

The Variegated Landscape of Mediation

**A Comparative Study of Mediation Regulation and
Practices in Europe and the World**

Manon Schonewille and Dr Fred Schonewille (eds.)

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INTRODUCTION TO: THE VARIEGATED LANDSCAPE OF MEDIATION

A COMPARATIVE STUDY OF MEDIATION REGULATION AND PRACTICES IN EUROPE AND THE WORLD

Manon Schonewille¹ and Dr Fred Schonewille²

'What you see and what you hear depends a great deal on where you are standing. It also depends on what sort of person you are.' (C.S. Lewis)³

Compiling this book has been a challenging and hugely interesting journey, comparable to getting 360 degrees feedback while entering into many different worlds. When we came up with the idea 'to prepare a comparative overview of mediation practices and regulation worldwide', we had no idea what we were getting ourselves into. Our vision was that we simply needed a comprehensive and simple grid (such as those provided in the folding covers and at the end of each chapter in this book) to compare regulatory aspects worldwide. Such a comparison, based on several standardised benchmarks for each country, would be helpful for those mediating across-borders, those involved in education, and legislators. Our mission was to use the grid to identify and analyse any 'common cores' we would find that defined mediation in all countries around the world, as well as listing good practices.

At the time, Fred was involved as an advisor to the draft Dutch mediation legislation led by MP Ard van der Steur. Having access to an overview of how mediation was being regulated elsewhere, and knowing what was being done in other countries would also aid the drafting of new legislation. Manon was teaching, negotiating and mediating across many borders and was often struck by the diverse practices she witnessed. She felt the need for a practical reference tool to assist parties and their counsel on how to initiate and prepare for a cross-border mediation more effectively. These challenges are described in the second chapter of this book, 'Mediation in the European Union and Abroad: 60 States Divided by a Common Word?'.

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- 3 C.S. Lewis in 'The Magician's Nephew' (The Chronicles of Narnia Publication). Two children are tricked by their uncle, a magician, into becoming part of an experiment and they set off on an amazing adventure. What happens when they touch the magic ring is far beyond anything even the magician could have imagined. Thrown into the wood between the worlds, the children soon discover that they can enter many worlds through the mysterious pools they find there.

1. Challenges

We encountered challenges and discovered many fascinating facts while compiling this book. The idea of creating something fully comparable was exciting, but not every country fits into the neat grid format or could address the original questions that we provided. Even 'standardised benchmarks' or a set of (in our eyes) 'simple closed questions' turned out to be interpreted differently depending on which country and with which mediation worldview these questions were read and answered. In fact we even came across another Dutch worldview regarding mediation styles and approaches that we had unwittingly imposed on others in this study (described in Chapter 2). There are in fact more exceptions than rules, and several questions were very hard to answer, especially with a simple 'yes' or 'no' or another similarly-limited range of answers that we asked the respondents to observe. Answering questions about your own country and at the same time trying to take into account where your country might be on a comparative worldwide continuum was not an easy task. Introducing question 16, asking for the country-specific remarks, did help; however, we increasingly realised that we had given an extremely challenging task to our esteemed contributors, who were making a huge effort to fit their countries' responses into our strict grid format, even if it was not a comfortable fit. We really appreciate their efforts and great work and would like to thank all of them warmly.

Sixty jurisdictions are covered in this book. They are at various stages of mediation development, have different levels of sophistication, and their disparate approaches to mediation practices, styles and process, both internally in each country and externally, were often hardly comparable. We hope that, for the second edition of this book, we will be able to cover more than 60 jurisdictions, including those that withdrew their contribution because of inter-state difficulties and those where, despite much effort on our part, we were unable to identify a knowledgeable professional willing to contribute to this book. We also expect that those countries where mediation is just starting to develop will be able to report their mediation activities and developments to contribute to the next edition.

This book offers a comprehensive overview of many mediation regulatory frameworks for commercial and civil cases, as well as a practical overview of the development of mediation and worldwide mediation practices in 60 jurisdictions, with a special emphasis on the European Union. The book is designed to facilitate a direct comparison, based on standardised benchmarks for each country. This is intended to assist educators, those mediating across-borders and adjudicators, as well as policy makers and litigators. We would like to thank Professor Jay Folberg for pointing out that it was important to bear in mind for the whole book, including the title, that the study is about the broader application of mediation rather than just a study of regulatory frameworks.

Mediation is developing rapidly around the world, and is being promoted actively in many countries. The European Union introduced a Mediation Directive in May 2008,⁴ starting a trend of legislative efforts that is increasingly introducing mediation as part of the judicial system in many European countries. The Directive not only impacted upon EU Member States, which were required to implement its provisions by May 2011, but also influenced neighbouring and other countries that are not EU Member States. Related to this, education about mediation is increasing worldwide, and there is a new interest in finding appropriate methods, substance and didactics for teaching mediation internationally. At the level of higher education,

4 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

law schools are the dominant players, although mediation or mediation advocacy are still not taught as separate disciplines in most universities and professional bodies around the world. This raises questions about the interdisciplinary character and the potential development of mediation as a new profession, and whether it should be viewed purely from its 'legal' application. The development of higher education in mediation in several countries and the search for best practices and the exchange of education tools is comprehensively addressed in *Mastering Mediation Education*,⁵ edited by Martin Euwema and Fred Schonewille (2013).

