide regulatory documents of the professional community were developed after 2014;[6]
- All master and certificate programs in mediation came into being at Ukrainian Universities after 2014;[7]

3 According to the President of the Ukrainian Mediation Center, the Center has trained around 1,000 people in various mediation and negotiation programs during 6 years (2008–2013) and around 6,000 during another six years (2014–2019) confirming 6-fold rise in demand for mediation training after 2014. Other interviewees also confirmed the increase in several times. Interviews with Ukrainian mediators, Kyiv, October 13, 2019: December 2019.

4 National Association of Mediators of Ukraine (NAMU) established in 2014, http://namu.com.ua/en/; League of Mediators of Ukraine – in 2017, http://limu.org.ua/en)

5 Among 17 mediation centers listed at the website of the National Association of Mediators of Ukraine, 14 were established after 2014, http://namu.com.ua/en/partners/

6 Code of Ethics (2017), http://namu.com.ua/en/info/mediators/ethical-code/, Dialogue Standards: Definition and Principles (2018), https://drive.google.com/file/d/1JN3QRE8EXU5D1FvY3Go1H19ZvRNHNxAo/view; Founding Principles for Basic Mediation Training (2019), http://namu.com.ua/ua/info/mediators/sfrsvrk-iafaey-ravarrya-baisvyp-ravynap-pyeekakhsua/

7 Master in Conflict Settlement and Mediation at Kyiv Polytechnyk University (2017), https://fsp.kpi.ua/ua/nova-spetsializatsiya-vregulyuvannya-konfliktiv-ta-mediatsiya-spetsialnist-054-sotsiologiya/ Certificate and Master Programs »Professional Mediation« at Chernivtsi National University (2018), https://www.facebook.com/profi.mediation.chnu/; Master in Mediation and Conflict Management at private business school KROK (2019), https://bs.krok.edu.ua/magistr-z-mediaciji-ta-menedzhmentu-konfliktiv/; Mediation Certificate Program at National Law University, Kharkiv (2018), https://www.facebook.com/mediation.nlu/

– Since 2015 three national mediation forums are being conducted annually in Kyiv, Odesa and Lviv;[8]
– Professionally facilitated dialogues in Ukraine boomed after 2014, with at least 157 dialogue processes identified and monitored by research (Kyselova, 2018b, 2019).

In terms of institutional layout, mediation became a part of the post-Euromaidan legal reforms and has materialized in the Presidential strategy of court reforms and several other policy documents recommending to develop mediation as a part of Alternative Dispute Resolution.[9] In 2016, constitutional amendments made mandatory pre-trial dispute resolution possible including mandatory mediation.[10] 2017 innovations in the civil, commercial and administrative procedural codes introduced a pre-trial settlement procedure by judges, and the possibility to get 50% cash back of the court filing fee in case parties have reached a settlement.[11] In August 2019 Ukraine has signed (although not ratified yet) the Singapore Convention on the International Mediated Settlement Agreements.[12]

Furthermore, and perhaps most importantly, since 2014 Ukrainian mediators embarked on the agenda of promoting mediation through the strategies of social activism akin to the strategies of civil society movements. Two specific strategies have been identified by this study – mediation as a

8 OSCE National Dialogue Forum, Kyiv/Odesa, https://www.osce.org/project-coordinator-in-ukraine/400829?download=true, Lviv Mediation Forum http://mediation.lviv.ua/forum/, Mediation and Law Forum, Odesa http://mediation.ua/ru/post/1424

9 Decree No. 276/2015 of the President of Ukraine of 20 May 2015 »Strategy of reform of court system, court procedures and related legal institutions in 2015–2020«, accessed January 15, 2020, http://zakon4.rada.gov.ua/laws/show/276/2015; Resolution of the Cabinet of Ministers of Ukraine No 418-p of 27 May 2015 »On approval of the Plan of priority actions of the government of Ukraine for 2016«, accessed January 15, 2020, https://zakon.rada.gov.ua/laws/show/418-2016-%D1%E2%80%89%80/paran6#n9

10 Article 124 of the Constitution of Ukraine, accessed January 15, 2020, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

11 Procedural innovations were inter alia motivated by the desire of Ukrainian government to increase its rating in the World Business »Doing Business« ranking. See, Decree No. 1406-p of the Cabinet of Ministers of Ukraine of 16 December 2015 »Action plan on implementation of the best practices of the World Bank Group rating "Doing Business«, accessed January 15, 2020, http://zakon1.rada.gov.ua/laws/show/1406-2015-%D1%80

12 Ukraine is among 46 signatories to the Singapore Convention, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

volunteering and a social service; and dialogue as a tool of peacebuilding and social transformation.

The rise in the volunteering activity is generally a new feature of the post-Euromaidan Ukrainian civil society (Worschech, 2017). An example of specific volunteer activism was suggested by an interviewee referring to community family mediation project initiated by the Ukrainian Mediation Center, National Association of Mediators and implemented by the League of Mediators of Ukraine.[13] Since 2017 family mediators have launched a pilot scheme at the Kyiv Departments of Services in the Matters of Children in six districts of Kyiv. The group of around 30 certified mediators – mostly lawyers and psychologists – work as volunteers and offer mediation services in urban communities to divorcing couples in disputes regarding parenting and visitation rights and other family matters. In 2019 they were able to mediate 366 cases with 391 hours of mediated sessions. The project has developed a sophisticated referral scheme connecting state agencies and volunteer mediators. It also seeks to ensure highest quality of mediation services and invests a lot into continuous professional training of its members including regular group and individual supervision of mediators. The most important aspect of the project is that mediation services are offered to people *pro bono* and volunteer mediators do not get paid, spending each from 10 to 20 hours per week for this activity. Nor were they supported by any international or national donor agency. For the fourth year, family mediators are able to rely on their internal resources and civic activism to initiate such a well-institutionalized and structured mediation program.

More than being just a voluntary project, family mediation initiative has resulted in institutional changes – mediators have set up a working group with the Ministry of Social Policy to develop the State Standard of Mediation as a Social Service that was passed by the Order of the Ministry in 2017, allowing for volunteers to legitimately offer mediation services to disadvantaged groups of population as *pro bono* or paid by the state.[14]

Apart from increased volunteer activity in providing mediation as a social service to population, Euromaidan Revolution and armed conflict in Eastern Ukraine have coincided with increased activism of Ukrainian mediators in socio-political sphere through dialogue movement. On-going armed conflict triggered demand in mediation and dialogue of socio-po-

13 Interview with Ukrainian mediator, Kyiv, December 23, 2019.

14 Order No. 892 of the Ministry of Social Policy of Ukraine of 17 August 2016 »State Standard of Mediation as a Social Service«, accessed January 15, 2020, http://zakon2.rada.gov.ua/laws/show/z1243-16

litical conflicts in the conflict-affected areas of the country as a part of the peacebuilding and reconciliation efforts. In 2018 Mediation and Dialogue Research Center at Kyiv-Mohyla University has identified 157 dialogue processes conducted during 2014–2018 by 66 organizations all over Ukraine and abroad (Kyselova, 2018b). These dialogues were mostly held at the local community level by Ukrainian civil society organizations and supported by international donor community. The topics for dialogues ranged from reconciliation, historical memory, identities and future of Ukraine, to more »technical« topics of decentralization, health care and education reform, everyday problems of local communities, integration of internally displaced persons and war veterans into local communities, Human Rights and rights of minorities, etc. (ibid.).

Most importantly, dialogue has found its way to institutional recognition by the government much faster than mediation. In the first years of the armed conflict in the East of Ukraine (2015–2016) international organizations pushed Ukrainian government to recognize and legitimize dialogue. For example, Ukraine Recovery and Peacebuilding Assessment by the UN, EU and the World Bank recommended Ukrainian government and civil society actors to promote social cohesion and a culture of tolerance through dialogue and civic participation.[15] From 2016 onwards, these aims were reflected in the policy documents of the Ukrainian government, including commitments to support people-to-people dialogue with the territories not controlled by the Ukrainian government in the East of the country (cross-contact-line dialogue).[16] Due to the support by the OSCE Project Coordinator in Ukraine (OSCE PCU), dialogue and conflict resolution skills have been integrated into the training curriculum of civil servants.[17] OSCE PCU helped to connect dialogue facilitators to the governmental agencies in order to design and facilitate tailor-made dialogue processes with the aim to resolve

15 UN/EU/World Bank »Ukraine Recovery and Peacebuilding Assessment«, accessed January 15, 2020, http://www.un.org.ua/en/publications-and-reports/un-in-ukraine-publications/3738-ukraine-recovery-and-peacebuilding-plan-volume-2

16 Ministry of Temporary Occupied Territories of Ukraine, Action Plan of 11 January 2017, accessed January 15, 2020, http://zakon2.rada.gov.ua/laws/show/8-2017-%D1%80; Ministry of Temporary Occupied Territories of Ukraine, State Target Program of December 13, 2017 on Recovery and Peacebuilding in Eastern Regions of Ukraine, accessed January 15, 2020, http://zakon3.rada.gov.ua/laws/show/1071-2017-%D0%BF; Cabinet of Ministers of Ukraine, National Action Plan »On implementation of UN Resolution 1325 Women, Peace and Security«, accessed January 15, 2020, http:// zakon2.rada.gov.ua/laws/show/113-2016-%D1%80/print1493904687523518#n11

17 See for example, on-line training course »Mediation and Dialogue Skills for Public Servants«, https://courses.ed-era.com/courses/course-v1:OSCE_EDER-A+Med_101+2020/about

conflicts inside the agencies or engage civil society into decision-making processes.[18] Several permanent local dialogue platforms in various fields – from peacebuilding and reconciliation to local conflict resolution and prevention – have been established after 2014 and successfully function.[19]

Thus, after 2014 Euromaidan Revolution and the eruption of the armed conflict in the East of Ukraine, mediation has experienced a rise which was connected neither to courts nor legislative or donor support. This development took a very distinct path of »civic activization« of mediation by triggering voluntary *pro bono* projects of mediators and expanding the use of mediation and dialogue into communities, public deliberation and government spheres beyond resolution of inter-personal disputes.

3. Explaining the Rise of Mediation in the Aftermath of the Euromaidan Revolution

3.1. Match of Basic Values between Mediation and Euromaidan Revolution

Mediation as a professional practice and social institution worldwide still has not attained a uniform and universal understanding of its core values and philosophies. Heated debates go around fairness and efficiency in mediation and transformative potential of mediation (De Girolamo, 2019; Hyman & Love, 2002; Noce, 2002; Nolan-Haley, 2018; Welsh, 2001). Community mediation programs that were in the heart of mediation movement in the US, were seen to be capable of producing positive societal changes beyond personal transformation of disputants to achieve »community empowerment, the creation of a new sense of community through self-governance or neighborhood control, decentralized judicial decision-making, and the substitution of community members for professional dispute resolvers« (Harrington & Merry, 1988, p. 716). Publication of the »Promise of Mediation« book by Bush and Folger in 1994 and their advocacy for the transformative mediation as a distinct model (Bush & Folger, 2004) have triggered fierce debates on the viability of the model and the ability of mediation to impact general population beyond limited effect on the immediate disputants, let alone to trigger societal changes at the structural level (Menkel-Meadow, 1995; Milner, 1996).

18 https://www.osce.org/project-coordinator-in-ukraine/400829

19 See for example, Initiative »Donbas Dialogue« https://www.donbassdialog.org.ua, »Women Initiatives for Peace in Donbas« http://ideizmin.com.ua/en/projects/pidstorinka-dva/, Geo-Information System of Monitoring, Analysis, Assessment and Resolution of Conflicts, UNDP, https://dialog-ua.org/

Despite disagreement, most authors agree on the two sets of basic intrinsic values of mediation (Harrington & Merry, 1988). The first set underlies voluntary nature of mediation and empowerment, recognition and self-determination of the parties (Menkel-Meadow, 1995, p. 236) that »associates mediation with the values of individual consent, such as freedom from coercion and external authority« (Harrington & Merry, 1988, p. 718). According to Blaustone, the core values of mediation refer »to the self-actualization or self-determination of the individual; ownership or responsibility for her own actions; individual responsibility to understand the experience of the others in the dispute and to act in ways which acknowledge this previous understanding« (Blaustone, 1994, p. 259). In Fuller's words, the value of mediation is in its capacity to empower people – to reorient them »toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another« (Fuller, 1971, p. 325).

The second set of mediation values that originated in community mediation movement refers to mediation's capacity to increase »community participation and neighborhood self-governance [and] to evoke the sense of a cohesive community« that well connects to the values of democracy (Harrington & Merry, 1988, p. 718). In another field – deliberative democracy, mediation was argued to share its normative goals that according to Rosenberg include (1) the making of more effective and just policy decisions, (2) the building of more united communities that embrace group and individual differences, (3) the facilitating of more equal, caring and cooperative social relations, and (4) the fostering of greater levels of cognitive and social development of individual citizens (Rosenberg, 2007, p. 14–15). Thus, the major claims of community mediation, dialogues and other tools of deliberative democracy refer to formation of »better citizens« and enhancing their civic capacities (Pincock, 2011).

Both sets of values which are attributed to mediation – individual responsibility and civic activism – were also at the heart of the 2014 Euromaidan Revolution in Ukraine. The core ideas of mediation have connected very well to ideology of Euromaidan as a protest movement that relied on the »values of democracy, dignity (hence its other name of Euromaidan: the Revolution of Dignity), political rights and freedoms, as well as the growing awareness of individual civic responsibility« (Burlyuk, Shapovalova, & Zarembo, 2017, p. 3). During Euromaidan Revolution the call »for mobilization in order to make change happen« appealing to everyone's individual responsibility materialized in several slogans used by protesters (Musliu & Burlyuk, 2019, p. 645). Even when it became obvious that EU would not support Ukraine by opening up prospects of EU membership, Euromaidan pro-

testers still answered with ironical reference to the Ukrainians' own responsibility for their country – »If you want to Europe – lift up your ass [stand up and do something]« (Trach, 2016). Responsibility, dignity and awareness of own rights are precisely the values that some mediators, who gave interviews in this study, saw as needed for the post-Euromaidan Ukrainian society and capable of being promoted through mediation:

> The person needs to be very mature in order to be able to assume responsibility for own decisions. Ukrainians are not that mature yet. Most of them, I think, would prefer someone else to take a decision, even if it is bad for this person. At least, if it does not work, you can then blame the decision-maker. Yet, what is obvious, those people who bring their disputes to mediation and agree to mediate, they do take this responsibility. And those who do not – simply do not come to mediation.[20]

> Yes, Ukrainians are generally not ready to take up responsibility for their lives. They got used to transfer this responsibility to the government, to the judge or consultant. There is no culture of responsibility and ability to think and analyze independently. But if we continue to provide people with ready solutions, this culture will never be established. Therefore, in a wider view, we [mediators] are creating a new culture and new environment where mediation is able to give roots as an institution.[21]

Furthermore, mediation development in Ukraine contributed to the anti-Soviet discourse of the Euromaidan Revolution as it marked a clear departure from patrimonialism of the Soviet epoch. According to Musliu and Burlyuk many slogans and chants used by the Euromaidan protesters referred to the Soviet legacy as negative signifiers and »acted as binary opposites to chanted slogans in which the EU/Europe was a symbol of goodness« (Musliu & Burlyuk, 2019, pp. 640–641). In a similar way, Soviet legacy was seen as an obstacle to mediation, as exemplified by the following quote from the interview with the practicing mediator:

> Soviet regime has nearly eliminated all healthy energy in the society and wiped out the culture of dialogue and understanding. We, as mediators, still feel this legacy in people's desire to punish each other even at their own expense: »I am not going to get anything but let him go to jail.« We see the lack of understanding of the value of peace, good neighborhood, tolerance to others. Mediation helps to bring these values back.[22]

20 Interview with Ukrainian mediator, Lviv, June 10, 2016.

21 Interview with Ukrainian mediator, Kyiv, December 13, 2019.

22 Interview with Ukrainian mediator, Odesa, June 4, 2016.

Mediation was also seen as a completely new approach to resolution of conflicts in a post-totalitarian context. During the Soviet times, although some kind of private dispute resolution was allowed to corporate entities (mostly pre-trail procedures and arbitration), very few opportunities for non-violent third-party dispute resolution was permitted by the state to the citizens (Hendley, 2013; Kyselova, 2015; Nosyreva, 2003). The Soviet citizens had primarily two choices to resolve their conflicts – either self-help through informal negotiations or going to a court, with a gap in between. Mediation offers such a middle-range dispute resolution institution and a new set of interest-based cooperative techniques. Therefore, mediation, being perceived as a distinctively new phenomenon coming from the West,[23] is seen as an important tool of deliberative democracy that can contribute to uniting Ukrainians as a political nation and ultimately to democratic societal transformations.

Beyond the intrinsic values of mediation as a process, mediation has very well connected to overall Europeanization discourse and European aspirations of Ukraine which have become the catalysts of the Euromaidan protests and its consequences. According to Onuch, »Ukraine is Europe« was one of the most widely used slogan at Euromaidan and it did not refer to some particular formal relationship between Brussels and Kyiv but rather to »the desire to see Ukraine embrace ›European values‹... [such as] Human Rights safeguards, political stability, and the pursuit of a certain »quality of life« (Onuch, 2014, p. 48).

Although institutionalized mediation is a North American phenomenon which is relatively new at the European continent, public discourse of Ukrainian mediators in mass and social media has portrayed mediation as »an integral part of European culture« and as »an important European value« (Krupelnitsky, 2011). Indeed, European Union has recently promoted mediation and pushed for greater mediation use and integration within court system through its Directives and policies in civil, consumer, criminal and other areas (De Palo & Trevor, 2012). Furthermore, mediation was claimed to be explicitly recognized by the EU-Ukraine Association Agreement as a weapon against corruption and organized crimes (Vasylchak & Kutas, 2010). The following quote demonstrates how mediators use the discourse of Europeanization to persuade clients to mediate:

23 Although some antecedents of mediation could be found in Ukrainian rural communities or historical kozak self-governance, or even in the business practices during the Soviet times (Kyselova, 2015), currently mediation is being represented as a distinctively new phenomenon both by local Ukrainian and international mediators.

> Whether we want it or not, our country »goes« to Europe. When I was practicing and »selling myself« as a mediator I told people that mediation is a European practice. This is what they do in Europe. I often tell that people in Europe do not go to courts as soon as their dispute arises. Court is the last instance when you have already done everything else possible. Europeans do this – they sit at the negotiation table and try to get to the agreement. And when our people [Ukrainians] hear this, they resist: »no, she is insane, she won't want this; he does not believe in such things; if I suggest mediation he will say that I have conspired with a mediator«, and so on... But when you start propagate mediation through the prism of European approach, people often say »yes, interesting, let's give it a try«. We [mediators] should use this more strategic approach further.[24]

Such a myth of mediation as a »European practice« can be as utopian as other visions of Europe by the Euromaidan revolutionaries and reformers (Minakov, 2015), yet it is undeniable that this myth has helped Ukrainian mediators to elevate their status in the society and to promote the use of mediation by general population. Thus, mediation has fit organically the post-Euromaidan ideologies of Ukraine with its emphasis on individual responsibility for changes in own country, enhanced civic activism and public participation, anti-Soviet sentiments, ideology of European integration and peacebuilding.

3.2. Mediation Untied to Courts: Defending Mediation from Co-optation

As argued elsewhere, the major challenge of Ukrainian mediation up until now has been the lack of political will on the part of the government and the courts to institutionalize mediation (Kyselova, 2017a). This has paradoxically assisted the formation of mediation by leaving it largely for the professional community of mediators to develop itself in harsh political and economic conditions.

Generally, the interest of the court system in mediation stems from the inefficiencies of the courts themselves. Where litigation is long and costly, mediation has more prospects to flourish. This was not the case in post-Soviet countries including Ukraine and Russia where in comparative perspective courts were quick and relatively cheap for population and hence not interested in mediation (Hendley, 2013; Kyselova, 2014).

Apart from structural reasons (Kyselova, 2017a, pp. 126–129), there were also the reasons of bad luck that a proverbial »Champion of mediation« within court system has not appeared in Ukraine. Although Ukrainian mediation organizations and international donors did reach some top officials and

24 Interview with Ukrainian family mediator, Kyiv, June 10, 2016.

judges through court mediation projects, political instability did not allow for the generation of strong and stable support. The judicial elite, who have been trained within the framework of the pilot mediation projects, have been many times reshuffled and those who remain in place are under severe pressure of anticorruption campaigns which complicate any mediation initiatives within courts (Kyselova, 2016). Although, since 1997 court mediation schemes were piloted in more than fifteen Ukrainian courts of general and administrative jurisdictions, neither of them have become a self-sustainable nation-wide endeavor after the donor funding had seized (Kyselova, 2016).

In the absence of strong support to mediation on the part of judges and politicians, at least before 2020, international donors and international organizations were reluctant to invest large amounts into mediation development. Instead, some of them (for example, USAID and OSCE) have chosen the strategy of small steps – modest grants on request of mediators and dialogue facilitators but in a consistent long-term manner (Kyselova, 2017a). Although such a strategy allowed for capacity-building and consolidation of mediators as professional community, it did not result in any major break-through in mediation development until recently.

The absence of the law on mediation has become one of the stumbling blocks in mediation development. Ukraine is likely to be the world champion in the number of draft laws on mediation attempted at the Parliament. Fourteen drafts of the law on mediation have been submitted to the Parliament since 2010 but neither of them passed through by the time of writing of this paper. What was initially seen as an achievement – signing Singapore Convention on the International Mediated Settlement Agreements in August 2019[25] – has stalled again at the Parliament that does not rush to ratify the Convention.

Moreover, the Parliament not only blocked the law on mediation on numerous occasions but attempted to actually co-opt it. One of the attempted raids was performed in summer 2019 when without any prior consultations several MP's have registered the draft law on mediation in the parliament (Kyselova, 2020). The draft was aimed to monopolize mediation for the gains of few and establish a kind of state licensing system for mediation. Ukrainian mediators were able to mobilize and to repeal the draft law. This episode was just one in the bigger struggle of Ukrainian mediators for the law on mediation that would not create any preferential treatment

25 Ukraine is among 46 signatories to the Singapore Convention, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

for anyone but will provide clear, transparent, decentralized, and fair rules for newly emerging mediation practice and profession based on self-regulation of the professional community. Perhaps the time is ripe now for greater judicial involvement into mediation when the new judges, infused with the »Euromaidan revolutionary consciousness« are coming to judicial system highlighting people empowerment and recognition as core values of mediation rather than its potential to clear court dockets and to bring profits for gate-keepers. However, after the many years of legislative experience, it is clear that the struggle over who controls mediation will still be as intense in 2020 as the preceding ten years.

3.3. Maturity of Mediation Community and Their Ideology of »Agents of Change«

While the match between values of mediation and revolution, and relative disinterest of the Ukrainian courts in mediation and consequently their inability to co-opt mediation are important factors, both were apparently present in the earlier 2004 Revolution (Orange Revolution) in Ukraine which nevertheless has not impacted development of mediation in any significant way. The difference between 2004 and 2014 revolutions with respect to mediation concerns the level of maturity of professional community of mediators.

Professional communities of mediators and dialogue facilitators were analyzed in details in two other studies (Kyselova, 2017b, 2018a) and as estimated, more than 3000 people were trained in mediation skills since mid-1990-s up until 2013. The Institute for Peace and Common Ground and Ukrainian Mediation Center at the Kyiv-Mohyla Business School have been established respectively in 2003 and 2008 and provided the strong institutional base for further mediation development.

Furthermore, apart from the quantity of mediators by 2014, their »quality« was also important. Ukrainian mediators are well-known for their ability to unite for common cause despite a lot of internal tensions and disagreements. While several top-down attempts of international donors to set up a national umbrella mediation organization failed, Ukrainian mediators were able to mobilize their internal resources and to establish such an association on their own in 2014. Since that time, National Association of Mediators of Ukraine (NAMU) works towards the goal of »development of mediation profession according to the best international practices«.[26] NAMU organizes annual mediation and facilitation congresses; develops standards of ethics and mediation training; drafts and lobbies for legisla-

26 National Association of Mediators of Ukraine, http://namu.com.ua/

tion on mediation in coordination with the members of the Ukrainian Parliament, Ministry of Justice, all levels of courts, Administration of the President of Ukraine, Ministry of Social Policy and other stakeholders.

Thus, Ukrainian mediators were rather successful in establishing a professional association in a truly collaborative, inclusive and participatory manner. They managed to resist the temptation to monopolize the emerging market. Despite obvious competition for shares of mediation market, several strong mediation NGOs and their leaders are working together in selected areas of common interest to promote mediation in Ukraine. They took a time to develop themselves as professional community independently of the international donors and now they are seen as powerful actors in the field who are able to stand for self-regulation of their profession.

Furthermore, based on the empirical data, mediation leadership seems to have internalized the values of mediation and took them further – to promote mediation as a tool of societal transformation.

Although ideologies of »service providers« (concerns towards professionalization of the field, drafting and lobbying for legislation, developing accreditation for training programs and professional standards) make the backbone of professional identities of Ukrainian mediators and dialogue facilitators (Kyselova, 2017b), 2014 Euromaidan Revolution and armed conflict in the East Ukraine have enhanced societal orientations of mediators in two ways.

First, those mediators, who work in traditional inter-personal family, business, organizational etc. mediation, began to be more sensitive towards societal matters and the role of mediation in society. Besides participation in volunteer mediation projects described above, many interviewees in this study as well as participants in the strategic planning sessions revealed that an ultimate goal of their mediation organizations was »raising a culture of peaceful conflict resolution in Ukraine« with self-sustainable mediation market as an effective vehicle for such a cultural shift.[27] Interviews in this study demonstrate that the motive to »help others« and »to contribute to societal change« prevailed over financial remuneration, although the latter was not completely excluded. The excerpt from the interviews with Ukrainian dialogue facilitators highlight this point:

> My motivation [to mediate and facilitate dialogues] is to help the parties, who are in a permanent or situational conflict with each other, to establish

27 Interview with Ukrainian mediator, Lviv, 10 June 2016. See also, Zvenyslava Novakivska, Rezultaty strategichnoyi sesiyi po planuvanniu rozvytku seredovyscha mediatoriv do 2020 [Results of the Strategic Session on Planning of Mediation Development 2020] (OSCE, 2017).

> understanding. Conflicting state is a state of serious emotional stress. These are emotions of aggression or fear that do not allow for effective brain activity which is required for anything new. This situation is a great setback for development of our society and economy. And this is also a handy situation for those who want to manipulate people in conflict for own advantages. Therefore, I became involved into mediation/dialogue community to help Ukraine start living under new standards and become more efficient in order that our children have better prospects.[28]

Second, after 2014 the new movement of dialogues in the context of peacebuilding was established and influenced mediation field by ideologies of »agents of change«. Detailed analysis of Ukrainian dialogue facilitators as a professional community is given elsewhere (Kyselova, 2017b). Here it suffices to say that dialogue facilitation movement is headed by the experienced Ukrainian mediators, who have been trained long before the 2014 crisis and were joined by a number of talented newcomers from the post-Euromaidan civil society. After 2014, they have been able to acquire new expertise of group facilitation and to regularly facilitate dialogues on various topics in local communities affected by traumatic war experiences, problems of internal displacement, newly initiated decentralization reforms and many other challenges.

Although many dialogue facilitators started this activity as service providers hired by international organizations, later they were able to articulate their professional identity and ideology of societal transformation. According to the interviewees, this ideology manifested itself in their aspiration to transform Ukraine into a more peaceful and cooperative society which is capable to resolve all the problems through talks, search for mutual interests, trust and respect to all members of the society acknowledging diversity and differences among them. This is a clear ideology of professionals as »agents of change« that stretches beyond service provision and money-earning and aims at societal changes.

Dialogue facilitators suggested that in order to achieve meaningful societal changes, they should play a more active role in civil society initiatives, beyond just rendering services of dialogue facilitation. According to the interviewee, Odesa Regional Mediation Group has come up with Odesa Model of Dialogue that apart from traditional roles of facilitators – third-parties who facilitate meetings – also included multiplicators who are responsible for networking within local community; analysts who monitor situation on the ground and give a signal to initiate a dialogue when they »smell the smoke«; organizers who take care of logistics; and experts who offer expert

28 Interview with Ukrainian dialogue facilitator, Lviv, June 11, 2016.

advice during the dialogue sessions.[29] This approach allows dialogue facilitators to act as agents of societal change – to initiate dialogue processes and to make independent choices as to what community problem requires their intervention and in what way, as well as to help to support grassroot civil society initiatives resulting from facilitated dialogues.[30]

Finally, summarizing their understanding of the value of dialogue, Ukrainian dialogue facilitators have developed the Standards of Dialogue where they stated that dialogue is unique because »it allows for the inclusion of civil society and different groups of people in the process of social change at all levels – from resolving conflicts in the community to implementing reforms at the national level or conducting peace negotiations between states« (Standards of Dialogue, 2018, p. 4).

Thus, this study suggests that the maturity and societal orientation as »agents of change« were important, if not decisive, factors contributing to the rise of mediation and dialogue after 2014. Civic activism and political action of established professions is not unknown, with the movement of »cause lawyering« in the US being the most prominent example. Yet, civil rights or cause lawyers who »commit themselves and their legal skills to furthering a vision of the good society« remain within the profession albeit as its deviant part (Sarat & Scheingold, 1998, p. 3). In contrast, dual nature of mediation in Ukraine – as an emerging profession and as a part of civil society – allowed mediators to perform as civil society actors.

Majority of interviewed mediators and dialogue facilitators in this study were lawyers, psychologists or other established professionals. This gives some ground to suggest that mediation in Ukraine turned out to be a convenient space for civic activism of middle-class, relatively well-off, established professionals with high social status like lawyers and psychologists. While these groups of population are less likely to resort to direct political actions or join traditional civil society in street political protests, interviewed mediators in this study confirmed the idea that mediation serves as a safe forum to express their political views, their discontent with the corruption and inefficiencies of the court system, and to channel their energy to the projects of societal importance.

29 Presentation of the Odesa Dialogue Model, https://www.youtube.com/watch?v=Y-fe4404dH8

30 Interview with the Head of Odesa Regional Mediation Group, Kyiv, 3 August, 2019.

4. Conclusion

This chapter focused on mediation in the context of revolutionary events and outbreak of violence in Ukraine and aimed to answer the question whether such events are capable to boost development of mediation and under what conditions.

In answering this question based on the empirical data from interviews and focus-groups, the chapter unraveled the puzzle of post-2014 mediation rise in Ukraine which was connected neither to mediation law nor to donor or court support, but – as suggested by this study – might originate in the fundamental societal change prompted by the 2014 Euromaidan Revolution and armed conflict in the East of Ukraine. The chapter analyzed the current strategies of Ukrainian mediators that may be regarded as social activism – convening projects in *pro bono* mediation and facilitated dialogues in order to strengthen social cohesion and transform structural foundations of the society; to promote individual responsibility, social activism and participatory democracy in Ukraine.

The study has identified three explanations for these post-2014 strategies which are neither definitive nor exclusive but rather serve as hypothesis for further research into their nature and interrelationship. The first factor refers to the organic match between values of mediation and the Euromaidan Revolution such as the emphasis on individual empowerment, responsibility for own life and civic participation; rejection of the Soviet nostalgy; and embracing of European values. The second factor – relative disinterest of the Ukrainian courts in mediation and consequently their inability to co-opt mediation. And the third factor – the maturity of mediation community and their willingness to embrace values of mediation and the Euromaidan Revolution to become the agents of societal change.

This chapter suggests that mediation and dialogue may have a cumulative transformative effect at the society, outside legal system, provided the goal of mediation is untied from the court system and expanded to include mediation as a tool of societal transformation. The excessive focus on the court mediation by international donors in developing countries may isolate mediation from society and hamper its potential societal impact. This study suggests that local mediators, civil society and international donor community need to think more creatively – »out of the box« – and encompass the logic of mediation as a societal tool rather than just a supplement to courts. As a wider implication, the study suggests that the full-fledged mediation development in Ukraine needed a fundamental change of societal context which was brought by the 2014 Euromaidan Revolution and the armed conflict in the East of the country. It may be the case that for mediation to flourish, the society must be »ripe« in terms of

the number of people bearing values of individual responsibility, civic activism and participatory democracy. Ukrainian Euromaidan Revolution of 2014 gave such an impulse that triggered, *inter alia,* the development of mediation in many areas of societal life – from business and family disputes to community dialogues and political peace processes. This hypothesis requires further research to investigate the impact of mediation and dialogue at various levels of society.

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Mediation in Conflicts of Nature Conservation and Energy Transition

Bettina Knothe

1. Mediation in Conflicts of Nature Conservation and Energy Transition

In Germany, many regions are pooling their strengths to bring renewable energy to the fore. Municipalities and operators increasingly adopt technologies to produce »green electricity«. Civil society actors are committed to stand up for saving energy and using renewable energy as well.

More and more professional operators, cities and municipal administrations and civil society actors decide to start early dialogues in planning or approval procedures. In addition, these actors are ready to include professional conflict managers in their project management to guarantee a good quality of cooperation and process design. Notwithstanding many conflicts exist about the planning and implementation of renewable energy power plants on local and regional level.

2. Conflict in Energy Transition – Why People Resist Renewable Energies at the Local Level

Land destruction and loss of species are the main conflict topics in the realisation of renewable energy on local level. In many cases, civil society stakeholders question whether spatial planning guarantees that the local ecosystem is capable of coping with the construction of renewable energy plants and whether it can be guaranteed that protected (animal) species are not endangered.

However, conflict issues can differ considerably depending on the chosen energy source and technology as well as the given natural environment. Wind energy plants carry the risk of colliding with birds of prey and bats with rotor blades. Moreover, they affect the animals' habitats and affect the appearance of the landscape. Solar energy systems change the habitats of animal and plant species massively by covering the earth with large photovoltaic modules. Conflicts about biogas plants arise in relation to odour nuisance, noise and the increased impact on road and commercial routes

through trucks which deliver the fermentation material. In the case of hydropower, conflicts are often connected with the protection of the local fish populations or with a dispute about the determination of the minimum amount of water flow that stabilize the water ecosystem.

Landscape in special is a controversial topic for all renewable energy sources. Main conflict points are (a) height and number of wind turbines and photovoltaic systems that claim much environmental space, (b) the »maizeing« of the landscape through intensive cultivation of maize as preferably used energy crop and (c) power lines that cut through the landscape.

There are also many individual reasons to be against technical systems and infrastructure for renewable energies. For example, there is the fear of possible health effects from sound emissions and shadows cast by wind turbines. Concerns about the value of one's own property in the neighbourhood of wind farms, unequal distribution of financial benefits from lease payments between local stakeholders and the lack of regional participation in the operation of a plant or wind farm fuel local conflicts additionally.

It is difficult to guarantee common state of information on planned projects that is satisfactory for all publicly involved actors. Citizens often have no or only few experiences with formalised procedures and deadlines for objections in local participation processes? Whereas nature conservation NGO's are usually well positioned at this point and make very qualified contributions, residents sometimes first hear about a project shortly before the excavator starts rolling.

The feeling of not being involved in decision-making processes at an early stage or not having received information early enough in considerably many cases challenge the dialogue between residents, project promoters and administrations.

3. Conflict Consultancy at the Competence Centre for Nature Conservation and Energy Transition (KNE)

Professional and civil society actors in the field of nature conservation and energy transition have three strategies to avoid conflicts or de-escalate already emotionally challenging situations: (1) They can balance different interests and views from the start. This requires questions, concerns, criticisms and concerns of civil society actors and residents to be recognized and taken seriously. (2) Stakeholders create mutually agreed rules, for example for processing, evaluating, and dealing with expert data in the context of the approval processes. Professional actors acknowledge the need to provide civil society actors with comprehensive information and to give

them the chance to understand the relevant legal provisions. (3) All actors actively negotiate and arrange conditions for participation in the planning process and work out strategies for local and regional responsibility in running the power plants.

The Competence Centre for Nature Conservation and Energy Transition (KNE) contributes to mitigate and resolve conflicts at local level. The KNE was commissioned by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) in July 2016. As an independent and neutral organization, the KNE offers support to all players in energy transition and nature protection.

The KNE provides consultancy and conflict management on all political levels – local, regional, and federal. It takes all actor's interests and aims into consideration and install negotiation processes with equal discussion rights for all involved stakeholders. Over the past four years, the KNE has contributed to the de-escalation of conflicts in the implementation of energy transition measures at various levels. This was the case, for example, in negotiations between mayors, residents, project promoters, local and municipal councils in the context of wind energy planning, photovoltaic and biogas projects (see also example below).

4. KNE Mediators pool

Experience from the successful implementation of renewable energy shows that professional coaching, moderation, and mediation can help to resolve conflicts. Fifty-two professionally active mediators in all regions of Germany are available nationwide for moderation and mediation in the conflict area of nature conservation and energy transition. They are all part of the KNE Mediator Pool. Both, the department of conflict consultancy inside the KNE and the KNE Mediator Pool contribute extraordinarily to the transformation of energy supply services and utilities for a sustainable energy transition process.

5. Practical Example

At the beginning of a request KNE carries out an initial consultation with the inquiring partner to settle the order and undertake a first conflict analysis. Often, a moderated exchange meeting on site follows. It serves to clarify interests and objectives with the key actors and to plan next steps for a conflict mediation. KNE mediators then take over the lead for the subsequent moderation and dialogue process.

The following example is about a municipality that is confronted with the planning of three wind turbines. The administration is faced with the decision to conduct and purchase a local development plan or to conclude an urban development contract with a project promoter. The decision is to be taken at the upcoming local council and municipal council meetings. The mayor fears open conflicts between supporters and opponents of the construction of the turbines and assigned the KNE to mediate between the conflict parties.

The residents of the community are divided. Opponents mostly fear that the wind turbines will interfere with nature and landscape, as well as increase noise pollution. They believe that too many wind turbines have already been installed in the local environment. In contrast, other residents benefit from the planned plant construction through the sale of land. They therefore support the planning. The mayor tells, opponents are upset but discussion and dialogue are still possible.

The following figure documents the moderation process led by the KNE.

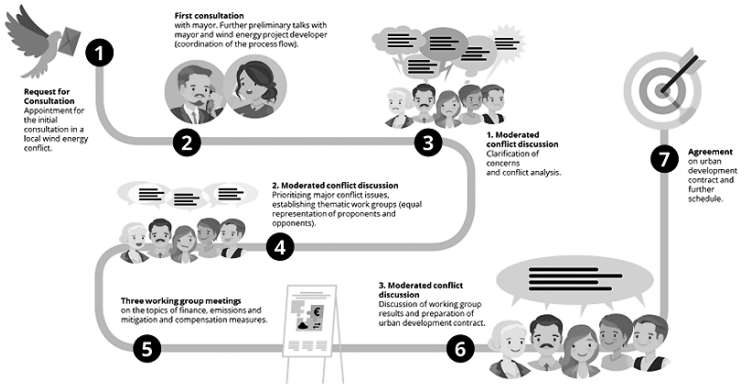


Figure 1 ® KNE: *Conflict Resolution Process in Wind Energy Planning on Local Level*

During the process KNE mediators used needs-orientated and solution-focused methods to enable a constructive dialogue between the parties at conflict. Several approaches have been successful.

