Course Name	**: Negotiation and Mediation skills**
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Introduction

Negotiation occurs in business, non-profit organizations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life. The study of the subject is called *negotiation theory*. Professional negotiators are often specialized, such as *union negotiators*, *leverage buyout negotiators*, *peace negotiators*, *hostage negotiators*, or may work under other titles, such as diplomats, legislators or brokers.

The word "negotiation" is from the Latin expression, "negotiatus", past participle of negotiare which means "to carry on business".

Approaches to negotiation

Negotiation typically manifests itself with a trained negotiator acting on behalf of a particular organization or position. It can be compared to mediation where a disinterested third party listens to each sides' arguments and attempts to help craft an agreement between the parties. It is also related to arbitration which, as with a legal proceeding, both sides make an argument as to the merits of their "case" and then the arbitrator decides the outcome for both parties.

There are many different ways to segment negotiation to gain a greater understanding of the essential parts. One view of negotiation involves three basic elements: *process*, *behavior* and *substance*. The process refers to how the parties negotiate: the context of the negotiations, the parties to the negotiations, the tactics used by the parties, and the sequence and stages in which all of these play out. Behavior refers to the relationships among these parties, the communication between them and the styles they adopt. The substance refers to what the parties negotiate over: the agenda, the issues (positions and - more helpfully - interests), the options, and the agreement(s) reached at the end. Skilled negotiators may use a variety of tactics ranging from negotiation hypnosis, to a straight forward presentation of demands or setting of preconditions to more deceptive approaches such as cherry picking. Intimidation and salami tactics may also play a part in swaying the outcome of negotiations.

The advocate's approach

In the advocacy appracch, a skilled negotiator usually serves as advocate for one party to the negotiation and attempts to obtain the most favorable outcomes possible for that party. In this process the negotiator attempts to determine the minimum outcome(s) the other party is (or parties are) willing to accept, then adjusts their demands accordingly. A "successful" negotiation in the advocacy approach is when the negotiator is able to obtain all or most of the outcomes their party desires, but without driving the other party to permanently break off negotiations, unless the best alternative to a negotiated agreement (BATNA) is acceptable.

Traditional negotiating is sometimes called *win-lose* because of the assumption of a fixed "pie", that one person's gain results in another person's loss. This is only true, however, if only a single issue needs to be resolved, such as a price in a simple sales negotiation.

During the 1960s, Gerard I. Nierenberg recognized the role of negotiation in resolving disputes in personal, business and international relations. He published *The Art of Negotiating*, where he states that the philosophies of the negotiators determine the direction a negotiation takes. His *Everybody Wins* philosophy assures that all parties benefit from the negotiation process which also produces more successful outcomes than the adversarial “winner takes all” approach.

Getting to YES was published by Roger Fisher and William Ury as part of the Harvard negotiation project. The book's approach, referred to as Principled Negotiation, is also sometimes called mutual gains bargaining. The mutual gains approach has been effectively applied in environmental situations (see Lawrence Susskind and Adil Najam) as well as labor relations where the parties (e.g. management and a labor union) frame the negotiation as "problem solving". If multiple issues are discussed, differences in the parties' preferences make win-win negotiation possible. For example, in a labor negotiation, the union might prefer job security over wage gains. If the employers have opposite preferences, a trade is possible that is beneficial to both parties. Such a negotiation is therefore not an adversarial zero-sum game.

There are a tremendous number of other scholars who have contributed to the field of negotiation, including Holly Schroth at UC Berkeley, Gerard E. Watzke at Tulane University, Sara Cobb at George Mason University, Len Riskin at the University of Missouri, Howard Raiffa at Harvard, Robert McKersie and Lawrence Susskind at MIT, and Adil Najam and Jeswald Salacuse at The Fletcher School of Law and Diplomacy.

The new creative approach

Perhaps the most famous negotiation parable involves an argument over an orange. The most obvious approach was to simply cut it in half, each person getting a fair share. But, when the negotiators began talking to each other, exchanging information about their interests, a better solution to the problem became obvious. The person wanting the orange for juice for breakfast took that part and the person wanting the rind for making marmalade took that part. Both sides ended up with more. Neither agreement is particularly creative. The parable of the orange becomes a story about creativity when both parties decide to cooperate in planting an orange tree or even an orchard. In a similar way, Boeing buys composite plastic wings for its new 787 Dreamliner designed and manufactured by Japanese suppliers, and then sells the completed 787s back to Japanese airlines, all with a nice subsidy from the Japanese government. This is what is meant by creativity in negotiations. At business schools these days much is being learned about creative processes. Courses are offered and dissertations proffered with "innovation" as the key buzz word at academic conferences and in corporate boardrooms. And, the more heard about innovation and creative processes the greater is the appreciation that the Japanese approach to negotiations, by nature, uses many of the techniques commonly emphasized in any discussion of creative processes. Indeed, there appears to be a deeply fundamental explanation why the Japanese have been able to build such a successful society despite their lack of natural resources and relative isolation. While Japanese society does have its own obstacles to creativity – hierarchy and collectivism are two – they have developed a negotiation style that in many ways obviates such disadvantages. Indeed, the ten new rules for global negotiations advocated by Hernandez and Graham[3] nicely coincide with an approach that comes naturally to the Japanese:

1. Accept only creative outcomes
2. Understand cultures, especially your own.
3. Don't just adjust to cultural differences, exploit them.
4. Gather intelligence and reconnoiter the terrain.
5. Design the information flow and process of meetings.
6. Invest in personal relationships.
7. Persuade with questions. Seek information and understanding.
8. Make no concessions until the end.
9. Use techniques of creativity
10. Continue creativity after negotiations.

Beyond the practices of the Japanese, credit must also be given to the luminaries in field that have long advocated creativity in negotiations. Howard Raiffaand his colleagues recommend: …the teams should think and plan together informally and do some joint brainstorming, which can be thought of as "dialoguing" or "prenegotiating." The two sides make no tradeoffs, commitments, or arguments about how to divide the pie at this early stage. Roger Fisher and William Ury title their Chapter 4 in *Getting to Yes*, "Invent[ing] Options for Mutual Gain." David Lax and James Sebenius, in their important new book, *3D-Negotiations*go past getting to yes, and talk about "creative agreements" and "great agreements." Lawrence Susskindand his associates recommend "parallel informal negotiations" toward building creative negotiation outcomes. These ideas must be pushed to the forefront in thinking about negotiations. The field generally is still stuck in the past, talking about "making deals" and "solving problems" as above. Even the use of terms like "win-win" expose the vestiges of the old competitive thinking. The point is that a negotiation is not something that can be won or lost, and the competitive metaphor limits creativity. The problem-solving metaphor does as well. Thus, the first rule of negotiations is: Accept only creative outcomes! Lynda Lawrence at IdeaWorks, a Newport Beach consulting firm has developed a most useful list of ways to generate more ideas during negotiations:

10 Ways to Generate More Ideas

1. Establish common goals of what this "collaboration" would create. A more workable deal? Some common long term goals? A closer partnership?
2. Establish the rules of engagement. The purpose of the exercise is to resolve differences in creative ways that work better for both parties. All ideas are possibilities, and research shows that combining ideas from different cultures can result in better outcomes than those from a single culture.
3. Trust is key, and difficult to establish in many cultures. Certain techniques might speed that process a little. Being offsite, for example. Establishing physical proximity that unconsciously signals intimacy.
4. Add diversity (gender, culture, extroverts, different work specialties, experts, outsiders) to the group. Indeed, the diversity associated with international teams and alliances is the real goldmine of creativity in negotiations.
5. Use storytelling. This both helps establish who you are and what point of view you are bringing to this collaboration.
6. Work in small groups. Add physical movement. Tell the participants to relax, play, sing, have fun, and silence is ok.
7. Work holistically and using visuals. If, for example, there are three sticking points where neither side is happy, agree to work on those points by spending a short time – 10 minutes – on each point where both sides offer "crazy" suggestions. Use techniques of improvisation. Neither side should be offended by the crazy ideas. No one should criticize. Explain that by exploring crazy ideas that better ideas are often generated.

8. Sleep on it. This enables the unconscious to work on the problems, and gives negotiators time to collect opinions before meeting again the next day. Other kinds of breaks, coffee, etc. are also helpful. The overnight part is particularly important. Anthropologist and consumer expert Clotaire Rapaille [9] suggests that the transitions between wakefulness and sleep allow new kinds of thinking "…calming their brainwaves, getting them to that tranquil point just before sleep" (page 8).
9. Doing this process over several sessions allows both sides to feel that progress is being made, and actually generates better and more polished ideas that both sides can invest in.
10. It is the process of creating something together, rather than the specific proposals, which creates bonding around a shared task and establishes new ways of working together. Each side feels honored and all can feel that something is being accomplished.

For the Japanese reader, some of these will be quite familiar. It's easy to get Japanese in close physical proximity (#3), they've been living that way for millennia. In Japanese companies there are not so much marketing specialists as different from engineers as different from finance analysts. Each executive may have worked in several functional areas, limiting the "chimney effect" often associated disparagingly with American firms (#4). Physical movement (#6) – picture the start of the day at the typical Japanese factory. The Japanese also seem to work best in small groups (#6). Silence is definitely ok (part of #6). The Japanese invented karaoke (#6 and singing). The Japanese have difficulty criticizing others, especially foreigners (#7). The use of visuals and holistic thinking are natural for Japanese (#7). Breaks are also a common procedure for Japanese (#8). Japanese will work better with people with whom they are familiar (#9).

It should also be noted that some of these techniques will seem foreign to Japanese negotiators. For example, diversity is not a strong suit for Japanese – purposefully adding women and other elements of diversity (#4) to their groups would seem odd. However, the two key things the Japanese do in negotiation that others can and should learn are: First, the Japanese are the absolute champion information vacuums on the planet. They keep their mouths shut and let everyone else do the talking. Thus, they use the diversity of their international colleagues (customers, suppliers, competitors, scientists, etc.) to a greater extent than any other society. Often this is denigrated as copying and borrowing, but in fact being open to everyone's ideas has always been the key to creativity and human progress. While the Japanese, like everyone else around the world, are ethnocentric, they still very much respect foreign ideas. Second, the Japanese will only work with dolphins (cooperative negotiators), that is, when they have a choice. Trust and creativity go hand-in-hand. And, they will work to train their foreign counterparts to behave more cooperatively for the latter's own good. Witness the 25-year joint venture between Toyota and General Motors for manufacturing small cars in Fremont, CA as a prominent example.

Application of principles of creativity will be appropriate in at least three points during negotiations. Above noted was Howard Raiffa's suggestion that they be used in pre-negotiation meetings. Second, others advocate their use when impasses are reached. For example, in the negotiations regarding the Rio Urubamba natural gas project in Peru, the involved firms and environmentalist groups reached what at the time seemed to be an irreconcilable difference -- roads and a huge pipeline through the pristine forest would be an ecological disaster. The creative solution? Think of the remote gas field as an offshore platform, run the pipeline underground, and fly in personnel and equipment as needed.

Finally, even when negotiators have arrived at "yes," a scheduled review of the agreement may actually move the relationship past "yes" to truly creative outcomes. Perhaps such a review might be scheduled six months after implementation of the agreement has begun. But, the point is time must be set aside for a creative discussion of how to improve on the agreed to relationship? The emphasis of such a session should always be putting new ideas on the table – the answers to the question "what haven't we thought of?"

Other Negotiation Styles

Shell identified five styles/responses to negotiation. Individuals can often have strong dispositions towards numerous styles; the style used during a negotiation depends on the context and the interests of the other party, among other factors. In addition, styles can change over time.

1. **Accommodating**: Individuals who enjoy solving the other party's problems and preserving personal relationships. Accommodators are sensitive to the emotional states, body language, and verbal signals of the other parties. They can, however, feel taken advantage of in situations when the other party places little emphasis on the relationship.
2. **Avoiding**: Individuals who do not like to negotiate and don't do it unless warranted. When negotiating, avoiders tend to defer and dodge the confrontational aspects of negotiating; however, they may be perceived as tactful and diplomatic.
3. **Collaborating**: Individuals who enjoy negotiations that involve solving tough problems in creative ways. Collaborators are good at using negotiations to understand the concerns and interests of the other parties. They can, however, create problems by transforming simple situations into more complex ones.
4. **Competing**: Individuals who enjoy negotiations because they present an opportunity to win something. Competitive negotiators have strong instincts for all aspects of negotiating and are often strategic. Because

their style can dominate the bargaining process, competitive negotiators often neglect the importance of relationships.

5. **Compromising**: Individuals who are eager to close the deal by doing what is fair and equal for all parties involved in the negotiation. Compromisers can be useful when there is limited time to complete the deal; however, compromisers often unnecessarily rush the negotiation process and make concessions too quickly.

Emotion in negotiation

Emotions play an important part in the negotiation process, although it is only in recent years that their effect is being studied. Emotions have the potential to play either a positive or negative role in negotiation. During negotiations, the decision as to whether or not to settle, rests in part on emotional factors. Negative emotions can cause intense and even irrational behavior, and can cause conflicts to escalate and negotiations to break down, while positive emotions facilitate reaching an agreement and help to maximize joint gains.

Affect effect: Dispositional affects affect the various stages of the negotiation process: which strategies are planned to be used, which strategies are actually chosen, the way the other party and its intentions are perceived, the willingness to reach an agreement and the final outcomes.Positive affectivity (PA) and negative affectivity (NA) of one or more of the negotiating sides can lead to very different outcomes.

Positive effect in negotiation

Even before the negotiation process starts, people in a positive mood have more confidence, and higher tendencies to plan to use a cooperative strategy. During the negotiation, negotiators who are in a positive mood tend to enjoy the interaction more, show less contentious behavior, use less aggressive tacticsand more cooperative strategies.[This in turn increases the likelihood that parties will reach their instrumental goals, and enhance the ability to find integrative gains.Indeed, compared with negotiators with negative or natural affectivity, negotiators with positive affectivity reached more agreements and tended to honor those agreements more. Those favorable outcomes are due to better decision making processes, such as flexible thinking, creative problem solving, respect for others' perspectives, willingness to take risks and higher confidencePost negotiation positive affect has beneficial consequences as well. It increases satisfaction with achieved outcome and influences one's desire for future interactions. The PA aroused by reaching an agreement facilitates the dyadic relationship, which result in affective commitment that sets the stage for subsequent interactions.[

PA also has its drawbacks: it distorts perception of self performance, such that performance is judged to be relatively better than it actually is.] Thus, studies involving self reports on achieved outcomes might be biased.

Negative effect in negotiation

Negative effect has detrimental effects on various stages in the negotiation process. Although various negative emotions affect negotiation outcomes, by far the most researched is anger. Angry negotiators plan to use more competitive strategies and to cooperate less, even before the negotiation starts. These competitive strategies are related to reduced joint outcomes. During negotiations, anger disrupts the process by reducing the level of trust, clouding parties' judgment, narrowing parties' focus of attention and changing their central goal from reaching agreement to retaliating against the other side. Angry negotiators pay less attention to opponent's interests and are less accurate in judging their interests, thus achieve lower joint gains. Moreover, because anger makes negotiators more self-centered in their preferences, it increases the likelihood that they will reject profitable offers. Anger doesn't help in achieving negotiation goals either: it reduces joint gains and does not help to boost personal gains, as angry negotiators don't succeed in claiming more for themselves. Moreover, negative emotions lead to acceptance of settlements that are not in the positive utility function but rather have a negative utility. However, expression of negative emotions during negotiation can sometimes be beneficial: legitimately expressed anger can be an effective way to show one's commitment, sincerity, and needs. Moreover, although NA reduces gains in integrative tasks, it is a better strategy than PA in distributive tasks (such as zero-sum). In his work on negative affect arousal and white noise, Seidner found support for the existence of a negative affect arousal mechanism through observations regarding the devaluation of speakers from other ethnic origins." Negotiation may be negatively affected, in turn, by submerged hostility toward an ethnic or gender group.

Conditions for emotions effect in negotiation

Research indicates that negotiator's emotions do not necessarily affect the negotiation process. Albarracın et al. (2003) suggested that there are two conditions for emotional effect, both related to the ability (presence of environmental or cognitive disturbances) and the motivation:

1. Identification of the affect: requires high motivation, high ability or both.
2. Determination that the affect is relevant and important for the judgment: requires that either the motivation, the ability or both are low.

According to this model, emotions are expected to affect negotiations only when one is high and the other is low. When both ability and motivation are low the affect will not be identified, and when both are high the affect will be identify but discounted as irrelevant for judgment. A possible implication of this model is, for example, that the positive effects PA has on negotiations (as described above) will be seen only when either motivation or ability are low.

The effect of the partner's emotions

Most studies on emotion in negotiations focus on the effect of the negotiator's own emotions on the process. However, what the other party feels might be just as important, as group emotions are known to affect processes both at the group and the personal levels. When it comes to negotiations, trust in the other party is a necessary condition for its emotion to affect and visibility enhances the effect. Emotions contribute to negotiation processes by signaling what one feels and thinks and can thus prevent the other party from engaging in destructive behaviors and to indicate what steps should be taken next: PA signals to keep in the same way, while NA points that mental or behavioral adjustments are needed.

Partner's emotions can have two basic effects on negotiator's emotions and behavior: mimetic/ reciprocal or complementary. For example, disappointment or sadness might lead to compassion and more cooperation. In a study by Butt et al. (2005) which simulated real multi-phase negotiation, most people reacted to the partner's emotions in reciprocal, rather than complementary, manner. Specific emotions were found to have different effects on the opponent's feelings and strategies chosen:

- **Anger** caused the opponents to place lower demands and to concede more in a zero-sum negotiation, but also to evaluate the negotiation less favorably. It provoked both dominating and yielding behaviors of the opponent.
- **Pride** led to more integrative and compromise strategies by the partner.
- **Guilt** or **regret** expressed by the negotiator led to better impression of him by the opponent, however it also led the opponent to place higher demands. On the other hand, personal guilt was related to more satisfaction with what one achieved.
- **Worry** or **disappointment** left bad impression on the opponent, but led to relatively lower demands by the opponent. **Problems with lab negotiation studies**

Negotiation is a rather complex interaction. Capturing all its complexity is a very difficult task, let alone isolating and controlling only certain aspects of it. For this reason most negotiation studies are done under laboratory conditions, and focus only on some aspects. Although lab studies have their advantages, they do have major drawbacks when studying emotions:

- Emotions in lab studies are usually manipulated and are therefore relatively 'cold' (not intense). Although those 'cold' emotions might be enough to show effects, they are qualitatively different from the 'hot' emotions often experienced during negotiations.
- In real life there is self-selection to which negotiation one gets into, which effects the emotional commitment, motivation and interests. However this is not the case in lab studies
- Lab studies tend to focus on relatively few well defined emotions. Real life scenarios provoke a much wider scale of emotions.
- Coding the emotions has a double catch: if done by a third side, some emotions might not be detected as the negotiator sublimates them for strategic reasons. Self report measures might overcome this, but they are usually filled only before or after the process, and if filled during the process might interfere with it.
- **The pervasive impact of culture on international negotiations**

The primary purpose of this section is to demonstrate the extent of cultural differences in negotiation styles and how these differences can cause problems in international business negotiations. The reader will note that national culture does not determine negotiation behavior. Rather, national culture is one of many factors that influence behavior at the negotiation table, albeit an important one. For example, gender, organizational culture, international experience, industry or regional background can all be important influences as well. Of course, stereotypes of all kinds are dangerous, and international negotiators must get to know the people they are working with, not just their culture, country, or company.

The material here is based on systematic study of international negotiation behavior over the last three decades in which the negotiation styles of more than 1,500 businesspeople in 17 countries (21 cultures) were considered. The work involved interviews with experienced executives and participant observations in the field, as well as behavioral science laboratory work including surveys and analyses of videotaped negotiations. The countries studied were Japan, S. Korea, China (Tianjin, Guangzhou, and Hong Kong), Vietnam, Taiwan, the Philippines, Russia, Israel, Norway, the Czech Republic, Germany, France, the United Kingdom, Spain, Brazil, Mexico, Canada (English-speakers and French-speakers), and the United States. The countries were chosen because they constitute America's most important present and future trading partners. Looking broadly across the several cultures, two important lessons stand out. The first is that regional generalizations very often are not correct. For example, Japanese and Korean negotiation styles are quite similar in some ways, but in other ways they could not be more different. The second lesson learned from the research is that Japan is an exceptional place: On almost every dimension of negotiation style considered, the Japanese are on or near the end of the scale. For example, the Japanese use the lowest amount of eye contact of the cultures studied. Sometimes, Americans are on the other end. But actually, most of the time Americans are somewhere in the middle. The reader will see this evinced in the data presented in this section. The Japanese approach, however, is most distinct, even *sui generis*.

