**E-Book**
**«Mediation in Civil and Criminal Cases to Foster European Wide Settlement of Disputes»**

## Chapter V

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**The Wider Context:**
**an Introduction to Conflict Management**
**and Dispute Resolution**

SUMMARY: Introduction. – 1. Conflict management. – 2. A timeline on the evolution of conflict as object of study. – 2.1. The link between conflicts and legal disputes. – 2.2. Conflict management categories. – 3. Alternative Dispute Resolution (ADR). – 3.1. Why to use ADR. – 3.2. When to use ADR. – 3.3. When the use of ADR may not be recommended. – 3.4. Accreditation and standards for ADR practice. – 4. Mediation. – 4.1. EU public policy and legislative development on mediation and ADR. – 5. Review questions.

**Introduction**

Learning about mediation and training in skills needed to become an effective mediator should both be the chief aims of any program concerned with access to justice and customer empowerment in the European Union. Granted that the importance of these subjects for the region manifest in the strengthening of the Common Digital Market, this is the clearest of application of laws and policies, but not necessarily the most important. Mediation was not created by Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, and European legal professionals have not been assigned an exclusive responsibility about providing mediations services. Mediation is only one of many methodologies for conflict management and dispute resolution already well-studied within the domain, appreciated and practiced worldwide; and negotiation skills are common in a wide range of fields[1]. Looking at the wider context, from a historical and theoretical perspective, will be the purpose of the two following chapters. In those sections it will become clear that working on conflict management and dispute resolution requires a specific mind-set, rather than legal proficiency; that its dissemination should reflect a philosophical perspective likely to produce profound cultural transformations; and, that its practice can be the most rewarding when principled, structured and collaborative. The best mediators know that conflicts and disputes involve many more decisions about people than about the problems they claim to have. Hence, the questions that need to be addressed and the decisions that are discussed are often emotional rather than rational. Legal standards can propose and impose only fair settlements in a procedural sense, but decline other commitments. A good legal settlement may put an end to a

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[1] Negotiation has developed as an independent discipline of study with its own theoretical principles and methods. See more from para. 4.

legal dispute but preserve or even enhance the underlying conflicts. Court decisions may be disastrous for the parties and the cause of the demise of organizations, associations and relationships[2].

The European Union (EU) has responded to the techno-economic requirements of the time by issuing public policies and rules aimed at institutional transformations[3]. The greatest of all standing challenges in the way of realizing the economic potential of the unified –digital- market seem to be linked to the existence of cultural barriers[4]. Cross-border transactions will continue to increase, and with them the fears of consumers, traders, and organizations to face difficulties dealing with unfamiliar languages, interests, and expectations. Electronic commerce and the provision of services online, for instance, hold a promise of economic growth that has not yet been realized in the region. Any customer has access to an enormous amount of goods at a variety of prices; in terms of logistics, most aspects have been simplified with no custom controls, low rates in shipping and a reliable courier network. Buying however, may not be the end of a commercial transaction, but could turn into the beginning of an extended relationship between the parties. They could become associates, or be confronted in a dispute. If a buyer wants to return a defective item, an item that is no longer wanted, or that has been shipped by mistake, or if the case involves the need for technical support after the sale is concluded, what sort of EU wide scheme could be in place that could guarantee reliability, redress and assistance? Alternative Dispute Resolution (ADR) competences can have a positive effect in various fields of legal practice, such as civil affairs and family law when relevant to cross border disputes, but more important than the capacity of legal professionals and the legal system to back up the outcome of ADR processes is the empowerment of people to self-regulate, and the regaining of trust in their own competences to resolve their conflicts without having to resort to courts. Professional negotiators are the key stakeholders who can contribute via coaching, mediation and other facilitation techniques to the expansion of the collaborative culture of conflict management, area in which scholars and practitioners have incessantly been working for the past fifty years. The resolution of disputes and conflict, with or without legal relevance, does not lie within court rooms. Strengthening the web of society is a daily task to every person interested in efficient and more fulfilling relationships, and it begins with awareness of the spectrum of possibilities available to handle grievances and contradictions.

Technology has also been incorporated into the emerging European scheme of conflict management and dispute resolution. Technological platforms could be attractive innovations for the tech savvy population, who could otherwise appear to be uninterested to give ADR techniques a chance. Technology features cannot by themselves decrease disputes or increase their resolution rate, but they can be effective in terms of introduction and awareness of the wider spectrum of possibilities in conflict management and dispute resolution.

Intense global interaction, and emerging governance patterns derived from this interconnectivity impose three main demands on all stakeholders[5]: cooperation, cohesion and self-regulatory confidence[6].

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[2] Examples are widely referenced in the relevant literature, consult for instance: Hensler, D.R. HENSLER, *Our courts, ourselves: How the alternative dispute resolution movement is re-shaping our legal system*, in *Penn St. L. Rev.*, 2003, p. 165; D.M. TRUBEK, A.SARAT, W.L. FELSTINER, H.M. KRITZER, *Costs of Ordinary Litigation*, in *The UCLA L. Rev.*, No. 31, 1983, p. 72; J.S. MURRAY, *Lawyers and Alternative Dispute Resolution Success*, in *Pepperdine Law Review*, No. 14(4), 2013, p. 5. Particularly in the field of employment relationships, see: D.M. MCKENZIE, *The role of mediation in resolving workplace relationship conflict*, in *International journal of law and psychiatry*, No. 39, 2015, p. 52 ff.

[3] M.C. SOLARTE-VASQUEZ, *The institutionalization process of alternative dispute resolution mechanisms in the European Union. The Estonian Legal Developments Experience*, in *L'Europe Unie*, No. 7-8, 2014, p. 94 ff.

[4] Culture is understood in this text to encompass formal and informal institutions including language, customs, traditions, uses, laws, social structures, etc., drawing from: *What is culture? A compilation of quotations*, GlobalPAD Core Concepts by Spencer-Oatey, available at GlobalPAD Open House http://go.warwick.ac.uk/globalpadintercultural.

[5] A comprehensive way to describe the stakeholders could be – natural persons, groups or organizations with an interest or a stake in a certain matter, also those whose interests or stakes are affected by a given situation. Being a stakeholder does not require conscious involvement.

[6] See *supra*, note 3.

# 1. Conflict management

*"Peace is not the absence of conflict but the presence of creative alternatives for responding to conflict -- alternatives to passive or aggressive responses, alternatives to violence."*
~ Dorothy Thompson
*"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."*
~ Abraham Lincoln

*"Conflict is inevitable, but combat is optional."*
~ Max Lucador

*"Cooperation means win-win, confrontation means lose-lose."*
~ Zhu Feng

*"There are three ways of dealing with difference: domination, compromise, and integration. By domination only one side gets what it wants; by compromise neither side gets what it wants; by integration we find a way by which both sides may get what they wish."*
~ Mary Parker Follett

*"Courtesy towards opponents and eagerness to understand their view-point is the ABC of non-violence."*
~ Mohandas Gandhi

A common misconception about the meaning and existence of conflict is that a conflict is a negative situation that should be avoided. Equally widespread is the understanding of conflict as the opposite of peace. Consider the following definitions:

- Merriam-Webster dictionary[7]:
  *"1: fight, battle, war "an armed conflict"*
  *2 a : competitive or opposing action of incompatibles : antagonistic state or action (as of divergent ideas, interests, or persons) b : mental struggle resulting from incompatible or opposing needs, drives, wishes, or external or internal demands*
  *3: the opposition of persons or forces that gives rise to the dramatic action in a drama or fiction."*
  It presents words such as discord, disharmony, division, friction, variance and war as synonyms to conflict, whereas the terms agreement, peace and harmony are stated to be antonyms.

- Cambridge dictionaries online[8]:
  In British English, conflict is stated to designate an "*active disagreement between people with opposing opinions or principles*", or the "*fighting between two or more groups of people or countries*". For the American version, the noun is equalled to disagreement and said to be appropriate to use in cases of an active disagreement, as between opposing opinions or needs, and said to mean also "*fighting between two or more countries or groups of people*" and struggle.
  In the business context it is defined as "*a serious disagreement between people, organizations, or countries with opposing opinions*" or "*a situation in which there are opposing demands or ideas and a choice has to be made between them*."

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[7] http://www.merriam-webster.com/dictionary/conflict.
[8] http://dictionary.cambridge.org/dictionary/english/conflict.

In both cases, as in most of the non-specialized literature, the word "conflict", rather than being explained, is conceptually developed, constructed with connotations that signal warning against the phenomenon. Phenomenon is what a conflict can accurately be said to be.

| **Reflection questions** |
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| - In what way an ADR and conflict management theory can benefit from looking at conflict as a phenomenon? |
| - Are conflicts created, discovered, revealed Are they real, tangible? What is the nature of conflict in general and how definitions and categories affect its impact and management? |

The convenience of looking at conflict in a more general, versatile way is the capacity of the concept to adapt in time and apply to various domains where its basic theory could anyway remain valid. The same can be said about the discipline of conflict management and dispute resolution[9]. A broad conception is preferred also because it relates to all stages of conflicts and regardless of the type of relationship in which it may manifest itself. Conflict management works in every arena, if a constructive opportunity for transformation is recognized. This statement gives raise to different conceptions of conflict that do not depart from the definitions presented above. For professional negotiators and conflict managers, definitions deprived of bias or the positive ones reflect consolidated principles[10]. An objective and all-encompassing way to define conflict could be: contradiction that requires change. Connotations added by conflict management and resolution experts include for instance:

- Conflict is "*...a universal feature of human society...*"[11] that originates in the structural differences marked by the economy, politics, status, psychological development and culture. Hostilities arise, according to Galtung, when the differentiation is perceived to create incompatibilities based on wishes or goals.

