Index

access to justice
accessibility 31
France 110
Hong Kong 86
India 216
Malaysia 137
The Netherlands 111
United Kingdom 82, 84
United States 156
affordability 31–4
France 110
Hong Kong 86
India 216
Malaysia 137
The Netherlands 111
United Kingdom 82, 84
United States 156
human rights considerations 45–6
impartial justice see impartiality
improvement of 228, 246
inconsistency with institutionalized
court-based settings 44–5
rise of court-based mediation,
scholarly critiques 43–8
Access to Justice (Interim and Final
Reports, 1995 and 1996) 66
adjudication 16
administrative cases 119, 196
ADR see Alternative Dispute
Resolution (ADR)
Afcons Infrastructure Ltd and another
v. Cherian Varkey Construction
Co. (P) Ltd and others (2010),
India 212, 214
African countries 54–5
Ahmedabad Mediation Centre,
India 209
AIJA (Australian Institute of Judicial
Administration) 38
Alternative Dispute Resolution
(ADR) 49, 66
see also Alternative Disputes
Resolution Act 1998, US;
Alternative Disputes Resolution
Act 2010, Ghana; arbitration;
arbitrators; conciliation; court-
based mediation; mediation;
National Alternative Dispute
Resolution Advisory Council,
Australia
Australia 158, 160, 163, 164
China 189
France 99, 106
global context of court mediation
reform 25, 27, 31, 32
global mediation survey 221
Hong Kong 85, 86
impartiality and effectiveness 96,
138, 156, 168, 184, 204
India 206
Italy 173, 174
Malaysia 126
The Netherlands 112, 113
organizations providing ADR
services, monitoring 107
Platform ADR 113
United States 45, 143, 144, 145, 146,
155
Alternative Disputes Resolution Act
1998, US 146
Alternative Disputes Resolution Act
2010, Ghana 55
arbitration 55, 106, 132, 171, 189
see also Arbitration and Conciliation
Act 1996, India; Institute of
Arbitration and Mediation
(IIAM), India; Kuala Lumpur
Regional Centre for
Arbitration
Australia 164, 167
awards 214
India 206, 209, 214, 215
Arbitration and Conciliation Act 1996, India 208, 209
Assisted Dispute Resolution programme, Australia 160
Australia 158–69
Alternative Dispute Resolution (ADR) 158, 160, 163, 164
arbitration 164, 167
Assisted Dispute Resolution programme 160
Civil Dispute Resolution Act 2011 (CDRA) 159, 162–5, 167
civil justice ranking 167–9
civil justice system 158, 168, 169
court-annexed mediation 28
Courts (Mediation and Arbitration) Act 1991 160
District Court Act 1967 (Queensland) 30
Federal Circuit Court (Magistrates Court) 158, 162
Federal Court 158, 162
Federal Court of Australia Act 1976 158, 160, 164, 167
Federal Court Rules 2011 162
High Court 158
Institute of Judicial Administration (AIJA) 38
Law and Justice Legislation Amendment Act 1997 160
law/policy background 159–62
Legal Aid Commissions 161, 162
legal aid policy 160–62
mandatory mediation in 28, 37–8, 52, 159–60
National Alternative Dispute Resolution Advisory Council (NADRAC) 38, 159
New South Wales 28, 29, 30, 37–8, 47
practical implementation of ADR policies 164–6
programme features 162–4
Requirement to Attend Mediation Orientation Session 30
research results, analysis 167–9
South Australia 30
tribunals 162
Victoria 28, 30, 159, 162

Australian Competition and Consumer Commission v. Collagen Aesthetics Australia Pty Ltd (2002) 165, 166
backlogs of cases see case backlogs
Bangalore Mediation Centre 216
Bosnia and Herzegovina 33, 232
Brazil 27
Burchell v. Bullard (2005) 72
California 147, 148, 153, 155
Camp David mediation 42
CAMS see Court of Appeal Mediation Scheme (CAMS), UK
Canada mandatory mediation 30, 37
Public Service Staff Relations Board 40
Quebec 226
Saskatchewan province 56, 226
Carter, President Jimmy 42
case backlogs 257
global context of court mediation reform 26, 29, 36
India 35, 206, 210, 211
Italy 170, 171–2, 174, 185
Malaysia 126–7
programme design 55, 58
caseload reduction rationale, court mediation reform 3, 18, 67, 228, 250, 257
global context of court mediation reform 26, 27, 29, 34–5, 37, 38, 43, 48
CDRA see Civil Dispute Resolution Act 2011 (CDRA), Australia
CEDR Solve (mediation provider), UK 69, 70
Central London County Court (CLCC)
Automatic Referral to Mediation pilot scheme 30
county court trial centre 32
voluntary mediation scheme (VOL) 66, 67–8, 79–80
Centre for Effective Dispute Resolution (CEDRI), UK 81
CFI (Court of First Instance), Hong Kong 85, 95, 96
Index

