

TABLE OF CONTENTS

<i>Foreword</i>	vii
<i>Preface</i>	ix
<i>Table of Cases</i>	xxix
<i>Table of Statutes</i>	xxxiii
<i>Table of Arbitration Conventions</i>	xxxiv
<i>Table of Arbitration and Practice Rules</i>	xxxv
<i>Table of Rules of Court</i>	xxxv
<i>Table of Codes of Procedure</i>	xxxv

CHAPTER 1: THE NATURE OF DISPUTES

Introduction	1
Subject matter	2
Nature of issues	3
Ramifications	3
Behavioural conflict or justiciable dispute	5

CHAPTER 2: DISPUTE RESOLUTION OUTLINE

ADR Defined	9
The Philosophy of ADR	9
The ADR Experience Abroad	14
Overview of Dispute Resolution Procedures	18
Negotiation	18
Adjudication	18
Mediation or conciliation	19
Hybrid processes	19
Terminology	21

CHAPTER 3: LITIGATION AND COURT-ATTACHED PROCESSES

Litigation	22
Introduction	22
The United States	22
England & Wales	23

Contents

The adversarial system	23
The role and approach of lawyers	24
The civil justice system in England & Wales	26
Official Referee's Business	26
The Commercial Court	27
Other jurisdictional changes	28
Tribunals	28
Tribunals analogous to courts	29
Administrative tribunals	29
Domestic tribunals	30
Grievance and other Administrative Procedures	30
Court Procedures	31
Commercial Court procedures	31
Administrative law and judicial review	31
Reform in court organisation	32
Reform in court procedure	32
ADR as an Instrument of Procedural Reform	33
Court-ordered ADR	33
Experience of ADR in the courts	34
Court-ordered (or court-annexed) arbitration	34
Court-annexed mediation	38
Judicial settlement conferences	40
Settlement weeks	40
Neutral expert fact-finding	40
Early Neutral Evaluation	40
Private Judging	42
"High-low" Contracts	43
Multi-door Courthouse	44
The Experience in Australia	47
Conclusion	48

CHAPTER 4: ARBITRATION AND OTHER ADJUDICATION

Arbitration	50
Arbitration between states	50
Statutory arbitration	52
Building Societies Act 1986	53
New Roads and Street Works Act 1991	53
County Courts Act 1984	53
Agricultural Holdings Act 1986	54
Arbitration of commercial disputes	54

Contents

Arbitration Defined	56
The agreement to arbitrate	57
Procedural freedom	57
A binding award	60
Arbitration Distinguished	60
Arbitration distinguished – the expert	60
Arbitration distinguished – mediation/conciliation	61
Amiable Composition	62
Legal basis for amiable composition	63
Legal nature and scope	63
Amiable composition in practice	65
Different Kinds of Arbitration	66
Final offer arbitration (or pendulum arbitration)	67
“Documents only” arbitration	67
What may be arbitrated	67
Separability: Kompetenz-Kompetenz	69
Increasing Use of International Commercial Arbitration	71
Harmonisation – The UNCITRAL Model Law and Rules	72
A Variety of Commercial Disputes	74
Institutional and Ad Hoc Arbitration	76
Approaches to procedure	79
Applicable law	80
Hostility to arbitration	81
The future	83
Contractual Adjudication	84
Expert Determination	85

CHAPTER 5: NEGOTIATION

Negotiation – the primary tool	88
Negotiation as a learned skill	88
Theories of Negotiation	89
A problem-solving approach	89
Competitive theory	94
Other theories and models	95
Skills, Strategies and Style	96
Power	97
Culture, gender and values	98
Perceptions and psychology	101
Good faith in negotiation	102
The neutral negotiation role	106

Contents

CHAPTER 6: PRINCIPLES OF MEDIATION

Mediation and Conciliation Defined	108
Common Features of Mediation	109
Variations in Mediation Practice	111
1. Different fields of activity	112
Commercial and civil disputes and claims for breach of duty	112
Industrial and labour disputes	112
Family disputes including issues arising on separation and divorce	112
Community and neighbourhood issues	113
Public policy issues and social conflict	113
International issues	113
Other mediation usages	114
2. Voluntary or mandatory mediation	114
3. Facilitative or evaluative mediation	115
4. Intervention	115
5. "Professionalisation" of mediation	117
6. Caucusing and shuttle mediation	117
7. Sole mediation or co-mediation	118
8. Disciplinary background of the mediator	119

CHAPTER 7: MEDIATION: THE COMMON CORE OF PRACTICE

The Stages and Facets of Mediation	121
Stage 1: The initial inquiry – engaging the parties	121
Providing written material	122
Providing oral information	123
Assisting in engaging other parties	123
Stage 2: The contract to mediate	124
Stage 3: Preliminary communications and preparation	127
Stage 4: Meeting the parties	128
Stage 5: The parties' presentations	131
Stage 6: Information gathering	132
Displaying information: the flip-chart	133
Stage 7: Facilitating negotiations	134
Joint or separate meetings (caucuses)	134
Facilitation	136
Generating and developing options	136
Building trust and understanding	137
Using communication and other skills	137
Brainstorming	137