- Conflict is universal, the very manifestation of diversity, void of inherent value other than its call for consistency (harmony, balance, accord, consensus) and hence with the potential for advancing personal, group, organizational and social progress depending on the skills applied to its management. "*Contradiction is universal, absolute, existing in all processes of the development of things and running through all processes from beginning to end.*"[12] Tensions resulting from conflicts could be positive catalysts of change.

- Conflicts are not circumscribed to wars or equivalent to riots and violence, although they may degenerate into perverse situations becoming the root of clashes, confrontations and disputes. Nevertheless, conflict is not the opposite of peace for the former is a state of reality, whereas the latter is an ideal construct that in addition cannot be measured, verified, spread or generalized. A more precise understanding of these problematic concepts allows appreciation of the opportunities that a well-managed conflict can bring about and of the expectations that people could place on conflict resolution schemes.

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[9] "Conflict management" and "dispute resolution" are not equivalent expressions. The latter refers to conflicts that have already evolved into disputes and require solution and settlement, which means that there is an explicitly registered contradiction that has not found proper redress. Conflicts can be prevented from becoming disputes and could be administered satisfactorily, for the benefit of all parties involved.

[10] Read below on the theory of negation bargaining styles, applicable to CR and CM. Consult also the page of the Conflict Resolution Network for an insight on the win-win approach at: http://www.crnhq.org/content.aspx?file=66138|37449y#win-win.

[11] Read more on this and other Johan Galtung's perspectives in www.transcend.org and in his earlier writings such as: J.GALTUNG, *A structural theory of aggression*, in *Journal of Peace Research*, 1964, p. 95 ff.. See also *infra*, note 13.

[12] This is an understanding that reflects the ontology of conflict as a field of study without any specific reference to ethics, but linked to the dialectic paradigm of though. The quote belongs to Mao Tse-tung.

Johan Galtung has explained how and why conflict resolution as a defined, specialized field of study started developing in the middle of the past century and most actively between the 1950s and 1960s and during the post- Cold War era[13]. At the same time conflict began to be an object of scientific study. The consolidation of the theory of conflict is to be credited to a multidisciplinary team of sociologists, psychologists, international affairs experts, and political science scholars rather than to the legal science. This is not to say that conflict had not been addressed before or that the law was unconcerned about the effects of conflict, rather that different disciplines coincided at that point in looking at conflict as a general phenomenon, capable of being analysed according to the same principles and displaying similar properties no matter at what level it may manifest itself: international, national, social, sectorial, organizational, familiar or interpersonal. Until that point studying conflict or writing about it from such different disciplinary backgrounds and specific focus on types of disputes gave it a fragmented and unstructured appearance. However, it is from earlier works that common themes are found to emerge:

- A proper understanding of conflict is needed to overcome the growing complexity of human exchange and social interaction. Conflict studies should be multi-disciplinary, multilevel and multi-cultural in both theory and practice.
- Conflicts can be constructive or destructive depending on the management they receive.
- Conflicts do not always turn into disputes. Disputes the form that one or more underlying conflicts may take.
- The institutionalization of conflict management methodologies and a systematic approach to conflict contributes to social progress.
- Conflict management overlaps with conflict resolution, ADR and conflict transformation[14].
- The most convenient tool to develop effective conflict management competences is negotiation.
- The space for ADR emerges time and time again when the political and social environments are in the state of unrest and need it.
- Negotiation skills are enhanced by methods and techniques that can be learned.
- In every conflict competitive and cooperative interests coexist.
- The elimination of conflict is not possible. It is however possible to cure its bad reputation by spreading knowledge about its positive functions.
- Conflicts and disputes can be managed constructively and disputes can also be prevented.

While it is easy to identify the positive functions of conflicts, listing the benefits of legal disputes poses difficulties. The common use of a specific terminology has through the years consolidated two contrasting models of conflict and dispute management. Walton and McKersie used the terms integrative and distributive bargaining in the sixties[15]; in the early seventies, Deutsch linked to these the concepts cooperative and competitive, respectively[16]. Later, during the same decade, Ury, Patton and Fisher popularized the expressions "principled" and "positional" when they spoke on behalf of their popular Harvard negotiation approach[17]. Each style of practice is in turn associated with a perspective, principles, strategy and tactics that affect the processes and outcomes of conflict management techniques and the context in which the conflict develops. The literature invokes the factors of abilities and skills -and their absence- in procedures where conflict and disputes are conducted, and illustrates with evidence that reinforces the claim that understanding is a by-product

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[13] Read further on: J. GALTUNG, *Peace by peaceful means: Peace and conflict, development and civilization*, Vol. 14, 1996; C. WEBEL, J. GALTUNG (eds.), *Handbook of peace and conflict studies*, London/New York, 2007.

[14] "Conflict management" is a more encompassing expression as it does not exclude the other two. A detailed explanation on this can be found in: M.C. SOLARTE-VASQUEZ, N. JÄRV, K. NYMAN-METCALF, *Usability factors in Transactional Design and Smart Contracting,* in T. KERIKMÄE, A. RULL (eds.), *The Future of Law and eTechnologies*, Berlin, 2016, p. 149 ff.

[15] R.B. MCKERSIE, C.R. PERRY, R.E. WALTON, *Intraorganizational bargaining in labor negotiation*, in *Journal of Conflict Resolution*, 1965, p. 463 ff.

[16] Read M. DEUTSCH, *Sixty years of conflict*, in *International journal of conflict management*, 1(3), 1990, p. 237 ff.

[17] Visit the Harvard Negotiation Project website at http://www.pon.harvard.edu/category/daily/conflict-resolution/?cid=11410.

of a conflict well-resolved. It can be said that to move pass the initial contradictions of a relationship is already progress.

ADR development is often thought to coincide with economic efficiency and is considered to be a variable that can affect growth. Hence, it has been argued that a practical way to contribute to the EU's efforts to meet the needs of its single market is to support the creation and dissemination of an integrative conflict management and ADR culture. This way, increased commercial exchange within the region and outside of its borders can be both efficient and smooth. Any strategy in this respect has to include awareness projects and multi-disciplinary education programs to build up knowledge about conflict theory, and train the skills needed for enhancing integrative negotiation and other ADR competences. It has been noted that "*It is equally important to detect constructive individual, and culture-specific qualities that need to be preserved and channelled to implement more effective ADR processes in this and other countries with adversarial and adjudicative preferences in conflict management and low rates of ADR success.*"[18] Aspects that are considered to strengthen educational and training programs combine practice (coached by experts in real life scenarios rather than simulated exercises) and theoretical content including: conflict as a human phenomenon; styles and approaches in conflict management; established dispute resolution schemes and their capacity to resolve conflict; conflict identification, classification, evaluation and intervention in case studies; conflict management and negotiation methodologies; strategy design, planning and execution; continuous self-assessment exercises; negotiation tactics in cross cultural settings; comparative cultural identities and cross cultural training; and the applicable legal and ethical standards in the practice of conflict management and ADR.

In recent years, from the advent of the internet and other telecommunication technologies, and the complexities of the semantic web, the theory of conflict management has evolved tremendously, especially in the provision of legal services and on self-regulation. The branch that remained focused on peace studies matured decades ago and is being applied in cyber defence and security policy development. In other words, the same concepts are used in new domains from innovative platforms. Recommender systems and artificial intelligence will become the next barrier to cross and entities that humans will need to involve in the management of their affairs. Therefore, it is important to be sufficiently informed, and ready for the challenge of having to integrate into that unknown exchange.

## 2. A timeline on the evolution of conflict as object of study

Thoughts on conflict have existed as long as the rules that govern people's behaviour within groups have. Both cooperation and conflict being inherent to the development of early human associations, techniques and methods of management and redress were devised by need. The bulk of testimonies on ancient conflict and disputes is linked to wars, battles, conquest and the use of power. Those historical accounts can be found in reference literature that describes the evolution of mankind, societies and the prevailing world view of each period[19]. Notwithstanding the access to insights that older and classical literature may offer, the chronology that affects the most, the status of conflict as an object of study nowadays is short. A timeline with developmental highlights starting in the second half of the 20th century reveals giant steps: the importance that understanding of the transformative role of conflict has in implementing economic rules and policies, and the need to increase people's involvement to increment personal responsibilities in accessing justice and finding redress for their claims.

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[18] See *supra*, note 6.