1. At the beginning of the first session, all participants had the opportunity to present their perspective arguments openly and without inter-

ruption. This gradually created a spirit of trust between the stakeholders.

2. The neutral KNE mediators used techniques from the field of mediation such as mirroring, doubling, asking and inquiries. This fostered an understanding of the respective concerns of the conflict parties and gradually contributed to the concrete clarification of possible solutions.
3. During the process, three joint working groups were formed on the most important issues of conflict, which were finance, emissions as well as mitigation and compensation measures. During this phase, the residents took independent responsibility for the conduction of the working groups as well as the communication with the municipality and the project executing organisation.

During the third and last moderated conflict discussion, the municipal representatives decided in agreement with the residents to conclude an urban development contract with the project executing organisation. The parties agreed on the core content of the treaty. For this purpose, ecological mitigation and compensation measures, a measurement of noise nuisance and financial compensation for the municipality were defined. In addition, the parties agreed on a timetable for the further implementation of the project.

6. Quality Management

Conflict situations and stakeholder groups are very special in every project. Accordingly, each consultation and moderation are unique under their respective conditions. To give mediators a good insight into conflicts and conflict management in the policy field of nature conservation and energy transition, they have been trained in a special further training program (see below). Moreover, they can exchange and supervise each other in a collegial manner up to twice time a year in face-to-face meetings.

7. KNE Advanced Training Programme, Mediation in Nature Conservation and Energy Transition (2017–2019)

In cooperation with the Institute for Conflict Management at the European University Viadrina, the KNE initiated a further development training for mediation in nature conservation and energy transition. In this advanced training, fifty-two professionally active mediators were trained for conflict resolution in the field of nature conservation and energy transition. After having successfully completed the training the graduates were included into the KNE mediator pool. The further education offered knowl-

edge, skills, and competencies (a) to develop specific policy-field competence, (b) to become acquainted with the specific conflict issues in energy transition and (c) to deal with them methodically.

Learning topics included climate change, nature and species protection in Germany and the EU, political goals and measures for climate change and energy transition, the different roles of renewable energies, conflicting objectives between energy transition and nature and species protection, the importance of commitment and protest, as well as questions on attitudes and acceptance in the process of expanding renewable energies.

The training sensitized the mediators for fundamental issues and questions about energy transition conflicts. They learned how to identify relevant legal questions and how to obtain further information on a case-by-case basis. This included thematic topics such as planning and approval law, relevant local and regional authorities and responsibilities, information on regional-specific planning features as well as special information on the planning, construction, and operation of wind turbines. Acquired knowledge of the actor groups now enables the mediators to address them appropriately. In particular, the mediators have deeper insight into motivations and restrictions for dialogue and participation of specific actor groups. This competency supports them to assess and support actor specific decision-making processes in mediation and moderation. The participants know criteria for the composition of mediation groups and how to work with a system of delegates from the various stakeholders.

In the KNE advanced training course, the participants practised different dialogue methods, elaborated approaches to analyse thoroughly the conflict situation and developed strategies for appropriate conflict communication on local level. Other topics of the training were the integration of mediation into political decision-making processes, organizational and financial foundations of mediation in the public sector, order clarification, and conflict analysis.

During the training, the participants tested different methodological approaches for working with several and diverse participants and large groups. They identified communities and differences between mediation and moderation methodology, tested methods for the transfer of information between experts and laypersons, trained tools for visualization and securing results, carried out team co-mediation approaches, and learned about public relations and press work accompanying mediation processes.

8. Collegial Support and Professional Supervision – KNE Expert Forum Mediator Pool

The KNE offers KNE mediators the possibility to meet and exchange experience about their conflict work. During these meetings, the participants discuss performed moderation and mediation methods in energy conflicts, inform each other on the status of their activities with various stakeholder on regional and national level and agree on possibilities and conditions of cooperation on federal and regional level. They report on current issues at stake for municipalities, project promoters, associations, energy agencies and engaged citizens at local level. The participants of the KNE Expert Forum are committed to strengthen networking with all relevant stakeholders to meet local needs and demands for conflict resolution as early as possible. KNE mediators organise themselves in regional groups. They have set themselves two main goals (1) establishing a continuous mutual technical and collegial exchange and (2) making themselves available as regional contact persons for all professional and civil society actors in energy transition on local, regional and federal level.

9. Outlook: Dialogue in the Multi-level Policy Field of Energy Transition

What helps local actors finding ways to prevent conflicts at early stage or to encounter already escalated conflicts in the field of nature conservation and energy transition? First, it requires the active willingness of every stakeholder to consciously recognize and accept the (potentially) conflicting situation. In a second step, a democratic basis needs to be established to introduce strategies and ways to enter a dialogue or coming back to it. In a third step, it is promising to engage a neutral moderator/mediator for conflict resolution and facilitation of the negotiation process. A neutral moderator has the task of initiating a constructive and appreciative discussion atmosphere in recognition of all contrary positions existing on site. He or she should promote the willingness of the actors to talk to each other and support them to establish a space for constructive dialogue. This includes to balance emotionally escalated situations and step into an exchange of concerns and arguments (»face to face«).

Conflict resolution in the field of nature conservation and energy transition under the current environmental political circumstances rarely has the opportunity to conduct an open-ended decision about the »yes« or the »no« for the implementation of renewable energy technologies on local level. It is commonly agreed and part of the political agenda that renewable energy will play the major role for energy supply in the future. So,

in contrary, what conflict resolution in this field can offer, is to perform a space that make negotiation about ways *how* this outlook will be realised possible. Experience from KNE conflict advice shows that every conflict has the potential for a solution, provided the conflict parties are willing to approach each other.

ZoffOff for Free!

Free Neighbourhood Mediation – Unfair Competition?

Olav Berger, Imke Kerber
Translated and edited by *Ellen Birkhahn*

ZoffOff *(SpatOff)* is a pro bono mediation project in Berlin-Kreuzberg, offering general assistance in conflicts as well as neighbourhood mediation free of charge. Beneficiaries are individuals and institutions, who otherwise would not have had the opportunity as they lack the resources to afford fee-based services. Started off as a vague idea by a local pastor, ZoffOff quickly grew into an increasingly known and recognized project with over 200 trained mediators who offer their services on a voluntary basis. An important feature of ZoffOff as a community mediation project is that it also offers trained mediators the opportunity to put their skills to good use. This article introduces the project and addresses the question of whether such projects undermine the fee-based mediation market.

1. Community Mediation in the Neighbourhood

ZoffOff is a mediation project based in the middle of Kreuzberg, a vibrant multicultural quarter at the heart of Berlin. Qualified mediators volunteer to support individuals, associations, housing communities, school classes, teams and initiatives in constructively managing their conflicts. ZoffOff sees itself as non-profit hub for conflict resolution, welcoming everybody regardless of their belief systems, origins or any other attributes. Both, the project and the individual mediators involved, desire to tangibly contribute to a non-violent culture of resolving conflicts – in the neighbourhood and beyond. With its low-threshold approach, ZoffOff offers an easily accessible introduction to mediative conflict resolution and hence supports persons and institutions who cannot afford fee-based assistance. From the very beginning, ZoffOff's approach was designed in order to complement existing public and private citizen-oriented counselling services. It thus cooperates closely with relevant institutions, public bodies and civil society organizations like family counselling. With a pool of around 200 pro bono mediators meeting the training requirements according to the Ger-

man *»Regulation on Basic and Continuing Training of Certified Mediators«*[1], ZoffOff currently mediates about thirty cases per year, each in a tandem (a so called »co-mediation«).

2. How ZoffOff Started

The idea and rationale behind ZoffOff, developed by an open-minded local pastor and graduate of the master's program in mediation and conflict management at European University Viadrina Frankfurt (Oder), was as follows:

> *»While I was and still am constantly in demand as a facilitator, my fellow students only rarely drummed up cases. That's how the idea for ZoffOff came up: On the one hand, you have people with conflicts and a need for conflict resolution – on the other hand, you have trained conflict mediators willing to get going. Why not bring them together – (...) and create a win/win situation.«*

Following this rationale, ZoffOff offers co-mediation, meaning that the individual mediation teams at ZoffOff are always comprised of a *»senior mediator«*, i. e. mediators with practical experience from at least four mediations, and a *»junior mediator«* with less or no real-life mediation experience.

ZoffOff addresses multiple aims and audiences that can be described as an »external« and an »internal« perspective: In general (here understood as the »external« perspective), ZoffOff aims to publicly introduce mediation as a useful tool for conflict transformation while increasing awareness and »normalizing« conflicts within society. Specifically, ZoffOff addresses people and initiatives who can benefit from a free-of-charge and low-threshold-offer, allowing them to acknowledge a mediation service by donating according to their financial resources. In the sense of *»Why not give it a try?«*, people are invited to experience the benefits of mediation and conflict resolution. When satisfied, the mediation participants will be more likely to constructively handle conflicts in the future, to inspire or even encourage others to experience mediation themselves.

ZoffOff's internal perspective is to offer an opportunity of supervised practice in »real« cases for newly trained mediators, including (free) supervision and (in many cases free) advanced trainings. This offers the chance to gain practical experience to newcomers to the field of mediation, which – in most cases – is the strongest motivation to join the project in the first

1 Verordnung über die Aus- und Fortbildung von zertifizierten Mediatoren (ZMediatAusbV), BGBl. I p. 1994 et seqq, (2016).

place. Gradually – as a side effect – the criteria for the designation »certified mediator« (according to German law) can also be met.[2]

3. Excursus: Community Mediation and the Evaluation of the German Mediation Act

In July 2012, the German *»Act for the Promotion of Mediation and other Procedures of out-of-court Dispute Resolution«*[3] became law. It was crafted as an omnibus act which in its article 1 comprised the *»Mediation Act«*[4] as well as various changes to different procedural acts in its articles 2–8.[5]

In section 8 of the Mediation Act the German federal government was requested to report *»by 26 July 2017, [...], on the effects of this Act with regard to the development of mediation in Germany and on the situation of basic and continuing training of mediators«*. In July 2017 the federal government responded to this request with an evaluation report.[6] The commissioned research institute states the following in its executive summary:

1. *The number of mediations conducted is at a consistently low level. Most of the mediations are conducted by only a few mediators.*
2. *Conducting mediations offers little in terms of earning potential. Many mediators therefore also offer mediation trainings.*

However, pro bono mediation projects such as Berlin's ZoffOff or Munich's Stelle für Gemeinwesenmediation – SteG *(Center for Community Media-*

2 The label »certified mediator« is highly controversial among mediators, as the mediators issue their own certificate – the state does not monitor the advanced training or the adherence to the requirements stated in ZMediatAusbV. Additionally, there are only rather vague requirements for the institutions issuing the advanced training certificates in Sec. 5 ZMediatAusbV. The label itself is not, as it seems to the untrained eye, a chance to provide quality assurance. It could, if not taken very seriously by the mediators themselves, open the door to false labelling.

3 Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, BGBl. I p. 1577 et eqq. (2012).

4 Mediationsgesetz (MediationsG), BGBl. I S. 1577 et seqq. (2012).

5 Two extensive commentaries on this act are: Greger, R., Unberath, H. & Steffek, F. (Eds). (2016). *Recht der alternativen Konfliktlösung* (2nd ed). C. H. Beck and the more current Klowait, J. & Gläßer, U. (Eds.). (2018). *Mediationsgesetz Handkommentar* (2nd ed). Nomos.

6 Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren. (2017). http://dip21.bundestag.de/dip21/btd/18/131/1813178.pdf.

tion)[7] were not reviewed in the evaluation process. Only registered mediators belonging to the officially recognized German mediation associations were included in the study. Pro bono mediations and initiatives were not taken into consideration, even though they might be even be more common than offers on the fee-based market. Based on the figures, around 160 initial inquiries reach SteG per year and about 60 reach ZoffOff. Due to this obvious demand, it is questionable whether the »general stagnation of mediation« attested by the evaluation report is correct.

»Community mediation«, *»pro bono mediation«* and related terms cannot be found in the report at all. However, the authors of that report cannot and should not be blamed. The field of community mediation, which exists alongside the fee-based mediation market, is – at least in Germany – not easy to put into numbers. This is due to multiple reasons: Community mediators who volunteer in a project like ZoffOff are not listed publicly, statistical data about the number of mediations aren't accessible for outsiders and so forth.

The report also states that the federal government will take this evaluation as an opportunity to *»consider how the goal of promoting mediation that has been intended by the legislator of the Mediation Act can be better realized in the long term«*.

4. Field of Tension

The above-mentioned evaluation report on the German Mediation Act already illustrates the tension that arises between the fee-based mediation sector and the field of pro bono community mediation: In the fee-based sector, there are more trained mediators than actual requests for mediation. Some ZoffOff mediators even experienced first hand that the fee-based mediation market is critical towards non-for-profit engagement as offered by ZoffOff. Thus, in one case, a mediator who was about to start in a fee-based mediation position was asked to withdraw from a ZoffOff engagement. Even though this may be an individual case, it significantly highlights that the situation is perceived as competitive.

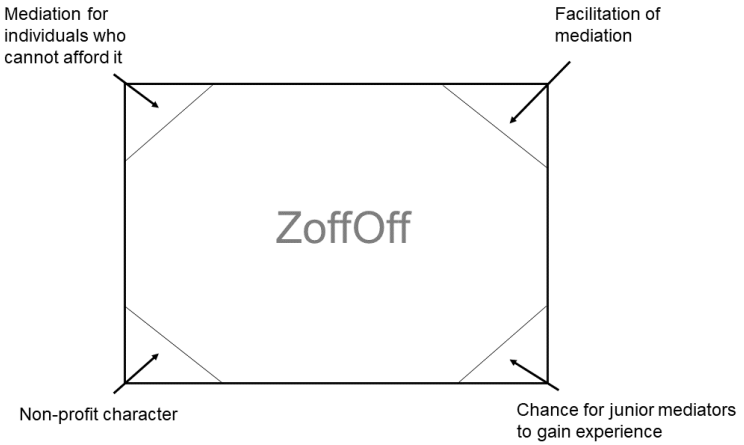
From the very beginning, ZoffOff was aware that tensions could arise and already acknowledged this issue in its guidelines: *»ZoffOff is a non-for-profit mediation offer on an honorary basis and does not serve the acquisi-*

7 Stadt München, Amt für Wohnen und Migration. (2021), *Stelle für Gemeinwesenmediation – SteG.* https://www.muenchen.de/rathaus/Stadtverwaltung/Sozialreferat/Wohnungsamt/steg.html.

tion of commercial mediation mandates for the honorary mediators working for ZoffOff or their respective organizations, offices, joint practices etc.«

In addition to this *»code of honour«*, further provisions have been added to ensure that both the offer and the target group addressed by ZoffOff in line with the non-for-profit status. For example, the guidelines clearly state that in the initial interview for a potential mediation, the financial background should be discussed in a sense of *»Does the assessed financial situation of the parties justify a free mediation by ZoffOff?«*

It is obvious that this is also an internal field of tension, as the following diagram – based on a case analysis model by Prof. Dr. Ulla Gläßer[8] – demonstrates:



The corners form the four basic elements of ZoffOff's key ideas. All four corners represent both guidelines or goals as well as possible challenges that limit ZoffOff's field of action (metaphorically speaking: dent the square). Changing one element by e. g. adopting a new guideline, would have an immediate – widening or denting – effect on the others. For example, *»If we introduce a credit assessment instead of the previous self-assessment (dent to the top left corner), we get fewer cases and thus offer less opportunity for practice (dent to the top and the bottom right corners), but avoid any questions with regard to our non-profit character (expanding the bottom left corner)«*.

8 The underlying model has been widely used in mediation supervision, but has not yet been published.

When taking the logic of this analysis model seriously and applying it to the top right corner, one could ask: »(How) could an increase of ›facilitation of mediation‹ (even) be achieved without denting the other three corners?«

These considerations illustrate that ZoffOff, like other community mediation projects, acknowledge the need to clearly separate themselves from the fee-based market while addressing this issue proactively. It is, however, questionable whether the tensions between both mediation markets can be fully resolved in the future.

5. Similarities and Differences to Commercial Offers

First of all, it should be noted that in the context of welfare, mediation is not an entirely unique or separate field. Similar, if not identical, discussions and demarcation attempts between commercial and pro bono offers exist in the fields of counselling, therapy, etc. as well.

In Germany, it is part of the state's provision of primary care (for children and adults) at the district youth welfare office to – under certain conditions – be able to use child and family counselling services free of charge. The same applies to the use of psychiatric services, for example in situations of crisis. These are institutionally offered services, flanked by many pro bono projects alongside commercial services. It is possible that the competition between commercial and pro bono providers in that context isn't worth mentioning because, at least at present, the (rather high) demand for therapy places in Germany is not met by the market of professional therapists – at least not in a timely manner.

In the field of mediation, there are many similarities to this phenomenon, but also essential differences, which are relevant to answer to the initial question of this article: *»Free neighbourhood mediation – a matter of unfair competition?«*

Common to both offers, the pro bono and fee-based ones, is the demand for quality. As mentioned above, ZoffOff demands that its mediators meet the training requirements of the ZMediatAusbV – and it additionally offers supervision and further trainings to ensure a high quality standard. ZoffOff's aspiration is quite clear: *»mediation«* should never be used to label a semi-professional offer. ZoffOff mediators have received the following feedback from clients after a first mediation session which speaks for itself: *»I'm both surprised and impressed by the quality, considering that this is free-of-charge«*.

The essential differences between a fee-based mediation and a ZoffOff mediation are:

- A ZoffOff mediation is limited to 5 sessions (90 minutes each), with an average of around 3 sessions.
- Mediation at ZoffOff is always conducted in a co-mediation team, consisting of a more and a less experienced mediator.
- At ZoffOff, the parties cannot choose the mediators themselves. All »case« inquiries are shared with the pool of mediators and assigned on the basis of the internal applications process and ZoffOff's criteria.

If inquiring parties consider themselves able to pay regular mediation fees, ZoffOff intake persons kindly recommend search portals or mediation associations to them, but never individual mediators. Rare exceptions are made only in cases where the inquirers can reasonably justify why a mediation needs to be conducted by ZoffOff (mediators), e. g. due to an established and trusting relationship with the project which opens a promising mediation opportunity that would not be considered otherwise. As in all other cases, the parties are encouraged to express their appreciation for the ZoffOff services by offering a (anonymous) donation after a mediation.

6. Are Payment and Appreciation (In-)Compatible?

The quote *»free of charge, but high in quality«*, as stated above, highlights another field of tension, namely how pro bono services can be adequately appreciated – so that the mediators providing it do not »sell themselves« short.

Justifiably, the fee-based mediation market takes a critical stand towards mediation on a pro bono basis. They fear that people/initiatives might prefer pro bono offers and will not consider fee-based mediation in the first place. At the same time, it is important that pro bono mediation is neither perceived nor presented as an offer with lower quality standards or less valuable than fee-based mediation. Irrespective of being offered on a fee-based or pro bono basis, mediation is a professional service and committing to it should be taken seriously either way.

ZoffOff mediators are as qualified as fee-based mediators. However, as they are investing spare time to offer mediations, their commitment is easily (mis-)perceived as semi-professional or as some kind of a hobby. Especially as ZoffOff mediators do not receive a formal (financial) acknowledgement of their work, a strong commitment by clients and some form of appreciation is important to uphold the motivation of ZoffOff mediators. With-

out creating pressure or requesting a specific sum, ZoffOff mediators encourage clients to express their appreciation e. g. by donating a (small) amount to the ZoffOff project (not the individual mediators). Both in the initial and the final mediation session, this issue is addressed in a respectful and sensitive manner, keeping the (limited financial) resources of the clients in mind. In one particular case, a client donated a 10 Euro bill accompanied by the convincing words *»Thank you very much, that's all I can do right now«*. In another case, the mediators suggested that appreciation could also been shown in a non-monetary fashion by e. g. playing live music at an upcoming ZoffOff event. Until now, ZoffOff mediators have never experienced freeloaders nor a lack of appreciation.

7. Unfair Competition and/or Beneficial Co-Existence?

Certainly, ZoffOff, as well as other pro bono mediation projects constitute competition for fee-based mediators. However, the honorary mediation offers are neither limiting nor replacing fee-based mediations. Other than in the economic sector, the mediation market(s) are not at »race« or »rivalry« with the consequences of displacement or exclusion.

From ZoffOff's perspective, pro bono mediation and fee-based mediation are two different entry points into the field of mediation, with gains and losses on both sides.

In a pro bono project like ZoffOff, mediators are quickly gaining practical experience, and they engage in activities beyond classic mediations while benefiting greatly from personal development opportunities (including the already mentioned supervision). For example, ZoffOff is organized around different working group that allow newcomers to engage with potential clients by taking over the responsibility of conducting the initial interview with clients before a mediation begins. Overall, ZoffOff offers an »entry point« and the opportunity to *»get going«*. However, ZoffOff mediators do not receive any financial reimbursement and have to invest a lot of personal resources (like time and motivation). Furthermore, ZoffOff's services are explicitly limited (see above) and are overall comparable to similar low-threshold public or private counselling services.

Once established as a mediator, fee-based mediation holds the – for some people essential – opportunity to make a living from this profession and to focus solely on this kind of work.

ZoffOff understands itself as an addition to fee-based mediation services. In other words: Would it help a quarrelling couple who are waiting for an appointment with the parental and family counselling services, if the lat-

ter refer them to a fee-based counselling or the mediation market which the couple could not afford? Is it not more sensible for counselling services to be able to refer this couple to other free offers in the neighbourhood?

On the rare occasion that ZoffOff accepts mediations that could theoretically be assigned to the fee-based market, it is done without the intention to compete. The objective is to seize the chance to promote mediation itself and thus to improve the mediation market in general.

ZoffOff mediation parties don't simply walk in the door by chance. Most of the time, they come due to recommendations of people who previously experienced mediation as a useful tool of conflict transformation themselves. As it has been shown in other countries, making mediation commonly known and demonstrating its potential will turn out to beneficial for the »fee-based market« as well – albeit in the long run. Replying bluntly to voices critical of pro bono mediation, one could argue that the professional and personal gain of mediators growing through projects like ZoffOff is greater than the potential risk of »losing« a few fee-based cases.

8. Conclusion

Pro bono, donation-based community mediation deserves and rightly claims its own space as a complementary offer to other free municipal and honorary services. This is especially true when the circle of addressees is described and limited in a transparent and criteria-oriented manner.

A quality assurance system based on the usual standards can ensure that no labelling fraud or dumping takes place under the label of *»mediation«*. This also ensures that the *»mediation brand«*, which is emerging according to the evaluation report on the German Mediation Act, will grow rather than wither.

As with the different schools and styles of mediation, the Aristotelian, more mechanistic framework of an *»either – or«* approach to the question of *»competition or cross-fertilisation«* falls short. Rather, the wisdom holds true: a field of flowers is only a wildflower meadow when different flowers bloom side by side. Sticking to the image of the wildflower meadow a little longer: community mediation can have a pollination effect.

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Section 3
Mediation Moves ... Organisational (Conflict) Culture

Moving Employment Mediation into the Gig Economy

Katarzyna Antolak-Szymanski

1. Introduction

Much has been written about the sharing or gig economy, where people share assets (a car, an apartment), or their labor on short term assignments (a gig), for compensation. It has often been described as »disruptive«, in a negative sense to older business models, and perhaps more positively for consumers. As anyone who has taken an Uber ride to the airport, or stayed at an Airbnb rental on vacation can attest, it is an increasing part of our lives. In the field of labor and employment law, the gig economy has indeed disrupted the longstanding and classic employee-employer work model (Sowers, 2019[1]; Garden, 2017[2]). Workers such as Uber drivers or those that deliver meals on bicycles or mopeds don't necessarily fit into this model; they have some characteristics of independent contractors, but also are controlled to some degree by the platforms on which they work, as a traditional employer might control them. It has even been suggested to create a new category of dependent worker, with some (but not all) of the rights of traditional employees (Carboni, 2016; Nadler, 2018; Directive on Transparent and Predictable Working Conditions in the European Union of 2019[3]). Apart of how these legal issues are solved as a matter of labor law, such gig workers also have regular disputes with their platforms/employers. These disputes may involve traditional employment-type issues such as money and scheduling, but also some new issues, such as disputes over »star« ratings and other consumer reviews. Moreover, since much of their work re-

1 »[G]ig economy worker classification« a prime example of disruption caused by new technology.

2 Noting the »disruptive potential of the gig economy.« For an overview of the legal questions involved, see generally the Spring 2016, Volume 37 issue of the Comparative Labor Law and Policy Journal, with articles by Jeremias Prassl and Martin Risak, Valerio De Stefano, Miriam Cherry and Antonio Aloisi.

3 The Directive on Transparent and Predictable Working Conditions in the European Union provides a broad definition of worker – not found in other employment law directives – that could encompass gig workers, and giving them certain rights.

lationship with the platform is online, they have a need to be able to effectively resolve these disputes in the same forum – online.

This article will propose a new model of mediation for workers in the gig economy. This model will address the issues and needs set forth above: 1) mediation as a means to resolve disputes over whether or not gig workers are employees, 2) ways to resolve issues through mediation, such as star ratings, that are specific to gig workers, in addition to more traditional workplace problems and 3) creating an effective online dispute mechanism for gig workers that is efficient, practical and accessible. There is a need for precisely such a new type of mediation model. Such a model offers a three-fold benefit: a decrease in litigation over gig workers' employment status; providing increased access to mediation of work disputes irrespective of whether or not a gig worker is an employee under national labor law; and a better tailored mediation system that fits the specific character of gig work.

Specifically, the article will first address the utility of using mediation in traditional labor and employment relationships. Next, distinctions between work in the gig economy and traditional employment will be analyzed, with an eye towards what might be borrowed from existing labor mediation practices and what must be changed. Finally, an outline of a new mediation model for gig workers will be presented.

2. Traditional Labor Relationships and Mediation

Mediation has a long history of being used as a means of resolving labor disputes. Originally, it was utilized by employers and labor unions to avoid or settle strikes. Recognizing the value of avoiding and ending costly strikes that could have a negative impact on economic (and even political) stability and public services (especially transportation), governments supported and even promoted the use of mediation in this sector. In the United States, this support eventually took the form of creating a special federal government agency – the Federal Mediation and Conciliation Service (FMCS) – designed to train and provide qualified mediators to resolve disputes between labor unions and employers (Barrett, 2016). Moreover, numerous countries, including the United States, Poland and Finland, enacted laws requiring unions and employers to attempt mediation before the union went out on strike (National Labor Relations Act, Section 8(d)(3), 2010; Act on Resolution of Collective Disputes of 1991; Ylhainen, 2017[4];

4 Explaining mandatory mediation in Finnish labor law.

Dal-Re, 2003[5]). These mandatory mediation laws have been quite successful. Many collective bargaining disputes have been settled before a strike became necessary, and even where strikes have taken place, their duration has been shortened through the use of mediation.

As labor unions have experienced a global decline since the 1980s (Hirsch, 2010[6]), there have been a rise in individual employment cases. Problems at work have not disappeared, but they have been dealt with more and more on an individual, rather than a collective, basis. At the same time, especially in the United States, there was a huge expansion of the use of mediation in civil cases. This growth was caused by many factors, but was accelerated by the introduction of the concept of the multi-door courthouse, which in turn ultimately led to the courts themselves directing or referring cases to mediation and arbitration where it would be more appropriate (Tindall & Smith, 2009[7]). The U. S. courts in particular found that individual employment cases were particularly amenable to settlement through mediation. By the 2000s, mediation in civil and commercial cases (including most labor cases) was being promoted by the European Union and its member states as well (Directive on certain aspects of mediation in civil and commercial matters of 2008).

Mediation was (and continues to be) effective in individual employment disputes, particularly those involving discrimination, for a number of reasons (Torregrossa, 2002). Historically, employment relationships were viewed as special, longer term commitments (Dolder, 2004). It made sense for both parties to repair a breakdown on their relationship caused by a misunderstanding or one time mistake through mediation, rather than risk a permanent breach in the courts. In other words, the employment relationship was worth saving, given its long-term value to both sides. Employment relationships also share some parallels to family matters, in that cases often involved breakdown in communications and highly charged emotional disputes. In both family and labor matters, mediation can prove to be especially effective in opening dialogues and working through the parties emotions, thereby leading to a settlement (Douglas & Maier, 1994). Finally, in employment discrimination matters, both sides share a concern to keep embarrassing details about the case confidential, which is one of the major benefits of mediation (Harkavy, 1999[8]).

5 Giving an overview in Europe.

6 Providing statistics on »the worldwide decline in union membership.«

7 Particularly stating that »In the past three-and-a-half decades, the quest for a multi-door courthouse has resulted in remarkable growth in ADR.«(Tindall & Smith, 2009, p. 687).

8 Noting advantages of confidentiality for the victim.

In the European Union, the fundamental legal principle that employees may not be discharged without cause makes it difficult to easily dissolve an employment relationship (European Charter of Fundamental Rights of the European Union, 2012[9]), contributes to the value of mediation as a means to working out difficulties that may arise between employees and employers. While the American employment at will doctrine, permitting employers to fire employees for any or no reason, provides no European-type general job protection, strict anti-discrimination laws (which are an exception to that doctrine) mean that mediation stills plays a valuable role in the employment context. In the United States, employers found liable for violating employment discrimination laws are subject to large monetary penalties, including both compensatory and punitive damages. Mediation becomes a form of risk management for the employer and employee: the employer has an incentive to pay a lesser amount in mediation to avoid the risk of an even larger award in court (coupled with high attorney's fees), and the employee should be motivated to take some kind of financial settlement rather than risk obtaining nothing at court.

Consequently, because of its effectiveness, U.S. courts routinely refer or send employment cases to mediation, where there is a relatively high rate of settlement (Torregrossa, 2002[10]; Lahav, 2018[11]; Kiernan, 2018[12]; Schatz, 2005[13]). Sometimes employers ask or even require employees to agree to mediation any employment related disputes as a condition of employment (Myers, 2014[14]), although in the U.S. arbitration clauses are more popular. A mediation clause can also be found in an arbitration agreement, however, as a prerequisite to moving the dispute forward in arbitration. Employers also may have their own internal mediation program (or broader alternative dispute resolution (ADR) program, including arbitration), where em-

9 Article 30 states that »very worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.«

10 »Experience has shown that cases involving employment discrimination ... are prime candidates for mediation.«; the highest number of cases settled under the Third Circuit's mediation program were employment discrimination claims, accounting for 22% of the whole (Torregrossa, 2002, p. 1069, 1079).

11 Noting that employment cases in the U.S. Federal District Court for the Southern District of New York are subject to mandatory mediation.

12 Explaining that 40% of employment cases and 65% of wage and hour claims were settled under the Southern District of New York's mandatory mediation program.

13 »Mediation is particularly appropriate in resolving disputes in the employment setting....« (Schatz, 2005, p. 111).

14 »Many employers mandate mediation for dispute resolution.« (Myers, 2014, p. 17).

ployees either have the option of or are required to bring their claims to mediation before pursuing them in the courts. One particularly notable internal employment mediation program is operated by the United States Postal Service, known as REDRESS, covering almost 800,000 employees and reporting very positive results (Bush, 2001). There have even been signs that American labor unions are attempting to promote the use of mediation of individual statutory employment claims through mediation provisions in collective bargaining agreements (Hodges, 2010).

3. Challenges Posed by the Gig Economy

3.1. Key Distinctions Between the Traditional Labor Model and Work Relationships in the Sharing Economy

The gig or sharing economy has been described as a paradigm shift in both business and employment relationships (Cunningham-Parmeter, 2019[15]; Zale, 2016[16]; Hanna, 2017[17]; Leader, 2019[18]; Oranburg, 2018[19]). It has been defined many different ways, but the sharing economy essentially involves a computer platform linking services provided by individuals to other consumers (Scott & Brown, 2017). These services often include or involve the use of property owned by an individual, such as their car (in the case of ride-sharing platforms) or even their house or apartment (let out on a short-term rental through a platform like Airbnb), and often the use of their labor (driving in the case of ride-sharing, otherwise delivering food for Ubereats or Grubhub, or work in completing various small tasks via the Amazon Mechanical Turk)(Scott & Brown, 2017[20]). In this sense the individual is sharing an unused or underutilized item owned by them (car, home, labor) for compensation, thereby monetizing that asset (Scott & Brown, 2017; Stemler, 2017a[21]). At a minimum, the platform links the supply and demand of these services through a computer application accessible on the internet

15 Raising the question whether it is a new labor paradigm.

16 Citing a paradigm shift in property relations.

17 Referencing a business paradigm shift.

18 Recognizing the need for a new paradigm.

19 Contending that labor law is a bad fit for the gig economy, and calling for a new paradigm.

20 Referencing shared access to underutilized goods and services, including the labor of underemployed individuals.

21 Restating one common premise of the sharing economy as the use of excess capacity (i. e., a car, an apartment) to become an entrepreneur, but going on to criticize that premise.

(Garden, 2017). Sometimes, the platform goes beyond this basic role by controlling the manner these services are provided and their prices as well.

In most cases, the platform does regulate the quality of services offered through a consumer rating system. Users of the platform can rate the quality of an Uber driver, Airbnb room or other service offered by giving more or less »stars« on a review. When the reviews are aggregated, it offers other users of the platform a sense of whether it is worth taking the service offered from that particular individual. Consistently poor reviews, as defined by the platform, can also be a basis for removing an individual from the platform (Kaltner, 2018[22]; Stemler, 2017b[23]).

In the employment context, the gig economy is even premised upon the idea that the individuals sharing their property, time and work are independent contractors and not traditional employees (Atmore, 2017[24]). Economically, this relieves the platforms of the burden of applying labor law to the individuals providing services. They no longer have the obligation of providing any type of job security, and avoid unionization, the payment of employment taxes and social benefits, and the application of many anti-discrimination, minimum wage and overtime laws and regulations (Atmore, 2017). On the other side, individuals work as much or as often as they want and in some respects (depending on the circumstances) act as their own boss (Lao, 2018[25]; Pasquale, 2016[26]). In this way providing a ride via Uber or a task on the Mechanical Turk could be considered a one-time gig instead of a traditional long term job.

To the extent that this premise is accepted and the gig economy expands, this would result in an ever-increasing shift of what were traditional jobs (subject to the protections and benefits of national labor law) to relatively unregulated independent contractor relationships. Importantly, as a question of national labor law, it is still unsettled whether or not an individual offering a service on a particular platform is an independent contractor or an employee of the platform. This issue is the subject of litigation

22 Explaining the star rating system used by Uber and Lyft, and examining its implications.

23 Outlining Uber and Airbnb's rating system, but also arguing the results are skewed towards a positive rating).

24 »Many scholars warn that employer status could financially destroy many gig companies and predict that the gig economy may cease to exist altogether under this classification.« (Atmore, 2017, p. 910–912).

25 »[G]ig economy workers particularly value the flexibility and control afforded them under this model and cite that as their major motivation for participating in the gig economy« (Lao, 2018, at p. 1575).

26 Recognizing this argument, but concluding this freedom is illusory.

throughout North America and Europe, and also of new legislation. Such legislation either essentially makes gig workers employees for purposes of labor law as in California in the U.S. (California Assembly Bill AB-5, 2020), or, while recognizing their non-employee status, offers them benefits long provided to traditional employees (such as the right to join a labor union, wage protection, and some job security).

3.2. Problems With Applying a Standard Labor Mediation Model to Gig Work

Many of the presumptions behind the success of mediation in cases between an employee and an employer are simply not present in the gig worker-platform relationship. Initially, there is a threshold legal question – as noted above – as to whether a gig worker is an independent contractor or an employee subject to national labor law. If this issue is in doubt, then it is difficult to know what legal rights vis-a-vis (and thus claims against) the platform a person has in the first place. As a result, the parties would have difficulty in agreeing on what topics could even be subject to mediation. This issue is mostly not present in traditional labor mediation: there may be a question of whether the employer is guilty of discrimination, but not whether or not the employer is subject to employment anti-discrimination law.

Even apart from this issue, there are other major distinctions between gig work and traditional employment that may detract from the effectiveness of mediation. One reason labor mediation works is that it is operating to preserve a long-term relationship between the parties. While the concept of life-time work has been eroding, in some sectors it still exists (such as public employment) and in any case employees and employers at least hope or expect that a work relationship will be for a longer term. Employers do not like high turn-over, and employees likewise prefer some stability to buy a house and otherwise plan their lives. In this environment, mediation can help the parties look past one unfavorable episode, resolve their differences and keep the employment relationship intact for the future. Gig work, by its very nature, is premised upon a different concept. An Uber driver in theory can work as much or as little as they want; they are »their own bosses.« Indeed, gig workers may perform work for various platforms at the same time, in different proportions as they see fit. Gig work may be incidental to another job they hold, or another business they operate, as a means of earning some supplemental income. In sum, the gig itself is not something meant to be continuous or necessarily for the long term. If both the platform and the gig worker are only thinking short term, this removes some of the motivation to settle a dispute in mediation on the basis of preserving a long-term relationship.

The emotional, »family-like« component of employment may also be absent between gig workers and platforms. A supervisor and employee spending years together in an office or other physical environment develop a personal relationship with one another. The breakdown of this relationship can lead to employment law problems, but these underlying relationship issues can often be solved by a skilled mediator. Such close personal relationships, however, may be absent in the sharing economy. Gig work is arranged electronically through the platform, and in-person contact between gig workers and platform administrators may be limited. Indeed, algorithms, rather than live managers, may make decisions to discontinue an individual from the platform (after, for example, a certain number of negative reviews) (Cunningham-Parmeter, 2019). The fact that the gig workers has a more impersonal relationship with the platform may reduce the ability of a mediator to solve a dispute by focusing on (and diffusing) emotionally charged interrelationship issues.

International aspects of some types of gig work may also pose obstacles in transposing traditional labor mediation models to the sharing economy. Individuals performing work for Amazon's Mechanical Turk or for Task Rabbit may be located in different countries than that in which the platform is based. This creates a problem in determining what state's law (and possibly labor law) applies, and, given the potential geographic distances involved, could make any in-person labor mediation process impracticable.