Champion Concord Ltd v. Lau Koon Foo (No. 2) FACV16/2010; (2011), Hong Kong 92
Chennai Mediation Centre, India 210
Chew Hon Keong v. Betterproducts Industries Sdn Bhd (2013), Malaysia 134, 135
China 186–205
civil justice ranking 203–5
civil justice system 187, 188, 204
civil mediation paper (consent judgment) 198–9
Civil Procedure Law, PRC 186, 190, 194, 198, 202
Confucianism 189
contracts 199, 200–201, 202
costs issues 202–3
everly studies of mediation in 185–6
fees 202
ground rules 194–8
initiating legislation 191–2
initiating of mediation 194
judicial mediation 188–9, 191–4
advantages, Chinese context 191–2
costs incurred 202–3
scope of application for 194
in various phases of civil litigation process 192–4
legality principle 195–6
litigation era (1990s) 190–91
mediation process 196–8
People’s Mediation Committee 196
policy background 189–92
post-litigation era (post-2000s) 191
post-mediation implications 198
practical implementation 200–201
pre-litigation era (1950s to the 1980s) 190
principles of Chinese mediation 195–6
programme features 192–9
rationale for mediation 191–2
research results, analysis 201–5
revolutionary era 189–90
scheduling of mediation sessions 192–4
scope of application for judicial mediation 194
statistics, mediation-related 201–2
in-trial mediation 193–4
Chint Group Corporation v. Schneider Electric Low Voltage (Tianjin) Co. Ltd (2007), China 200
‘chotei,’ Japan 54
Civil Dispute Resolution Act 2011 (CDRA), Australia 159, 162–5, 167
enforceability 163–4
practical implementation 164–5
procedure 162–3
civil justice
see also justice
civil justice rankings
Australia 167–9
China 203–5
Hong Kong 96–7
India 27
Italy 183–5
Malaysia 137–8
The Netherlands 122–3
United Kingdom 82–4
United States 155–7
civil justice reform
see also reform of court mediation
Hong Kong Civil Justice Reform (CJR) 85, 86, 88, 91, 93
Italy 170
United States 145
civil justice systems 9, 12, 26, 31–2, 37, 252
Australia 158, 168, 169
China 187, 188, 204
France 109
Hong Kong 96
India 216
Italy 170, 171, 174, 181, 184, 185
Malaysia 125, 128, 137, 138
The Netherlands 110, 122, 123, 124
United Kingdom 67, 82, 83
United States 155, 156
civil law
see also commercial disputes
contracts see contracts
employment 27, 42, 47, 65
family cases see family law
property 182, 214, 215
Civil Mediation Online Directory, UK 67

Shahla F. Ali - 9781786435866
Downloaded from Elgar Online at 02/13/2019 06:47:07AM
via free access
Court mediation reform

civil mediation paper (consent judgment) 198–9
Civil Procedure Act, India 206
Civil Procedure Code (CPC), The Netherlands 112
Civil Procedure Rules (CPR), Hong Kong 29
Civil Procedure Rules (CPR), UK 44, 68, 70, 74–6, 78
CLCC see Central London County Court (CLCC)
Code of Civil Procedure, France 101, 103, 105, 107
Code of Civil Procedure, India 35, 208–9, 212
coercion to mediate 13, 30, 195, 253 see also mandatory mediation
global context of court mediation reform 44, 46
non-coercive mediation 230, 255
Colombia 36
commercial disputes
France 100, 101
India 214, 215
Italy 172, 173, 175, 176
Malaysia 131
community-based mediation 41–2
conciliation 79, 101, 250
India 206, 209, 214, 215
Italy 170, 171, 175
mandatory 36
versus mediation 206
Model Law on International Commercial Conciliation, UNCITRAL 60, 61
programme design 54, 60, 61
traditional 10
confidence in mediation 252–3
Australia 168–9
China 203, 204
France 109
global mediation survey 229–30
Hong Kong 86, 96–7
India 207, 216
Malaysia 137–8
mandatory mediation 221, 253–4
measures 9
The Netherlands 111, 122
United Kingdom 82, 83–4
United States 144, 155
confidence in proceedings
France 99, 102
India 215
Italy 152, 179
Malaysia 129
The Netherlands 112, 115, 116
programme design 55, 61
conflicts of interest 15, 19, 239–40, 257
avoiding 91, 116
Confucianism, China 189
consent for mediation agreement 197
all parties 125, 148, 206, 214
both parties 69, 127, 214
decrees 153
delay in 73
France 102
global context of court mediation reform 39
judgments 134, 197, 198–9
judicial mediation 99
lack of 6, 30, 179, 193, 213, 214, 215
Malaysia 127
mutual 151, 213, 215
orders 76, 133, 134, 135
programme design 50, 51, 57
United Kingdom 69, 71
United States 146, 151, 152
written 91
contracts 27
China 199, 200–201, 202
Hong Kong 92, 94
India 213, 215
Italy 173, 178, 182
United Kingdom 69, 76
United States 152
costs issues
see also fees
awards 71, 72, 74, 163, 165
China 202–3
France 103
global mediation survey 226–7
Hong Kong 94–5
Italy 180
judicial mediation 202–3
The Netherlands 118, 121–2
reduction of cost rationale for court-based mediation 18, 26, 31–4, 48, 192, 228, 232, 250, 257
United Kingdom 77

Shahla F. Ali - 9781786435866
Downloaded from Elgar Online at 02/13/2019 06:47:07AM
to via free access
United States 151
unreasonable failure to engage in mediation 94–5
voluntary mediation 232–4
Court of Appeal Mediation Scheme (CAMS), UK 67
see also United Kingdom
pre-settlement 69–70
post-settlement 70
statistics 80
Court of First Instance (CFI), Hong Kong 85, 95, 96
Court of Justice of the European Union (CJEU) 45, 58
court procedures, complexities 27
court-annexed mediation
Australia 28
data collection 7
India 35–6, 210
Malaysia 126, 129, 130–32, 134, 137
The Netherlands 36
court-based mediation
see also mediation; reform of court mediation
confidence in programmes see confidence in mediation 229–30
costs 226–7
in-court mediation 113, 188
court-annexed mediation see court-annexed mediation
court-ordered mediation 181
efficacy issues 25
extrinsic factors 2, 26, 39–43, 249–50
improvement strategies 242–7
intrinsic policy justifications 2, 26–43, 249–50
judge-led 129–30, 133, 136
pre-trial 128, 147, 164, 193
process considerations 40–41
public policy 46–7
rationales for see rationales for court-based mediation
reform aims, global context 25–48
regional implementation of 29
scholarly critiques of rise in access to justice 45–6
inconsistency with institutionalized court-based settings 44–5
public policy 46–7
response to 48
unsuitability for particular case types 47
scholarly critiques of rise of strengths and challenges 235–42
time reduction 38
in-trial 53, 193–4
court-ordered mediation, Italy 181
Courts (Mediation and Arbitration) Act 1991, Australia 160
Courts and Legal Services Act 1990, UK 31
CPC Amendment Act, India 208
criminal law
Australia 164
China 190
France 99, 100, 105, 107
global context of court mediation reform 28, 36
India 213
Malaysia 127
programme design 56
United Kingdom 67
cross-border law 58, 61
CY Foundation Group Ltd v. Leonora Yung and others (2011), Hong Kong 93
data collection methodology 7–10
survey data collection method 224–6
Dato’ Dr Joseph Eravelly v. Dato Hilmi Mohd Nor (2011), Malaysia 135
delay reduction, as rationale for court-mediation reform
Australia 167, 169
China 204, 205
France 109, 110
global context of court mediation reform 19, 26, 30, 34–9
Hong Kong 86, 96, 98
Italy 184
Malaysia 125, 137, 139
The Netherlands 111, 123, 124
United Kingdom 65, 82, 84
United States 144, 155, 157
Delhi High Court Mediation and Conciliation Centre 210
Court mediation reform