[19] See, for instance, K.J. HOLSTI, *Peace and War: Armed Conflicts and International Order 1648-1989*, Cambridge 1991; J.S. NYE, *Understanding International Conflicts*, Harlow, 2008[7]; T. CLEARY, *The Japanese Art of War. Understanding the Culture of Strategy*, Boulder, 2005; B.Z. TAMANAHA, *On the Rule of Law: History, Politics, Theory*, Cambridge, 2004. For some perspective, also look into the classic S. TZU, *The Art of War*, New York, 2002, and A.H. JOMINI, *The Art of War*, Rockville, 2007.

Also in the field of conflict and the administration of disputes, the most meaningful structural changes have demonstrated that preconditions of political liberalism and democratic guarantees such as freedom and equality are necessary for implementation. The evolution of the theory has been explained in a continuum extending for 60 years from the aftermath of the Second World War when rationality and humanism began to be used to address conflict, its roots, causes, triggers, and effects on a much wider scale than the population directly suffering the violence (Theory building and terminology development stage).

Presently, a responsive and engaging proactive legal practice is at the lead, inspiring both public laws (legislative development) and private practice[20]. ADR proposals in that continuum aim at finding relief in times of crisis, solving, or transforming conflicts and preventing intractability and as many disputes as possible[21]. Fig 1 charts the process and illustrates the links between the specialized areas that have emerged in conflict management and dispute prevention[22]. The figure as explained below presents general denominations and streams of practice during the past six decades.

End of the World War II – Cold War: Problem solving techniques become popular

International Affairs → Theory of conflict and peace →
- Conflict management
- Diplomacy (preventive)
- Conflict resolution
- Conflict transformation (restorative justice)

CONFLICT AS AN OBJECT OF SCIENTIFIC STUDY (1950s)

Impact on trade | Impact on employment | Impact on all civil law fields

THERAPEUTIC LAW (legal practice 1980s-now)

Legal Practice → Dispute settlement outside the courts ADR movement

- Preventive law (1950s)
- Collaborative law (1960s-80s)

Conflict and dispute management
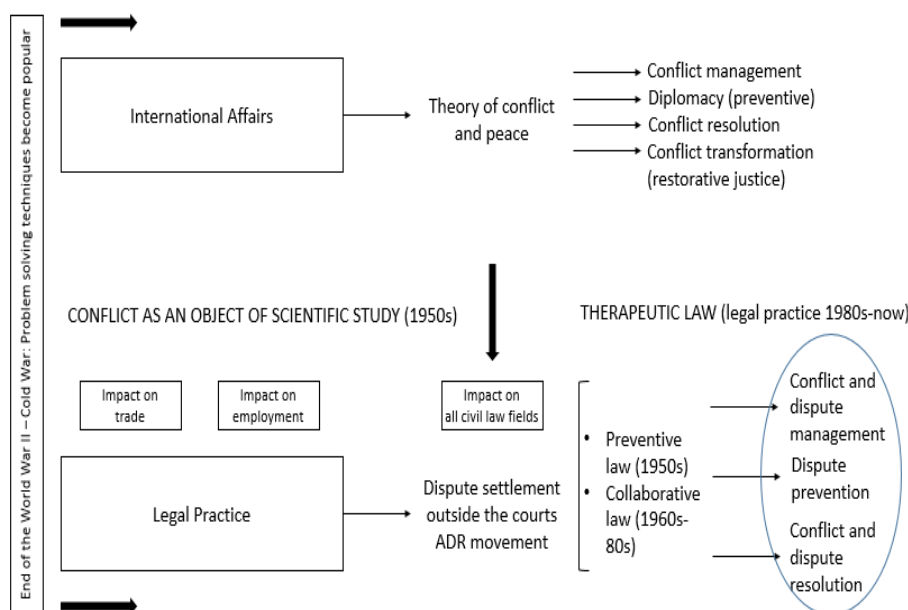Dispute prevention
Conflict and dispute resolution

Fig. 1: *Evolution of thought and trends in conflict management and dispute resolution 1950s-2010s. Adapted from the original continuum by Solarte-Vasquez, Järv and Neyman-Metcalf, 2016.*

This recent historical account begins with the second half of the past century in the WWII period that resulted in a shift of mentality when the concept of human rights and the focus on human dignity emerged strong. A horrified international community supported the conduction of the Nuremberg and Tokyo trials on war crimes against peace and humanity[23]. Peace studies were the first in developing a distinctive terminology, a peace and conflict theory and an outreach strategy to influence public policy. Governments established the United Nations with the purpose of preserving the international community from harm by working on peace, conflict resolution, security and cooperation[24]. From then on, the importance of individuals and groups over states inspired and empowered democratic activism and at the same time, "*analytical problem solving methods were*

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[20] Soile Pohjonen explains the origins and fundamentals of the proactive law movement in her article *Proactive Law in the Field of Law* from 2006, available online at http://www.scandinavianlaw.se/pdf/49-4.pdf.

[21] Intractability refers to difficult-to-alleviate, stubborn, unmanageable, enduring, malignant and therefore destructive conflicts. On intractable conflicts, read further in P.T. COLEMAN, *Characteristics of Protracted, Intractable Conflict: Toward the Development of a Metaframework-I*, in *Peace and Conflict: Journal of peace psychology*, 9(1), 2003, p. 1 ff.

[22] The chart is adapted from the original by Solarte-Vasquez, Järv and Nyman-Metcalf: see *supra*, note 14.

[23] On international criminal justice, read for instance P.M. WALD, *Judging War Crimes*, in *Chi. J. Int'l. L.*, 1, 2000, p. 189.

[24] Find out about the purposes and principles of the United Nations online at http://www.un.org/en/documents/charter/chapter1.shtml.

*applied to conflict analysis focusing on human motives and relationships (and soon were seen to apply at all social and political levels).*"[25]

The conflict management discipline is shown to subdivide according to the field of application in two main branches. On one hand, the upper line related to public functions and overlaps with international relations and political sciences and on the other, the line shown at the lower end of the chart that corresponds to the private legal practice. Peace, justice, reparation, dispute prevention and reconciliation were concerns addressed by conflict and peace studies but greatly influencing the practice of law in general gradually moving from, at first, the impact on trade to employment, contracts and finally informing the family law practice. The core theory was consolidated by the 1980s.

The reflection of needs underlying conflicts, the cause, or ultimate source of legal disputes, began to be explored as needs were considered to be at the core of all human exchanges. Think about structural social conflicts regulated by law such as employment relationships and the provision of services as a function of the state. In these examples the parties are not equal, one must subordinate to the other, pushing needs to surface, predisposing grievances and struggle. The revival of arbitration, conciliation and mediation encouraged the incorporation of new views in law schools and by legal scholars that started to look into these and other factors affecting human behaviour. The role of law and legal experts in the administration of disputes was then being redefined[26].

The appearance of what has been called Therapeutic Legal Practice meant that a value revolution was taking place. The legal practice should heal the parties rather than increment their animosities. Furthermore, whenever possible, self-regulatory instruments (agreements, pacts and contracts) should consolidate cooperation and consider the satisfaction of the needs of all people involved, for stability and mutually satisfying arrangements. Brown proposed and worked on the Preventive Law philosophy that is valid and inspires legal service developments to this date[27]. In the 1990s, ADR had fully integrated the theory of conflict in courses offered at law schools in countries such as the United States of America, Canada and the United Kingdom while advanced techniques and innovative approaches to peace building and keeping were implemented in areas where the international community supported reconstruction and development based on self-determination and a competent, non-violent management of conflicts, prevention of disputes, reparation and reconciliation[28]. Collaborative, principled and integrative access to justice (and alternative) strategies were found to achieve more than mere legal settlements which signalled that relying on legal procedures alone should not be considered the only option or even the ideal one. The amount of "good deals" increased, resolution of conflicts became more efficient and disputes were meaningfully prevented because more people could find redress to their claims effectively.

The theory of interests and needs that the Harvard Method popularized, is one of the best known. It continues to be the key in assisting the political, social and legal conception of conflict evolve towards a non-adversarial component of human association[29].

To the right of the chart are written on each line, the specific fields that drew from the theory and currently apply the conflict management and dispute prevention logic and techniques. The chart misses a section on the institutional transformation that society is experiencing because of the ICTs

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[25] See *supra*, note 20.

[26] Consult further in C. MENKEL-MEADOW, *Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, in *The. Mo. J. Disp. Resol.*, 1985, p. 25 ff.

[27] The original proposal on the preventive law practice is published as L.M. BROWN, *Practice of Preventive Law*, in *The. J. Am. Jud. Soc.*, No. 35, 1951, p. 45. Read also on preventive law D.P. STOLLE, D.B. WEXLER, *Therapeutic jurisprudence and preventive law: A combined concentration to invigorate the everyday practice of law*, in *Ariz. L. Rev.*, No. 39, 1997, p. 25 ff. S.S. DAICOFF, *Law as a healing profession: The comprehensive law movement*, in *Pepperdine Dispute Resolution Law Journal*, Fall 2005, p. 6 ff., the Author discusses the meaning of a comprehensive law practice. On general conflict and peace studies find the book by C. WEBEL, J. GALTUNG (eds.), *Handbook of peace and conflict studies*, cit.

[28] Visit the United Nations Volunteers' page at http://www.unv.org/what-we-do.html for information on these initiatives and the work they do.