Finally, the risk management motivation for settling a case in gig worker mediation, while still present, is often reduced. In a traditional employment discrimination case, remedies ordered by a court may include reinstatement, lost wages, compensatory damages and (in the U.S.) punitive damages, all of which the employer has an incentive to avert by reaching a settlement in mediation. Most of these remedies, on the other hand, would not even be available to an aggrieved gig worker if they were considered an independent contractor instead of an employee. To have access to such relief, the gig worker would first have to go through the arduous process of proving he or she is an employee, and then further prove that he or she is entitled to damages under the applicable employment law. This two-step process makes it less likely that a platform would offer reasonable relief in a mediated settlement, since the gig worker's odds of success would be commensurately weaker than in a standard labor law case.

4. The Need for a Different Approach: New Methods for Mediating Work Disputes in the Gig Economy

4.1. Outlining a New Mediation Methodology for the Gig Economy

As noted above, traditional employment mediation is based on different assumptions than are present in the typical gig worker/platform dispute. Applying the standard labor mediation model to gig economy disputes in a one size fits all fashion will not necessarily produces similar successes. A new approach is needed that combines the best and most relevant aspects of employment mediation with different mediation strategies and methods more directly applicable to issues arising from gig work.

This approach takes into account four key elements: determining the types of gig work disputes that would be most susceptible to mediation, what style or approach to mediation would work best in this context, the increased use of online mediation in these kinds of cases, and the form of mediation agreements between gig workers and platforms.

4.2. Types of Work Disputes Subject to Mediation

For gig workers claiming benefits derived from labor law, in most cases (where the legal question has not yet been conclusively decided) a threshold issue is whether they are independent contractors or employees. Gig workers would only be eligible for employment law protections if they can prove that they are employees. This question is arguably an existential issue for the platforms, as – according to them – they argue that they would not be profitable if forced to provide benefits and tax payments required by labor law (Lao, 2018[27]; Kelly, 2020[28]). In other words, the platforms contend that they could no longer stay in business if they were forced to treat gig workers as employees rather than independent contractors. Given what is at stake for both sides, it is at first glance debatable whether mediation of this threshold dispute would be practical. That is, to the extent that the platform conceded one gig worker was an employee in a mediated settlement, it suggests a concession on this issue for all gig workers. The platform is unlikely to treat some gig workers as contractors and others as employees where they are doing identical work; it would be impractical to do so

27 »[F]itting gig economy work relationships into the employment classification could be an »existential threat« to online-intermediated work.« (Lao, 2018, p. 1581).

28 »Uber is facing an existential threat to its business model—California's newly enacted Assembly Bill 5 (AB5). Uber and other app-based technology companies that built their business models on the backs of independent contractors now need to quickly reinvent themselves.« (Kelly, 2020).

from an administrative perspective and the potential legal precedent could be harmful[29]. Consequently, if it were impossible to concede employee status in mediation, it would appear that there is no room for a mediated settlement and there is no point in mediating this issue in the first place.

Analyzing this issue more closely, however, mediating a gig worker's employee or independent contractor status would be beneficial. Certainly, there are many examples of cases (in labor law and other fields) that at first appear to be unresolvable but later are settled with the help of skilled mediator. Here, likewise, there are a range of options possible in mediation aside from one side winning or losing.

An indication of what may be possible is provided by the initial settlement reached in the *O'Connor v. Uber* California class action case, which turned on precisely the issue of whether Uber drivers were independent contractors or employees (O'Connor v. Uber, 2016). In that case, the drivers were seeking tips purportedly unlawfully retained by Uber, on call payments for time spent waiting for rides, and compensation for mileage (reimbursement for employees who use their own vehicles for work), damages to which they would be entitled if they were determined to be employees of Uber. Under the terms of the settlement, the drivers received certain financial compensation, and also non-economic relief. The non-economic terms included Uber agreeing to a support the formation of a driver's association that would help look after drivers' interests, create a kind of progressive discipline system where drivers were given warnings in most cases before they are deactivated from the platform, and provide drivers with additional information about how Uber's star rating system for drivers is calculated. In reaching the settlement, Uber did not concede that the drivers were employees (O'Connor v. Uber, 2016). Under the proposed deal, Uber therefore preserved its business model and the drivers received some allegedly lost compensation and, in some respect, a greater voice in important decisions made by Uber that impacted them (O'Connor v. Uber, 2016[30]).

On the other hand, there may be situations where under governing labor law the test for determining employee status clearly weighs in favor of either the gig worker or the platform. This may be often the case under the new California law which codifies a simplified »ABC« test which would result in most gig workers being classified as employees (California Assem-

29 Even if a settlement in mediation was confidential, the fact that the gig worker's status changed to that of an employee at some point – as an administrative and tax matter – would not be secret.

30 However, the settlement was ultimately rejected by the court as not providing enough relief to the drivers. (O'Connor v. Uber, 2016, p. *14–19).

bly Bill AB-5 of 2020; Dynamex v. Superior Court, 2018[31]), or where the platform really does function more like an employer rather than an intermediary computer application. In these situations, a settlement reached in mediation could result in the platform acknowledging that the gig worker is an employee, while compromising on the amount of damages involved to limit its financial exposure. Alternatively, the applicable law and facts may be conclusively in favor of the platform *not* being an employer. In such cases, while the gig worker may not obtain relief on this main issue, a mediator may assist the parties in crafting a negotiated settlement which gives the gig worker a greater voice or respect through non-economic terms, as in the proposed O'Connor settlement (O'Connor v Uber, 2016). Consequently, for all these reasons the key issue of employee or independent contractor status in gig economy cases should be subject to mediation, rather than excluded.

Whether or not gig workers are employees, they do have certain independent concerns connected to their use of the platform that directly affect their livelihood. Two major concerns involve their ratings on the app and (often relatedly) their deactivation from the platform. A gig worker with low customer ratings will at best have more and more difficulty in getting clients through the platform, and ultimately may lose access to the platform. The gig worker may dispute a particular review or reviews or challenge the manner in which the review was calculated. A related issue may be the portability of customer ratings from one platform to another, if the gig worker changes or works through more than one platform (Holloway, 2016[32]). With respect to deactivation, due to performance problems, lack of availability or any or even no reason, the potential harm to the gig worker is obvious. This is especially the case where an individual actually relies on gig work as their primary source of income, which is more and more a reality. The vision of gig work as exclusively a means to earn extra money no longer always rings true. In the case of Instagram, for example, influencers – people with significant followers on the app who earn income from product placement or endorsements – have attempted to form a union in large part to challenge Instagram's alleged pattern of arbitrarily removing them from the platform, with no right of appeal (Lorenz, 2019). Other practices that may be disputed include the methods for distribution of work and the receipt of assignments.

31 California Assembly Bill AB-5 codified the simplified test outlined by the California Supreme Court in *Dynamex v. Superior Court,* (2018).

32 Noting the fairness of allowing a gig worker to take »their reputation with them.« (Holloway, 2016, p. 332).

That these issues are of concern to gig workers is unremarkable. A somewhat more challenging proposition is whether disputes over these issues should be subject to mediation. If gig workers were employees, they would have a right to form a union and then address these matters directly through collective bargaining and ultimately resolve them in a labor contract. In the European Union, deactivation concerns could be addressed through the protection against unjust dismissal under EU labor law and the law of each member state (European Charter of Fundamental Rights of the European Union, 2012). Moreover, as employees, such disputes may be eligible for mediation under applicable national labor law or the terms of a collective bargaining agreement. However, as independent contractors, these protections would be largely absent. When a gig worker sings up to provide a service on a particular platform, he or she agrees to the platform's terms of service. This normally provides for the platforms complete authority over determining issues such as deactivation, customer reviews and work distribution. Therefore, there is probably no right for an independent contractor to legally challenge these questions.

However, whether or not there is an absolute right to bring a cause of action is a different question than whether mediation of these kind of disputes is desirable. For a number of reasons, mediation of these issues would offer many benefits to both sides.

First, from the perspective of the platform, to the extent mistakes have been made in calculating star ratings or making a deactivation decision, an incentive does exist for them to be corrected in a mediation process. Ignoring a disgruntled gig worker could lead to him or her filing a lawsuit challenging their status as an independent contractor, so that they could be reclassified as an employee and join a union as another way to protect their interests. Such a course of action would certainly pose risks for the platform. Not least among these would be a precedent setting decision upending their business model, simply because the platform did not correct a legitimate error regarding a review or deactivation. Second, taking a gig worker's point of view, absorbing considerable legal costs to fight a classification decision in court, which itself may be an uphill struggle from a legal perspective, in order to challenge a review or fight a deactivation, may not be a sound economic decision. If the problem could be resolved more informally and in a less expensive manner in mediation, this would also be to the advantage of the gig worker. Third, and finally, providing mediation would give gig workers the sense of having a larger voice in how the platform operates and therefore instill a greater sense of loyalty and even lead to more productivity. In mediation, an agreement is not required and the platform is free to insist on its rights to weed out poor performers with low customer ratings. There is only an institutional cost of time

and a relatively minor amount of money in paying for the costs of mediation in whole or in part. These costs are outweighed by giving gig workers a means to be heard and have a chance of correcting actual errors. Legions of disgruntled platform workers protesting may lead to corrective national or state legislation (see the example of California) and certainly does nothing to help public perceptions and ultimately the price of the platform's stock (Failinger, 2018[33]).

4.3. Styles of Mediation Appropriate to Gig Worker Disputes

There are diverse viewpoints on what style of mediation should be used in disputes between gig workers and platforms. One commentator has suggested evaluative mediation would be most fruitful in resolve these kinds of complex legal and factual disputes (Rubin, 2017). In evaluative mediation, the mediator gives an opinion on the parties' chances of success on the underlying legal action (Van Arsdale, 2015).[34] As noted earlier, the legal issue of whether a gig worker is an employee or not is a critical one, and either opens or closes the door on what other rights to which he or she may be entitled under national law. A mediator having a capacity to evaluate the strength of the parties' positions on this issue therefore seems reasonable. At the same time, the legal issue of whether someone is an employee or independent contractor in the gig economy is often murky and grey, without a clear answer. Therefore, a facilitative approach may also be called for. Other scholars have generally suggested facilitative mediation for dispute resolution systems in the sharing economy, although their focus was on smaller scale, community-oriented operations (Kulp & Kool, 2015). In facilitative mediation, the mediator acts to improve the communication between the parties to enable them to resolve the dispute themselves (Kulp & Kool, 2015). While there may be some limits on how far a facilitative ap-

33 Leaving the question of whether and how non-justiciable claims may be mediated exclusively to the platforms potentially creates the danger of a private mediation program that may be structurally unfair to the gig worker. Professor Marie A. Failinger, for example, argues that mediation of certain non-justiciable disputes should be court-connected (and furthermore, mandatory). (Failinger, 2014). The potential check against such unfairness is that a completely biased program will ultimately not be used by gig workers, and may cause further mistrust among them. An utterly biased program would create a contrary result – unhappy, litigious individuals – to the goals it was intended to achieve.

34 Some commentators take the position that evaluative mediation is an oxymoron and not mediation at all. Arguably, by making an evaluation on the merits of the case, the mediator loses her or his neutrality and becomes more akin to a decision maker. Others contend that some form of evaluation is an appropriate and even important component of the mediation process. See, e. g., Lowry (2000), for a summary of the debate.

proach may go where the mediation is conducted online (as recommended below), it still should have a place in these types of disputes, where the answer to the threshold legal question is not so clear.

Finally, where non-justiciable disputes are involved (i. e., when the gig worker lacks employee status and the applicable civil contract waives his or right to dispute any of the platforms work decisions), a transformative mediation approach may be warranted. In transformative mediation, the goal is to empower the parties, and allow them to recognize and trust each other. This, in turn, should help transform their relationship from conflict to one of cooperation and dialogue (Bush, 2001). Settlement may simply be a by-product of the transformation of their relationship. This style of mediation is used in the United States Postal Service's REDRESS employment mediation with some success (Bingham, et al., 2010). Its use in non-justiciable cases is logical, as an evaluative, legalistic approach would not lead anywhere – one side, the gig worker, would almost always come away with nothing (Failinger, 2014[35]). Once again, as with the use of facilitative mediation, transformative mediation does to a large extent rely on direct contact and interaction between the parties, which may be diminished somewhat if the mediation is held exclusively online. But this potential disadvantage would does not override its benefits.

4.4. A Special Emphasis on Online Dispute Resolution

Gig work has both similarities and differences with traditional labor, which makes it difficult to classify as a legal matter. However, certainly one specific characteristic is gig work's dominant online component. Work is assigned, distributed, evaluated and paid for via a computer application. Given this reality, mediation of gig worker disputes should likewise be mostly handled online. This would be more convenient for both the gig workers and the platform, as it is a medium both sides use and with which they are familiar (Albornoz & Martin, 2012[36]).

The concept of Online Dispute Resolution (ODR) is not new and its principles and features can be adopted for use in gig work mediation. The European Union's ODR Regulation (Regulation on online dispute resolution for consumer disputes of 2013) and Consumer ADR Directive (Directive on alternative dispute resolution for consumer disputes of 2013) outline the ba-

35 Advocating for the use of transformative mediation when mediating non-justiciable disputes.

36 »ODR is perfectly suitable for online claims; the dispute is dealt with in the same environment where the relationship was formed.« (Albornoz & Martin, 2012, p. 45).

sic characteristics that such a system should possess. The Consumer ADR Directive and the ODR Regulation were both the products of the European Union's ongoing efforts to promote the use of mediation among its member states. While a previous directive generally dealt with mediation in civil and commercial matters (Directive on certain aspects of mediation in civil and commercial matters of 2008) further legislation was necessary to address specific concerns raised by mediation (and other forms of ADR) in the consumer context. In particular, consumers were seen as being at a disadvantage vis-à-vis merchants in a typical ADR procedure. Merchants, because of their size and business sophistication, had institutional advantages in selecting a more favorably disposed mediator (for example), and could benefit from the repeat player advantage (i. e., an ADR professional has an incentive to act in a way that favors the merchant, who, with numerous ADR cases (thus a »repeat player«), has a greater potential to offer him or her repeat business than a consumer). The Consumer ADR Directive addresses these issues by creating special rules for the selection and qualification of ADR professionals and a system of transparency where consumers can easily see a given mediator's or arbitrator's background and experience. A further issue addressed by both the Consumer ADR Directive and especially the ODR Regulation is the possibility that a consumer in one member state may be quite geographically distant from the merchant from whom he or she purchased a product, which may be located in another member state 1000 or more kilometers away. This would make an in-person mediation process impracticable. In response, both the ODR Regulation created a uniform platform and basic rules for the use of ADR to resolve consumer-merchant disputes online. As outlined below, the Consumer ADR Directive and the ODR Regulation provide a useful template for how gig worker mediations should be handled.

A demand for mediation should be able to be filed online (Directive on alternative dispute resolution for consumer disputes of 2013, Article 5(2)(a) & (c)). Similarly, any forms or documents that are necessary to conduct the mediation should either be accessible online or be easily capable of being uploaded (Directive on alternative dispute resolution for consumer disputes of, Articles 8(a)[37] & 9(1)(a)[38]). Mediator biographies, including specific work history and expertise, should be posted electronically (Directive on alternative dispute resolution for consumer disputes of 2013, Article 7(1)[39]) and the mediator selection process should be capable of taking place online.

37 ADR procedure must be available and accessible online.

38 ADR entity must allow parties access to documents and evidence.

39 Biographical data of ADR personnel must be posted on website.

Moving beyond the procedures for organizing the mediation, in most cases the mediation itself should also be held online. It can be done through an online video conferencing system (such as Skype) or even through chats (Ebner & Zeleznikow, 2015[40]). Certainly, in a purely online system, the mediator would face some difficulties in ascertaining the parties' emotions, which is more difficult to do on a computer screen (Cunha, 2008[41]; Sela, 2018[42]). For similar reasons, from the parties' perspective, there could be a lack of trust in a mediator who only appears in a video (Exon & Lee, 2019). There also may be concerns about confidentiality, which may lead either side to be less forthcoming with their needs, interests and especially weaknesses (Lipsky & Avgar, 2006[43]). However, in many mundane, everyday cases – challenging a customer rating, for example – the online mediation model proposed here would simply be the most effective way to proceed; the benefits of ease of use, time and low cost would outweigh these disadvantages. In cases where more is at stake – a classification issue that may be precedent setting, or the deactivation of a longer-term gig worker who derives most of their income from their work on the platform – an option should exist to have the mediation conducted in person, where practicable[44]. However, in cases involving transnational gig work, for example, it would simply not be cost effective to have the parties meet in person for mediation.

The limited option for an in person mediation session is once again drawn from parallels to consumer mediation principles. Pursuant to the Consumer ADR Directive, »the ADR procedure must be accessible online and offline to both parties, irrespective of where they are.« (Menini and Ram-

40 ODR can be conducted through text and video.

41 »One of the main criticisms of ODR is that the loss of face-to-face contact is irreplaceable and is a crucial aspect of effective mediation.« (Cuhna, 2008, p. 173–174).

42 »In dispute resolution contexts, the absence of non-verbal cues can be particularly detrimental because disputants' antagonistic interpersonal and strategic orientation often leads them to misconstrue communicative intentions and »fill in« information that worsens the dispute rather than promotes its resolution.«) (Sela, 2018, p. 110).

43 »[T]o some extent the characteristics of ODR complicate the task of providing fair procedures. For example, concerns regarding the confidentiality of the process are clearly amplified by the nature of the ODR process and the existence of a perpetual ›paper trail.«. (Lipsky & Avgar, 2006, p. 52).

44 Compare the ODR Regulation, Article 10(b), which states that ordinarily, the parties need not be physically present in an ODR procedure, unless they agree. (Regulation on online dispute resolution for consumer disputes of 2013, Article 10(b)).

panelli v. Banco Popolare, 2017[45]) Moreover, mandatory mediation in the EU is prohibited where only an electronic version is provided (Menini and Rampanelli v. Banco Popolare, 2017). On the other hand, unlike consumers, who may be unfamiliar and/or uncomfortable with online processes, and therefore may feel at a disadvantage, gig workers – whose work is handled and regulated through a computer application – presumably are more sophisticated online than the average consumer. Consequently, the gig worker would have to show special circumstances to the mediator (for example, as mentioned above, where the case is particularly important) to have a right to an in person mediation (Schmitz, 2008[46]).

4.5. Other Aspects of the Form of the Mediation Agreement Between Gig Workers and Platforms

A mediation clause should be included in the terms and conditions of the initial agreement executed between the gig worker and the platform. Along with the online component, set forth above, the agreement should follow the minimum standards set forth in the EU's Consumer ADR Directive. Gig workers – and employees, for that matter, to which gig workers have a close affinity – have many similarities to consumers in the field of ADR. Both groups are in a weaker position vis-a-vis the merchant or platform, in terms of resources and knowledge. This imbalance needs to be corrected as much as possible in order to ensure the mediation process will ultimately be fair and effective.

Specifically, the process for selecting a mediator should be transparent and fair. Mediators should give full disclosure of their biography and work history and any possible conflicts of interests, so that the parties can make an informed choice in selecting the right mediator (Directive on alternative dispute resolution for consumer disputes of 2013, Article 7(1) [47]). Mediation should be free or at a nominal cost for gig workers (Directive on alternative dispute resolution for consumer disputes of 2013, Article 8(c)). To the extent the platform wishes to pay the costs of mediation, including any fees charged by the mediator, this fact should be disclosed and additional efforts should be made to ensure mediator neutrality. This may include limiting the pool of eligible mediators to those selected by a committee comprised of equal numbers of representatives from the platforms

45 Citing the Consumer ADR Directive, paragraph 8(a). (Menini and Rampanelli v. Banco Popolare, 2017, para. 60).

46 Arguing for the right for a consumer to have an in person arbitration hearing.

47 While this and the following articles only apply to consumer cases, it is argued here that the principles found therein should be exported to gig worker mediations.

and employee or labor rights organizations (Directive on alternative dispute resolution for consumer disputes of, Article 6(3)). Finally, the mediation should be conducted in a fast and efficient manner, and be completed for example as for consumers no later than 90 days from the date either party has requested mediation (Directive on alternative dispute resolution for consumer disputes of, Article 8(e)), unless the parties mutually agree for an extension of time.

In the U.S., there is a generally a less restrictive approach to ADR between parties with different levels of sophistication and resources, such as ADR between companies and consumers and employees (Drahozal & Friel, 2002[48]). While courts require a basic level of fairness, especially in the arbitrator or mediator selection process, the weaker side may be required to pay for part of the costs of ADR even beyond a nominal amount. Moreover, arbitration is the preferred form of ADR in American workplaces and for gig workers in particular (Garden, 2017). In employment cases, workers may be required to agree to arbitration (which produces a final, binding decision) rather than mediation as a condition of employment. Perhaps this is because U.S. employers have some institutional advantages in arbitration, ranging from a better knowledge of and relationship with available arbitrators, more reliable access to a lawyer in the ultimate arbitration case, and a capacity to absorb the expenses associated with arbitration (whereas an employee may simply give up their claim because it is too costly to pursue). For both employment and gig work cases, another important advantage for the employer and/or platform is a further provision in the arbitration agreement where the employee or gig worker agrees to waive the right to file or participate in a class action case, and instead must pursue the arbitration claim on an individual basis. This prevents the classification issue, for example, being conclusively resolved among all gig workers used by the platform, but instead decided on a case by case basis (Garden, 2017). Apart from the class action waiver, these advantages to the platform would also be present in a mediation case, albeit to a lesser degree since an agreement is not required and no decision is made by the mediator.

With respect to gig workers, however, a better approach that could be universally applied in the U.S. and the EU would be to focus on mediation rather than arbitration (Rubin, 2017[49]), with the procedural protections outlined in the EU Consumer ADR Directive. Having a fair mediation process, as opposed to an arbitration process weighted in favor of the platforms, ultimately will produce better results for both the platforms and

48 Pointing out the very different legal regimes.

49 Also arguing that mediation is preferable to arbitration in resolving Uber driver classification disputes.

the gig workers. Some large multinationals outside the gig economy, such as Shell Oil, have demonstrated this through their own internal employment ADR procedures. In Shell Oil's RESOLVE employment ADR program, employees receive free or reduced cost outside legal counsel in the mediation and arbitration process; the entire ADR process itself is without cost to the employee; and there is no binding decision unless the parties agree (Slaikeu & Hasson, 2012). The idea behind this generosity is that it is better and more effective for the long term to have a fair ADR process in which both sides have trust. This leads to more settlements, a happier work force and in the end, less litigation (Slaikeu & Hasson, 2012[50]; Green, 2017[51]). An aggressive approach, whereby the platforms sought to obtain leverage or other advantages in mediation to eliminate potential claims by gig workers is not a long-term solution. As demonstrated in California, where platforms such as Uber did rely on arbitration agreements, the ultimate backlash resulted in new legislation which put the platform in a much weaker position on the issue of gig worker classification.

5. Conclusions

It is difficult to say whether the gig or sharing economy will totally transform future work relationships. It is clear, however, that it has already changed the manner of work for a significant portion of people, especially in highly developed economies. These gig workers need a somewhat different model of mediation than that typically used by employers and employees. Gig workers may or may not be employees under national labor law standards, which creates another layer of issues to navigate in determining what, if any, work related issues they could dispute. Irrespective of their formal employment status, the nature and form of their work often differs from that of traditional employees: it is organized through a computer platform, often through an algorithm rather than a personal supervisor, and often is of a variable (and sometimes, but not always) a short duration (a »gig«). Most if not all interaction between the gig worker and the platform occur online, rather than in person. The new mediation model proposed addresses these distinctions.

The model proposed would include mediating the threshold issue of whether gig workers are employees or independent contractors, as well as other issues specific to gig work, such as star ratings and deactivation from the platform. In most cases, mediation could take place online, and the basic

50 Providing a general overview.

51 Praising the fairness and effectiveness of the RESOLVE program.

terms of the mediation agreement would include as a proposed model the minimum standards outlined in the EU Consumer ADR Directive, ensuring both fairness and effectiveness. By using this model, gig workers and platforms would be able to solve what often appear to be intractable problems, and move forward in establishing a better working relationship.

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The Ecology of Mediation

Katarzyna Schubert-Panecka

1. The Ecology of Mediation

Mediation can be understood in many different ways and a variety of ideas about mediation exist as the field has developed and continues to unfold over time and across the globe (cf. Alexander, 2008; Bush & Folger, 2005; Bröckling, 2017; Duss-Von Werdt, 2015; Moore 2003; Trenczek et al., 2017). Practitioners, researchers, educators, and legislators continuously attempt to clarify its definition and what mediation should accomplish (Tröndle, 2018). Nevertheless, the current variety of the historically justified approaches will continue. We can benefit from this variety as far as the terminology can be adapted to the respective field of application and to the disciplinary provenance of the mediator. The risk of arbitrariness remains and is limited by, among other things, various legislations which require clarification.

One such effort is the Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008, on certain aspects of mediation in civil and commercial matters. The content of this directive has been incorporated into the national legislation of the EU member states. Article 3 defines mediation as a *»structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. (A) mediator means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the (EU) Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.«* Then mediation can be understood as a normative ideal, as a *»political technology of depoliticisation«* (Bröckling, 2017, pp. 142 *et seq.*) or more appropriate for practitioners – as a model of a confidential and structured process, which should primarily serve the understanding of and between the mediants. In this process mediants *»should be perceived as a person(s), and if possible all their conflict-motivating interests should be taken seriously and understood in the respective context of life«* (Berger, 2020, p. 25). Here mediants are supported by a versatile partisan third party (without substantive decision-making power), who helps the mediants to develop a viable solution that is acceptable for

them and based on their own responsibility (cf. Schubert-Panecka, 2018b, p. 9). Ideally, the solution may allow the integration of the needs, interests, or beliefs of the mediants that appear in a conflict (cf. Follett in Bröckling, 2017, p. 146) and touch areas that are existential or at least unfold existential meaning (Berger 2020, p. 25). In many countries, such a solution results in an agreement which becomes legally binding.

Depending on the understanding of mediation, it will affect the mediative attitude and the idea of what can (or cannot) happen in mediation, how the mediants are to be accompanied, empowered or still managed, as well as what knowledge and competences mediators should have to mediate in a qualitative way. As people are known to prefer the constructions of reality, content and competences that are most familiar to them, it is understandable that lawyers are more likely to insist on the need for legal anchoring of such knowledge and understanding of mediation, while linguists tend to pay attention to the importance of language. Psychologists prioritise the basics of psychology for their success, and sociologists underline the behaviour of human beings in groups and vice versa, their repercussions on the individual, respecting also the influence of the environment on interpersonal interactions. When placed in the context of the »VUCA world« mediation will be at least affirmed in its complexity and ambiguity. This is even more the case because the modern networked society facilitates a dialogue between representatives of different provenances and interdisciplinary research on mediation. The handling of the potentiated complexity and ambiguity needs to be learned as well as the volatility and uncertainty in their new dimensions. Even when it comes to offering the mediants a qualitative and fair service that pretends to be more sustainable and in many ways better than the judicial procedures that have been established for many centuries, it is also essential to take a closer look at the world and our relationships to it and to critically consider what mediation promises to whom and what does and doesn't work. Consequently and as the demand for mediation is increasing, **before mediation and mediators are able to move something, maybe we should take a break and rethink and trace what the inner place or the starting point of our feelings, thinking and acting is?**

The aim of this article is explicitly not to question the meaning or even the need for mediation. It is rather its promise, which is to be critically reflected in the VUCA context. This is already happening in the scientific study of mediation, enhanced in the German-speaking world since 2010 by the Research Group on Mediation (https://forschungsgruppe-mediation.weebly.com/), in the Scandinavian region by Nordic Mediation Research or by the ADR Study Space in Poland. These are all efforts committed to examining and validating the description and effectiveness of mediation in an

interdisciplinary way. This was also done by the participants of the conference mediation moves in 2018. More than 20 people immersed in the topic *»The Ecology of Human Beings in Business«* at my workshop with the same name. A trace of the impact of geopolitical and economic changes on our mediative attitude and work made it possible to reflect the social and individual *status quo*. In an analogous manner, it is outlined here in the world in which we live and work today, which influences and megatrends affect this life, and how these can be taken up in the context of mediation. In this sense, this article is also **an invitation for you as a reader to check where you stand, how you see mediation and its effectiveness, what is valued, overestimated, and therefore could be conceived differently.** Furthermore, you will learn of the idea of *»The Ecology of (Human Beings in) Mediation«* as one possible answer to the challenges of today's times. This and (also your) other answers are needed, if mediators are to effectively support their clients in the context of their individual and collective needs and positions. To start this kind of learning and reflection you may want to consider the following questions before continuing reading this article:

- What is it like for you to be a mediator in these times?
- What do you most like about your life?
- What do you identify the most strongly with as a mediator?
- What factors are mostly influencing your and your community life?

2. The »Map of Influences« and the »VUCA-World«

We invent and construct our reality, primarily on the basis of our socialisation.

The image we take of another person or of mediation depends on our attention focus and previous experience with certain people and their groups, and of what self-efficacy expectations we have of ourselves and what constitution we are in. All these factors shape the image that we consistently make of ourselves, of our fellow human beings, of the mediants and their situation, and then how we deal with ourselves or with them. The atelier in which we learn to focus our perception and shape this, can be outlined with the so-called *Map of Influences* and supplemented with ideas of late modernism and the VUCA world. VUCA is an acronym that dates to the US Army War College in the 1990s and stands for a volatile, uncertain, complex and ambiguous world (Schröder, 2019). In this world, people and organisations are challenged to reorient themselves over and over again, to develop throughout their lives, to adapt their goals and to make continual decisions. Humankind *should* learn to deal with a certain dose of volatility,

uncertainty, complexity and ambiguity, almost accepting it and following the promise that s/he will be able to draw from it abundantly if s/he brings enough discipline to the process. S/he or someone else, as one of the news reports accurately puts it: *»The greater the well-being of the employees, the more successful the company is.«* In the context of business, among other things, the concept of VUCA aims to heighten the sense of *»competitiveness in highly volatile markets threatened by collapsed crises«* rather than, for example, learning to resist them, as Bröckling for example, states *»to defend himself against what he has learned to endure, to override what he so confidently manages«* (Bröckling, 2017, pp. 133 & 136).

But let us pivot the perspective of the four properties of VUCA and examine what further influences affect each individual as well as groups and entire societies on a meta-level.

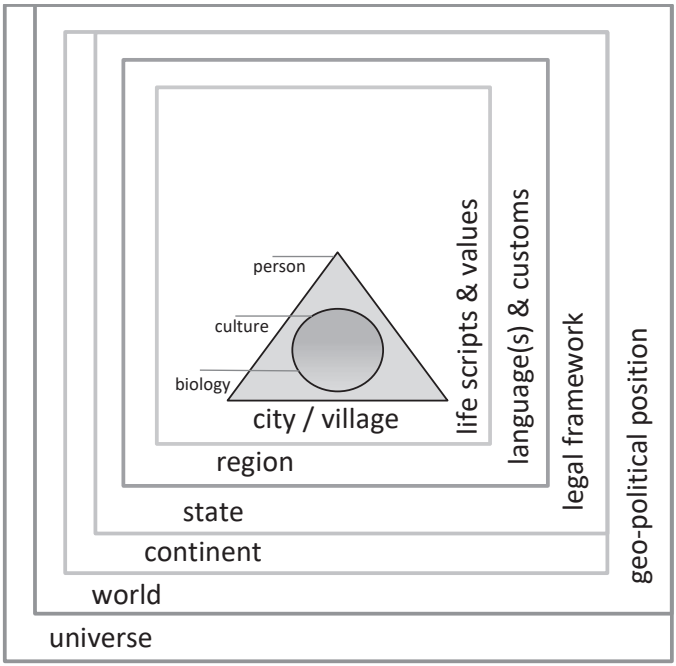

Figure 1: *The Map of Influences (Schubert-Panecka, 2018a, p. 5)*

The *Map of Influences* illustrated above only sketchily exemplifies what external and internal forces are acting on people; how structural, cultural, in-

stitutional and conceptual influences can shape us.[1] You may have mentioned some of these factors while answering the questions set out earlier in this article. Depending on the timing, on the continent, the state and the regional origin, urban or rural descent, the mono- or multilingual linguistic stamp, the biological sex or the social gender, the socio-economic conditions we are born into, each individual or grouping internalises different aspects of life. We are constructed or manipulated as »other« subjects and must also make ourselves such (to move away from the idea of a sovereign and autonomous subject.[2]

»We live in a reality of polyphonic first-person narratives, and we are met from all sides with polyphonic noise« (Tokarczuk, 2019, p. 3).

Influences on the individual also include trends as processes of societal change, and megatrends as slow and long-term fundamental structural changes in organisational systems that are appearing globally in all sectors of society and the economy (Horx, 2011, pp. 58 ff.).[3] For mediative contexts it is important to name technologisation, projectification, flexibilisation and plasticisation flanking the transformations we are going through. These have an impact on the conflict dynamics (especially when it comes to identity oriented conflicts) (Redlich, 2019, pp. 37 ff.) and should be considered against the background of the twelve notable megatrends 2020:

Connectivity	Culture of Knowledge
Healthy	Gender Shift
Globalisation	Individualisation
Mobility	New Ecology
New Work	Security (Securitisation)
Silver Society	Urbanisation

Figure 2: *Twelve notable megatrends 2020 (Zukunftsinstitut, 2020).*

1 See also Rosa, 2019, p. 26.

2 See also Alkenmeyer et al. (2018), where Alkenmeyer, Bröckling & Peter examine in detail the question *»in which the relationship of the individual to himself is formed and formed in detail, which is often conditional, socially contextualised and broken in itself«*, ibid.

3 Further information, such as discussions on these megatrends and their interaction with the »VUCA world«, can be found in the work of Zukunftsinstitut (zukunftsinstitut.de).

All these trends – whether considered as developments or regressions – contribute to a description of late modernity which Bauman (2000) has described as ***»liquid modernity«***, in which Beck (1986) has seen the ***»risk society«*** and Rosa (2019) observes the ***»continuing acceleration«*** of social change and the pace of life. What these descriptions have in common is the effort to sociologically explain the world today as well as interpersonal interactions, and to point out the dangers that people produce and with which they must learn to deal. These dangers can be seen in the progressive alienation (Han, 2016), in the fixation to exhaustion of one's own and earthly resources, in the exhaustion of the *»I«* (Ehrenberg, 2015). According to the circumstances in which individuals or organisations ask for the some mediative support it very recommended to deepen our knowledge about the bigger picture of our society. In particular, if the relationship to space and to time, to people (including ourselves) or to things are taken into consideration, one is terrified by the effects of the *»aimless and compulsion to increase«* in the ecological, democratic and mental crisis at many places around the world. It is precisely these phenomena and effects that are often the trigger of conflicts, in which the search for orientation, identity and belonging ends.

»The first crisis signals a disturbance in the relationship between human and non-human »environment« or nature, the second a disturbance in the relationship to the social world and the third a pathology in subjective self-relationship.« (Rosa, 2019, p. 14).

In the process we are becoming increasingly aware of the traces of technologicalisation leading in addition to the – quite advantageous – digitalisation, to a fusion of private and working hours, which has already been made more flexible and projected in a number of industries. The entertaining (virtual) teams – conveying at first enough charm and variety – tire and deplete over time, crowd the dense map, and contribute to the *generation ›Maybe‹*. Mixed with the mentioned megatrends and the characteristics of the VUCA world, this description means for many of us a life full of *»relentless uncertainty«* affecting equally the individual experience, the global and the glocal society (Thorpe et al., 2016, pp. 138 ff.) and contributes to the *narrative of overburdening*, and, paradoxically also to the *narrative of self-determination,* which is so important in the mediative context. According to this, all possibilities in the world would be available to everyone. Everybody could also overcome the limitations of, for example, health, gender or religious nature by strong will. If anyone fails to take advantage of these possibilities, this person *is* solely responsible for it, because *»any chance not taken here and now is a chance missed; not taking it is thus unforgivable and cannot be easily excused, let alone vindicated.«* (Bauman, 2000, p. 163).

The picture is similar for the social fabric remaining, with increasingly few spaces for dialogue and connection, where the structures are fleeting. Freedom at will deprives the people who live in it of their roots and frames of reference and causes them to *»look for groups to which they can belong, certainly and forever, in a world in which all else is moving and shifting, in which nothing else is certain«* (Bauman, 2000, p. 172). There is hardly any space here to spark this uncertainty up to the *»ubiquitous feeling of (and the need for) security«* (also known as securitisation) (Bröckling, 2017, pp. 74 & 80). Rather, the brief (non-exhaustive) summary list of the (mega) trends below may give a first impression of their effects in human relationships and their conflicts, which will be linked to mediation later on (see also Wendt, 2017, pp. 20 ff.; cf. Schubert-Panecka et al., 2019, pp. 7 ff.):

- Globalisation
- De-standardised life scripts
- Supportive social milieus
- Pluralisation of society and the way of life
- Individualisation
- Social relationships in the form of a market
- Economic inequality
- Social exclusion
- Social polarisation

(see Appendix A for detailed descriptions of these trends).

These descriptors of current mega trends highlight the challenge for human beings in the VUCA world. Born into this world, s/he quickly learns which behaviours contribute to his/her survival, the experience of security and care. These days – in many parts of the world – equipped with technology and media from early childhood, breathing almost, online, s/he consequently juggles several balls 24/7 in his/her hands and tries to get the best out of the flexible, fast and flowing era. Various consumer goods are accessible primarily to so-called tourists (also known as winners), who mainly live in the northern hemisphere and benefit from the *liquid modernity* enabling them to travel around the world and increase their prosperity. Bauman set them in contrast to the vagabonds (also known as losers), who tend to suffer from this epochal time and feel the inequitable distribution of effects most (Thorpe et al., 2016, p. 142). Therefore, the extraterritorial and mobile power structures of this epoch give the tourist the fleeting impression of lingering on a successful, clean and healthy planet

of opportunities. The vagabond is more familiar with the taste of the dark and the insecure, for whom many freedoms only appear to be conditionally accessible (just think about the access to health care, to legal protection or gender-specific equality worldwide). After all and without certainty regarding the place of work, environmental or climatic influences, both groups tend to escape into their private four walls and reduce the variety of colours on our palette of perceptions to the two most well-known. The consequences of the fact, that we almost continuously absorb more or less true amounts of information that correspond to the »either or« thinking, and cement the already given polarisation, can be observed symptomatically in some conflict dynamics on the micro, meso and macro level.

»People strive to be successful in managing and coping with the difficulties of everyday life and to prove themselves to be masters in coping with life. Those who are incapable of doing so, who are unable to assert themselves, and who experience that, measured against the demands of society, can no longer compete, they are offended and embarrassed.« (Wendt, 2017, p. 25).