Contents

Testing the realism of the parties	138
Allowing venting of emotions	138
Evaluation	138
Mediation timetable	140
Stage 8: Impasse strategies	141
Stage 9: Terminating mediation and recording agreements	143
Terminating mediation	143
Agreements and summaries	144
Stage 10: Post-termination phase	149
Multi-party disputes	150
Mediation checklist	152

CHAPTER 8: CIVIL AND COMMERCIAL MEDIATION

The Stages of Civil and Commercial Mediation	153
Stage 1: The initial inquiry – engaging the parties	153
Stage 2: The contract to mediate	155
Stage 3: Preliminary communications and preparation	156
Stage 4: Meeting the parties	157
Stage 5: The parties' presentations	159
Stage 6: Information gathering	161
Obtaining expertise in the mediation	162
Stage 7: Facilitating negotiations	163
Stage 8: Impasse strategies	165
Stage 9: Terminating mediation and recording agreements	168
Sample Agreement	169
Stage 10: Post-termination phase	173
Mediation checklist	173
Mediation checklist	174
A. Before meeting	174
B. At initial meeting	175
C. In the event of impasse	176
D. When issues resolved	177
E. If mediation ends with issues unresolved	178
Checklist caution	178

CHAPTER 9: DIVORCE AND FAMILY MEDIATION

Outline of Family Mediation Practice in England and Wales	179
In court or out of court	181

Contents

Voluntary or mandatory	182
Issues: children, comprehensive or other	183
Sole mediation or co-mediation and multi-disciplinary considerations	183
The role of solicitors representing parties	186
Involving children in mediation	187
Reconciliation implications	188
Mediation and counselling/therapy distinguished	189
Other family mediation distinctions	190
The Stages of Family Mediation	191
Stage 1: The initial inquiry – engaging the parties	191
Stage 2: The contract to mediate	193
Stage 3: Preliminary communications and preparation	194
Stage 4: Meeting the parties	195
Stage 5: The parties' presentations	196
Stage 6: Information gathering	197
Stage 7: Facilitating negotiations	198
Legal advice or information	200
Stage 8: Impasse strategies	202
Stage 9: Terminating mediation and recording agreements	204
Stage 10: Post-termination phase	207

CHAPTER 10: LABOUR MEDIATION

Historical Introduction	208
Terminology	210
Rationale for ADR in Industrial Disputes	211
Advisory, Conciliation and Arbitration Service	213
Conciliation Practice	214
Mediation Practice	215
Conclusion	216

CHAPTER 11: MEDIATION OF COMMUNITY DISPUTES AND CRIMINAL REPARATION

Community Mediation Centres	218
The Mediation Process in Community Disputes	221
Stage 1: Engaging the parties	221
Stage 2: The contract to mediate	221
Stage 3: Preliminary communications	222
Stage 4: Meeting the parties	222

Contents

Stage 5: The presentations of the parties	223
Stage 6: Information gathering	223
Stage 7: Facilitating negotiation	223
Stage 8: Impasse strategies	224
Stage 9: Recording agreements	225
Stage 10: Post-termination phase	225
General observations	225
Mediation of social conflicts and inter-group disputes	226
Mediation in Schools	226
Victim/Offender Mediation	227
Process of victim/offender mediation	229

CHAPTER 12: MEDIATION OF PUBLIC ISSUES AND SOCIAL CONFLICTS

Public Issue Mediation	232
The rationale for public issue and social conflict mediation	233
Models of public policy mediation	235
Is mediation appropriate?	235
Preparation	235
Who should attend the mediation?	236
Absent parties or groups	236
Are all the parties equally able to represent their case?	237
Funding the process	237
Proceeding in imperfect circumstances	238
Designing the process and agreeing the conditions for the mediation	238
Facilitating negotiation	239
Shaping public policy	239
Relevance of mediation to United Kingdom planning procedures	241
Public issue mediation effectiveness	243
Criticisms of public issue mediation	244

CHAPTER 13: FUNCTION, ROLE AND SKILLS OF A MEDIATOR

The Mediator's Roles and Functions	246
1. The mediator as manager of the process	246
2. The mediator as information gatherer	247
3. The mediator as facilitator	248
4. The mediator as reality tester and evaluator	249
5. The mediator as scribe	250
6. The mediator as settlement supervisor	251

Contents

The Mediator's Attributes and Skills	251
The mediator's attributes	251
The mediator's skills	253
1. Listening	253
2. Observing non-verbal communications	253
3. Helping parties to hear	254
4. Questioning	254
5. Summarising	256
6. Acknowledging	256
7. Mutualising	256
8. Re-framing	257
9. Managing conflict and venting of emotions	257
10. Managing the process	258
11. Lateral thinking	259
12. Encouraging a problem-solving mode	259
13. Centring	260
14. Being silent	260
15. Constructive facilitation	261