[29] For an overview consult J.W. BURTON, D.J.D. SANDOLE, *Expanding the Debate on Generic Theory of Conflict Resolution: A Response to a Critique*, in *Negotiation Journal*, 3(1), 1987, p. 97 ff.

and other technologies. In the original source the most current research preoccupations of ADR experts on proactivity, collaboration, engagement and responsiveness are shown.

| **Reflection questions** |
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| -Are conflict management and dispute resolution skills transferable to any domain in any cultural setting? |
| -Should ADR schemes adapt to different legal traditions? In what way a legal tradition can possibly affect methods that are conducted outside courtroom and using non legal standards. |

### 2.1. The link between conflicts and legal disputes

The life of a legal dispute has been explained as a process that extends as long as the underlying conflict(s) remains unsolved and to the extent to which a legal system supports adversariness. Niller and Sarat reflected on the incentives than the existence or lack of remedies offer to potential disputants[30]. And how it could be taken as a hygienic test that could reveal the degree of tensions existing in society, according to the subject matter of the recorded claims.

- Grievances are the first manifestations of conflict; long before a legal process begins these afflictions are perceived. The feeling of having been wronged, and a sense of entitlement characterize grievances that themselves emerge from a contradiction or a conflict that is detected at a very basic level, sometimes even without any concrete elaboration. It appears as a perception of injustice and can ground resentment unless the grievance fades or resolves satisfactorily. A truism for expert conflict managers is that satisfaction results only when full redress is accomplished. Full redress requires both validation of the claim and the underlying grievance and reparation.

- The second stage is defined by claims. When people communicate their unsettling situation to a source of redress (the person or entity who can provide or not with a solution) they are registering their claims, which can be accepted in whole or in part or rejected. The value of both components cannot be emphasized enough[31].

- Disputes are configured when full redress does not take place. They are characterized by their unambiguity when opposition and antagonism shape the positions of the parties. Some of the disputes have legal relevance. In this case, rights and duties can be established by a court of law, as well as the possibility of a settlement based on legal standards. However, at all times, conflict management is a viable option, recommended to achieve authentic reconciliation of interest without removing the conflict from its natural context[32].

A society that is conscious of its conflicts could search for harmony and equilibrium with the help of a continuous analysis of the social climate, public opinion, educational system, readiness of the community to rid of some perceptions and labels about negotiation models and stereotypes about cooperation and assertiveness, etc. Understanding requires a multidisciplinary effort and general

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[30] R.E. MILLER, A. SARAT, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, in *Law and Society Review*, 15(3/4), 1980/1981, p. 52 ff.
[31] *Supra*, note 11.
[32] By this it is meant that the legal process is not a suitable forum to resolve some disputes, particularly those to which legal standards alone do not fit.

commitment that must engage all stakeholders involved[33]. The perception of remedy usability depends in big part of social arrangements rather than of the law; it is enough to observe the behaviours that in any given social setting are encouraged or discouraged and by which agents and how they are telling of the conflict management culture they manifest. The questions that follow guide the mapping of it:

- Are women more likely to cooperate than men?
- Are males expected to have a strong character?
- Is conceding to someone else's request a sign of weakness?
- Are people too proud to show their discontent?
- Could some groups be silent out of fear?
- Do institutional safeguards exist to ensure that the redress is effectively implemented?
- Is it safe to contradict?
- What roles are assigned to legal experts in the administration of conflicts and disputes?
- Do other professionals play a role as well?
- How the institutionalization of legal remedies takes place?
- Does it affect grievance perceptions and the occurrence of claiming?
- Is any entity collecting data and information regarding these issues?
- Are people aware of few or many ways to resolve disagreement? If not,
- what has prevented them from knowing more about the many options available?


## 2.2. Conflict management categories

Cultural, personal and environmental conditions shape the default function that people and groups naturally exhibit in the presence of conflict. That function is described in terms of style and summarizes emotional (feelings following contradictions: worry, anger, contempt, etc.), cognitive (understanding, information, what we know about a situation and the ways to sort it out) and physical components (stress and all reactions that it may cause), the product of our experiences and capacities. Learning about social psychology, human and anthropological needs, behaviour in general and defensiveness in particular equips a conflict manager to prepare negotiation strategies that work and influence people with an added bonus, the learning experience about the self. It imposes a more critical view on the own conduct and attitudes with an increased capacity for adopting corrections on time, understanding and restraints on becoming too self-righteous[34]. Having a handle of these very basic theories greatly develops proficiency in the use of advanced negotiation tactics and techniques, if to participate of methodologies that allow them. Table 1 groups the methods to manage conflict or disputes into four categories, taking into consideration the earlier conflict mode instrument for diagnosis, developed by Thomas and Kilmann, build on two dimensions: one assertive and the other cooperative[35]. Fig. 2 shows the original categorization that was meant to cover only the styles without any reference to the methods that each could relate to.

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[33] Possibly led by the state if the bonds of society are not so tight or if there is no democratic participation culture and sense of unity within communities or in the society. However, an effort that burdens only some in a group is unsustainable; thus, multistakeholderism is meaningful only when engagement of the actors can be balanced.

[34] Consult more on the book E.H. WERTHEIM, *Conflict management styles*, in *The encyclopaedia of peace psychology*, 2011, and D. ANTONIONI, *Relationship between the big five personality factors and conflict management styles*, in *International journal of conflict management*, 9(4), 1998, p. 336 ff. On psychological needs and defence mechanism find more information in J. GALTUNG, *The TRANSCEND Method in Conflict Mediation Across Levels*, in *European Psychologist*, 15(2), 2010, p. 82 ff., and the book by J. GALTUNG, D. FISCHER, *Johan Galtung. Pioneer of Peace Research*, Berlin, 2013, p. 59 ff. A basic definition of the most frequently used psychological defence mechanisms is available online at: http://www.intropsych.com/ch11_personality/defense_mechanisms.html. Maslow's seminal theory of needs and motivations can be searched as A.H. MASLOW, *A theory of human motivation*, in *Psychological review*, 50(4), 1943, p. 370.

[35] Check online http://www.kilmanndiagnostics.com/ and consult the original publication that led to this theory in K.W. THOMAS, *Thomas-Kilmann conflict mode instrument*, New York, 1974.
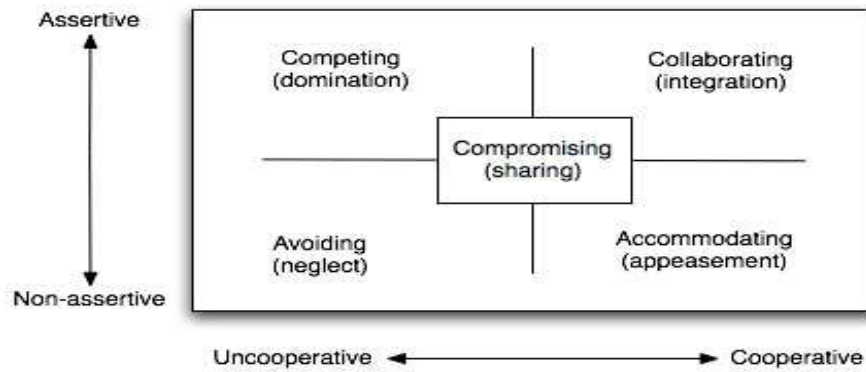
*Thomas and Kilmann conflict management styles chart*



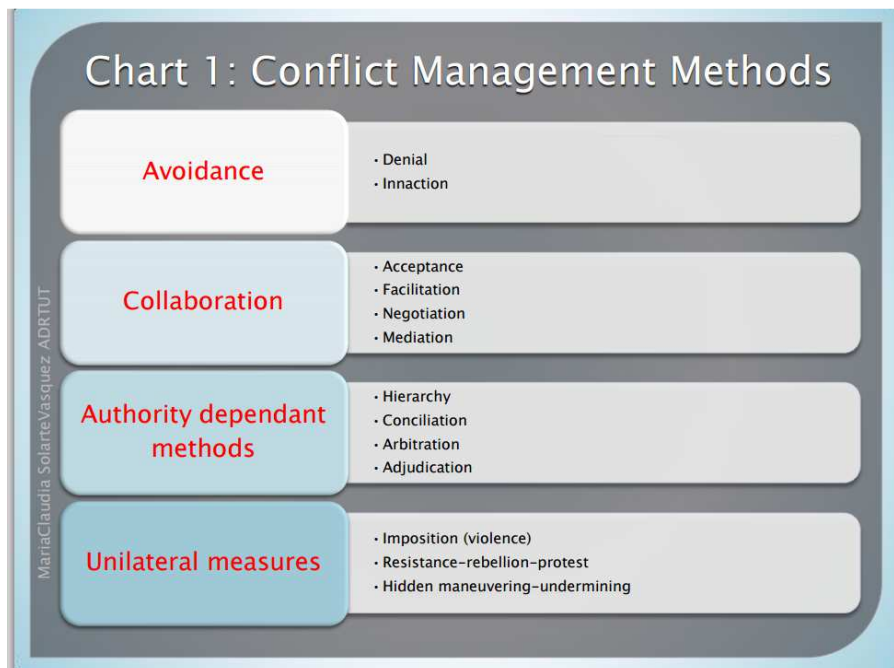Fig. 2: *Based on the five conflict modes by Thomas and Kilmann*



Fig. 3: *Table on conflict management methods Prepared by the author as a learning material for an e-course on ADR and available online in the repository of Tallinn University of Technology at: http://www.e-ope.ee/repositoorium/*

The table charts the methods in levels of intensity and according to which degree they require external involvement, formality, authoritative or compulsory standards and hostility.

