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The Citizen in European Private Law: Norm-setting, Enforcement and Choice

The Role of Mediation in Company Law

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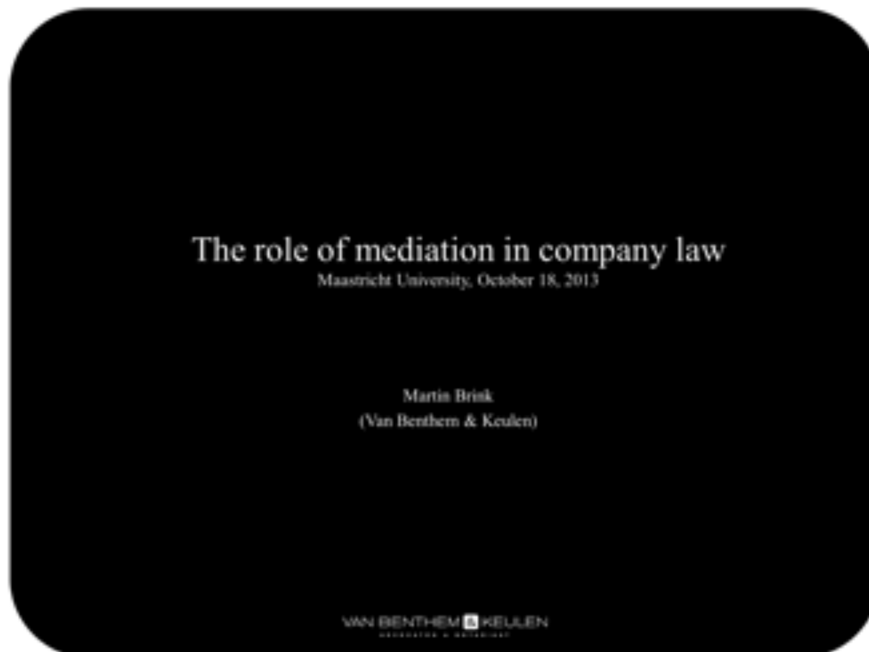


1. Introduction

Companies seek solutions to problems which are time and cost efficient. Litigation is slow, costly and renders exposure. Arbitration was an alternative but over the years became equally slow and more costly. ADR is an alternative.

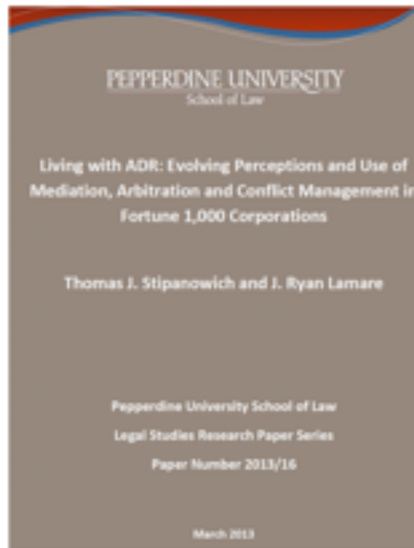
Well developed mediation markets can be found particularly in Anglo Saxon countries. Large corporations there are to an increasing extent becoming *dispute wise*, a notion I will come back to towards the end of this presentation.

Solving conflicts without turning to adjudication by government appointed courts or judges, is generally referred to as Alternative Dispute Resolution or ADR. Mediation is a member of the family of ADR, as e.g., early neutral evaluation ("*niet-bindend* advies"), non-binding arbitration, rent a judge ("*bindend advies*"), conciliation ("*bemiddeling*" or shuttle diplomacy) and a mixture of proceedings ("*hybrids*").
In the U.S. A. and U.K. arbitration is considered to be ADR. In the rest of Europe arbitration is considered to be adjudication because – although it does not involve government appointed judges - the parties themselves do no longer exercise ownership over the solution to a conflict.

