EDITORIAL

Judging mediation in Europe

Annie de Roo & Rob Jagtenberg

A number of books and journal articles have been published to date, addressing mediation from an international, and especially a European perspective. This seems self-evident in view of the EU’s (and Council of Europe’s) leading role in this area. Without claiming to give an exhaustive account, we may point at the recent international works of reference on mediation and dispute resolution generally, edited by Steffek and colleagues, by Espugues Mota and colleagues, by Brenneur and GEMME, and by Schonewille and Schonewille. Earlier work has been edited by inter alia Martin-Casals and colleagues, by CEDR, by Alexander, and by Cadet and colleagues. But even the 1980s already saw transnational publications such as a report comparing ADR practices in a procedural law perspective, issued by Blankenburg and Taniguchi, and a comparative survey of conciliation (a more frequently used designation at that time) edited by Kötz and Ottenhof. These important publications have mapped the mediation/conciliation landscape in many jurisdictions. Understandably, the majority of these studies focus on regulation (be it through legislation, codes of conduct or otherwise) and on the underlying policy documents. Empirical data pertaining to the actual use of mediation is occasionally encountered too, but empirical research into mediation has not advanced equally everywhere. We experienced this ourselves when we were assigned by the Dutch Ministry of Justice in 2003 to collate and compare data in neighbouring countries that could be instrumental in explaining the effectiveness of various mediation referral arrangements. We had to make several reservations

in our meta-analysis of data from five jurisdictions (at that time) in view of the national differences in research design.\(^5\)

Alternatively, one can try to learn more about the role of mediation by analyzing court judgments. In this way, valuable information can be collected about the attitudes of judges and the fate of legislation in practice. Here though, one has to reckon with a considerable ‘incubation period’, that is: the time that will be needed for new options such as mediation to become widely known, and used to the extent that disputants are prepared to involve the courts for deciding remaining controversies.

Even when an adequate supply of materials may be expected, there still will be problems of context, legal language and technicalities in court verdicts that may stand in the way of successful completion of such a comparative analysis of case law.

And yet, access to national mediation case law is important. Reading through this TMD special volume, one will readily notice how the case law diverges between EU Member States. What are the implications of this for the efficacy of Europe’s harmonization agenda?

If one seeks to advance the debate on dispute resolution methods at a European level, insight will have to be gained in what courts actually do, across Europe. TMD quarterly aims to assist in this, through the special European case law volume that now lies before you.

The present volume could only materialize thanks to the contributions of four outstanding experts from France (Justice Marc Juston), Germany (professor Ulla Gläßer), Italy (professor Elisabetta Silvestri), and the United Kingdom (professor Bryan Clark). These authors are all in an ideal position to select and highlight the most noticeable trends in mediation case law in their respective countries. The editorial board is proud to include these experts’ contributions here. The board also wishes to express its sincere thanks to two ‘mediation veterans’: Justice Béatrice Brenneur and professor Felix Steffek, who kindly introduced the volume editors to the experts in France and Germany.

**National developments: a first, brief impression**

The import of the articles collated in this special volume is almost self-evident: offering an overview of major trends in national mediation case law. The specific themes that are addressed vary according to specific national developments, but in most contributions the key subjects covered by the European Mediation Directive (52/2008/EC) keep recurring, as a connecting thread: (voluntariness in) the recourse to mediation, enforceability, confidentiality, and (to a lesser extent)

\(^5\) A. de Roo and R. Jagtenberg, Europese Mediationpraktijken, Den Haag: Boom Juridische uitgevers 2004. Dame Hazel Genn has kindly arranged for an english translation of the original report for internal use by the Civil Justice Council.
effect on limitation and prescription, independence and impartiality and professional qualifications.

Mediation clauses stand out as a rewarding subject from a comparative perspective. The picture that emerges is that French and German courts will not admit the claimant who turns to court directly, seeking to by-pass such a clause, while British courts today appear to scrutinize the precise wording of such clauses in order to determine their enforceability; and Dutch courts will simply admit such leapfrogging claimants, with reference to the consensual character of mediation.  

A fascinating pattern also emerges in regard of the recourse to mediation in the absence of prior agreements thereto. On the one hand, Italy and France stand out as jurisdictions where the legislator aspires to change the very culture of litigation through statutory provisions requiring litigants to explain whether (and if not, why not) amicable solutions have been explored before turning to court. It is not always clear though under which circumstances a claimant will be excused; courts have to clarify the exceptions to the rule on a case by case basis. While the process of judicial delineation continues, one could speak of a firm principle with a still somewhat undetermined end.

Compared to French and Italian law, British and Dutch courts show an almost opposite approach where voluntariness and the consensual character of mediation is underscored ‘at the front door’, but some compulsion (translatable in cash money figures) may be exerted ‘at the back door’. Yet the instruments differ: adverse cost awards in Britain, and general principles of law construed with hindsight to prior conflict behaviour, resulting in (denial of) compensation in the Netherlands. German case law seems to confess to voluntary recourse all along; it is noticeable that the recent evaluation of the 2012 Mediation Act hints at a stagnating number of mediations, and yet refrains from advising the government to explore more mandatory varieties of referral.

Confidentiality and privilege constitute another main area, parts of which are covered (but to varying extents, nationally) by domestic rules that ought to be in line now with the EU Mediation Directive. To the extent that confidentiality was/is only secured contractually, German and French courts on the whole seem to respect such arrangements. British and Dutch courts, by contrast, will not hesitate to override such contractual arrangements if (but only if) this is regarded necessary for the proper administration of justice, notably for ascertaining the material facts of the case.

Many more interesting issues are addressed in this special volume, such as (isolated) cases on independence and impartiality, where in-house mediators or multiplex contacts with external mediators are involved, cases on legal aid in mediation, cases on the specific position of lawyer-mediators, on the differences between mediators and conciliators (and designated mediator-judges) in various

6 The adjective ‘British’ is used instead of ‘English’ to accommodate judgments rendered under English law as well as judgments rendered under Scots law.
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jurisdictions, on the impact of the European Consumer ADR Directive and on phenomena such as assisted negotiation.

The editorial board is confident that the following articles will inspire and stimulate further studies and debate across Europe, on where these two modes of dispute resolution – mediation and court-adjudication – meet together.