Denial and inaction are uncooperative and unassertive ways to manage conflicts. Common signs of avoidance are procrastination (It is washing windows day, I have to do this before I prepare the report due), delaying or ignoring important conversations ('I cannot take care of this now', I am too busy to handle this at the moment'), sidestepping (This is none of my business, complain to someone else!), displacing and projecting (blaming others: 'This team does not work because they know very little about the issue'), rationalization (justification, and making up excuses to cope with upsetting situations: "He is not violent, just irritated because it has been a very tiring day, there is no need to discuss it any further"), etc.

Collaborative ways range from the self-sacrificing habit of giving it all up to preserve harmony and please others, (which demonstrates an exceedingly cooperative tendency but is at the bottom of the assertiveness scale), to the most constructive and significant ADR way to handle conflicts and disputes, assisted negotiation or mediation. In the middle other self-sufficient and non-authoritative ways that belong to this category are coaching, facilitation and some authors could claim

conciliation, although in this chart it remains outside because conciliation departs from the fundamental features that characterize collaborative methodologies: their informality, flexibility, multidisciplinarity, confidentiality, speed and predominant use of integrative/principled bargaining strategies. Mediation of the bunch is the only one that invites the participation of a third neutral party who is to expedite the process, and find the ways to bridge communication gaps during negotiations. This party does not propose anything and controls no more than the settings, agenda or processes so the parties maintain the control of an outcome that is reached or not based on their own creative resources[36].

Authority-dependent methods, in contrast, use standards that appear in the laws or are inspired in enforceable agreements starting from the use of authority in legitimate cases such as the right of parents over their children and the disciplinary allowances that labour law admits so that employees are subordinated to their employers within the legal limits. In conciliation procedures the object of the agreement (the purpose of a conciliation procedure all together) consists of rights and duties and the conciliator not only should possess a legal expertise but is also responsible for preparation of the contracts resulting from the conciliation. A conciliator can also intervene and explain, interpret and counsel on the terms of the possible pacts available. The legal procedure and arbitration are so similar and over-regulated, that lately they are differentiating mainly on that arbitration is a voluntary process, sourced on an agreement and it dispenses private justice whereas to the legal process we all have the right of access and it is a public function of the state, in principle, free of charge. Both clearly seek to reach a settlement of disputes rather than reconciliation or understanding and are more assertive as they are based on oppositional approaches. The definition of the outcome proclaims who is the winner and who is the looser so the logic of these methods is competitive, zero sum game[37].

Finally at the top of assertiveness and displaying the lowest degree of collaboration are the unilateral measures referred in the chart. They are behaviours that are illegitimate or illicit. Violent actions may be successful at first but they seldom result in durable, friendly and mutually beneficial agreements. It takes an excessive amount of resources to maintain the inflow of compulsion and the parties forced into submission are likely to despise the outcome becoming the worst enemies of the status achieved. Passive resistance and undermining actions consume big amounts of emotional and cognitive resources and strategy making for a purpose not so noble when it does not benefit all the parties involved. This is the case of irrational boycotts that hurt more people than they can possibly help, underachieving when expectations are very high on our performance, resisting to cooperate in collective efforts, damaging gossip, defamation, etc. In this category belong all behaviours that have the power to escalate and exacerbate rather than resolve a dispute and its underlying conflicts.

The best known ADR methods can be found in this chart, at least those that are included in conflict resolution training given that almost any form of resolving disputes except from litigation could be claimed to be an alternative methodology.

## 3. Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) comprises all methods and procedures of conflict management that do not follow a traditional scheme. By traditional scheme is meant all legal procedure related activities engaging public courts of law. ADR comprises a bundle of practices that incorporate ancient practices from across the world, that are still being studied under the title indigenous dispute resolution methods. Variations of third party involvement and informal dispute settlement similar to mediation and arbitration have featured in all societies. The rise of modern

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[36] A variety of resources on negotiation, collaborative negotiation and assisted negotiation is available online in http://www.mediate.com/index.cfm.

[37] Read further on J.S. MINAS, A. SCODEL, D. MARLOWE, H. RAWSON, *Some descriptive aspects of two-person non-zero-sum games – II*, in *Journal of Conflict Resolution*, 1960, p. 193-197.

states has absorbed them under the complexities and formalities of legal processes while their capacity to provide with relief and satisfaction has decreased. The ADR movement starting in the 1970s (in Europe the advent of recent ADR took place less than two decades ago) is a revitalization of practices that had remained marginalized for a long time.

Legal procedures as in those who are governed by the doctrine of the rule of law belong to the traditional (non-alternative) category and are linked in the literature to adjudication and litigation or sometimes called jurisdictional methods[38]. Alternatives do not aim at displacing traditional processes, in fact in some countries, types of associations and within certain fields; the use of some ADR methods has become norm. In international trade, for instance, compromissory clauses (the provision that proposes an agreement to resort to ADR if disputes connected to the case or some aspects of it arise) are so common, that they are included in draft agreements by default. The World Trade Organization (WTO) records that most Regional Trade Agreements (RTAs) establish self-regulatory procedures or negotiation methods for managing disputes that may arise between the members[39]; the evolution of arbitration and mediation – mainly – has a long history in the intergovernmental and transnational commerce worlds[40]. On the domestic level, a growing number of family and employment law discussions are coached, facilitated and/or mediated by neutral parties that are expert practitioners but not necessarily lawyers. Most recently, mediation and other reconciliation techniques have been introduced to criminal justice processes with different degrees of acceptation and success. The fact is that ADR continues to hold the name alternative but it is not the case in countries that began the reconsideration of the role of laws and lawyers in conflict management four to five decades ago or in the cases where the institutionalization patterns of these methodologies has not been pushed by formal means only, such as by law as in mandatory schemes of mediation proceedings.

### 3.1. Why to use ADR

The main goal of ADR is to provide redress and assistance in accessing to justice not only in the procedural sense (as within the court system), but also in terms of satisfying people's needs and conceding to their interests in an integrative manner. ADR methods provide with flexibility and amplitude of purposes and are not restrained by laws and terms that are standard to all. Other reasons to consider ADR is that these methods do not necessarily preclude access to the legal procedure, but can be used before and also after because in this context the decisions are only as final as the parties determine, depending on the format the outcome of the process may take. If a negotiation resulted in an agreement, then the laws of contracts and obligations should apply. ADR methods are thought to be efficient, less costly and more effective when they are administered correctly (in a collaborative, integrative manner, using a principled approach), so they are a good choice for parties whose relationships matter and will last longer than the dispute itself given that ADR methods work hard on preserving the vitality of institutions and human bonds. The textbook list of benefits associated with the use of ADR states that these processes are voluntary in principle, fast, flexible, less expensive, confidential and fair. Notwithstanding the evidence that supports these

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[38] A good reference text on adjudication and conflict is J.W. HOWARD JR., *Adjudication considered as a process of conflict resolution: A variation on separation of powers*, in *J. Pub. L.*, 18, 1969, p. 339. Find a more recent text on the international level C.L. DAVIS, *WTO Adjudication as a Tool for Conflict Management*, Princeton University Working Paper, 2010, http://wp.peio.me/wp-content/uploads/2014/04/Conf4_Davis-30.09.2010.pdf.

[39] C. CHASE, A. YANOVICH, J.A. CRAWFORD, P. UGAZ, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, WTO Working Paper, 2013, https://www.wto.org/english/res_e/reser_e/ersd201307_e.pdf.

[40] Read for instance the book: G. BORN, *International Commercial Arbitration*, The Hague, 2009.

attributes, each case must be evaluated according to legitimate criteria to determine with precision the sort of procedure that suits best toward its resolution[41].

## 3.2. When to use ADR

Provided an established cultural legitimacy of ADR methodologies, the preference of the parties plays a vital role in the successful completion of any redress process as well as the availability of ADR experts and organizations that could provide these services[42]. A party that is comfortable with any given proceedings is also likely to become engaged whatever may be the reason: sufficient awareness, recommendations, readiness, caution, curiosity, experience, self-reliance, etc. Besides preference, another consideration to make is that adjudication deals with isolated cases consisting of unambiguous disputes. The legal procedure therefore is ill suited to preserve the integrity of all situations that disputes may affect, and if there are too many issues to solve litigation may be of even more limited use[43].

Speed is an important component of ADR, a quick handle of a dispute could be the only way to maintain a business afloat or to resolve a failing relationship. In very short lived exchanges, this criterion is especially decisive given that relationships are not ongoing and the parties are in a rush to move on. Small claims by customers in sale agreements should not be piling up and jamming court rooms. Commerce requires expedited actions.