2. Worldwide trends, common cores, fascinating facts and good practices

Unsurprisingly, we found many similar worldwide trends emerging, such as new legislative efforts and increasing mediation education in universities. Although we knew that mediation is a very flexible practice, we expected there would be wide-ranging variations, though we were still hoping to find common cores or practices that are invariably and universally applied. Mediation turned out to be a fascinatingly variegated landscape indeed. Whatever aspect we looked into, be it that a mediator and the parties can always decide the style and approach of the mediation themselves, the voluntary nature of mediation, or even its confidentiality, there were always exceptions. In fact, our vision that we could find at least one common core to which all 60 states would respond in the same way turned out to be an illusion. A small and non-exhaustive selection of the fascinating facts, practices and regulatory frameworks that surprised us (from our Dutch perspective) includes:

- Although mediation education is increasingly featured in the curriculum of universities, mediation advocacy has yet to be commonly perceived as a valid field of study, education or practice. There are hardly any national procedures for the recognition or credentialing of mediation advocates or mediation advisors, despite the fact that mediation tends to be taught in some law schools (as opposed to business schools or other social science faculties, such as international affairs or psychology). A task force of the International Mediation Institute (IMI) recently developed new criteria for good mediation advocacy practices for those wishing to become IMI Certified Mediation Advocates.⁶
- Nearly all legislations leave the mediator and the parties to decide how they want to conduct the mediation process or what style of mediation to adopt, such as whether or not to use caucus, co-mediation teams, or single mediators. However, there are always exceptions to the rules. For example, mediation is defined as a 'facilitative' process in several countries (e.g., Malta). The Bulgarian Mediation Act also promotes a 'facilitative' approach, not by explicitly mentioning it, but by prohibiting mediators from expressing legal opinions or giving advice. What is meant by 'facilitative' varies in scope and nature from one country to another. In Austria, family mediation has to be conducted by co-mediators, preferably male and female, one a lawyer, the other a psychologist.
- In most jurisdictions it is not common practice for mediators to give binding opinions. In some countries, such as Bulgaria, mediators are even prohibited from giving binding opinions. In other countries, however, the law provides for an evaluative approach to mediation as the predominant style. In Estonia, for example, mediation is embodied in the Conciliation Act and if a case is not settled through mediation the mediator may present the parties with a suggested settlement proposal such a proposal is considered reasonable having regard to the facts of the dispute.
- Lawyers or others representing or supporting the parties in mediation are generally allowed to be present during mediation sessions if the parties wish them to. However, there are

5 Martin Euwema, Fred Schonewille, editors. *Mastering Mediation Education*. Apeldoorn/Antwerpen: Maklu, 2013.

6 www.imimediation.org/imi-mediation-advocacy-competency-certification.

exceptional circumstances, such as victim-offender cases in Denmark, where lawyers may not be present. In general it is not obligatory to have a lawyer present, except in some countries, such as Greece, Italy and Argentina, where legal representation in a mediation is compulsory.

- Mediators' obligations and liabilities are generally dealt with by civil law provisions, with the exception of Austria, where mediators breaching confidentiality and violating the interests of another person can be prosecuted under the criminal law and risks possible imprisonment for up to 6 months or a fine.
- In most jurisdictions, professionals with various backgrounds can be mediators, but in Argentina only lawyers can be accredited mediators (until 30 March 2014 that was also the situation in Greece). In Turkey, only legal professionals with 5 years experience can be mediators. In other countries, such as Cyprus, only lawyer-mediators can be appointed in certain circumstances, such as non-commercial civil cases. In Indonesia, a mediator must have legal knowledge and skills, be at least 35 years of age, and have experience (or have been active in their fields of expertise) for at least 15 years. In the Czech Republic, lawyers and non-lawyers are listed on separate mediation registers. In Estonia there are special provisions for lawyer mediators – for example, settlements concluded with the aid of a mediator who is a sworn advocate are more easily enforceable. In other jurisdictions, such as California and most other US States, the selection of who can be a mediator is left entirely up to the users of mediation services and there are no legal requirements in this area. In Greece, basic mediator training can only be offered by a Bar Association in collaboration with a Chamber of Commerce. In many countries (e.g., Slovakia, Spain, Serbia) mediators must have a university degree.
- Fees can usually be freely contracted between the parties and the mediator. However, some countries have rules laying down minimum or maximum rates that are provided for by law (e.g., Italy, Argentina, Turkey), including a maximum number of hours that can be charged in principle (e.g., Greece) or a minimum hourly rate that can be charged in the absence of an agreement on mediator fees (e.g., Malta). Sometimes, general rules on how to arrive at a mediator's fee are given – for instance, that the fee must be a reasonable amount and should consider the nature and the subject of the conflict/dispute (e.g., Romania).
- Generally, mediation services are offered by organisations providing these services, and by individuals who offer their mediation services privately. In Italy or Malta, however, individuals cannot provide private mediation services, and only recognised service providers may do so. In Romania, individuals can only offer services through a mediation office of two or more mediators, whereas in the Czech Republic, the opposite rule applies – bodies providing mediation services are prohibited and only individuals can offer these services.