CHAPTER 14: MINI-TRIAL (EXECUTIVE TRIBUNAL; SUPERVISED SETTLEMENT PROCEDURE)

The Mini-Trial Procedure	263
1. Appointment of neutral adviser	263
2. Preparation	264
3. The conduct of the mini-trial	265
4. The neutral adviser's role	267
5. The settlement negotiations	268
Kinds of cases suitable for mini-trial	269
Timing of mini-trial usage	270
General Observations about Mini-Trials	270

CHAPTER 15: OTHER ADR FORMS

Designing Hybrid ADR Processes	273
Med-arb	274
Neutral fact-finding expert	276
Summary jury trial	278
Ombudsman	279

Contents

CHAPTER 16: CHOICE AND TIMING OF PROCESS USE

General Principles Guiding Choice	282
Adjudicatory processes	282
Consensual (non-adjudicatory) ADR	284
Some Considerations in Choosing between Litigation and Mediation	285
Comparative Summary of Principal Dispute Resolution Processes	287
Litigation	287
Arbitration	288
Expert determination	288
Private judging	289
Court-annexed arbitration	290
Mediation	290
Med-arb	291
Mini-trial	292
Neutral fact-finding expert	293
Ombudsman	293
Reserving Rights while Using ADR	294
Timing of ADR Usage	296

CHAPTER 17: REPRESENTING DISPUTANTS IN NON-ADJUDICATORY ADR

The Advocate's Functions	299
1. Understanding the process	300
2. Understanding and preparing the case	300
3. Presenting the case	301
4. Negotiating and communicating	304
5. Strategies	307
6. Drafting and formalising	309

CHAPTER 18: JURISDICTION, FORUM AND LAW

ADR Jurisdiction	311
Authority Arising from Statute	311
Authority Arising from Agreement	313
Contract clause stipulating for ADR	313
Arbitration clause	314
Clause for non-adjudicatory ADR	315
Alternative CEDR sample short forms	316
CEDR middle length clauses	317

Contents

CEDR long form	317
ADR agreement after dispute has arisen	321
CEDR's form of mediation agreement	322
Specimen agreement between mediator and parties	325
Jurisdiction of Court to Override ADR Provisions and Conclusions	327
Enforceability of ADR clauses in contracts	327
ADR Forum	330
Applicable Law	331

CHAPTER 19: ETHICS, FAIRNESS AND POWER BALANCE

1. Rules of Traditional Practice	332
The Law Society	333
The Bar	336
2. ADR Ethics and Codes of Practice	336
3. Fairness	340
4. Ethics of Confidentiality	344
Ethics of confidentiality in ADR generally	344
Ethics of confidentiality in caucusing	346
Full disclosure of information from caucuses in joint meeting	347
Agreement to maintain confidentiality of separate meetings	348
5. Power Imbalances	349

CHAPTER 20: CONFIDENTIALITY AND PRIVILEGE

Confidentiality	355
General principles	355
Confidentiality in ADR	356
When confidentiality is not applicable	357
Privilege	359
Confidentiality creating privilege	361
Estoppel	367
Statutory privilege	367
A mediation privilege?	367
A privilege or immunity for mediators?	369
Clarification and reform	370

Contents

CHAPTER 21: ENFORCEMENT

Adjudicatory Processes	372
1. Litigation: enforcement of judgments/court orders	373
2. Enforcement of arbitration awards	374
Domestic awards	374
Foreign awards (non-Convention)	375
Convention awards	375
3. Enforcement of expert determination	376
Non-Adjudicatory Processes	376
Do the parties intend their settlement to become enforceable as a matter of law?	376
At what stage will a settlement arrived at in an ADR process become enforceable?	377
Enforcement as a matter of contract	379
Enforcement as an arbitration award or order of the court	379
Option to be released from settlement	380
ADR enforcement parallels bilateral settlement	381

CHAPTER 22: ADMINISTRATIVE MATTERS

Regulation Accreditation and Training of Neutrals	382
Regulation and accreditation	382
Training	384
Funding of ADR	386
Private funding	387
Legal Aid	388
State provision	389
Insurance	390
Legal expenses insurance	390
ADR in disputes covered by insurance	391
Professional Indemnity Insurance	392

CHAPTER 23: ADR RESERVATIONS

Are Settlements Necessarily Preferable to Adjudication?	394
When Non-Adjudicatory ADR is not Appropriate	398
Effects of Informal Third Party Intervention	400
Other Reservations	402

Contents

CHAPTER 24: ADR: FUTURE DIRECTIONS

A United Kingdom Perspective	406
Appendix: ADR Organisations in the United Kingdom and Abroad	411
Glossary: Terms and Abbreviations	417
Bibliography	425
Books, Directories, Journals and Reports	425
Articles, Papers and Transcripts	430
Index	439