Cultural differences cause four kinds of problems in international business negotiations, at the levels of:

- Language

- Nonverbal behaviors
- Values
- Thinking and decision-making processes

The order is important; the problems lower on the list are more serious because they are more subtle. For example, two negotiators would notice immediately if one were speaking Japanese and the other German. The solution to the problem may be as simple as hiring an interpreter or talking in a common third language, or it may be as difficult as learning a language. Regardless of the solution, the problem is obvious.

Cultural differences in nonverbal behaviors, on the other hand, are almost always hidden below our awareness. That is to say, in a face-to-face negotiation participants nonverbally—and more subtly—give off and take in a great deal of information. Some experts argue that this information is more important than verbal information. Almost all this signaling goes on below our levels of consciousness. When the nonverbal signals from foreign partners are different, negotiators are most apt to misinterpret them without even being conscious of the mistake. For example, when a French client consistently interrupts, Americans tend to feel uncomfortable without noticing exactly why. In this manner, interpersonal friction often colors business relationships, goes undetected, and, consequently, goes uncorrected. Differences in values and thinking and decision-making processes are hidden even deeper and therefore are even harder to diagnose and therefore cure. These differences are discussed below, starting with language and nonverbal behaviors.

Differences at the level of language

Translation problems are often substantial in international negotiations. And, when languages are linguistically distant,[29] greater problems should be anticipated. Particularly daunting can be work in global negotiation. Often the language used is English, but it may be spoken as a second language by most executives at the table. Indeed, native speakers from England, India, and the United States often have trouble understanding one another. Exact translations in international interactions are a goal almost never attained.

Moreover, language differences are sometimes exploited in interesting ways. Many senior executives in foreign countries speak and understand some English, but prefer to speak in their “stronger” native language and use an interpreter. Thus, we've see a senior Russian negotiator asking questions in Russian. The interpreter then translated the question for his American counterpart. While the interpreter spoke, the American’s attention (gaze direction) was given to the interpreter. However, the Russian’s gaze direction was at the American. Therefore, the Russian could carefully and unobtrusively observe the American's facial expressions and nonverbal responses. Additionally, when the American spoke, the senior Russian had twice the response time. Because he understood English, he could formulate his responses during the translation process.

What’s this extra response time worth in a strategic conversation? What’s it worth to be carefully able to observe the nonverbal responses of your top-level counterpart in a high-stakes business negotiation? Simply stated, bilingualism is not a common characteristic for Americans, and therefore competitors with greater language skills are afforded a natural advantage in international commerce.

Additionally, a common complaint heard from American managers regards foreign clients and partners breaking into side conversations in their native languages. At best, it is seen as impolite, and quite often American negotiators are likely to attribute something sinister to the content of the foreign talk—“They’re plotting or telling secrets.” This is a frequent American mistake.

The usual purpose of such side conversations is to straighten out a translation problem. For instance, one Korean may lean over to another and ask, “What’d he say?” Or, the side conversation can regard a disagreement among the foreign team members. Both circumstances should be seen as positive signs by Americans—that is, getting translations straight enhances the efficiency of the interactions, and concessions often follow internal disagreements. But because most Americans speak only one language, neither circumstance is appreciated. By the way, people from other countries are advised to give Americans a brief explanation of the content of their first few side conversations to assuage the sinister attributions.

But, there are problems at the level of language beyond translations and interpreters. Data from simulated negotiations are informative. In the study, the verbal behaviors of negotiators in 15 of the cultures (six negotiators in each of the 15 groups) were videotaped. The numbers in the body of Exhibit 1 represent the percentages of statements that were classified into each category listed. That is, 7 percent of the statements made by Japanese negotiators were classified as promises, 4 percent as threats, 7 percent as recommendations, and so on. The verbal bargaining behaviors used by the negotiators during the simulations proved to be surprisingly similar across cultures. Negotiations in all 15 cultures were composed primarily of information-exchange tactics—questions and self-disclosures. Note that the Israelis are on the low end of the continuum of self-disclosures. Their 30 percent (near the Japanese, Spaniards, and the English-speaking Canadians at 34 percent) was the lowest across all 15 groups, suggesting that they are the most reticent about giving (that is, communicating) information. Overall, however, the patterns of verbal tactics used were surprisingly similar across the diverse cultures.

Go to Exhibit 1, Verbal Negotiation Tactics, (the “what” of communications) across 15 Cultures

Nonverbal behaviors

Anthropologist Ray L. Birdwhistell demonstrated that less than 35% of the message in conversations is conveyed by the spoken word while the other 65% is communicated nonverbally. Albert Mehrabian, a UCLA psychologist, also parsed where meaning comes from in face-to-face interactions. He reports:

- 7% of the meaning is derived from the words spoken
- 38% from paralinguistic channels, that is, tone of voice, loudness, and other aspects of how things are said
- 55% from facial expressions

Of course, some might quibble with the exact percentages (and many have), but our work also supports the notion that nonverbal behaviors are crucial – how things are said is often more important than what is said.

Exhibit 2 provides analyses of some linguistic aspects and nonverbal behaviors for the 15 videotaped groups, that is, how things are said. Although these efforts merely scratch the surface of these kinds of behavioral analyses, they still provide indications of substantial cultural differences. Note that, once again, the Japanese are at or next to the end of the continuum on almost every dimension of the behaviors listed. Their facial gazing and touching are the least among the 15 groups. Only the Northern Chinese used the word no less frequently, and only the Russians used more silent periods than did the Japanese.

Go to Exhibit 2, Linguistic Aspects of Language and Nonverbal Behaviors ("how" things are said) across 15 Cultures: A broader examination of the data in Exhibits 1 and 2 reveals a more meaningful conclusion: The variation across cultures is greater when comparing linguistic aspects of language and nonverbal behaviors than when the verbal content of negotiations is considered. For example, notice the great differences between the Japanese and Brazilians in Exhibit 1 vis-à-vis Exhibit 2.

Distinctive negotiation behaviors of 15 cultural groups

Following are further descriptions of the distinctive aspects of each of the 15 cultural groups videotaped. Certainly, conclusions of statistical significant differences between individual cultures cannot be drawn without larger sample sizes. But, the suggested cultural differences are worthwhile to consider briefly.

Japan. Consistent with most descriptions of Japanese negotiation behavior, the results of this analysis suggest their style of interaction is among the least aggressive (or most polite). Threats, commands, and warnings appear to be de-emphasized in favor of the more positive promises, recommendations, and commitments. Particularly indicative of their polite conversational style was their infrequent use of *no* and *you* and facial gazing, as well as more frequent silent periods.

Korea. Perhaps one of the more interesting aspects of the analysis is the contrast of the Asian styles of negotiations. Non-Asians often generalize about the Orient; the findings demonstrate, however, that this is a mistake. Korean negotiators used considerably more punishments and commands than did the Japanese. Koreans used the word no and interrupted more than three times as frequently as the Japanese. Moreover, no silent periods occurred between Korean negotiators.

China (Northern). The behaviors of the negotiators from Northern China (i.e., in and around Tianjin) were most remarkable in the emphasis on asking questions (34 percent). Indeed, 70 percent of the statements made by the Chinese negotiators were classified as information-exchange tactics. Other aspects of their behavior were quite similar to the Japanese, particularly the use of *no* and *you* and silent periods.

Taiwan. The behavior of the businesspeople in Taiwan was quite different from that in China and Japan but similar to that in Korea. The Chinese on Taiwan were exceptional in the time of facial gazing—on the average, almost 20 of 30 minutes. They asked fewer questions and provided more information (self-disclosures) than did any of the other Asian groups.

Russia. The Russians' style was quite different from that of any other European group, and, indeed, was quite similar in many respects to the style of the Japanese. They used *no* and *you* infrequently and used the most silent periods of any group. Only the Japanese did less facial gazing, and only the Chinese asked a greater percentage of questions.

Israel. The behaviors of the Israeli negotiators were distinctive in three respects. As mentioned above, they used the lowest percentage of self-disclosures, apparently holding their cards relatively closely. Alternatively, they used by far the highest percentages of promises and recommendations, using these persuasive strategies unusually heavily. They were also at the end of the scale on the percentage of normative appeals at 5 percent with the most frequent reference to competitors' offers. Perhaps most importantly the Israeli negotiators interrupted one another much more frequently than negotiators from any other group. Indeed, this important nonverbal behavior is most likely to blame for the "pushy" stereotype often used by Americans to describe their Israeli negotiation partners.

Germany. The behaviors of the Germans are difficult to characterize because they fell toward the center of almost all the continua. However, the Germans were exceptional in the high percentage of self-disclosures (47 percent) and the low percentage of questions (11 percent).

United Kingdom. The behaviors of the British negotiators were remarkably similar to those of the Americans in all respects. Most British negotiators have a strong sense of the right way to negotiate and the wrong. Protocol is of great importance.

Spain. *Diga* is perhaps a good metaphor for the Spanish approach to negotiations evinced in our data. When you make a phone call in Madrid, the usual greeting on the other end is not *hola* ("hello") but is, instead, *diga* ("speak"). It is not surprising, then, that the Spaniards in the videotaped negotiations likewise used the highest percentage of

commands (17 percent) of any of the groups and gave comparatively little information (self-disclosures, only 34 percent). Moreover, they interrupted one another more frequently than any other group, and they used the terms *no* and *you* very frequently.

France. The style of the French negotiators was perhaps the most aggressive of all the groups. In particular, they used the highest percentage of threats and warnings (together, 8 percent). They also used interruptions, facial gazing, and *no* and *you* very frequently compared with the other groups, and one of the French negotiators touched his partner on the arm during the simulation.

Brazil. The Brazilian businesspeople, like the French and Spanish, were quite aggressive. They used the second-highest percentage of commands of all the groups. On average, the Brazilians said the word *no* 42 times, *you* 90 times, and touched one another on the arm about 5 times during 30 minutes of negotiation. Facial gazing was also high.

Mexico. The patterns of Mexican behavior in our negotiations are good reminders of the dangers of regional or language-group generalizations. Both verbal and nonverbal behaviors were quite different than those of their Latin American (Brazilian) or continental (Spanish) cousins. Indeed, Mexicans answer the telephone with the much less demanding *bueno* (short for "good day"). In many respects, the Mexican behavior was very similar to that of the negotiators from the United States.

French-Speaking Canada. The French-speaking Canadians behaved quite similarly to their continental cousins. Like the negotiators from France, they too used high percentages of threats and warnings, and even more interruptions and eye contact. Such an aggressive interaction style would not mix well with some of the more low-key styles of some of the Asian groups or with English speakers, including English-speaking Canadians.

English-Speaking Canada. The Canadians who speak English as their first language used the lowest percentage of aggressive persuasive tactics (threats, warnings, and punishments totaled only 1 percent) of all 15 groups. Perhaps, as communications researchers suggest, such stylistic differences are the seeds of interethnic discord as witnessed in Canada over the years. With respect to international negotiations, the English-speaking Canadians used noticeably more interruptions and no's than negotiators from either of Canada's major trading partners, the United States and Japan.

United States. Like the Germans and the British, the Americans fell in the middle of most continua. They did interrupt one another less frequently than all the others, but that was their sole distinction.

These differences across the cultures are quite complex, and this material by itself should not be used to predict the behaviors of foreign counterparts. Instead, great care should be taken with respect to the aforementioned dangers of stereotypes. The key here is to be aware of these kinds of differences so that the Japanese silence, the Brazilian "no, no, no…," or the French threat are not misinterpreted.

Differences in managerial values as pertinent to negotiations

Four managerial values—objectivity, competitiveness, equality, and punctuality—that are held strongly and deeply by most Americans seem to frequently cause misunderstandings and bad feelings in international business negotiations.

Objectivity

"Americans make decisions based upon the bottom line and on cold, hard facts." "Americans don't play favorites." "Economics and performance count, not people." "Business is business." Such statements well reflect American notions of the importance of objectivity.

The single most successful book on the topic of negotiation, *Getting to Yes*, is highly recommended for both American and foreign readers. The latter will learn not only about negotiations but, perhaps more important, about how Americans think about negotiations. The authors are quite emphatic about "separating the people from the problem," and they state, "Every negotiator has two kinds of interests: in the substance and in the relationship." This advice is probably quite worthwhile in the United States or perhaps in Germany, but in most places in the world such advice is nonsense. In most places in the world, particularly in collectivistic, high-context cultures, personalities and substance are not separate issues and cannot be made so.

For example, consider how important nepotism is in Chinese or Hispanic cultures. Experts tell us that businesses don't grow beyond the bounds and bonds of tight family control in the burgeoning "Chinese commonwealth." Things work the same way in Spain, Mexico, and the Philippines. And, naturally, negotiators from such countries not only will take things personally but will be personally affected by negotiation outcomes] What happens to them at the negotiation table will affect the business relationship regardless of the economics involved.

Competitiveness and Equality

Simulated negotiations can be viewed as a kind of experimental economics wherein the values of each participating cultural group are roughly reflected in the economic outcomes. The simple simulation used in this part of our work represents the essence of commercial negotiations—it has both competitive and cooperative aspects. At least 40 businesspeople from each culture played the same buyer-seller game, negotiating over the prices of three products. Depending on the agreement reached, the "negotiation pie" could be made larger through cooperation (as high as $10,400 in joint profits) before it was divided between the buyer and seller. The results are summarized in Exhibit 3Go to Exhibit 3, Cultural Differences in Competitiveness and Equality in Negotiation Outcomes across 20 Cultures:

The Japanese were the champions at making the pie big. Their joint profits in the simulation were the highest (at $9,590) among the 21 cultural groups involved. The Chinese in Hong Kong and the British businesspeople also behaved cooperatively in our negotiation game. The Czechs and the Germans behaved more competitively. The American pie was more average sized (at $9,030), but at least it was divided relatively equitably (51.8 percent of the profits went to the buyers). Conversely, the Japanese, and particularly the South Korean, Mexican businesspeople split their pies in strange (perhaps even unfair) ways, with buyers making higher percentages of the profits (53.8 percent, 55.0 percent, and 56.7 percent, respectively). The implications of these simulated business negotiations are completely consistent with the comments of other authors and the adage that in Japan (and apparently in Korea and Meixco as well) the buyer is "kinger". Americans have little understanding of the Japanese practice of granting complete deference to the needs and wishes of buyers. That is not the way things work in America. American sellers tend to treat American buyers more as equals, and the egalitarian values of American society support this behavior. The American emphasis on competition and individualism represented in these findings is quite consistent with the work of Geert Hofstede,[35] which indicated that Americans scored the highest among all the cultural groups on the individualism (versus collectivism) scale. Moreover, values for individualism/collectivism have been shown to directly influence negotiation behaviors in several other countries.

Finally, not only do Japanese buyers achieve higher results than American buyers, but compared with American sellers ($4,350), Japanese sellers also get more of the commercial pie ($4,430) as well. Interestingly, when shown these results, Americans in executive seminars still often prefer the American seller's role. In other words, even though the American sellers make lower profits than the Japanese, many American managers apparently prefer lower profits if those profits are yielded from a more equal split of the joint profits.

Time

"Just make them wait." Everyone else in the world knows that no negotiation tactic is more useful with Americans, because no one places more value on time, no one has less patience when things slow down, and no one looks at their wristwatches more than Americans do. Edward T. Hall in his seminal writing[is best at explaining how the passage of time is viewed differently across cultures and how these differences most often hurt Americans.

Even Americans try to manipulate time to their advantage, however. As a case in point, Solar Turbines Incorporated (a division of Caterpillar) once sold $34 million worth of industrial gas turbines and compressors for a Russian natural gas pipeline project. Both parties agreed that final negotiations would be held in a neutral location, the south of France. In previous negotiations, the Russians had been tough but reasonable. But in Nice, the Russians were not nice. They became tougher and, in fact, completely unreasonable, according to the Solar executives involved.

It took a couple of discouraging days before the Americans diagnosed the problem, but once they did, a crucial call was made back to headquarters in San Diego. Why had the Russians turned so cold? They were enjoying the warm weather in Nice and weren't interested in making a quick deal and heading back to Moscow! The call to California was the key event in this negotiation. Solar's headquarters people in San Diego were sophisticated enough to allow their negotiators to take their time. From that point on, the routine of the negotiations changed to brief, 45-minute meetings in the mornings, with afternoons at the golf course, beach, or hotel, making calls and doing paperwork. Finally, during the fourth week, the Russians began to make concessions and to ask for longer meetings. Why? They could not go back to Moscow after four weeks on the Mediterranean without a signed contract. This strategic reversal of the time pressure yielded a wonderful contract for Solar.

Differences in thinking and decision-making processes

When faced with a complex negotiation task, most Westerners (notice the generalization here) divide the large task up into a series of smaller tasks. Issues such as prices, delivery, warranty, and service contracts may be settled one issue at a time, with the final agreement being the sum of the sequence of smaller agreements. In Asia, however, a different approach is more often taken wherein all the issues are discussed at once, in no apparent order, and concessions are made on all issues at the end of the discussion. The Western sequential approach and the Eastern holistic approach do not mix well.

That is, American managers often report great difficulties in measuring progress in negotiations, particularly in Asian countries. After all, in America, you are half done when half the issues are settled. But in China, Japan, or Korea nothing seems to get settled. Then, surprise, you are done. Often, Americans make unnecessary concessions right before agreements are announced by the other side. For example, one American department store executive traveling to Japan to buy six different consumer products for her chain lamented that negotiations for the first product took an entire week. In the United States, such a purchase would be consummated in an afternoon. So, by her calculations, she expected to have to spend six weeks in Japan to complete her purchases. She considered raising her purchase prices to try to move things along faster. But before she was able to make such a concession, the Japanese quickly agreed on the other five products in just three days. This particular manager was, by her own admission, lucky in her first encounter with Japanese bargainer

This American executive's near blunder reflects more than just a difference in decision-making style. To Americans, a business negotiation is a problem-solving activity, the best deal for both parties being the solution. To a Japanese businessperson, on the other hand, a business negotiation is a time to develop a business relationship with the goal of long-term mutual benefit. The economic issues are the context, not the content, of the talks. Thus, settling any one

issue really is not that important. Such details will take care of themselves once a viable, harmonious business relationship is established. And, as happened in the case of the retail goods buyer above, once the relationship was established—signaled by the first agreement—the other "details" were settled quickly.
American bargainers should anticipate such a holistic approach to be common in Asian cultures and be prepared to discuss all issues simultaneously and in an apparently haphazard order. Progress in the talks should not be measured by how many issues have been settled. Rather, Americans must try to gauge the quality of the business relationship. Important signals of progress can be the following:

1. Higher-level executives from the other side being included in the discussions
2. Their questions beginning to focus on specific areas of the deal
3. A softening of their attitudes and position on some of the issues—"Let us take some time to study this issue"
4. At the negotiation table, increased talk among themselves in their own language, which may often mean they're trying to decide something
5. Increased bargaining and use of the lower-level, informal, and other channels of communication

Implications for managers and negotiators

Considering all the potential problems in cross-cultural negotiations, particularly when you mix managers from relationship-oriented cultures with those from information-oriented ones, it is a wonder that any international business gets done at all. Obviously, the economic imperatives of global trade make much of it happen despite the potential pitfalls. But an appreciation of cultural differences can lead to even better international commercial transactions—it is not just business deals but creative and highly profitable business relationships that are the real goal of international business negotiations.

Decision making

Decision making can be regarded as an outcome of mental processes (cognitive process) leading to the selection of a course of action among several alternatives. Every decision making process produces a final choice.[1] The output can be an action or an opinion of choice.

Overview

Human performance in decision making terms has been the subject of active research from several perspectives. From a psychological perspective, it is necessary to examine individual decisions in the context of a set of needs, preferences an individual has and values they seek. From a cognitive perspective, the decision making process must be regarded as a continuous process integrated in the interaction with the environment. From a normative perspective, the analysis of individual decisions is concerned with the logic of decision making and rationality and the invariant choice it leads to. Yet, at another level, it might be regarded as a problem solving activity which is terminated when a satisfactory solution is found. Therefore, decision making is a reasoning or emotional process which can be rational or irrational, can be based on explicit assumptions or tacit assumptions.
Logical decision making is an important part of all science-based professions, where specialists apply their knowledge in a given area to making informed decisions. For example, medical decision making often involves making a diagnosis and selecting an appropriate treatment. Some research using naturalistic methods shows, however, that in situations with higher time pressure, higher stakes, or increased ambiguities, experts use intuitive decision making rather than structured approaches, following a recognition primed decision approach to fit a set of indicators into the expert's experience and immediately arrive at a satisfactory course of action without weighing alternatives. Recent robust decision efforts have formally integrated uncertainty into the decision making process. However, Decision Analysis, recognized and included uncertainties with a structured and rationally justifiable method of decision making since its conception in 1964.