On a functional level, objectivity and the need to establish a precedent are two important considerations. Impartiality and rationality are principles that guide courts, but some conflicts do not call for objective, general and explicable management. Deciding on where to buy a house by a couple, what school is convenient for kids of a family, and what will be the theme for a party at a yearly community event are not predominantly rational and sit far from the legal standard in problem solving, granted that there is probably no law that cares for issues of no consequence for the general public.

Prudential criteria to weight are costs, informality, relationships, and privacy vs. publicity and the need for establishing policy or doctrine. The power conferred by public law to court officials does not derive from private agreements and is not supposed to be used to maximize anyone's particular ends. Court members and bodies explicate the law and compare it to the facts elucidated by investigations, and shaped by the petitions and actions of officials or private actors. The duty of the participants of the legal process ends with settlement and assignation of rights and responsibilities regardless of the level of resolution achieved. Public law also wants transparency and accountability and sanctions should deter others from incurring in illicit conducts. Hence, even in civil cases, there is a degree of openness that does not conform to the principle of confidentiality that governs most ADR procedures.

ADR's voluntariety is backed up by the civil laws on obligations and contracts. They may give raise to binding documents such as pacts and agreements. However, the courts have promoted ADR via mandate inside the proceedings when the law permits that and the judge considers it opportune,

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[41] The asymmetric power and financial resources of the parties may defeat the spirit of arbitration, for instance. When conflicts arise between dissimilar contenders such a big corporation vs. a small firms and a compromisory clause is enforced, the costs of private justice can determine the outcome. Litigation cannot be said to be always less costly, in fact, in some jurisdictions, bargaining and early settlement are also phases in legal procedures. Read on power imbalance in C. MENKEL-MEADOW, *Mediation, arbitration, and alternative dispute resolution (ADR)*, in *International Encyclopedia of the Social and Behavioral Sciences,* 2015. See in contrast: D.M. TRUBEK, A. SARAT, W.L. FELSTINER, H.M. KRITZER, *Costs of Ordinary Litigation*, in *The UCLA L. Rev.*, 31, 1983, p. 72. An article that continues being relevant because it raises these cost related issues and gives the reader a perspective on the history of ADR in the US, a country that together with others of the Common Law tradition have a consolidated practice and remain ahead of the rest in terms of legal innovation.

[42] A. WANIS-ST. JOHN, *Implementing ADR in transitioning states: Lessons learned from practice*, in *Harv. Negot. L. Rev.*, 5, 2000, p. 339 is an important text that explains transformations of judicial systems and access to justice as vehicles for the implementation of ADR programs.

[43] Another good classical text on the limits of legal procedures is L.L. FULLER, K.I. WINSTON, *The forms and limits of adjudication*, in *Harvard Law Review*, 1978, p. 353 ff.

it has been seen as a way to get people interested in these alternatives and have them recommended by a model they are likely to respect[44].

Besides reasons related to speed, expenses, formalities, and degree of confrontation/adversariness of ADR methodologies, it is expected that they encourage creativity and help avoid the unpredictability involved when decisions are rendered as a result of the traditional dispute resolution mechanisms. With improved communication it is expected that ongoing relationships are more rewarding, which could result in all parties interested in long lasting solutions. In the meantime statutory entitlements can be maintained. No party loses anything by first attempting to employ problem solving methods and find resolution through ADR means.

### 3.3. When the use of ADR may not be recommended

Litigation may lead to suitable settlements and be the best solution for some types of disputes. In cases where parties have unequal power or resources, or in civil rights violations, litigation can be an appropriate conflict resolution method that allows leverage and disclosure. Precedents are then set and serve as deterrence. Other listed reasons to opt for court involvement are: when ADR methods have already been tried and failed to deliver an acceptable outcome; when the main issues under discussions are not only legally relevant but require the application of legal standards, mainly; when the process needs to establish facts and can make good use of professional investigative services; when the case is of public interest or has the potential to affect the public order; and, when the parties to the disputes, even against better advise still prefer to rely on an authoritative declaration of rights[45].

Common methods of dispute resolution are negotiation, conciliation and arbitration. All other denominations derive from one of these or keep a very close resemblance. Mediation in any of its formats the equivalent to negotiation, but assisted[46]; coaching and facilitation are similar to mediation in that they preserve the autonomy of the parties and help the optimization of people's own means in resolving their conflicts and in managing their affairs[47].

Negotiation is described as a method that puts to use the parties' power to resolve the dispute. No outsider is vested with authoritative decision-making power concerning the resolution or management of the parties' affairs. This ADR method can be used as a preventive tool in proactive legal and business practices to anticipate possible disagreements and agree in advance on potential remedies and compromises. These activities are the implementation of the freedom to contract and are backed up by civil laws. A compromise does not mean that anyone suffers a loss if all parties are satisfied with the outcome and relationships can continue to move forward. A speedy resolution of conflicts and quick, unobtrusive and independent transformation of relationships are the main features of professional negotiation. Additionally, it may be the least expensive of all ADR methods and most importantly, it reflects the degree of autonomy and self-reliance of individuals, organizations and groups. Other benefits of negotiation are shared with its derivatives and with mediation: mainly the fact that parties participate voluntarily, that procedures are in principle informal and adaptable, and confidentiality.

In places where the ADR culture is not strong, these same characteristics are perceived as drawbacks: the fact that there are no set rules is perceived as an allowance for unethical, uncommitted and competing bargaining. But these possibilities exist even within highly regulated

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[44] A good article on this strategy for the EU countries is J.M. NOLAN-HALEY, *Is Europe headed down the primrose path with mandatory mediation*, in *NCJ Int'l L. & Com. Reg.*, 37, 2011, p. 981. Read also: M. HANKS, *Perspectives on Mandatory Mediation*, in *UNSWLJ*, 35, 2012, p. 929.

[45] Read part II and III on how to diagnose cases and select appropriate conflict resolution procedures in the book: A.E. DAUER, C. SAVAGE, J. SEIFERT, *Manual of Dispute Resolution: ADR Law and Practice*, Vol. 1, San Francisco, 1994.

[46] See the mediation types below.

[47] More on the main ADR proposals read J.R. ALLISON, *Five ways to keep disputes out of court*, in *Harvard business review*, 68(1), 1989, p. 166.

systems. Constructive and efficient negotiation techniques can be used in any context according to principles developed by the discipline that has been developing for the past forty years[48]. Although the use of negotiation or any other collaborative method does not guarantee satisfactory outcomes for all of the parties, the result when conducted constructively is more likely to be durable and friendly. Agreements where parties can find balanced benefits are called "win-win," characterized by having taken into consideration all needs, most of the interests and some of the wishes of the parties involved. When an outcome is of the satisfaction of all, the parties will work towards keeping their promises and complying with their obligations, in order to preserve their wellbeing. This suggest a logic that shows how the satisfaction of other people's needs is the strongest foundation of one's own wellbeing. The non-adversarial legal culture has been slowly spreading but not as successfully as expected in countries that have experienced recent institutional (social, political and economic) transitions. The inclusion of principled negotiation training in academic programs across faculties has repeatedly been suggested by scholars, researchers and practitioners during the last decade, at least. It can be proposed from a diversity of perspectives: psychological, legal, sociological or economical[49].

Mediation is a special form of negotiation that is assisted by a third party. The next section will examine this ADR method in detail. From both the theoretical and practical points of view, it fundamentally differs from conciliation despite the proliferation of legal acts regulating otherwise. Conciliation is an ADR method in which the parties retain power to decide on a resolution of the issue themselves, but relying on advise of a neutral third participant who must also hold legal expertise. Unlike in the case of negotiations that are often used when there is no legal dispute, and as a first attempt to resolve a conflict, conciliation is practiced for dispute settlement and resolution purposes and only when the object under discussion can be transacted about[50]. The method is relatively fast, confidential and friendly. Also, it is not disfavoured in events where unequal bargaining power is perceived because rights and duties as well as other legal standards apply.

In the scale of intensity and formality, the borderline ADR method is arbitration. This form of ADR vests authority to decide a dispute upon a third-party or arbitrator, who hears the evidence, evaluates based on the own or someone else's expertise and proffers an arbitration award that can be binding or not depending on the agreement of the parties. Issues of fairness arise in arbitration more than in any other type of ADR method when disputants possess unequal resources (power, knowledge, money, etc.) such as in consumer disputes. Compromisory clauses (arbitration agreements) should be signed with caution especially if obtaining justice by private means would restrict the parties from further access to courts.

ADR is practiced by private and public institutions and practitioners. Commonly court annexed programs develop some conciliation and mediations schemes; chambers of commerce; universities; non-profit associations; bar associations; industry groups; private companies; law offices; judges; ombudsmen; lawyers; trained ADR experts; community and religious leaders; elders; technical experts; social workers, etc. The debate will continue about the optimal practice of ADR and the perceived perils of justice that does not take into consideration the legal process. However the ADR

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[48] Read on negotiation theory in the following books: R. FISHER, W.L. URY, B. PATTON, *Getting to yes: Negotiating agreement without giving in*, New York, 2011; G.I. NIERENBERG, *The art of negotiating: Psychological strategies for gaining advantageous bargains*, New York, 1995; C. MENKEL-MEADOW, *Legal negotiation: A study of strategies in search of a theory*, in *Law & Social Inquiry*, 8(4), 1983, p. 905 ff.; H. RAIFFA, *The art and science of negotiation*, Harvard, 1983.

