

through ethical quagmires with accompanying mentoring from the commentaries. I think the text could be an excellent teaching tool in mediator training courses.

The fine work that has been done in this book should be applauded. It is a difficult subject matter to tackle and Professor Waldman has done so in a manner that will greatly enhance the field.

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## ***ADR in Business: Practice and Issues Across Countries and Cultures***

**Volume II, Wolters Kluwer, Arnold Ingen-Housz, ed.**

**Reviewed by Jennifer L. Gorskie and Matthew E. Draper**

The authors of this review are relatively young practitioners, both of whom have gained the lion's share of their experience by acting as counsel to clients in commercial dispute resolution, principally international arbitration. We enter the fray when a dispute has already arisen; we strategize how we can *win*, which typically means an *award* with a capital A. We might suggest that our client seek relief from a court instead of from an arbitral tribunal, depending on the circumstances, or recommend settlement. But it can be quite easy—for young practitioners and seasoned veterans alike—to overlook the various guided dispute resolution options available as an alternative to litigation or arbitration. *ADR in Business: Practice and Issues Across Countries and Cultures* may well be the antidote to that problem.

*ADR in Business*, Volume II (the first edition was published in 2006) is divided into five parts, each of which offers new and unique contributions to the alternative dispute resolution (“ADR”) field. It is not a treatise or a textbook; its chapters are directed at the seasoned practitioner, and do not purport to provide a primer on alternative dispute resolution techniques. Yet at the same time, *ADR in Business* is more than just a collection of scholarly articles on topics of interest only to those already well versed in the field of ADR. Instead, it offers a deep, nuanced look at the structural, economic, and other

advantages of various ADR techniques. The focus in this book's construct of ADR is on alternatives to litigation other than a standard arbitration process. It introduces some ADR options that may be less familiar but nonetheless appealing to litigation counsel, and it provides an in-depth study of some recent developments in ADR and how they can be best put to use. In short, *ADR in Business* has a little bit of something for everyone, whether the seasoned ADR practitioner, the novice litigation/arbitration counsel, the businessman seeking litigation alternatives, or anyone in between.

Part I of *ADR in Business* focuses largely on the “Why?” of ADR. This goes well beyond the basics. In a stellar introductory chapter by Pierre Tercier, the reader gets a concise and on-target explanation of the structural underpinnings of ADR as contrasted with arbitration and other forms of dispute resolution. In just a handful of pages, Tercier captures the various “modes” of dispute resolution and provides an overview of how ADR can both complement and diverge from judicial and arbitral modes. Jean Francois Guillemain then offers in chapter 2 a practical overview of the reasons one might choose alternative dispute resolution. More normative in approach than Tercier's piece, Guillemain offers a view on the goals of ADR, which is best viewed as a way to assist parties in reaching a mutually acceptable compromise. According to Guillemain, “Its aim is often to *restore or preserve the dynamics of the contract*, though sometimes its function is simply to encourage resumption of dialogue between the parties.” We recommend Part II of *ADR in Business* to anyone not yet convinced that ADR is a viable option; it is guaranteed to provide, at the very least, food for thought.

It would be disingenuous to suggest that *ADR in Business* does not have some pro-ADR bent; its authors are mostly practitioners in the field, and chapters such as “Making Mediation Mainstream,” which is devoted largely to promoting the mission of the International Mediation Institute, argue for the institutionalization of the field as a profession and area of expertise. Yet many of the book's contributors acknowledge the failures of ADR and the problems inherent in current models of deal-facilitation and mediation, which often do little to engender the trust or confidence of future ADR-users. In response, they offer realistic and workable ideas for regulating and harmonizing the field of mediation, including institutionalized training of mediators, uniform standards and procedures utilized across jurisdictions, and a review system through which parties can provide feedback on mediator performance. One comes to understand early in reading *ADR in Business* that ADR has real advantages; it is difficult then to take issue with proposals to regulate, institutionalize, and train lawyers in the field.

What's more, *ADR in Business* supports its conclusions in favor of ADR with hard facts and convincing logic. In Chapter 5, for example, Manon Schonewille

and Kenneth Fox engage in a detailed, example-driven analysis of how an experienced “deal-facilitator” might move parties much further in their negotiations than they could ever accomplish themselves, and use his/her skills to guarantee a long-term and sustained outcome that likely could not be reached by lawyers or businessmen focused solely on the dispute-at-hand. Take one basic technique: the use of an “anchor number,” a monetary starting point off which a party’s perceptions of movement up or down are largely influenced. An experienced and trained deal facilitator might engage in “caucusing” with the parties, approaching each separately to learn their anchor number, or offer a suggested anchor number of his own. He can then effectively use this information in the negotiation setting in order to manage the parties’ expectations of reasonableness and move them closer to a deal. Such information sharing simply could not exist in a bilateral, interested party negotiation setting.