Decision making processes

According to behavioralist Isabel Briggs Myers, a person's decision making process depends to a significant degree on their cognitive style. Myers developed a set of four bi-polar dimensions, called the Myers-Briggs Type Indicator (MBTI). The terminal points on these dimensions are: *thinking* and *feeling*; *extroversion* and *introversion*; *judgment* and *perception*; and *sensing* and *intuition*. She claimed that a person's decision making style correlates well with how they score on these four dimensions. For example, someone who scored near the thinking, extroversion, sensing, and judgment ends of the dimensions would tend to have a logical, analytical, objective, critical, and empirical decision making style.
Other studies suggest that these national or cross-cultural differences exist across entire societies. For example, Maris Martinsons has found that American, Japanese and Chinese business leaders each exhibit a distinctive national style of decision making. Some of the decision making techniques that we use in everyday life include:

- listing the advantages and disadvantages of each option, popularized by Plato and Benjamin Franklin
- flipping a coin, cutting a deck of playing cards, and other random or coincidence methods
- accepting the first option that seems like it might achieve the desired result
- prayer, tarot cards, astrology, augurs, revelation, or other forms of divination
- acquiesce to a person in authority or an "expert"
- choosing the alternative with the highest probability-weighted utility for each alternative (see Decision Analysis)

Cognitive and personal biases

Biases can creep into our decision making processes. Many different people have made a decision about the same question (*e.g.* "Should I have a doctor look at this troubling breast cancer symptom I've discovered?" "Why did I ignore the evidence that the project was going over budget?") and then craft potential cognitive interventions aimed at improving decision making outcomes.

Below is a list of some of the more commonly debated cognitive biases.

- Selective search for evidence (a.k.a. Confirmation bias in psychology) (Scott Plous, 1993) – We tend to be willing to gather facts that support certain conclusions but disregard other facts that support different conclusions. Individuals who are highly defensive in this manner show significantly greater left prefrontal cortex activity as measured by EEG than do less defensive individuals.
- Premature termination of search for evidence – We tend to accept the first alternative that looks like it might work.
- Inertia – Unwillingness to change thought patterns that we have used in the past in the face of new circumstances.
- Selective perception – We actively screen-out information that we do not think is important. (See prejudice.) In one demonstration of this effect, discounting of arguments with which one disagrees (by judging them as untrue or irrelevant) was decreased by selective activation of right prefrontal cortex.
- Wishful thinking or optimism bias – We tend to want to see things in a positive light and this can distort our perception and thinking. Choice-supportive bias occurs when we distort our memories of chosen and rejected options to make the chosen options seem relatively more attractive.
- Recency – We tend to place more attention on more recent information and either ignore or forget more distant information. (See semantic priming.) The opposite effect in the first set of data or other information is termed Primacy effect (Plous, 1993).
- Repetition bias – A willingness to believe what we have been told most often and by the greatest number of different of sources.
- Anchoring and adjustment – Decisions are unduly influenced by initial information that shapes our view of subsequent information.
- Group think – Peer pressure to conform to the opinions held by the group.
- Source credibility bias – We reject something if we have a bias against the person, organization, or group to which the person belongs: We are inclined to accept a statement by someone we like. (See prejudice.)
- Incremental decision making and escalating commitment – We look at a decision as a small step in a process and this tends to perpetuate a series of similar decisions. This can be contrasted with **zero-based decision making**. (See slippery slope.)
- Attribution asymmetry – We tend to attribute our success to our abilities and talents, but we attribute our failures to bad luck and external factors. We attribute other's success to good luck, and their failures to their mistakes.
- Role fulfillment (Self Fulfilling Prophecy) – We conform to the decision making expectations that others have of someone in our position.
- Underestimating uncertainty and the illusion of control – We tend to underestimate future uncertainty because we tend to believe we have more control over events than we really do. We believe we have control to minimize potential problems in our decisions.

Neuroscience perspective

The anterior cingulate cortex (ACC), orbitofrontal cortex (and the overlapping ventromedial prefrontal cortex) are brain regions involved in decision making processes. A recent neuroimaging study,[8] found distinctive patterns of neural activation in these regions depending on whether decisions were made on the basis of personal volition or following directions from someone else. Patients with damage to the ventromedial prefrontal cortex have difficulty making advantageous decisions

A recent study involving Rhesus monkeys found that neurons in the parietal cortex not only represent the formation of a decision but also signal the degree of certainty (or "confidence") associated with the decision. Another recent study found that lesions to the ACC in the macaque resulted in impaired decision making in the long run of reinforcement guided tasks suggesting that the ACC is responsible for evaluating past reinforcement information and guiding future action.

Emotion appears to aid the decision making process: Decision making often occurs in the face of uncertainty about whether one's choices will lead to benefit or harm (see also Risk). The somatic-marker hypothesis is a neurobiological theory of how decisions are made in the face of uncertain outcome. This theory holds that such decisions are aided by emotions, in the form of bodily states, that are elicited during the deliberation of future consequences and that mark different options for behavior as being advantageous or disadvantageous. This process involves an interplay between neural systems that elicit emotional/bodily states and neural systems that map these emotional/bodily states.

Styles and methods of decision making

Styles and methods of decision making were elaborated by the founder of Predispositioning Theory, Aron Katsenelinboigen. In his analysis on styles and methods Katsenelinboigen referred to the game of chess, saying that "chess does disclose various methods of operation, notably the creation of predisposition—methods which may be applicable to other, more complex systems. In his book Katsenelinboigen states that apart from the methods (reactive and selective) and sub-methods (randomization, predispositioning, programming), there are two major styles – positional and combinational. Both styles are utilized in the game of chess. According to Katsenelinboigen, the two styles reflect two basic approaches to the uncertainty: deterministic (combinational style) and indeterministic (positional style). Katsenelinboigen's definition of the two styles are the following.
The combinational style is characterized by

- a very narrow, clearly defined, primarily material goal, and
- a program that links the initial position with the final outcome.

In defining the combinational style in chess, Katsenelinboigen writes:
The combinational style features a clearly formulated limited objective, namely the capture of material (the main constituent element of a chess position). The objective is implemented via a well defined and in some cases in a unique sequence of moves aimed at reaching the set goal. As a rule, this sequence leaves no options for the opponent. Finding a combinational objective allows the player to focus all his energies on efficient execution, that is, the player's analysis may be limited to the pieces directly partaking in the combination. This approach is the crux of the combination and the combinational style of play. The positional style is distinguished by

- a positional goal and
- a formation of semi-complete linkages between the initial step and final outcome.

"Unlike the combinational player, the positional player is occupied, first and foremost, with the elaboration of the position that will allow him to develop in the unknown future. In playing the positional style, the player must evaluate relational and material parameters as independent variables. (…) The positional style gives the player the opportunity to develop a position until it becomes pregnant with a combination. However, the combination is not the final goal of the positional player—it helps him to achieve the desirable, keeping in mind a predisposition for the future development. The Pyrrhic victory is the best example of one's inability to think positionally. The positional style serves to
a) create a predisposition to the future development of the position;
b) induce the environment in a certain way;
c) absorb an unexpected outcome in one's favor;
d) avoid the negative aspects of unexpected outcomes.
The positional style gives the player the opportunity to develop a position until it becomes pregnant with a combination. Katsenelinboigen writes:
"As the game progressed and defense became more sophisticated the combinational style of play declined. . . . The positional style of chess does not eliminate the combinational one with its attempt to see the entire program of action in advance. The positional style merely prepares the transformation to a combination when the latter becomes feasible.

Topic 3 Facilitation

The term **facilitation** is broadly used to describe any activity which makes tasks for others easy. For example:

- Facilitation is used in business and organisational settings to ensure the designing and running of successful meetings.
- Neural facilitation in neuroscience, is the increase in postsynaptic potential evoked by a 2nd impulse.
- Ecological facilitation describes how an organism profits from the presence of another. Examples are nurse plants, which provide shade for new seedlings or saplings (e.g. using an orange tree to provide shade for a newly planted coffee plant), or plants providing shelter from wind chill in arctic environments.

A person who takes on such a role is called a **facilitator**. Specifically:

- A facilitator is used in a variety of group settings, including business and other organisations to describe someone whose role it is to work with group processes to ensure meetings run well and achieve a high degree of consensus.
- The term **facilitator** is used in psychotherapy where the role is more to help group members become aware of the feelings they hold for one another (*see* Group psychotherapy)
- The term **facilitator** is used in education to refer to a specifically trained adult who sits in class with a disabled, or otherwise needy, student to help them follow the lesson that the teacher is giving (*see* Disability)
- The term **facilitator** is used to describe people engaged in the illegal trafficking of human beings across international borders (*see* Human trafficking).
- The term **facilitator** is used to describe those individuals who arrange adoptions by attempting to match available children with prospective adopters.
- The term **facilitator** is used to describe someone who assists people with communication disorders to use communication aids with their hands. See Facilitated communication

Topic 3 Arbitration

Arbitration, a form of alternative dispute resolution (ADR), is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides. Other forms of ADR include mediation (a form of settlement negotiation facilitated by a neutral third party) and non-binding resolution by experts. It is more helpful, however, simply to classify arbitration as a form of binding dispute resolution, equivalent to litigation in the courts, and entirely distinct from the other forms of dispute resolution, such as negotiation, mediation, or determinations by experts, which are usually non-binding. Arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is far more controversial in consumer and employment matters, where arbitration is not voluntary but is instead imposed on consumers or employees through fine-print contracts, denying individuals of their right to access the courts.

Arbitration can be either voluntary or mandatory and can be either binding or non-binding. Non-binding arbitration is, on the surface, similar to mediation. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable.

Nature

Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed will be final and binding. Arbitration is not the same as:

- judicial proceedings, although in some jurisdictions, court proceedings are sometimes referred as arbitrationsalternative dispute resolution (or ADR) expert determination
- mediation

Advantages and disadvantages

Parties often seek to resolve their disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

- when the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed (as one cannot "choose the judge" in litigation)
- arbitration is often faster than litigation in court
- arbitration can be cheaper and more flexible for businesses
- arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
- because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court judgments
- in most legal systems, there are very limited avenues for appeal of an arbitral award

However, some of the disadvantages of arbitration can be that:

- arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees sometimes do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job
- if the arbitration is mandatory and binding, the parties waive their rights to access the courts and have a judge or jury decide the case
- in some arbitration agreements, the parties are required to pay for the arbitrators, which adds an additional layer of legal cost that can be prohibitive, especially in small consumer disputes
- in some arbitration agreements and systems, the recovery of attorneys' fees is unavailable, making it difficult or impossible for consumers or employees to get legal representation; however most arbitration codes and agreements provide for the same relief that could be granted in court
- if the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee
- there are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned
- although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays
- in some legal systems, arbitral awards have fewer enforcement remedies than judgments; although in the United States, arbitration awards are enforced in the same manner as court judgments and have the same effect
- arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of an award, such as the relocation of assets offshore
- rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law.
- discovery may be more limited in arbitration
- the potential to generate billings by attorneys may be less than pursuing the dispute through trial

- unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award
- although grounds for attacking an arbitration award in court are limited, efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the perceived economic incentive to arbitrate the dispute in the first place.

Arbitrability

By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedures cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. *Examples*: Until relatively recently (80s), antitrust matters were not arbitrable in the United States. Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters is at least restricted. However, most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.
- Some legal orders exclude or restrict the possibility of arbitration for reasons of the protection of weaker members of the public, e.g. consumers. *Examples*: German law excludes disputes over the rental of living space from any form of arbitrationwhile arbitration agreements with consumers are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement.

Arbitration agreement

In theory, arbitration is a consensual process; a party cannot be forced to arbitrate a dispute unless he agrees to do so. In practice, however, many fine-print arbitration agreements are inserted in situations in which consumers and employees have no bargaining power. Moreover, arbitration clauses are frequently placed within sealed users' manuals within products, within lengthy click-through agreements on websites, and in other contexts in which meaningful consent is not realistic. Such agreements are generally divided into two types:

- agreements which provide that, if a dispute should arise, it will be resolved by arbitration. These will generally be normal contracts, but they contain an arbitration clause
- agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration (sometimes called a "submission agreement")

The former is the far more prevalent type of arbitration agreement. Sometimes, legal significance attaches to the type of arbitration agreement. For example, in certain Commonwealth countries, it is possible to provide that each party should bear their own costs in a conventional arbitration clause, but not in a submission agreement.

In keeping with the informality of the arbitration process, the law is generally keen to uphold the validity of arbitration clauses even when they lack the normal formal language associated with legal contracts. Clauses which have been upheld include:

- "arbitration in London - English law to apply"suitable arbitration clause"arbitration, if any, by ICC Rules in London"The courts have also upheld clauses which specify resolution of disputes other than in accordance with a specific legal system. These include provision indicating:
- that the arbitrators "must not necessarily judge according to the strict law but as a general rule ought chiefly to consider the principles of practical business""internationally accepted principles of law governing contractual relations"Agreements to refer disputes to arbitration generally have a special status in the eyes of the law. For example, in disputes on a contract, a common defence is to plead the contract is void and thus any claim based upon it fails. It follows that if a party successfully claims that a contract is void, then each clause contained within the contract, including the arbitration clause, would be void. However, in most countries, the courts have accepted that:

1. a contract can only be declared void by a court or other tribunal; and
2. if the contract (valid or otherwise) contains an arbitration clause, then the proper forum to determine whether the contract is void or not, is the arbitration tribunal. Arguably, either position is potentially unfair; if a person is made to sign a contract under duress, and the contract contains an arbitration clause highly favourable to the other party, the dispute may still referred to that arbitration tribunal. Conversely a court may be persuaded that the arbitration agreement itself is void having been signed under duress. However, most courts will be reluctant to interfere with the general rule which does allow for commercial expediency; any other solution (where one first had to go to court to decide whether one had to go to arbitration) would be self defeating.

Applicable laws

Arbitration is subject to different laws. These may be summarized as follows:

- The law governing the arbitration agreement
- The law governing the arbitral tribunal and its proceedings (lex arbitri - procedural law)
- The law governing the substance of the dispute
- The law governing recognition and enforcement of the award

Severability and law governing the arbitration agreement

The arbitration agreement which is part of the main contract (often referred to as "container contract") is governed by the law which governs the main contract. An important feature of arbitration, however, is severability - the fact that arbitration agreement lives a life of its own and is autonomous of the main agreement. Invoking the invalidity of the main agreement may not necessarily bring with it the invalidity of the arbitration clause. Another feature closely tied to this is "competence-competence" - the ability of the arbitration tribunal to decide on its own jurisdiction. Therefore a party who is trying to avoid arbitration at an early stage by claiming that the main contract is invalid will face the arbitration agreement separate from the main one and the arbitrators deciding on their own competence.

Seat of the arbitration

Most legal systems recognise the concept of a "seat" of the arbitration, which is a geographical and legal jurisdiction to which the arbitration is tied. The seat will normally determine the procedural rules (*lex arbitri*) which the arbitration follows, and the courts which exercise jurisdiction over the seat will have a supervisory role over the conduct of the arbitration.

Parties to the arbitration are free to choose the seat of arbitration and often do so in practice. If they do not, the arbitral tribunal will do it for them. Whereas it is possible to detach procedural law from the seat of arbitration (e.g. seat in Switzerland, English procedural law) this creates confusion as it subjects the arbitration to two controlling and possibly conflicting laws. The procedural law of arbitration, normally determined by the seat, ought to be distinguished from the procedure that the arbitration panel will follow. The latter refers to daily operation of the arbitration and is normally determined either by the institution in question (if arbitration is institutional, e.g. ICC Rules) or by reference to a ready-made procedure (such as the UNCITRAL Rules).

The seat of arbitration might not be the same as the place where proceedings are actually happening. Thus, for instance, an ICC arbitration may have its seat in London (and therefore be governed by the English *lex arbitri* and ICC procedural rules) and most sessions may take place outside the UK.

Law applicable to procedure

The essential matters of procedure -- such as any disagreement over the appointment or replacement of arbitrators, the jurisdiction of the tribunal itself, or the validity of an arbitration award -- are determined by the procedural law of the seat of the arbitration, and may be decided by recourse to courts. The parties normally influence this through their choice of the seat of arbitration or directly through choice of procedural law.

All other matters of procedure are generally determined by the arbitral tribunal itself (depending on national law and respect for due process) and the preferences of the arbitrators, the parties, and their counsel. The arbitrators' power to determine procedural matters normally includes:

- mode of submitting (and challenging) evidence
- time and place of any hearings
- language and translations
- disclosure of documents and other evidence
- use of pleadings and/or interrogatories
- the appointment of experts and assessors

Law applicable to substance

Parties in a commercial dispute will often choose the law applicable to the substance of their dispute. In fact, they are more likely to choose substantive than procedural law as this will have direct impact on the outcome of their dispute. This choice is usually expressed in the arbitration clause itself or at least in part of the contract where the clause is located.

If the parties do not choose the applicable law the arbitral tribunal will. This is normally interpreted as the ability of the tribunal to choose the choice-of-law rules which will, in turn, point to the applicable law. The arbitrators are not strictly speaking bound by public policy order or mandatory rules of third states but will normally observe them as that increases the chance of the award being recognized.

The tribunal may decide *ex aequo et bono* only if the parties have expressly authorized them to do so.

Law applicable to recognition and enforcement

The law that applies to issues of recognition will always be the law of the state where this recognition is sought. In a large number of states this will be governed by 1958 New York Convention which harmonizes the recognition and enforcement of foreign arbitral awards.

Sources of law

States regulate arbitration through a variety of laws. The main body of law applicable to arbitration is normally contained either in the national Private International Law Act (as is the case in Switzerland) or in a separate law on

arbitration (as is the case in England). In addition to this, a number of national procedural laws may also contain provisions relating to arbitration.
By far the most important international instrument on arbitration law is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Some other relevant international instruments are:

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The UNCITRAL Model Law (providing a model for a national law of arbitration)
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

Arbitral tribunal
The term *arbitral tribunal* is used to denote the arbitrator or arbitrators sitting to determine the dispute. The composition of the arbitral tribunal can vary enormously, with either a sole arbitrator sitting, two or more arbitrators, with or without a chairman or umpire, and various other combinations.
In most jurisdictions, an arbitrator enjoys immunity from liability for anything done or omitted whilst acting as arbitrator unless the arbitrator acts in bad faith.
Arbitrations are usually divided into two types:

- *ad hoc* arbitrations and administered arbitrations.

In *ad hoc* arbitrations, the arbitral tribunals are appointed by the parties or by an appointing authority chosen by the parties. After the tribunal has been formed, the appointing authority will normally have no other role and the arbitation will be managed by the tribunal.
In administered arbitration, the arbitration will be administered by a professional arbitration institution providing arbitration services, such as the LCIA in London or the ICC in Paris. Normally the arbitration institution also will be the appointing authority.
Arbitration institutions tend to have their own rules and procedures, and may be more formal. They also tend to be more expensive, and, for procedural reasons, slower.
Duties of the tribunal
The duties of a tribunal will be determined by a combination of the provisions of the arbitration agreement and by the procedural laws which apply in the seat of the arbitration. The extent to which the laws of the seat of the arbitration permit "party autonomy" (the ability of the parties to set out their own procedures and regulations) determines the interplay between the two.
However, in almost all countries the tribunal owes several non-derogable duties. These will normally be:

- to act fairly and impartially between the parties, and to allow each party a reasonable opportunity to put their case and to deal with the case of their opponent (sometimes shortened to: complying with the rules of "natural justice"); and
- to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for resolution of the dispute.

Arbitral awards
Although arbitration awards are characteristically an award of damages against a party, in many jurisdictions tribunals have a range of remedies that can form a part of the award. These may include:

1. payment of a sum of money (conventional damages)
2. the making of a "declaration" as to any matter to be determined in the proceedings
3. in some jurisdictions, the tribunal may have the same power as a court to:
    1. order a party to do or refrain from doing something ("injunctive relief")
    2. to order specific performance of a contract
    3. to order the rectification, setting aside or cancellation of a deed or other document.
4. In other jurisdictions, however, unless the parties have expressly granted the arbitrators the right to decide such matters, the tribunal's powers may be limited to deciding whether a party is entitled to damages. It may not have the legal authority to order injunctive relief, issue a declaration, or rectify a contract, such powers being reserved to the exclusive jurisdiction of the courts.

Enforcement of arbitration awards
One of the reasons that arbitration is so popular in international trade as a means of dispute resolution, is that it is often easier to enforce an arbitration award in a foreign country than it is to enforce a judgment of the court.
Under the New York Convention 1958, an award issued a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defences.
Only foreign arbitration awards can be subject to recognition and enforcement pursuant to the New York Convention. An arbitral decision is foreign where the award was made in a state other than the state of recognition or where foreign procedural law was used.[21]
Virtually every significant commercial country in the world is a party to the Convention, but relatively few countries have a comprehensive network for cross-border enforcement of judgments of the court.

The other characteristic of cross-border enforcement of arbitration awards that makes them appealing to commercial parties is that they are not limited to awards of damages. Whereas in most countries only monetary judgments are enforceable in the cross-border context, no such restrictions are imposed on arbitration awards and so it is theoretically possible (although unusual in practice) to obtain an injunction or an order for specific performance in an arbitration proceeding which could then be enforced in another New York Convention contracting state.
The New York Convention is not actually the only treaty dealing with cross-border enforcement of arbitration awards. The earlier Geneva Convention on the Execution of Foreign Arbitral Awards 1927 remains in force, but the success of the New York Convention means that the Geneva Convention is rarely utilised in practise.

