

Same, but different ...

Regulating mediation in Europe (and the Netherlands)



ISBM workshop by
Manon Schonewille

The **Directive 2008/52/EC OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL** of 21 May 2008 ...



Lawyers in ADR

**Roles, Responsibilities and Opportunities of the
Lawyers in Alternative Dispute Resolution (ADR)**

**... ON CERTAIN ASPECTS OF MEDIATION
IN CIVIL AND COMMERCIAL MATTERS**

In cooperation with

A Project implemented by



Utrecht University (The Netherlands)
University of Deusto (Spain)
UEAPME (Belgium)
ACB (The Netherlands)
ECLA (Belgium)



Go to

www.adrcenter.com/cj

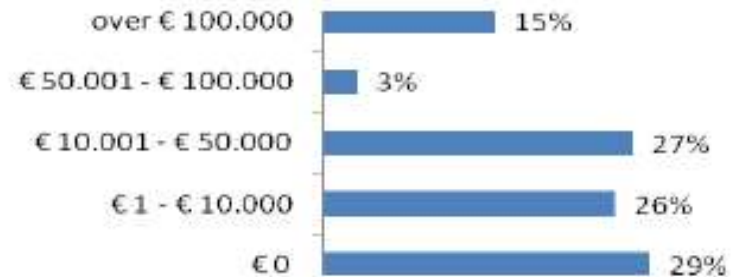
to download the EU :

- *Mediation Advocacy e-book;*
- *Video explaining mediation; and*
- *Survey on the costs of commercial litigation.*

5. Lawyers - Estimated average annual legal costs (legal and court expenses) that your average client organization spends in relation to EU cross-border disputes.

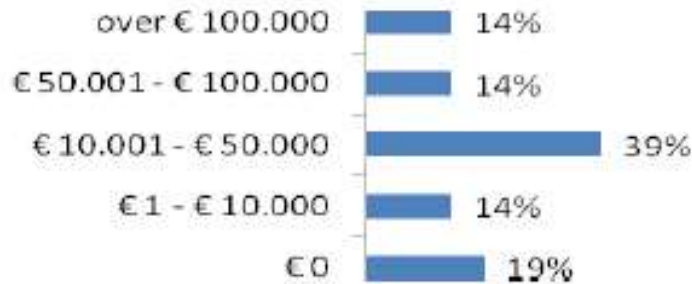


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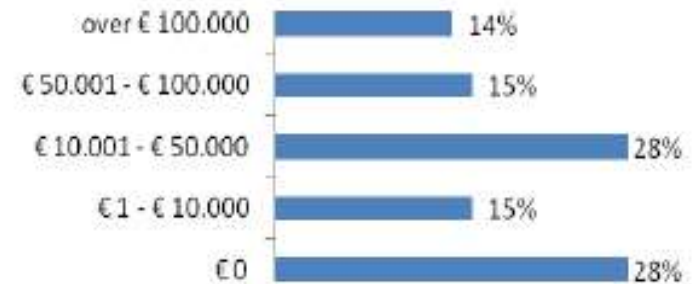


Quantitative survey among lawyers and companies:
 2/3 EU corporations reported allocating a (large) portion of budget to **legal costs** incurred as a result of EU cross-border disputes (in line with estimate lawyers)

6. Lawyers - Estimated average annual business cost (time spent by office staff, "opportunity costs", loss of goods, failed or incomplete payments, damage to commercial reputation) that your average client organization incurs in relation to EU cross-border disputes.