Denmark 53–4

discrimination reduction rationale 19, 86, 110, 111, 124, 169
Malaysia 125, 139
United States 144, 157
dispute settlement

cultural and societal approaches to 53
dispute types 55–6
District Courts (DCs), Hong Kong 85, 95
divorce law 106, 121, 197
domestic violence cases 236

Dunnett v. Railtrack plc (2002), UK 69, 71–2, 80

economic development 27
effectiveness of ADR 96, 138, 156, 168, 184, 204
efficiency factors 252–3
Australia 167, 168
China 203, 204
economic development and judicial efficiency 27
France 109–10
Hong Kong 86, 96
India 207, 216
Italy 184
Malaysia 137
measures 9
The Netherlands 111, 122, 123
programme design 232
rationales for mediation 51
and rise of court-based mediation 26–30
Singapore as role model 27–8
United Kingdom 82
United States 144, 155
voluntary mediation 253, 256
employment 27, 42, 47, 65
labour disputes 56, 175
enforcement of mediated agreements

Australia 163–4
Civil Dispute Resolution Act 2011 (CDRA), Australia 163–4
cross-border 61
France 105
Hong Kong 92
India 213–14
Malaysia 134
mediation award 213–14
settlement agreements 75–6
United Kingdom 75–6
United States 152–3
EU Mediation Directive 2008/52/EC 45
and France 99, 100, 101, 102, 106
and Italy 170, 172–3, 185
and The Netherlands 112
voluntary and mandatory mediation 57–8
European Convention on Human Rights (ECHR) 45, 59
European Council 99
European Court of Human Rights (ECtHR) 58
European Parliament 172
expenses see costs issues; fees
Expert Group Customized Conflict Resolution program, The Netherlands 114
extrinsic factors, court-based mediation 2, 26, 39–43, 249–50
process considerations 40–41
relational justifications 39–40
societal considerations 41–3

family law
divorce 106, 121, 197
domestic violence cases 236
matrimonial law 131
Federal Circuit Court, Australia 158, 162
Federal Court of Australia 158, 162
Federal Court of Australia Act 1976 158, 160, 164, 167
fees
calculating 202
cancellation 70
case acceptance 202
China 202
contingent 91
court 34, 211
expert witness 180
fixed 69
free or discounted 53
global mediation survey 226–7, 233, 240
Hong Kong 91
Index 279

hourly 240
India 211
Italy 177, 180
Malaysia 132
mandatory mediation 257
The Netherlands 118
paid for by parties 257
subsidized 118
United Kingdom 31, 68, 69, 70, 71, 81, 82
venue 82
waiver 180
Finland 42
Fiss, Owen 15, 46
Florida 148, 151, 154, 227
France 99–110
civil justice system 109
Club of Mediators for Public Service 108
Code de procédure civile (Code of Civil Procedure) 101, 103, 105, 107
commercial disputes 100, 101
court powers to monitor organizations providing ADR services 107
Decree 2012/-66 of 20 January 2012 100–101
effect of mediation on limitation period 106
and EU Mediation Directive 99, 100, 101, 102, 106
ground rules, ADR programmes 104–5
Inter-enterprises Mediator 108
International Arbitration Chamber of Paris 104
Law No. 95-125 of 8 February 1995 100, 103, 104, 105
law/policy background 100–101
Mediation Ordinance No. 2011/1540 99–100, 102
Mediator of Economic and Financial Ministries 108
Ministry of Justice and Freedoms 100, 102
National Federation of Mediation Centres 104
Paris Mediation and Arbitration Centre 104
practical implementation of ADR policies 105–7
procedures and scheduling of mediation 103–4
programme features 102–5
purpose/rationale behind mediation programme 101–2
referral for mediation 105–6
research results, analysis 108
settlement agreements, enforceability 105, 107
voluntary mediation 99, 102, 110
free will 51, 195
Fuller, Lon 1, 15, 16
Garby, Thierry 101
Garg, Shashank 210
Garritt-Critchley v. Ronnan (2014), UK 77
general public polling (GPP) 8
Genn, H. 79
Ghana 54–5
Global Competitiveness Report 2016–2017
Australia 169
France 109–10
Hong Kong 96
India 216
Italy 184
Malaysia 137
The Netherlands 123
United Kingdom 83
United States 155
global mediation survey 221–48
certainty in court mediation programmes 229–30
court mediation costs 226–7
efficiency 232–5
fairness 230–32
fees 226–7, 233, 240
findings 229–35, 242–7
improvement strategies, mediation programmes 242–7
limitations 222
rationale for introducing at mediation programmes 227–9
strengths and challenges of court mediation programmes 223, 235–42
summary of findings 222–4
survey data collection method 224–6
Global Pound Conference (GPC) 223–4
Golden Eagle International (Group) Ltd v. GR Investment Holdings Ltd (2010), Hong Kong 94, 95
‘good faith’ requirements 51
Grillo, T. 47
Group of Friends of Mediation, United Nations 42
Gujarat Law Society, India 210