The American Institute for Conflict Prevention & Resolution ("CPR") drew up a pledge document, a policy statement in support of a more flexible, creative and constructive approach to solving conflicts. Over 4000 corporations in the U.S.A. have signed this *CPR Corporate Policy Statement on Alternatives to litigation*. Over 1500 law firms in the U.S.A. signed the *CPR Law Firm Policy Statement on Alternatives to Litigation*.

International Institutions such as ICC – launching revised ADR Rules on December 4, 2013 in Paris - CEDR, UNICITRAL, WIPO and IBA (Rules on ICSID Investor State Mediation) to name just a few, adopt mediation rules to service the business community. Also the Dutch Arbitration Institute has adopted its own mediation rules.

To give a quick scan impression of developments I mention some data obtained from surveys into dispute management by companies in the U.S.A. and the UK.



PEPPERDINE UNIVERSITY
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Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations

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Table A: Conflict Resolution Policies of Fortune 1,000 Respondents (1997, 2011) (in percent)

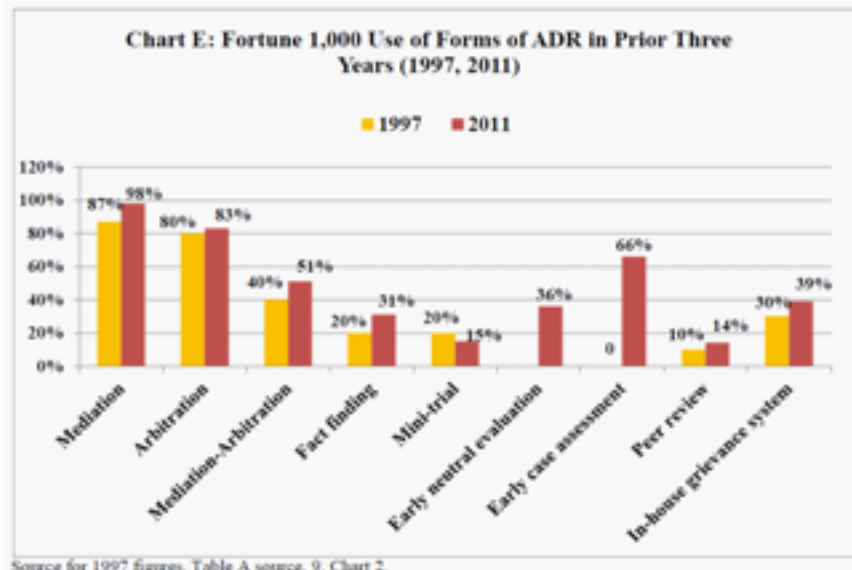
Corporate Policy	1997		2011
	Defending Party	Initiating Party	
Always litigate	5.0%	6.1%	0.6%
Litigate first, then move to ADR for those cases where appropriate	24.7%	21.4%	18.8%
Litigate only in cases that seem appropriate, use ADR for all others	25.2%	27.0%	38.2%
Tries to move to ADR always	11.7%	11.3%	11.1%
No company policy	20.8%	22.1%	25.2%
Other	12.6%	12.1%	6.1%

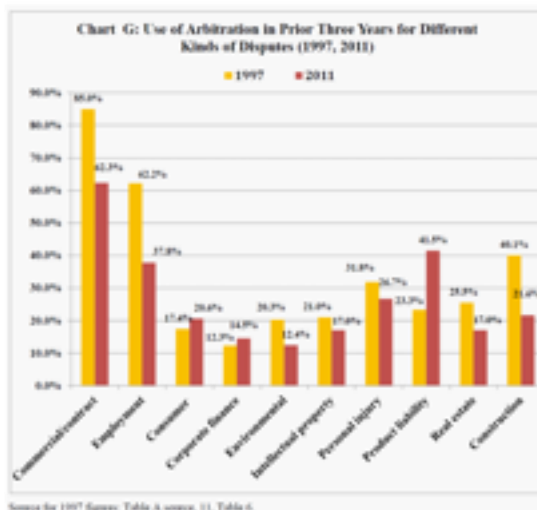
Source. DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS, CORNELL/PERC INST. ON CONFLICT RESOL.11, TABLE 5 (1998).