[49] Note that many theories can offer compelling arguments in favour of fair dealings and constructive transaction seeking. For instance, behaviouralism informs economics with the rational choice theory that explains why people, from among the available options, choose the one predicted to be the most useful. However, assessment of the options is affected by biases like loss aversion (read on Kahneman and Tversky' prospect theory in D.KAHNEMAN, A. TVERSKY, *Prospect Theory: An Analysis of Decision under Risk*, in *Econometrica*, 47(2), 1979, p. 263 ff., problematizing the assumptions of rational choice theory), a consideration of enormous relevance to the planning of any ADR strategy. Knowledge of the human nature is of chief importance in the development of ADR skills, in particular of those applicable to collaborative practices.

[50] This follows the rules of things that can be sold, purchased and disposed of or agreed upon. For example a car, a house, a holiday trip or a building contract. In contrast, honour and satisfaction, the white house or Puerto Rico cannot be object of a conciliation agreement or a contract. These last are the main purposes of a conciliation rather than the resolution of an underlying conflict.

expansion is unstoppable. A good strategy for effective and undisturbed dissemination is to set a clear purpose for policies and campaigns and become consistent: should the priority be creating a new conflict management and dispute resolution culture? Improve access to justice? Diminishing the costs of the system? Shortening redress procedures? Increasing practitioners' satisfaction with their profession? Maybe some of these combined? Another discussion revolves around who makes for a better ADR facilitator: is the legal standard so relevant? Could people with social psychology and psychology background be better equipped than lawyers to administer disputes?

### 3.4. Accreditation and standards for ADR practice

Strong arguments have been raised in favour of establishing minimum standards and professionalizing the work of ADR practitioners. Scholars and academic institutions have made great progress in the development of those, as well as principles and theories concerning their mother disciplines: conflict and negotiation. It is widely accepted that in the presence of standards the practice of ADR would have a code of ethics; practitioners could benefit from building up a reputation and consumers of ADR services will be able to trust the techniques offered; awareness followed by confidence on the procedures may increase and with it the credibility, consistency and capacity of ADR field could be established.

The current landscape in the field lacks unity, guidance and organization. Some approaches to ADR are ineffective and outdated, and the gap between people who study ADR and teach it and practitioners who also teach is growing as evidenced in the literature that they produce and publish in journals in the field such as in The Negotiation Journal[51], Conflict resolution Quarterly[52], New Law Journal[53], Cardozo Journal of Conflict Resolution[54], Harvard Negotiation Law Review[55], etc. Besides, without joining current trends on automatization, and Online Dispute Resolution (ODR) or technology-assisted conflict management and dispute resolution, ADR could become outdated and/or its practice problematic. ADR must appeal to popular and political cultures, become diverse dynamic and profit from developments in the neurosciences, behavioural economics, visual statistics, and other non-conventional research fields.

ODR systems could be integrated to artificial intelligence actors in the future, in support of the interest of the parties. Scholars such as Arno Lodder and John Zeleznikow argue that ODR could even serve "justice" by contrasting exchanges with legal provisions and precedents. Their ongoing research is increasingly concerned with these possibilities[56]. So far, they are successfully replicating ADR procedures, although progressing in terms of information visualization and analysis. For example, online applications can provide accurate overviews about recorded data and support different mapping options on the same information with graphics. Software programs and applications can be developed with the assistance of proficient negotiators so the design of new interactive environments can suit the needs and requirements of the information society beyond usability. First with prevention in mind, proposing exchange and transactions in simple and understandable ways, and second, facilitating the execution of agreements (in combination with blockchain technology and smart contracts)[57]. ADR processes have been incorporated in judicial

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[51] http://www.pon.harvard.edu/publications/negotiation-journal/.

[52] http://onlinelibrary.wiley.com/journal/10.1002/(ISSN)1541-1508.

[53] http://www.newlawjournal.co.uk/nlj/.

[54] http://cardozojcr.com/.

[55] http://search.lib.monash.edu/primo_library/libweb/action/dlDisplay.do?vid=MON& search_scope=default_scope&docId=dedupmrg662987&fn=permalink.

[56] See A.R. LODDER, J. ZELZNIKOW, *Developing an online dispute resolution environment: Dialogue tools and negotiation support systems in a three-step model*, in *Harv. Negot. L. Rev.*, 10, 2005, p. 287; A.R. LODDER, J. ZELEZNIKOW, *Enhanced dispute resolution through the use of information technology*, Cambridge, 2010.

[57] Read on these models in www.ethereum.org and V. BUTERIN, *Ethereum: A Next-Generation Generalized Smart Contract and Decentralized Application Platform*, http://vbuterin.com/ethereum.html.

procedures and administrative practices as well[58]. However the patterns of governance have shifted the trend from the centralized regulatory authorities of the state to people and this requires increased and varied competences from all to perform in a renewed self-regulatory and highly technical capacity, in all fields. The continued involvement of the state could become more intrusive than ever, while requiring substantial monitoring, control, and adjudication at high costs and towards unsatisfactory settlements.

The takeaway message seems to be that, regardless of the context in which the ADR professional practices and of the preferred model of mediation, there is a sense that mediation and ADR need to look underneath the conflict and to move into the realm that explores conflict at a deeper level for disputants. The challenge, as an academic has pointed out, is that the field of conflict resolution needs to broaden its impact and definitions for practitioners and experts to become conflict engagers[59].

| **Reflection questions** |
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| - Will the vigorous expansion of ADR in Europe be reshaping the professional identity of lawyers and professionals working on transactional affairs?<br>Take into account that a strong ADR culture is expected to rebuild social bonds and revitalize the public trust in justice. It provides with self-help methods to create the conditions for sustainable economic growth and development and ultimately could contribute to the optimal management of social conflicts and the reduction of legal disputes. |
| - Should this movement have a say on the research and study within the social sciences and the law? Can it propose a shift of focus onto conflict management and dispute prevention outside the court system? If so, how? |
| A key issue to keep in check is that most ADR proponents hold a flagship overly focusing on efficiency that can be misleading and limiting. Conflict management is not a competence that can be easily obtained and the promise of a good ADR system rests on its implementation within a judicial and social reform process to assure readiness and legitimacy. |
| - Are there better or worse ADR and ODR methods? |

## 4. Mediation

Mediation is an ADR method that amplifies the scope of the common negotiation by incorporating a neutral party to aid the process and promote associative, integrative and principled bargaining strategies. Mediation is informal but structured, even more so in recent years with its increasing institutionalization via laws and regulations. Mediators are professional negotiators employed to facilitate conflict resolutions, dispute settlement, understanding and creative reconciliation. In the literature, scholars coincide on that the main characteristics of mediation are its voluntary nature,

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[58] Conciliation in divorce proceedings and custody cases, facilitation services in municipalities to handle claims and complaints, the institution of the ombudsman, community based and family mediation programs such as counselling to address interpersonal conflict, etc.

[59] Read further in B. MAYER, *Beyond neutrality: Confronting the crisis in conflict resolution*, Hoboken, 2004.

confidentiality and collaboration[60]. Mediators assume the role of coach/facilitator, explain the procedure to the participants and proceed only with their consent, create a safe environment and establish the rules of procedure. Mediators seek to improve communication techniques, maintain calm and focus on the object of the negotiation, while remaining neutral in regard of a possible outcome.

Mediation is voluntary because it emerged naturally so, and the principle remains that it cannot be imposed. However, mandatory mediation exists and spreads, proposed mainly to raise awareness on ADR methodologies in places where they are not well known or understood[61]. ADR's core principles may be threatened by the intrusion of legal procedures into their methodologies, for instance when mediation is required by law before a case is heard in court and its implementation is committed to the rule of law doctrine. A different appraisal can be made about compulsory participation in information events or moot mediation sessions to show the possibilities that the method can open to the parties. Adding such stage to the civil procedure would ensure that opting or not for this method is a fully informed decision. Until now few questions are more disputed by experts than the nature and scope of the voluntariety principle that can become reduced to free termination at any time after the first meeting. Obligations to mediate in cases could degenerate into meaningless ceremonies that would waste everyone's time and other institutional resources. Furthermore, it can create obstacles to access courts and justice if fees are also imposed. European legislators intended to strengthen ADR regulating mediation and Online Dispute Resolution (ODR) in spite of the differing expectations and mentalities of EU member states, with the priority to improve access to justice and customers standing in events of cross border disputes[62]. The directive recommended the promotion of ADR, encouragement of mediation and the search for balance between these methods and judicial proceedings. Some countries have been reluctant to adopt mandatory mediation such as France, and others have gone for a mild obligation to mediate which is the case of Slovenia and Netherlands[63]. In any event, in mediation whatever the jurisdiction, no agreement, outcome or decision can be imposed on the participant parties.

The confidentiality principle protects the privacy of the parties and prevents that the options discussed during the process will not adversely affect them beyond the scope of mediation.