3. Incentives, penalties and mandatory aspects

A trend that we noted is that there are several initiatives around the world to encourage the use of mediation through offering incentives, or by introducing mandatory aspects or even penalties.

Some legislation in some countries includes mandatory process steps for trying or considering mediation. In France, Romania and Israel, for example, attending a pre-mediation or mediation information session, can be compulsory. Mediation is an obligatory process step for specific cases in many jurisdictions around the world including Texas, Florida, Argentina, Australia, Canada, Croatia, Egypt, India, Japan, Lebanon and Rwanda. In Ecuador, mediation is promoted through arbitration. If a request for arbitration is filed and answered, the director of the arbitration centre is required to call parties to a mediation, and Rule 9 of the American Arbitration Association's October 2013 Commercial Arbitration Rules and Mediation Procedures makes

mediation a process step that parties need to opt out of - not one that they need to opt into. In the Canadian Province of Ontario parties will not be assigned a court date without first having attended a mediation session.

Some countries introduce penalties for not mediating, or not mediating in good faith. In Malta the court may award double costs in the other party's favour if a party refuses or fails to participate in mediation or fails to collaborate with a mediator without just cause. In Italy if the mediator's proposal is rejected by one of the parties and a settlement is not reached, the mediator's proposal is included in the court file. If the court's ruling coincides with the mediator's proposal, the court can impose sanctions on the party who rejected the proposal. In Singapore the court reserves the right to take into account, when determining costs, unsatisfactory reasons for not attempting mediation or unreasonable termination of mediation.

Incentives for parties who try mediation voluntarily before going to court are included in legislation or applied in practice as a way of promoting the use of mediation. In Texas some courts facilitate an early trial setting if the litigants participated in mediation and did not settle the matter. In Australia's project for family law property disputes, cases are also scheduled early for hearing. A reduction in costs may be considered by the court for parties who try mediation in The Bahamas; mediation in workplace cases by the Labour inspector is free in Cameroon and in Spain and Catalonia free mediation and free legal assistance are offered under certain circumstances. For parties reaching a settlement agreement that is subsequently implemented in a court settlement agreement in Bulgaria, half of the stamp duty deposited is refunded to the plaintiff; in Croatia, the party proposing mediation can be exempted from court fees. In England and Wales, for small claims, the court hearing fee is refunded if there is a settlement prior to the hearing and in Scotland efforts to expedite resolution generally (including mediation) may be recognised in some costs awards. In Greece mediated agreements are not subject to stamp duty in order to be enforceable.

4. Objective and conclusion

In the individual country chapters of this book, the authors, who are knowledgeable professionals in their jurisdictions, give a comprehensive and fascinating overview of mediation development in their countries. Combined, these chapters show the breadth and variety of mediation regulations and practices around the world. We hope that this book will become a standard reference work for users, practitioners, adjudicators, legislators and educators. It can support comparative academic studies, and provide guidelines to professionals mediating across-borders, as well as to legal counsellors who are supporting clients in international cases. The objective of this book is partly to enable ADR practitioners and academics to obtain an overview of developments in other countries, to facilitate working across-borders, to compare our practices and to lay the groundwork to identify and formulate in the future common core features as well as good practices for mediation practice and regulation. Equally importantly, we hope this book will be a valuable reference book for clients, corporate counsel and lawyers who manage disputes abroad and a tool to facilitate and stimulate cross-border mediations.

Last but not least we would like to express our great appreciation and to thank our research assistant Eldrid Bron, without whose valuable energetic support and positive 'can do' attitude we would not have been able to carry out and compile a survey of this magnitude. At least we would not have been able to publish it in this decade!

We started this introductory chapter with a quote of C.S. Lewis in *The Magician's Nephew*, so we wrap this up with two other quotes from him:

'When things go wrong, you'll find they usually go on getting worse for some time; but when things once start to go right they often go on getting better and better.'

'Pooh! Grown-ups are always thinking of uninteresting explanations.'

Let's find fascinating explanations and approaches to make sure that, with informed consent, the 'thinking outside the box' capacities of mediation are preserved while continuing to improve on quality and predictability; and let's keep on learning from one another. Now that we have comparative overviews available to us, as well as the great interest that this survey has already sparked, we hope that mediation will become increasingly used as a logical first step in trying to resolve all conflicts. Things are starting to move in the right direction, and can only improve in the future.