

THIRD-PARTY  
SETTLEMENT  
OF  
DISPUTES  
IN THEORY  
AND  
PRACTICE

Lillian L. Randolph

THIRD-PARTY SETTLEMENT OF DISPUTES  
IN THEORY AND PRACTICE

by  
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To all who struggle to shed light  
on difficult subject-matters, of which  
there is no better example than M.F.P.

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## CHAPTER ONE

### AN OVERVIEW

On 19 August 1965, Britain proposed as a project for the then-pending twentieth (1965) session of the United Nations General Assembly that "The United Nations should initiate a study of the entire field of peaceful settlement of disputes in all its aspects . . ." The project was not brought beyond preliminary discussion.<sup>1</sup> However, the British statement suggests several propositions relevant to peaceful settlement and third-party settlement, the form of peaceful settlement which results from United Nations efforts. The statement suggests that peaceful settlement at the international level is unsatisfactory, that third-party settlement could contribute substantially to establishing peaceful relations, that the dissatisfactions related to peaceful settlement and third-party settlement might be overcome by means of greater knowledge, and that the knowledge should be of broad scope. These propositions constitute the framework of this book.

Understanding of third-party settlement can contribute substantially to knowledge of peaceful settlement, for the latter seems a more likely outcome of third-party settlement than of negotiation (or bargaining), the kinds of active efforts which produce peaceful settlement.<sup>2</sup> Third-party

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<sup>1</sup> See Office of Public Information (1967, pp. 98-101). The proposal was discussed in the Assembly and referred to the First Committee and the Special Political Committee, both of which were unable to resolve questions in the way of undertaking the study. The item was continued to the 1966 session, where it was joined to discussions of peacekeeping operations. It has since been lost in the more thorny controversies arising in peacekeeping.

<sup>2</sup> The superiority of third-party settlement compared to direct efforts of the parties in producing peaceful settlement was an argument of early writers, for example, Jones (1908), in behalf of establishment of international organizations concerned primarily with peaceful settlement. The argument by modern writers, such as Regala (1964), serves to urge use of existing third-party agencies, in particular, the United Nations, whenever violence seems likely or is underway.

settlement adds to negotiation the endeavors of the third party without precluding opportunities of the parties to achieve their own solution. Agreement to third-party settlement establishes a proclivity to accommodation, since each party communicates tacitly at least a willingness to accept the third-party solution. Third-party settlement offers distinctive advantages for a result of peaceful settlement in each of the phases of settlement. In the initial phase, parties can more readily agree on the third party than decide all important aspects of negotiating positions, which may eventuate in settlement efforts and a solution largely by the third party. In the intermediate phase, third parties can propose solutions which parties find acceptable but cannot advance because of disadvantages for partial interests in taking on a moderate position. In the final phase, third parties can expect support from the public, such as the international or the national society, in behalf of enforcement of solutions, a support less freely extended to parties because of association with conflict and partial interests.

The purpose of this book is to develop understanding of third-party settlement as a universal method of dispute resolution. Third-party settlement is examined over a long extent of time and in various geographical settings. Brought to light are characteristics which are evidenced whenever third-party settlement eventuates in resolution and differences in the form of the characteristics over time and in various geographical places. A distinction among the characteristics is indicated according to those whose form is controllable or not by third parties as suggested in logic and practice. The first of these defines the subjects treated, which extend to enforcement of solutions (even though some professional third parties disclaim responsibility for enforcement) and to some matters germane in other ways of responding to disputes. The second indicates, among other information, the accompaniments of resolution and party satisfaction--



outcomes of third-party settlement which are perhaps equally worthy of achievement but not always compatible. The last makes apparent the opportunities available to third parties for promoting resolution and party satisfaction, and yields a description of a policy of third parties--a course of third-party action--from which a greater support of parties and publics for third-party settlement might result.