The collaboration principle is linked to what has been called interest-based procedure. Criteria to decide does not need to imitate legal standards but conform to them, while trying to achieve maximum legitimacy and an integrative, satisfactory result for all involved. Considerations may include emotional, personal, and other non-transactable interests as well.

Unlike arbitrators, mediators do not take the role of judges or decide on anything but procedural matters, agreed upon in advance and on negotiation enhancing methods. This is true even in places where the mediator is allowed to provide evaluations or assessment of the dispute in as long as non-binding.

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[60] Consult the book M.S. HERRMAN (ed.), *The Blackwell handbook of mediation: bridging theory, research, and practice*, Hoboken, 2009; J. BERCOVITCH, *International mediation: A study of the incidence, strategies and conditions of successful outcomes*, in *Cooperation and Conflict*, 21(3), 1986, p. 155-168; J.A. WALL, J.B. STARK, R.L. STANDIFER, *Mediation: a current review and theory development*, in *Journal of Conflict Resolution*, 45(3), 2001, p. 370 ff.; D.A. HENDERSON, *Mediation success: An empirical analysis*, in *Ohio St. J. on Disp. Resol.*, 11, 1996, p. 105; K.J. HOPT, F. STEFFEK, *Mediation: principles and regulation in comparative perspective*, Oxford, 2013.

[61] The contemporary practice of mediation, in Europe and beyond, is regulated by laws concerned with quality, unified standards and issues of accountability. In addition, in traditional legal systems in the United States, Australia, England and Canada, mediation is instituted as precondition to other formal procedural steps.

[62] The EU Mediation Directive (Directive 2008/52/EC) accessible at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF focuses on certain aspects of mediation in civil and commercial matters, was adopted by the EU Parliament on 23 April 2008 and came into force on 13 June 2008. The ODR regulation, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF , established a EU wide online dispute resolution platform to help consumers in any of the 23 official languages to find redress to their cross border claims and hence, stimulate the digital economy.

[63] Details on the relevant legislation specific to every EU member state can be found at the European portal at: https://e-justice.europa.eu/content_mediation-62-en.do An EU overview on the topic is available at: https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do.

All negotiation concepts and theory apply well to mediation. In terms of styles and techniques there is a clear differentiation between competitive (distributive) and collaborative (integrative) approaches[64]. The benefits attributed to mediation apply only when the latter is the case.

*Negotiation Styles and concepts*

| Competitive approach | Collaborative approach |
| --- | --- |
| Emphasis is placed in distribution | Focuses on integration |
| The main tools are use of power and compulsion | The main tools are creativity and problem solving techniques |
| The parties claim gains and advance positions though demands | The parties try to create value and share it for the benefit and satisfaction of all |
| Hidden manoeuvring, lies and non-disclosure are common tactics | Openness and transparency and explicit discussion of interest are preferred tactics |
| The gains of one party are the losses of the others so outcomes are often perceived as unfair | All parties have a stake, a say and find satisfaction on legitimate outcomes so they are likely to be respected and appreciated |
| Elements and resources of the negotiation are viewed as fixed this at the end the decisions revolved around the proportions to be assigned to each party. | The parties act as associates and partners in search of good outcomes. They trust the process and develop as many options as possible to expand the possibilities and preserve the relationships. Disputes are divided into different components: issues (problems identified), needs (underlying interest), interests (stakes at the process) and positions (wishes and preconceived notions of what needs to be achieved) |

Source: adapted from Ury, W., & Fisher, R. (1981). Getting to yes. *Roger Fisher, William L. Ury, Getting to Yes.*

Mediation can be applied to any type of dispute or preventively, just like negotiations to transform or create relationships. Parties that wish to continue working together in the future often employ negotiation as a friendly method to resolve disputes. To form a mutually acceptable agreement discussing over interests rather than over positions is of chief importance. Positions are stiff and whimsical, whereas discussing interest may give raise to a multitude of mutually satisfactory options. Unlike positions, interests can take many shapes. The parties in mediation do not invest authority to decide the dispute in a neutral third party. Instead, this authority remains within the parties themselves, who are free to terminate mediation like during negotiations, anytime they consider it necessary.

Mediation/assisted negotiation is the least formal of all the schemes where a neutral third party facilitates the exchange between two or more others, but its conduction involves concrete responsibilities. Top quality mediation requires proficient strategic planning and can benefit from

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[64] See a classification that differentiates the soft and strong styles of negotiation and offers the principled alternative reaching out to everyone's needs also in Getting to yes by Fisher and Ury. Consult *supra*, note 46.

the application of project management skills. Effective negotiations take place when the tactics can be planned in consideration to the postulates that Fisher and Ury introduced in their studies[65]:

1. separate the two levels of every negotiation: relationship and issues, creating a cognitive dissonance: being soft on the people and strong against the problem;
2. work on improving perceptions, controlling emotions and bridging communication gaps to be able to formulate the discussion in terms of interest, not positions;
3. stress the need of being creative when developing options on a possible outcome that would benefit all parties, and;
4. insist upon the convenience of legitimate decision making, based on justifiable, objective and acceptable criteria.

The ADR literature on mediation has classified a number of tasks that could better help the parties finding a solution to their disagreements. They could be summarized on coaching association and creative administration of the disputes. In respect to concrete proceedings, since until very recently, this has been a field greatly advantaged by its flexibility, there were no rules except from recommendations and best practice advice on how the processes had to be sequenced. This aspect is relevant in terms of logistics but other than this, as long as feedback based iterative tactics are into place during sessions, no special process is preferred. A mediator should be ready to adapt proceedings to the requirements of each case. Generally, mediation consists of a progression of meetings arranged by the facilitator, beginning with an information exchange stage (were the parties are instructed on guidelines and the process in effect), followed by dialog meetings and ending with a concluding session. Advancements are registered throughout, to reinforce the commonalities, increasing the capacity of the parties to integrate, and also to divide the disagreement areas into deconstructed, simpler, more manageable parts. The results should represent consent on legally enforceable agreements for mutual gain, partial agreements, or their absence, that in times is the most reasonable and mutually beneficial resolution available. If mediation procedures terminate without a satisfactory result, another form of ADR can be pursued if the parties have not yet decided to resort to litigation. As mentioned earlier, willingness to mediate very much determines the effectiveness of these processes.

### 4.1. EU public policy and legislative development on mediation and ADR

Recently, mediation and conciliation schemes have received the most attention by public policy at the national and supranational levels. These ADR methods have been the first regulated and in effect in the EU. Ideally, the main task of professional mediators continues being the empowerment of individuals for the management of their own affairs and the production of self-regulatory solutions to their disagreements. National institutional action could contribute to any policy effort much more efficiently than supranational initiatives that for many reasons follow the principle of subsidiarity. Conflict management structures respond to cultural patterns and traditions that are not common to all countries of the EU where many states possess no experience in collaborative ADR. So far quantitative studies prevail in the analysis of mediation and conciliation development, but a more qualitative, interdisciplinary research is needed to identify the factors determining awareness, use and satisfaction of the people that engage in those processes. The same is true in regard to ODR processes when they spread among customers and most importantly in cases that involve cross border claims.

The existing theoretical foundation of mediation in Europe does not commit to specific styles or perspectives but follows the general principles: third party intervention, neutrality and confidentiality. A mediator is tasked with facilitating agreements, rather than merely understanding, therefore it can be said that in the EU mediation scheme the settlement is the goal of a mediation process. In terms of practical requirements, each state has been in charge of creating training and

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[65] *Ibid*, p. 59.

qualification requirements for certification if professionalizing mediation has been its aim. Subject matter expertise has never been an expectation to impose onto these facilitators because they are not to advice on the issues central to the disputes.

In practice, after a mediator is chosen an agreement is signed on the commitments that the parties undertake: good faith during all proceedings, consent on the process that is being proposed, a pact of confidentiality, and acknowledgements of the nature of the method and the role of the mediator. It is common to propose independent sessions for information gathering and preparations, and recommended to begin the mediation by explaining every step and reminding the parties of the purposes and benefits of an assisted negotiation. Every institution and practitioner proposes different sequences and/or allowances such as retaining legal counsel, and their actual involvement in every case.

As with every other approach to conflict management or style even the most collaborative of the processes may reach no optimal solution. If participants hold no interest in the negotiation and disputants are unwilling to contribute despite attempts to engage them in a principled exchange it is possible that alternatives, namely not negotiating, postponing, or resorting to other techniques are better options for the parties. Still there will not be much loss, as during effective negotiations relationships are clarified and understanding starts to shape. These cannot really be called drawbacks, because conflicts and disputes are human affairs, complex, multifaceted rather than dependent on processes and external management. No resolution may signify a good outcome, or a temporary one. The settlement a dispute may have to be postponed and litigated before the courts. Resorting to mediation should not preclude the parties from accessing other redress sources when needed.

| Reflection questions |
|---|
| - Do you consider it wrong to compel unwilling parties to mediate? |
| - Does compulsion breach the right of access to the courts required by the European Convention on Human Rights (ECHR)? |
| - What arguments would you use as a mediator in order to persuade parties to trust mediation processes? |
| - What could be examples of disputes that could be well served by collaborative bargaining during mediation sessions? |