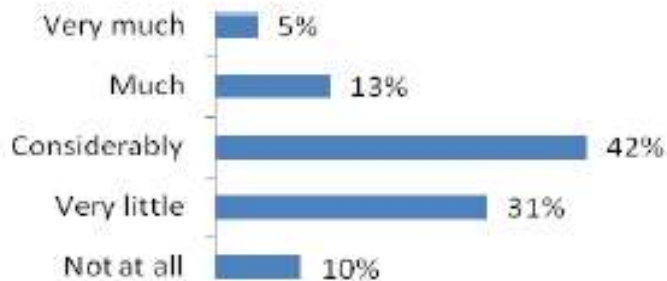


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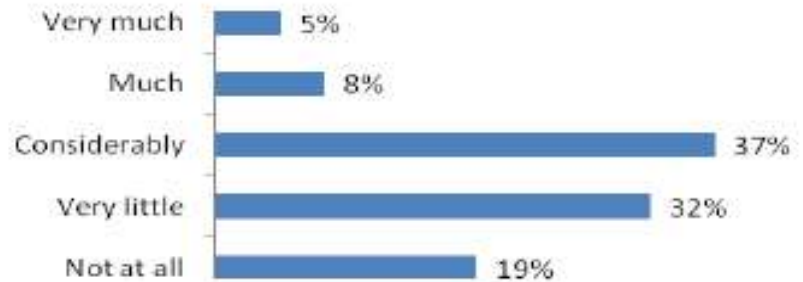


Nearly 2 out of 3 responding corporations and 4 out of 5 lawyers estimated **significant** costs incurred—both in **capital** and **resources**—as a result of handling cross-border disputes.

9. Lawyers - How much does the risk of an international dispute in a foreign EU Court influence your clients' decision to sign a contract with a counterpart?



9. How much does the risk of an international dispute in a foreign EU Court influence your decision to sign a contract with a counterpart?



For nearly 50% of EU corporations the decision to sign a contract with an EU counterpart is seen as unduly risky due to potential of cross-border disputes and litigating abroad.

Mediation in the EU

- Paradox that can be summarized in two numbers:
 - - 75% settlement rate
(70% mandatory-80% voluntary)
 - 0,5% use of mediation
(# mediations / cases filed in court)

DIRECTIVES

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

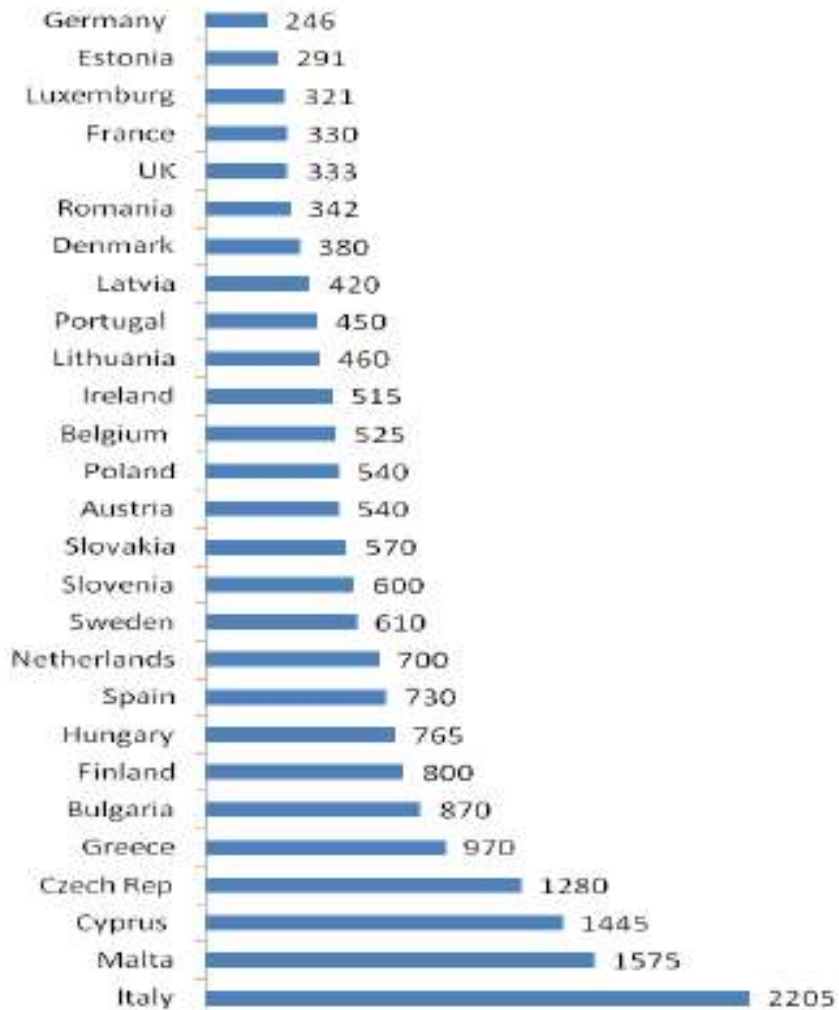
(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