3. Challenges of the VUCA World in a Mediative Context

The influencing factors mentioned here affect us both as a private person and in our profession (as well as the mediants). Many parties experience uncertainty, high stress in everyday life and structural bottlenecks, at work and/or privately. The precarious employment relationships of the mediants, in which one gets the impression that even with the greatest commitment of everyone involved, one can only minimise the damage, are not uncommon. Moreover, there are organisations in which necessary structural changes are out of question, or in which mediation is only offered as a sign of willingness to cooperate, or mediation is conducted after a decision that has already been made (Bröckling, 2017, p. 171; Schreiber, 2019). Of course, there are numerous cases that fulfill the (understanding) idea of mediation such as this that can be sustainably fulfilled. There are also many organisations and people engaged in the reorganisation of the workplace trying to transform it via Sociocracy and other methods in the so-called New Work (Bergmann, n. d.). The illustrated changes in the society, the dismantling of hierarchies, process-oriented structures and transformation itself, lead inevitably to more conflicts and significantly increase the need for mediation as well as for mediative skills in people like leaders or Scrum masters for instance (cf. http://agilemanifesto.org). Nevertheless, it makes sense to reflect on mediation individually and collectively, at the same time as considering the financial position of many independent mediators.

Two examples to exemplify how these detailed complexities manifest for mediation:

1. In an international company with headquarters in Germany and several branches worldwide, there is a conflict in the management team of one branch. Mediation is scheduled. During the order clarification and the meetings with the mediants, it becomes clear that the conflict between the individual team members not only has psychological, social and organisational dynamics, but is also strongly dependent on external influences. The VUCA-like components, such as volatility of the market, the uncertainty of the future of the company and the complexity of the processes discomfort the management team. The international competition culminates in the individual calculation and faith for its own existence. The intensive working hours and financial and time pressures that exert some strain on the managers (both in their professional and private roles), the historical experiences of the involved countries and their political situation, right up to the health problems of the managers, fill the conflict area with diverse expectations and dynamics. Against this background, the question arises whether the mediator's job is to identify and work out these influences with the actors/actresses, what can be changed by them, what can be changed at a higher level and where they have no influence. In the list of these circumstances the question arises whether discussions must also be held with the company management ideally allowing for identification of the actors' (in) ability during the order clarification. For the mediation educators, this suggests a recommendation to design appropriate learning processes and curricula.

2. In another case, parents are accompanied mediatively because one parent has abducted a child across borders. This mediation takes place under the regulation of the Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980 and aims to find an amicable solution for the return of the child. If an agreement is reached, the judge will take it into consideration in the subsequent proceedings and the family has a good chance of getting their agreement legally confirmed. This regulation is a successful synthesis of the legal framework on part of the state (including its judgment and its international effectiveness among the states that have ratified the aforementioned convention) and the effective participation of parents in dispute resolution with the support of mediators. The team consists of two representatives of psychological and legal provenance, ideally female and male and having a good command of the native languages of the mediants. This example also illustrates the consequences of all the influences outlined above: Each parent lives in a different country hundreds of kilometers

from each other. Like their parents, the children are multilingual and, because of trips to their respective grandparents, they are very familiar with the other language areas and cultures. These journeys are part of their everyday life as well as the everyday life of many of their colleagues from school or kindergarten. However, one of the trips turned out to be almost final. The children are brought into the home country of their mother without the father's consent. There had been a violent argument between the parents previously, in which all the frustrations that had arisen over years demanding laborious integration and living in a foreign country seemed to be expressed. Now all contact had been lost until the police and judiciary are involved and with the help of MiKK (https://www.mikk-ev.de/en/), mediation can proceed. During this mediation, the misunderstandings and injuries that have arisen over the years become visible, which – in addition to the »usual couple issues« – are also interwoven with the cultural backgrounds of parents and the global influences on their lives. The pressure to fail immediately attributed to individual fault, the psychological instability of both parents, the desire for (one's own) integrity and that of the children, the allegations of drug and alcohol addiction, violence and manipulation of the children dominate the room. The mediators have 10 hours to contribute to an understanding between parents. The mediation appointments are often made up at short notice and can use a good portion of the intercultural skills of the mediators, in addition to their linguistic, psychological and legal knowledge.

Nowadays, **if you want to act effectively, responsibly and sustainably as a mediator, it makes sense to be able to identify and include the respective environment and the interactions between our perception and world relationship as well as the dynamics between the mediants and mediators.** In addition to the desire for effectiveness and sustainability, the importance of the accepting and appreciative presence while settling the conflict (as the third party, the almost »uninvolved involved«) who is already influencing the dyad without any action (Heck, 2019, pp. 11 ff.) could prompt us to adequately meet the responsibility of the respective roles. Such responsibility can be answered in various ways and depends on the mediative context, one's own understanding of mediation and various influences on the mediants. We have determined which influences affect the individual and its relationships with other people, in a private, professional and social context. This also indicates that these influences pose not inconsiderable challenges and difficulties, which are structurally related conflicts that mediators must be aware of. For socially disadvantaged people living in material, social and cultural poverty, this exacerbation means more and more that their way of life becomes an enormous effort and their existence

is endangered. The following circumstances, for example, can be discussed when dealing with conflicts:

- health deficiencies and risk situations
- access to drugs and various eating disorders, gambling addiction
- excessive upbringing, physical or mental neglect up to child abuse and (psychological and physical) domestic violence (Wendt, 2017, p. 23).

This is not to say that difficulties only affect the group mentioned. Even the mentioned *tourists* are not spared from health complaints or outbreaks of violence and are increasingly concerned about their future.

»Precarious economic and social conditions train men and women (...) to perceive the world as a container full of disposable objects, objects for one-off use, the whole world – including other human beings.« (Bauman, 2000, p. 162).

The question to be asked is how and where can a healthy lifestyle be cultivated, constituting a good start point for mediators to perform effective and sustainable work.

In these precarious times with unstable political systems, volatile financial markets, scarcity of resources, ecological changes or even pandemics on the one hand and international job competition, rapid market movements and increasing absenteeism of employees on the other hand putting more and more strain on everyone, it is important to pay special attention to one's own and the secular balance of power (Schubert-Panecka, 2018a, pp. 12 ff.). Since the beginning of the new millennium, incapacity to work and early retirement have increased massively as a result of mental illnesses. Even if the causes are controversial, the multicausality and many other influences have to be taken into account, the high number of these illnesses and suicides makes it clear that the *liquid modernity* has consequences that we have to learn to deal with first (cf. Schubert, 2016, pp. 240 ff.).

4. The Ecology of (Human Being in) Mediation

One possibility for meeting these requirements is seen in the regular critical examination of the world, you live in and (co)create; another is the so-called ***Ecology of Human Being***. Ecology is understood here as a scientific sub-discipline of biology exploring the relationships of living beings with each other and with their inanimate environment or as a careful attitude and acting with environmental resources (https://nachhaltigkeit.info). In terms of humankind, it is primarily a question of whether and how it deals

with him/herself and its environment in a balanced and healthy way.[4] This includes strengths and inadequacies, roots, the structural and social opportunities and bottlenecks surrounding the individual. Secondarily, it is about the social responsibility of every individual (and collective subjects) about dealing with worldly resources and our own footprint on earth (e. g. https://www.footprintcalculator.org). Their reflection, the inclusion or at least understanding of the interdisciplinary knowledge, the various influences such as the socio-political environment of the mediants could be used by mediators as well as their educators, the legislators in matters of mediation and the mediants themselves by avoiding wrong decisions and building the available forces for the benefit of all actors. ***The Ecology of Mediation*** means in consequence that mediators are able to identify at least most of the described influences and to assess what can and what cannot be responded to in the mediative way. Furthermore, ecological thinking and acting mediators take responsibility for their constructive attitude and the third space, they create before, during and after the mediation procedure. It also means that they respect the complexity of the given (mediants and their own) reality and do not promise, what they cannot deliver. This kind of humble and reflexive attitude lets them understand better, how far the seeking for identity and belonging can lead to conflicts in the VUCA world and this can be translated to the mediants in the very beginning of the cooperation. In addition to reflection, time and space are needed to feel yourself and to be(come) able to contribute to a sustainable approach both inside and outside, both in your private and in your professional life for instance as a mediator. In order to gain some distance from yourself and to be able to return to the **lethological attitude,** opening us to look at ourselves as well as at the mediants.[5] Tokarczuk recommends *»tenderness«* as an idea that could also be about receiving and accompanying the mediants (2019), an idea that leads us to offer confidence and the healing effects of the conversation. A further description of such ideas, methods and concepts can be found in Schubert-Panecka (2018b). It is important to note here that in addition to the ecological way of dealing with oneself, with the close and extended environment, the self-reflection, the lethological attitude, an emphatic cooperation also matters a lot. All this can be supported also by mediators (for instance with mindfulness and *Mindsight* (which is described below), helping in turn to resonate with others, including the mediants.

4 See also Guattari, 1989.

5 Lethology is understood as the teaching of state of not knowing, in which one's own knowledge is parked away and there is a complete focus on the other person (Radatz, 2010, p. 30).

»We live in association with others, observe them, are stimulated by them, swing with them and, last but not least, participate in the world through them.« (Breithaupt, 2017, p. 11)

Such a connection, resonating and influencing also takes place in a meditative context. Depending on how acceptably and truly openly we realise our expectations and become aware of the effectiveness of any expectations and narratives vis-à-vis the mediants, it can contribute to an *encounter* or a *mis-encounter* (Begegnung – Vergegnung, s. *I – Thou* as a relationship that stresses the mutual, holistic existence of two beings) (Buber, 1999).

Assuming that **mediators are responsible for ensuring communication, creating dialogue and connection, and designing the process so that people can access the preparedness to cooperate and other resources they need to deal with the conflict sustainably, to support the understanding between the conflicting parties,** mediators usually acquire so-called **dialogical skills** and other techniques including methods from the field of psychology and communication. Dialogue is understood here as a fundamental principle of the world order, helping people to build deep interpersonal relationships through language, creating meanings and values, that in turn take the needs and experiences of all those involved into consideration. In this sense, a dialogue takes place both interpersonally and intrapersonally. Its success – both internally and externally – contributes to understanding and can be supported by the fact that we:

- open up and make our experience truly transparent,
- listen to ourselves and other people attentively, emphatically to generatively,[6]
- behave honestly in the dialogical space instead of using internalised patterns or personal visions of the world or the future (inner flexibility),
- speak from the heart, always remaining radically respectful.

5. Meditation and Mindsight

To create a secure third space and to persevere in a lethological attitude it is presupposed that the mediator knows him/herself and his/her triggers very well, and is able to regulate them in a constructive way.

6 Generative listening (called also presencing) *»represents a state of the social field in which the circle of attention widens and a new reality enters the horizon and comes into being«* (Scharmer & Kaeufer, 2013, p. 20).

The means by which we conduct self-dialogue has an impact in a meditative context and can be utilized by mediators to increase their ability to create this space, and trust. **Meditation** or mindfulness according to Kabat-Zinn (2016) uses this dialogue in an observer position (as mediators know well) in favour of stress reduction. In this form of meditation, people practice to identify, hear and understand living, inward, less visible parts of themselves. By (re)focusing their attention again and again, people cultivate the slowing down of the perception processes, can realise their judgments or biases and distance themselves from what they have experienced. Over time they develop new behavioural patterns that make them maintenance-free in stressful situations and still present and able to act (Kabat-Zinn, 2016). The importance of this quality in mediation seems to be self-explanatory, if we only memorise the affect of emotions in a conflict situation and the functionality of reciprocal dyadic mirroring (Bauer, 2016). **Mindsight** is one another helpful approach and represents a special kind of focused attention as a practiced look at the inner world of our mind (Siegel, 2010). Mindsight is part of our human capacity to perceive the mind of the self and others, a powerful lens through which we can understand our inner lives with more clarity, integrate the brain, and enhance our relationships with others. It is focused attention that allows us to see the internal workings of our own minds and a skill that can change our mind. One of the possibilities to grow as a person – through the integration of our feelings and memories – is to widen what Siegel (2010) calls a *»window of tolerance«* and as he promises: *»When that window is widened, we can maintain equilibrium in the face of stresses that would once have thrown us off kilter. (...) our windows of tolerance determine how comfortable we feel with specific memories, issues, emotions, and bodily sensation«* (p. 137). Within this window we tend to remain receptive and able to respond to the needs and wishes of the mediants, while outside of it we tend to react. In addition to that we learn a lot about ourselves, can increase our empathy and can improve the quality of our relationships as *»(t)he resonance circuitry not only allows us to ›feel felt‹ and to connect with one another, but is also a help to regulate our internal state«* (Siegel, 2010, p. 138). Furthermore it helps us »name and tame« the emotions we are experiencing rather than being overwhelmed by them. Mediants' emotions around the conflict affect not only them, but also the mediator. Knowing how to establish the distance (and the beginner mind) again could enable us to direct attention toward those aspects of self-performance and situation that we all and especially the mediants, can affect rather than those that appear immutable (Shapiro, 2016, p. 14). This is why the practice of mindfulness and/or mindsight is so beneficial for mediators, and for the conflicted parties.

6. Resonance

Through engaging in mindfulness it is possible to address and appreciate different aspects of our identity, accept or dissolve the inner ambivalences and our encounters with other people can also gain quality. Also our communication and empathy towards the conflicting parties can improve if further integration of undesirable experiences or expectations and clarification of one's own motivations and needs are updated in every situation. Empathy is understood as compassion and experience, which is initially serving those who feel empathy and quasi prepare a space for those in whom they empathise (Breithaupt, 2017, p. 14). We could incorporate these into the so-called third room of mediation. This third room or space is the one in which resonances arise due to the institution and structure, as well as the appreciative acceptance and confidence, so that conflicts can be resolved in a forward-looking manner. **Resonance** is primarily an acoustic phenomenon that arises *»when the vibration of one body stimulates the natural frequency of the other«* (Rosa, 2019, p. 282). The resonance relationships can *»develop process-wise also in mutual adjustment movements, which can be understood as a swinging towards each other«* (Rosa, 2019, p. 283) and sometimes fill the mediative space too. This requires a medium capable of resonance or an oncoming resonance space. Similar to the psychotherapeutic context, the mediator and/or her/him and the mediants can succeed *»through synchronised and response resonances (...), to record the client's situation, to make them audible and palpable and thus reflexively accessible to both, to become more objective and* (maybe) *workable«* (Rosa, 2019, p. 286). Thanks to their own reflexivity and ability to resonate, mediators can also support the resonance states of others. Fear and stress, on the other hand, level out the ability to empathise and respond. *»Acceleration constraints and competitive pressure (even) tend to generate increasing resonance blocks.«* (Rosa, 2019, p. 294).

Summing up, in Rosa's *sociology of the good life,* if acceleration is the problem (and we have to deal with this one also in many mediation settings), resonance could be part of the solution. To implement this we have to understand that the quality of a human life and relations cannot be measured in terms of resources, options, or moments of happiness. Obviously, numerous competences are expected from mediators, and of course from the educating and regulating staff, including those that can successfully master interaction and cooperation with people of different cultural, national, social or professional backgrounds. According to the given VUCA-world etc. mediators can improve the afore-mentioned (and others) abilities and competences exercising their emotional intelligence (Goleman, 1995), widening their window of tolerance or the ability to resonate in and to reflect

in some wider perspective. To support the mediants in an appropriate way they can also deepen the idea of **mediative thinking.**

Mediative thinking is a way of thinking beyond the current visible differences of those affected, that gives trust in something in common, in a connection that is consciously sought not only for every thought but also for every action and which can be traced back to the mindful basic attitude towards oneself and others (Schubert-Panecka, 2018, p. 20). Out of an epistemic modesty, a mediative thinker believes that every person has resources at her/his disposal with which s/he can master her/his challenges, but which can nevertheless experience structural restrictions. Always coming inwards and outwards in her/his center, a mediative thinker mediates between people and organisations. S/he goes in the middle, in between, connects in the conversation and strengthens the respectful treatment of the parties. S/he trusts that *»different knowledge, different ideas, different demands, also opposing goals or even unequal values (...)«* can be clarified thanks to the debate, and contribute to an understanding. This is a very important approach, not only in view of the *liquid modernity* and some counter currents, when it comes to plural societies and increasing radicalisation, but also because:

»People who think mediatively, who think independently, are capable of consensus and willing to compromise, have an eye on the next generations, are oriented towards the common good, do not pursue particular interests and are not guided by ideologies. They are personalities who enable a different experience of the world, uncover an expanded awareness of possibilities and thus also contribute to developing an attitude that forms a self-shaping relationship with the world, encounter other people with reason and empathy and always know that the context has to be taken into account.« (Zanolli, 2017, pp. 116 ff.)

7. Summary

In our globalised and interconnected world, known also as the VUCA world, where one seems to be more volatile, uncertain, complex and ambiguous than ever before, the growing aspirations for orientation and clarity are becoming visible. These aspirations can be realised even more since living in a multicultural, digitalised and somehow tense environment has become the everyday life for most of us. Since we are not only globally linked but also remain digitally supported in an almost permanent exchange with each other and are often overwhelmed by a great deal of information, individual and (supposedly) objective realities seem to be dominated by emotions and an increasing lack of tolerance (Bauman, 2000, pp. 172 ff.).

We can enjoy multicultural communities and multidisciplinary teams, where people from different generations and disciplines, cultural and linguistic backgrounds are living or working together. But there is also some kind of insecurity in the air meaning that this development is accompanied not only by (self-)doubts and diverse geopolitical, sociological and cultural changes, but also by an increased potential for misunderstandings, which in the ideal case also follow communication processes. In this sense, **we are always newly challenged to discover the present diversity of our societies and the multidimensional nature of individuals and groups, to respect them and to face their openness or even curiosity.** A challenge, in which accomplishment is fostered by the ability to interact in intra- and intercultural situations effectively and appropriately, turning them into intercultural ones.

What do the circumstances and aspirations, the geopolitical changes and the digital socialisation mean to the mediators? How can they support conflicted parties if the mediators themselves also struggle with these circumstances? As our environment is changing all the time it is **inner stability and flexibility** a mediator needs to support her/his clients (mediants) in a sustainable and fair way. Before mediators can achieve this they could benefit from at least a level of security or a trusted environment, **openness to the changing world, ambiguity tolerance and much self-reflection** (using one of the named methods). These steps are required even more as mediation and mediative skills and thinking belongs to a field of occupations characteristic of liquid modernity (cf. Münte, 2016) and are needed in the changing world in many different areas.

How can mediators take a differentiated view of the influences on their lives and socialisation and also take their effects into account in the context of the mediative processes? Depending on which understanding of mediation someone represents, which philosophy of life or even expectations of self-efficacy someone cultivates, we will have different (collected) experiences and ideas on how to deal specifically with these challenges. With this contribution, you were invited to reflect on these influences in relation to yourself, and to the mediants. But also to see the practical challenges or a potential conflict party with a beginners' look. With the ecology of the human being in mediation, a healthy handling of our individual and interpersonal resources and skills in the context of all these influences was presented. In a contemporary and future-oriented manner concrete approaches for establishing these skills were outlined: with meditation, mindsight, resonance and mediative thinking. During a mediation we could create conditions for a better resolving of the mediants conflicts, so that they can »resonate« with each other (Cramer in Rosa, 2019, p. 285) and thereby recognise what is in their power and what is not. It seems to

be a constant balancing between the influences on the mediative spaces, in which the environment and the people truly belong and are seen in the context of their concerns and conflict situation. Such balancing is preceded by a dynamic process of reflection and integration by the mediator, which is expressed in personal agility and makes mediation itself moveable. If mediation intends to move something, it seems to be critical that mediators have assimilated a flexible and confident attachment and are aware, from which inner place they are acting. With the right tools and mindsets mediators can hold the system and discover with the parties, what was before, what can emerge.

8. Appendix A

Descriptions of the megatrends impacting society

- **Globalisation** means that the exchange of goods and services such as the intertwining between individuals, groups and societies like states takes place worldwide. People, organisations and machines are linked on many levels. Connectivity dominates social change, including the international labor and knowledge market. Digital communication technologies are changing our lives fundamentally, socio-cultural codes are being reprogrammed so that modern liveliness and behaviour patterns emerge (Zukunftsinstitut 2019, https://www.zukunftsinstitut.de/). As a result, more and more people from different milieus, cultures and linguistic areas come together, they start families, belong to diverse groups and temporarily inhabit diverse continents, primarily cities, gaining more importance with the increasing population *(urbanisation)*.
- **De-standardised life scripts** follow the variety of design options but also indicate the agony of choice, and thus also the decision pressure. Whether it is family or professional development, the models available today have become so various that orientation is lacking: certain people experiment with the opportunities, others choose more conservative options. The number of options can be observed, for example, from the choice of fields of study. In Germany alone, around 15,000 are available to high school graduates. The number of students increases annually, but so does the number of those who drop out of their studies early (s. studies on dropout rates). Many young people believe they don't know what they want to do or achieve in their lives, it is assumed that their motivation to learn is low, their life plans too diffuse. The abundance of possibilities and seductive promises seem to lead to a situation where decisions are replaced by non-decision and result in a state of uncertainty. This uncertainty appears particularly dramatic against

the background of the climate crisis and the fears of young people. At the same time, the population (especially in the northern hemisphere) is getting older and stays healthy for longer, so that a new phase of life arises (or shifts) after retirement and new life plans emerge with it *(silver society)*.

– **Supportive social milieus** once helping *»make my life a success«* (Wendt, 2017, p. 20) disappear now in many places due to international competition and the resulting mobility. Both parties pay a high price for these changes: the parents remaining alone at the place of origin and the children living increasingly far away for their everyday challenges of an (uncertain) workplace and staying on their own (also digitised and competitive) in issues of parenting or care of the parents (at distance). If those affected persons are thrown back just on themselves concerning their life style and have to cope with it without the network of the extended family, it is hardly surprising that this creates another dimension of pressure on families and that their conflicts increase.[7] People emigrating due to job search, war or climatic changes, are barely able to integrate in the new environment and/or couldn't withstand financial pressure, for example, are particularly at risk.

– **Pluralisation of society and the way of life** means primarily the different ethnic groups, language areas, lifestyles, religions and the diversity of the genders that belong to a society. Behavioural patterns, enabling people to cope with life in modern societies and simultaneously contribute to their own identity and belonging, are also taken into account. The need for meaning and distinctiveness is expressed, among other things, in the music style, body design or the type of nutrition. The attributions of masculinity and femininity are also renegotiated and the importance of gender roles in society is discussed *(gender shift)*.

– **Individualisation** is regarded as a consequence of the industrialisation and modernisation of western societies, where an individual transition from foreign to self-determination takes place. In this process of transition, the individual has a high degree of personal responsibility, while collective references decrease. This could enable many more people to discover themselves, their own talents and preferences and, for example, choose the life partner freely. Currently we are talking about the recursion of this trend: Only after satisfying individual needs the empathy

7 Lifestyle is understood as a way of life and a targeted planning of one's own professional and family biography. It is about planning or acting, through which someone – organised according to individual value patterns and preferences – both contributes to individual meaningfulness and authenticity and also satisfies social conditions (Wendt, 2017, p. 24).

for the *We* could thrive. Nevertheless, one criticises the consequences of individualisation: There would be significantly fewer *Us* and significantly more *Me* (narrative) in the attitude towards life of this era often resulting in loneliness, distrust or alienation (Han, 2016, pp. 52 ff.).

- **Social relationships in the form of a market** follow individualisation and clarify how these relationships are shaped by the desire for social status. The path leading to an accepted status, a more or less high position that a person occupies in comparison to other members of the respective social system, is seen as increasingly shifting to consumer and leisure goods, to services such as coaching and training, and sharpened in the ego staging (Schäfers, 2000, p. 380).
- **Economic inequality:** According to the »Report on global inequality«, Germany is as unequal today as it was shortly before the outbreak of the First World War (Alvaredo et al., 2018). The report shows that the top 10 percent of the world's total income in Europe is 37%, and the share of children under the age of 15 living in poor conditions (i. e. whose families have less than 60% of the average income), approx. 16%. According to the Joint Welfare Association, 3.7 million people in Germany are considered poor (German Joint Welfare Association, 2018, p. 3). This applies although Germany is in 18th place of all countries worldwide when it comes to wealth, measured in terms of gross domestic product per capita. Consequently, if there is such an inequality in this country, where people are better off than 90% of the earth's population according to the figures, we can only guess the extent of this inequality in other countries. The social inequality arising from this regression has a negative impact on social cohesion and becomes another piece of the puzzle that threatens democracies.
- **Social exclusion** affects people who have no access to a society. On the one hand because certain offers aren't available due to unemployment or low income, and on the other hand because they lack the knowledge or courage to get involved in them.
- **Social polarisation** refers to the close connection between low socioeconomic status and low life expectancy or illness. According to the studies, the health risk of children and adolescents increases, for example, the more precarious the conditions in the family of origin are or the social shame in peer becomes effective.

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Mediating in Non-hierarchical Systems

Monia Ben Larbi

1. Introduction

Mediation is a facilitated decision-making process based on consensus. Thus, as mediators, we bring consensus into organizations, no matter what their usual mode or system of decision-making is. We talk a lot about the principles of mediation with our clients, we particularly explain omnipartiality and the voluntary nature of our work. Still, only very few mediators proactively broach the issue of a possible clash of the decision-making cultures of mediation on the one side and of the client organization on the other.

The main reason for this is our assumption that an organization always works in a hierarchical setting. We assume that the ultimate decision-making authority lays with a superior. We invest a lot of effort into building a process which either includes superiors or clearly sets a frame in which the involved parties can make decisions autonomously.

Today, however, more and more organizations move away from hierarchical systems and adapt a democratic and/or self-organized way of working together. Aspects of organizational design have been on the top of trend studies for some years, as high performance is hardly possible with industrial-age models (Rahnema & Durme, 2017). There is a tendency to move beyond empowerment, as owners do not simply empower their employees but truly share their power. In classical Empowerment Systems, the power can be taken away from the employees in an instant. Empowerment is a management or leadership tool meant to increase motivation and productivity. Conversely, power cannot be taken away from the employees in a shared power system, as these organizations belong to all their members. The discourse has now even moved to the cutting-edge idea that an organization primarily belongs to itself (Klein & Sangmeister, 2018). In this type of organization there are no power centers anymore, and thus no human decision-making umbrella under which mediation takes place. If the people in the mediation do not reach a decision, there is noone else with the power to do so. Organizations are not (primarily) led by people anymore, but by the principles and processes that were agreed upon. »Who« decides »what« and »how« is at the essence of the operating mode and is often in-

cluded as a main focus in the organizations' constitutions. In this sense, highly binding decision-making processes are the new bosses[1].

This text will focus on four different decision-making systems that are used in organizations: consensusbased, consentbased, systemic consensingbased and advisorybased. It will explain the respective concepts of decision-making, and discuss relevant conclusions for the mediators' work within such organizations.

2. Consensus-based Organizations

In consensus, only those decisions are taken that everyone agrees with. Depending on the organization, this can mean that everyone is happy with the decision or simply that everyone can live with it. One might assume that a consensus-based procedure such as mediation is easiest to establish in a consensus culture. Of course it has several advantages. The parties are used to achieving co-creative results in discussions. They also usually have experience with the presence of a facilitator and can participate in the process with more personal responsibility. Yet, it is precisely this closeness to their everyday consensus culture that makes it much more difficult for mediators to support a change in perspective. Mediation often represents something different from the usual problem solving mechanism of an organization, which greatly contributes to the generation of new ideas and approaches. A large number of conflicts in consensus organizations are also amplified by considerable »process fatigue«. Employees often have an immense longing for quicker decision-making and more individual leeway. They also easily become impatient if the process reminds them too much of everyday professional life.

Therefore, mediators should design a contrasting process in a way that the familiar rhythm is varied and methods are used that support the process of the individual more than the group. However, consensus as the »normal« mode of decision-making within mediation does not need to be questioned.

Recommendations for working with consensus-based organizations:

– Make sure that the (mediation) process is different enough from the day-to-day decision-making mode;

1 Morning Star, a tomato-sauce producing company, describes their self-management system as one without human bosses, where it is assumed that adults can manage themselves in the workplace just as well as in the rest of their lives. They built their company on the principles that human beings should not use force or coercion against other human beings and that people should honor the commitments they make to others – basically on the principles of law (TED, 2013).

– Pay close attention to (invigorating) rhythm, as participants are used to (and often tired of) slow processes and therefore might want the pace quickened;
– Focus intervention methods particularly on the individual as discussions are usually group-oriented.

3. Consent-based Organizations

More and more organizations are deciding not only against hierarchy, but also against consensus, as the latter is often too slow to adapt and to bring out sufficient creativity and innovation (Laloux, 2014). Consensus gives individuals the power to hold others back and to block change and evolution. Though consensual decisions may be thorough, they take a lot of energy and time that a lot of people would prefer to invest in creating results and impact. One important underlying assumption of consensus is that such decisions are particularly sustainable. However, the faster everything changes, the clearer it becomes that all decisions are only good/valid for a limited amount of time and have to be reconsidered constantly. A specific singular decision is not as important as we might think.

Organizations that still want to include everyone but spend less time on achieving decisions and, instead, more time on implementing decisions often work with consent – a sociocratic approach (Strauch & Reijmer, 2018). This means: Not everyone has to agree (as in consensus), but nobody should have serious objections to a proposed decision. Sociocratic consent gives the individual veto power, but is also linked to a specific form of decision-making process: consent facilitation. Here, there are initially various rounds in which all those involved in the circle share information with each other, express opinions and adjust their views. Then the moderator makes a proposal based on everything he/she has heard, which directly turns into a decision if there are no serious objections. If there is a veto, another round of stating opinions takes place and an adapted proposal is made. This process is repeated until everyone is willing to agree with the decision.

However, not all consent decisions are taken in a circle. Often it is enough for individuals to inform others and ask if there are any serious objections. If no objections are voiced, (tacit) consent is considered given. In many organizations, not answering within a certain time frame is also interpreted as consent, making sure no one is blocked in their work by waiting for answers. Some organizations take an even more radical approach to consent: a serious objection is not enough. Whoever uses their right of veto also has to take on the task him/herself or at least take responsibility for

coming up with a better solution. In consent, the default is a »yes« to every new proposal. Unless someone vehemently opposes the idea and is ready to take responsibility for alternative solutions, new ideas are tested[2]. Basically, consent gives all members of the organization the obligation to inform and thus empower others to stop processes that might not be good for the organization, while giving individuals as many liberties as possible to accomplish their work.

In a consent organization, mediators can count on the parties' abilities to listen very well and to combine interests in common solutions. The parties are able to understand and manage processes – because, as a rule, the facilitation of consent circles usually rotates. Employees in consent-based organizations are used to living with decisions that they do not find perfect and have learned that total approval is often not necessary. So it can happen that the fine-tuning of the consensus is not seen as relevant and prevents them from going back to work.

However, conflict may arise exactly from the continuous consent mode, from people being dissatisfied over long periods of time – not dissatisfied enough for a serious objection but dissatisfied enough for a conflict to arise. In consent organizations, this is exactly what needs to be discussed with the parties: How important is it for you to make a decision with which you are all satisfied and not just »not dissatisfied«? If the parties do not feel perfect consensus is necessary, the mediation can conclude in consent in order to adapt to the dexterity of the organization and not to slow anyone down.

Recommendations for working with consent-based organizations:

- Keep in mind that the mode of consent could be a part of the problem/conflict;
- Find out whether consent or consensus is needed and adapt the decision-making mode of the mediation process to it;
- Create a balance between getting people back to work quickly and making sure that there is no remaining dissatisfaction;
- Use »advanced intervention methods« as people are usually process experts themselves.

2 A prominent example in Germany is the Berlin-based Company Dark Horse, whose principles for decision making can be found online (Dark Horse Innovation, 2018).

4. Systemic Consensing-based Organizations

The desire to work more and talk less is also the logic behind systemic consensing (Paulus, Schrotta, & Visotschnig, 2020). The assumption behind this approach is that it is not necessary for everyone to agree. However, if there is too much resistance, implementation can become very difficult and perhaps even impossible. It is also essential to know about the resistance of the people who do not talk much in group settings – and a systematic process is needed where the resistance of all involved individuals is taken into consideration, even if they do not join in the discussion. Therefore, organizations working with systemic consensing measure resistance in the group rather than agreement. In the first stage, the question that needs a decision is formulated as precisely as possible. Then, creative ideas are produced and written down as proposals. In the third stage, each person rates each proposal on a scale from one to ten, with ten being the highest amount of resistance. In the last stage, the points for each proposal are added up and the proposal with the least resistance points becomes the decision of the group. In systemic consensing there is no veto; it is possible that one person has to live with a decision that they really do not like. Still, the path of least resistance is chosen until the next decision.

Systemic consensing is clearly a method that could be used in the formulation and evaluation of options in mediation. Yet, the focus is a negative one, whereas mediation is a positive, interest-driven process. Mediation in systemic consensing organizations can be a very effective tool of organizational development, as it explicates and clarifies what is really important. Bringing interests into the process might feel like a detour for parties who are used to working with systemic consensing in the first moment, but it creates better ideas and proposals that can then be brought back into the consensing context. In addition to this, just as in consent-organizations, continuous systemic consensing can lead to a situation where some people are constantly dissatisfied and in urgent need of decisions that they can stand behind. Systemic consensing can lead to an organizational culture that is very active – as new things are quickly put into action – but one in which discussions are very negative, as the focus is more on why not to do something and less on the positive sides of new ideas.

Recommendations for working with systemic consensing-based organizations:

- Consider whether the mediation could be finished after working out the interests, as the parties are used to generating and evaluating options;
- Keep the conversation more on the positive side;

– Focus particularly on interests as a solid foundation for future decisions and organizational development;
– As in consent-based organizations: Find out if constant dissatisfaction is part of the conflict.

5. Advisory-based Organizations

In consent or systemic-consensing, the consensus in mediation does not disturb the system, as the standard decision-making mode is still group decision-making. In advisory-based organizations, however, decisions are made by individuals and not by groups anymore. Is mediation still compatible with this decision-making mode?

The idea behind the advisory process is the conviction that groups are not always wiser than specific individuals. The people who do the work are considered as the experts and should be able to decide over their own area of responsibility. There should be no separation between »doers« and »deciders«. Brian Robertson tells a little anecdote to explain: He was flying his plane when one lamp turned on. He waited for a while and as no other lamps followed, he assumed it was a mistake, did not take the warning seriously – and almost crashed. He realized that this could happen in his company. One person could notice some danger but unless other people would support this notion, the alarmed person could do nothing against the danger. Robertson realized he was not giving any room for the wisdom and intuition of the individual. In his model *holacracy*[3] he works with a clear determination of roles one person takes on in the organization (Robertson, 2015). The idea is that if one person has a role (i. e. the design of the website) then they are totally responsible for it including all decisions that need to be taken. Before they take a decision, they need to ask for advice from people who are affected by it and, if needed, from experts. After hearing all the advice, they will take the decision by themselves and all others agree to support the decision, assuming that the role owner is the best person to make the decision. Another assumption in holacracy is that every conflict is always an indicator of unclear roles. That makes conflict one of the most positive mechanisms of organizational and team development, as each conflict brings a little more clarity about who is the expert and should act and decide on certain things.

This model is one of the processes of self-organization made famous by the book ›Reinventing Organizations‹ (Laloux, 2014). Frederic Laloux describes

3 Different authors use different spellings: Holacracy, Holocracy and Holycracy.

evolutionary organizations with three main qualities: self-management, wholeness and evolutionary purpose. Self-management refers to a network that is created if individuals work in clear roles. As all roles are interconnected, the advisory-based decisions create a huge network that is way too complex for one person to control. Hierarchy in those organizations is not only undesirable but impossible, as it would massively limit the collective intelligence. Wholeness means that the members of the organization are invited to be present as whole people with all their strengths and limitations – not only in their professional roles. Freedom to work in a mode that best suits an individual is central to this approach. Every person should be able to choose how they can serve the organizational meaning best. For this, they need to choose what they do and how they do it, with as little group restraints as possible. Example: One person is very good at coaching others and at administrating budgets. In other systems, they would have to choose between these two tasks, as these are traditionally located in different departments and rarely included in the same job description. In advisory-based organizations, they can do both. This flexibility and resulting diversity of job »layouts« are good for the organization, as they create a network of activities instead of compartmentation. The same applies to the work style: Some people prefer to work in the office whilst others prefer to work at home. Some people want to work for limited hours, and others enjoy going all in. Some people are crunch-time workers and some like to work with a lot of planning certainty. Every time a group chooses a process, it supports some and limits others. Advisory-based organizations make sure that people are not limited in their freedom, which is also a great motivator for personal development.

Wholeness also means that cognitive intelligence is not the only factor in decision-making. In advisory-based organizations, emotions and intuition are taken very seriously. These factors play an important role for the third principle, the evolutionary purpose. The idea behind this principle is that in a complex and quickly changing world, we cannot work with strategies and long-time project plans anymore, as we do not know what will happen tomorrow. The old system is replaced with the idea that we need to ask the organization almost daily what it needs – collectively and individually. The logic of long-term decisions is replaced with a »sense and respond« mode of organizational development and this sensing process needs all our six senses, actively including intuition.

As the relationships in the network are always built directly from one individual to another, most advisory-based organizations guarantee quick access to mediation. Conflicts can spread very quickly, as everyone is connected to everyone and adjourned decisions can kill the entire flow. Mediations do not usually lead to common decisions though; they rather aim

at restoring the self-management quality and mode in which each person decides for him/herself what is best for the organization. Mediations that try to lead to consensual agreements on how the common work should be organized can limit the constitutional freedom of an advisory-based organization. »Compulsive consensus« may even have tangible negative consequences for the organizational development that relies solely on a network of individual decisions.

Recommendations for working with advisory-based organizations:

- Start the mediation process quickly;
- Accept that the principle of individual decisions based on advice cannot be overruled as it is constitutional to this type of organization;
- Make sure that the parties do not limit their freedom if common decisions are taken;
- Include clarity of roles in each mediation to advance organizational development;
- Accept that decisions are short-term;
- Use sensing methods, as decisions are not only cognitive but holistic;
- Use group-based methods to balance out the default mode of individual decision-making.

6. Conclusions

An infusion of consensus can be a gift to hierarchical organizations, but also to consent or systemic consensing organizations.

However, the decision-making mode itself can be a source of conflict: In consensus-based organizations, the well-known process of reaching consensus can be perceived as cumbersome, time-consuming – and thus be encountered with impatience. In consent and systemic consensing organizations, the individuals can become discontent when they need to live with some level of dissatisfaction for long periods of time. All those organizations rely on collective decision-making, therefore consensus does not create a cultural clash.

