Précis of
The Multi-Tasking Judge:
Comparative Judicial Dispute Resolution

The Multi-Tasking Judge brings together a series of papers written by international experts in the field of judicial dispute resolution. They arise from an International Research Collaborative (IRC) in Comparative Judicial Dispute Resolution sponsored by the Law and Society Association. By the term “judicial dispute resolution”, the experts refer to the work undertaken by judges to engage in settlement processes for civil litigation, including judicial conciliation and mediation.

A particular focus of the IRC in Judicial Dispute Resolution is surveying judicial activities regarding judicial dispute resolution in a number of countries, reflecting on that information and suggesting trends, aspirations and future developments. Therefore, the jurisdictional inputs in this significant book range from The Netherlands, Canada, the USA, the People’s Republic of China, and Australia. The Chapters describe, analyse and critique the processes and practices used in these diverse environments, positing that the uptake and development of judicial dispute resolution is the result of a complex mix of factors.

This book presents important theoretical discussion as well as qualitative and quantitative studies, which consider judicial dispute resolution from a range of perspectives. Importantly, for the future, survey instruments included in the book have been designed by a panel of highly regarded experts that can be used to develop and extend our understanding of this important facet of judicial work.

Contents

Foreword by Chief Justice Wayne Martin of the Supreme Court of Western Australia
Preface
Acknowledgments
Introduction by Tania Sourdin and Archie Zariski

Part I: Theory and Context of Judicial Dispute Resolution

Ch 1: ‘The future of judicial dispute resolution: Judges who facilitate participatory justice’ by Jean-François Roberge, Université de Sherbrooke, Canada

In this Chapter, Jean-François Roberge focuses first on the reasons behind the creation of JDR in Canada, where judges have been practising JDR for 20 years now, before moving to an analysis of the future of JDR. He explains how the phenomenon was created to meet the challenge of access to justice, but now it is time, posits the author, to see whether or not the way in which JDR has evolved in Canada “truly meets the needs of Canadians”. Roberge continues by examining in detail the results of various studies into JDR practices and access to justice, concluding that a judge who is a “participatory justice facilitator” has the potential to be the future of JDR. This Chapter invites us to consider dispute resolution achieved through the more active engagement of the litigating parties as a form of justice that is complementary to adjudication and well suited to modern conditions in society.
Ch 2: ‘Understanding judges’ responses to judicial dispute resolution: A framework for comparison’ by Archie Zariski, Athabasca University, Canada

In Chapter 2, one of the Editors, Archie Zariski, attempts to understand the responses by judges JDR, suggesting that while the practice seems to be increasing worldwide, it is not “universally welcomed by judges”. Zariski employs a comparative approach to answer this question and creates a framework to analyse differences that exist. He considers leading theories of judicial behaviour to assist in understanding “why some judges are more prone to act as ‘settlers’ and others to act solely as ‘triers’ of the cases before them”. Then he undertakes an analysis via a modification and extension of activity theory, which allows consideration of the issues from at least four perspectives to understand judicial behaviour in this area more fully. Zariski’s approach encourages us to view judges as enmeshed in a variety of organisational and institutional systems all of which influence, and are influenced by, their judicial dispute resolution activities.

Ch 3: ‘The application of procedural justice research to judicial actions and techniques in settlement sessions’ by Nancy Welsh, Pennsylvania State University, USA; Bobbi McAdoo, Hamline University, USA; and Donna Stienstra, Federal Judicial Center, USA

In this Chapter, Nancy Welsh, Bobbi McAdoo and Donna Stienstra discuss the application of procedural justice research techniques to evaluate the dispute resolution procedure of settlement discussions hosted by a judge. Their desire is to investigate which judicial actions “enhance or reduce” the perceptions of both parties and lawyers of procedural and substantive justice and to reveal which judicial actions render settlement more or less likely. The authors chronicle their development of a draft questionnaire for lawyers to be administered by courts following judicial settlement sessions in civil non-family matters. Their aim is to develop questionnaires that will collect valuable information from clients and judges about judicial settlement sessions as part of their work with the IRC. This Chapter invites us to consider carefully what judges are actually doing in their facilitative role.


In Chapter 4, the final chapter of this Part, Machteld de Hoon and Suzan Verberk discuss the results of “pilot projects” conducted in The Netherlands to explore whether or not JDR could provide “a viable, sustainable and lasting solution” in 68 different cases. In the context of the pilot projects, the authors examine the differing roles played by judges and how these roles have developed over time, including exploring the benefits and challenges presented by judges acting as “conflict managers”. Their work illuminates some difficulties faced by judges when taking a facilitative approach including the necessity of trying to understand the conflict underpinning the legal dispute.

Part II: Global Practices of Judicial Dispute Resolution

Ch 5: ‘Theory and practice of court-annexed mediation in China: Quo vadis?’ by Dr Sarah E Hilmer, The Chinese University, Hong Kong, PRC

In Chapter 5, Sarah Hilmer introduces the general Chinese mediation process and then focuses on court mediation in particular. She refers to recent court mediation developments, such as the Chaoyang District Court mediation scheme and the recently issued Several Opinions of the Supreme Court of the People’s Republic of China Concerning the Establishment and Improvement of Dispute Resolution Mechanism that Connect Litigation and Non-litigation Proceedings. Her analysis explores the hypothesis that mediation in court developed from “a political endeavour” towards a more globally accepted form of court mediation.
Ch 6: ‘Settlement judges East and West: A comparison of judicial settlement activity in China and Canada’ by Archie Zariski, Athabasca University, Canada, and Shi Chang-qing, Yantai University, PRC

In Chapter 6, Zariski teams with Shi Chang-qing to review current practices of judicial settlement activity in the Court of Queen’s Bench in the Canadian Province of Alberta and corresponding practices in the Yantai Intermediate Court in the Chinese Province of Shandong to discover similarities and differences in how judges of those courts go about such work. By means of a critical analysis process, the authors attempt to identify the strengths, weaknesses and possible trends of development of judicial practice in both courts, with a view to continuing the international dialogue and mutual learning concerning this feature of the administration of justice. This Chapter employs a theoretical perspective integrating individual and organisational levels in a unit of analysis described as an activity system within the operations of courts and the activities of judges. This framework has been called cultural-historical activity theory (CHAT) and is described by Zariski in Chapter 2 of this book.