Hak Tung Alfred Tang v. Bloomberg LP and Another (2010), Hong Kong 94
Halsey v. Milton Keynes General NHS Trust (2004), UK 45, 72, 77, 94–5
hearings 27, 70
Her Majesty’s Courts Service (HMCS) Small Claims Mediation Scheme, UK 67, 68, 70, 80
HMCS (Small Claims Mediation Scheme), UK 67, 68, 70, 80
Hong Kong 85–98
Alternative Dispute Resolution (ADR) 85, 86
civil justice ranking 96–7
Civil Justice Reform (CJR) 85, 86, 88, 91, 93
civil justice system 96
Civil Procedure Rules 29
Construction and Arbitration List 87
contracts 92, 94
Court of First Instance 85, 95, 96
court power to resolve points of difference in mediation proposals 93–4
court-based mediation 29
District Courts (DCs) 85, 95
duration of case 95–6
Governmental 2007–2008 Policy Address 87
initiating legislation 88–9
Joint Mediation Helpline Office 86
Lands Tribunal 87
law/policy background 86–9
Mediation Certificate, filing 89–90
Mediation Code 90, 91–2
Mediation Co-ordinators’ Offices 85
Mediation Council 42
Mediation Minute 90
Mediation Notice 90
Mediation Ordinance (MO) 91–2
Mediation Response 90
New Insurance Mediation Pilot Scheme (NIMPS) 88
pilot programmes 42, 86, 87–8
practical implementation of ADR policies 93–4
Practice Direction 3.3 88
Practice Direction 6.1 87
Practice Direction 31 29, 85, 88, 89, 92, 93
programme features 89–95
Proposal 64 29
Proposal 68 86–7
referral for mediation 86
research results, analysis 95–7
Rules of the High Court (Amendment) Rules 2008 88–9, 95
settlement agreements 92
voluntary mediation 29
webpage, mediation-dedicated 86
Working Party on Mediation 29, 86, 87, 91
human rights considerations 26
critique of court-based mediation 45–6
mandatory or voluntary mediation 58, 59
Illinois 146–7, 148
impartiality 26, 179
of ADR 96, 138, 156, 168, 184, 204
of mediators 116, 130, 179
implementation of ADR policies
Australia 164–6
China 200–201
France 105–7
Hong Kong 93–4
India 214–15
Malaysia 135
The Netherlands 118
United Kingdom 76–8
United States 153–4
improvement strategies, court mediation programmes
Index

access to justice 246
enhanced mediator training 242–3
financial and organizational resources 244–5
flexible settlement arrangements 246
ongoing evaluation 246–7, 256–7
public education 244
rewards and incentives 245–6
in-court mediation 113, 188
indemnity basis, costs paid on 77
independence, duty of 130
India 206–18
Ahmedabad Mediation Centre 209
arbitration 206, 209, 214, 215
Arbitration and Conciliation Act 1996 208, 209
Bangalore Mediation Centre 216
British style courts in 207
case backlogs 35, 206, 210, 211
Chennai Mediation Centre 210
civil justice ranking 27, 216–17
civil justice system 216
Civil Procedure Act 206
Code of Civil Procedure (CPC) 35, 208–9, 212
commercial disputes 214, 215
conciliation 206, 209, 214, 215
contracts 213, 215
contributions of mediation in 211
court-annexed mediation 35–6, 210
CPC Amendment Act 208
Delhi High Court Mediation and Conciliation Centre 210
enforcement 213–14
evolution of mediation in 209–11
fees 211
Gujarat Law Society 210
historical background 207–8
Industrial Disputes Act 1947 208
initiating legislation 208–9
Institute for Arbitration Mediation Legal Education and Development (AMLEAD) 210
Institute for the Study and Development of Legal Systems (ISDLS) 209
Institute of Arbitration and Mediation (IIAM) 42
Legal Services Authority Act 1987 35, 208
Lok Adalats (specialized courts) 35, 206, 207, 208, 209, 213
Madras High Court 210
mandatory mediation 206, 216, 217
Mediation and Conciliation Project Committee (MCPC) 210
mediation process 211–12
Pancha 207
Panchayat system 207
policy background 207–11
practical implementation of ADR policies 214–15
programme features 211–14
rationale for mediation 210–11
referral for mediation 212–13
research results, analysis 215–17
US Educational Foundation in India (USEFI) 210
Indiana 147, 148, 150
Industrial Disputes Act, India 208
industrial mediation 196
Institute for Arbitration Mediation Legal Education and Development (AMLEAD), India 210
Institute for the Study and Development of Legal Systems (ISDLS), India 209
Institute of Arbitration and Mediation (IIAM), India 42
institutional mediation inconsistency with institutionalized court-based settings 44–5
Malaysia 133–4
Inter-American Commission on Human Rights (IACHR) 59
Inter-American Court of Human Rights 58
International Arbitration Chamber of Paris 104
International Chamber of Commerce 104
in-trial mediation 53, 193–4
intrinsic policy justifications 2, 26–43, 249–50
Israel 56
Italy 170–85
acceptance rates 181–2
case backlogs 170, 171, 174, 185
civil justice ranking 183–5