With the increased significance of out-of-court intervention processes, it has been suggested no longer to use the phrase Alternative Dispute Resolution but 'Appropriate Dispute Resolution', which better expresses the array of options now available to parties in dispute.

Mediation:

- *an agreement in writing;*
- *the parties engage a neutral person to assist them*
- *in a confidential process*
- *in which they voluntarily participate*
- *to in a non binding manner*
- *attempt to resolve an issue which keeps them divided*
- *by trying to appreciate the views and interests of the other party,*
- *while – save reservations in this respect – they avail over the authority to make decisions.*





Many studies of dispute resolution confirm that respondents most often went to arbitration pursuant to a contractual provision. Comparable contractual provisions are now used more frequently where it concerns ADR in general.

Table B: Triggers for Use of ADR in Companies (1997, 2011)

	1997*		2011		
	For use of mediation	For use of arbitration	Corporate/ Commercial Disputes	Employment Disputes	Consumer Disputes
Part of contract	10%	67%	54.2%	19.4%	41.2%
Ad hoc/voluntary	40%	10%	26.6%	43.1%	36.1%
Company policy	9%	5%	3.9%	12.7%	2.1%
Court mandate	29%	7%	13.5%	19.8%	20.6%
Other	17%	9%	1.8%	4.9%	0.0%

*Numbers for 1997 are approximate, based on bar charts in original published study. *See* Table A source, 15, Chart 4.

In case of corporate/commercial contracts, compared to litigation and also compared to arbitration, mediation is expected to be used more often in future.

Table K: Likelihood, Compared to Litigation, of Respondent's Company to Use Mediation for Disputes in the Future (2011)

	Very likely	Likely	Unlikely	Very unlikely
Corporate/commercial disputes	41.0%	44.6%	12.2%	2.1%
Employment disputes	36.3%	51.1%	9.3%	3.3%
Consumer disputes	24.7%	55.3%	13.8%	6.4%

Table L: Likelihood, Compared to Litigation, of Respondent's Company to Use Arbitration for Disputes in the Future (2011)

	Very likely	Likely	Unlikely	Very unlikely
Corporate/commercial disputes	12.4%	37.8%	31.3%	18.6%
Employment disputes	14.2%	24.7%	26.6%	34.5%
Consumer disputes	19.8%	24.1%	31.9%	24.2%

The In-House Counsel Commercial Mediation Survey 2013 undertaken by the Centre for Effective Dispute Resolution (CEDR) covering 20 industry sectors predominantly in the United Kingdom , showed that 60% of all disputes,were settled by negotiation pre-litigation. A further 12% were settled by negotiation following commencement of litigation.
The third most frequent outcome was settlement by mediation. This was higher than all other ADR processes combined at 6% (including arbitration which alone was under 2%).
Resolution by mediation was even higher than receiving judgements at court, 5%, whilst 9% of cases from the relevant period (the last three years before the date of the survey) were still on-going.
There is no reason why a similar development as seen in Anglo Saxon countries (U.S.A., U.K. and Australia) will not continue to occur in the rest of Europe and within The Netherlands. The relevant movement will not be restricted to common law countries. Privatisation, cutting of budgets and the shift to have citizens take on more ownership for their own faith, is clearly noticeable also in the EU and certainly in The Netherlands.