Ch 7: ‘From judgment to settlement: The impact of ADR on judicial functions from a comparative perspective’ by Shi Chang-qing, Yantai University, PRC

In this Chapter, Shi Chang-qing posits that ADR and the settlement culture have had an enormous impact on justice systems around the world, with the result that “formal justice is no longer the only important way to settle disputes and the impact of informal justice is increasingly strong”. She explores the manner in which justice systems are undergoing “institutional rearrangements involving peaceful negotiation” and how the judicial function is changing from giving judgment to facilitating settlement. Thus informal justice is alternating with formal justice in the arena of dispute resolution, but, as the author suggests, this alternation is not as “simple as a pendulum; they are always at the state of intersection and penetration of each other”. Shi then undertakes a detailed examination of the judicial function today and ultimately considers consequential changes in the operational mode of state power. This Chapter invites us to locate JDR within the intersection of law and society, justice and legality.

Ch 8: ‘The multi-door courthouse is open in Alberta: Judicial dispute resolution is institutionalised in the Court of Queen’s Bench’ by Associate Chief Justice John D Rooke, Court of Queen’s Bench, Alberta, Canada

In Chapter 8, John Rooke asserts that the JDR Program of the Court of Queen’s Bench in Alberta, Canada, has become “an integral, normative, and institutional part of the resolution of disputes litigated in the Court”. He bases this assertion on a detailed analysis of empirical research data from a survey completed by lawyers and clients who participated in the Court’s JDR Program in 2008, as well as on his own judicial experience and research into legal literature. The author explores the consequences of this enormous change in the Court’s procedures and opines that it has led to “more demand by lawyers and litigants for the JDR Program”, leading to the fact that the “‘multi-door courthouse’ is open in Alberta”.

Part III: Issues and Challenges for Judicial Dispute Resolution

Ch 9: ‘Confidentiality in judicial mediation in Canada’ by Louise Otis, McGill University, Canada; Catherine Rousseau-Saine, McGill University, Canada; and Eric H Reiter, Concordia University, Canada

In Chapter 9, Louise Otis, Catherine Rousseau-Saine and Eric H Reiter explore an important challenge that has arisen as a result of mediation programs becoming established in Canada: “the uncertainty surrounding the protection of the confidentiality of mediation proceedings”. The authors confront this challenge by providing an overview of the different judicial mediation programs in place in Canada and by assessing the protection of confidentiality provided within these programs. They opine that the ideal of confidentiality is being tested and consider questions about the “appropriate level of protection” and the nature and justification of that protection. These authors remind us that JDR exists within legal parameters that cannot be ignored, but may need to be reworked.
Ch 10: ‘The need for a method and structure in settlement conferences’ by Machteld Pel, Mediator, The Netherlands

In Chapter 11, Machteld Pel describes her experiences in The Netherlands teaching beginner and advanced judges the “methods and structure of settlement conferencing, referral to mediation and conflict diagnosis during sessions”. She explains how her involvement in research and pilots, as well as her exploration of others’ research, has led to her belief that “there is a need for a general professional standard to be applied to settlement conferences that does not simply rely on an individual judge enforcing regulations or ensuring that the interests of the parties are of critical importance”. Pel then describes the current “state of the art” relating to how judges should approach settlement conferencing. This Chapter complements Chapter 5 and highlights some of the training and education that may be necessary to equip judges to undertake effectively a more facilitative role.

Ch 11: ‘Why judges should stick to their knitting: A critique of judicial dispute resolution in parenting cases’ by Noel Semple, University of Toronto, Canada

In Chapter 12, Noel Semple provides a detailed analysis of the use of “informal JDR” in parenting disputes, critically evaluating whether or not and to what extent it is in the best interests of the children involved. He presents three arguments against its use in such cases, ultimately rejecting two of the arguments but finding that the third – that “one might approve of settlement-seeking by the justice system in custody and access cases, but maintain that the system’s reliance on judges to do this work is mistaken” – has “substantial merit”. The author’s conclusion is that facilitative mediation by “non-judges” has major advantages over judicial settlement-seeking. This Chapter reminds us that JDR is but one alternative from many now available from a variety of ADR providers.

Ch 12: ‘Facilitative judging: Science, sense and sensibility’ by Tania Sourdin, Monash University, Australia

In Chapter 12 – the final chapter of this book – the other Editor, Tania Sourdin, presents a thought-provoking discussion of the trend by judges in many countries to adopt “therapeutic, facilitative and problem-solving approaches” when conducting hearings and conferences. She explores the ways in which these approaches vary from jurisdiction to jurisdiction and from judge to judge, opining that some approaches are modelled on ADR strategies, others are borne from an enhanced understanding of participatory and procedural justice theory and practice, while still others have their roots in more recent developments and an increased understanding of how human interactions work and emerging developments in neuroscience. The author then moves to a consideration of the potential of neuroscience to mould current and emerging changes in the judicial process. This Chapter encourages us to be open to the potential substantive, as well as procedural, benefits that may flow from effective JDR.

Appendix A

List of Members of the International Research Collaborative (IRC) members sponsored by the Law & Society Association (LSA)

Appendix B

Select Bibliography on Judicial Dispute Resolution