Shahla F. Ali - 9781786435866
Downloaded from Elgar Online at 02/13/2019 06:47:07AM
via free access
Court mediation reform

civil justice system 170, 171, 174, 181, 184, 185
commercial disputes 172, 173, 175, 176
conciliation 170, 171, 175
Constitutional Court 174–5, 182
contracts 173, 178, 182
court-ordered mediation 181
Decree 28/2010 170
entry into force 174
impartiality of mediators 179
initial mandatory mediation scheme under 173–5
mediation settlement 177–9
Decree 180/2010 173, 175
Decree 145/2011 173
Decree 69/2013 170
court-ordered mediation 181
initial mediation session 181
new scope of mandatory mediation under 176
revival of mandatory mediation scheme under 175
and EU Mediation Directive 170, 172–3, 185
fees 177, 180
impartiality of mediators 178, 179
initial mediation session 181
Law 580/1993 171
Law 249/1997 175
Law 80/1998 175
Law 69/2009 172–3
Law 98/2013 175, 177
mandatory mediation 52, 170, 173–5, 176, 178–9
mediation procedure 176–8
mediation settlement 178–9
practical implementation of ADR policies 180–81
programme features 176–80
‘pro-litigation’ legal environment and court overload 171–2
research results, analysis 181–5
settlement rates 182–3
time and costs of mediation 180
trial length 27

Japan 54
Jeray v. Blue Mountains City Council (2013) 166

Johor Bharu, Malaysia 126
judge-led mediation
see also judicial mediation
China 188–9, 192–4
versus court-annexed mediation 189
Malaysia 127, 129–30, 133, 136
scope of application for 194
versus settlement, 188–9
Judicial Improvements Act, US 144
judicial mediation
see also court-based mediation;
judge-led mediation
advantages, Chinese context 191–2
China 188–9, 191–4
France 106
and litigation 189, 192–4
versus settlement 188–9
signed agreement reached during 188–9
versus court-annexed mediation 189
justice
access to see access to justice
civil see civil justice
impartial 26
perceptions of see perceptions of justice
procedural 47
justifications for court-based mediation see rationales for court-based mediation

Kenya 55
Kilthistle No. 6 Pty Ltd and others (Receiver and Manager Appointed) v. Austwide Homes Pty Ltd and others (1997), Australia 163, 165
King Par LLC v. Brosnan Golf Pty Ltd (2013), Australia 159, 165
Kuala Lumpur, Malaysia 126, 136
Kuala Lumpur Court Mediation Centre 129
Kuala Lumpur Regional Centre for Arbitration 127, 128
institutional mediation under 130
KLRCA Rules of Mediation 130
Kuantan, Malaysia 126, 136

Shahla F. Ali - 9781786435866
Downloaded from Elgar Online at 02/13/2019 06:47:07AM
via free access
Landelijk bureau Mediation naast rechtspraak (Dutch Court-Connected Mediation Agency) 113, 114
‘landing and building leases mediation,’ Japan 54
Law and Justice Legislation Amendment Act 1997, Australia 160
Law Society of New South Wales 29
LBM see Landelijk bureau Mediation naast rechtspraak (Dutch Court-Connected Mediation Agency)
Legal Aid Commissions, Australia 161, 162
legal aid policy
Australia 160–62
Italy 180
Malaysia 132
United Kingdom 31, 67
legal culture 111, 123, 180
local 25
Legal Services Authority Act 1987, India 35, 208
limitation periods, France 106
litigation
Italy, ‘pro-litigation’ legal environment and court overload 171–2
judicial mediation 189, 192–4
litigation era, China (1990s) 190–91
versus mediation 126, 229, 236
post-litigation era, China (post-2000s) 191
pre-litigation era, China (1950s to the 1980s) 190
satellite 233, 257
Lok Adalats (specialized courts), India 35, 206, 207, 208, 209, 213
longitudinal analysis 8, 10, 252
Luban, D. 46–7
Ma Xiwu, Trial Mode 189, 190
Macedonia 232
Malaysia 125–39
ADR terminologies and definitions 127
case backlogs 126–7
civil justice ranking 137–8
civil justice system 125, 128, 137, 138
commercial disputes 131
court-annexed mediation 126, 129, 130–32, 134, 137
diversity in 125
enforceability of agreements 134
fees 132
ground rules 132–4
historical background 125–6
institutional mediation 133–4
judge-led mediation 129–30, 133, 136
Kuala Lumpur Court Mediation Centre 129
Kuala Lumpur Regional Centre for Arbitration 127, 128
KLRCA Rules of Mediation 130
Legal Aid Department 132
Mediation Act 2012 128–9
Mediation Centre 127, 130–31
Mediation Committee of the Bar Council 126
mediation process 132–4
policy background 125–7
practical implementation of ADR policies 135
Practice Direction No. 4 on mediation 126, 128
Practice Direction No. 5 on mediation 126, 128
programme features 127–32
rationale for mediation 126–7
research results, analysis 135–8
Rules of the High Court 1980 128
scheduling of mediation sessions 127–9
Subordinate Courts Rule 1980 128
voluntary mediation 125, 133, 138
Malmesbury (James Carleton, Seventh Earl of Malmesbury) and others v. Strutt & Parker (a Partnership) (2008) 72
mandatory mediation
see also voluntary mediation
access to justice 46
Court mediation reform

appropriate, where 236
Australia 28, 37–8, 52, 159–60
Canada 30, 37
characterization of jurisdictions practising 6
conceptual divide between voluntary and mandatory mediation 50–57
confidence in 221, 253–4
cost considerations 33–4
direct court supervision 51
efficiency factors 232
improvement strategies 223
India 206, 216, 217
Italy 52, 170, 173–5, 176, 178–9
versus judicial determination 47
jurisdictional selection 52, 53
key achievements 223, 235–6, 252
key challenges 153, 223, 238–40
power imbalances, managing 240
programme design 49–61
regional and international approaches to 57–61
resource limitations 240
settlement rates 236
United States 143–4, 148–9, 154, 155
voluntary versus mandatory mediation 232–3
Massachusetts 154
matrimonial law 131
mediation
see also costs issues; court-based mediation; efficacy of global court mediation reform, assessing; fees; judge-led mediation; judicial mediation; mandatory mediation; mediation processes; mediators; perceptions of justice; referral for mediation; respective countries; voluntary mediation
adaptability across jurisdictions 49, 50
administrative 119, 196
coercion 13, 30, 44, 46, 195, 253
conceptual divide between voluntary and mandatory mediation 50–57
versus conciliation 206