The book comprises first a theory of third-party settlement, in which the understanding described above is developed, then an examination of practices in real settlements, and finally concluding statements which make a compact scheme of the material presented. The theory is set down in a chapter on structures, which describes the qualities of third-party settlement offering relatively small opportunity for control by third parties, and one on processes, which elaborates efforts performable by third-party initiative in behalf of realizing an outcome of resolution and/or party satisfaction. The practices, which are described in a single chapter, lend empirical evidence to the major points in the theory and indicate significant considerations in real settlements; great attention is given to legal instruments of wide applicability, agencies rather than ad hoc sources of settlements, and statistical data of third-party settlements. The concluding chapter accents existing problems in third-party settlement and possible remedies, with the result of providing a basis for a greater realization of third-party settlements in the future. In addition, appendix material, although ponderous, is included, because of comprising the basis of the statistical findings reported in the textual portion.

The Meaning of Third-Party Settlement. In any third-party settlement, parties to a dispute are engaged with a third party in active efforts of peaceable resolution. The parties comprise the source of the extreme positions of the dispute and, thus, can be viewed abstractly as only two

in number and without regard for the sources of positions between the extremes. Whether an extreme position is advanced by a single party or several parties is immaterial to the existence and perhaps the essence of the position;<sup>3</sup> however, the number of parties at each extreme is useful to indicate power relationships between parties. Positions between the extremes are akin to those of the third party, who is the conspicuous source of the compromise position as the solution. The dispute, it is apparent, refers to the extreme positions defined by the parties. In the experience of third-party settlement, the defining of disputes is an undertaking solely of the parties (although some might wish for such activity by third parties as an aspect of preventive dispute-settlement). The third party refers to the source of settlement efforts other than the parties. Clearly, parties to third-party settlements are capable of performing nearly all the efforts of settlement; the exception, because of defining the essence of third-party settlement, is enunciation of the solution. But the parties usually do not perform the efforts of settlement, either because of agreement to third-party settlement (and thus to a third-party performance) or intervention by third parties in behalf of a compulsory settlement. Third parties may be a single individual or several individuals, whose status is professional or merely that of a potential party to similar disputes, and are synonymously referred to here as mediators.<sup>4</sup> The active efforts of

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<sup>3</sup> Several instruments of third-party settlement regard parties with a similar interest, evidenced by similar positions, as a single party. For example, the General Act for the Pacific Settlement of International Disputes (1928) provides that, in the settlement of disputes by conciliation or arbitration, parties with a similar interest shall appoint one commissioner or arbitrator and perform the other obligations by mutual agreement (Article 34 (a,c)). The Rules of the European Court of Human Rights provides that: "If several parties have a common interest, they shall . . . be deemed to be one Party. The President of the Court shall invite them to agree to appoint a single elected judge or ad hoc judge . . ." (Rule 25, European Commission And Court of Human Rights (1960)).

<sup>4</sup> "Third party" is the more accurate term because of association with all the procedures of settlement, rather than mediation only. But "mediator"

peaceable resolution distinguish third-party settlement from the other responses to disputes of nonsettlement and violence, a matter elaborated subsequently. These efforts include the preliminaries of proceedings, such as decisions on jurisdiction, and of course those not eventuating in particular disputes in a peaceful settlement.

The characteristics regarded as structures of third-party settlement (i.e., those whose form is relatively unalterable by third parties) are distinguishable in terms of contributions to an outcome of peaceful resolution (or party satisfaction). Those crucial to resolution are: the power of the parties, the power of the third party, the importance of the dispute, and the degree of public support for peaceful settlement. The power of the parties defines the likelihood that the will of the parties is realized; a strong party power produces voluntary settlements, in which all efforts of settlement are agreeable to the parties. The power of the third party indicates the capacity of the third party to act on independent decisions regarding major questions; a strong third-party power affords compulsory efforts despite party resistance. The importance of the dispute describes the extent of commitment of parties to the realization of partial interests; an important dispute means a willingness of parties to apply party power in behalf of the outcome wanted by parties, which may produce violence. The degree of public support for peaceful settlement describes the strength and stability of third-party power; a strong public support produces a strong and stable third-party power, neither of which can be counted upon as conferments of the parties.