Arbitration with sovereign governments

Certain international conventions exist in relation to the enforcement of awards against states.

- The Washington Convention 1965 relates to settlement of investment disputes between states and citizens of other countries. The Convention created the International Centre for Settlement of Investment Disputes (or ICSID). Compared to other arbitration institutions, relatively few awards have been rendered under ICSID.
- The Algiers Declaration of 1981 established the Iran-US Claims Tribunal to adjudicate claims of American corporations and individuals in relation to expropriated property during the Islamic revolution in Iran in 1979. The tribunal has not been a notable success, and has even been held by an English court to be void under its own governing law.

Challenge

Generally speaking, by their nature, arbitration proceedings tend not to be subject to appeal, in the ordinary sense of the word.
However, in most countries, the court maintains a supervisory role to set aside awards in extreme cases, such as fraud or in the case of some serious legal irregularity on the part of the tribunal.
Only domestic arbitral awards (i.e. those where the seat of arbitration is located in the same state as the court seised) are subject to set aside procedure.
In American arbitration law there exists a small but significant body of case law which deals with the power of the courts to intervene where the decision of an arbitrator is in fundamental disaccord with the applicable principles of law or the contract. Unfortunately there is little agreement amongst the different American judgments and textbooks as to whether such a separate doctrine exists at all, or the circumstances in which it would apply. There does not appear to be any recorded judicial decision in which it has been applied. However, conceptually, to the extent it exists, the doctrine would be an important derogation from the general principle that awards are not subject to review by the courts.

Costs

In many legal systems - both common law and civil law - it is normal practice for the courts to award legal costs against a losing party, with the winner becoming entitled to recover an approximation of what it spent in pursuing its claim (or in defense of a claim). The United States is a notable exception to this rule, as except for certain extreme cases, a prevailing party in a US legal proceeding does not become entitled to recoup its legal fees from the losing party.
Like the courts, arbitral tribunals generally have the same power to award costs in relation to the determination of the dispute. In international arbitration as well as domestic arbitrations conducted in countries where courts may award costs against a losing party, the arbitral tribunal will also determine the portion of the arbitrators' fees that the losing party is required to bear.

Nomenclature

As methods of dispute resolution, arbitration procedure can be varied to suit the needs of the parties. Certain specific "types" of arbitration procedure have developed, particularly in North America.

- **Judicial Arbitration** is, usually, not arbitration at all, but merely a court process which refers to itself as arbitration, such as small claims arbitration before the County Courts in the United Kingdom.
- **High-Low Arbitration**, or **Bracketed Arbitration**, is an arbitration wherein the parties to the dispute agree in advance the limits within which the arbitral tribunal must render its award. It is only generally useful where liability is not in dispute, and the only issue between the party is the amount of compensation. If the award is lower than the agreed minimum, then the defendant only need pay the lower limit; if the award is higher than the agreed maximum, the claimant will receive the upper limit. If the award falls within the agreed range, then the parties are bound by the actual award amount. Practice varies as to whether the figures may or may not be revealed to the tribunal, or whether the tribunal is even advised of the parties' agreement.
- **Non-Binding Arbitration** is a process which is conducted as if it were a conventional arbitration, except that the award issued by the tribunal is not binding on the parties, and they retain their rights to bring a claim before the courts or other arbitration tribunal; the award is in the form of an independent assessment of the merits of the case, designated to facilitate an out-of-court settlement.
- **Pendulum Arbitration** refers to a determination in industrial disputes where an arbitrator has to resolve a claim between a trade union and management by making a determination of which of the two sides has the

more reasonable position. The arbitrator must choose only between the two options, and cannot split the difference or select an alternative position. It was initiated in Chile in 1979 and has proved to be a very effective mechanism.

- This form of arbitration is also known as **Baseball Arbitration**. It takes its name from a practice which arose in relation to salary arbitration in Major League Baseball.
- **Night Baseball Arbitration** is a variation of baseball arbitration where the figures are not revealed to the arbitration tribunal. The arbitrator will determinate the quantum of the claim in the usual way, and the parties agree to accept and be bound by the figure which is closest to the tribunal's award.

Topic 4

Alternative dispute resolution

Alternative dispute resolution or external Dispute Resolution in some countries, such as Australia includes dispute resolution processes and techniques that fall outside of the government judicial process. Despite historic resistance to ADR by both parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

Alternative dispute resolution (**ADR**) tends to transform into **Appropriate dispute resolution**. ("Alternative ways of solving conflicts (ADR)", Zeno Sustac & Claudiu Ignat, 2008).

Types and features of alternative dispute resolution

ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration. (Sometimes a fifth type, conciliation, is included as well, but for present purposes it can be regarded as a form of mediation. See conciliation for further details.) ADR can be used alongside existing legal systems such as Sharia Courts within Common Law jurisdictions such as the UK.

ADR traditions vary somewhat by country and culture. There are significant common elements which justify a main topic, and each country or region's difference should be delegated to sub-pages.

ADR or Alternative Dispute Resolution is of two historic types. First, methods for resolving disputes outside of the official judicial mechanisms. Second, informal methods attached to or pendant to official judicial mechanisms. There are in addition free-standing and or independent methods, such as mediation programs and ombuds offices within organizations. The methods are similar, whether or not they are pendant, and generally use similar tool or skill sets, which are basically sub-sets of the skills of negotiation.

ADR includes informal tribunals, informal mediative processes, formal tribunals and formal mediative processes. The classic formal tribunal forms of ADR are arbitration (both binding and advisory or non-binding) and private judges (either sitting alone, on panels or over summary jury trials). The classic formal mediative process is referral for mediation before a court appointed mediator or mediation panel. Structured transformative mediation as used by the U.S. Postal Service is a formal process. Classic informal methods include social processes, referrals to non-formal authorities (such as a respected member of a trade or social group) and intercession. The major differences between formal and informal processes are (a) pendency to a court procedure and (b) the possession or lack of a formal structure for the application of the procedure.

For example, freeform negotiation is merely the use of the tools without any process. Negotiation within a labor arbitration setting is the use of the tools within a highly formalized and controlled setting.

Calling upon an organizational ombudsman's office is never a formal procedure. (Calling upon an organizational ombudsman is always voluntary; by the International Ombudsman Association Standards of practice, no one can be compelled to use an ombuds office.)

Informal referral to a co-worker known to help people work out issues is an informal procedure. Co-worker interventions are usually informal.

Conceptualizing ADR in this way makes it easy to avoid confusing tools and methods (does negotiation once a law suit is filed cease to be ADR? If it is a tool, then the question is the wrong question) (is mediation ADR unless a court orders it? If you look at court orders and similar things as formalism, then the answer is clear: court annexed mediation is merely a formal ADR process).

Dividing lines in ADR processes are often provider driven rather than consumer driven. Educated consumers will often choose to use many different options depending on the needs and circumstances that they face.

Finally, it is important to realize that conflict resolution is one major goal of all the ADR processes. If a process leads to resolution, it is a dispute resolution process. The salient features of each type are as follows:

1. In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. (NB – a third party like a chaplain or organizational ombudsperson or social worker or a skilled friend may be coaching one or both of the parties behind the scene, a process called "Helping People Help Themselves" – see Helping People Help Themselves, in Negotiation Journal July 1990, pp.

239–248, which includes a section on helping someone draft a letter to someone who is perceived to have wronged them.)

2. In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does *not* impose a resolution on the parties. In some countries (for example, the United Kingdom), ADR is synonymous with what is generally referred to as mediation in other countries.
3. In collaborative law or collaborative divorce, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigation variant that happens to rely on ADR like attitudes and processes.
4. In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration. This is known as a 'Scott Avery Clause'. In recent years, the enforceability of arbitration clauses, particularly in the context of consumer agreements (e.g., credit card agreements), has drawn scrutiny from courts. Although parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review.

Beyond the basic types of alternative dispute resolutions there are other different forms of ADR:

- Case evaluation: a non-binding process in which parties present the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator.
- Early neutral evaluation: a process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing their case and may influence them towards a settlement.
- Family group conference: a meeting between members of a family and members of their extended related group. At this meeting (or often a series of meetings) the family becomes involved in learning skills for interaction and in making a plan to stop the abuse or other ill-treatment between its members.
- Neutral fact-finding: a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.
- Ombuds: third party selected by an institution – for example a university, hospital, corporation or government agency – to deal with complaints by employees, clients or constituents. The Standards of Practice for Organizational Ombuds may be found at http://www.ombudsassociation.org/standards/.

An organizational ombudsman works within the institution to look into complaints independently and impartially
"Alternative" dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence.
In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster "**appropriate**" dispute resolution. (See Lynch, J. "ADR and Beyond: A Systems Approach to Conflict Management", Negotiation Journal, Volume 17, Number 3, July 2001, Volume, p. 213.)
That is, some cases and some complaints in fact ought to go to formal grievance or to court or to the police or to a compliance officer or to a government IG. Other conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need mediation or arbitration. Thus "alternative" dispute resolution usually means a method that is not the courts. "Appropriate" dispute resolution considers **all** the possible responsible options for conflict resolution that are relevant for a given issue. Arbitration and mediation are the best known and most commonly used forms of ADR within the UK. However in recent years adjudication is rapidly gaining attention as a quick, fair and cheap was to settle disputes.
ADR can increasingly be conducted online, which is known as online dispute resolution (ODR, which is mostly a buzzword and an attempt to create a distinctive product). It should be noted, however, that ODR services can be provided by government entities, and as such may form part of the litigation process. Moreover, they can be provided on a global scale, where no effective domestic remedies are available to disputing parties, as in the case of the UDRP and domain name disputes. In this respect, ODR might not satisfy the "alternative" element of ADR.

Country-specific examples

China

Chinese trained mediators have a long history and were practicing in court annexed mediations in the United States more than thirty years ago.

Modern era

Traditional people's mediation has always involved the parties remaining in contact for most or all of the mediation session. The innovation of separating the parties after (or sometimes before) a joint session and conducting the rest of

the process without the parties in the same area was a major innovation and one that dramatically improved mediation's success rate.
Traditional arbitration involved heads of trade guilds or other dominant authorities settling disputes. The modern innovation was to have commercial vendors of arbitrators, often ones with little or no social or political dominance over the parties. The advantage was that such persons are much more readily available. The disadvantage is that it does not involve the community of the parties. When wool contract arbitration was conducted by senior guild officials, the arbitrator combined a seasoned expert on the subject matter with a socially dominant individual whose patronage, good will and opinion were important.
Private judges and summary jury trials are cost and time savings processes that have had limited penetration due to the alternatives becoming more robust and accepted.

Iceland

The Saga of Burnt Njal is the story of a mediator who was so successful that he eventually threatened the local power structure. It ends in tragedy with the unlawful burning of Njal alive in his home, the escape of a friend of the family, a mini-war and the eventual ending of the dispute by the intermarriage of the two strongest survivors. It illustrates that mediation was a powerful process in Iceland before the era of kings.

Roman Empire

Latin has a number of terms for mediator that predate the Roman Empire. Any time there are formal adjudicative processes it appears that there are informal ones as well. It is probably fruitless to attempt to determine which group had mediation first.

India

Alternative dispute resolution in India is not new and it was in existence even under the previous Arbitration Act, 1940. The Arbitration and Conciliation Act, 1996 has been enacted to accommodate the harmonisation mandates of UNCITRAL Model. To streamline the Indian legal system the traditional civil law known as Code of Civil Procedure, (CPC) 1908 has also been amended and section 89 has been introduced. Section 89 (1) of CPC provides an option for the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement.
Due to extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach.

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, talex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defence in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.
Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or a panel of arbitrators so appointed constitute the Arbitration Tribunal.
Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do accept to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.
Once the period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

Conciliation

Conciliation is a less formal form of arbitration. This process does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In case of multiple conciliators, all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation.
Parties may submit statements to the conciliator describing the general nature of the dispute and the points at issue. Each party sends a copy of the statement to the other. The conciliator may request further details, may ask to meet

the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.
When it appears to the conciliator that elements of settlement exist, he may draw up the terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both.
Note that in USA, this process is similar to Mediation. However, in India, Mediation is different from Conciliation and is a completely informal type of ADR mechanism.

Lok Adalat

It roughly means "People's court". India has had a long history of resolving disputes through the mediation of village elders. The system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, where by mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences.
There is no court fee and no rigid procedural requirement (i.e. no need to follow process given by Civil Procedure Code or Evidence Act), which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts.
Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.
The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 because it is a judgement by consent.
All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court.
Permanent Lok Adalat for Public Utility Services
In order to get over the major drawback in the existing scheme of organisation of Lok Adalats under Chapter VI of the Legal Services Authorities Act, 1987, in which if the parties do not arrive at any compromise or settlement, the unsettled case is either returned back to the Court of law or the parties are advised to seek remedy in a court of law, which causes unnecessary delay in dispensation of justice, Chapter VI A was introduced in the Legal Services Authorities Act, 1987, by Act No.37/2002 with effect from 11-06-2002 providing for a Permanent Lok Adalat to deal with pre-litigation, conciliation and settlement of disputes relating to Public Utility Services, as defined u/sec.22 A of the Legal Services Authorities Act, 1987, at pre-litigation stage itself, which would result in reducing the work load of the regular courts to a great extent.

- Permanent Lok Adalat for Public Utility Services, Hyderabad, India

Lok Adalat (people’s courts), established by the government, settles dispute through conciliation and compromise. The First Lok Adalat was held in Chennai in 1986. Lok Adalat accepts the cases which could be settled by conciliation and compromise, and pending in the regular courts within their jurisdiction.
The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws, and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.
Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat.
Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat as the scope for compromise through an approach of give and take is high in these cases.
Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

Pakistan

The relevant laws (or particular provisions) dealing with the ADR are summarised as under:
1. S.89-A of the Civil Procedure Code, 1908 (as amended in 2002) read with Order X Rule 1-A (deals with alternative dispute resolution methods). 2. The Small Claims and Minor Offences Courts Ordinance, 2002. 3. Sections 102–106 of the Local Government Ordinance, 2001. 4. Sections 10 and 12 of the Family Courts Act, 1964. 5. Chapter XXII of the Code of Criminal Procedure, 1898 (summary trial provisions). 6. The Arbitration Act, 1940. 7. Articles 153–154 of the Constitution of Pakistan, 1973 (Council of Common Interest) 8. Article 156 of the Constitution of Pakistan, 1973 (National Economic Council) 9. Article 160 of the Constitution of Pakistan, 1973

(National Finance Commission) 10.Article 184 of the Constitution of Pakistan, 1973 (Original Jurisdiction when federal or provincial governments are at dispute with one another)

ADR in the US Navy

SECNAVINST 5800.13A established the DON ADR Program Office with the following missions:

- Coordinate ADR policy and initiatives;
- Assist activities in securing or creating cost effective ADR techniques or local programs;
- Promote the use of ADR, and provide training in negotiation and ADR methods;
- Serve as legal counsel for in-house neutrals used on ADR matters; and,
- For matters that do not use in-house neutrals, the program assists DON attorneys and other representatives concerning issues in controversy that are amenable to using ADR.

The ADR Office also serves as the point of contact for questions regarding the use of ADR. The Assistant General Counsel (ADR) serves as the "Dispute Resolution Specialist" for the DON, as required by the Administrative Dispute Resolution Act of 1996. Members of the office represent the DON's interests on a variety of DoD and interagency working groups that promote the use of ADR within the Federal Government.

Additional resources

Cornell University's Scheinman Institute on Conflict Resolution

Cornell's ILR School has joined forces with Cornell's Law School to present the country's most comprehensive conflict resolution program focusing on workplace alternative dispute resolution (ADR). The Martin and Laurie Scheinman Institute on Conflict Resolution mission is to educate the next generation of neutrals – arbitrators, mediators and facilitators – who can help resolve disputes between employers and employees, both unionized and non-unionized. The Institute provides training for undergraduate and graduate students, consultation and evaluation, and conducts research. It also offers courses in two- to five-day sessions designed for professionals who are interested in or practicing in the workplace dispute resolution field. These highly intensive and participatory courses are coordinated by Cornell ILR faculty and are held in the ILR School's conference center in Manhattan and on the Ithaca campus. Participants can earn two certificates, Workplace Alternative Dispute Resolution and Conflict Management and Labor Arbitration.

Fordham Law School's Dispute Resolution Program

Fordham Law School's Dispute Resolution program placed in the top 10 of U.S. News and World Report's 2008 rankings of the best Dispute Resolution programs in the nation, according to the recently-released rankings. Along with Fordham's Clinical Training program, the Dispute Resolution program is the top-ranked specialty program at Fordham Law School. The Alternative Dispute Resolution program at Fordham combines an integrated agenda of teaching, scholarship, and practice in conflict resolution within the national and international communities. In addition to the classroom and clinical experience, the law school's student-run Dispute Resolution Society competes in ABA-sponsored interschool competitions as well as international mediation and arbitration competitions. In 2008 the Society's teams won the ABA Regional Negotiation Competition, placed third overall in the International Chamber of Commerce Commercial Mediation Competition in Paris, and reached the semifinals of the Willem C. Vis (East) International Commercial Arbitration Competition in Hong Kong. Additionally, Fordham's Dispute Resolution Society hosts an annual symposium on current Dispute Resolution topics and also teaches a class on dispute resolution skills to seniors at the Martin Luther King, Jr. High School in New York City.

Straus Institute for Dispute Resolution

Pepperdine University School of Law's Straus Institute for Dispute Resolution provides professional training and academic programs in dispute resolution including a Certificate, Masters in Dispute Resolution (MDR) and Masters of Law in Dispute Resolution (LLM). Straus provides education to law and graduate students, as well as mid-career professionals in areas of mediation, negotiation, arbitration, international dispute resolution and peacemaking. The Straus Institute has consistently ranked the number one Dispute Resolution school in the nation for the past 5 years, and has remained among the top 10 schools over the last decade.

Harvard Program on Negotiation

"The [Harvard] Program on Negotiation (PON) is a university consortium dedicated to developing the theory and practice of negotiation and dispute resolution. As a community of scholars and practitioners, PON serves a unique role in the world negotiation community. Founded in 1983 as a special research project at Harvard Law School, PON includes faculty, students, and staff from Harvard University, Massachusetts Institute of Technology and Tufts University. Harvard currently offers 12 week courses on negotiation and mediation for participants from all disciplines and professions as well as weekend seminars taught by their professors. The Harvard PON program is currently ranked #3 falling from #2 last year according to the US World and News Report, and has also remained among the top 10 schools over the last decade.

CUNY Dispute Resolution Consortium

The City University of New York Dispute Resolution Consortium (CUNY DRC) serves as an intellectual home to dispute-resolution faculty, staff and students at the City University of New York and to the diverse dispute-resolution community in New York City. At the United States' largest urban university system, the CUNY DRC has become a focal point for furthering academic and applied conflict resolution work in one of the world's most diverse cities. The

CUNY DRC conducts research and innovative program development, has co-organized countless conferences, sponsored training programs, resolved a wide range of intractable conflicts, published research working papers and a newsletter. It also maintains an extensive database of those interested in dispute resolution in New York City, a website with resources for dispute resolvers in New York City and since , the CUNY DRC assumed a leadership role for dispute-resolvers in New York City by establishing an extensive electronic mailing list, sponsoring monthly breakfast meetings, conducting research on responses to catastrophes, and managing a public awareness initiative to further the work of dispute resolvers.

CPR Institute for Dispute Resolution

- The International Institute for Conflict Prevention and Resolution, known as the CPR Institute, is a New York City membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

The CPR Institute was founded in 1979 as the Center for Public Resources by a coalition of leading corporate general counsel dedicated to identifying and applying appropriate alternative solutions to business disputes, thereby mitigating the extraordinary costs of lengthy court trials.

CPR's mission is "to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes. CPR is a nonprofit educational corporation existing under the New York state laws, and is tax exempt pursuant to Section 501(c)(3) of the U.S. Internal Revenue Code.

It is governed by a board of directors, and its priorities and policies are guided in large part by consultation with an executive advisory committee. Its funding derives in principal part from the annual contributions of its member organizations, and from its mission-related programming. The various operations and activities that fulfill the Institute's mission are captured in the acronym of its name:

C: CPR convenes legal and business leadership to develop, and encourage the exchange of, best practices in avoiding, managing and resolving disputes.

P: CPR publishes its own work and that of other like-minded organizations, making resources available to a global community of problem-solvers.

R: CPR helps to resolve complex disputes among sophisticated parties, by devising rules, protocols and best practices, and by providing disputants with resources and consulting expertise in selecting appropriate methods and neutrals to assist in the dispute resolution process.

ICAR

Established at George Mason as an alternative to a sociology program due to Virginia's then policy against duplicating graduate schools, it was the nation's first major dispute resolution graduate program. It has been a major success.