In advisory-based organizations though, the decisions are taken on an individual basis; this approach represents one of the main motors of self-organization and organizational development. Forcing employees into group decision-settings is even »anti-constitutional«, however legitimate if all parties agree. Paradoxically, in these organizations mediation is most com-

mon and included in many organizational constitutions, as conflicts spread more quickly to the entire organization, with everything being so interconnected. Yet, mediation results cannot limit the freedom of each employee to work on what they regard as most important and in the workstyle that suits them best. Many mediations end after the exploration of interests and ideas and then lead back into the individual decision-making mode. On the other hand, almost all mediations include an adaptation of the roles of the individuals and thus bring more clarity on who decides what.

The methods used in consent and systemic consensing can easily be used in the decision-making part of a mediation process. The mediation process can also prepare individual decisions.

So the remaining question is: How essential is consensus for mediation? Do we still consider a process to be mediation if decisions are taken in other ways and not everyone is perfectly satisfied? Is consensus one of the constitutive principles of mediation that needs to be strictly observed – as voluntariness, omni-partiality, individual responsibility, openness of outcome and confidentiality? By examining these other important principles, it becomes clear that none of them are endangered if we work with other decision-making models.

As organizations change, mediation in organizations needs to change as well. Just as organizations need to ask themselves how far they are willing to go in new formats, mediators need to answer the same question. Maybe we can learn from the advisory-based organizations – so that we do not need to answer that question based on a consensus in the mediation community. Each of us can find his/her own position – and constantly adapt as we sense our role in new organizations and decide from there.

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Section 4
Mediation Moves ... into the Digital World

The New Normal: Online Dispute Resolution and Online Mediation

Lin Adrian

1. Introduction

In his seminal book, *21 Lessons for the 21st Century* (2018), historian Yuval Noah Harari points out that advances in biotechnology and information technology have a huge transformational impact on all levels of society. This is certainly true in relation to mediation. While we still do not have automatic robot-mediation, a growing number of mediators have migrated online and have increasingly incorporated e-mail exchanges and communication and videoconferencing into their conflict resolution practices over the past decades. What Harari did not – and could not – anticipate was the transformative power of a pandemic. The COVID-19 crisis has entailed a quantum leap forward in online mediation activities. For many, mediating by online means has become the new normal while some are still contemplating making the transition over into exploring this new forum.

The place for information technology in mediation has been debated. Some argue that mediation is, by its very nature, a face-to-face unplugged endeavor, while others embrace mediation in online environments. Before the pandemic, I met a former student who commented on the fact that I had been writing and speaking about online dispute resolution (ODR) in recent years. She reminded me that when she brought the topic up in my mediation class ten years ago, I found it largely irrelevant. I now regard my response as extremely old-fashioned and blind to the changes that were happening even then. Our field was beyond the question of *whether* technology has a place in mediation long before the pandemic, and at a stage of conducting inquiries into critically exploring *how and when* to use technology and *what* technologies to use. However, I think many struggle to fully understand the implications of the technological turn and how to make the best of it.

During the *Mediation Moves Conference* at European University Viadrina, Frankfurt (Oder), in 2018 – the conference which provided the impetus for this book – Nancy Welsh, Nadja Alexander and I offered a workshop for mutual reflection on online dispute resolution. The interest in the topic was overwhelming. Participants kept arriving and more and more chairs had

to be carried into the crowded room, proving that the topic of technology and conflict resolution is of interest to many. As the session opened, the participants looked expectantly at us, the presenters. We looked at each other with shared doubt as to whether our idea of creating a space for reflection on this topic really was what people came for. We had a dynamic, engaging session, but I think many were seeking more concrete answers to the fundamental questions about technology's place and application in mediation than we were able to provide at the time.

This contribution will not attempt to cover or respond to all the issues posed by the technological turn; its overall purpose is to provide a mental map and the necessary vocabulary for informed discussions and continuing reflections about the role of technology in conflict resolution generally, and in mediation in particular, to help us untangle the complexity that this relatively new area of practice entails. It begins by defining ODR and relating it to alternative dispute resolution (ADR) before going on to present a continuum of ODR processes. Following this, online mediation is defined and its different forms described. I then address a number of issues related to online mediation and finish by making a few concluding remarks. Those who are in search of specific, practical tips for their online conflict resolution and mediation practices will have to consult other sources (for e. g. Ebner, 2021, or the many tip-sharing websites online).

2. Online and Alternative Dispute Resolution – Definitions and Overlaps[1]

Online dispute resolution and alternative dispute resolution are at times perceived to be synonymous. Recognizing that there are certain overlaps, they do, however, differ. *Online dispute resolution* is a label for all forms of dispute management which, whether in full or in part, use information and communication technologies (UNCITRAL, 2017: para. 24; Thiessen, Miniato & Hiebert, 2012, p. 329). *Alternative dispute resolution (ADR),* on the other hand, is a designation for all forms of dispute resolution that replace litigation and going to court. The term ADR has been challenged in recent years and some argue that »effective« or »appropriate« should replace »alternative« (see e. g. Stipanowich & Lamare, 2014). As ADR processes have become more widespread, common and institutionalized, they are being used less as an opt-out to avoid going to court and are instead chosen for their own merits in a given conflict situation. For simplicity, I employ the tradition-

1 Section 2 and 3 are revised versions of sections 2 and 3 in Adrian (2018).

al ADR-label in this piece, albeit broadening it to encompass not only alternatives to litigation but also alternatives to other types of adjudication.

ODR was initially ADR applied to online disputes (Katsh & Rabinovich-Einy, 2017, p. 32 f.) and came about as the result of three converging developments in the US around the turn of the century. First, the emergence e-commerce resulting in low value conflicts between geographically distant parties. These were ill-suited for resolution within existing systems. Second, alternative dispute resolution was quite well developed and gaining ground as a means of solving conflicts in many arenas. Third, technologies were emerging that made online dispute resolution possible. These developments combined laid the foundations for the digital dispute resolution universe of today.[2]

The linkage between ADR and ODR is described as follows in the very first book on ODR dating from 2001:

> »ODR draws it main themes and concepts from alternative dispute resolution (ADR) processes such as negotiation, mediation, and arbitration... [and central to both ADR and ODR]...is the idea of providing dispute resolution in a more flexible and efficient manner than is typical with courts and litigation.« (Katsh & Rifkin, 2001, p. 2)

The relationship between ADR and ODR has changed considerably since 2001. ODR is no longer a subsection of ADR, but rather an independent field of practice and research. It encompasses a broad array of conventional, alternative and new forms of dispute resolution that involve the use of technology. The relationship between ADR and ODR today is illustrated in the figure below:

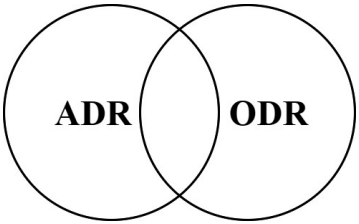

Figure 1: Relationship between ADR and ODR

2 For more details on the history of ODR, see Ethan Katsh and Orna Rabinovich-Einy (2017).

There can be considerable overlap between ADR and ODR in the processes for example when a legal dispute over a contract is mediated online or a consumer complaint is negotiated using a software. However, much ADR takes place in conventional, mostly technology-free processes. Examples of stand-alone ADR are face-to-face mediation of a legal dispute over a custody and early neutral evaluation of the merits of a court-case by an independent third party. Equally, ODR can take place without a touch of ADR. Examples of stand-alone ODR are online judging or the use of online technologies in the course of litigation (such as by means of video interrogation of witnesses).

3. ODR Continuum

Online dispute resolution includes a broad variety of digitally supported mechanisms used to solve different types of disputes. In order to understand ODR more comprehensively and to critically reflect on its use, drawing a distinction between its different types is beneficial. For this purpose, I have developed a continuum, in figure 2 below:

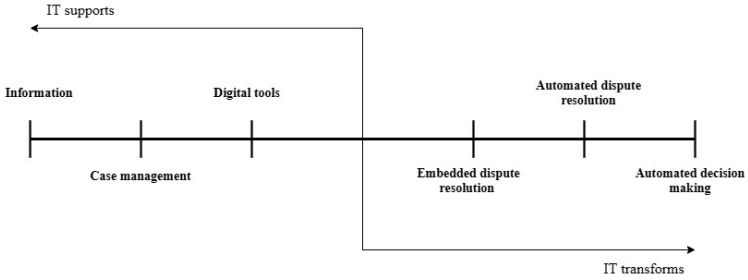

Figure 2: ODR and level of digitalization

Going from left to right, the complexity and level of digitalization increase from simple information services on the far left to fully automated decision making on the far right, with a number of other activities in between. There is an important dividing line between using technology to *support* dispute resolution activities that in themselves remain more or less unchanged, and using technology which fundamentally *transforms* the dispute resolution. When regular dispute resolution is supported by technology, the intervention is performed by other means but essentially remains the same. In contrast, when dispute resolution is transformed, new forms

evolve which can change the way that conflict is handled. The dividing line is illustrated by the vertical line in the figure above.

The use of technology for **information** is situated at the far left of figure 2. This typically entails the consultation of a website, such as that of a first-instance courts, for information about how to file a court case or a community mediation program's information about its mediation services. Information accessed on such platforms is so common today that we hardly think of it as a technological service. A more recent phenomenon is the use of apps or social media to disseminate information about processes such as arbitration and mediation.

Taking a step to the right, online **case management** takes the use of technology one stage further. Case management is digitalized, but the conflict resolution does not necessary follow suit. An example of this is the digitalization of the administrative procedures in Danish courts which began in 2017 (Domstolsstyrelsen, 2018). Today, all civil cases must be filed online and all documents uploaded to the system as the case proceeds in the justice system. However, trials still follow the rules and procedures detailed in the 1919 *Administration of Justice Act*. While some changes have been made in the past hundred years, hearings are conducted in a manner quite similar to the trials of the last century. Similarly, the WIPO (World Intellectual Property Organization) offers an online case administration system for parties to a dispute (2016).

The next point on the continuum is the use of **digital tools** in conflict resolution. The conflict resolution strategy or approach remains relatively unchanged but is performed using digital tools. An example of this is mediation via video conferencing systems or in virtual classrooms. Today, simple online meeting software – including Zoom, Microsoft Teams, Skype, GoToMeeting etc. – can easily be accessed and used for mediations. An example of a full-blown online mediation service is OnlineMediators.[3] Disputants from around the world can identify mediators from many different countries who will work with them in an online space. Carrel and Ebner (2019) further suggest that face-to-face mediation may benefit from integrating technologies to improve the overall, offline mediation process.

The EU's Online Dispute Resolution Platform (ODR platform),[4] created in 2016, combines online case management and the use of digital tools in its otherwise traditional method of conflict resolution (Adrian, 2018, p. 103 f.). The platform assists consumers within the EU to file complaints in their country's language. Furthermore, it assists the parties in identifying an

3 https://onlinemediators.com/ last accessed January 13, 2021.

4 https://ec.europa.eu/consumers/odr last accessed January 13, 2021.

approved dispute resolution body for handling the complaint and helps them to reach agreement on having this body handle the dispute. If the parties do not reach an agreement on seeking a resolution with a mutual decision on which body to use, they must either pursue their complaint through other means or rescind it. The platform does not make any procedural or substantive decisions. If, for example, a Romanian couple buys a baby bed online from a business in France that they are unhappy with, they can file a complaint in Romanian on the ODR Platform. If the business does not agree that the complaint should be addressed or if the two sides cannot agree on which existing conflict resolution body to use, the couple must either drop their complaint or pursue it in a way other than through the ODR platform (ibid).

Up to this point, I have described the ODR activities to the left of the vertical line in the continuum. These forms of technology support existing conflict resolution activities but do not fundamentally change how conflict resolution is performed: an online case management system does not alter an arbitration hearing or a video-assisted mediation performed with techniques from face-to-face mediations. When moving to the right of the vertical line, conflict resolution undergoes fundamental changes either through a transformation of the way in which existing activities are performed or the invention of entirely new methods. I have placed mediation by digital tools to the left of the vertical line in the current iteration of the figure included above (figure 2.). Future research may reveal that some forms of online mediation are carried out in such a way as to cross that line, either because the technology forces mediators to substantially change their practice or because mediators themselves use the features of a software to transform their own practice.

Negotiation software is an example of (technologically) **embedded dispute resolution.** Using these tools, it is the computer program (the software) that assists the parties and undertakes the facilitation – humans are only involved in designing said program. Programs of this nature can integrate state of the art knowledge of negotiation and conflict resolution. The software can, for example, ask parties questions that will help them move focus from positions to interests and needs, which potentially dissolves deadlocks and enable the generation of new ideas for a solution (Fisher, Ury & Patton, 2011). Furthermore, a software can confidentially ask the parties for their monetary demands and bottom lines and identify whether there is a »zone of agreement«, that is an amount that is higher than the minimum of one party and lower than the maximum of the other party (Lax & Sebenius, 2006). Obtaining information about the existence or absence of a zone of agreement assists the parties in deciding whether they should continue their negotiations or, alternatively, adjust their demands.

Private companies were the first entities to develop digital negotiation assistance (Katsh & Rabinovich-Einy, 2017). The emergence of e-commerce, multiplying trade across large distances for often small amounts of money, created a need for fast, inexpensive and practical conflict resolution in order to safeguard buyers and sellers and – perhaps more importantly for many platforms – in order to safeguard businesses. A trading platform without effective dispute resolution mechanisms will lose credibility and business very quickly and may struggle to survive in a competitive environment.

Courts and government agencies are beginning to support parties' negotiations in various ways too. The online court, *Civil Resolution Tribunal (CRT),* in British Columbia, Canada, handles small claims cases up to $ 5000, compensation for motor vehicle injuries up to $ 50000, strata property (condominium) trades, and agreements between societies and cooperative associations.[5] The first step in the process is to gather information regarding legal rights and to draft letters to the other party. If this does not resolve the case, the second step is encouraging the parties to negotiate. In order to support the parties' negotiations, the online court provides quite elaborate negotiation advice (Civil Resolution Tribunal, 2021). The negotiations themselves take place by mail or via telephone – not through a specially designed software – and although the court does not provide software nor participate in the negotiations directly, the court inevitably shapes and changes the negotiation if the parties take the advice it provides. Great Britain is currently implementing a proposal to create a similar court in cyberspace, *Her Majesty's Online Court* (Civil Justice Council, 2015; Susskind, 2019, p. 95 f.)

Automated dispute resolution takes us one step further to the right on the continuum. While assisted negotiations support the parties' own discussions in a variety of ways, automated dispute resolution uses algorithms to actively propose solutions based on input from the parties. The parties therefore become recipients in an expert system rather than being supported in their own activities. Blind bidding systems are an early example of a rather simple, automated negotiation system (Katsh & Rabinovich-Einy, 2017, p. 35). In disputes over money, the claimants file their bottom line into the system and the other party similarly files what amount that they are willing to pay. The program keeps the bottom line confidential and the parties do not learn the other's input. In advance, the parties agree to splitting the difference if their bottom lines are close to each other. If this turns out to be the case, the software calculates a proposal for an amount that they can settle on. Other models combine assisting the parties' own

5 https://civilresolutionbc.ca/ last accessed January 13, 2021.

negotiations with more advanced forms of automated negotiation. In the online dispute resolution product *Smartsettle,* for example, an algorithm takes account of the parties' information regarding demands, preferences etc. in reviewing and optimizing their agreement (Thiessen, Minato & Hiebert, p. 354). This contributes to solving the inherent challenge of parties' »leaving value on the table« during negotiation and dispute resolution, that is making agreements that are less advantageous than they could be to both parties.

To the far right on figure 2 is **automated decision-making** in which algorithms determine binding decisions in disputes. To my knowledge, we are yet so see a working example of this type of automated adjudicative activity. However, it is quite likely that algorithms will soon adjudicate less complex cases – those in which a statute may be straight forward and simple to apply or where enough prior rulings may have been made for the legal status in a matter to be clear. Automated adjudication is a natural next step. Automated negotiation and automated decision making have many features in common, but the critical difference between the two is that automated dispute resolution leaves decision making *to* the parties whereas automated decision-making makes decisions *for* the parties.

So far, I have treated the different processes on the continuum in figure 2 as if they are clearly delineated, separated and independent dispute resolution mechanisms. In reality, however, they are often combined in ODR dispute resolution systems**.** In British Columbia's *Civil Resolution Tribunal* (as mentioned above), a human facilitator provides online mediation if the parties are unable to negotiate a solution themselves. If the intervention by the facilitator does not result in an agreement being reached, the case can go on to the next stage in which a tribunal adjudicates the matter. The tribunal's ruling is equal to a regular offline ruling in its legal effects. Another example of a multi-step system is the Dutch online dispute resolution platform for divorce, *Uitelkaar,* run by *Justice42.*[6] Parties answer a number of questions in an online intake and the system proposes an automatically generated settlement on the basis of this information. The parties can agree to the proposed settlement as is, they can continue to negotiate its terms, or they can choose to call upon a mediator. If they reach an agreement, there is a legal requirement for said agreement to be reviewed by an independent lawyer.[7]

6 https://uitelkaar.nl/ last accessed January, 2021.

7 The information regarding Uitelkaar is based on a telephone conversation with the CEO of Justice42, Kasper Scheltema in 2020.

ODR has the potential to radically change the way we handle conflict in the private as well as the public domain and is already well on its way to doing so. Digitally assisted conflict resolution transforms time, space and procedure, and lays the foundation for developing new dispute resolution models that exceed the powers of our imagination. ODR holds many promises in terms of being a cheap, flexible, innovative, sustainable and convenient form of dispute resolution but concurrently raises many issues of concern regarding justice, power, responsibility and privacy, to mention but a few, which are beyond the scope of this contribution to explore. Instead, I will turn to one ODR practice, online mediation, which I presume to be of special interest to readers of this volume.

4. Online Mediation

Mediation originated as a face-to-face endeavor and some maintain that online mediation is thus an oxymoron – the heart and soul of mediation lies in the mediator and the parties being present in the same room at the same time. Among others, law professor Joel B. Eisen was very critical of the idea that online mediation could foster equally good processes as face-to-face mediation, seeing that mediators need social cues, body language, verbal nuance and intimacy in their mediation work (1998, 1308). Since the publication of his writing, technology has improved immensely and it has become second nature to many mediators to incorporate increasing amounts of technology into their practices. The COVID-19 crisis accelerated this development at an unprecedented pace. If mediators were to continue to help disputants during phases of restricted social contact, they had to find ways to engage with them that did not demand any physical proximity.

Parlamis, Ebner and Mitchel (2016) use the term »e-mediation« to capture online mediation. Like face-to-face mediation, they understand e-mediation as a voluntary process of resolving disputes with the assistance of a third party. They posit, however, that:

> »Different from its in-person counterpart, e-mediation is also assisted by a fourth party. E-mediation relies on information technology (synchronous or asynchronous text-based media, audio-communication, or videoconferencing) to facilitate the mediation process.« (ibid, p. 237)

They discuss whether e-systems, which give more substantial advice, should be considered e-mediation or be labeled e-negotiation. They refrain from making the potentially contentious choice and, through reference to Thiessen, Miniato and Hierbert (2012), distinguish instead between processes that include and those that preclude human mediators and limit their definition of e-mediation to processes that include human medi-

ators (Parlamis et al., 2016, p. 238). I align myself with this distinction as it captures the theoretical and practical implications of mediation in an online setting. With this decision, I delimit my focus to the activities situated to the left of the vertical line on the online conflict resolution continuum. As I find the various ways in which technology is directly involved in mediation most interesting and relevant, I will engage with mediation activities that belong to the »digital tools« section of the continuum in figure 2. Consequently, in this section I explore human mediation with the involvement of technology and bookmark mediation in cyberspace where algorithms replace the third party.

Rickert (2019) divides online mediation into three categories – asynchronous text-based mediation, synchronous audio-based mediation and synchronous audio-video based mediation – while Parlamis, Ebner, and Mitchel, as per the quote cited above, point to the various ways that mediation can take place online more generally: synchronous or asynchronous text-based media, audio-communication, or videoconferencing. They all consider two important distinctions: time and medium. In the context of time, it makes a big difference whether communication takes place with the mediator and the parties simultaneously and in real-time, or whether the participants and the mediator have minutes, hours or days to think and react to propositions. Regarding medium, there is a big difference between communication based on text alone, be it via mail or chat, and communication that is oral. Furthermore, it is consequential whether communication is audio only, or whether it is possible to see each other in addition to hearing each other.

This is an overview of the possibilities:

	Synchronous	**Asynchronous**
Written	Chat	E-mail Text-message
Audio	Telephone conferencing	Telephone – individual Recorded audio-messages
Audio-video	Video conferencing	Video – individual Recorded video-messages

Figure 3: Different forms of online mediation

Mediation need not strictly be *either* online *or* offline; many hybrid combinations are possible and e-mail correspondence between mediator and disputants before and after physical meetings is commonplace. While e-mail correspondence may primarily happen in relation to practical matters (e. g.

scheduling meeting times), online activities can also play a more active role in the mediation itself. This is the case when an online intake system is combined with a face-to-face mediation, as described by Bollen and Euwema (2013), or if a physical mediation meeting continues via e-mail to finalize the details of the agreement. As Carrel and Ebner (2019) note, technology in mediation is often conflated with online mediation. They highlight the various ways in which face-to-face mediation meetings may incorporate technologies to improve the face-to-face mediation processes, such as using digital whiteboards for taking notes and drafting agreements, visiting a database of agreements for inspiration during brainstorming and integrating decision-making software into the in-person meeting.

4.1. Online Communication

Moving mediation online changes the dynamics in »the room«. Most importantly, it changes the communication between the parties as well as between the parties and the mediator. Social cues such as facial expressions, body language, gestures and tone of voice are absent in written communication, and emojis are poor substitutes. In audio-video interaction, the social cues are present, but less marked than they would be in face-to-face interaction. Early theories of the impact of media on interaction concentrated on the objective characteristics of communication and the presence or absence of informational cues (Friedman & Belkin, 2013, p. 4). In media richness theory, Daft and Lengel (1986) focused on the ability of various media to handle uncertainty and equivocality. According to them, different media have different levels of richness and written media is rather lean as compared to face-to-face communication which is regarded as rich. In their view, written media is appropriate for conveying certainty, whereas face-to-face interaction is better at managing ambiguity, which there is much of in conflict management. Reichwald et al. (1998), among others, further develop the media richness theory and add complexity of the task to the equation in the area of tele-cooperation. They argue that the media must fit the complexity of the task in order to avoid oversimplification or overcomplication – in short, more complex tasks require richer media. This is certainly true for conflict resolution. While media richness theory focusses on the media channel, social presence theory (Short, Williams and Christie, 1976) turns its attention to perceptions of presence in communication, suggesting that the more visual and verbal cues the media transmits, the more sense of presence of others it gives. Presence is needed for relationship building – a central feature of mediation. In this view, face-to-face interaction is superior for establishing a sense of presence and for establishing relationships.

Grounding in communication is another useful concept for online mediation. According to Clark and Brennan (1991), grounding is the process by which participants in an exchange are aligned, among others things, by being present at the same time, by being able to see each other and by hearing each other. When mediation moves online, grounding may be challenged due to the change in communication media. In an online environment, disputants are not always present at the same time, they may not be able to see each other, and they may not hear each other thus compromising their sense of grounding.

Construal level theory of psychological distance (Trope & Liberman, 2010) offers a different perspective. It is concerned with how the media affects our cognition and how we process information. Psychological distance is comprised of distance in time, distance in space, social distance and hypotheticality, and Trope and Liberman argue that humans think very concretely about objects that are close to them and more abstractly about objects that are distant. Hence, psychological distance may increase creativity and the ability to think more clearly (ibid). This might ultimately be quite useful in a conflict situation and be an asset in online mediation.

This selection of theories is helpful in understanding some of the challenges posed by online mediation from a communication perspective. They direct our attention to the gains of moving from face-to-face to online interaction, as well as pinpointing the areas where we need to think about compensating for what is lost in this transition. We need to take the richness of the media into consideration when choosing the platform, employ strategies to boost a sense of presence, and reduce psychological distance when it is a disadvantage for mediation endeavors (e. g. in building relationships) whilst maintaining it where it is advantageous (e. g. when developing ideas in a creative process).

4.2. Empirical Insights in Online Mediation

A number of studies of online mediation find that it can work and at times even add value to the mediation process. In a Canadian pilot project using e-mail, phone and video mediation, video mediation was evaluated most positively out of the three options (Tait, 2013). The experience with video mediation was summed up this way:

> »Mediators were impressed with an experience that approximates face-to-face mediation to the extent that they often forgot that a technological interface was there. Many clients who participated were surprisingly familiar with some form of web conferencing and some others were willing to try it. At the same time, conducting mediation through technology cannot ever be exactly the same as face-to-face mediation. The mediator has several extra

> things to manage and must respond nimbly to technical problems. The mediator also has much less control over the mediation setting where the parties are, and must ensure that children are not present and that confidentiality can be maintained at the remote locations. Finally, there is still some loss of the richness of an in-person encounter and mediators need strategies to compensate.« (Ibid, p. 88)

It thus seems that although some richness was lost and mediators sometimes encountered challenges, there was a willingness to engage in online mediation and mediators found that it worked surprisingly well. In another study evaluating an asynchronous online tool to mediate divorce settlement in the Netherlands, researchers found that the settlement rate was higher in the online setting than in face-to-face mediations (Bollen, Verbeke & Euwema, 2014). Furthermore, it was found that mediation through this online tool generated high levels of justice perception in general and significantly higher levels of procedural and interpersonal justice for women than for men. The researchers explain one of the key reasons for the results as the asynchronous intervention enabling a space to cool off between messages as well as allowing parties to express themselves without fear of interruption.

Bollen and Euwema (2013) have investigated the impact of using a hybrid approach in a workplace setting where parties were requested to complete an online intake prior to a regular face-to-face mediation. They found that superiors were more satisfied with face-to-face mediation than subordinates, but that following an online intake, this disparity ceased. This suggests than online interventions can be useful in countering the effects of hierarchy.

In a recent experiment comparing video-mediation with face-to-face mediation in a workplace setting, Shin, Yang and Bente (2017) found that parties reported less emotional arousal and felt less uncomfortable in the video condition than the face-to-face condition. Furthermore, the parties rated their counterparts more likeable and trustworthy and were more satisfied with the result of their conversation in the video setting. The researchers explain the result as the (positive) effect of experiencing fewer social cues and possibly also feeling less pressured to giving immediate answers and less trapped in the conversation.

Exon and Lee (2019) have tested the parties' level of trust in a face-to-face mediator as compared to a mediator met through telepresence, a technology that resembles a face-to-face setting more closely than regular videoconferencing. Special cameras and sensitive microphones give participants a sense of being in the same room, looking at each other and noticing verbal and social cues (Exon and Lee, 2019:111 f.). The researchers found no

statistical difference in the two conditions. Therefore, an online environment like the one established through telepresence can apparently create similar levels of trust in the mediator as a face-to-face encounter.

Lastly, I would like to mention an experiment that I worked on in collaboration with my colleagues (Druckman et al. 2020). In this research, we compared different modes of assistance in conflict situation where two parties tried to reach an agreement on issues such as the use of a patent. The parties received either no assistance (the control), assistance via a computer screen, assistance from a human or assistance from an android robot teleoperated by a human. The mediated assistance was identical in each mode of intervention. The most interesting result in the context of this contribution is that parties in the robot condition arrived at more agreements, more integrative agreements and had more positive perceptions of the intervention than those in the other conditions. We speculate that this may be attributable to a novelty effect.

Research in the field of online mediation is emerging but still lacking in a number of important ways. Some of the reported studies concern mediation by mail while others assess the impacts of video-mediation, and although studies of one technology can inspire practices and studies in another technology, the transfer value is limited. Written and video mediation work very differently in terms of mediator strategies, trust, communications requirements, party behavior etc. and therefore the findings of studies on one type of online mediation will primarily be relevant only for that particular type.

Generally, existing studies echo the experience of online practitioners that, despite some skepticism even objection voiced to the process, mediation can in fact move online and in some instances this forum may even add value to the mediation process. Reporting from practice, Susan Raines (2005) suggests that it is even possible to conduct transformative mediation in writing by adjusting mediation strategies.

4.3. Confidentiality and Self-determination

Mediation online – whether in writing, by video or an approach combining both – requires adjustments to a number of key elements in the mediation process. I will not get into all the nuts and bolts of online mediation in this contribution (for that see e. g. Ebner, 2021), but it is pertinent to reflect briefly on the fate of two core components of mediation in an online setting: confidentiality and self-determination. It is important to carefully consider confidentiality in an online environment where there might be a paper trail, easy access to recordings and eventual hidden listeners, and the uncertainties of the online environment may furthermore limit the open-

ness of the parties. It is thus important to work around confidentiality issues to ensure this feature of the process is respected as much as possible, while at the same time being realistic about potential leaks or breaches so that parties can make informed decisions about what they share in an online mediation and how they do it. Confidentiality in a face-to-face setting is to some degree based on trust and this is surely the case in an online setting, too. However, trust-building requires different tools in an online universe and the mediator must pay special attention to utilizing these effectively. The challenge can be partly solved by addressing confidentiality and potential leaks more actively, in an up-front manner in an online mediation than is necessary in a face-to-face mediation and additionally by having the parties sign a confidentiality clause. One dimension of confidentiality is privacy, which is pertinent in any online environment as a number of breaches of privacy in recent years have shown and to which online mediation is by no means immune. An online mediator needs to consider privacy carefully when choosing an online mediation platform.

Self-determination is another central feature of mediation. The online environment requires that the mediator becomes a more active moderator than in face-to-face interaction. To avoid online chaos, the mediator needs to control the conversation and enforce rules of communication to a greater extent than in a face-to-face mediation. This, in turn, entails a risk of pacifying the participants if not compensated for appropriately. The mediator must ensure that the parties are involved in the process and decision-making by, for instance, meta-communicating much more actively. While self-determination may be somewhat stifled for some participants in an online setting, it may conversely be strengthened for others. Acting behind a screen may level out hierarchy and lead to frank conversations, as some of the aforementioned studies suggest.

4.4. Ethics

Ethical guidelines for mediation usually address confidentiality and self-determination. As mediation moves online, there is a need for ethical guidelines to address these topics in new ways as well as taking into consideration other issues that are unique to online activities (see also Exon, 2017, p. 663). Exon argues that in addition to regulating online mediator behavior, there is a need for further ethical regulation in relation to fourth parties (the technology itself) and fifth parties (businesses that create and/or run said fourth parties) (ibid., p. 662). Referring to the broad practice of ODR processes which have existed for 20 years now, Ebner and Zeleznikow (2016) determine the current state of governance to be »low-to-no«. This situation is similar in relation to online mediation, and I will argue that Ebner and Zeleznikow's remarks regarding the readiness of in-

ternal regulation within the professional field of ODR in general is quite apposite of online mediation:

> »The field of online dispute resolution is at an important developmental point, on the cusp of being recognized, adopted, and institutionalized by a number of national and international systems. It is seeing a resurgence of service proliferation and practitioner activity in the private sector. We suggest that ODR, as a field of professional endeavour, is now mature enough and motivated enough to engage in an internal discussion of governance and that the basic building blocks for such an effort already exist. Online dispute resolvers and the entities with which they are associated would benefit from wider, deeper, and more deliberate participation in a conversation about whether to begin a process of creating internal governance, and about how to then create effective and appropriate institutions and norms.« (p. 320)

I call for similar conversations and reflections to be made with appropriate actions taken within the field of online mediation. Governance is paramount and should include the development of training requirements, licensing guidelines and accountability processes as well as ethical guidelines to ensure appropriate and just processes.

5. Final Remarks

My hope with this contribution is to deepen our understanding of ODR and online mediation and to build up a common vocabulary to reflect on the many issues related to these relatively novel but proliferating activities. The COVID-19 crisis made the topic extra timely. As a consequence of social distancing and lockdowns, conflict resolution has moved online and offline mediators have found interest in online services at an unprecedented pace.

The technological leap creates a growing need for documentation and research. Our current state of knowledge regarding online processes is limited but fortunately on the rise, as we struggle to fill many gaps and reflect on the new issues posed by ODR. Among other key things, we need a deeper understanding of the effects of online activities on the parties, further exploration of strategies which work online and those that do not, more knowledge about the content of outcomes, critical reflection on the role of online conflict resolution institutions, and the development of theories that will depict the online reality and enable us to unpack it further. With regard to practice, we need to refine our tools for conducting appropriate online conflict management and expand professional training in this area. Additionally, ODR requires that ethical guidelines be tailored to the online reality.

Yuval Noah Harari's (2018) reflection cited in the introduction on the dramatic effects of technology touches a chord. Independent of the current COVID-19 reality, the field of conflict management is greatly affected by advances in information technology and, as a result, the field of mediation is moving in new directions in a process of profound transformation (of which, I am certain, we are only seeing the beginning). In this contribution, I have related online mediation to existing technologies. However, I have also brought the readers' attention to studies using telepresence and forms of human operated robot technology – none of which are yet used in practice, to my knowledge. In the near future, we are likely to see more new technologies emerging that are useful for mediation.

I think that most mediators in 2021 agree that the appropriate question is no longer whether or not online mediation *is* appropriate, but rather to delineate *when* it is appropriate, by which technology, how it is best practiced and what aspects mediators and institutions need to pay special attention to. It is an exciting as well as a challenging development, and I do not think any of us know exactly where it will take us, but the transformation will certainly require careful and critical thinking about a great number of issues in the years to come.

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There Will Be No Good Dispute Resolution in the Wrong Procedural Framework

DiReCT – Dispute Resolution Comparison Tool

Felix Wendenburg, Jörn Gendner, Ulrich Hagel, Jan Nicolai Hennemann, Mark Zimdars

Every conflict deserves to be resolved in an adequate dispute resolution procedure. The choice of this procedure can neither be left to chance nor simply be standardized. However, the art of choosing an adequate way of dealing with the conflict is difficult (Hagel, 2014). Dispute settlement clauses follow the purpose of preponing the moment in which the dispute resolution procedure is chosen to the time when the contract is concluded. However, in practice the parties to the contract are usually not (fully) aware of the range of possible procedures and the differences between them (PricewaterhouseCoopers [PWC] & Europa-Universität Viadrina Frankfurt (Oder) (Ed.) [EUVF], 2007, p. 13). Also, the contracting parties often lack practical experience with regard to more exotic procedures (PWC & EUVF, 2007, p. 13) and are not sufficiently aware of their (future) procedural interests. In addition, the characteristics of the future conflict are usually not fully predictable at the moment the contract is concluded, so that a dispute settlement clause, be it simple or multi-tiered, in many cases does not provide a satisfactory procedural guideline when a dispute actually arises (Odrig, 2019; Wendenburg, 2013). Thus, in the event of a conflict, the parties tend to stick to the traditional dispute settlement procedures known to them – i. e. for the B2B-context: negotiation, arbitration and litigation. In order to enable the conflicting parties and the lawyers advising them to choose the most suitable dispute resolution procedure based on the procedural interests of the conflicting parties in the very moment of conflict, the RTMKM has developed a software-based instrument (DiReCT – Dispute Resolution Comparison Tool) that operates similarly to the user-friendly Wahl-O-Mat, a German software usually published in the wake of National elections that helps voters to make up their minds about their political preferences (Comparable software tools are in place i. a. in the Netherlands [StemWijzer], in the US [sidewith], and for the stimulation of political consciousness for other European countries [voteswiper]): voters answer a number of questions, the tool relates them to the political program of all eligible parties for a certain election and shows the degree to which the user's individual preferences match the different parties programmatic statements.

DiReCT
Dispute Resolution Comparison Tool

As an initial step, this tool has been developed based on German National assumptions, values and is set within the national legal framework. Going forward it will need to be adapted to international situations, furthermore its future usage in other countries will need some tailoring. The basic principles of the tool can, however, work everywhere. DiReCT is also comparable to the Wahl-O-Mat in its playful educational character, which the creators of the tool believe will best serve its purpose of a widespread use, to enhance knowledge about the great variety of dispute resolution procedures and improve the choice of an optimized dispute resolution procedure for each case.

1. The Origin of the Idea

Confronted with the dilemma described above, the Canadian-German company Bombardier Transportation, as early as 2005, began to systematically think about how to establish a choice of procedure-instrument that reflects the parties' procedural interests and developed an excel-based tool for its own use in order to objectify the choice of an adequate dispute resolution procedure and to make it more transparent.

The first version of this tool was based on the methodological approaches as devised by the dispute resolution pioneers Sander and Goldberg in 1994 (Sander & Goldberg, 1994, pp. 49–51) and on refined approaches by Sander and Rozdeiczer in 2006 (Sander & Rozdeiczer, 2006, pp. 1–3). Bombardier Transportation combined these methodological considerations with a weighting matrix based on its own practical experiences, resulting in a common approach for a company-specific selection of the most suitable dispute settlement procedure (Dispute Resolution Recommendation Matrix – DRRM) (Gläßer et al., 2014, pp. 53–55; Hagel, 2014; Hagel & Steichbrecher, 2012, 2014). During the development of the DRRM, only the procedures relevant for Bombardier at the time, namely mediation, adjudication, arbitration, expert determination and litigation, were taken into consideration.

Following on from this, the RTMKM's Business-to-Business (B2B) Conflicts Working Group has developed a tool that is intended to make the advantages of Bombardier Transportation's DRRM available to the entire German corporate landscape. In view of the expansion of the user group, it was deemed advisable to extend the selection to other dispute resolution procedures. For this purpose, the Working Group first collected and described different procedures available for the settlement of B2B-conflicts. It was decided as initial step to focus the development of the tool on the German landscape. In addition to the classic dispute settlement procedures (negotiation, mediation, conciliation, arbitration, litigation), the Working Group also took into account procedures that are, at least in Germany, seldom chosen due to the lack of awareness or familiarity of potential users (e. g. mini trial, dispute resolution boards, MedArb, cooperative practice). The next step was to gather those interests and motives that prompt conflict participants to decide for or against a particular dispute settlement procedure. In order to cover a maximum of possible interests, the Working Group interviewed a large number of dispute settlement experts from different German companies. The resulting extensive list of procedural interests included, in addition to the always important aspects of procedural costs, the duration of the procedure and the confidentiality framework, also the questions of whether the conflict party needed to establish a precedent, what effects the respective procedure might have on the business relationship, as well as the complexity of the question(s) in dispute. In a matrix composed of procedural interests and dispute resolution procedures (which in its original version contained 17 procedures and 42 procedural interests), the procedures received between zero and ten points for their respective capability of covering each procedural interest.

With regard to the procedural interest »capability of dealing with non-judicial aspects of a conflict«, for instance, litigation received zero, MedArb five, conciliation eight and cooperative practice ten points. The assignment of different scores resulted from extensive discussions in the Working Group and was based on common basic assumptions about the archetype of the respective procedure in the German legal and business environment. For example, the basic assumption about arbitration (relevant, i. a., for an assessment of the procedural costs) was that the arbitration tribunal usually consists of three arbitrators and the parties are represented by lawyers.