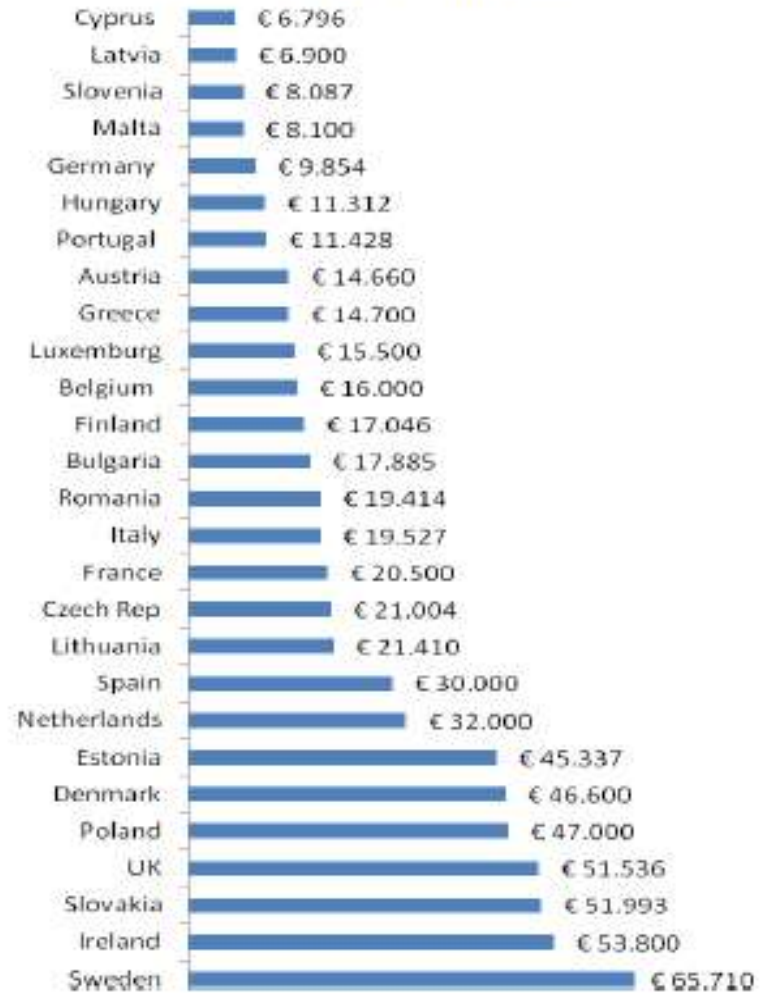
European *Union*:

- 27 Members with 25 Civil Law jurisdictions and 2 Common Law jurisdictions
- Approaches towards legislation in mediation matters and *ready-ness* to use ADR in the EU in cross border relationships
- (Approaches towards mediation (style))

Time (in days)