Mediation

Mediation, a form of alternative dispute resolution (ADR) or "appropriate dispute resolution", aims to assist two (or more) disputants in reaching an agreement. The parties themselves determine the conditions of any settlements reached— rather than accepting something imposed by a third party. The disputes may involve (as parties) states, organizations, communities, individuals or other representatives with a vested interest in the outcome.

Mediation, in a broad sense, consists of a cognitive process of reconciling mutually interdependent, opposed terms as what one could loosely call "an interpretation" or "an understanding of". The German philosopher Hegel uses the term 'dialectical unity' to designate such thought-processes. This article discusses the legal communications usage of the term. Other Wikipedia articles, such as Critical Theory, treat other usages or "senses" of the term "mediation," as for example cultural and biological.

Mediators use appropriate techniques and/or skills to open and/or improve dialogue between disputants, aiming to help the parties reach an agreement (with concrete effects) on the disputed matter. Normally, all parties must view the mediator as impartial. Disputants may use mediation in a variety of disputes, such as commercial, legal, diplomatic, workplace, community and family matters. A third-party representative may contract and mediate between (say) unions and corporations. When a workers' union goes on strike, a dispute takes place, and the corporation hires a third party to intervene in attempt to settle a contract or agreement between the union and the corporation.

Mediation is the only way assisted by one third, which promotes freedom of choice of protagonists in a conflict

History of mediation

The activity of mediation in itself appeared in very ancient times. Historians presume early cases in Phoenician commerce (but suppose its use in Babylon, too). The practice developed in Ancient Greece (which knew the non-marital mediator as a *proxenetas*), then in Roman civilization, (Roman law, starting from Justinian's *Digest* of 530 - 533 CE) recognized mediation. The Romans called mediators by a variety of names, including *internuncius*, *medium*, *intercessor*, *philantropus*, *interpolator*, *conciliator*, *interlocutor*, *interpres*, and finally *mediator*.

Some cultures regarded the mediator as a sacred figure, worthy of particular respect; and the role partly overlapped with that of traditional wise men or tribal chief.

Mediation and conciliation

"Conciliation" sometimes serves as an umbrella-term that covers all mediation and facilitative and advisory dispute-resolution processes. Neither process determines an outcome, and both share many similarities. For example, both processes involve a neutral third-party who has no enforcing powers.

One significant difference between conciliation and mediation lies in the fact that conciliators possess expert knowledge of the domain in which they conciliate. The conciliator can make suggestions for settlement terms and can give advice on the subject-matter. Conciliators may also use their role to actively encourage the parties to come to a resolution. In certain types of dispute the conciliator has a duty to provide legal information. This helps any agreement reached to comply with any relevant statutory framework pertaining to the dispute. Therefore conciliation may include an advisory aspect.

Mediation works purely facilitatively: the practitioner has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution. Several different styles of mediation exist: evaluative, facilitative, and transformative. Evaluative mediation has somewhat of an advisory role in that its practitioners evaluate the strengths and weaknesses of each side's argument should they go to court; whereas facilitative mediators and transformative mediators do not do this.

Furthermore, the definitions of mediation used by the different styles of mediation differ in that evaluative mediation has the main drive and goal of settlement, while transformative mediation, in contrast, looks at conflict as a crisis in communication and seeks to help resolve the conflict, thereby allowing people to feel empowered in themselves and better about each other. The agreement that arises from this type of mediation occurs as a natural outcome of the resolution of conflict.

Both mediation and conciliation serve to identify the disputed issues and to generate options that help disputants reach a mutually-satisfactory resolution. They both offer relatively flexible processes; and any settlement reached should have the agreement of all parties. This contrasts with litigation, which normally settles the dispute in favour of the party with the strongest legal argument. In-between the two operates collaborative law, which uses a facilitative process where each party has counsel.

Why choose mediation

Several reasons exist for choosing mediation over other channels of dispute resolution (such as those involving attorneys and courts).

- Parties to a dispute may choose mediation as (often) a less expensive route to follow for dispute resolution. While a mediator may charge a fee comparable to that of an attorney, the mediation process generally takes much less time than moving a case through standard legal channels. While a case in the hands of a lawyer or filed in court may take months or even years to resolve, a case in mediation usually achieves a resolution in a matter of hours. Taking less time means expending less money on hourly fees and costs.
- Mediation offers a confidential process. While court hearings of cases happen in public, whatever happens in mediation remains strictly confidential. No one but the parties to the dispute and the mediator(s) know what has gone on in the mediation forum. In fact, confidentiality in mediation has such importance that in most cases the legal system cannot force a mediator to testify in court as to the content or progress of a mediation. Many mediators actually destroy their notes taken during a mediation once that mediation has finished. The only exceptions to such strict confidentiality usually involve child abuse or actual or threatened criminal acts.
- Mediation offers multiple and flexible possibilities for resolving a dispute and for the control the parties have over the resolution. In a case filed in court, the parties will obtain a resolution, but a resolution thrust upon the parties by the judge or jury. The result probably will leave neither party to the dispute totally happy. In mediation, on the other hand, the parties have control over the resolution, and the resolution can be unique to the dispute. Often, solutions developed by the parties are ones that a judge or jury could not provide. Thus, mediation is more likely to produce a result that is mutually agreeable, or win/win, for the parties. And because the result is attained by the parties working together and is mutually agreeable, the compliance with the mediated agreement is usually high. This also results in less costs, because the parties do not have to seek out the aid of an attorney to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law.
- The mediation process consist of a mutual endeavor. Unlike in negotiations (where parties are often entrenched in their positions), parties to a mediation usually seek out mediation because they are ready to work toward a resolution to their dispute. The mere fact that parties are willing to mediate in most circumstances means that they are ready to "move" their position. Since both parties are willing to work toward resolving the case, they are more likely to work with one another than against one another. The parties thus are amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute.
- Finally, but certainly not least, and as mentioned earlier in this article, the mediation takes place with the aid of a mediator who is a neutral third party. A good mediator is trained in conflict resolution and in working with difficult situations. The good mediator is likely to work as much with the emotional aspects and relationship aspects of a case as he or she is to work on the "topical" issues of the matter. The mediator, as a

neutral, gives no legal advice, but guides the parties through the problem solving process. The mediator may or may not suggest alternative solutions to the dispute. Whether he or she offers advice or not, the trained mediator helps the parties think "outside of the box" for possible solutions to the dispute, thus enabling the parties to find the avenue to dispute resolution that suits them best.

Mediation in the franchising sector

Franchise-agreements represent ongoing commercial agreements between the contracting parties. The agreements usually have elements of an imbalance of bargaining power and of an imbalance of business experience between the franchisee and franchisor; and the parties also face many external commercial pressures.

The franchising code of conduct functions as a mandatory code under the TPA. All franchise agreements must have a clause that requires dispute resolution. Mediation in this field works because it can identify alternatives for the parties and then the parties can work together to solve the dispute. This type of mediation has formal procedures: for example: whoever wishes to initiate the mediation must advise the respondent in writing, outlining the nature of the dispute ,and they will then have three weeks to agree to a method of resolving the dispute otherwise they may go to mediation. For further information on mediation in the franchise community, and links to further resources, see www.FranchiseMediation.org.

Early neutral evaluation and mediation

The technique of early neutral evaluation (ENE) provides early focus in complex commercial disputes, and — based on that focus — offers a basis for sensible case-management or a suggested resolution of the entire case in its very early stages.

In early neutral evaluation, an evaluator acts as a neutral person to assess the strengths and weaknesses of each of the parties and to discuss the same with parties jointly or in caucuses, so that parties gain awareness (via independent evaluation) of the merits of their case. In the case of mediation, solutions normally emerge from the parties themselves and mediators endeavour to find the most acceptable solution by bridging gaps between the parties. Parties generally call on a senior counsel or on a panel with expertise and experience in the subject-matter under dispute in order to conduct ENE. One refers to such persons as "evaluators" or as "neutral persons".

Mediator education and training

Suitable education and training for mediators becomes a complex issue — largely due to the breadth of areas which may call on mediation as a means of dispute-resolution. Debate ensues on what constitutes adequate training on the principles of mediation as well as what personal attributes an individual needs in order to effectively carry out a mediator's role.

The educational requirements for accreditation as a mediator differ between accrediting groups and from country to country. In some cases legislation mandates these requirements; while in others professional bodies impose standards and applicants must comply prior to becoming accredited by them. Many US universities offer graduate studies in mediation, culminating in the PhD or DMed degrees.

In Australia, for example, professionals wanting to practise in the area of family law must have tertiary qualifications in law or in social science, undertake 5 days training in mediation and engage in at least 10 hours of supervised mediation. Furthermore, they must also undertake 12 hours of mediation-education or training every 12 months. Other institutions offer units in mediation across a number of disciplines such as law, social science, business and the humanities. In Australia not all fields of mediation-work require academic qualifications, as some deal more with practical skills rather than with theoretical knowledge: to this end membership-organizations provide training-courses to further the adoption and practice of mediation. Internationally a similar approach to the training of mediators is taken by the organization CEDR, which trains 300 mediators a year in China, Hong Kong, India, Ireland, Nigeria, Pakistan, United Kingdom, Ukraine and elsewhere.

No legislated national or international standards on the level of education which should apply to all mediation practitioner’s organizations exist. However, organizations such as the National Alternative Dispute Resolution Advisory Council (NADRAC) in Australia continue to advocate for a wide scope on such issues. Other systems apply in other jurisdictions such as Germany, which advocates a higher level of educational qualification for practitioners of mediation.

Providing an Introduction

When starting off a mediation session an introduction can set the vibe for the entire discussion. This being said, it is quite important to be detailed so both parties can start off on the same page regardless of their differences. There are multiple steps to be taken when making an informed introduction. Every mediator’s introduction is different depending on what they decide to cover (Domenici,2001). These steps are usually included.

- Introduction of mediators and parties
- Words of encouragement
- Explanation of the process and definitions of mediation and the mediator’s role
- Ground rule or communication guidelines
- Confidentiality provisions
- Caucus possibility
- Signing the agreement to mediate

- Asking for questions

Mediator codes of conduct

The application of a code of conduct to the practice of mediation becomes problematic — due in part to the diverse number and type of practitioners in the field. A tendency exists for professional societies to develop tamples of this in Australia include the mediation codes of conduct developed by the Law Societies of South Australia and Western Australia and those developed by organisations such as Institute of Arbitrators & Mediators Australia (IAMA) and LEADR for use by their members. Other organizations such as the American Center for Conflict Resolution Institute ([www.accri.org]) have developed both classroom and distance learning courses which subscribe to its mission of promoting peace through education. The CPR/Georgetown Ethics Commission (www.cpradr.org), the Mediation Forum of the Union International des Avocats, and the European Commission have also promulgated codes of conduct for mediators.

Writers in the field of mediation normally espouse a code of conduct that mirrors the underlying principles of the mediation process. In this respect some of the most common aspects of a mediator codes of conduct include:

- a commitment to inform participants as to the process of mediation.
- the need to adopt a neutral stance towards all parties to the mediation, revealing any potential conflicts of interest.
- the requirement for a mediator to conduct the mediation in an impartial manner
- within the bounds of the legal framework under which the mediation is undertaken any information gained by the mediators should be treated as confidential.
- mediators should be mindful of the psychological and physical wellbeing of all the mediations participants.
- mediators should not offer legal advice, rather they should direct participants to appropriate sources for the provision of any advice they might need.
- mediators should seek to maintain their skills by engaging in ongoing training in the mediation process.
- mediators should practise only in those fields in which they have expertise gained by their own experience or training.

Accreditation of ADR in Australia

Australia has no national accreditation system for ADR. However, following the National Mediation Conference in May 2006, the National Mediation Accreditation Standards system has apparently started to move to its implementation phase.

ADR practitioners recognize that mediators (as distinct from arbitrators or conciliators) need to be recognized as having professional accreditations the most. There are a range of organizations within Australia that do have extensive and comprehensive accreditations for mediators but people that use mediation are unsure as to what level of accreditation is required for the quality of service that they receive. Standards will tend to vary according to the specific mediation and the level of specificity that is desired. Due to the wide range of ADR processes that are conducted it would be very difficult to have a set of standards that could apply to all ADR processes, but standards should be developed for particular ADR processes

Clients need the assurance that mediators have some form of ongoing assessment and training throughout their careers. Mediators must satisfy different criteria to be eligible for a variety of mediator panels. Also different mediator organizations have different ideals of what makes a good mediator which in turn reflects the training and accreditation of that particular organization. Selection processes for ADR practitioners are based on the needs of the service, but a problem is posed when organizations, such as the court want to refer a client to mediation and they usually have to rely on their in-house mediators or rely on word of mouth. There are inconsistent standards. A national accreditation system could very well enhance the quality and ethics of mediation and lead mediation to become more accountable. There is a need for a unified accreditation system for mediators across Australia to establish clarity and consistency.

es of mediation

One core problem in the dispute-resolution process involves the determination of what the parties actually dispute. Through the process of mediation participants can agree to the scope of the dispute or issues requiring resolution. Examples of this use of mediation in the Australian jurisdiction include narrowing the scope of legal pleadings and its use in industrial and environmental disputes.

Definition of the nature of a dispute can often clarify the process of determining what method will best suit its resolution.

One of the primary uses of mediation involves parties using the mediation process to define the issues, develop options and achieve a mutually-agreed resolution.

Australia has incorporated mediation extensively into the dispute-settlement process of family law and into the latest round of reforms concerning industrial relations under the WorkChoices amendments to the Workplace Relations Act.

Where prospects exist of an ongoing disputation between parties brought on by irreconcilable differences (stemming from such things as a clash of religious or cultural beliefs), mediation can serve as a mechanism to foster communication and interaction.

Mediation can function not only as a tool for dispute resolution but also as a means of dispute prevention. Mediation can be used to facilitate the process of contract negotiation by the identification of mutual interests and the promotion of effective communication between the two parties. Examples of this use of mediation can be seen in recent enterprise bargaining negotiations within Australia.
Governments can also use mediation to inform and to seek input from stakeholders in formulation or fact-seeking aspects of policy-making. Mediation in wider aspect can also serve to prevent conflict or to develop mechanisms to address conflicts as they arise.

Native-title mediation in Australia

In response to the Mabo decision by the High Court of Australia, the Australian Government sought to alleviate the concerns of a wide section of the population and industry on the decisions implications on land tenure and use by enacting the Native Title Act 1993 (Cth). A cornerstone of the act is the use of mediation as a mechanism to determine future native title rights within Australia.
Although not barring litigation, the Act seeks to promote mediation through a process incorporating the Federal Court and the National Native Title Tribunal (NNTT). This is seen as having a better long tern success by providing flexible and practical solutions to the needs of the various stakeholders.
The extensive use of mediation in the resolution of native title matters does not stop the referral of matters to the courts for resolution, nor is mediation precluded from occurring whilst legal challenges are being pursued. A recent case where Native Title rights were found exist over a large portion of the City of Perth has seen the simultaneous use of mediation and formal legal appeals processes.
A key feature of Native Title mediation involves the use of Indigenous Land Use Agreements (ILUAs). These binding agreements are negotiated between native title claimant groups and others such as pastoralists, miners and local governments and cover aspects of the use of the land and any future act such as the granting of mining leases. Some of the features of native title mediation which distinguish it from other forms include the likelihood of lengthy negotiation time frames, the number of parties (ranging on occasion into the hundreds) and that statutory and case law prescriptions constrain some aspects of the negotiations.

Philosophy of mediation

The uses of mediation in preventing conflicts

Mediation is adaptable to anticipate problems, grievances and difficulties between parties before the conflict may arise. This has potential applications in large and private sector organisations, particularly where they are subject to excessive change, competition and economic pressure. A key way mediation is used to prevent these conflicts is complaint handling and management. This is a conflict prevention mechanism designed to handle a complaint effectively at first contact and to minimise the possibility of it developing into a dispute. According to Charlton (2000, p. 4) a person who undertakes this role is commonly known as a “dispute preventer”.
While the corporate sector may provide one area in which to use the mediation process for preventing conflicts, dealing with everyday life’s disputes provides another. This is no more evident in neighbourhood conflict. One's behaviour affects one's neighbours, just as what they do affects you. The key way to prevent conflicts with neighbours is to behave as a good neighbour oneself. Spencer and Altobelli (2005, p. 17) believe simple consideration and conversation with neighbours helps achieve a peaceful coexistence. Making it is easier for you to live as privately or as sociably as you wish. Ideal suggestions for consideration in preventing conflicts between neighbours include:

- meeting one's neighbors
- keeping one's neighbors informed
- awareness of differences
- appreciation
- consideration of one's neighbors' points of view
- showing candidness
- communicating
- demonstrating respect

One can also employ mediation to reduce or prevent violence in sports and in schools, using peers as mediators in a process known as **peer mediation**. This process (highlighted by Cremin) provides a way of handling conflicts and preventing violence in primary schools and high schools. Schools adopting this process often recruit and train students interested in being peer mediators.
In general, effective communication provides the ideal way to prevent and resolve any conflict; talking things over — along with listening — handles problems optimally and should ultimately avoid the dispute going to the courts.

Responsibilities regarding confidentiality in mediation

One of the hallmarks of mediation is that the process is strictly confidential. The mediator must inform the parties that communications between them during the intake discussions and the mediation process are to be private and confidential. In general, the information discussed can never be used as evidence in the event that the matter does not settle at mediation and proceeds to a court hearing. Spencer and Altobelli (2005, p. 261) point out it is considered common for parties entering into mediation to sign a mediation agreement document with the mediator. The parties

therefore agree that it's a condition of being present or participating in the mediation and the document if necessary may be deemed confidential by virtue of the common law.
Confidentiality lies at the heart of mediation. It is imperative for parties to trust the process. Very few mediations will ever succeed unless the parties can communicate fully and openly without fear of compromising their case before the courts. Charlton and Dewdney (2004, p. 344.) highlight mediation confidentiality is seen as one of the key ingredients to encourage disputing parties to negotiate with each other in order to achieve a settlement of their dispute.
Organisations have often seen confidentiality as a reason to use mediation ahead of litigation, particularly when disputes arise in sensitive areas of their operation, or to avoid their affairs becoming publicised among business competitors, acquaintances or friends. Steps put in place during mediation to help ensure this privacy include;

1. The mediation meeting is conducted behind closed doors.
2. Outsiders can only observe proceedings with both parties consent.
3. No recording of the transcript is kept; and
4. There is no external publicity on what transpired at the mediation.

There is no doubt confidentiality contributes to the success and integrity of the mediation process. However it will be difficult for a mediator to guarantee full confidentiality protection between the parties.

Legal implications of mediated agreements

Parties who enter into mediation do not forfeit any legal rights or remedies. If the mediation process does not result in settlement, each side can continue to enforce their rights through appropriate court or tribunal procedures. However, if a settlement has been reached through mediation, legal rights and obligations are affected in differing degrees. In some situations, the parties may only wish to have a memorandum or a moral force agreement put in place; these are often found in community mediations. In other instances, a more comprehensive deed of agreement is drafted and this deed serves to bring a legally binding situation. Charlton and Dewdney (2004, p. 126.) point out that a mediated agreement may be registered with the court to make it legally binding and it is advisable to have a lawyer prepare the form or, at the very least, to obtain independent legal advice about the proposed terms of the agreement.
Mediation has opened the door for parties in conflict to resolve their differences through non-traditional judicial forums. Over the last few decades, mediation has brought to light the processes, or alternatives to litigation, that enable parties to resolve their differences without the high cost associated with litigation. An interesting remark made by Spencer and Altobelli (2005, p. 223): "Court systems are eager to introduce mandatory mediation as a means to meet their needs to reduce case loads and adversarial litigation, and participants who understand the empowerment of mediation to self-determine their own agreements are equally as eager to embrace mediation as an alternative to costly and potentially harmful litigation."
Recently[j], mediation has come under the spotlight and the watchful eye of many state legal systems for its ability to resolve party disputes, reduce court case loads, and reduce overall legal costs. Yet while parties enter into mediation intending to preserve their legal rights and remedies, mediation may result in these rights being directly or indirectly affected. Parties that have resolved their conflict through this voluntary process and settled on an agreement should seek legal advice if they are unsure of the consequences.