Similarly, the characteristics described as processes (i.e., those whose forms are capable of change by third parties) are usefully understood

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supplies the interest of variety and is the more euphonious in discussions of the parties and the third party or third-party settlement and the third party.

by whether the forms thereof contribute to an outcome of peaceful resolution or party satisfaction. Understanding of the variable characteristics and the efforts which have been made by third parties comprising alteration suggest undertakings for present third parties in promoting either of the outcomes described. Such is valuable information for all third parties. Some exist professionally with violence, either as the denouement of their efforts or as a situation toward which their efforts are not applied, but also with the comfort that the activities in third-party settlement are satisfying to the parties. Such is the case for international third parties, whose problem is peaceful resolution rather than party satisfaction. The remainder, neglecting the seemingly small group of third parties able to compel resolution by stark force, operate with a legal authority facilitative of resolution in disputes regulated by law, which is ground for a relatively modest regard for resolution, but also with a keen concern for party satisfaction. Such describes the mediators serving industry in the United States, who hear complaints of government intervention and compulsory arbitration.<sup>5</sup>

But party satisfaction and resolution are never certain; rather, they are no more than likely outcomes. On the one hand, third-party settlement means that the third party has some power independent of the parties, apparent always in a capacity to enunciate solutions. This produces party dissatisfaction in the risk that the solution will not grant the party position. On the other hand, parties decide whether or not, and how, disputes are settled--the initial, but not always the final, mode of disposition. These decisions arise from the right of parties to define disputes and the widespread principle that parties should have the major responsibility

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<sup>5</sup>The point is suggested in the statement to the press in 1963 of G.W. Taylor, an arbitrator and member for several years of the President's Committee on Labor-Management Policy: "We give only lip service to mediation. We say that mediation is a form of governmental intervention that is least worst . . ."

for resolving their own disputes. Such are the basis of violence, of non-settlement, and of failures of the peaceful methods of negotiation and third-party settlement.

The right of parties to define disputes may result in failure to bring conflict to a peaceable resolution for two reasons. The first is inability of some parties to formulate conflict as a dispute, defined as divergent party positions. A vague feeling of antagonism between parties or a division of parties on a large number of issues is not conducive to a formulation of disputes. The second is unwillingness of some parties to accept peaceable resolution, which is realized by means of the natural party advantage, deriving from the act of defining disputes, of choosing the method of settlement. The definition sometimes extends to a statement on methods; disputes described as nonnegotiable feature an unacceptability to the parties of any peaceful efforts. Or the definition may simply conclude with performance of a method; violence offers immediate redress for an unacceptable party position, and nonsettlement, preservation of an acceptable status quo.

The principle that parties should have the major responsibility for resolution impedes interference by publics and third parties with the party choice of methods. Violence has often run its course at the international level, in world and local wars, because of the precept of international publics and third parties that party consent is essential to third-party efforts. In American industry, violence is also evident but has served to prompt laws favorable to peaceful resolution. Not less important among the effects of the principle than the occurrence of violence is the smothering of interest in opportunities of third parties to promote outcomes not supported by the parties; the principle suggests that the third-party function consists merely of serving the will of the parties. However, two considera-

tions relevant everywhere justify the principle. First, matters agreed to by the parties are likely to have their support, which aids, for instance, implementation of solutions and acceptability of third-party settlement. Second, the interest of publics in peaceful settlement is more indefinite than that of parties, which establishes the party interest as the primary one. Publics infrequently support third-party settlement when parties have agreed to negotiation or when disputes are not strongly related to the public welfare. By contrast, parties might be expected to hold a preference between negotiation and third-party settlement, which afford a different degree of party control, and to care about methods whenever advantage to party interests is a prospect.

The right of parties to define disputes is logically defensible, even though the result may be recourse to methods not greatly helpful to peaceful resolution. Who else with the same accuracy as the parties can elaborate the party positions? Who but the parties can provide certainty as to the existence of a dispute? And who besides the parties supplies the reason for efforts of settlement? In all the methods of settlement, the defining of disputes is, and should be with minor exceptions, the exclusive function of the parties. The exceptions comprise interpretations by third parties of the importance of disputes to party interests and third-party solutions which dispose of issues implicated in the dispute but not indicated by the parties.