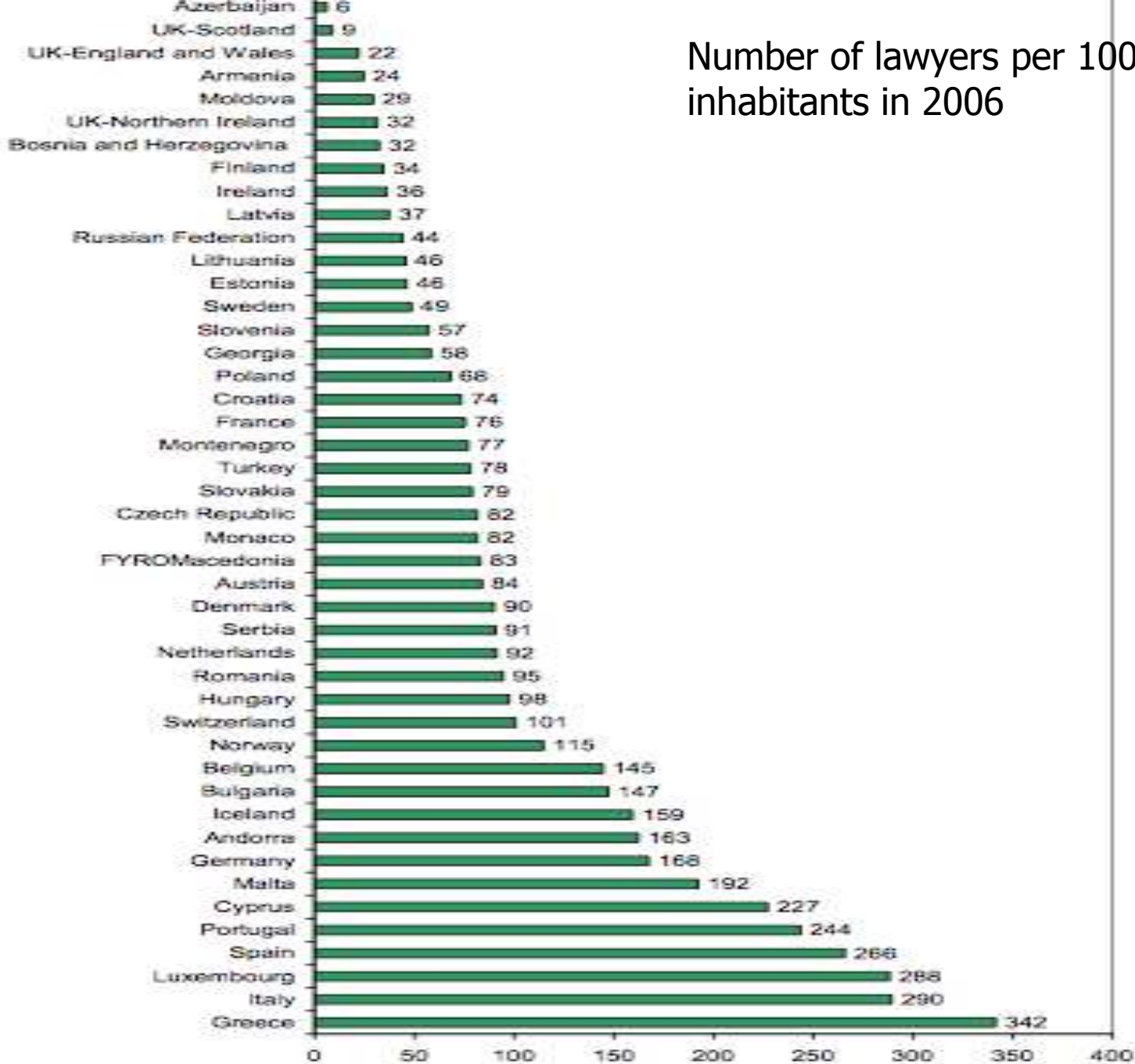


Cost of a domestic litigation

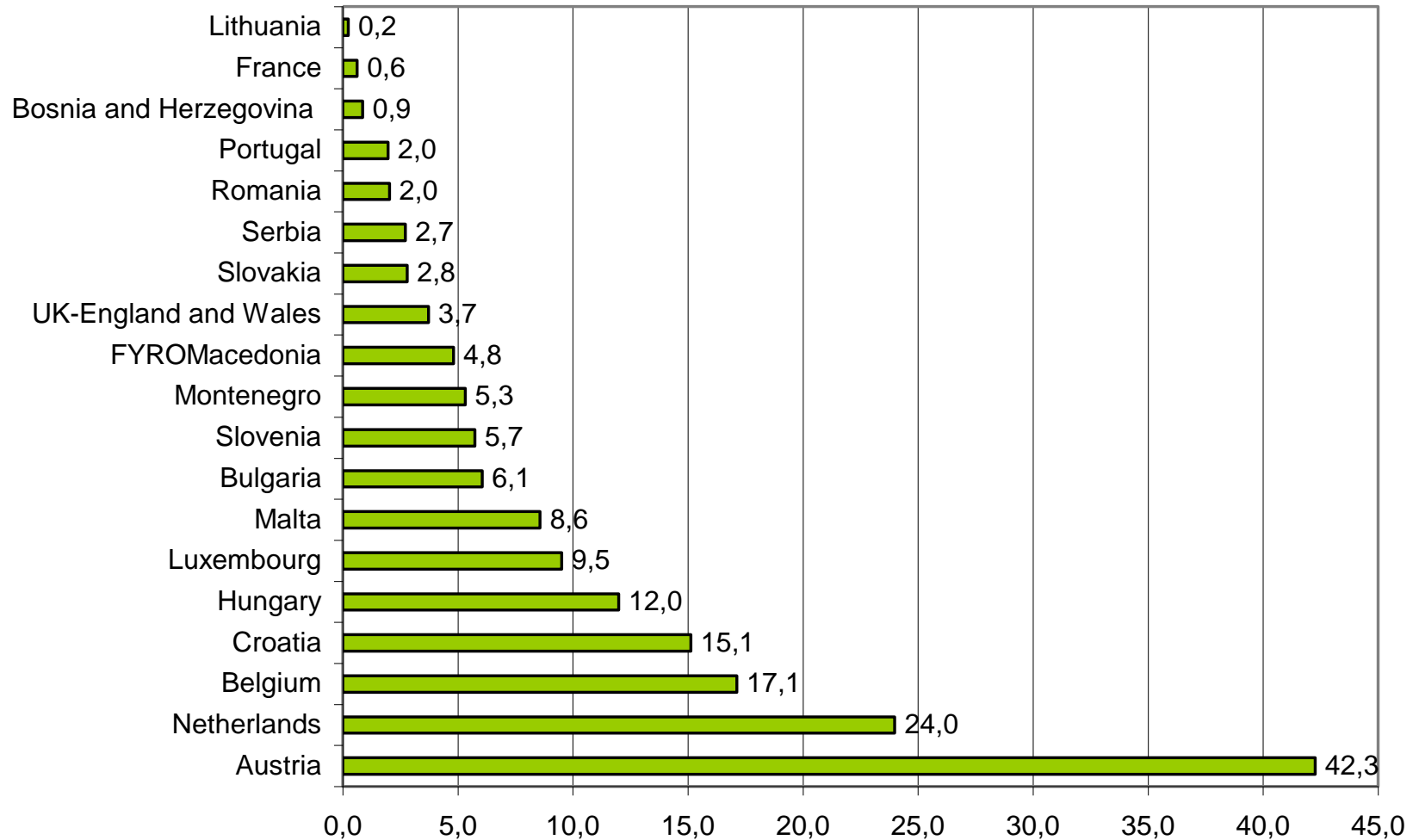


With standard case as reference point (buyer/seller inadequate goods, single step no appeal), estimate of time & cost of domestic litigation in the EU for case value of € 200,000

Number of lawyers per 100.000 inhabitants in 2006



Accredited mediators/100.000 inhabitants 2006



Regulation of ADR in the EU

- 
- 0% - The UK, Ireland No legislation, regulation by mutual understanding & agreement: many mediations
 - 10% - 25% - The Netherlands. No legislation, self-regulation of mediator, special rules for court connected mediation, legal mediation aid, disciplinary court: many mediations
 - 25%-50% - France, Belgium – A law, not so much mediations
 - 80% - Austria – A law with very strict quality rules and mediation going on
 - 100% - Bulgaria, Romania – An elaborate law, but not too many cases yet

YES	NO
Belgium	Austria
Croatia	Bosnia and Herzegovina
Denmark	Bulgaria
Finland	Czech Republic
France	Germany
Greece	Hungary
Luxembourg	Iceland
Malta	Ireland
Monaco	Italy
Montenegro	Latvia
Netherlands	Lithuania
Norway	Poland
Russian Federation	Portugal
Serbia	Romania
Slovenia	Slovakia
Spain	Switzerland
Sweden	
FYRO Macedonia	
UK-Northern Ireland, Scotland, England, Wales	