Common aspects of mediation

Mediation as a process involves a third party (often an impartial third party) assisting two or more persons, ("parties" or "stakeholders") to find mutually-agreeable solutions to difficult problems.
People make use of mediation at many different levels and in multiple contexts: from minor disputes to global peace-talks. This makes it difficult to provide a general description without referring to practices in specific jurisdictions — where "mediation" may in fact have a formal definition and in some venues may require specific licenses. This article attempts only a broad introduction, referring to more specific processes (such as peace process, binding arbitration, or mindful mediation) directly in the text.
While some people loosely use the term "mediation" to mean any instance in which a third party helps people find agreement, professional mediators generally believe it essential that mediators have thorough training, competency, and continuing education. The term "mediation" also sometimes occurs incorrectly referring to arbitration; a mediator does not impose a solution on the parties, whereas an arbitrator does.
While mediation implies bringing disputing parties face-to-face with each other, the strategy of "shuttle diplomacy", where the mediator serves as a liaison between disputing parties, also sometimes occurs as an alternative.
Some of the types of disputes or decision-making that often go to mediation include the following:
Family:

- Prenuptial/Premarital agreements
- Financial or budget disagreements
- Separation
- Divorce
- Financial distribution and spousal support (alimony)
- Parenting plans (child custody and visitation)

- Eldercare issues
- Family businesses
- Adult sibling conflicts
- Disputes between parents and adult children
- Estate disputes
- Medical ethics and end-of-life issues

Workplace:

- Wrongful termination
- Discrimination
- Harassment
- Grievances
- Labor management

Public disputes:

- Environmental
- Land-use

Disputes involving the following issues:

- Landlord/tenant
- Homeowners' associations
- Builders/contractors/realtors/homeowners
- Contracts of any kind
- Medical malpractice
- Personal injury
- Partnerships
- Non-profit organizations
- Faith communities

Other:

- Youth (school conflicts; peer mediation);
- Violence-prevention
- Victim-Offender mediation

Mediation commonly includes the following aspects or stages:

- a controversy, dispute or difference of positions between people, or a need for decision-making or problem-solving
- decision-making remaining with the parties rather than imposed by a third party
- the willingness of the parties to negotiate a "positive" solution to their problem, and to accept a discussion about respective interests and objectives
- the intent to achieve a "positive" result through the facilitative help of an independent, neutral third person

In the United States, mediator codes-of-conduct emphasize "client-directed" solutions rather than those imposed by a mediator in any way. This has become a common, definitive feature of mediation in the US and in the UK.
Mediation differs from most other adversarial resolution processes by virtue of its simplicity, informality, flexibility, and economy.
The typical mediation has no formal compulsory elements, although some common elements usually occur:

- each of the parties allowed to explain and detail their story;
- the identification of issues (usually facilitated by the mediator);
- the clarification and detailed specification of respective interests and objectives;
- the conversion of respective subjective evaluations into more objective values;
- identification of options;
- discussion and analysis of the possible effects of various solutions;
- the adjustment and the refining of the proposed solutions;
- the memorialization of agreements into a written draft

Due to the particular character of this activity, each mediator uses a method of his or her own (the law does not ordinarily govern a mediator's methods), that might eventually differ markedly from the above scheme. Also, many matters do not legally require a particular form for the final agreement, while others expressly require a precisely determined form.
Most countries respect a mediator's confidentiality.

Online mediation

Online mediation, a sub-category of online dispute resolution, involves the application of online technology to the process of mediation. Online Mediation extends the reach of mediators to disputes between persons who are too geographically distant, or otherwise unable (for example, through disability), to attend; or where the value of the dispute does not justify the cost of a face-to-face mediation. Online mediation can also prove useful prior to face-to-

face mediation — to commence the mediation process early where urgency exists, to narrow the issues, to commence brainstorming of solutions and to prepare the parties.

Mediation in business and in commerce

The eldest branch of mediation applies to business and commerce and still this one is the widest field of application, with reference to the number of mediators in these activities and to the economical range of total exchanged values. The mediator in business or in commerce helps the parties to achieve the final goal of respectively buying/selling (a generic contraposition that includes all the possible varieties of the exchange of goods or rights) something at satisfactory conditions (typically in the aim of producing a bilateral contract), harmonically bringing the separate elements of the treaty to a respectively balanced equilibrium. The mediator, in ordinary practice, usually cares of finding a positive agreement between (or among) the parties looking at the main pact as well as at the accessory pacts too, thus finding a composition of all the related aspects that might combine. in the best possible way, all the *desiderata* of his clients.

Academics sometimes include this activity among the auxiliary activities of commerce and business, but it has to be recalled that it differs from the generality of the others, because of its character of independence from the parties: in an ordinary activity of agency, or in the unilateral mandate this character is obviously missing, this kind of agent merely resulting as a *longa manus* of the party that gave him his (wider or narrower) power of representation. The mediator does not obey to any of the parties, and is a third party, looking at the contraposition from an external point of view.

Subfields of commercial mediation include work in well-known specialized branches: in finance, in insurance, in ship-brokering, in real estate and in some other individual markets, mediators have specialized designations and usually obey special laws. Generally, mediators cannot practice commerce in the genre of goods in which they work as specialized mediators.

Mediation and litigation

Mediation offers a process by which two parties work towards an agreement with the aid of a neutral third party. Litigation, however, is a process in which the courts impose binding decisions on the disputing parties in a determinative process operating at the level of legal rights and obligations [Boulle 2005]. These two processes sound completely different, but both are a form of dispute resolution. Litigation is conventionally used and conventionally accepted, but Mediation is slowly becoming more recognized as a successful tool in dispute resolution. Slowly these processes are becoming inter-dependent, as the Courts in some cases are now referring parties to Mediation. In saying this, there are distinct differences between the two processes. Mediation claims to resolve many of the problems associated with litigation, such as the high costs involved, the formality of the court system and the complexity of the court process. Mediation does not create binding agreements unless the parties consent to it, and the Mediator has no say in the outcome. Even though our court system and mediation have increasing connections, they still reflect different value assumptions and structural approaches towards dispute resolution.

Community mediation

Disputes involving neighbors often have no formal dispute-resolution mechanism. Community-mediation centers generally focus on this type of neighborhood conflict, with trained volunteers from the local community usually serving as mediators. These organizations often serve populations that cannot afford to utilize the court systems or other private ADR-providers. Many community programs also provide mediation for disputes between landlords and tenants, members of homeowners associations, and businesses and consumers. Mediation helps the parties to repair relationships, in addition to addressing a particular substantive dispute. Agreements reached in community mediation are generally private, but in some states, such as California, the parties have the option of making their agreement enforceable in court. Many community programs offer their services for free or at most, charge a nominal fee.

The roots of community mediation can be found in community concerns to find better ways to resolve conflicts, and efforts to improve and complement the legal system. Citizens, neighbors, religious leaders* and communities became empowered, realizing that they could resolve many complaints and disputes on their own in their own community through mediation. Experimental community mediation programs using volunteer mediators began in the early 1970s in several major cities. These proved to be so successful that hundreds of other programs were founded throughout the country in the following 2 decades. Community mediation programs now flourish throughout the United States.

Competence of the mediator

Numerous schools of thought exist on identifying the "competence" of a mediator. Where parties retain mediators to provide an evaluation of the relative strengths and weaknesses of the parties' positions, subject-matter expertise of the issues in dispute becomes a primary aspect in determining competence.

Some would argue, however, that an individual who gives an opinion about the merits or value of a case does not practise "true" mediation, and that to do so fatally compromises the alleged mediator's neutrality.

Where parties expect mediators to be process experts only (i.e., employed to use their skills to work through the mediation process without offering evaluations as to the parties' claims) competence is usually demonstrated by the ability to remain neutral and to move parties though various impasse-points in a dispute. International professional organizations continue to debate what competency means.

In France, professional mediators have created an organization to develop a rational approach to conflict resolution. This approach is based on a scientific definition of a person and a conflict. It helps to develop a structured process of mediation interviews and meetings of the parties. Technology mediators are particularly advanced in terms of accompanying changes induced by the dynamics of conflict. Mediators have adopted a code of ethics which provides the protagonists guarantees professionalism. They know their technical including through a website, the wikimediation, create by Jean-Louis Lascoux and funded by the European Commission.

When to use mediation

Not all disputes lend themselves well to mediation. One set of criteria for suitability, which is applied in the subsection below, is provided in *Mediation - Principles Process Practice, Boulle L. 2005*

Factors relating to the parties

Factors relating to the parties provide the most important determinants when deciding whether or not a dispute lends itself to mediation, as of course, the parties are the essential key to mediation. Basically, if the parties are not ready and willing to mediate, mediation cannot take place. If a mediation does take place against the parties wishes, the process will not work because one of the principles of mediation is participation, and the parties will not constructively participate if they are forced. Another factor to consider when judging a disputes suitability for mediation is whether the parties have legal representation. If one party does and the other does not, then it is not fair to mediate. Unlike the court system, a legal representative will not be appointed to the non-represented party. Therefore both parties need to consent to either be represented by legal advisers or not. It is not essential that legal advisers are present in the mediation session. However in most cases it is strongly advised that the parties seek legal advice before signing the legally binding agreement. A final factor to consider is the legal capacity of the parties. A minor cannot enter a mediation session for obvious legal reasons, the same goes for a person with mental illness or disability that would effect their decision-making ability. Once these are considered and no difficulties found, the remaining points on the checklist need to be considered.

Preparing for mediation

People participating in mediation, often called “parties” or “disputants”, can take several steps to prepare for mediation, as can their lawyers, if involved.

Just as parties need not agree to take part in mediation, they need not prepare for mediation — with one notable exception. In some court-connected programs, courts will require disputants to both participate in and prepare for mediation. Preparation involves making a statement or summary of the subject of the dispute and then bringing the summary to the mediation.

If preparation for mediation is voluntary, why bother? Research uncovered the following potential benefits of preparing. Disputants who meet the mediator prior to the mediation meeting tend to have less anxiety, a higher percentage of their disputes settle at mediation, and they express increased satisfaction with the mediation process. The following preparation activities appear in no fixed order. Not all would apply for every mediation.

Is mediation the right dispute resolution process at this time? This subdivides into two questions: is mediation the right dispute resolution process?; and are the parties ready to settle? For example, the dispute may involve a significant power-imbalance between the parties. In such a case, another dispute resolution process may make a better job of balancing power.

Readiness has great importance. Perhaps a loss or injury has occurred too recently. Overwhelming emotions may render objective decision-making extremely difficult, if not impossible. Alternatively, an injury may not have had sufficient time to heal so that any continuing loss becomes difficult to quantify. Other examples abound. Although entering into a mediation to settle the entire dispute may seem inappropriate, this does not mean that mediation cannot help. Some disputants participate in brief mediations with the goal of finding an interim solution to the problem that manages what the parties need to investigate during the interval between the present and when the dispute is ready to be settled.

Another preliminary mediation task involves identifying who should participate in the mediation. Laws give decision-making power to certain individuals. It seems obvious that these individuals are essential to the mediation. Others important participants could include lawyers, accountants, support-persons, interpreters, or spouses. Ask: who needs to be involved in order to reach settlements that will be accepted and implemented?

Convening a mediation meeting requires as much care as convening any important meeting. What location will best foster settlement? Do any participants have special needs? What date and time will work best? Will participants have access to food and beverages? Should the room have a table and chairs, or couches? Does the room have natural light? Does it offer privacy? How much time might a mediation take?

At times disputants have the ability to select the mediator: they should exercise due diligence. Anyone can act as a mediator, with no licensing required. Some mediator organizations require mediators to qualify. Mediators listed in court-connected rosters have to meet certain experiential and training requirements. Many mediators have a wide range of skills. Matching the mediator with the dispute and the needs of the disputant comprises a pre-mediation task. For example, the mediator will need to have skill in managing the many parties involved in a land-use dispute. Expertise in family law may prove important in divorce mediation, while knowledge of construction matters will add value in construction disputes.

The task of selecting the right mediator can occur more readily when participants take time to analyze the dispute. Just what is the dispute about? Parties probably agree in some areas. By identifying agreements, parties clarify the issues in dispute. Typically, misunderstandings occur. These usually result from assumptions. What if these can get cleared up? Might some information be missing? and if all of the disputants shared all of the information, wou;d the matter quickly settle?

Mediation involves communication and commitment to settle. Disputants can hone their communication-skills prior to mediation so that they express what they want more clearly and so that they hear what the other disputants say about what a settlement needs to include. Sometimes the dispute isn't about money. Rather, a sincere apology will resolve matters. When disputants communicate respectfully, they generate more opportunities for creative settlements.

What objectives does each of the disputants have? Thinking about creative ways that each disputant can achieve their objectives before the mediation allows participants to check out the viability of possible outcomes. They come to the meeting well prepared to settle.

What information do participants require in order to make good decisions? Do pictures, documents, corporate records, pay-stubs, rent-rolls, receipts, medical reports, bank-statements and so forth exist that parties need to gather, copy and bring to the mediation? With all of the information at hand at the mediation, one may avoid the need to adjourn the meeting to another, later date while parties gather the information. And one minimises the risk of overlooking a critical piece of information.

Parties may need to make procedural choices. One important decision involves whether to keep the mediation. Other decisions address how to pay the mediator and whether to share all information relevant to the dispute. A contract signed before the mediation can address all procedural decisions. These contracts have various names, such as "Agreement to Mediate" or "Mediation Agreement". Mediators often provide an Agreement to Mediate. Disputants, and their lawyers, can (by agreement) insert appropriate provisions into the agreement. In some cases, court-connected mediation programs have pre-determined procedures.

Mediators have a wide variety of practices in matters of contact with the disputants or their lawyers prior to the mediation meeting. Some mediators hold separate, in-person preliminary meetings with each disputant. These have many names, including "preliminary conferences". Disputants who meet with the mediator before the mediation learn about the process of mediation, their own role, and what the mediator will do. Having met the mediator before the mediation, disputants can put to rest any concerns about whether they can trust the mediator's neutrality and impartiality; and they can focus on how to resolve the dispute.

The above outline sets out the most significant steps in preparation for mediation. Each unique dispute may require a unique combination of preliminary steps.

Mediation as a method of dispute resolution

In the field of resolving legal controversies, mediation offers an informal method of dispute resolution, in which a neutral third party, the mediator, attempts to assist the parties in finding resolution to their problem through the mediation process. Although mediation has no legal standing *per se*, the parties can (usually with assistance from legal counsel) commit agreed points to writing and sign this document, thus producing a legally binding contract in some jurisdiction specified therein.

Mediation differs from most other conflict resolution processes by virtue of its simplicity, and in the clarity of its rules. It is employed at all scales from petty civil disputes to global peace talks. It is thus difficult to characterize it independently of these scales or specific jurisdictions - where 'Mediation' may in fact be formally defined and may in fact require specific licenses. There are more specific processes (such as peace process or binding arbitration or mindful mediation) referred to directly in the text.

Safety, fairness, closure

These broader political methods usually focus on conciliation, preventing future problems, rather than on focused dispute-resolution of one matter.

One can reasonably see mediation as the simplest of many such processes, where no great dispute exists about political context, where jurisdiction has been agreed, whatever process selected the mediator is not in doubt, and there is no great fear that safety, fairness and closure guarantees will be violated by future bad-faith actions. Assuming some warranty of safety, fairness, and closure, then the process can reasonably be called 'mediation proper', and be described thus:

Post-mediation activities

Some mediated agreements require ratification by an external body to which a negotiating party must account — such as a board, council or cabinet. In other situations it may be decided or understood that agreements will be reviewed by lawyers, accountants or other professional advisers after the mediation meeting. Ratification and review provide safeguards for mediating parties. They also provide an opportunity for persons not privy to the dynamics of a mediation and the efforts of the negotiating parties to undermine significant decisions they have made.

In the United States, the implementation of agreements reached in mediation requires tailoring to the mediated subject. For example, successful family and divorce mediations must memorialize an agreement which complies with the statutes of the state in which the parties will implement their mediated agreement. In New York, for example, the

New York Domestic Relations Law specifies both technical and substantive requirements with which pre-marital (or pre-nuptial) and post-marital (or post-nuptial) agreements must comply (NY Domestic Relations Law, Sec. 236, Part B).

Official sanctions

In some situations the sanctions of a court or other external authority must validate a mediation agreement. Thus if a grandparent or other non-parent is granted residence rights in a family dispute, a court counselor will be required to furnish a report to the court on merits of the proposed agreement. parties to a private mediation may also wish to obtain court sanction for their decisions. Under the Queensland regulatory scheme on court connected mediation, mediators are required to file with a registrar a certificate about the mediation in a form prescribed in the regulations. A party may subsequently apply to a relevant court an order giving effect to the agreement reached. Where court sanction is not obtained, mediated settlements have the same status as any other agreements.

Referrals and reporting-obligations

Mediators may at their discretion refer one or more parties to psychologists, accountants or social workers for post-mediation professional assistance. Where mediation is provided by a public agency, referrals are made to other authorities such as Centrelink.

Mediator debriefing

In some situations, a post-mediation debriefing and feedback session is conducted between co-mediators or between mediators and supervisors. It involves a reflective analysis and evaluation of the process. In many community mediation services debriefing is compulsory and mediators are paid for the debriefing session.

Mediator roles and functions

Mediator functions are classified into a few general categories, each of which necessitates a range of specific interventions and techniques in carrying out a general function.

Creating favorable conditions for the parties' decision-making

Mediators can contribute to the settlement of disputes by creating favorable conditions for dealing with them. This can occur through:

- Providing an appropriate physical environment- this is through selection of neutral venues, appropriate seating arrangements, visual aids and security.
- Providing a procedural framework- this is through conduct of the various stages of mediation process. As the chair of the proceedings, they can establish basic ground rules, provide order, sequence and continuity. The mediators opening statement provides an opportunity to establish a structural framework, including the mediation guidelines on which the process will be based.
- Improving the emotional environment- this is a more subtle function and varies among mediations and mediators. They can improve the emotional environment through restricting pressure, aggression and intimidation in the conference room by providing a sense of neutrality and by reducing anxiety among parties.

Assisting the parties to communicate

People in conflict tend not to communicate effectively and poor communication can cause disputes to occur or escalate. For mediators to encourage communication efficiently, they themselves must be good communicators and practice good speaking and listening skills, pay attention to non-verbal messages and other signals emanating from the context of the mediation.

Facilitating the parties' negotiations

Mediators can contribute expertise and experience in all models and styles of negotiation so that the parties are able to negotiate more constructively, efficiently and productively. This function is prominent after the problem-defining stages of mediation and involves mediators bringing direction and finesse to the negotiation efforts of the parties. Mediators can also act as catalysts for creative problem solving, for example by brainstorming or referring to settlement options generated in analogous mediation experiences.

Functions of the parties

the functions of the parties will vary according to their motivations and skills, the role of legal advisers, the model of mediation, the style of mediator and the culture in which the mediation takes place. Legal requirements may also affect their roles. In New South Wales the Law Society has published *A guide to the rights and Responsibilities of participants*.

Preparation

Whether parties enter mediation of their own volition or because legislation obligates them to do so, they prepare for mediation in much the same way they would for negotiations, save that the mediator may supervise and facilitate their preparation. Mediators may require parties to provide position statements, valuation reports and risk assessment analysis. The parties may also be required to consent to an agreement to mediate before preparatory activities commence.

Disclosure of information

Agreements to mediate, mediation rules, and court-based referral orders may have requirements for the disclosure of information by the parties and mediators may have express or implied powers to direct them to produce documents, reports and other material. In court referred mediations parties usually exchange with each other all material which would be available through discovery or disclosure rules were the matter to proceed to hearing. This would include witness statements, valuations and statement accounts.

Party participation

The objectives of mediation, and its emphasis on consensual outcomes, imply a direct input from the parties themselves. The mediation system will expect that parties attend and participate in the mediation meeting; and some mediation rules require a party, if a natural person, to attend in person. However, the process assesses party participation in overall terms, so a party failing to participate in the initial stages may make up for this later in the process.

Choice of mediator

The choice of mediation as a dispute resolution option links closely to the identity of a mediator who conducts it.[. This follows from the circumstances: different models of mediation exist, mediators have a lot of discretion in a flexible procedure, and the mediator's professional background and personal style have enormous potential impacts on the nature of the service provided. These factors make the selection of mediators of real practical significance. The term "choice of mediator" implies a process of deliberation and decision-making. No formal mechanism for objecting to the appointment of particular mediators exists, but in practice the parties could ask mediators to withdraw for reasons of conflict of interest. In community mediation programs the director generally assigns mediators without party involvement. In New South Wales, for example, when the parties cannot agree on the identity of a mediator the registrar contacts a nominating entity, such as the Bar Association which supplies the name of a qualified and experienced mediator. The following are useful ways of selecting a mediator:

- Personal Attributes - qualities and characteristics which are innate, as opposed to skills and techniques which can be learned and developed. In this concept a number of desirable attributes for mediators include interpersonal skills, patience, empathy, intelligence, optimism and flexibility.
- Mediation qualifications, experience and background - while some jurisdictions prescribe no generalized qualifications for mediators, in some specific contexts mediators require qualifications prescribed by legislation. In New South Wales, for example, the Family Law Act 1975 (Cth) proscribes qualifications for mediators. Qualifications usually revolve around knowledge of the theory and practice of conflict, negotiation and mediation, mediations skills, and attitudes appropriate for mediation. There are three factors of relevance: experience in practice of mediation, experience in the substantive area of dispute, and personal life experience.
- the mediator's training
- the mediator's professional background
- the mediator's certification and its value
- the mediation model offered, and whether it suits the case
- any conflict of interest the mediator may have
- the mediator's willingness to allow, and possibly encourage, mediation participants to seek creative solutions the mediator's fee

Values of mediation

Mediation contains three aspects: feature, values and objectives. The three aspects, although different, can and do at times overlap in their meaning and use. There are a number of values of mediation including Non Adversarialism, Responsiveness and Self Determination and Party Autonomy.