While the procedural characteristics were easy to describe in some cases and therefore the scoring did not pose any difficulties (for example, only litigation received ten points with regard to the criterion of respecting preclusion deadlines, while all other procedures received zero points) the relationship among the different procedures with regard to other procedural interests seemed less clear: for example, it remains a highly subjec-

tive question whether litigation should receive many or few points with regard to the sustainability of the solution to the conflict, since it terminates at least a part of the conflict in a legally binding manner, but is limited to the judicial aspects of a conflict, while disregarding other interests of the conflict parties.

In the next step of the developing process of DiReCT, the Working Group reduced the 17 procedures to the 14 most relevant from a German perspective (litigation, arbitration, accelerated arbitration, MedArb, expert determination, adjudication, dispute adjudication board [DAB], dispute review board [DRB], expert opinion, conciliation, mini trial, mediation, cooperative practice, negotiation) and combined all identified procedural interests into only a few questions. In this process of aggregation, the scores assigned to the different procedures had to be readjusted. In an iterative process, in which also scientists working in the field of dispute resolution and members of the judiciary were involved, the Working Group went through an iterative process of refining their evaluations. Particular attention was given to avoiding any bias in favor of certain procedures, so that the tool really achieves its purpose of creating awareness for the entire range of B2B-dispute settlement procedures and their respective areas of application.

2. How DiReCT Works

The software is available free of charge at www.rtmkm.de, so far in German language, an English version is planned. It has been designed in a user-friendly way: parties to a B2B-conflict reflect upon their (potential) conflict and answer a total of 15 questions. The first four questions are aimed at procedural interests that seem to speak in favor of litigation only (requirement to set a precedent, necessity of interim orders/injunctions, need for securing evidence, compliance with exclusion periods).

Even if a user answers one of the four preliminary questions in the positive, it remains possible to continue the questionnaire and go through the ensuing catalogue of questions. This reflects the situation that it always remains possible to conduct an ADR-procedure parallel to litigation.

The aim of the subsequent questions is to determine the user's key procedural interests. On the basis of the responses, DiReCT determines which dispute resolution procedure best suits the user's interests and issues a recommendation. To facilitate further individual tailoring and adapt to his/her respective case, the user can individually weigh the relevance of the questions against one another.

As part of the recommendation chart on which all procedures are listed in the order of their aggregated scores, the tool shows the characteristics of each of the included 14 procedures including their advantages and disadvantages in detail. The tool also issues some further recommendations. Some of them are of a rather general nature (for example, the tool advises users to enter into renegotiations with the other party on the most suitable procedure if the recommendation generated by DiReCT is in contradiction to a contractual agreement on the dispute settlement procedure. In these cases, the tool furthermore recommends suggesting to the other party to use DiReCT which could simplify the agreement on the procedure. A further suggestion given by the tool is to check whether the other side might have signed a corporate ADR pledge (Klowait, 2016) which would create a common understanding in favor of choosing an ADR procedure.

Some recommendations are, however, directly related to specific answers given by the individual user. For example, if the user indicates through his answer to the related question that a neutral third party involved in the settlement of the dispute should have special matter expertise, DiReCT advises the user to precisely define the required knowledge when drafting the neutral's profile and to agree with the other party on criteria for the choice of the neutral. As data security and anonymity are of paramount importance to the RTMKM, the use of DiReCT is completely anonymous, no data is saved, neither with regard to the number of users, nor to the answers given.

3. Basic Assumptions, Questions and Determinations Based on Subjective Evaluation

As a selection-tool, DiReCT is intended to support parties to B2B-conflicts in choosing the most suitable procedure for resolving their conflict. Every conflict has its own individual characteristics, each settlement procedure may appear in different shapes and designs. For example, litigation can take place over one or more instances, an arbitration is sometimes conducted by one, sometimes by three arbitrators, and e. g. mediations in the B2B-context may take place with or without external lawyers. One of the tasks of the Working Group was therefore to agree upon basic assumptions about the most common form in which the different procedures usually appear in the German legal and business environment when used to solve B2B-conflicts. Eventually, the Working Group assumed that in a B2B context external lawyers are involved in the management of all 14 available procedures, with the exception of expert opinion, DAB, DRB, mini trial and negotiation. This assumption is based on the practical experience that the latter cases would usually be supported exclusively by in-house legal sup-

port. For litigation, it assumed that the first instance decision will not be appealed; for arbitration that the arbitral tribunal is composed of three arbitrators; for MedArb that mediator and arbitrator will be the same person; for DAB and DRB a three-person board; and for mini trial, cooperative practice and negotiation, it assumed that no third parties are involved. These basic assumptions will have to be modified in part should the tool be applied to international B2B-conflicts.

Formulating questions and making determinations based on subjective evaluation was more difficult than defining the basic assumptions described above. In order to keep the complexity of the evaluation within limits, the Working Group decided against scaled answer options so that the final version of the tool provides only binary answer options (yes/no). The questions had to be simple on the one hand and at the same time be able to mirror the users' highly differentiated procedural interests realistically.

Three questions and the corresponding determinations based on subjective evaluation may illustrate this process: First, DiReCT is intended to support parties to a B2B-conflict in assessing whether (and if so, for what reasons) the situation they are considering amounts to a complex conflict. The tool differentiates between complexity that arises from the large number of disputed factual and/or legal questions and complexity that results from the large number of conflict parties without a common contractual obligation. A conflict is less complex if the conflict can be reduced to only a few factual or legal questions. If the latter is the case, litigation, expert determination and expert opinion appear to be ideally suited to resolving it. These three procedures therefore receive ten points in this category. But how should negotiation and mediation be assessed in this case? The mere fact that both negotiation and mediation are designed also for the clarification and resolution of non-judicial elements of the conflict does not mean that these procedures are unsuitable for dealing with legal questions (as consensus can be reached also on legal questions). At the same time, there are also constellations in which the parties to the conflict can easily isolate a legal question that needs to be resolved, but consensus-based procedures may be less suitable as the superior level of decision makers (e. g. the board, tax authorities, accounting, etc.) might have to approve their results without having been part of the negotiation. Therefore, in this case, mediation and negotiation receive a lower score (two points) than law-based procedures (conciliation: four points, adjudication: seven points, arbitration: eight points). Another extremely relevant party interest with regard to the choice of the most adequate procedure is the length of the proceedings. In order to get to the bottom of the question of whether the parties to the conflict are interested in a quick dispute settlement or, on the contrary, want to strategically delay the dispute settlement process, DiReCT asks wheth-

er it is convenient for the user if the process of dispute settlement takes a long time. If this is the case, all procedures receive zero points – on the one hand, many of the procedures can be extended almost indefinitely by a tactical approach, and on the other hand – and unfortunately this cannot be avoided in practice – one party may at times use a settlement procedure solely to delay the resolution of a dispute. If, on the other hand, it is important for the user to come to a quick resolution of the dispute, DRB, DAB, expert opinion, conciliation, mini trial, and mediation are on top of the list. These procedures even outrun negotiation as third party interventions may lead to a degree of efficiency that makes up for the (time) effort of initiating the procedure.

DiReCT also takes up the question of whether the conflicting parties are willing and able to provide the human resources necessary to conduct the dispute settlement procedure. Only if the user claims not to be willing or able to set aside sufficient human resources, the tool differentiates among the procedures. The more resources a party can make available, the more it is able to engage in procedures that require a thorough preparation on a fact-finding level (litigation, arbitration). If the user, however, does claim to be able to invest substantial human resources, this does not lead to a low rating of the, at first glance, less time-consuming settlement procedures such as negotiation or mediation, because this ability itself does not in principle speak against the choice of an non-decision procedure. In addition, the preparation of a settlement procedure that does not lead to a third-party decision can also be very resource intensive. Accordingly, if the answer is affirmative, all procedures are rated equally with 10 points.

The members of the Working Group are aware of the fact that the evaluation of the different procedures is ultimately a subjective value decision. This decision was objectified to the extent that it was (re)assessed not only by numerous RTMKM-company representatives, but also by conflict scientists and by members of the judiciary. Following this (re)assessment, the Working Group iteratively adjusted the scores. Nonetheless, these value decisions resulting from expert discussions are open to criticism and must prove themselves in practice insofar as they have to contribute to results that are rational and intuitively convincing. Ultimately, however, DiReCT does not follow the goal of generating a mathematically accurate and irrefutable answer to the question of the most adequate dispute settlement procedure. Rather, its aim is to achieve the educational purpose to make users aware of the large selection of available process options and to stimulate a more reflected and conscious decision about which procedure to choose.

4. Future Developments

DiReCT has been available to the public for free use since April 2019. As both the spectrum of procedures and the procedural interests of the parties to a conflict differ significantly depending on the conflict context, DiReCT is, in its current version, limited to the context of B2B-conflicts in the German legal environment. Comparable instruments will be developed for the context of consumer conflicts, workplace conflicts, conflicts in the context of administrative law and B2B-conflicts with an international dimension in the nearer future. Tailoring to other jurisdictions would be a potential further step.

In the case of consumer conflicts, both the procedures (e. g. informal/formal customer complaints, written conciliation, algorithmically supported (semi)automated conciliation, blended forms of conciliation and mediation etc.) and the evaluation criteria (the costs of the [subsidized] procedures will have to be put in relation to the value in dispute) differ from the B2B-context. With regard to workplace conflicts, the procedural options include an appraisal interview, the involvement of an ombudsman, team development, mediation, intervision, supervision and various coaching formats; any evaluation should i. a. take into account the employee's conflict history, the scope of the conflict with regard to colleagues and teams. Also, in case a sexual harassment is asserted the authors believe that some of the dispute resolution procedures would not be applicable, such as arbitration and expert determination or more project-oriented dispute resolution mechanisms such as DAB or DRB. As far as administrative law is concerned, the Working Group contemplates an extension of DiReCT to participative processes in the realm of energy, mobility, and agricultural transition. In this context, a distinction of procedures could be made between voluntary participation formats at an early stage and statutory participation formats at a later stage of planning processes. Also, project promoters and opponents to a project alike could use a comparable tool to gather information about the status of the procedure and how to get (re)involved in the planning process. The Working Group is particularly aware through its own cumulated experience and expert advice that on an international level procedures carrying the same designation are often interpreted and handled differently in different (national) contexts or even in fact designate different processes, e. g. in some countries »mediation« allows the »mediator« to make a final procedural determination and close a case against the parties' will whereas this is e. g. not the case in Germany. Additionally, the parties' motivation to choose a particular dispute resolution procedure very often differs in an international B2B-dispute from parties' procedural interests in a purely national B2B-conflict. While e. g. in Germany with a stable and efficient litigation system typically the parties to a dis-

pute would chose (private) arbitration over (public) litigation only if the special expertise of the decision-makers or the protection of business secrets seems crucial to them, in an international context parties might prefer arbitration over litigation for a wider range of different reasons (such as lower costs, possibility to influence the design of the proceedings, absence of appeals, speed of process).

An in-depth discussion and a hopefully playful use of the tool could lead to a broader knowledge about dispute resolution procedures and to the contemplation and usage of a greater variety of options for the respective decision-makers. The RTMKM Working Group is currently vetting several options to develop the tool further also in view of further enhancing its user-friendliness. One option is to create a feature that allows overlaying the procedural choices in DiReCT of several conflicting parties and to visualize them in a spider web diagram. Such a diagram could be the initial spark for a dialogue between the parties involved in the dispute which would initially relate to procedural questions but could also be a starting point for a meaningful discussion of the conflict's substance. Furthermore, in addition to a horizontal extension of the tool, it could make sense to integrate a tool such as DiReCT into the process of filing a lawsuit (which might someday become fully digitalized). Eventually, DiReCT might become a reference point when courts that conceive of themselves as multi door-courthouses start to provide procedural advice to the parties.

To conclude, DiReCT is a first step towards rationalizing process selection decisions by focusing more on procedural interests.

Author Note

This article is drawn from Hennemann & Wendenburg, 2020; Wendenburg et al., 2019.

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Section 5
Mediation Training Moves ... People (and Politics)

Academic Mediation Programs Move – an Impact Report

Lin Adrian, Ulla Gläßer, Kirsten Schroeter

1. Introduction

Everyone in the field of mediation training has witnessed that training moves participants. That change and development occur in a training program is no surprise (see Biesta, 2015), but the extent to which this happens and the components of change are not always predictable. As directors of two executive academic master's programs in mediation and conflict management, we have often witnessed students moving in unexpected directions, at a much more profound level than anticipated, and far more so than we have seen in other types of educational programs. We looked in vain for studies outlining and documenting these effects and therefore decided to test our anecdotal evidence as a first step. To do so, we set up a study of graduates to help understand the movements brought about by academic mediation training programs and provide more solid evidence to explain the impact that we have observed.

In the study, we distributed a questionnaire that combined a multiple choice-format (quantitative data) with free text answers (qualitative data). Our analysis of the quantitative data indicates that graduates consider the program content highly relevant both on the professional and personal levels. They describe numerous ways in which they have used their knowledge and skills in their everyday work-lives and multiple positive effects on their professional development. They feel more competent in handling their own conflicts and, in addition, detail a range of transfer activities beyond strict mediating (such as using mediation skills in other types of activities, giving talks and publishing on mediation and conflict management, introducing and promoting mediation in a variety of settings and influencing decision-makers).[1]

In this chapter, we explore the free text answers to one of the concluding questions in the survey which sought to capture the participants' own uninterrupted narrative about what participating in a mediation training pro-

1 For a more detailed account of the quantitative findings see Gläßer, Schroeter & Adrian (2020).

gram has brought them. For the multiple choice questions, the range of answers was defined by us and, thus, limited by our understanding of the changes that participants may undergo. In a free text format, the graduates articulate their points of view more freely which provides richer data than box-ticking answers do. As we had hoped, their accounts refine our understanding of their learning experiences and add important outcome elements that we would otherwise have missed.

We have enjoyed analyzing the data. Going through the many accounts from former students has been enlightening, moving, comforting and fun. In this chapter, we share our insights from the analysis in section 3 after describing our methodology in detail in section 2. In the final section (section 4), we discuss the limitations of our study and reflect on the possible consequences for the conceptual design of masters' programs in mediation and conflict management. We also consider the applicability of the study results to other types of mediation training programs.

2. Approach, Design and Methods Utilized in the Study

Our study uses data from two executive masters' programs in mediation and conflict management – one at the University of Copenhagen (Denmark), and the other at the European University Viadrina Frankfurt (Oder) (Germany).[2] The two programs were developed independently but share striking similarities: They have existed for a comparable amount of time (since 2002 and 2004 respectively) and cater to a similar target group of students with analogous motivations for studying mediation. The programs are based on quite similar conceptual and curricular designs and share the same basic understanding of mediation.

Students in both programs are typically academically trained professionals from a wide range of disciplines with at least some, and usually a significant amount of, professional experience. Most participants aim to enrich their professional practice with new perspectives on handling conflicts and state of the art skills. Students or their employers pay considerable tuition fees.

The programs span across three or four semesters. The programs' foundations are interdisciplinary, drawing on conflict resolution, sociology, law, economics, political science, psychology etc. The design of both programs follows a blended learning approach with intensive on-site learning sessions combined with group work and self-study activities between

2 See https://jura.ku.dk/uddannelser/efterogvidereuddannelse/master/ and https://www.rewi.europa-uni.de/de/studium/master/mediation/index.html

sessions. Participants study both the theory and practice of mediation and conflict management, as well as regulatory frameworks and preconditions in different areas of society (from family to public planning and international peace making). They are encouraged to develop a substantiated, critical perspective on alternative dispute resolution and their own understandings of conflict.

As program directors, we had access to almost all graduates since the programs' inceptions in 2002 and 2004 respectively and assumed that they would be inclined to answer questions from their former training institutions. We addressed the inherent problem of being too close to our object of investigation in a number of ways. The two master's programs paired up, so that the program directors could provide for the outsider perspective for their counterpart. The survey was disseminated by administrative assistants and was completed anonymously, unless respondents chose to include their names for follow-up. We analyzed the data together, making sure to ask critical questions and challenge our respective interpretations throughout.

In order to assess the impact of mediation training, we developed a questionnaire with 52 questions covering basic socio-demographic data, impact on professional life, impact on personal life, and the ways in which graduates influence their professional surroundings through publications, speaking engagements, policymaking etc. In addition, we asked evaluative questions to contribute to the improvement of the programs.[3] Most questions were in multiple choice-format, but a number of questions required the provision of a free text answer.

Questionnaires were administered in 2018, as an online survey[4] in the local languages. All alumni (a total of 600 former students) were contacted by e-mail and received a link to the online survey. We received 314 completed questionnaires in response, 281 from respondents still in employment and 33 from respondents who had retired or were out of work.

In this chapter, we focus on the answers to an open-ended question towards the end of our questionnaire: »Finally, please write a couple of sentences about what participating in the program has meant for you (it is ok to repeat aspects of previous answers).«

As indicated in the introduction, this question was posed in order to capture the graduates' own narrative about the impact that taking a master's

3 A copy of the questionnaire can be obtained by sending an e-mail to lin.adrian@jur.ku.dk, schroeter@europa-uni.de or glaesser@europa-uni.de.

4 Administered through SurveyXact.

degree in mediation and conflict resolution has had – it was left open to them whether to focus on their professional lives, private lives or both.

We limit our analysis in this chapter to answers from participants who are currently working, as the programs are primarily targeted toward active professionals. Of the 281 respondents in this group, 178 answered the question and the average length of the answers was 42 words. We applied a qualitative content analysis in our examination of the answers (Druckman, 2005), and were inspired by grounded theory (Glaser & Strauss, 1967) in which data-analysis is performed bottom-up with no predetermined categories or hypotheses. Although our own personal and professional experience as educators and mediators inevitably informed our reading, we tried to put that aside and approach the material with an open mind. Our ultimate aim was to let the data speak for itself.

The Danish and German answers were translated into English so that all authors could examine the entire body of material. At first, we read and reread the answers individually, developing our own first ideas for analysis. In our initial joint analysis, we looked for similarities and differences in the Danish and German answers in order to determine whether to do a comparative analysis or perform a joint analysis. As the differences between the two countries were insignificant, we determined that we could conduct a joint data analysis highlighting any important country specific differences. We went on to discuss our first impressions, exchanged examples and made a list of possible categories that captured the answers in analytically meaningful subgroups. We then reviewed all the answers again to test whether the categories adequately captured content that appeared frequently. This led us to define some categories more sharply and dismiss others.

As a result of this process, we have developed the following five categories that depict the main patterns of impact identified in the data:

1. Knowledge and skills

2. Professional identity and growth

3. Personal growth

4. Connection and network

5. Sense of frustration

3. Findings

In this section, we present the findings on the impact of mediation training according to the aforementioned five categories. We will reflect on different aspects we found within these categories and quote illustrative examples from the free text answers.

3.1. Knowledge and Skills

Former students report that they have obtained knowledge and skills in the field of mediation and conflict resolution through the programs. This is quite unsurprising since both programs are university-level and aim to combine academic knowledge of mediation, conflict and conflict management with practical skills. The comments from graduates also show that many had a certain level of knowledge and skills prior to entering the programs which they feel they improved upon.

Although neither program specifically aims to provide management training, many respondents explicitly highlight how the programs' content is applicable in their managerial positions. This makes sense, as managers need to communicate clearly, deal with conflict and – at times – act in a mediating manner. The graduates may feel that the programs fill a void with regard to dealing with conflict in management training left by programs they have attended previously.

The following statements give us a clearer idea about the connection between the programs' content and management skills:

> *»The program has definitely made me a really good and highly regarded manager – most employees follow my leadership because I am attentive, tolerant and clear and because I believe that we can find satisfactory solutions within the organizational constraints. Empathy, attentiveness, building bridges between colleagues.«*

> *»I have become a more competent manager (and meeting-participant) as I understand the value of listening and asking much better now.«*

> *»It has been the best management education I have attended but I did not realize that until afterwards.«*

> *»I was able to noticeably improve my leadership qualities. They were not bad in the past, but today they are better: team-oriented leadership and no longer … autocracy.«*

Former students report being less autocratic and more of a team leader, while others highlight acquiring better questioning and listening skills, being more responsive, as well as more empathic, inclusive and clear in

their communication – and reiterate central aspects of mediation such as building bridges and finding satisfactory solutions in controversial situations. The comments from the former students suggest that knowledge in the field of conflict management and mediation, supplemented by typical communication skills used in mediation are generally valuable in the field of management.

3.2. Professional Identity and Growth

Taking a master's degree in mediation means much more than learning and applying new skills. In the answers that we analyzed for this chapter, we find it interesting that numerous comments shed light on the multifacetted effects of additional knowledge and skills.

> *»It has given my practice a theoretical foundation …«*

> *»Significant professionalization and academic foundation of know-how and skills in both conflict management and mediation.«*

> *»Halfway through my professional life as a judge, the master's program helped me to supplement my legal knowledge with theoretical and practical aspects of conflict in such a way that – hopefully – I can do more justice to the particular concerns of the parties in the proceedings entrusted to me.«*

In the first and second quotes, the graduates describe how attending the program has helped them to establish firmer theoretical grounds for their mediation/conflict resolution expertise. The program has provided »a theoretical foundation« and »significant professionalization«, thus showing how post-graduate education can foster professionalization in the field of mediation/conflict management. Important criteria for any profession are specialized knowledge, shared education, autonomous work and professional ethics (Staugaard, 2017). Belonging to a profession also provides an individual with a professional identity encompassing certain points of view and values as well as shared knowledge and skills (Adrian et al., 2014). Pursuing a master's program in mediation readily contributes to the development of a sense of professional identity as a mediator/conflict resolution expert. A lingering sense of being a mediation and conflict resolution amateur is replaced by a sense of knowing what you are doing, of being a professional.

The third quote suggests a similar phenomenon: Participants enter the programs as professionals from different fields, and the knowledge and skills obtained in the program complete those of an existing profession to thus make the graduates better professionals in their profession of origin.

Related to the sense of professionalization, many comments address – on a more general level – what we might term as professional self-confidence:

»A lot of self-discovery, but also self-assurance about my own competencies.«

»I would like to emphasize in particular that the program prepared me very well for ›the life out there.‹ I have absolutely no concerns about working as a mediator now.«

»The level of discourse is clearly higher than in lawyer trainings; it strengthens self-confidence to have the master's degree.«

»The education has been very important to me. After graduation, I got a new position… Now I speak with authority about mediation and how it can be used as a healthy alternative to courts. It has given me a stronger voice among decision makers. It has allowed me to pave the way for mediation in my community.«

»Self-assurance«, »self-confidence« and »no concerns about working as a mediator now« attest to how these graduates have grown professionally. This may provide graduates with more certainty about their professional work and a sense of realizing their potential. This self-confidence also enables them to speak about mediation with more authority – which is an important factor for many. This may be inside organizations or on a community or political level, like the former student quoted above who felt emboldened to pursue a pro-mediation agenda much more effectively than before.

The free text answers also reflect how obtaining a master's degree in mediation positively affects careers in various ways:

»I wanted to change my career away from communications to something international and/or conflict related. It happened two years later and now I work for [name of international organization] as a monitoring officer.«

»The program helped me to establish my career in ADR over the course of the past almost ten years.«

»I have become able to use mediation as part of my services as a freelance occupational psychologist.«

The impact of the degree on a career can be quite profound: It can be the stepping-stone towards a change of career path for some, or a means for people to add a new service to what they already do. The change can be part of a deliberate plan as we see in the first quote, where the graduate entered into the master's program for the purpose of making a career change. For others, career changes come in unexpected ways:

»It was intended to further my skills in my job at the time but it has now become my livelihood and the golden age of my professional life.«

In addition to these effects, it seems that both the program content and the degree itself impact careers in other very interesting ways, too. We noticed a number of comments that speak to a new sense of professional meaning or a sense of »coming home« professionally:

»I chose to become a mediator in a time-limited position on a part-time basis and with a much lower salary. Will never regret this decision. Always new challenges and possibilities for development. The contact with the parties is exciting and two days are never the same. Experience the job as meaningful.«

»I feel that I have learned something with meaning and added value for my social environment.«

»The master's program in mediation was a real pathfinder for me: it gave my law studies a meaning in retrospect (!)…«

»In addition, my studies have helped me with my professional reorientation, so that I have now found a new job… that gives me a lot of pleasure and that unites the various areas that are close to my heart: children, family law and mediation.«

»I have thought a lot about my attitude in communication, mediation and conflict. Above all, I feel that I have arrived where I can be.«

Related comments such as »feel that the job makes sense« and »I have learned something with meaning and added value for my social environment« suggest that the graduates are not only engaged in professional activities that they enjoy and find fulfilling, but that they have arrived in professional situations which are more meaningful to them on a deeper level. Some even feel that they have come home professionally.

Mediation and conflict resolution, as taught in both programs, are based on a set of explicit values and principles, such as self-determination of the parties, acceptance of conflict as an inherent part of life, and a humanistic, systemic approach to communication and conflict resolution. These values and principles also underpin and inspire the academic and practical activities within the programs. The students identify with and experience this value set at play on various levels throughout their study life while attending the program, and we are convinced that this contributes substantively to the sense of finding meaning. Additionally, some people may come to the program with a permanent feeling of (mild) psychological discomfort caused by having a job or work environment that does not correspond well with their attitudes and beliefs (on cognitive dissonance, see Harmon-Jones and Mills, 2019). Making professional changes may re-

lieve this tension or eliminate it altogether, which may arguably also be an aspect of comments referring to »arriving« and giving law studies »meaning in retrospect«.

3.3. Personal Growth

Most academic programs do not (overtly) advertise personal growth as a part of the package. However, in our view, the practice of mediation and conflict resolution without self-awareness is futile. Hence, our programs – like any good mediation training – include a fair amount of self-reflection in feedback activities, group work, and reflection on action (Schön, 1987). As a result, our graduates, like most who have undertaken intensive mediation training, have experienced changes and growth on a personal level:

> *»It has had a profound impact on my work, my personal and private life. I have become very well equipped to face the world, my fellow humans, my family and myself. I had not imagined it would turn out to be such a profound change for me. It has really been a tough process and a rewarding one. I am deeply grateful that you granted me this opportunity. THANKS!«*

> *»I cannot put a price on the importance of the education for me; it has changed me as a person. The program led me to a path which I by intuition knew was right, but I did not know that it existed.«*

> *»My studies and the network I have gained through them, have added an enormous value to my life. Mediation has changed me in a positive way.«*

> *»The program was very important for me personally in many respects and resulted in changes on several levels (which I can only rudimentarily describe here). On the one hand, I have been engaged with myself and my attitude towards conflicts and have learned more about myself than I could ever have imagined. This was not an easy and pleasant process, but in the end it was incredibly helpful and enriching for me and my work as a mediator.«*

> *»The program has really contributed to my professional and personal development. I have learnt so much about myself personally…«*

These comments explain that going through the program can have a profound – and for many unexpected – impact not only on the professional level, but also on a personal one. Students enroll in an academic program that does not flag personal development as a component, but we hear no complaints about the inclusion of this aspect of the education. Former students regard this very positively, using descriptors like e. g. »better«, »profound«, »helpful« and »enriching«. One comment honestly explains that it was not »an easy and pleasant process, but in the end it was incredibly helpful and enriching for me and my work as a mediator«. The pain is clear-

ly outweighed by the gain. Quite a few former students describe the impact of the program as life changing, for example:

> *»I have radically changed my life. I quit a management job to become self-employed. I got divorced during the last exams, but in no way do I attribute this to the education;-). On the contrary, I am convinced that my knowledge of and experience with conflict has contributed to the fact that I got through the divorce in a constructive manner. Today, I am convinced that I will continue to support people in difficult situations. I embark on a psychotherapy education in 2019 (much inspired by the master's in mediation and the idea of continuing education).«*

> *»Participating in the master's program has changed my life. The decision for the program was one of the best decisions of my life! The program sets the bar very, very high for all subsequent training courses with regard to content quality, implementation, and the people involved!«*

> *»The master's program has changed my (private and professional) life.«*

These and other similar comments reflect the profound level of change that some graduates experience. This shows that participating in a master's program in mediation not only enhances or expands what the participants do and who they are; it can even become an existential turning point. This turning point may be a result of graduates gaining a sense of agency, in accordance with Biesta's suggestion »that education always functions in relation to three domains: that of qualification, that of socialization and that of what, with a technical term, I have referred to as subjectification, which is about the ways in which students can be(come) subjects in their own right and not just remain objects of the desires and directions of others« (2015, p. 235).

In summary, we want to assert that, for many of our respondents, the impact they experienced is not one of *either* professional *or* personal growth. These aspects of growth rather seem to go hand in hand, as many of the quotes above demonstrate. As they address this dual growth experience, many graduates also express shifts in their general view on conflict and conflict handling, and on human communication and interaction at the same time. They begin to see »conflict as an opportunity and a challenge rather than a burden«. Others comment on how their horizons have been broadened, how they have »greater respect for fellow human beings and their points of view« and how they have gained »a new understanding of what it means to be a human«. This suggests that attending a master's program in mediation broadens and deepens the framing of communication, conflict, and humans in general and for some changes their overall approach to life by offering a new mindset on a number of key issues.

3.4. Connection and Network

Participants in the mediation programs share an intensive and quite intimate learning experience over an extended period of time (3 to 4 semesters). They engage in numerous simulations, communication exercises, and self-reflections, whilst both giving and receiving thorough feedback. In addition, the implicit and explicit certainties acquired and relied upon in their primary discipline are regularly challenged. Students therefore get to know each other very well both as professionals with diverse backgrounds and as quite different personalities. They appreciate each other greatly, as evidenced by the adjectives used to describe former fellow students such as »interesting«, »special«, »inspiring« and »fantastic«. They also learn to appreciate the heterogeneity of the group and establish ways of inspiring each other.

According to many respondents, this personal encounter has value in and of itself:

> *»Meeting so many fellow students with different qualifications who have the same interest, aptitude, understanding, was a very large part of the value of attending the program for me.«*

> *»I have come into contact with fascinating people who have shown a high level of self-reflection, which I find very interesting.«*

> *»Thanks to our colorfully mixed class, I have gained an insight into the professional fields in which mediation is relevant and can be used. I would never have thought of some fields without these insights.«*

> *»I feel comfortable in the [mediation community], and our joint understanding of values contributes to that.«*

For many, these encounters facilitate the development of a strong network which, we think, is then strengthened by an evolving sense of community. Participants who choose an educational program such as a master's in mediation likely share a number of interests and thus form a »community of interest« from day one. Over the course of the program, this initial community of interest may evolve into a community of practice that, as defined by Wenger (1998), »are groups of people who share a concern or a passion for something they do – and learn how to do it better as they interact regularly« (p. 1). As mediation programs explicitly educate and train (future) practitioners, participants also »develop a shared repertoire of resources: experiences, stories, tools, ways of addressing recurring problems – in short a shared practice. This takes time and sustained interaction« (p. 2). This process is a powerful source of bonding and network formation.

Whereas to some the network is predominantly professional in nature, to some it generates meaningful friendships:

> *»I also found the conversations and personal exchanges with other students, to whom friendships have developed in the meantime, a great enrichment and still value them very much. It is a nice feeling to feel connected with so many different people (from a variety of different disciplines) through the enthusiasm for mediation.«*

> *»During this time, I got to know people with whom I am friends, and this has enriched my life.«*

While making new friends may be expected during a first course of studies, typically among a group of rather young people as they follow bachelor's courses, it is less of a given in cohorts that are more diverse, with an average age over 40, comprised of participants who have already completed at least one study program and who are well-established on their career paths as well as in their personal lives. We think that the new friendships between some graduates are an additional result of the intense interpersonal experience of the program in combination with a sense of belonging to a community of practice with shared values and passions (as described above).

Irrespective of whether participants focus on the professional aspects of the network and shared practice or on the personal relationships, both practices of relating to and learning from each other help to create a sense of belonging – a belonging that endures far beyond graduation.[5]

3.5. Sense of Frustration

We have pointed out a number of ways in which participants in academic mediation programs experience movement that – so far – has seemed unequivocally positive. However, some participants also describe some ambivalent or even uncomfortable effects of becoming sensitized to the complexities of communication and conflict while undergoing mediation training.

Studying mediation and conflict management sharpens perspectives on conflict and provides an awareness of the somewhat overwhelming array of circumstances that are suboptimal.

> *»Participating in the program has led me to perceiving drawbacks [with regard to working conditions] even more intensely.«*

5 From the quantitative data of our survey, we know that more than 80 percent of the graduates meet at least once a year and almost 30 percent meet more than eight times a year.

»With all my knowledge (regarding interests etc.) it is sometimes even harder to come to terms with obviously ›irrational‹ decisions by superiors.«

This can spark calls for improvement with regard to the handling of conflict in real life. In addition, becoming more competent in handling conflicts may lead to situations wherein graduates' enriched repertoire of interventions and behaviors is met with resistance or elicits critical feedback from colleagues and/or superiors:

»In conflicts within my working environment (with colleagues or superiors), people unfortunately often lack the willingness or ability to engage in mediative ways of thinking.«

»My belief that conflicts can be resolved more constructively if dialogue is established between the parties has been reinforced. It is frustrating when parties maintain that it is better not to engage in dialogue.«

»Surely I could often apply what I have learned. But unfortunately, one also reaches one's limits when on the one hand, this method of conflict resolution is not appreciated or not understood – and when on the other hand, I sometimes lack distance when I am personally involved.«

»I was able to noticeably improve my leadership qualities… Nevertheless, from time to time my superior accuses me of provoking conflicts instead of solving them…«

Obtaining a master's degree in mediation means developing from being a relative novice with regard to conflict and conflict resolution to becoming an expert on these matters (Dreyfus & Dreyfus, 1980). The quotes above illustrate that while becoming an expert in a field is rewarding in many ways, it can also be the source of frustration.

Some participants envision taking part in the mediation program as a pathway into a practice as a freelance mediator. It is worth noting that neither program promises such a transition into successful mediation business, as it is not yet a well-established path and requires a lot of personal stamina and persistence. Nevertheless, it is understandable that a number of participants have that goal. Participants who enter the program with this aspiration may feel a sense of disappointment and frustration when realizing how difficult it is to become a full time mediator.

»I took up the master's program in the hope of becoming self-employed in this field – which has remained an illusion. But mediation became a profitable add-on (though not financially profitable).«

»I – or rather we – were very euphoric in our training. Our trainers ignited the fire in us. Unfortunately, I reverted to the everyday grind in my job as well as

in my private life. Mediation is still of little importance. Mediation as a main occupation is difficult, because it would not secure the livelihood.«

»High contribution to personal development, but not the expected development towards mediation as a real occupational field. In my opinion, this shows that the possibility of earning a living with mediation is rather low. Nevertheless, I took a lot out of the program; on an emotional level there is a deeper connection compared to my basic training as a lawyer.«

This frustration was only expressed among German respondents and we looked at different hypotheses in order to understand this difference between the German and Danish graduates who otherwise appear similar in almost every respect. The difference does not come from a divergence between the mediation activities as one might think. From our quantitative data, we know that the number and range of mediation activities after completing the mediation program are similar in both countries. Therefore, the frustration some respondents described seems rather to stem from divergent expectations: Potentially, Danish participants are less likely to envision a (full-time) freelance mediation practice and are hence less often disappointed. Frustration may further be fueled by an ongoing critical discussion among practitioners, mediation organizations and policymakers about the slow development of the mediation market in Germany. When the German Mediation Act was introduced in 2012, the legislator aimed to increase the use of mediation and stimulate the economic development of the mediation market through this process. A first evaluation from 2017 (Bundesministerium für Justiz und Verbraucherschutz, 2017) found little such effect which caused discontent among stakeholders. These measures contributed to a sense of impatience and might explain why some German graduates scrutinize the value of their mediation education by looking on the return on their investment. While the Danish market for mediation practice is limited in the same way as it is in Germany, the discourse surrounding it is different. Danish mediators discuss and lament the low use of mediation as well, but do so with critical wonder rather than outright discontent and without strong mediation organizations or government initiatives pushing for a faster development.

4. Concluding Remarks

The findings of our study confirm and expand the anecdotal evidence of change that gave rise to the initial idea for the empirical exploration. In both countries, most graduates report significant changes in their professional and/or personal lives – and attribute these, mostly positive, changes to their participation in the master's programs. Beyond acquiring knowl-

edge and skills, many respondents report that the study program has changed their perspective on communication and conflict, their attitude towards their work-life or even, in some cases, their entire lives. They have experienced professional and personal growth, and become part of a new network. For some, a sense of frustration has accompanied them in the move to new levels of understanding.

The findings confirm our impressions from evaluations and many informal conversations with students over the years. Even so, we were taken by surprise by just how much change the programs fostered and felt enlightened by the categories of change that illustrated how multifaceted this change is. This notwithstanding, some methodological considerations regarding the approach of our study and its specific advantages and challenges still hold:

First of all, the personal and professional changes that have been reported in our survey cannot be attributed to the participation in a graduate program alone. In order to avoid over-estimating the effects of training, it is prudent to consider other factors which enable or catalyze this impact. Some respondents hint at aspects such as readiness for change and pre-existing levels of expertise.

Secondly, we asked graduates for a self-assessment of a study program that they had consciously chosen, paid for and invested a significant amount of time and work in. This might provide overly positive assessments of impact, a cognitive or perceptual distortion also known as self-serving bias (Forsyth, 2008).

Furthermore, most of the graduates, after several semesters of intensive engagement with the program, have developed quite a personal relationship with the trainers and program directors. This creates heightened trust, openness and a readiness to invest time in completing the survey – but it might also produce some distortion in the form of answers that aim to please.

Last but not least, we – as the program directors – were, of course, also susceptible to the effects of a self-serving bias. We are convinced that mediation skills and the underlying mindset are very useful in many domains of life; we want to offer programs that equip participants with as many useful resources as possible and we are happy to see a rich outcome of our efforts. However, we tried judiciously to control our own wishful thinking and, by combining the German and Danish surveys, introduced a crossover (semi-) external perspective while collaboratively interpreting the data. Insider research on professional education has a long history and is, as Humphreys (2012) puts it, »a growth industry«; we agree with her that it should be our aim »to become risk-aware rather than risk-averse, given that insider re-

search can excavate rich data from the deep strata of our consciousness and communities, and given the impossibility and undesirability of eliminating risks« (p. 582).

Even in light of this critical assessment, the study gives new empirically founded proof that the value of thorough mediation training goes far beyond acquiring mediation skills and, in fact, generates change in a number of ways. The analysis provides a refined understanding of the different dimensions of impact and change experienced by participants in an academic mediation program. The categories that we were able to carve out from working through the free text answers provide us with a targeted perspective and more precise language when we reflect on the movement generated or at least catalyzed by such programs.