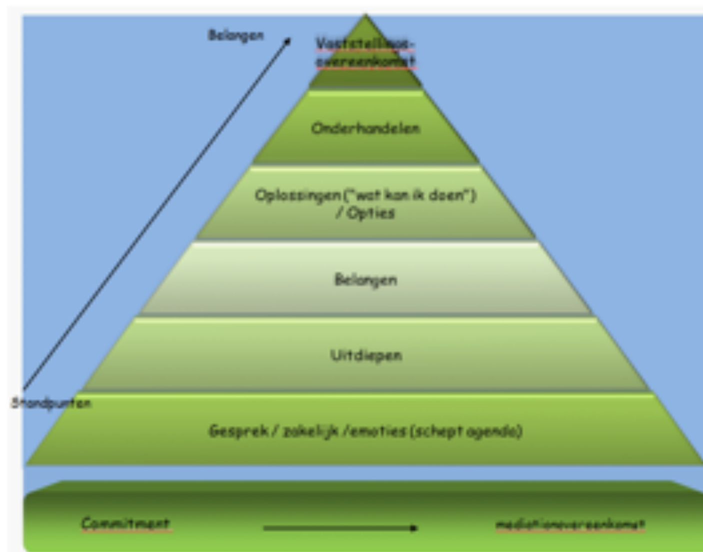
Overall – compared with all regions of the world – the picture as shown from statistics of ICC, the picture is still more in favour of arbitration.

ICC Arbitration and ADR 2007 – 2012

	2007	2008	2009	2010	2011	2012
Arbitration new cases	599	663	817	793	796	759
Total ongoing arbitration cases	1285	–	1461	–	1501	–
ADR (mediation)	12	11	24	13	27	21

2. <u>Definitions</u>

Allow me to show in brief the operation of a mediation process.



Let us now look a bit closer at some definitions .

Mediation in company law is lately referred to as 'corporate mediation'.

Corporate mediation belongs to the family tree of commercial mediation. One definition of commercial mediation is found in the *Canadian Commercial Mediation Act 2010* (c 16, Sched

3, s 3): commercial mediation is mediation pertaining to a commercial dispute. A commercial dispute is defined as a:

> "…*dispute between parties relating to matters of a commercial nature, whether contractual or not, such as trade transactions for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements and concession, joint ventures, other forms of industrial or business cooperation or the carriage of goods or passengers*."

Mediation whereby one of the parties is acting in a professional capacity is referred to as business mediation. A party acts in a professional capacity when acting in a representative role on behalf of an enterprise either or not driven in the form of a legal entity, or of some other institution, government agency or as shareholder or member of an organ of a legal entity (e.g. board member) or of an undertaking (e.g. the workers' council) or as a partner in a partnership or as a member of a cooperative.

Business to business mediation is mediation between two professional parties. The object of the mediation will mostly be of a commercial or financial nature. One characteristic is that professional parties often will have a certain experience with negotiation and more often than not will be represented by counsel.

Corporate mediation concerns preventing and solving conflicts pertaining to shareholders' issues (also "geschillenregeling"), exits, valuation issues, , inquiries into the state of affairs of a company ("enqueterecht"), corporate governance and co-determination issues, liability of directors, intra group issues and issues in joint ventures or other alliances, splitting up of joint ventures or other alliances and the dissolution of legal entities, product liability issues, conflicts pertaining to merger and acquisition agreements (warranties and indemnifications) and issues concerning annual accounting, banking and securities' law. It also aims to prevent and solve conflicts with government agencies in the field of planning and zoning, re-allocation of places of business and other conflicts.

3. **Working methods**

The basic working method in ordinary mediation is the facilitative approach. The facilitative working method is based on the idea that the burden of decision making should rest with the parties themselves only. The mediator does not contribute his or her own assessments, predictions, or proposals. Nor will any pressure be applied. In a myriad of ways the mediator devises and implements strategies to help the parties communicate and negotiate effectively with one another, to encourage them to develop and consider options, and to help direct the process towards consensual resolution (Brown & Marriott, 2011). The contribution will consist mostly of asking questions, helping the parties to develop their own proposals and to exchange views and ideas from their own spiritual and practical domain and to evaluative these themselves with the help of reality testing (Riskin, 1996). The aim is to maintain harmony and respect complete party autonomy.