Each Person, Mediator and Process has values that can be attributed to them. These values are as diverse as Human Nature itself and as such provides for no uniformity amongst the values and on how those values are enforced by each party.

The Non-adversarialism value of mediation is not based on the attitudes of the parties involved, but is based on the actual process of mediation and how it is carried out. To clarify the context of the meaning it is said that Litigation is adversarial as its process must come to a logical conclusion based on a decision made by a presiding judge. Mediation does not always end with a decision.

Responsiveness, another value of mediation, responds to the interests of the parties without the restrictions of the law. It allows the parties to come to their own decisions on what is best for them at the time. Responsiveness shows how the mediation process is informal, flexible and collaborative and is person centered.

Self-determination and party autonomy gives rise to parties gaining the ability to make their own choices on what they will agree on. It gives the parties the ability to negotiate with each other to satisfy their interests, generate some options which could lead to an outcome satisfactory to both parties. This autonomy or independent structure provided by the mediation process removes the need for the presence of professional bodies and turns the responsibility back on to the parties to deal with the issue and hopefully to a satisfactory conclusion.

Mediation with arbitration

Mediation has sometimes been utilized to good effect when coupled with arbitration, particularly binding arbitration, in a process called 'mediation/arbitration'. In this process, if parties are unable to reach resolution through mediation, the mediator becomes an arbitrator, shifting the mediation process into an arbitral one, seeking additional evidence as needed (particularly from witnesses, if any, since witnesses are normally not called upon by a mediator), and finally rendering an arbitral decision.
This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor - rendering what, in Western European court procedures, would be considered an arbitral (even 'arbitrary') decision.
Mediation/arbitration hybrids can pose significant ethical and process problems for mediators. Many of the options and successes of mediation relate to the mediator's unique role as someone who wields coercive power over neither the parties nor the outcome. If parties in a mediation are aware the mediator might later need to act in the role of judge, the process could be dramatically distorted. Thankfully, mediation-arbitration often involves using different individuals in the role of mediator and (if needed later) arbitrator, but this is not always the case.

Mediator liability

Mediators should take necessary precautions to protect themselves, as they are putting themselves in a vulnerable position in terms of liability. Mediators need to be qualified and properly trained before they can mediate a legally binding mediation. In mediation, there are a number of situations in which liability could arise. For example, a mediator could be liable for misleading parties about the process and/or process of alternative dispute resolution. If a mediator inappropriately recommends mediation as a dispute resolution method, those involved can hold the mediator liable. A breach of confidentiality on the mediators behalf could result in liability. These situations can all lead to court proceedings, although this is quite uncommon. Only one case has been recorded in Australia so far.
Three areas exist in which liability can arise for the mediator:

1. Liability in Contract
2. Liability in Tort
3. Liability for Breach of Fiduciary Obligations.

Liability in Contract arises if the Mediator breaches contract between themselves and one or both of the parties. This can be in written or verbal contract. There are two forms of breach - failure to perform and anticipatory breach. The latter is harder to prove because the breach has not yet happened. If the breach is proven in can result in damages awarded. The damages awarded are generally compensatory in nature, very rarely pecuniary. Limitations on liability include causation (Proving liability requires a showing of actual causation).
Liability in Tort arises if a mediator influences a party in any way (compromising the integrity of the decision), defames a party, breaches confidentiality, or most commonly, is liable in negligence. To be awarded damages, the party must show suffering of actual damage, and must show that the mediator's actions (and not the party's actions) are the actual cause of the damage.
Liability for Breach of Fiduciary Obligations can occur if parties misconceive their relationship with the Mediator for something other than completely neutral. The mediator has the role of remaining neutral at all times, but the parties could misinterpret the relationship to be a fiduciary one.

Mediators' liability in Tapoohi v Lewenberg (Australia)

Tapoohi v Lewenberg provides the only case in Australia to date that has set a precedent for mediators' liability.
The case involved two sisters who settled a deceased estate via mediation. Only one sister attended the mediation in person: the other participated via telephone with her lawyers present. A deal was struck up and an agreement was executed by the parties. At the time it was orally expressed that before the final settlement was to occur there was requirement for taxation advise to be sought as such a large transfer of property would encompass some capital gains tax to be paid.
Tapoohi had to pay Lewenberg $1.4 million dollars in exchange for some transfers of land. One year later, when the capital gains tax was recognized by Tapoohi she filed proceedings against her sister, lawyers and the mediator based on the fact that the agreement was subject to further advise being sought in relation to taxation.
The mediator's agreement stage took place verbally without any formal agreement: only a letter stating his appointment. Tapoohi, a lawyer herself, alleged that the mediator breached his contractual duty, bearing in mind the lack of any formal agreement; and further alleged several breaches on his tortuous duty of care.
Although the court dismissed the summary judgment, the case shows that the mediators owe a duty of care to all parties and that parties can hold them liable should they breach that duty of care. Habersberger J held that it "not beyond argument" that the mediator could be in breach of contractual and tortious duties. Such claims were required to be made out at a hearing but a trial court
This case emphasizes the need for formal mediation-agreements including clauses that would limit mediators' liability.

Mediation in the United States

Note the differences between the legal definition of civil mediation in the United States of America and mediation in other countries. Compared with the situation elsewhere, mediation appears more "professionalized" in the United

States[1] where State laws regarding the use of lawyers as opposed to mediators may differ widely. One can best understand these differences in a more global context of variances between countries.
Within the United States, the laws governing mediation vary greatly on a state-by-state basis. Some states have fairly sophisticated laws concerning mediation, including clear expectations for certification, ethical standards, and protections preserving the confidential nature of mediation by ensuring that mediators need not testify in a case they've worked on. However, even in states that have such developed laws around mediation, that law only relates to mediators working within the court system. Community and commercial mediators practising outside the court system may very well not have these same sorts of legal protections.
Professional mediators often consider the option of liability insurance — traditionally marketed through professional dispute-resolution organizations.

Without-prejudice privilege

The without-prejudice privilege in common law terms denotes that when in honest attempts to reach some type of settlement any offers or admissions cannot be used in a court of law when the subject matter is the same. This further applies to negotiations that are made as part of the mediation process. There are however some exceptions to the without privilege rule.
The without prejudice privilege emerges clearly from the description of the case *AWA Ltd v Daniels* (t/as Deloitte Haskins and Sells). *AWA Ltd* commenced proceedings in the Supreme Court of NSW against *Daniels* for failing to audit their accounts properly. Mediation was ordered and failed. But during the mediation *AWA Ltd* disclosed that they had a document that gave its directors full indemnity with respect to any legal proceedings. *AWA Ltd* was under the impression that they gave this information without prejudice and therefore it could not be used in a court of law. When mediation failed litigation resumed.
During the litigation *Daniels* asked for a copy of the indemnity deed. *AWA Ltd* claimed privilege, but the presiding **Rolfe J**, stated that privilege was not applicable as the document was admissible. Further to this **Rolfe, J** added that *Daniels* was "only seeking to prove a fact which was referred to in the mediation".
The without-prejudice privilege does not apply if it has been excluded by either party or if the rights to the privilege has been waived in proceedings and it must be remembered that although a mediation is private and confidential, the disclosure of privileged information in the presence of a mediator does not represent a waiver of the privilege.

Mediation in politics and in diplomacy

Diplomats typically engage in mediation as one of their most important activities. Some people consider that it should be a relevant quality of democratic politicians, given that usually in both these fields the explicitation of the respective mansions (on a formal basis, at least) require the achievement of agreements between separate entities of which the diplomat or the politician are third parties by definition; Hobbes and Bodin found that the organs of a state have a mediating power and function.
These activities are usually performed in order to get, on the subjective point of view of this mediator, a recompense that might be in the form of a direct economical advantage, a political advantage, an increased international prestige or influence.

One of many non-violent methods of dispute resolution

In politics and in diplomacy, mediation obviously offers a non-violent method of dispute resolution (some indeed argue that other methods would be many), although it is usually assumed or included in definitions of other methods.
Some theorists, notably Rushworth Kidder, have claimed that mediation is the foundation of a new (some say 'postmodern') ethics - and that it sidesteps traditional ethical issues with pre-defined limits of morality.
Othersclaim that mediation is a form of harms reduction or de-escalation, especially in its large-scale application in peace process and similar negotiation, or the bottom-up way it is performed in the peace movement where it is often called mindful mediation. In this form, it would be derived from methods of Quakers in particular.

Mediation and industrial relations

According to Boulle (2005, p. 286), conciliation and ADR began in industrial relations in Australia long before the arrival of the modern ADR movement. One of the first statutes passed by the Commonwealth parliament was the Conciliation and Arbitration Act 1904 (Cth). This allowed the Federal Government to pass laws on conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state. In Australian industrial relations, conciliation has been the most prominently used form of ADR, and is generally far removed from modern mediation.
Significant changes in state policy concerning Australian industrial relations took place over the decade 1996 to 2007. The Howard government, with the introduction of the Workplace Relations Act 1996 (Cth), sought to shift the industrial system away from a collectivist approach, where unions and the AIRC had strong roles, to a more decentralized system of individual bargaining between employers and employees (Bamber et al., 2000, p. 43). The WRA Act 1996 (Cth) diminished the traditional role of the AIRC by placing the responsibility of resolving disputes at the enterprise level (Boulle, 2005, p. 287). This allowed mediation to be used to resolve industrial relations disputes instead of the traditionally used conciliation.
The new 'Work Choices' Amendment came into effect in March 2006, and included a compulsory model dispute-resolution process that doesn't involve the AIRC. Mediation and other ADR processes have been encouraged by the

government as a better option than the services provided by the AIRC. The government has realized the benefits of mediation to include the following (Van Gramberg, 2006, p. 11):

- Mediation is cost saving
- Avoids polarization of parties
- Is educative
- Probes wider issues than the formal court system
- Provides greater access to justice
- Gives disputants more control over the dispute process

The workplace and mediation

Mediation emerged on the industrial relations landscape in the late 1980s due to a number of economic and political factors, which then induced managerial initiatives. According to Van Gramberg (2006, p. 173) these changes have come from the implementation of human resource management policies and practices, which focuses on the individual worker, and rejects all other third parties such as unions, and the Australian Industrial relations Commission (AIRC). HRM together with the political and economic changes undertaken by the Howard government has created an environment where private ADR can be fostered in the workplace (Bamber et al., 2000, p. 45). The decline of unionism and the encouragement of individualization in the workplace have encouraged the growth of private mediations. This is demonstrated in the industries with the lowest union rates such as in the private business sector having the greatest growth of mediation (Van Gramberg, 2006, p. 174).

The Howard government's Work Choices Act, which came into effect on March 2006, made further legislative changes to deregulate the industrial relations system. A key element of the new changes was to weaken the powers of the AIRC in conciliation and arbitration by installing and encouraging private mediation in competition with the services provided by the AIRC.

Workplace conflicts can cover a great variety of disputes. For example disputes between staff members, allegations of harassment, contractual disputes relating to the terms and conditions of employment and workers-compensation claims (Boulle, 2005, p. 298). At large, workplace disputes are between people who have an ongoing working relationship within a closed system, which indicate that mediation would be appropriate as a means of a dispute resolution process. However in organisations there are many complex relationships, involving hierarchy, job security and competitiveness that make mediation a difficult task (Boulle, 2005, p. 298).

Conflict-management

Society perceives conflict as something that gets in the way of progress, as a negative symptom of a relationship that one should cure as quickly as possible (Boulle, 2005, p. 87). However within the mediation profession conflict is seen as a fact of life and when properly managed it can have many benefits for the parties and constituents (Bagshaw, 1999, p. 206, Boulle, 2005, p. 87). The benefits of conflict include the opportunity to renew relationships and make positive changes for the future. Mediation should be a productive process, where conflict can be managed and expressed safely (Bradford, 2006, p. 148). It is the mediator’s responsibility to let the parties express their emotions entailed in conflict safely. Allowing the parties to express these emotions may seem unhelpful in resolving the dispute, but if managed constructively these emotions may help towards a better relationship between the parties in the future.

Measuring the effectiveness of conflict management

The ADR field has felt a need to define the effectiveness of dispute-resolution in a broad manner, including more than whether there was a settlement (Boulle, 2005, p. 88). Mediation as a field of dispute resolution recognized there was more to measuring effectiveness, than a settlement. Mediation recognised in its own field that party satisfaction of the process and mediator competence could be measured. According to Boulle (2005, p. 88) surveys of those who have participated in mediation reveal strong levels of satisfaction of the process.

Benefits of mediation may include:

- discovering parties' interests and priorities
- healthy venting of emotions in a protected environment
- an agreement to talk about a set agenda
- identifying roles of the constituents, such as relatives and professional advisors
- knowledge of a constructive dispute resolution for use in a future dispute

Confidentiality and mediation

Confidentiality emerges as a powerful and attractive feature of mediation (Van Gramberg, 2006, p. 38). The private and confidential aspect of mediation is in contrast with the courts and tribunals which are open to the public, and kept on record. Privacy is a big motivator for people to choose mediation over the courts or tribunals. Although mediation is promoted with confidentiality being one of the defining features of the process, it is not in reality as private and confidential as often claimed (Boulle, 2005, p. 539). In some circumstances the parties agree that the mediation should not be private and confidential in parts or in whole. Concerning the law there are limits to privacy and confidentiality, for example if their mediation entails abuse allegations, the mediator must disclose this information to the authorities. Also the more parties in a mediation the less likely it will be to maintain all the

information as confidential. For example some parties may be required to give an account of the mediation to outside constituents or authorities (Boulle, 2005, p. 539).
Two competing principles affect the confidentiality of mediations. One principle involves upholding confidentiality as means to encourage people to settle out of the courts and avoid litigation, while the second principle states that all related facts in the mediation should be available to the courts.
A number of reasons exist for keeping mediation private and confidential; these include:

- it makes the mediation appealing
- it provides a safe environment to disclose information and emotions
- confidentiality makes mediation more effective by making parties talk realistically
- confidentiality upholds mediators' reputations, as it reinforces impartiality
- confidentiality makes agreement more final, as there is little room to seek review

Global relevance
The rise of international trade law, continental trading blocs, the World Trade Organization (and its opposing anti-globalization movement), and use of the Internet, among other factors, seem to suggest that legal complexity has started to reach an intolerable and undesirable point. There may be no obvious way to determine which jurisdiction has precedence over which other, and there may be substantial resistance to settling a matter in any one place. Accordingly, mediation may come into more widespread use, replacing formal legal and judicial processes sanctified by nation-states. Some people, like members of the anti-globalization movement, believe such formal processes have quite thoroughly failed to provide real safety and closure guarantees that are pre-requisite to uniform rule of law. Following an increasing awareness of the process, and a wider notion of its main aspects and eventual effects, some commentators in recent times have frequently proposed mediation for the resolution of international disputes, with attention to belligerent situations too.
However, as mediation ordinarily needs participation by the interested parties and it would be very difficult to impose it, in case one of the parts refuses this process it cannot be a solution.
Fairness
As noted, mediation can only take place in an atmosphere where there is some agreement on safety, fairness and closure, usually provided by nation-states and their legal systems. But increasingly, disputes transcend international borders and include many parties who may be in unequal-power relationships.
In such circumstances, with many parties afraid to be identified or to make formal complaints, terminology or rules of standing or evidence slanted against some groups, and without power to enforce even "legally binding" contracts, some conclude that the process of mediation would not reasonably be said to be "fair".
Accordingly, even when a party offers to mediate and a mediator attempts to make the process fair, mediation itself might not operate as a fair process. In such cases, parties may pursue other means of dispute resolution.
From a more technical point of view, however, one must recall that the parties must require mediation, and very seldom can it be imposed by "non-parties" upon the parties. Therefore, in presence of entities that cannot be clearly identified, and that practically don't claim for their recognition as "parties", the professional experience of a mediator could only apply to a proposal of definition, that besides would always miss the constitutional elements of a mediation. Moreover, in such circumstances, the counter-party of these eventual entities would very likely deny any prestige of 'party' to the opponent, this not consenting any kind of treaty (in a correct mediation).
More generally, given that mediation ordinarily produces agreements containing elements to enforce the pacts with facts that can grant its effectiveness, note that other mechanisms apart from legal systems may ensure protection of the pacts: modern mediation frequently tends to define economic compensations and warranties too, generally considered quicker and more effective. The concrete 'power' of an agreement is classically found in the *equilibre* of the pact, in the sincere conciliation of respective interests and in the inclusion of measures that would make the rupture of the pact very little convenient for the unfaithful party. Pacts that don't have such sufficient warranties are only academically effects of a mediation, but would never respect the deontology of the mediator.
Phoenix Coyotes
On May 19, 2009 a bankruptcy judge ordered the NHL and Phoenix Coyotes owner Jerry Moyes to mediation in an attempt to resolve their fight over who is in control of a franchise that both sides agree is insolvent.
Judge Redfield Baum made the ruling after hearing arguments from attorneys on both sides in U.S. bankruptcy court Tuesday over the NHL's contention that Moyes had no authority to file Chapter 11 bankruptcy earlier this month. The league and Moyes are to report their progress at a status hearing May 27. Meanwhile, Baum said to relocate the team anywhere must be decided before the franchise is sold.
Conflict management style
A **conflict management style** is the pattern of behaviour an individual develops in response to conflict with others such as differences of opinion. Conflict management styles tend to be consistent over time.[*citation needed*] Conflict management is the skill needed to resolve different situations.
Development
The field of conflict management, conflict resolution, or conflict transformation (there is a lack of consensus in naming convention[*citation needed*]) has since the 1970's sought to teach people to be more conscious of their conflict

management style. The premise behind this is that greater awareness of their style by individuals enables them to make better choices of how to respond. Someone who knows they have a tendency to avoid conflict, for example, might in some circumstances choose a different and perhaps more appropriate response.

Application

The most widely used tool for this is a conflict style inventory, typically a short questionnaire filled out by a user, with interpretation of the scores given in writing or by an instructor. The point is not to categorize the user, but rather to give him or her a framework in which to assess responses and options. Conflict style inventories in wide use today include the Thomas Kilmann and Style Matters: The Kraybill Conflict Style Inventory

Diplomacy.

Diplomacy is the art and practice of conducting negotiations between representatives of groups or states. It usually refers to international diplomacy, the conduct of international relations through the intercession of professional diplomats with regard to issues of peace-making, trade, war, economics and culture. International treaties are usually negotiated by diplomats prior to endorsement by national politicians.

In an informal or social sense, diplomacy is the employment of tact to gain strategic advantage or to find mutually acceptable solutions to a common challenge, one set of tools being the phrasing of statements in a non-confrontational, or polite manner.

Origin of the word

The word stems from the Greek word "*diploma*", which literally means 'folded in two'. In ancient Greece, a diploma was a certificate certifying completion of a course of study, typically folded in two. In the days of the Roman Empire, the word "*diploma*" was used to describe official travel documents, such as passports and passes for imperial roads, that were stamped on double metal plates. Later, the meaning was extended to cover other official documents such as treaties with foreign tribes. In the 1700s the French called their body of officials attached to foreign legations the corps "*diplomatique*". The word "*diplomacy*" was first introduced into the English language by Edmund Burke in 1796, based on the French word "*diploma tie*".

The science of diplomatics, dealing with the study of old documents, also ows its name to the above, but its present meaning is completely distinct from that of diplomacy.

Diplomats and diplomatic missions

The collective term for a group of diplomats from a single country who reside in another country is a diplomatic mission. Ambassador is the most senior diplomatic rank; a diplomatic mission headed by an ambassador is known as an embassy, with the exception of permanent missions at the United Nations, the Organization of American States, or other multilateral organizations, which are also headed by ambassadors. The collective body of all diplomats of particular country is called that country's diplomatic service. The collective body of all diplomats assigned to a particular country is the diplomatic corps. (See also diplomatic rank.)

History

Ancient Egypt, Canaan, and Hittite Empire

Some of the earliest known diplomatic records are the Amarna letters written between the pharaohs of the Eighteenth dynasty of Egypt and the Amurru rulers of Canaan during the 14th century BC. Following the Battle of Kadesh in *c.* 1274 BC during the Nineteenth dynasty, the pharaoh of Egypt and ruler of the Hittite Empire created one of the first known international peace treaties which survives in stone tablet fragments.

Classical Greece

The Greek City States on some occasions sent envoys to each other in order to negotiate specific issues, such as war and peace or commercial relations, but did not have diplomatic representatives regularly posted in each other's territory. However, some of the functions given to modern diplomatic representatives were in Classical Greece filled by a proxenos, who was a citizen of the host city having a particular relations of friendship with another city – a relationship often hereditary in a particular family.