This, in turn, leads us to reconsider and refine the concepts of our programs: Which aspects of change do we foster consciously, and which happen more by chance? How could we optimize curricular content, didactic approaches and the overall structure of our programs to reflect the findings of this study in order to counter frustrations and support the obvious positive impact of the mediation training at the personal, professional and societal level?

We have studied two executive, university-based master's programs. There are a wide range of shorter and longer mediation training programs offered at educational institutions, by professional organizations and by private providers. Participants in these programs similarly acquire knowledge and skills, experience personal growth, develop professional self-confidence and build a network. Therefore, we speculate that the findings of our study (at least partially) apply to other types of programs as well. Although we think that the depth of development in each of the areas that we have identified in this study is unique to programs that combine theory and practice over longer periods of time in an acedemic setting, we nevertheless hope that our study will inform and inspire other programs and trainers in defining the effects of their training and in thinking about program development.

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Mediation Moves: The Effects of Mediation Training – in Stories

Greg Bond with Eva Chye, Alexander von Aretin, Sophie Tkemaladze, Larissa Wille-Friel, Tat Lim, Elena Koltsaki and Marion Uitslag

Introduction

Greg Bond

When I ask myself how my mediation training affected me, I think back to the first enthusiastic months. I experienced so much transformation. This was personal and it was professional. I gained new pictures of myself and of old conflicts and wounds, and I gained new insights into others and their needs and reasoning. I gained new skills for communication with members of my family and at work.

Shortly after the mediation training I began to redefine my professional life, and have since entered on a completely new career. There is more balance in my life. More than ten years on, I also ask myself if this transformation has always been good. Have I learned to give up too easily when it comes to asserting my »rights«? Have I become impatient with old friends and with colleagues, and do I expect too much of others when it comes to the ability to listen, or the ability to deal well with conflict and see the many sides to the story? And how deep has any change really been? Each of these insights and all of these questions could be illustrated with a story.

I cannot be sure of course if the changes I have experienced are all attributable to mediation training and practice. Maybe I would have become wiser anyway. Maybe not. This is no more than a story I like to tell.

I have always been interested in stories. Stories are subjective; they tell it how the storyteller sees it. Stories are ambiguous; they never have all the answers. Stories can be key in mediation. Stories are fun to read. Stories are inspiring.

The following seven stories are told by people who trained in mediation and live and work in different parts of the world. I asked them to tell a story about how mediation training changed their lives – whether personal or professional. The seven storytellers are not all practicing mediators, but

they all write about how mediation training led to transformation. How it moved them somewhere they had not been before.

Eva Chye and Sophie Tkemaladze write about shifting communication patterns in professional interaction. Tat Lim writes about a fundamental shift in his approach to lawyering, which is echoed by Elena Koltsaki, who adds a story about how she became a different kind of mother to her three children. Larissa Wille-Friel writes about the expectations that she had of »becoming« a mediator and how the small changes in communication have made a difference to friendships. Alexander von Aretin also addresses how his practice as an attorney has changed, while finishing with a story about his family. Marion Uitslag's story is about family too; she relates a personal tragedy and reflects on how mediation training gave her a new perspective. I think that these stories all have one thing in common: they show how the authors have gained a new sensitivity and different kinds of self-reflection through training as and, in some cases, also working as mediators.

I warmly thank the contributors to this collection for their openness and their willingness to share their stories. I hope that readers may be inspired by reading them. We all have stories to tell.

Backpackers, Vegetables and the Disruptive Power of Mediation

Eva Chye

So, what has digital disruption got to do with mediation?

As an innovation consultant, I see organisations prioritising technology solutions over human-centred solutions. Given that I am also trained in mediation, I have noticed that the best results happen when organisations prioritise customer needs and staff input over technology.

In an era where artificial intelligence, robotics and the internet of things are revolutionising the way we live, work and play, it is understandable why clients want to focus on technology-driven solutions. Yet, when you think about it, automations are only tools of trade, humans are the real drivers of growth.

At almost all of my client meetings, a client starts off wanting to know what kinds of innovation are happening »out there.« Do I foresee digital disruption and how it is going to impact their business? There is a lot of pressure on executives to respond to a dynamic environment quickly, cheaply and effectively. They want to know if I can recommend a tech solution that can address these concerns.

Recently, a client gave an example of how they have been encouraging innovation in their organisation. In the spirit of thinking outside the box, the brief given to staff was to come up with creative ways to get backpackers to eat more vegetables. I should clarify that this company's business has nothing to do with backpackers or vegetables. This was a game and participants had fun coming up with cool ideas, one of which involved a spacesuit.

However, it struck me that none of the ideas explored whether said backpackers actually wanted to eat vegetables or the reasons they weren't eating enough vegetables. The gravity of the discussion was centred on innovative ideas.

When I pointed this out to the client, I was met with a blank stare. This was only a game and there was time pressure. The team were tasked with developing innovative solutions!

So I asked the client isn't that how we respond to real-life situations? Time is always tight and solutions are always required sooner rather than later. This time I was met with thoughtful silence.

Mediation has taught me that impactful outcomes are only achievable when we peel back the layers, understand underlying interests and give stakeholders the autonomy to develop mutually agreeable solutions.

Going back to the example of fibre-deprived backpackers, after a moment's silence, the client said, »We need to shift our focus back on what customers want and then think of creative alternatives to deliver what they want.«

You should have seen the smile on my face. I am not proposing mediation as a management practice. What I do know is that even though digital innovations are changing the way we live and work, they do not change human needs and emotions.

Mediation training has allowed me to be conscious of the importance of human-centred solutions. In consulting clients, I have helped them to recognise that sustainable growth depends on staff who are inspired to accelerate innovation and are given the capacity (within broad parameters of control) to conduct open, interactive discussions and develop the best solutions for customers and therefore the business.

In fact, since mediation requires parties to put all the solutions on the table, it actually encourages creativity and innovative ideas.

After all, innovation might be the engine of growth but humans are the drivers.

Eva Chye is an account director at PwC Business Align and Connect in Perth, Australia.

In 2016 she did a Certificate of Advanced Study and Training in Mediation at Humboldt University Berlin, Germany, as part of a postgraduate degree in International Commercial Law with The University of Western Australia.

The Conflict Resolution Journey

Alexander von Aretin

1. Experiences from My Studies in Mediation at the European University Viadrina in Frankfurt (Oder)

In autumn 2015, I successfully completed my education as a mediator at the Viadrina University in Frankfurt with a master's degree. A fulfilling time had come to an end, in which, after many years as a lawyer, I dealt with out-of-court conflict resolution and gained a great deal of expertise in communication and behavioural psychology, intercultural communication, negotiation as well as sociology and various ADR methods. In addition, it was very enriching for me to be able to escape from my work routine as a lawyer during the usually three-day study blocks and to be able to dedicate myself to mediation training with fellow students of all ages and from various occupational groups such as psychology, business administration, theology and education. Not only professional contacts, but also friendships have developed with many of these fellow students.

After completing my training, I returned to professional practice, stuffed full to the brim with a »craftsman's toolbox« consisting of a five-phase mediation model, omnipartiality, a circle of chairs, active listening and the loop of understanding. I now saw my work with different eyes and listened even more attentively to the parties in order to understand their real interests behind the dispute and to encourage them to find a personally and economically sensible solution. This not only in litigation, but also within the framework of contract drafting and negotiations or the preventive avoidance of legal disputes. Increasingly, I also began to mediate in shareholder disputes or family disputes.

2. Practical Experience

To what extent has my mediation training at Viadrina influenced or changed my practical work?

At first I had to find out that classical mediation could not easily be implemented in practice, especially against the background of my other legal activities and the expectations that these usually brought. In my role as an actively advising attorney, many clients expect not only facilitation and procedural support from me, but also creative proposals for solutions. Should I therefore take a more active role than the classic mediator and facilitator role would allow? I have successfully done this many times, not least because many clients are not as autonomous and »reasonable« as was as-

sumed in my mediation training. A »narcissistic« approach resistant to rational argument seems to unfortunately be on the advance, and the power factor is increasingly played out in negotiation and also in mediation. Circumstances that demand stronger control of the procedure from me than I would have expected after my training.

Increasingly, I am experiencing that frozen conflicts cannot be solved around the table. The fronts are too hardened, arguments are repeated, and there is little readiness to open up to the arguments and points of view of the other sides. This, however, opens up possibilities for creative procedural designs, as I would like to illustrate below using the example of a conflict in my own family.

3. The Conflict in My Family

After an inheritance dispute, a serious conflict broke out between two brothers that divided my whole family. For ten years the conflict deepened to the point of house bans and criminal charges. Lawyers' attempts at conciliation and several mediations did not help. Communication was broken off. People only spoke to each other when absolutely necessary. The whole family, from grandmother to grandchildren, suffered.

As a member of this extended family and direct cousin of the quarrelling brothers, I was asked to try another mediation »as a last resort.« I thought about finding a new setting to make a change of perspective possible. I decided not only to change the place where the conflict was negotiated (up to that point, people had met in the family house that was the subject of the disputed inheritance), but also to integrate the disputants into a larger circle of people, as the next generation in the family had good relations and considered this dispute superfluous. I therefore proposed not a round-table mediation with a typical mediation procedure, but a two-week family trip to Armenia, a country the family originally came from, but that living members had never visited. To my astonishment, this suggestion was not only accepted by both brothers, but a total of twenty-three people from the family wanted to take part in this adventurous individual journey, in total seven from the generation of the brothers in dispute, and sixteen from the next generation, aged twelve to twenty-three years.

Would this journey go well after this long period of conflict? I was not the only one to think of murder and manslaughter!

We started off from different places in Germany and met up in Yerevan, sceptical about what was ahead of us. We drove through the rough and hot country, hiked to various monasteries, churches, and museums, climbed mountain peaks, and spent the evenings with locals. We talked to many peo-

ple and looked for our common family roots. These other topics, the common search for the common history, getting to know each other in a new situation, and coping with the same everyday issues, such as how to survive the dirt in a hostel, how to get up a mountain in the heat, and asking why Armenians always seem to eat the same vegetables, already relaxed many tensions. In addition, we had to cope with dangerous situations together (crossing rivers, crossing suspension bridges, driving along a dangerous border between Armenia and Azerbaijan in a state of war) and we gained many common insights. One insight was that the children of the quarreling brothers, who had not seen each other for years, understood each other very well. Much cognac and good stories from interesting Armenian hosts did the rest.

In the end, the journey ended well and all participants were not only talking to each other again, but had also learned a lot from each other. The conflict had not yet been settled, but many interests, needs and motives had been clarified, without the word mediation having been used or the conflict discussed even once during the whole trip.

4. Conclusion

Sitting together around a table and concentrated work in the office setting is usually right in a professional context. In the case of frozen conflicts, a different setting in a non-professional context can lead to a change of perspective and help to resolve frozen positions. Talking becomes possible again, which facilitates communication and clarification.

Alexander von Aretin trained as a mediator with the master's in mediation at European University Viadrina in Frankfurt (Oder), Germany, between 2013 and 2015.

He is an attorney and partner at the law firm Graf von Westphalen in Berlin, Germany.

Listening to Others, Listening to Myself

Sophie Tkemaladze

I realised mediation training had affected my life outside of the training and any formal practice of mediation quite soon after the training. Here is how it happened.

Shortly after the training I was elected to the board of a professional association. At one of its first meetings the board gathered to discuss the type of membership it would have and the prerequisites for acceptance into the association. One of my colleagues and I had a certain view on that matter which we voiced. Several other members of the board expressed a view opposite to what we proposed. As I was listening, I noticed I was summarising their viewpoints, asking questions and genuinely trying to understand the rationale behind what they were saying. The discussion was taking quite some time and most of it was being taken up by the conversation focused on the viewpoint of the members who contradicted the initial position of myself and my colleague.

My colleague turned to me and asked me, in a private conversation, why I was not voicing our arguments? »Don't you think that our proposition is the right way to go?« he asked. To which I responded that I did not know. He said, »Well, you are changing your mind very easily, Sophie.« I took his comment as a critique of my weakness in not being able to uphold my point of view. Being a newly elected member and one of only two women in this board with nine members, I felt attacked. I challenged him and lectured him a little on the purpose of the discussion and the importance of being open to the possibility of changing one's own mind. But he sternly defended his opinion right until the end of the meeting, whereas I ended up sharing the view of the others and supported the decision favouring their proposal.

I had mixed feelings about how the meeting went. On the one hand, I felt good that an open discussion had taken place and that I had listened and discovered perspectives I had never thought of before. I was confident that the decision made was the right one. On the other hand, I was not happy about the dynamics of the conversation with my colleague. I went through what had happened several times in my mind. I asked myself: How did I feel when he said that? Why did I feel that way? What assumptions did I make? How did I act? Could I have done anything else? These were the kind of questions that help people climb down the »ladder of inferences« to which I had been introduced during my mediation training. In searching for answers I realised I had not found out what my colleague had really meant. I had assumed that his comment was accusatory and started to

justify and defend myself; even if my assumptions were right, I had failed to find out why my colleague saw things that way? Maybe there was something about how I was listening? Or when? Or to what or whom? Or something else? I did not know. I had dismissed his feedback without first finding more about it. I had failed to listen.

What happened that evening happened many times afterwards, and is demonstrative of two ways mediation training has triggered the moves:

1. The way I listen to differences in opinions and the way I manage those differences has become more productive. The urge to assert has been substituted by curiosity. A whole new world of perspectives and information of which I was ignorant has now started to flow. That helps me to be more efficient and helpful in both professional and personal settings.

2. Of course, just like during the conversation with my colleague that evening, I often fail to listen when other »natural« reactions and habits take over. The change, however, is that now I am more aware when that happens. The same tools help me listen to myself. As I take time to reflect on what is going on in my head or heart, I discover habits, biases and drivers which I was not conscious of. I must say, those discoveries are not always pleasant to acknowledge. But knowing them gives me a chance to ask myself if they are something I want to (and can) change or should I (do I have to) keep, manage and own them? Grappling with my own challenges is an exercise which helps me make positive changes in my life and makes it more meaningful.

Sophie Tkemaladze mediates commercial and labour disputes at Tbilisi City Court, Tbilisi, Georgia. She is an independent practitioner and an assistant professor in private law at New Vision University, Tbilisi, Georgia.

She did her first mediation training at Harvard Law School's Harvard Mediation Program in the USA in February 2016.

Why Tea and Cake Help Me to Integrate Mediation in My Life

Larissa Wille-Friel

Tea and cake had a place in my life (and heart) long before mediation walked into it. Well, having heartfelt conversations while drinking tea and eating cake.

Staying up late talking to friends or family with a steaming cup of hot tea and a slice of delicious cake always felt comforting and right. Even *Big Bang Theory's* Sheldon Cooper, who is not well equipped to deal with emotional situations or conflicts, knows to offer a hot beverage to someone in a crisis or with worries.

Mediation is an inner voice that guides me and influences me in daily situations whether in my private or work life. My mediation training offers me tools that compliment (and maybe even »complete«) the experience that I have acquired in over ten years of working as a student counsellor.

I have to admit that I assumed that becoming a mediator would help me more in my own conflict situations, but the fact is that I am still as affected by conflicts as I was before. But mediation does provide guidelines. It helps me understand. And being affected isn't necessarily a bad thing; it shows me how my clients might feel in conflicts. My personal insight might help me understand their situations and to develop an idea as to what might feel helpful to them.

Because I have a counselling background that focuses on fact finding and then helping others to make their own decisions about their academic careers, I am used to being asked for information or help. My mediation training helps me to further suppress my urge to jump into action right away, provide the apparently required information or take somebody by the hand and accompany them through the next steps – whether these be applying for university or a scholarship, or something else. My mediation training guides me in helping people to help themselves. After integrating this at work, I am getting better at using this special kind of help while talking to my family and friends as well.

I catch myself using techniques like active listening, mirroring, looping, and others, on my friends and family members too. When I realise this, I try to blend these techniques into the conversation naturally and use them authentically – not just as way for me to practice my skills. My husband sees through me very quickly and sometimes teases me if it isn't natural. But I have had some great experiences with my girlfriends. On two different oc-

casions with two different friends, I had conversations in cafés where I realised how my mediation training has transformed the way I communicate and has enabled me to help them through difficult times. While drinking tea and eating cake they told me about the conflicts they were involved in.

Let me take you along to a typical meeting with one of my friends. After sharing each other's news, we talk about things that are on our minds or worry us. My friend usually asks me something like »what would you do in a situation like this?« Or »do you think I made a mistake when I said (did) that?« Or »what should I do next?«

My initial impulse is still to jump into problem-solving mode and either take action for my friends or answer along the lines of, »Oh I know exactly how you feel because I have been in your position too and I think you should act the following way.« But I am getting much better at catching myself before I impulsively say something like this. Instead I try to apply the techniques of active listening and mirroring, voicing what I believe I might be hearing between the lines, and asking questions instead of giving answers or opinions.

My friends seem to feel taken seriously, to feel heard and have room to reflect on their own thoughts. Sometime we even unearth some hidden thoughts or feelings like the iceberg under the surface of the sea.

Since I love talking to friends and to people in general, I sometimes need some help to provide pauses and space for my friends to reflect. I can recommend cake and tea for those situations. I ask a question and then to avoid uncomfortable silence (which still pushes my »I need to act or talk« button) I stir or sip my tea, eat a piece of my cake, and just smile encouragingly. This feels much more natural for me than sitting without something to do. (I especially suggest tea and cake since busying myself with my smart phone is a no-go in situations where somebody is looking for my advice or help.)

While I grow as a mediator and gain more experience I might get better at accepting silence in a conversation. I might not need tea or cake in the future – but wouldn't it still be nice to sit and talk over tea and cake?

Larissa Wille-Friel works as a student counsellor and advisor in the Centre for University Communications and as a mediator in the Conflict Advisory Service at the Technical University of Applied Sciences Wildau, Germany.

She completed her mediation training at the University of Applied Sciences Potsdam, Germany, in 2017.

The Evolution of a Peacemaker-Lawyer

Tat Lim

Almost twenty years ago, I received my first mediation training in Singapore. Since then, I have become a »junkie« for mediation-related training, travelling to many parts of the world to receive my fix on new ideas, thoughts and practices relating to mediation. This has developed into a win-win outcome – fulfilling my wanderlust, while providing me with opportunities to network with mediation practitioners in the midst of lots of learning!

Yet, there is a compelling seriousness to the trainings I've attended. Each has altered my worldview of conflict and life, and been a catalyst in my evolution from a litigation lawyer clothed in the mind-set of a mediation practitioner to that of a mediation practitioner clothed in the mind-set of a litigation lawyer.

Some thirty years ago, when instructed on a case, the predominant thought in my mind would have been to chart out a case theory that enabled clients to win the case in a contested hearing before a judge. Now, the paramount thought is how to help clients achieve their objective without having to attend court.

A litigation lawyer clothed in the mind-set of a mediation practitioner is an oxymoron: the clothes do not fit well. In my early years as a litigation lawyer, I sometimes found myself struggling at court hearings. I felt the need to explore more than what the clinical process of litigation permits, and to collaborate with opposing counsel in a process that did not make this possible, as it permitted only a win-lose outcome. The result was frustration and disappointment.

Today, I consider myself a mediation practitioner who comfortably wears the clothes of a litigation lawyer. I am conversant with negotiation strategies and have developed an awareness of my own personal conflict style. Consequently, I have gained an ability to understand the conflict in a given situation, predict the actions and reactions of disputants and protagonists, and then to control and deploy a considered response in conflict situations.

In a recent case in which I represented an oil and gas company involved in a dispute with a ship owner, a meeting to negotiate was held in the ship owner's lawyer's office. The lawyer proceeded to postulate the strengths of the ship owner's case and derided my client's position. The expression of contempt was palpable. Years ago, such a situation would invariably have resulted in my amygdala being seized, and a fight response would have ensued. In this instance, I was able to »go to the balcony,« to review what was

going on in the room. I calmly pointed out errors in my opposing lawyer's case theory after which I invited the lawyer and his client to consider mediation. Although that lawyer rejected mediation outright, the obvious difference in our respective handling of the situation drew praise from my client and compelled the ship owner to take the unusual step of agreeing to future meetings with my client without his lawyer's presence. After two further meetings, during which my client (on my advice) adopted a strategy of marginalising that lawyer's influence on the process, the matter was settled without the need to file proceedings in arbitration.

Sadly, success stories such as this are not as common as might be hoped. Clients with high-conflict personalities often require (and demand) their lawyers to assert a win-lose mind-set and adopt a competitive strategy that takes no prisoners. In such cases, there is little regard to the potential fallout of the approach and the outcome feels like the expression »cutting the nose off to spite the face.«

Yet hope prevails: with disputants increasingly seeking cost and time efficient processes to resolve disputes, and with an increasing awareness of the benefits of mediation, the tide in favour of collaborative dispute resolution processes is shifting faster than ever before. Against such a backdrop, I am reminded of the encouraging words of a giant some one hundred and fifty years ago: »Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.«

Through my mediation trainings, I have become that peacemaker lawyer.

Tat Lim is a dispute resolution practitioner with Aequitas Law LLP and Maxwell Mediators, based in Singapore.

His first mediation training was a course within the National University of Singapore's MBA programme in 2000.

The In-House Mediator

Elena Koltsaki

Mediation is a new land or, better even, a deeper layer in a world of disputes worth discovering and exploring. The hear of it makes it quite an unfathomable space for someone who is not aware of what exactly it is, but that was also the case when Marco Polo or Christopher Columbus began their presumably unending travels to the unknown. I suppose this is how it should feel like for all those starting out with mediation.

I have been through the times of admiring the clear-cut, »raw« rules-based legal thinking. I can recall losing myself in textbooks and commentaries, spending countless hours reading between the lines, weighing up words and commas. Mediation was the point where I crossed the Rubicon. It appeared different and innovative. A new breath of fresh air. An opportunity not to be missed. I remember moving from »the law says« to »I see how you feel« at the speed of light.

I can still recall the first day of my mediation training course when I was asked »what are your expectations from this course?« At that time, personal expectations were limited to adding to my academic background, by exploring a »new field of law.« What proved to be the game changer, though, was that I was not landing on a field ruled by the law but on a new space where justice – at least as I perceived it back then – may not be the ultimate goal.

Aristotle once said that »between friends there is no need of justice« and it was my mediation training that challenged me to make this my new professional and personal goal.

Many years since my training as a mediator, I today admit that it totally reset my attitude towards preventing and managing conflict. Although I had expected changes to occur on a professional level, I never imagined the impressive transformation on a personal level. As an example, here is a story of how I handled a conflict in a family with three teenagers!

I remember myself walking into the kitchen one day when two of my kids, in turn, rushed at me accusing each other of reading their school homework out aloud, which they claimed was distracting each of them from studying. In a »pre-mediation era« I would have exercised my authority as a mother. Fairly, as I believed, never considering other available options, not to say the underlining issues that were triggering the fight.

This is also what was expected from me by my kids. A single judge family court, deciding on the spot. But mediation had changed the rules of apply-

ing family justice! I spent some time talking to each of them in turn. I dug a little bit more on why. I applied a new terminology, softer words, more consideration. I asked them to propose ways to avoid this situation. We discovered what was lying behind the obvious. My son needed an excuse for not having done his school duties on time, »thanks« to my daughter. So, he was reading loudly to create a valid excuse. My daughter »replied« by reading loudly back in an effort to prove that, although younger, her voice is also »loud enough.« It all escalated to a no-studying afternoon. After seeing each of them separately, the three of us convened a joint session. Honest statements were made by both. They proposed arrangements to accommodate the need for sometimes reading loudly. They worked on their own plan. The solution they found lasted longer than any prior arbitrary decision of mine ever did.

Not having to judge their behaviour was a relief for me and a whole new world for the kids. What is more impressive is that they now refer »cases« to our »family mediation centre« (me and their father), so we have the privilege of practising as mediators in our own house!

Wouldn't this be motive enough to take the mediation path in life?

Elena Koltsaki is an adjunct professor in ADR at ALBA Graduate Business School at the American College of Greece, Athens, and a mediation trainer at the Bar of Athens.

She did her first mediation training with ADR Group in the United Kingdom in 2011.

When it Becomes Personal

Marion Uitslag

Waiting for my favourite brother Henry to come and visit me, I received the terrible message that he died in a car accident while waiting at the bus stop to take the bus to me. The man who ran over Henry was driving drunk and he drove much too fast. My world turned upside down … my fantastic, lovely, younger brother was gone: actually killed. All of a sudden I understood the meaning of the word »perpetrator« although this was a car accident and not a planned crime.

For the first time in my life I felt I was a victim.

The court sentenced the driver of the car to six months' suspension from driving. I was astonished and shocked.

In those days' victim-offender mediation did not yet exist, but after a while the former employer of my brother contacted me to ask if my parents and I would be open to a meeting with the driver of the car. We agreed.

I learned a lot from this conversation, especially how not to run a sensitive meeting like this. The employer, who conducted the meeting, had no clue. The car driver did not make any apologies, he did not ask how we felt and he did not ask what kind of a person my brother was. And this was what we desperately needed: to share our grief with him. He only diminished his responsibility by saying that he had been drinking but not so much and that he was driving fast but not so fast.

After this conversation I was angrier than ever.

Several months later the car driver called me and introduced himself as »the person involved in the car accident with your brother.« I reacted by saying »the person who killed my brother?« »If you want to put it like this,« he said. »How would you put it?« I asked him. »Would you say that he died because you had not been drinking so much or because you were driving fast but not so fast? Why are you calling?« The man asked if he could compensate us somehow. »And what do you have in mind?« I asked. He offered a set of plastic garden furniture, which he produced himself. I asked him if he thought he could pay off the debt for my brother's death with plastic furniture and told him never to call again. After this call I felt really good. Justice was done!

Fifteen years later I received my first training as a mediator. During this training I learned that it is very helpful for everyone involved in a conflict

to listen to each others' stories. It took me several conversations with my trainers and fellow-students and even more months to think things over before I started to realise that I had actually rejected this opportunity concerning my brother's death. I realised that the man who was responsible for the car accident tried – in a very clumsy way – to restore something. He was the one who had asked for a meeting with my parents and myself. He tried to compensate us, in an odd way, but he tried.

I felt bad about my reaction and I spoke with my older brother and his wife (my parents had already died). I shared with them my new perspective on the situation, and, even more important, the change in my thoughts and feelings towards the offender. I became milder. They understood and shared my experience and we decided to approach the driver in order to have a conversation in which we all would be able to listen to one another. Unfortunately, I learned that the driver had died in the meantime. My brother, his wife and I were very sorry, for ourselves, and also for the driver, because now we understood that this conversation could have brought peace of mind for all of us. Although the actual conversation never took place, which still hurts me, it did help me a lot to speak and think about this painful event in an open and non-judgemental way. This began with my mediation training.

Tomorrow I will be the mediator in a case between a victim and an offender, a car accident with severe injuries for the victim. In a short phone call the victim told me that the car driver committed a serious crime. The offender explained to me that it was an accident. I think both are right and if I can help them listen to one other maybe they can see a little of the »right« of the other and get rid of some of their anger.

Marion Uitslag is a researcher and lecturer in mediation and conflict resolution at the University of Applied Sciences Utrecht and the University of Utrecht. She is a mediator in workplace conflicts and in court-connected penal cases in Utrecht, The Netherlands.

Her first mediation training was at the ADR-Institute, University of Amsterdam, The Netherlands, in 2001–2002.

10 Years of Mediation and Peace Dialogue Trainings in Nigeria: A Reflection on Impact, Meta-Goals and Conditions in View of the Town Hall Meeting Project

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1. 10 Years of Mediation and Peace Dialogue Trainings in Nigeria: A Reflection on Impact, Meta-Goals and Conditions in View of the Town Hall Meeting Project

Reflective dialogue and mediation trainings have made collective impact in dialogue and peacebuilding on a communal level in conflict-affected Nigeria when implemented in inclusive and sustainable programs.

Since 2009, the Centre for Sustainable Development and Education in Africa (CSDEA) (http://csdea-africa.org/), together with German and US-American colleagues/partners,[1] have sponsored mediation trainings on a regular basis. The focus of CSDEA's mediation trainings and interventions over the years include strengthening transparency and accountability in local governance, resolution of land disputes, conflict settlement in oil-bearing communities, resolving conflicts within families and communities, and dispute resolution between farmers and pastoralists. However, for the purpose of this article, we will discuss the use of mediation and reflective dialogue in strengthening transparency and accountability in local governance, and how mediation trainings of varying lengths and formats support this approach.

The article starts with a short introduction about CSDEA and the work it does. In summary, we introduce the state of violence, cycle of corruption and underperformance that determine the conditions of projects and training approaches. By means of the Town Hall Meeting concept based on mediation and reflective dialogue principles, we present CSDEA's efforts and achievements in the field of strengthening transparency and accountability in local governance. The article concludes with a look at the difficulties

1 For example, the berlin open space cooperative (boscop), inmedio berlin, California State University, Western Institute for Social Research, and the Annapolis Friends Meeting.

faced by projects emphasising sustainability and why mediation and reflective dialogue trainings are highly necessary.

In order to illustrate the special situation in Nigeria – and countries alike – and its requirements, we refer in a comparative way to the situation in German/European or Anglo-American legal systems.

2. CSDEA

CSDEA is a non-governmental organisation headquartered in Abuja. The CSDEA promotes creative and new approaches towards ensuring sustainable development in Nigeria and generally in Africa. It »advocates transformational policies that lead to peacebuilding and good governance through advocacy, capacity development, reflective dialogue and research.« (Centre for Sustainable Development and Education in Africa [CSDEA], n. d.). The CSDEA promotes its vision through collaborative engagement and networking at local, sub-regional, continental, and global levels (Ekpon, 2017).

CSDEA's engagements in society cover a broad field.[2] They align with the organisation's transformative multi-stakeholder and multi-track (Böhmelt, T., 2010) approach that forms part of its mission.

From the outset[3], spreading mediation is part of a larger effort with approaches to the constructive resolution of conflicts at both the micro and the macro levels[4] (process- and structure-related).

3. Insecurity, Violence, Cycle of Corruption and Underperformance

Due to economic instability, low security (group violence, extremism, kidnappings etc.) and difficult personal financial situations resulting from the economic crisis, everyday life in Nigeria is challenging.

The rise of violent groups in Nigeria – as in many other countries – is due to a multiplicity of factors which include underdevelopment, poor gover-

2 For example, youth, health, environmental sustainability, community, prevention of violent extremism, support of victims of violent extremism including kidnapping and rape.

3 CSDEA was found in 2007 and the first mediation training course took place in 2009.

4 For approaches, see Ropers, N. (1995). Friedliche Einmischung: Strukturen, Prozesse und Strategien zur konstruktiven Bearbeitung ethnopolitischer Konflikte (p. 33). Berghof Foundation.

nance, weak institutions, religious violence, and an inability to engage the productive sectors of the economy. It is of utmost importance that steps are taken to address the underlying issues that drive individuals towards religious radicalisation and violent groups, strengthen resilience of communities to manage radical religious and political views, clannism, and ethnicity (Ekpon et al., in press). In order to do so, it is a central task of governments and communal leaders to fill in the roles of formal or informal conflict and crisis managers to maintain an integrative and inclusive attitude through conducting dialogue orientations in tense situations.

Local governments are supposed to be the structure through which governance actually impact people. However, there are high rates of corruption and a lack of dedication at the local governmental level in Nigeria as some of these leaders are more interested in enriching themselves than promoting the common good of their constituents. The governed are also complicit as they expect their local government leaders to meet their individual and family needs on a daily basis through cash distribution and hand-outs instead of strategic community policies and programs. The salaries of local leaders are not sufficient to operate in this manner and as such they engage in corrupt activities to meet these personal demands of some members of their constituencies. This has created a toxic cycle of corruption and underperformance of local government structures in Nigeria.

4. Mediation and Reflective Dialogue Training – Part of a Wider Concept

The Town Hall Meeting based on mediation and reflective dialogue principles is an example of how CSDEA works to strengthen transparency and accountability in local governments. After ten years of experience with mediation trainings, the CSDEA has come to the conclusion that – besides many other positive personal/individual and societal outcomes[5] – their best case study is the use of reflective dialogue to ensure transparency and accountability in local governance in Nigeria.[6] This insight led to a shift in objectives and understandings of issues such as impact, meta-/goals and standards.

5 Mediation training has an impact, especially in the long-term, both on the individual and on the societal level. This is since the participants of trainings learn things that are important in private as well as political and communal life. They will act as role models for people who interact with them as participants, advisors, leaders or mediators in conflict situations.

6 Ekpon, T., personal communication, October 4, 2010.

Implementing and evaluating peace dialogue and conflict management skills in countries like Nigeria requires approaches that are process-oriented and reflect the complexity and diversity of the context. Even more than comparable courses in developed and politically stable countries, the potential of training initiatives lies in a **multi-goal approach:** conveying individual and collective conflict competence, creating dialogue spaces, integrating a wide range of stakeholders – including those who are under-represented in society's formal discourses, among others.

5. Town Hall Meetings Using Principles and Rules of Reflective Dialogue

The situation of violence, corruption and underperformance described above moved CSDEA to enhance the capacity of government chairpersons and officials to strengthen local governance through the application of reflective dialogue in their work.

In 2014 CSDEA initiated a long-term project to transform public Town Hall Meetings into an element of local governance on the community level. Meetings are held every month to discuss revenues and expenditures. It is the aim of the project to create sustainable conditions for peace at the structural level. There would be step-by-step meetings in as many communities as possible in order to contribute to maintaining and establishing peace. The concept consists of measures on different levels, notably on communication quality (dialogue and contact) and participation (information, representation, and transparency).

Part of the approach includes having stakeholder representatives from various relevant groups of society. Political leaders, religious and traditional leaders, women groups, youth leaders, trade unions, farmers' association, civil society organisations, the cattle breeders association and other identified leaders of thought are brought together from all political wards (counties) that form a particular local government. At the end of every month, they meet for dialogue to disclose federal allocations and locally generated revenues and agree on expenditures. Government chairpersons and leaders of various citizen groups who participated in CSDEA's training initiatives learn how to make use of reflective dialogue, gain a deeper insight on good governance, and underlying principles of mediation[7] in those meetings.

7 Such as neutrality, independence, all-/partiality, empathy, needs and interests, separation of factual and relational levels.

Participants to the local government dialogue meeting are supposed to conduct prior meetings with their various constituents to agree on what projects and programs are of paramount importance to their communities. They make project submissions that will be beneficial to their various communities. These submissions are evaluated in terms of cost implication and entered into the monthly expenditures. A formula that prioritizes projects to receive immediate funding is also agreed upon using reflective dialogue principles. In this way, constituents are aware of how much money comes into a local government and how it will be spent.

Against the background that not every request submitted will be funded that month due to the limitation of funds, some projects can take several months to receive funding. Other projects may require monthly funding for a period of time. The reflective dialogue is key for communication about distributional questions in constructive, de-escalating ways to enable people to understand and accept decisions and its underlying rationale.

The dialogue project has promoted transparency, accountability, and citizen's engagement in governance on the local level where it was implemented in Adamawa and Benue States Nigeria. Citizens were also able to experience the dividends of democracy as the federal allocations and internally generated revenues were no longer used to please a few who have access to the local leaders. Rather, they were used to serve all citizens.

Expectedly, the new strategy also led to tension between local government leaders and some members of their communities who preferred the handouts that they previously received to solve their individual needs. However, the transparency and accountability in the process ensured that the majority of constituents were satisfied with the process, and this minority rebellion faded away because of the lack of public support.

6. Impact of Governance, Mediation and Peace Dialogue Trainings

CSDEA sponsored various trainings complying with standards[8] that can be found in many Anglo-American countries, the USA amongst others.

Depending on the target group and conditions at that time (which often have a great influence on whether a training can be held at all), training concepts varied in lengths and format. Three-day training sessions took place

8 On international trends in standards, see Ade, J., & Alexander, N. (2017). *Mediation und Recht: Eine praxisnahe Darstellung der Mediation und ihrer rechtlichen Grundlagen* (3rd ed.)(para. 157f). Wolfgang Metzner Verlag.

in different locations throughout Nigeria. Four to five days leadership trainings focusing on good governance and peace dialogue were organised in collaboration with German and American partner organisations[9] in Abuja, Annapolis, Berlin, Denver, Dubai, San Francisco, and Yola from 2009 to 2019.[10] The training groups were characterized by high diversity regarding faith, ethnic group, gender, age, social field and background. It was not easy to engage women for courses as they would have to spend extra time and money, on top of being busy with family and work. Though they were fewer in quantity, it has to be acknowledged as an important success that women always participated, even in the leadership trainings abroad.

The content of the interactive training programs was compiled on the basis of collegial reflection regarding professional standards and the on-site situation for participants. It always included the introduction of mediation, understanding role characteristics regarding negotiators, mediators, conciliators, arbitrators, judges, communication skills and tools such as active listening, empathy loop of understanding, self-reflection, concepts like the escalation steps, vicious circle, perpetrator-victim-saver-dynamics, the meaning of basic needs and interests, the field of tension and dynamic between self-assertion and giving in. Accumulated practical and theoretical knowledge regarding good governance, inclusiveness and participation over the years showed to be of increasing importance. Hence, the training programs now provide comprehensive knowledge and communication tools for responsible citizenship and leadership in society.

In order to know whether the training measures have made an impact, CSDEA monitored the implementation via the town hall meetings, on how receptive people were to change. Government officials who implemented the project also shared their perception and reflections. Both sources led to the conclusion that the quality of communication had changed and it became possible to talk and decide on how allocations and taxes for local governments are to be spent for the common interest of the entire population.

9 Regarding Germany, see *berlin open space cooperative (boscop)* (www.boscop.org) and *inmedio berlin* (www.inmedio.de). The group of trainers consists of Theophilus Ekpon, Juliane Ade, Willibald Walter, Ulrike Pusch, Juliane Westphal.

10 It was part of the concept to invite Nigerian leaders to Germany into an unfamiliar surroundings and train them in mixed groups with German participants. Regrettably, due to the restrictive German visa policy and the considerable effort that participants have to go to on site in order to apply for a visa, we had to give up on this for now.

7. Challenges and Impediments to Sustainability

Support for mediation in Nigeria and most of Africa is limited. In addition, triggering and supporting factors of conflict as well as obstacles to dialogue and peace development are structural in nature and must be approached holistically (Ekpon et al., in press).[11]

Against the background of economic and physical insecurity through violence, corruption and underperformance as described above, stability in planning and financing takes on a completely different and greater importance.[12] It is a dilemma for projects that try to have long-term impact for society as a whole that they often are among the first to be denied or deprived of money. Both the government and private sectors have not effectively harnessed the opportunities presented by mediation and dialogue. This trend hinders the sustainability of mediation projects and programs. Most international development assistance have also not effectively promoted mediation as an effective process for conflict resolution and peace building leading to the inability to sustain mediation initiatives.