conclusion of 117–18
consent for see consent for mediation
cross-border law 45
defining 60, 102–3
degree of movement along voluntary/mandatory spectrum 5
EU Mediation Directive see EU Mediation Directive 2008/52/EC
industrial 196
institutional 133–4
judicial see judicial mediation
jurisdictional selection of mandatory or voluntary systems 52–7
lawyers, engagement with trial programmes 52–3
versus litigation 126, 229, 236
online 57
opt-in/opt-out rules 5–6, 256
practical implementation see mediation, practical implementation
public acceptance 181–2
regional and international approaches to 57–61
rejection of 71–2, 76, 77, 94–5
reports 151
satisfaction with 17
success of 232–3
telephone-based 70
timing of see time frames/timing of mediation
unreasonable failure to engage in/unreasonable refusal 71–2, 77, 94–5
voluntary nature of 72–3
voluntary versus mandatory 232–3
Mediation and Conciliation Project Committee (MCPC), India 210
Mediation Code, Hong Kong 90
ground rules 91–2
Mediation Council, Hong Kong 42
Mediation Ordinance (MO), Hong Kong 91–2
Mediation Ordinance No. 2011/1540, France 99–100
mediation, practical implementation
Index

Australia 164–6
China 200–201
France 105–7
Hong Kong 93–5
India 214–15
Italy 180–81
Malaysia 135
The Netherlands 118
United Kingdom 65, 76–8
United States 153–4
mediation processes
  China 196–8
  India 211–12
  Italy 176–8
  Malaysia 131, 132–4
  The Netherlands 115–16, 120–21
  normative and public policy expectations 51
  processing time 120–21
  rationales for court-based mediation 39, 40–41
  United Kingdom 74–5
  United States 147–50
  mediation rationales see rationales for court-based mediation
mediators
  Club of Mediators for Public Service, France 108
  conduct 104–5
  duties 104–5
  confidentiality 91
  impartiality 116, 130, 178, 179
  independence 130
  European Code of Conduct for Mediators 104
  ground rules, explaining 150–51
  Mediator of Economic and Financial Ministries, France 108
  multi-functional role 132
  qualifications 174
  quality of 240, 241–2
  reporting obligations 51–2
  training of 210, 242–3
  Mediators Without Borders group 43
  mediatory adjudication 195
  methodology, research see also Global Competitiveness Report 2016–2017; Rule of Law Index 2016
correlation 11, 12, 20, 222–3, 252, 258
data collection 7–10
  Global Competitiveness Report (GCR) 8, 9
  improvement of overall court mediation process by program type 223–4
judicial and governance indicators 8, 9, 10
longitudinal analysis 5, 8, 252
  Rule of Law Index (ROI) 8, 9
  strengths and challenges 10–11, 252
  survey data collection method 224–6
t-test 11
Michigan 147, 148, 151
  Ministry of Justice and Freedoms, France 100, 102
Missouri 149
MMC (Malaysian Mediation Centre) 127, 130–31
  Mediation Rules 131
  Model Law on International Commercial Conciliation, UNCITRAL 60, 61, 251
  Moti Ram v. Ashok Kumar (2011), India 215
  multi-door courthouse 2, 233, 257
  Murray v. Bernard (2015), UK 78
NADRAC (National Alternative Dispute Resolution Advisory Council), Australia 38, 159
National Alternative Dispute Resolution Advisory Council, Australia 38
National Alternative Dispute Resolution Advisory Council (NADRAC), Australia 38, 159
National Federation of Mediation Centres, France 104
National Mediation Helpline, UK 66–7, 71, 81
Netherlands, The 111–24
  administrative cases 119
  civil justice ranking 122–3
  civil justice system 110, 122, 123, 124
  Civil Procedure Code (CPC) 112
community support for mediation 118
conclusion of mediation 117–18
costs issues 118, 121–2
Council of the Judiciary 121–2
court-annexed mediation 36
Court-Connected Mediation Agency (LBM) 113, 114
development of Dutch mediation programme 112–14
and EU Mediation Directive 112
Expert Group Customized Conflict Resolution program 114
fees 118
law/policy background 111–14
legal representation 117
Mediation Institution (NMI) 113, 120
mediation process 115–16
Ministry of Justice 112, 113
pilot programmes 113
Platform ADR 113
practical implementation of ADR policies 118
processing time 120–21
pro-conciliation legal culture and lack of regulation 111–12
programme features 114–18
referral for mediation 111, 114–15, 119
Research and Documentation Centre, Ministry of Justice 113
research results, analysis 119–23
resolution time frame 121
settlement 117–18
settlement rates 119–20
voluntary mediation 112, 122, 123–4
New Insurance Mediation Pilot Scheme (NIMPS), Hong Kong 88
New South Wales, Australia 28, 29, 30, 37–8, 47
New York 146, 147, 148, 152
Nigel Witham Ltd v. Robert Lesley Smith and Jacqueline Isaacs (2008) 73
NIMPS (New Insurance Mediation Pilot Scheme), Hong Kong 88
non-coercive mediation 230, 255
North Carolina 34, 147, 148, 149, 150, 152
nudge theory 12, 253
OECD (Organisation for Economic Co-operation and Development) 27
ongoing evaluation 246–7, 256–7
online mediation 57
oral referral for mediation 114
orders, court-ordered mediation 181
Pancha, India 207
Panchayat system, India 207
Paris Mediation and Arbitration Centre 104
party entrenchment 241
People's Republic of China (PRC) 186