Part II of *ADR in Business* sets out some of the many frameworks available for pursuing ADR. Expert practitioners describe court-ordered mediation, online ADR, and ADR pursuant to formal institutional rules, such as those of the International Chamber of Commerce (“ICC”), among others. For example, Thomas Schultz informs us of the astonishing fact that the eBay Community Court resolves roughly 60 million disputes every year through a combination of computer-assisted negotiation and online mediation. Mr. Shultz worries, however, about the growth of an autonomous “legal” system where the parties apply “eBay law.”

A number of contributors consider the ICC’s ADR Rules in detail, and some of the thorny legal issues they and ADR in general raise. Professor Charles Jarroson identifies a number of these issues. For example, following a successful ADR proceeding, what can be done when a party fails to perform the resulting settlement agreement? The agreement is simply a contract, which itself may contain an ADR or arbitration clause in case of disputes. One of the limitations of ADR is that settlement agreements are not accorded the same level of worldwide enforcement as arbitral awards or court decisions. Peter Wolrich, who chaired the ICC working party that drafted the ICC ADR Rules, provides some suggested solutions to the problem raised by Professor Jarroson. Mr. Wolrich rightly points out that the parties to an ADR-brokered settlement agreement are free to structure it in a way that makes the need for enforcement unlikely, for example by requiring a bank guarantee for future payments. Alternatively, if the settlement occurs during the pendency of arbitral proceedings, he suggests that the parties request the arbitral tribunal to render an award by consent. This is just some of the sound advice Mr. Wolrich provides in his article-by-article commentary to the ICC ADR Rules, which is essential reading for any user (or prospective user) of those Rules. Similarly, Hannah Tümpel and Caliope Sudborough of ICC Dispute Resolution Services

provide a very practical chapter describing how ICC ADR rules are administered and the procedures they follow. Perhaps most useful is their inclusion of examples from actual cases administered by the ICC, describing how the ICC’s ADR Secretariat has handled a variety of situations.

This in-depth consideration of the ICC’s ADR Rules is invaluable to practitioners. A future edition of *ADR in Business* would benefit from providing similar treatment to other popular ADR rules, such as the American Arbitration Association’s Commercial Mediation Procedures.

In Part III, *ADR in Business* devotes a number of chapters to practical advice for ADR practitioners and lawyers. One chapter by Denis Brock and Rebecca Pither provides advice on how lawyers of international law firms should talk to their clients about ADR, both before and after a dispute arises. Michael Schneider, a well-regarded arbitration practitioner who successfully led the recent revision of the UNCITRAL international arbitration rules, discusses how arbitrators might better use ADR techniques. Mr. Schneider argues that “[t]he principal, if not the only, function of the arbitrator is to settle the dispute that the parties have submitted to him.” To that end, he sets forth a number of examples of how ADR methods have been successfully employed by arbitrators. All of the chapters in this Part provide practical, real-world ways for employing ADR, or elements of ADR, to help to solve disputes.

*ADR in Business* makes the lingo of ADR seem familiar and the psychological and cognitive underpinnings of negotiation and conciliation theories accessible even to the novice reader. In Part IV, which focuses on hybrid theories of dispute resolution, an opening chapter by Jeremy Lack aptly titled “Appropriate Dispute Resolution” discusses theories such as conflict escalation and the development of holistic approaches to conflict prevention and resolution. While such concepts may be familiar to a seasoned psychologist or a negotiation specialist, they are typically not studied by the average litigator—and after reading Lack’s chapter, one wonders why not. Lack encourages both litigation counsel and litigants themselves to think as “consumers” by questioning the dispute resolution process and how it might be tailored to best suit the peculiarities of a dispute. He examines the benefits and drawbacks of “directive vs. facilitative” dispute resolution processes and “evaluative vs. non-evaluative” approaches, and suggests how various forms of each might be combined in a hybrid approach that will have the best chance at reaching party consensus. Lack’s chapter is followed by a probing discussion by Edna Sussman about the lack of and need for an enforcement mechanism for mediated settlements so the parties are not left with just another contract to enforce. Sussman discusses the differences among jurisdictions as to whether an arbitration award can be issued to reflect a mediated settlement agreement by a mediator who had not been appointed

as the arbitrator before the settlement. Sussman reviews the pros and cons of eliminating contract law defenses to mediated settlements and urges that mediated settlement agreements be turned into arbitral awards and that the New York Convention be construed to require enforcement of such awards.

*ADR in Business* truly lives up to its name, demonstrating its sweeping international scope, in Part V, whose essays delve into the nuances of ADR across borders and regions. We learn of the unique challenges to ADR across Latin America, where the practice is not effectively supported by the court system. There are chapters on ADR in Australia, the Arab world, and even Sub-Saharan Africa, where entrenched norms regarding amicable and peaceful problem solving lend themselves rather neatly to an ADR approach. A final chapter discusses the European Mediation Directive for mediation in cross-border disputes, approved in 2008, which has faced many challenges in implementation by Member States.

*ADR in Business* is an important and unique contribution to the ADR field. It manages to present on virtu-

ally all of the fundamental issues underlying the ADR field without sacrificing nuance, scholarship, or depth. It should convince even the most skeptical counselor to consider closely the added value an ADR approach can bring to the right cases, while at the same time providing a respect-worthy guide to the ADR community for ADR's increased implementation and use.

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