It continues to be a major challenge for CSDEA's Town Hall Meeting project which used reflective dialogue to support transparency and accountability in local governance. This is because majority of the funds came from states and local governments where Chief Executives and high-ranking politicians nominated themselves to be the beneficiaries of the project.[13] This tendency left gaps when they lose re-election or move on to other assignments. As elected officials, these state and local government leaders should have nominated technical staffs who are civil servants to be part of the project. This would have ensured continuity and institutional memory when they, the elected leaders, left office. For the future, CSDEA sees the need to better institutionalize the trainings by ensuring that various career civil servants are drawn from each local government to be part of the team to continually monitor the process and have peer exchanges between implementing teams in each of the local government areas and authorities involved in the project.

Another weakness is the relatively low number of people being trained and the lack of resources for developing a new culture together. An example

11 For an analysis of intervention approaches in a number of countries affected by extremist violence concluding with a list of 18 recommendations regarding obstacles and challenges, see also Kerber (2017) and Von Dobeneck et al. (2016).

12 On the interrelation of sustainability and long-term funding regarding dialogue, mediation and peacebuilding, see Van der Leest et al. (2010).

13 For example, through participating in qualifying trainings themselves such that the acquired competence was not integrated and secured for the system.

is through means of experiencing events that connect diverse groups of citizens in learning. As a result, when challenging situations and conflicts arise, communities lack in capacity to deal with those challenges in a constructive way, preventing escalation and exclusion.

The structural background of these conflicts calls for a holistic policy that promotes mediation as an effective process for conflict resolution and peace building, embedded with measures that address the underlying issues of conflicts. Long-term and consistent funding for mediation programs with a systemic approach is required if the dividends of mediation are to be optimally harnessed for the peace building and development of Nigeria.

Mediation and conflict dialogue trainings and practices should not be regarded as secondary to economic or military strategies. It should be thought of and treated as an important key intervention in developing sustainable and resilient enough conflict management systems in order to handle challenges for society's integration and peace capacity – especially in times when violent extremism develops into a long-term challenge for communities and countries (Ekpon et al., in press).

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Mediators Move Outdoors – an Adventure Based Learning Approach

Silke Amann

When I am among the trees

When I am among the trees,
especially the willows and the honey locust,
equally the beech, the oaks and the pines,
they give off such hints of gladness.

I would almost say that they save me, and daily.

I am so distant from the hope of myself,
in which I have goodness, and discernment,
and never hurry through the world
but walk slowly, and bow often.

Around me the trees stir in their leaves
and call out, »Stay awhile.«
The light flows from their branches.

And they call again, »It's simple,« they say,
"and you too have come
into the world to do this, to go easy, to be filled
with light, and to shine."

Mary Oliver

Nature! All of our senses are awakened by the beauty, vitality, diversity, scents and sounds of nature. A Japanese proverb states: »Emotions are born during the observation of nature.« Emotions such as feeling secure or feeling at ease, as described in the poem above, and further emotions such as longing, respect and beauty overcome us. Aesthetic nature is capable of touching us and holding us in the here and now.

It is therefore not at all surprising that nature, with all its ability to reach people, has a psychosocial function (Rosa, 2016, p. 456; Gebhard & Kisteman (Ed.), 2016; Gebhard 2001; Renz-Polster & Hüther, 2013).

This is already demonstrated by the ubiquitous desire of people to integrate nature into their daily life, as indicated by the booming outdoor in-

dustry, colourful garden arrangements, the passion for collecting funghi, wild herbs, stones or shells, interest in birdsong, the high demand for calenders with landscape motifs, in addition to indoor plants and the increasing trend towards natural healing techniques. On the other hand there is the increasing digitalisation and urbanisation of society, which can alienate man from nature (Brämer et al., 2016) and which has been described as unsettling in many aspects: pedagogically, philosphically, sociologically, psychologically and ecologically (Rosa, 2016; Louv, 2013; Gebhard & Kisteman (Ed.), 2016; Gebhard, 2001; Renz-Polster & Hüther, 2013). In their book *»Landschaft, Identität und Gesundheit«* [translating into *»Landscape, Identity and Health«*] Gebhard and Kisteman (2016) present the theory that landscape has an effect on the development of personality. They use the expression *»therapeutische Landschaften«* (Gebhard & Kisteman (Ed.), 2016) [»therapeutic landscapes«] which attributes to nature both physical and psychological effects. The therapeutic effect of nature is described as *»something, which is beneficial to man in a very complex and deep sense«*, fuelled by its ability to *»offer space for perception and simultaneously give meaning«*(Gebhard & Kisteman (Ed.), 2016, p. 2). Accordingly, nature offers a place of yearning, a space that can touch, excite and cast a spell, encouraging experiences and functioning as a mirror to the soul. In addition, time spent in nature can be seen as a recovery from an overly hectic urban lifestyle. My own experience as a mediator, systemic counselor and experiential adventure educator also supports the theory that time spent in nature positively affects psychosocial change processes.

During mediation, dependent on its focus, parties are looking for both a resolution of the matter and a profound transformation of the cause of the conflict. This goes along with a change in behaviour or behavioural development and, in my opinion, calls not only for a sustainable solution, but also an emotional component and a holistic approach. It is therefore absolutely essential to reach people on an emotional level.

By combining these two assumptions *»first of all that every human being has a longing for experiences in nature and that nature provides a positive environment to encourage change, touch a person and reach him in his entirety« and »secondly that mediation is a process which aims at change and demands the participation of the emotions«*, my goal was to scientifically examine the practicability of incorporating nature into mediation.

The result of my work is »nature-assisted mediation«, which complements mediation practice and which offers the conflicting parties an additional approach to the root cause of the conflict situation. On the following pages I will demonstrate, based on the experiences of clients in conflict situations,

the supportive potential of incorporating nature into mediation, and how this can be implemented in practice.

1. From Conflict to Change

»You can't change what's going on around you
until you start changing what's going on within you.«

Zig Ziglar

Conflicts present themselves as complex processes, which do not solely affect the cognitive/rational aspects of the human perceptive level. The emotional respectively volitional life is also affected by the incompatibility of the interaction between actors. Tension and pressure increase and act as social stressors (Stächele & Volz, 2013, p. 48). If such an overwhelming situation persists, eustress, a positive form of mobilising energy, is converted to distress. This not only has physical, but also emotional, cognitive and behavioural effects. If the body cannot reduce the level of stress hormones, the ability of the body to regulate itself is impaired. Neurobiology maintains that persistent stress factors can result in a regression to previously established strategies, which are sometimes formed in early childhood or may even be archaic reactions. Hüther comes to the conclusion that »prudent and sustainable solutions (...)« cannot »be found between conflicting parties, whose brains have entered such a state« (Hüther, 2013, p. 84).

In contrast, Morton Deutsch, who is regarded as the founder of modern conflict research, has a positive view of conflict. He states that »conflict is at the root of personal and social change« (Deutsch, 1976, p. 16).[1]

How then is it possible, based on the above-mentioned stress situations, to salvage what Deutsch referred to as the conflict potential in order to resolve conflicts and to achieve a profound change?

In order to achieve relief, encourage flexibility and an openness for solutions and thus find lasting solutions to a conflict, it would be advantageous to reduce psychological pressure whilst resolving the conflict. Following a thorough analysis based on the individual conflict experiences of clients, I have grouped the basic conditions which are advantageous for the process of change into three concepts: centering, stimulation and creativity.

1 Original Text: *»Der Konflikt [...] ist die Wurzel persönlicher und gesellschaftlicher Veränderung.«*

1.1. Centering

> *»Challenge is a two-edged sword. While it presents the opportunity for change and success, it also lays bare the issues we are afraid of: losing face, failure and injury. Where there is opportunity for growth, there is also the opportunity for overstepping our bounds, of pushing too far, and thereby retarding the growth we want so badly […].«*
> *(Schoel et. al., 1988, p. 130)*

The non-satisfaction of deficit needs creates tension that aims to cover the lack. This was already concluded by Maslow in the course of his pyramid of needs. As long as the resulting imbalance is within a movable range, free of fears and blockages, usually leads to opening up to new and unfamiliar things. Luckner and Nadler (1997) define this condition in their comfort zone model as the growth or learning zone. However, if the demands and the level of agitation exceed the capabilities of the individual, the process of change stagnates and the individual enters the panic zone.

Hüther also describes the process of moving away from established strategies as one which causes anxiety; he further emphasises that in order for the conflicting parties to take this step, trust must be established, in addition to reducing both the external pressure and the inner level of agitation (Hüther, 2013, p. 83).[2] Haken and Schiepek, who have developed eight general conditions for the monitoring and counselling of change processes, prioritise the formation of stability conditions (Haken, Schiepek, 2010, p. 246). In terms of favourable conditions for change, Bastine (drawing on findings from the fields of psychology of learning and stress management research) describes the need for security as crucial, both as a precondition and as a framework condition (Bastine, 2004, p. 17).

»Attachment research« also refers to the aspect of security (Ahnert, 2008, p.17). This research describes conflicts as stressful situations which trigger attachment behaviour (dependent on individual developmental psychological representation), which impedes successful conflict resolution (Wölfer, 2003, p. 37). Calming and reassuring conditions can be helpful in reducing the detrimental effects of this behaviour. Similar results are also found in conflict research. Glasl writes of the necessity of reinstating the self-control mechanisms of the conflicting parties (Glasl & Weeks, 2008, p. 31). Based on this interdisciplinary approach to factors which are essential for the facilitation of change processes, I have given the first framework condition the title *»centering«*.

2 Original Text: …dass *»der äußere Druck […] bzw. das innere Erregungsniveau abgesenkt werden«* muss.

This incorporates the following concepts: establishing security, reducing the level of inner agitation, reducing the external pressure, reestablishing self-control, and stabilising and establishing trust. Other descriptive terms such as »creating freedom from disturbances,«(Thomann & Prior, 2017, p. 113), securing a good climate (Thomann & Prior, 2017, p. 62), offering a calming atmosphere (Thomann & Prior, 2017, p. 145), as used by Thomann and Prior, fall into this category. Centering can, among other things, facilitate higher self-respect, an improved ability to regulate negative emotions, increased cognitive ability and a constructive and solution-oriented outlook.

1.2. Stimulation

»Called by many names –
dissonance, tension, the edge, uncomfortability;
disequilibrium is the key for shifting perceptions.
It is the catalyst by which the process of change begins.«
(Handley, 1998, p. 206)

The human brain repeatedly follows well-known paths, which can lead to entrenched thinking and behavioural patterns. However, in order to make lasting conflict solutions possible, it is necessary for those involved in conflicts to develop new ways of thinking and, where possible, to be open to new ideas. Neurobiological findings therefore call for conditions which »get under the skin«, which have contact with the inner self (Hüther, 2013, p. 85).

The above-mentioned comfort zone model of Luckner and Nadler also sheds light on this condition. The authors describe habits as a »comfort zone«, in which no learning occurs. In contrast, they define a »feeling of the unknown and unpredictable« (Luckner & Nadler, 1997, pp. 24) as a »change condition«. Once again based on the psychology of learning (since learning is – according to Rink and Becker – » a permanent change in the behavioural position of the individual, brought about by experience«(Rink & Becker, 2011, p. 108)), Bergmann states the disruption of routine and the initiation of conscious disturbance as necessary conditions (Bergmann, 2006, p. 4).

Taking all of these theories into consideration, it becomes clear that something new, something unknown, a constructive degree of agitation or irritation can be utilised, based on the foundation of centering, as a further condition supporting processes of change. I have grouped together these aspects as the second framework condition and used the term *»stimulation«*.

1.3. Creativity

»Creativity involves breaking out of established patterns in order to look at things in a different way.«

Edward de Bono

During the phase in which solutions are sought, which is also called the »creative phase« (Zebisch, 2009), creativity is of prime importance. However, creativity is also essential during the other phases of the mediation process, in order to abandon old patterns of behaviour and interaction, find new ways and thus to achieve change.

For both the mediator – the creative designer of the mediation process and the initiator of creativity (Montada & Kals, 2013, p. 199 / Spangenberg & Spangenberg, 1997, p. 15) between the conflicting parties – and for the conflicting parties themselves, *»creativity«* is considered a necessary resource to explore new pathways, and is therefore the third framework condition.

2. Nature's Potential

»I go to nature to be soothed and healed and to have my senses put in order.«

John Burroughs

Depending on the specific conflict situation and the current status of the conflict resolution process, the conditions centering, stimulation and creativity positively support the process of change. Centering can create a stable basis so that the conflicting parties can engage with the process of change, stimulation can light the way and initiate the journey, and creativity allows all possibilities to be exploited.

Incorporating nature offers possibilities for creating and supporting all three of these conditions. The current state of knowledge provides plenty of explicit and implicit evidence for the manifold effective components of the experience in the nature.

The three factors or principles cannot be clearly separated. They interact and are mutually dependent on one another. Irritations are therefore only able to unfold their stimulating quality when the process has a stable basis, and creativity can only flourish in situations which are free from outer constraints. However, in order to give a structured view of the potentials of nature, separate explanations of the three dimensions follow.

2.1. Finding Centering in Nature

»And into the forest I go,
to lose my mind and find my soul.«

John Muir

Nature's potential in supporting centering consists of the following five aspects:

2.1.1. Relaxation and Stress Reduction

In 2003, Hartig et al. proved in a predominantly environmental psychological study the connection between a walk in a rural area and the reduction of negative stress experiences. The increase in positive emotions of the experimentees was higher in a rural area as compared to an urban area. In the mean time numerous studies have confirmed the observation that there is a connection between time spent in a rural area and lowering of blood pressure and cortisol level as indicators for reduction of stress levels (Park et al., 2007; Bowler et al., 2010). Li et al. (2008) have focussed on woodland areas and have analysed the effect of an extended stay in the forest (forest bathing), also confirming the reduction of stress hormones. The psychoevolutionary theory of Ulrich (PET) also ascribes psychophysical relaxa-tion to a stay in nature, but underlines the necessity of an unspectacular, aesthetic natural environment (Ulrich, 1984, pp. 420).

2.1.2. Mental Regeneration

In their empirically proven attention restoration theory (ART), Kaplan and Kaplan (1982 & 1989) define »directed attention«, which is brought about by a cognitive element and therefore demands a high input of energy. This directed attention is not inexhaustibly available and it has a counterpart, »effortless attention«, which functions without a cognitive element. Since Kaplan and Kaplan attribute the capability of awakening interest in the form of »effortless attention« to nature, they particularly highlight the potential to regenerate the gradually reduced fitness through »directed attention«.

2.1.3. Encouraging Peaceableness

Kuo and Sullivan (2001) have examined whether a natural environment can reduce aggression and violence, based on Kaplan's ART of mental regeneration. Long-term studies on aggressive behaviour in Alzheimer patients with and without outdoor gardens have already shown that violent incidents occur significantly more often in institutions without gardens (Mooney & Nicell, 1992). Studies involving prison inmates also document less hostility on days when they have taken part in gardening projects

(Rice & Remy, 1998). Kuo and Sullivan (2001) also came to the conclusion that inhabitants of inner-city social housing in greener areas showed less aggressive violent behaviour than those living in areas with less vegetation. S. Kaplan (1987) sees a connection to the already proven mental exhaustion. He described the tendency towards »outbursts of anger and potentially … violence«(Kaplan, 1987, p. 57) as the consequence of mental exhaustion. Kuo and Sullivan proved this assumption in further tests. They referred to three symptoms of mental exhaustion – the impairment of cognitive assimilation, irritability and impulsiveness and examined their contribution to aggression. Considering all factors, they came to the conclusion that if these three factors are affected by mental exhaustion, then the result will be destructive, aggressive conflict handling. In contrast, recreation in a natural environment opens up paths to reflective and tactful handling of conflicts.

2.1.4. Raising of Spirits

In combination with the findings of the mood-congruity effect[3] (Bower, 1981, pp. 129–140), this also leads to an increased capacity for recollection (Snyder & White, 1982), judgement and thinking (Bower & Cohen, 1982). Furthermore, the influence of a natural environment consequently can place the perception of both the process and the other conflicting party in a more positive light.

2.1.5. Attachment

Attachment and autonomy play an important role in the life experience of every human being. The concepts of attachment and exploration are at the centre of the theory of attachment. Maslow places them at the centre of his hierarchy of needs as »belongingness and love needs« and »self-actualisation«(Maslow, 2010, pp. 62). Bush and Folger built their concept of transformative mediation on a human image, in which humans are inherently both individuals and connected with one another (individual autonomy and social connection (Bush & Folger, 2009, p. 47; Bush & Folger, 2004, p. 59)).

They describe a relational view of human nature and recognise this »dual consciousness« as innate in the human being. Hüther (2011, audio file, minute 23:28) also describes attachment and autonomy as the two original basic needs. He sees them as the key to the growth process in the course of mediation. If these basic needs are not satisfied, pressure, tension and

3 *»The mood-congruity effect (…) means that people attend to and learn more about events that match their emotional state«* (Bower, 1981, p. 147).

stress can build up. Fulfilling these basic needs can therefore lead to a reduction of these conditions.

When working with nature, a profound feeling of attachment can be achieved (Kreszmeier & Hufenus, 2000, p. 34; Renz-Polster & Hüther, 2013, p. 33; Williams, 2002). Furthermore it can be concluded that such a »feeling of connection« has the potential to have a favourable effect on conflict mediation, by reminding the conflicting parties of mutual needs and can thus help them to understand each other better.

2.1.6. The Balance Between Emotions and Cognition

According to Wilbers »integral theory« (Wilber, 2004), there is a general imbalance in the western world, due to the fact that the »intentional qualities« (feelings, emotions, will, longing, phantasy, dreams etc.) are underrepresented. In such a culture, nature can create an emotionally and cognitively balanced foundation. Watzke (2008, p. 25) sees the latter as key to finding a mutual understanding and a solution in mediation with highly conflicting parties.

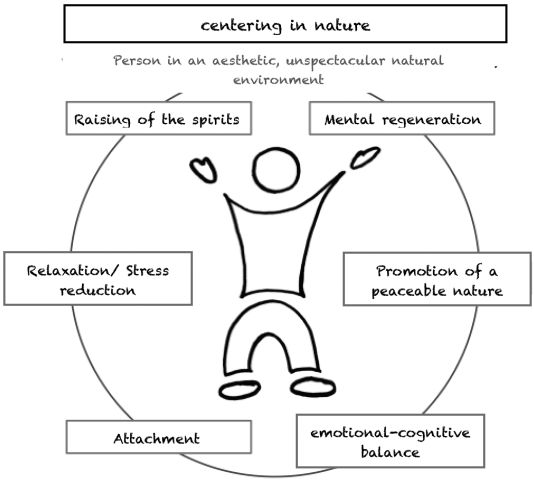

Fig. 1 The centering potential of nature

2.2. Stimulation through Nature

»Deep in the forest I stroll
to hear the wisdom of my soul.«

Angie Weiland-Crosby

The stimulating potential of a natural environment has five aspects:

2.2.1. Stimulating the Emotions

The term »aesthetics« is derived from the Greek *aisthesis,* which means sensory/corporeal perception (Hartl, 2016, p. 14). An aesthetic experience is a form of perception which differs from purely cognitive perception as it occurs through the senses. »Aesthetics is perceptive feeling«[4] (Längle, 2015, p. 64). It includes the whole spectrum of the senses: hearing, smelling, tasting and feeling. Time spent in an aesthetic natural environment adds an emotional component to our perception and allows access to one's own emotional life.

2.2.2. Building Bridges through Pictorial Experience

The metaphoric experience of nature facilitates a method of learning through » images, situations and occurrences, which are particularly symbolically and can be relevant to other situations in life« (Kreszmeier & Hufenus 2000, p. 61). The abundance of metaphors in a natural environment can make new images/symbols perceptible and tangible, and can thus support the process of change as such. A clearing in a dark forest, the view from a mountain peak, a fork in the road – all of these situations become pictorial experiences, filled with meaning and linked to the current situation: rays of hope, new perspectives and zones of decision. The shared path to a new shore can be undertaken in reality; a glimpse into the future can be seen while taking in a new view; obstacles can be symbolically removed. Developing (new) metaphors can be deliberately planned by choosing a natural environment and outdoor activity that corresponds with the themes of the mediation. For example, a fork in a road can trigger the decision as to whether a mutual path or separate ways are more suitable for the conflicting parties; a bubbling stream, which becomes calmer along its course can symbolise the path from the bubbling anger of the mediation parties to finding more peace. Alternatively, metaphors can appear suddenly and without intention – such as a narrow part of the bubbling stream, which can be seen by the parties as an unpleasant closeness in their relationship, thus frequently causing strong feelings.

4 Original Text: *»Ästhetik ist wahrnehmendes Fühlen.«*

2.2.3. Stimulating Self-Reflection

In their ART concept, Kaplan and Kaplan refer to the effect of »being away«. In contrast to the daily routine, they see the experience of a natural environment as having the potential to stimulate self-reflection (Kaplan & Kaplan, 1989, p. 147). Kreszmeier & Hufenus also refer to this quality in the experience of nature. They see nature as being the opposite of civilisation, and as having the ability to function as a mirror to the individual's inner images (Kreszmeier & Hufenus, 2000, p. 60).

2.2.4. Encouraging Presence

Supported by the above-mentioned mental recovery function, the emotionally moving aesthetic natural sights and the new experiences that are far removed from daily life can shift the parties' attention into the here and now.

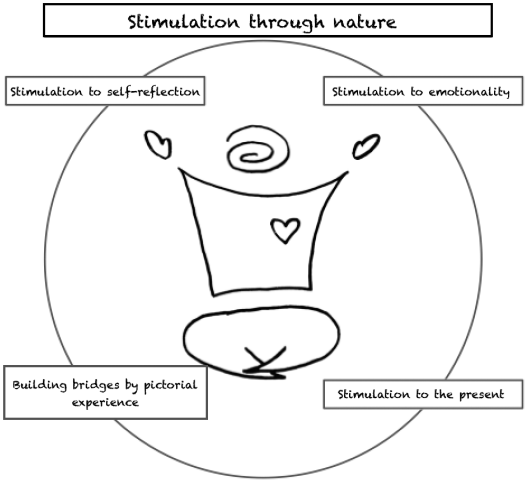

Fig. 2 The stimulating potential of nature

The implementation of the stimulating potential in mediation is limited by three factors: Firstly, in contrast to the stabilising potentials, the stimulating qualities are often not plannable. Secondly, the ability to access the basic factor of »being moved« is connected to the individual needs for security and relationship: for a person, who is filled with existential needs that have not (yet) been met, the sense for beauty and new experiences is, to large extent, lost (Längle, 2015, p. 68). Thirdly, intensive, stimulating experiences have to be adventurous and aesthetically outstanding, which can exceed the financial, time and organisational ressources and possibilities of mediation.

Despite these factors, even in an modest experience of nature, there are diverse possibilities for introducing stimulating potentials.

2.2.5. Supporting Creativity through Nature

»It's the marriage of the soul with nature that makes the intellect fruitful and gives birth to imagination.«

Henry David Thoreau

Many researchers have concluded that creativity as a competence can be stimulated and intentionally developed (such as Preiser, 2006, p. 5). Csikszentmihalyi refers to a change in outer conditions as a fruitful method of fostering creativity (Csikszentmihalyi, 2015, p. 9). Furthermore, he describes creative processes as attention-intensive and places that require »less perceptible effort« as useful. (Csikszentmihalyi, 2015, p. 20). Furthermore, a secure and unencumbered situation can be regarded as a positive foundation for enabling creativity (Möller, 2017, p. 169). In addition to the effect of the qualities of a natural environment mentioned so far, Lichtenfeld et al. (2012) empirically proved that the test results of persons stimulated with the colour green were more creative. The colour blue has also been repeatedly shown to produce similar results (Causse, 2014, p. 57; p. 135). Images, symbols and metaphors in a natural environment can provide the inspiration for new solutions.

It has also been observed that physical activity has a potentially stimulating effect on creativity. Oppezzo and Schwarz (2014, pp. 1142–1152) were able to prove in several experiments that physical activity can favourably contribute to creativity and association skills. Physical activity encourages the production and conversion of the neurotransmitters serotonin, dopa-

mine and noradrenaline, which all have positive effects on brain activity (Meeusen & De Meirleir, 1995).

A natural environment can encourage movement, increase space, offer inspiration and therefore encourage the creativity of mediation parties and mediators alike.

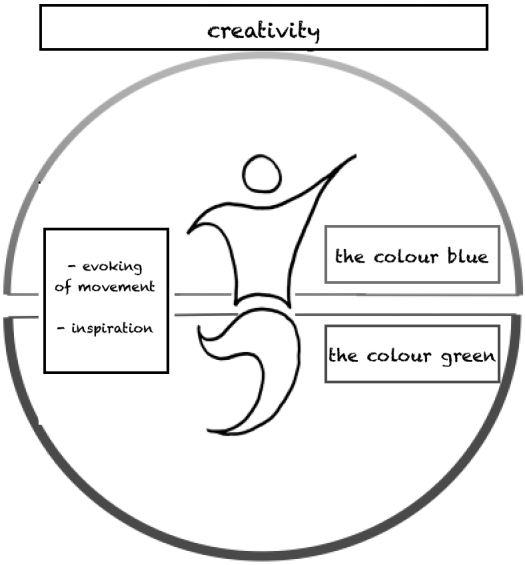

Fig. 3 The creative potential of spending time in a natural environment

3. Practical Implementation – an Inspiration

By integrating nature into mediation, a wide range of variants are possible, from general to temporary. A simple implementation with little logistical and economical expenses which does not require giving up the comfort of the urban setting can be achieved by using an indoor base for the mediation with easy access to a natural environment. The temporary, process-orientated implementation of nature can support the mediation: As a method (working with metaphors/ symbols etc.) analogous to other supplements or for supportive goal-oriented design of the surroundings (calming the storm; encouraging self-reflection or creativity, promoting understanding, etc.).

3.1. Nature in the Mediative Phase Model

The mediator, as the designer of the process, can integrate nature according to the plan described below. However, this is not an inflexible process, much rather should the potential be used in relation to the specific goals and themes of each phase. At all times, the implementation of the medium nature is the responsibility of the mediator designing the process, who must take into account the current needs of the mediation parties.

3.1.1. Phase 0 – Preparation

Special attention should be paid to the preparatory phase. Locations with easy access to a natural environment (own rooms or hotels/venues with nature close by) are a basic requirement and require the readiness of the clients to invest financially and to supply personnel.

The mediator must find out about the details of the natural environment in advance: He/she must locate places for retreat, ensure confidentiality in the chosen environment, include the weather in planning the schedule and, if necessary, seek out favourable aesthetic and metaphorically relevant places for the process. This can require an earlier arrival at the location, to begin preparations beforehand; a previous inspection of the natural environment may be advisable. Group mediations require more intensive preparation of the outdoor environment due to the more extensive nature of the process.

The planned implementation of a natural environment should be included in introductory talks. This ensures that special needs or limitations can be taken into consideration (e. g. whether paths are suitable for wheelchairs) and allows the participants to be prepared (e. g. to wear suitable shoes, bring rain coats etc.). Any uncertainty could cause additional strain on the conflict situation and lead to an unfavourable atmosphere (Berning &

Trenczek, 2013, p. 285). The necessary equipment for visualisation in the natural environment and the organisation of seating facilities must also be considered and prepared.

3.1.2. Phase 1 – Initiation of the Process

In this phase, it is not yet particularly necessary to spend time outdoors. The mutual agreement can be made in the indoor base. However, at this point it is recommended to remind the parties that part of the process will take place in a natural environment, in order to ensure that the parties agree to the procedure and do not later feel that they have been taken by surprise. Any questions concerning the necessity or effect of spending time outdoors can be discussed at this point (at the latest).

3.1.3. Phase 2 – Collection of Topics

As analysed at the beginning of this article, social conflicts between individuals produce stress (Hüther, 2002), which in turn releases dynamic psychosocial mechanisms (Glasl, 2013, p. 39). These mechanisms lead to a reduction in perception, limited thought capacity, controlled emotionality, a one-sided fixed will and a reduction in the variety of behavioural patterns. If the parties are confronted with their conflict history during phase 2, it is possible that the above-mentioned limitations unfold and make mediation difficult. Glasl attributes a psychological pull to these »bottom up drives«. (Glasl, 2013, p. 39). Persons who are strongly affected by the conflict can therefore fall into a negative and destructive conflict spira (Bush & Folger, 2009, p. 51), which then leads to a disturbed interaction with others. This can be explained by the above-mentioned »mood congruency effect«. However, according to Ulrichs, in a natural environment which is experienced as safe and aesthetic, the same unconscious »bottom up drives« can lead to relaxation and an improvement in mood instead of irritation. Nature can therefore, due to the described centering potential, be conducive to an interruption of the negative spiral in conflict situations (s. Fig. 5). The implementation of nature is therefore appropriate in phase 2, above all to ensure a positive and constructive start to the conflict development through the centering effects (relaxation, stress reduction, encouragement of peaceableness, improving of mood and the creation of an emotional cognitive balance).

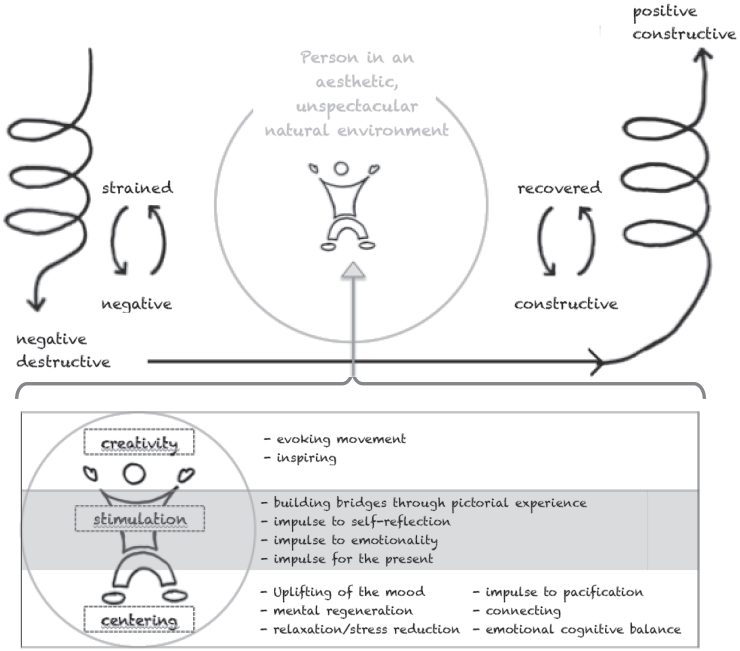

Fig. 4 Support of the conflict transformation

The increased level of destructive agitation can be reduced to a constructive level and the stimulating potential of nature can promote access to emotionality and encourage the parties to be more present.

3.1.4. Phase 3 – Defining Interests

In Phase 3 the mode of the interaction should change from »the primarily aggressive-reactive mode to a creative-constructive mode« (Gläßer & Kirchoff 2005, p. 131) and the conflict parties are given an opportunity for self-reflection and clarification of individual interests.

In accordance with the three dimensions centering, stimulation and creativity, this is the point at which – from a solid basis of centering and by means of stimulating methods - the parties can be accompanied on their way to self-reflection. Risks, adventures, aesthetically pleasant moments, experience of resonance and metaphorical nature experiences are fitting additions to a targeted process design. As summarised above, these additions can only be used to a limited extent in the process of mediation. Spending time in a natural environment can be favourable in various as-

pects and can touch and motivate people who are in conflict and encourage creative introspection. It is however possible that individuals in conflict may have difficulties in accepting and implementing the impulses provided by the environment.

3.1.5. Phase 4 – Generating and Evaluating Options for Solutions

In Phase 4, also called »the creative phase«, the aim is to widen the range of possible solutions by increasing creativity, in order to make optimal use of the options available. A change of location from an indoor area to a creativity-stimulating outdoor area, when paired with movement sequences, has been shown to be a promising supportive measure in this phase. Natural symbols, pictures and metaphors can also be integrated into this phase of the process as inspiration during the search for solutions (»Go out into nature, gather suitable materials on your way (leaves, stones etc.) and associate with each object a possible solution«).

3.1.6. Phase 5 – The End of the Procedure

When reaching phase 5, the process of change has been initiated. It can be seen as the gateway to implementing the solutions into the daily life of the mediation parties. Metaphorical nature experience can be beneficial in this phase to test the practicability and suitability of possible solutions. For example, the mutually celebrated crossing of the river can represent the imminent final agreement and any disagreement during the course of the exercise could indicate that a rethinking of the solution is needed. Furthermore, ritual experiences in nature can underline the significance of the transition from conflict to agreement.

4. Outcomes and Outlook

The potential of nature within the mediation process is manifold; I have outlined some ways of harnessing it. However, this is not an exhaustive report, and individual creativity is essential for process design. Particularly in environmental mediation, family mediation, neighbourhood mediation and elder mediation, the implementation of nature in the mediation process appears to be a welcome addition. This is especially true in elder mediation where, as supported by the results of garden therapy with older citizens, nature can build a bridge which makes it easier for older people to engage with mediation. Mediation with children, young adults and in schools can also benefit from mediation with an intensive nature experience, as longer assignments of experiential outdoor education is already regularly used in these fields.

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Monia Ben Larbi started working as a mediator in 1995. She was deeply inspired by her early experience working with teams in organizations which had a strong sense of purpose and commitment to social impact, and has specialized in working with new work organizations, mostly with self-organized structures, in the past decade. Besides mediation, Monia builds organizations which aim to make a difference in the way we learn and work, as well as transform rural regions. As someone who personally struggles with chronic illness, one of her main areas of expertise and interest is creating truly inclusive workplaces.

For more about Monia, see www.monias.org.

Olav Berger is a graduate in Administration and a controller at the State Chancellery of the Federal State of Brandenburg in Germany. He is also an active mediator, logotherapist and alternative psychotherapy practitioner. Olav is the CEO of ZoffOff e.V., which he co-founded while doing the Master's Program in Mediation and Conflict Management at the European University Viadrina Frankfurt (Oder). Olav has been without a larynx since 2015, but this has not detracted from allowing him to fully engage in the above-mentioned activities – although he now does so with a different »voice«.

For more information, see http://www.zoffoff.de.

Ellen Birkhahn is a practicing lawyer with a focus on civil law cases, certified German-English translator, and a practicing mediator in the field of employment and business conflicts. She teaches communication classes for young lawyers. Ellen is currently completing her PhD thesis at the European University Viadrina in Frankfurt (Oder) and also works as research and teaching assistant for Prof. Dr. Gläßer.

For more about Ellen, see www.ellen-birkhahn.de.

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For more about Greg, see www.bond-bond.de/en and https://en.th-wildau.de/gregory-bond/.

Theophilus Ekpon is the Director of the Centre for Sustainable Development and Education in Africa (CSDEA), Abuja, Nigeria, and a member of the Executive Committee of the Hague based Global Civil Society Platform for Peacebuilding and Statebuilding (CSPPS). He previously worked for the United Nations in New York and Nigeria. Theophilus has facilitated over 40 mediation training workshops in collaboration with partners that include the California State University, Inmedio Institute-Berlin and BOSCOP-Berlin, which have led to over 1000 mediators being trained in Nigeria, Kenya, Germany and the United States. Through his work at the CSDEA, he has developed a Governance and Dialogue Program that enables local government officials in Nigeria to make use of reflective dialogue to work with their constituents to ensure transparency and inclusivity in governance.

For more information, see www.csdea-africa.org.

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Dr. Ulrich Hagel is a mediator, academic and in-house negotiator and litigator. As Global Head of Litigations & the General Counsel Office at Alstom (formerly Bombardier Transportation GmbH), he is not only working conceptually on conflict management processes and tools but also operationally leading in negotiations, ADR-processes, arbitration and court litigation for complex disputes. Since 2010, he has also been a Partner at KonsensKanzlei in Berlin. Ulrich has published numerous articles on Conflict Management, Contract Management and Compliance. He is co-editor of the German Arbitration Journal (SchiedsVZ), and founding as well as board member of the Board of the *Round Table Mediation und Konfliktmanagement der Deutschen Wirtschaft* (RTMKM). He is also a member of several advisory boards (German Arbitration Institute DIS, European Institute for Conflict Management EUCON and the Online-Magazines AnwaltSpiegel and Dispute Resolution). Since 2014, he is Academic Director of the MBA-Program »International Commercial & Contract Management« at the Dresden International University.

For more information, see www.konsenskanzlei.de.

Jan Nicolai Hennemann researches, teaches and consults at the intersection of business, law and technology. He is a jurist, industrial engineer, and executive coordinator of conflict, crisis and change at Sweco, an international architecture and design company. In recent years, Nicolai has built up and led the innovation department of the Competence Centre on Green Business (KNUW.NRW). The Competence Centre on Nature Conservation and Energy Transition (KNE gGmbH) lists him as one of about 50 mediators who were specially trained to tackle conflicts arising in the context of renewable energy projects on behalf of the German Government. As a lecturer and researcher, he teaches at various universities and academies. Nicolai is also a member of the board of the *Round Table Mediation und Konfliktmanagement der Deutschen Wirtschaft* (RTMKM), where he heads the business mediation working group. He is currently enrolled in a PhD programme on Organizational Leadership and Change at the University of Zilina, Slovakia.

For more information, see www.sweco-gmbh.de and www.conflictcrisischange.com.

Dr. Georgios Karamanidis is an accredited mediator, lawyer and insolvency administrator in Thessaloniki, Greece, specializing in commercial and

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For more information, see www.diadrasiadr.gr and www.ks-lawyers.gr.

Imke Kerber is a project manager at Robert Bosch Stiftung Gmbh. She implements and supports peace activities worldwide. In the past year, Imke has co-developed a new strategy for the foundation's topic »Peace«, which involves emphasizing the role of locally led peace approaches and innovation in international peacebuilding. Imke previously worked as a research associate at the Center for Peace Mediation at the European University Viadrina Frankfurt (Oder). As a trained mediator, she specializes in conflict resolution through dialogue and mediative formats. She holds a Master's degree in Peace and Conflict Studies from the Otto-von-Guericke University Magdeburg, Germany. Imke has also previously worked at UNESCO (Paris, France) and the United Nations Peacebuilding Fund (New York City, USA). Imke is founding member of ZoffOff e.V.

For more information, see http://www.zoffoff.de.

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For more information, see https://md.ukma.edu.ua.

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For more information, see http://www.mediation-altona.de/team/kirsten-schroeter and https://www.kd.nomos.de.

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For more information, see www.schubert-panecka.eu.

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