see also China Civil Procedure Law 186, 190, 194, 198, 202
Mediation Law 188
Provisional Organic Regulations 190
perceptions of justice 252–3
Australia 169
China 205
France 109, 110
Hong Kong 89, 96, 97, 98
India 207, 216
Italy 185
measures 9, 10
The Netherlands 111, 122, 123
United Kingdom 82
United States 144, 155, 157
PGFII SA v. OMFS Company I Ltd (2013), UK 76, 77
Philippines 227
pilot programmes 258
Canada 37
Hong Kong 42, 86, 87–8
The Netherlands 113
United Kingdom 30, 66, 67, 68
post-litigation era, China (post-2000s) 191
post-traumatic stress disorder (PTSD) 236
post-trial mediation 193
power imbalances, managing 15, 20, 21, 47, 223, 240, 257, 258
PRC see People’s Republic of China (PRC)
pre-litigation era, China (1950s to the 1980s) 190
pre-trial mediation 128, 147, 164, 193
process considerations, court-based mediation 40–41
process pluralism 17
programme design 49–61
see also mandatory mediation; voluntary mediation
case backlogs 55, 58
conciliation 54, 60, 61
confidentiality in proceedings 55, 61
consent for mediation 50, 51, 57
context dependant 258
criminal law 56
efficiency factors 232
mixed methods of mandatory and voluntary mediation 6
property law 182, 214, 215
public education 242, 244
public policy
critique of court-based mediation 46–7
mediation settlement 179
voluntary and mandatory mediation,
conceptual divide 51, 52
Public Service Staff Relations Board, Canada 40
qualified respondent questionnaires (QRQs) 8
Quebec, Canada 226
rationales for court-based mediation
see also court-based mediation;
voluntary mediation
rational for court-based mediation
see caseload reduction rationale, court
mediation reform
cost reduction see costs issues
court access see access to justice
delay reduction see delay reduction,
as rationale for court-mediation reform
effectiveness and efficiency 26–30
extrinsic 2, 26, 39–43, 249–50
harmony 41, 87, 125, 189, 191
impartiality 26
India 210–11
intrinsic 2, 26–43, 249–50
Malaysia 126–7
outcome fairness 230–32, 254–5
process considerations 40–41
quality of outcomes/decisions 228, 229, 254
relational justifications 39–40
self-determination 17, 44
societal considerations 41–3
United Kingdom 67–8
voice in outcome, giving to parties 228
workplace relations, improving 40
RDC (Rules of the District Court (Amendment) Rules 2008, Hong Kong 88–9, 95
referral for mediation
automatic 6
categorical 30, 158
discretionary 6, 30, 158
France 105–6
Hong Kong 86
India 212–13
The Netherlands 111, 114–15, 119
oral 114
self-referral 114–15, 235
written 114, 119
reform of court mediation
aims, global context 25–48
assessing efficacy of global court mediation reform 1–22
civil case administration 2
data collection methods 7–10
empirical studies 25
findings, summary of 11–15
global mediation survey 232–5
limitations 10–11
programme quality 257–8
spill-over benefits 257
theoretical background 15–18
relational justifications, court-based mediation 39–40
res judicata 107
Research and Documentation Centre of the Dutch Ministry of Justice 113
research results, analysis
see also methodology, research;
statistics, research
Australia 167–9
China 201–5
France 108
Hong Kong 95–7
India 215–17
Italy 181–5
Malaysia 135–8
The Netherlands 119–23
United Kingdom 79–81
United States 154–7
Resource Development Ltd v.
Swanbridge Ltd (2009), Hong
Kong 93–4
resources
financial and organizational 244–5
limitations 240, 241
revolutionary era, China 189–90
rewards and incentives 245–6
rule of law
Hong Kong 86, 98
India 217
United Kingdom 82, 84
Rule of Law Index 2016
Australia 168
China 204
India 217
Italy 184
The Netherlands 123
United Kingdom 84
United States 156–7
Rules of the High Court (Amendment)
Rules 2008, Hong Kong 88–9, 95
Sabah Forest Industries Sdn Bhd
v. Mazlan bin Ali (2012), Malaysia 135
Salem Advocate Bar Association (II),
Tamil Nadu v. Union of India
(2005), India 214
Sander, F.E.A. 6
Saskatchewan province, Canada 56, 226
satellite litigation 233, 257
scheduling of mediation sessions
China 192–4
France 103–4
Malaysia 127–9
United States 146–7
self-determination 17, 44
self-referral for mediation 114–15, 235
Serbia 232
settlement
case settlement 5
enforceability of agreements
see settlement agreements, enforceability
flexible arrangements 246
versus judicial mediation 188–9
The Netherlands 117–18
out of court 47
partial agreement 117–18
rates of see settlement rates
wakai (judicial settlement), Japan 54
settlement agreements, enforceability
France 105, 107
Hong Kong 92
Malaysia 134
United Kingdom 75–6
settlement rates
see also settlement agreements, enforceability
India 206–7
Italy 182–3
mandatory mediation 236
The Netherlands 119–20
relational and commercial disputes 55–6
United States 154, 155
silence 76, 77, 212
Singapore, as role model 27–8
Small Claims Mediation Scheme
(HMCS), UK 67, 68, 70, 80
soft law 6, 30, 250
South Carolina 149, 150, 154
statistics, research
see also research results, analysis
China 201–2
Hong Kong 95–6
Malaysia 135–7
United Kingdom 79–81
Stienstra, D. 143–4
Stimec, Arnaud 101
Stipanowich, T.J. 6, 7
sub-Saharan Africa 54–5
Index