Europe

Ancient roots

The ability to practice diplomacy is one of the defining elements of a state. As noted above, diplomacy has been practiced since the first city-states were formed millennia ago in ancient Greece. For most of human history diplomats were sent only for specific negotiations, and would return immediately after their mission concluded. Diplomats were usually relatives of the ruling family or of very high rank in order to give them legitimacy when they sought to negotiate with the other state.

One notable exception involved the relationship between the Pope and the Byzantine Emperor; papal agents, called *apocrisiarii*, were permanently resident in Constantinople. After the 8th century, however, conflicts between the Pope and Emperor (such as the Iconoclastic controversy) led to the breaking of close ties.

The origins of diplomacy lie in the strategic and competitive exchange of impressive gifts, which may be traced to the Bronze Age and recognized as an aspect of Homeric guest-friendship.Thus diplomacy and trade have been inexorably linked from the outset. "In the framework of diplomatic relations it was customary for Byzantine emperors and Muslim rulers, especially the 'Abbāsids and the Fātimids, as well as for Muslim rulers between themselves, to exchange precious gifts, with which they attempted to impress or surpass their counterparts," remarks

David Jacoby, in the context of the economics of silk in cultural exchange among Byzantium, Islam and the Latin West: merchants accompanied emissaries, who often traveled on commercial ships. At a later date, it will be recalled that the English adventurer and trader Anthony Sherley convinced the Persian ruler to send the first Persian embassy to Europe (1599–1602).

Roots of modern diplomacy

Early modern diplomacy's origins are often traced to the states of Northern Italy in the early Renaissance, with the first embassies being established in the thirteenth century. Milan played a leading role, especially under Francesco Sforza who established permanent embassies to the other city states of Northern Italy. Tuscany and Venice were also flourishing centres of diplomacy from the 1300s onwards. It was in the Italian Peninsula that many of the traditions of modern diplomacy began, such as the presentation of an ambassador's credentials to the head of state.

From Italy the practice was spread to other European regions. Milan was the first to send a representative to the court of France in 1455. However, Milan refused to host French representatives fearing espionage and that the French representatives would intervene in its internal affairs. As foreign powers such as France and Spain became increasingly involved in Italian politics the need to accept emissaries was recognized. Soon the major European powers were exchanging representatives. Spain was the first to send a permanent representative; it appointed an ambassador to the Court of England in 1487. By the late 16th century, permanent missions became customary. The Holy Roman Emperor, however, did not regularly send permanent legates, as they could not represent the interests of all the German princes (who were in theory all subordinate to the Emperor, but in practice each independent).

During that period the rules of modern diplomacy were further developed. The top rank of representatives was an ambassador. At that time an ambassador was a nobleman, the rank of the noble assigned varying with the prestige of the country he was delegated to. Strict standards developed for ambassadors, requiring they have large residences, host lavish parties, and play an important role in the court life of their host nation. In Rome, the most prized posting for a Catholic ambassador, the French and Spanish representatives would have a retinue of up to a hundred. Even in smaller posts, ambassadors were very expensive. Smaller states would send and receive envoys, who were a rung below ambassador. Somewhere between the two was the position of minister plenipotentiary.

Diplomacy was a complex affair, even more so than now. The ambassadors from each state were ranked by complex levels of precedence that were much disputed. States were normally ranked by the title of the sovereign; for Catholic nations the emissary from the Vatican was paramount, then those from the kingdoms, then those from duchies and principalities. Representatives from republics were ranked the lowest (which often angered the leaders of the numerous German, Scandinavian and Italian republics). Determining precedence between two kingdoms depended on a number of factors that often fluctuated, leading to near-constant squabbling.

French diplomat Charles Maurice de Talleyrand-Périgord is considered one of the most skilled diplomats of all time.

Ambassadors, nobles with little foreign experience and no expectation of a career in diplomacy, needed to be supported by large embassy staff. These professionals would be sent on longer assignments and would be far more knowledgeable than the higher-ranking officials about the host country. Embassy staff would include a wide range of employees, including some dedicated to espionage. The need for skilled individuals to staff embassies was met by the graduates of universities, and this led to a great increase in the study of international law, modern languages, and history at universities throughout Europe.

At the same time, permanent foreign ministries began to be established in almost all European states to coordinate embassies and their staffs. These ministries were still far from their modern form, and many of them had extraneous internal responsibilities. Britain had two departments with frequently overlapping powers until 1782. They were also far smaller than they are currently. France, which boasted the largest foreign affairs department, had only some 70 full-time employees in the 1780s.

The elements of modern diplomacy slowly spread to Eastern Europe and Russia, arriving by the early eighteenth century. The entire edifice would be greatly disrupted by the French Revolution and the subsequent years of warfare. The revolution would see commoners take over the diplomacy of the French state, and of those conquered by revolutionary armies. Ranks of precedence were abolished. Napoleon also refused to acknowledge diplomatic immunity, imprisoning several British diplomats accused of scheming against France.

After the fall of Napoleon, the Congress of Vienna of 1815 established an international system of diplomatic rank. Disputes on precedence among nations (and therefore the appropriate diplomatic ranks used) persisted for over a century until after World War II, when the rank of ambassador became the norm. In between that time, figures such as the German Chancellor Otto von Bismark were renowned for international diplomacy.

Ancient India

Ancient India, with its kingdoms and dynasties, had a long tradition of diplomacy. The oldest treatise on statecraft and diplomacy, *Arthashastra*, is attributed to Kautilya (also known as Chanakya), who was the principal adviser to Chandragupta Maurya, the founder of the Maurya dynasty who ruled in the 3rd century BC, (whose capital was Patliputra, today's Patna, the chief city of Bihar state). *Arthashastra* is a complete work on the art of kingship, with long chapters on taxation and on the raising and maintenance of armies. It also incorporates a theory of diplomacy, of how in a situation of mutually contesting kingdoms, the wise king build alliances and tries to checkmate his

adversaries. The envoys sent at the time to the courts of other kingdoms tended to reside for extended periods of time, and *Arthashastra* contains advice on the deportment of the envoy, including the trenchant suggestion that 'he should sleep alone'. The highest morality for the king is that his kingdom should prosper.

China

Long before the Tang and Song dynasties, the Chinese had sent envoys into Central Asia, India, and Persia starting with Zhang Qian in the 2nd century BC. Another notable event in Chinese diplomacy was the Chinese embassy mission of Zhou Daguan to the Khmer Empire of Cambodia in the 13th century. Chinese diplomacy was a necessity in the distinctive period of Chinese exploration. Since the Tang Dynasty (618–907 AD), the Chinese also became heavily invested in sending diplomatic envoys abroad on maritime missions into the Indian Ocean, to India, Persia, Arabia, East Africa, and Egypt. Chinese maritime activity was increased dramatically during the commercialized period of the Song Dynasty, with new nautical technologies, many more private ship owners, and an increasing amount of economic investors in overseas ventures.

During the Mongol Empire (1206–1294) the Mongols created something similar to today's diplomatic passport called paiza. The paiza were in three different types (golden, silver, and copper) depending on the envoy's level of importance. With the paiza, there came authority that the envoy can ask for food, transport, place to stay from any city, village, or clan within the empire with no difficulties.

Since the 17th century, there was a series of treaties upheld by Qing Dynasty China and Czarist Russia, beginning with the Treaty of Nerchinsk in the year 1689. This was followed up by the Aigun Treaty and the Convention of Peking in the mid 19th century.

As European power spread around the world in the eighteenth and nineteenth centuries so too did its diplomatic model and system become adopted by Asian countries.

Modern era

Diplomatic relations within the Early Modern era of Asia were depicted as an environment of prestige and Status. It was maintained that one must be of noble ancestry in order to represent an autonomous state within the international arena.[6] Therefore the position of diplomat was often revered as an element of the elitist class within Asia. A state's ability to practice diplomacy has been one of the underlying defining characteristics of an autonomous state. It is this practice that has been employed since the conception of the first city-states within the international spectrum. Diplomats in Asia were originally sent only for the purpose of negotiation. They would be required to immediately return after their task was completed. The majority of diplomats initially constituted the relatives of the ruling family. A high rank was bestowed upon them in order to present a sense of legitimacy with regards to their presence. Italy, the Ottoman Empire, and China were the first real states that perpetuated environments of diplomacy. During the early modern era diplomacy evolved to become a crucial element of international relations within the Mediterranean and Asia.

Ottoman Empire

Diplomatic traditions outside of Europe differed greatly. A feature necessary for diplomacy is the existence of a number of states of somewhat equal power, as existed in Italy during the Renaissance, and in Europe for much of the modern period. By contrast, in Asia and the Middle East, China and the Ottoman Empire were reluctant to practice bilateral diplomacy as they viewed themselves to be unquestionably superior to all their neighbours (hence, set up smaller nations as tributaries and vassals). The Ottoman Turks, for instance, would not send missions to other states, expecting representatives to come to Istanbul. It would not be until the nineteenth century that the Ottoman Empire established permanent embassies in other capitals.

Relations with the government of the Ottoman Empire (known as the Sublime Porte) were particularly important to Italian states. The maritime republics of Genoa and Venice depended less and less upon their nautical capabilities, and more and more upon the perpetuation of good relations with the Ottomans. Interactions between various merchants, diplomats, and religious men between the Italian and Ottoman empires helped inaugurate and create new forms of diplomacy and statecraft. Eventually the primary purpose of a diplomat, which was originally a negotiator, evolved into a persona that represented an autonomous state in all aspects of political affairs. It became evident that all other sovereigns felt the need to accommodate themselves diplomatically, due to the emergence of the powerful political environment of the Ottoman Empire. One could come to the conclusion that the atmosphere of diplomacy within the early modern period revolved around a foundation of conformity to Ottoman culture.

Italy

The origins of modern diplomacy within the international spectrum of politics, could often be traced back to the states of Northern Italy. This was during the early renaissance, where the first diplomatic embassies were established in the thirteenth century. The state of Milan played an incredible part in the establishment of permanent embassies within the city states of Northern Italy. Various diplomatic traditions were also conceived within Italy. The presentation of an Ambassador's credentials and acknowledgments are elements that were inaugurated in Italian early modern diplomacy.

The practice of diplomacy and its various intricacies were also spread to various other autonomous European states. Milan created the first diplomatic international gesture in 1455, by sending a representative to the court of France. It was extremely controversial however, that they would not accept the same gesture from France, due to the fears of

espionage and intervention in internal affairs. It had eventually become evident that as super powers such as France and Spain grew in size and strength, and there was an overarching necessity to accept any form of diplomatic effort within the international arena. Eventually Italy paved the way for all European power to exchange representatives. By the late 16th century, permanent emissaries were standard practice.

Diplomatic strategy

Real world diplomatic negotiations are very different from intellectual debates in a university where an issue is decided on the merit of the arguments and negotiators make a deal by splitting the difference. Though diplomatic agreements can sometimes be reached among liberal democratic nations by appealing to higher principles, most real world diplomacy has traditionally been heavily influenced by hard power.

The interaction of strength and diplomacy can be illustrated by a comparison to labor negotiations. If a labor union is not willing to strike, then the union is not going anywhere because management has absolutely no incentive to agree to union demands. On the other hand, if management is not willing to take a strike, then the company will be walked all over by the labor union, and management will be forced to agree to any demand the union makes. The same concept applies to diplomatic negotiations.

There are also incentives in diplomacy to act reasonably, especially if the support of other actors is needed. The gain from winning one negotiation can be much less than the increased hostility from other parts. This is also called soft power.

Many situations in modern diplomacy are also rules based. When for instance two WTO countries have trade disputes, it is in the interest of both to limit the spill over damage to other areas by following some agreed-upon rules.

Diplomatic immunity

Diplomatic immunity

The sanctity of diplomats has long been observed. This sanctity has come to be known as diplomatic immunity. While there have been a number of cases where diplomats have been killed, this is normally viewed as a great breach of honour. Genghis Khan and the Mongols were well known for strongly insisting on the rights of diplomats, and they would often wreak horrific vengeance against any state that violated these rights.

Diplomatic rights were established in the mid-seventeenth century in Europe and have spread throughout the world. These rights were formalized by the 1961 Vienna Convention on Diplomatic Relations, which protects diplomats from being persecuted or prosecuted while on a diplomatic mission. If a diplomat does commit a serious crime while in a host country he may be declared as persona non grata (unwanted person). Such diplomats are then often tried for the crime in their homeland.

Diplomatic communications are also viewed as sacrosanct, and diplomats have long been allowed to carry documents across borders without being searched. The mechanism for this is the so-called "diplomatic bag" (or, in some countries, the "diplomatic pouch"). While radio and digital communication have become more standard for embassies, diplomatic pouches are still quite common and some countries, including the United States, declare entire shipping containers as diplomatic pouches to bring sensitive material (often building supplies) into a country.

In times of hostility, diplomats are often withdrawn for reasons of personal safety, as well as in some cases when the host country is friendly but there is a perceived threat from internal dissidents. Ambassadors and other diplomats are sometimes recalled temporarily by their home countries as a way to express displeasure with the host country. In both cases, lower-level employees still remain to actually do the business of diplomacy.

Diplomats as a guarantee

In the Ottoman Empire, the diplomats of Persia and other states were seen as a guarantee of good behavior. If a nation broke a treaty or if their nationals misbehaved the diplomats would be punished. Diplomats were thus used as an enforcement mechanism on treaties and international law. To ensure that punishing a diplomat mattered rulers insisted on high-ranking figures. This tradition is seen by supporters of Iran as a legal basis of the 1979 Iranian hostage crisis. In imitation of alleged previous practices supporters of the Iranian Revolution attempted to punish the United States for its alleged misdeeds by holding their diplomats hostage. Diplomats as a guarantee were also employed sometimes in pre-modern Europe and other parts of Asia.

Diplomacy and espionage

Diplomacy is closely linked to espionage or gathering of intelligence. Embassies are bases for both diplomats and spies, and some diplomats are essentially openly-acknowledged spies. For instance, the job of military attachés includes learning as much as possible about the military of the nation to which they are assigned. They do not try to hide this role and, as such, are only invited to events allowed by their hosts, such as military parades or air shows.

There are also deep-cover spies operating in many embassies. These individuals are given fake positions at the embassy, but their main task is to illegally gather intelligence, usually by coordinating spy rings of locals or other spies. For the most part, spies operating out of embassies gather little intelligence themselves and their identities tend to be known by the opposition. If discovered, these diplomats can be expelled from an embassy, but for the most part counter-intelligence agencies prefer to keep these agents *in situ* and under close monitoring.

The information gathered by spies plays an increasingly important role in diplomacy. Arms-control treaties would be impossible without the power of reconnaissance satellites and agents to monitor compliance. Information gleaned from espionage is useful in almost all forms of diplomacy, everything from trade agreements to border disputes.

Diplomatic resolution of problems

Various processes and procedures have evolved over time for handling diplomatic issues and disputes.

Arbitration and mediations

Nations sometimes resort to international arbitration when faced with a specific question or point of contention in need of resolution. For most of history, there were no official or formal procedures for such proceedings. They were generally accepted to abide by general principles and protocols related to international law and justice.

Sometimes these took the form of formal arbitrations and mediations. In such cases a commission of diplomats might be convened to hear all sides of an issue, and to come some sort of ruling based on international law.

In the modern era, much of this work is often carried out by the International Court of Justice at the Hague, or other formal commissions, agencies and tribunals, working under the United Nations. Below are some examples.

- Hay-Herbert Treaty Enacted after the United States and Britain submitted a dispute to international mediation about the US-Canadian border.

Conferences

Other times, resolutions were sought through the convening of international conferences. In such cases, there are fewer ground rules, and fewer formal applications of international law. However, participants are expected to guide themselves through principles of international fairness, logic, and protocol.

Some examples of these formal conferences are:

- Congress of Vienna (1815) – After Napoleon was defeated, there were many diplomatic questions waiting to be resolved. This included the shape of the map of Europe, the disposition of political and nationalist claims of various ethnic groups and nationalities wishing to have some political autonomy, and the resolution of various claims by various European powers.
- The Congress of Berlin (June 13 – July 13, 1878) was a meeting of the European Great Powers' and the Ottoman Empire's leading statesmen in Berlin in 1878. In the wake of the Russo-Turkish War, 1877–78, the meeting's aim was to reorganize conditions in the Balkans.

Negotiations

Sometimes nations convene official negotiation processes to settle an issue or dispute between several nations which are parties to a dispute. These are similar to the conferences mentioned above, as there are technically no established rules or procedures. However, there are general principles and precedents which help define a course for such proceedings.

Some examples are

- Camp David accord Convened in 1978 by President Jimmy Carter of the United States, at Camp David to reach an agreement between Prime Minister Mechaem Begin of Israel and President Anwar Sadat of Egypt. After weeks of negotiation, agreement was reached and the accords were signed, later leading directly to the Israel-Egypt Peace Treaty of 1979.
- Treaty of Portsmouth Enacted after President Theodore Roosevelt brought together the delegates from Russia and Japan, to settle the Russo-Japanese War. Roosevelt's personal intervention settled the conflict, and caused him to win the Nobel peace prize.

Diplomatic recognition

Diplomatic recognition is an important factor in determining whether a nation is an independent state. Receiving recognition is often difficult, even for countries which are fully sovereign. For many decades after its becoming independent, even many of the closest allies of the Dutch Republic refused to grant it full recognition. Today there are a number of independent entities without widespread diplomatic recognition, most notably the Republic of China on Taiwan. Since the 1970s, most nations have stopped officially recognizing the ROC's existence on Taiwan, at the insistence of the People's Republic of China. Currently, the United States and other nations maintain informal relations through de facto embassies, with names such as the American Institute in Taiwan. Similarly, Taiwan's de facto embassies abroad are known by names such as the Taipei Economic and Cultural Representative Office. This was not always the case, with the US maintaining official diplomatic ties with the ROC, recognizing it as the sole and legitimate government of all of China until 1979, when these relations were broken off as a condition for establishing official relations with Communist China.

The Palestinian National Authority has its own diplomatic service, however Palestinian representatives in most Western countries are not accorded diplomatic immunity, and their missions are referred to as Delegations General. Other unrecognized regions which claim independence include Abkhazia, Transnistria, Somaliland, South Ossetia, Nagorno Karabakh, and the Turkish Republic of Northern Cyprus. Lacking the economic and political importance of Taiwan, these nations tend to be much more diplomatically isolated.

Though used as a factor in judging sovereignty, Article 3 of the Montevideo Convention states, "The political existence of the state is independent of recognition by other states."

Informal diplomacy

Informal diplomacy (sometimes called Track II diplomacy) has been used for centuries to communicate between powers. Most diplomats work to recruit figures in other nations who might be able to give informal access to a country's leadership. In some situations, such as between the United States and the People's Republic of China a large amount of diplomacy is done through semi-formal channels using interlocutors such as academic members of thinktanks. This occurs in situations where governments wish to express intentions or to suggest methods of resolving a diplomatic situation, but do not wish to express a formal position.
Track II diplomacy is a specific kind of informal diplomacy, in which non-officials (academic scholars, retired civil and military officials, public figures, social activists) engage in dialogue, with the aim of conflict resolution, or confidence-building. Sometimes governments may fund such Track II exchanges. Sometimes the exchanges may have no connection at all with governments, or may even act in defiance of governments; such exchanges are called Track III.
Om some occasion a former holder of an official position continues to carry out an informal diplomatic activity after retirement. In some cases, governments welcome such activity, for example as a means of establishing an initial contact with a hostile state of group without being formally committed. In other cases, however, such informal diplomats seek to promote a political agenda different from that of the government currently in power. Such informal diplomacy is practiced by former US Presidents Jimmy Carter and (to a lesser extent) Bill Clinton and by the former Israeli diplomat and minister Yossi Beilin (see Geneva Initiative).

Paradiplomacy

Paradiplomacy refers to the international relations conducted by subnational, regional, local or non-central governments. The most ordinary case of paradiplomatic relation refer to co-operation between bordering political entities. However, interest of federal states, provinces, regions etc., may extend over to different regions or to issues gathering local governments in multilateral fora worldwide. Some non-central governments may be allowed to negotiate and enter into agreement with foreign central states.

Cultural diplomacy

Cultural diplomacy is a part of diplomacy. It alludes to a new way of making diplomacy by involving new non governmental and non professional actors in the making of diplomacy. In the frame of globalization, culture plays a major role in the definition of identity and in the relations between people. Joseph Nye points out the importance of having a *soft power* besides a *hard power*. When classical diplomacy fails, a better knowledge can help bridging the gap between different cultures. Cultural diplomacy becomes a subject of academic studies based on historical essays on the United States, Europe, and the Cold War.

Small state diplomacy

Small state diplomacy is receiving increasing attention in diplomatic studies and international relations. Small states are particularly affected by developments which are determined beyond their borders such as climate change, water security and shifts in the global economy. Diplomacy is the main vehicle by which small states are able to ensure that their goals are addressed in the global arena. These factors mean that small states have strong incentives to support international cooperation. But with limited resources at their disposal, conducting effective diplomacy poses unique challenges for small states

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