There are in principle as many working methods as there are mediators. A distinction is made between '*process oriented'* and '*outcome oriented*'. Directive means that the mediator takes an active role in orchestrating the process.

An evaluative working method is appreciated by many entrepreneurs and their attorneys (ABA Section of Dispute Resolution Task Force Survey 2008). Evaluation happens when a mediator expresses any kind of view or opinion on the merits of one or more of the issues between the parties, or of any matter under discussion – perhaps even going so far as mentioning an expectation concerning a to be expected outcome of litigation if the case were to adjudicated.

There is a direct relationship between an evaluative method of mediation and subject matter expertise. If a mediator would want or would be expected to contribute knowledge from her subject matter expertise, then he or she must avail over relevant expertise.

I have already indicated what some of the characteristics of corporate mediation are. A recent study – be it of limited scope (25 mediators and 20 corporate users of mediation in 7 countries) – *Commercial Mediation in Europe, An Empirical Study of the User Experience* (Filler, 2012) paints the following picture of an eligible mediator:

> "*...an eligible mediator must not only dispose over self-evident prerequisites, such as a good reputation, a flawless record of success and empathy, but he/she must furthermore also be absolutely familiar with business language, and in addition, he/she must have a basic understanding of the particulars of the industry that he/she is going to work in . On top of his/her basic professional configuration, professional experience and specialist expertise, a mediator, to be eligible for the job, must – in line with the queried company representatives' common denominator – have a strong personality and profound rhetorical abilities and negotiating and consensus building skills. Apart from his/her flawless professionalism, process management skills and relevant experience and expertise in the field, it is inevitably their unwavering trust in themselves as a mediator to be able to cope with the assigned tasks, which have been seen by the mentioned company representatives as the indispensable professional ingredients of a [corporate] mediator."*

I add to this the ability to use all working methods available, including evaluative mediation and a more active, i.e., directive attitude.

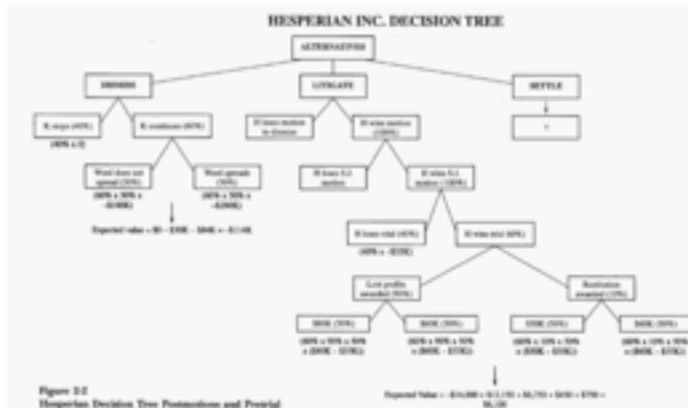
The recent IMI ADR Users Survey of March 24, 2013 found that entrepreneurs prefer experienced mediators (72%) with a legal background (41%), who do not work purely facilitative but adopt a pro active idea generating role, including proposing solutions and settlement options (77% of the users of mediation interviewed). This confirms the results of earlier surveys, such as a survey by the Dutch Mediation Foundation ACB in 2004 and my own research in 2011 (Brink, 2012).

4. Mediation in company law.

Mediation is increasingly seen also as a management tool in corporate governance (Eijsbouts, 2011). It may help to prevent and solve issues that otherwise might have affected the efficiency, risk management or other exposure of corporations.

Research shows that companies are becoming sophisticated and put increasing emphasis on control of the process of managing conflict, including reliance on early neutral evaluation and early case assessment, with approaches aimed at deliberate management of conflict in early stages, as well as control over the selection of third-party neutrals and increasing sophistication in the use of ADR (Stipanowich and Lamare, 2012, p. 3). They become *dispute wise.*

Early Case Assessment, including conflict diagnosis, together with a collaborative practice approach (business owner, counsel, direct report). Purpose: diagnosis, prevention (addressing conflict at its roots), avoiding escalation, solving a problem and assessing risk management line responsibility.