But the principle that parties should have the major responsibility for resolution of their disputes is not defensible. Parties are willing perpetrators of damage to the public interest, in the form of catastrophic violence and an insecure status in some places of third-party settlement, the outstanding method of peaceful resolution. Yet party satisfaction and at least a partial reliance on parties for the realization of all the

fundamental steps in third-party settlement are, to say the least, worthy qualities. A later part of the book explains the point that third parties should take on a greater responsibility for realization of peaceful settlement and party satisfaction, and describes the efforts by which such could result. The novel contribution is not the descriptions of the efforts, which have already been performed by various third parties. Rather, new light is shed on various aspects of the proposition that third parties can attempt by independent actions the achievement of both objectives for a result of greater acceptability of third-party settlement to parties and publics alike.

The Necessary and Desirable Conditions of Third-Party Settlement.

Aristotle wrote about conditions necessary for men to live and those desirable for men to live well. Some conditions are necessary if third-party settlement is to occur; others are desirable if third-party settlement is to have a high prospect of realizing all the component steps, including achievement of a solution and implementation. The necessary conditions must exist prior to proceedings in order for settlement efforts to be undertaken. The desirable conditions contribute to third-party settlement by their presence or, beyond this consideration, by the degree to which the conditions prevail.

The necessary conditions are:

1. The elements which define the event of third-party settlement, namely, parties, a dispute, a mediator, and capacity of the mediator to perform efforts of resolution.
2. As the basis of proceedings, an authority of intervention or obligatory jurisdiction, or party agreements to have recourse to third parties. The former derive from public support and the latter, from a belief of parties that third-party settlement will promote party interests, which may

extend to concern for the public welfare.

3. Fundamental to public support is belief of the public that third-party settlement is a means to achieve or preserve a favorable situation, such as domestic tranquility or justice for all. Party agreements depend on disputes of moderate importance to parties. The agreements may not result in trivial controversies because of acceptability of nonsettlement or in disputes of critical importance, because of unacceptability of the risk of solutions discordant with party positions.

4. Belief of the mediator in a purpose to be served by the third-party settlement. Such provides inspiration for the third-party efforts, which are time-consuming, uncertain as to outcome, and sometimes supplied gratis to the parties. The purpose may be to further the interests of the parties, the public, or both.

5. A confidence of each party that the other will observe obligations. Performances of all party responsibilities, such as choosing third parties and implementing solutions, depend upon a belief of each party that the other will realize obligations as the basis for the individual performances.

6. Expectation regarding the extent of third-party authority to be exercised. Such expectation serves in voluntary settlements as a consideration leading parties to choose third-party settlement rather than another kind of response to disputes, and in compulsory settlements, as a reason for public support of a forceful third-party authority. Compulsory settlement is a means to allay public anxiety regarding possible dangers to the public interest.

The desirable conditions are:

1. A belief of parties that the mediator has no commitment to either party. Professional mediators more than mediators who are political leaders seem likely to be without an advance interest in upholding the position of one of the parties. Commitments limit the gains capable of anticipation



by parties, thereby limiting the acceptability of third-party settlement, and obviously work against whatever support parties and publics give for solutions on the merits.

2. Availability of several agencies applying settled procedures. A choice among agencies and procedures offers the prospect that desired outcomes may be realized, which inspires a willingness to have recourse to third-party settlement. And the choice described saves parties from having to consider details of third-party settlement while the dispute is "hot."

3. Disputes between parties of similar bargaining power. This condition, which can be described simply as power equality, is not the same as legal equality.<sup>6</sup> Power equality is helpful to the occurrence of third-party settlement, because the parties are stalemated in making gains apart from aid of a mediator. Power equality is also helpful to the acceptance of solutions and thus to a third-party ability to render impartial solutions, because of the adverse public image resulting from denial of resolution when this result can hardly be expected from further efforts, and because the support of one party for the solution poses the possibility to the other of suffering from coercive measures in behalf of acceptance of the solution.

4. Mediators having professional experience in proceedings concerned with disputes similar to those at hand, knowledge regarding the subject-matters of the disputes, and communication of a dedication to rendering reasoned conclusions--whether solutions or merely decisions regarding, for instance, the adequacy of the facts. These qualities inspire a confidence of the parties that partial interests will receive full consideration despite the possibilities of incomplete descriptions or otherwise poor communications of such by the parties. This is reason for party agreement

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<sup>6</sup>Legal equality is often provided for in instruments of third-party settlement. The provision directs mediators to regard the parties as of equal power, and thus promotes impartial solutions.