Superior IP International Pty Ltd v. Ahearn Fox Patent and Trade Mark Attorneys (2012), Australia 164, 165

Supreme People’s Court, China see also China; People’s Republic of China (PRC)
ground rules laid down by 194–5

Notice of the Supreme People’s Court on Issuing Several Opinions on Further Implementing the Work Principle of “Giving Priority to Mediation and Combining Mediation with Judgment” 191

Provisions on Several Issues Concerning the Civil Mediation Work of the People’s Court 191

Several Opinions on Further Displaying the Positive Roles of Litigation Mediation in Building of a Harmonious Socialist Society 191

telephone-based mediation 70
time frames/timing of mediation data collection 8
Italy 180, 183
The Netherlands 120–21
processing time 120–21
resolution time frame 121
United Kingdom 73
voluntary versus mandatory mediation 234

Tomlin orders, UK 76
triangulation of research 7, 8

t-test 11
Turkey 42

UNCITRAL (United Nations Commission on International Trade Law) 6
Conciliation Rules 60
Model Law on International Commercial Conciliation 60, 61, 251

Working Group 250

United Kingdom 65–84

Automatic Referral to Mediation pilot scheme 30

CEDR Solve (mediation provider) 69, 70

Central London County Court Automatic Referral to Mediation pilot scheme 30

county court trial centre 32

voluntary mediation scheme 68

Centre for Effective Dispute Resolution (CEDRI) 81
civil justice ranking 82–4
civil justice review (1990s) 31
civil justice system 67, 82, 83

Civil Mediation Online Directory 67, 71

Civil Procedure Rules (CPR) 44, 68, 70, 74–6, 78

consent for mediation 69, 71

contracts 69, 76
cost reduction 31

Court of Appeal (Civil Division) 67–8

Court of Appeal Mediation Scheme (CAMS) 67, 69–70, 80
court-based ADR initiatives for non-family civil disputes 79–80

Courts and Legal Services Act 1990 31
encouragement of ADR 30, 32
fees 31, 68, 69, 70, 71, 81, 82
government mediation 81–2
ground rules, mediation 71–3
historical background 66–7

Interim Report 1995 32

Legal Aid Board 67

mediation process 74–5
National Mediation Helpline 66–7, 71, 81
non-family cases 69, 79–80
paths to justice survey 79
policy background 66–8
practical implementation of mediation policies 76–8
pre-action protocols 74
programme features 68–71
rationale for VOL pilot scheme 67–8
research statistics 79–81
settlement agreements 75

Small Claims Mediation Scheme (HMCS) 67, 68, 70, 80
Tomlin orders 76

Shahla F. Ali - 9781786435866
Downloaded from Elgar Online at 02/13/2019 06:47:07AM
via free access
voluntary mediation 68, 79–84

Woolf Reforms 32, 66

United Nations

see also UNCITRAL (United Nations Commission on International Trade Law)

General Assembly 43, 61

use of mediation by 42–3


United States 143–57

Alternative Dispute Resolution (ADR) 45, 143, 144, 145, 146, 155

Alternative Disputes Resolution Act 1998 145, 146

budget allocation 32

California 147, 148, 153, 155

challenges regarding mandatory mediation 153

civil justice ranking 155–7

civil justice system 155, 156

conclusion of processes 151–2

Congress 144, 145

consent for mediation 146, 151, 152

contracts 152

costs issues 151

court-based mediation 143–4

enforcement 152–3

Fair Housing Act 153, 154

Federal Rules of Appellate Procedure 143, 144

Federal Rules of Civil Procedure 27

Federal Trademark Act 1946 147

Florida 148, 151, 154, 227

ground rules, explaining by mediators 150–51

Illinois 146–7, 148

Indiana 147, 148, 150

introduction of mediation in (1983) 27

Judicial Conference 1994 144–5

Judicial Improvements Act 144

Justice Department 144, 153

law/policy background 144–6

mandatory mediation 143–4, 148–9, 153, 154, 155

Massachusetts 154

mediation process 147–50

Mediation Reports 151

Michigan 147, 148, 151

Missouri 149

nature and process of mediation 150

New York 146, 147, 148, 152

North Carolina 34, 147, 148, 149, 150, 152

objectives for implementation of mediation programmes 145–6

practical implementation of ADR policies 153–4

programme features 146–53

research results, analysis 154–7

roles and responsibilities of mediators and parties 150–51

scheduling of mediation sessions 146–7

South Carolina 149, 150, 154

unresolved cases 152

Virginia 30

US Educational Foundation in India (USEFI) 210

Victoria, Australia 28, 30, 162

County Court Building Cases List 159

Virginia, United States 30

voluntary mediation see also mandatory mediation

characterization of jurisdictions practising 6

conceptual divide between voluntary and mandatory mediation 50–57

costs issues 232–4

efficiency factors 232, 256

France 99, 102, 110

free will assumption 51

Hong Kong 29

jurisdictional selection 52, 53

key achievements 223, 237–8, 252

key challenges 223, 241–2

Malaysia 125, 133, 138

The Netherlands 112, 122, 123–4

programme design 49–61

regional and international approaches to 57–61

United Kingdom 68, 79–84
Index

voluntary nature of mediation 65, 72–3
voluntary versus mandatory mediation 232–3

wakai (judicial settlement), Japan 54

WODC (Research and Documentation Centre of the Dutch Ministry of Justice) 113

women’s interests, undermining 16

Woolf Reforms, UK 32, 66

World Bank 27, 28

Worldwide Governance Indicators (WGIs) 8, 9

World Economic Forum 8, 9, 28

World Justice Project 8

World Trade Organization (WTO), Dispute Settlement Body 58

written referrals for mediation 114, 119

written settlement agreements 75–6

Wu Yim Kwong Kindwind v. Manhood Development Ltd (2012) 95