Korobkin: Negotiation theory and strategy

Early case assessment: Disputes are systematically analyzed in order to formulate a strategy for their handling in a manner consistent with business goals. A broad formal corporate protocol may be the result to be used for assessing and managing cases.

Many companies today employ strategies aimed at deliberate, proactive and systematic assessment of conflicts in the early stages – perhaps even the first sixty days – in order to lay the groundwork for business decisions about their forward management. Many others are utilizing targeted expert evaluations to promote early settlement or more efficient settlement. The idea is to move away from case-by-case resolution towards a sustainable system-based process for greater efficiency and improved quality.

Drafting model dispute clauses and designing mechanisms for a combined use of ADR methods.

Due to changes in the economic context (globalisation, a litigation party in one country may be a business partner in another country; exposure may lead to loss of future business opportunities, etc) in house counsel must propose other alternatives to conflicts than mere traditional litigation, and must favour the use of other tools aimed at balanced, negotiated outcomes that preserve the business relationship. In house counsel may be(come) an agent of change, creating a legal department that is more responsive to the needs of business units, aligned with the company's goals and focused as much on enabling business development as on managing risk.

In support of a culture of change, and in order both to spread and strengthen it, these same chief legal officers have set up modes of regular communication with the company's business units, whether via informal meetings, newsletters, internal training, model documents that take into account past experience ('3d generation language').

[Extra

In The Netherlands, three consultation proposals for new laws, published on April 25, 2013 are expected to be turned into legislative proposals submitted to the Second Chamber of Dutch Parliament in the summer of this year:

- Directive 2008/52/EC of the EU Parliament and of the Council May 21, 2008
- Council Regulation (EC) no. 44/2001 December 2000 in Jurisdiction and the recognition and enforcementof judgements in civil and commercial matters

- Act on the Registered Mediator
- Act stimulating mediation in civil law
- Act stimulating mediation in administrative law

(1) *Act on the Registered Mediator*, introducing o.a. the protected title “RegM” and a statutory regulation of the profession of registered mediator.
(2) *Act stimulating mediation in civil law*, introducing o.a. suspension of statutes of limitation in case of mediation procedures, the legal status of the mediation agreement, a duty to inform the court whether mediation has been attempted or why not, legal relevance of mediation clauses in agreements, facilitated (electronic) interaction with the court in case of need of a partial judgement or a confirmation of a settlement and a limited waiver for a mediator to give testimony.
(3) *Act stimulating mediation in administrative law,* introducing a duty for government institutions and agencies to as a rule introduce the option of mediation to interested parties. The administrative court will have to be informed whether mediation has been attempted or why not. Similar rules will apply for tax authorities.

The *Act stimulating mediation in civil law* will apply and have to be applied to all cases where there can be assumed to exist an issue of interpersonal relationship. This will according to the draft bill include cases in the field of corporate litigation. Article 22a of the to be amended Dutch Code of Civil Procedure refers to amongst others: conflicts involving shareholders, directors, legal entities, partnerships and participants in mutual funds, parties to intellectual property agreements and conflicts between companies and government agencies.

The active involvement of mediation in all administrative procedures alone will boost the awareness of companies and the public of mediation and what it can contribute for solving problems. Enactment of the relevant proposals will be the driver towards a tipping point beyond which mediation will become a household instrument in the chain of solutions in case of conflict.**]**

Brown, H. & Marriott, A. (2011). *ADR: Principles and Practice.* 3d ed. Londen: Sweet & Maxwell,
Fille, E. (2012). *Commercial Mediation in Europe, An Empirical Study of the User Experience.* Alphen a/d Rijn: Kluwer.
Stipanowich, Th. J. & Lamare, J.R. (2012). *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict management in Fortune 1,000 Corporations* (http://ssrn.com/abstract=2221471).