"Irreconcilable" Issues in Regulating Mediation

"Private" ADR

1. Voluntary attempt
2. Flexible procedure
3. Mediator accreditation standard set by the market
4. No sanctions for refusal to mediate (in the absence of a contract clause or statutory obligation)
5. Mediation body different legal forms and can be an individual
6. Proposals exchanged are irrelevant in subsequent proceedings
7. Mediation fees are freely contracted (and might be high)
8. Mediator does not have to be a lawyer
9. Outside counsel presence not necessary
10. Mediated settlement = contract

Mandatory attempt

Rigid procedure

Mediator accreditation standard set by public regulation

Some sanctions

The structure of mediation body determined by law

Proposals exchanged are relevant in subsequent proceedings

Mediation fees are fixed

Mediator has to be a legal professional (or at least a University graduate)

Outside counsel presence necessary

Mediated settlement = enforceable title

"Public" ADR

Features of EU Mediation – a Variegated Landscape (pre-directive implementation)

		UK	IT***	AU	NL
1. Attempt	Voluntary	√		√	√
	Mandatory		√*		
2. Mediation clause	Case admissible in court			√**	√
	Mandatory	√	√		
3. Procedure	Flexible	√		√	√
	Rigid		√	(√)	
4. Mediator accreditation standard	Set by the market	√	√		√
	Set by public regulation			√	
5. Sanctions	No sanctions		√	√	√
	Some sanctions	√			√ (employment cases)
6. Mediation body	Different legal forms and can be an individual	√			√
	Its structure determined by law		√	√	



Features of EU Mediation – a Variegated Landscape (pre-directive implementation)

		UK	IT	AU	NL
7. Proposals exchanged	Are irrelevant in subsequent proceedings	√			√ (case law)
	Are somewhat relevant in subsequent proceedings		√	√	
8. Mediation fees	Are freely contracted (and might be high)	√	√		√
	Are fixed			√	
9. Mediator	Does not have to be a lawyer	√	√	√	√
	Has to be a legal professional				
10. Outside counsel presence	Not necessary	√	√	√	√
	Necessary				
11. Mediated settlement **	Contract	√		√?	√
	Enforceable title		√		√*

* possible in court connected mediation ** In all EU countries except Denmark through notary!

Since end 90's, promotion of **ADR** as **active part** of the **Dutch** judicial **policy**.

Main **goals**:

- resolution of disputes **out of court**;
- achievement of the **qualitatively best** or **most effective** way of settling disputes;
- realization of various forms of **access to justice** that **primarily** give **responsibility** for resolving disputes to the **parties**; and,
- **decreased pressure** on judicial system.

- **First** examine in **practice** and **research** on a large scale what worked and what did not work => 5 year pilot before considering legislation on mediation.
- It functioned well in practice => huge ADR infrastructure but no legislation.
Mainly regulated by mediation market.

- Almost 1000 cases referred by judges (now > 1000 per year)
- Duration av. 6 hours under 100 days
- > 60% mediated successfully (after pilot with judges trained based on findings which cases to refer higher!)
- Nearly 90% agreements carried out within 3 months

- Parties choose mediation in >5% of the cases where mediation is proposed (through various methods).
- With exception of legislation regarding confidentiality, legislation does not appear to be necessary, although it is recognized that having a mediation law can stimulate actual use of mediation.
- Testing first before implementing legislation leads to well founded choices with respect to the eventual legal embedding of the system.

What are the **3** most important
success predicting indicators
for referral to mediation?

(according to the research in Dutch court connected
mediation programs)

- The parties **want to resolve** their dispute.
- They are **willing and able** to **negotiate** the conflict or at least they want to discuss it (negotiating space).
- Conflict **not** extremely **escalated**.

- Want to retain control over outcome
- Look for a quick solution
- Look for a economic or business result
- Combination of factors:
 - 70-90% settlement rate
 - High level of satisfaction
 - Short lead time, i.e. little mediated hours

The **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, published on the Official Journal of the European
Union L. 136/3 on May 24, 2008

“... a **structured process**, however named
or referred to, whereby two or more **parties** to
a dispute attempt by themselves, on a
voluntary basis, to reach an agreement on
the **settlement** of their dispute with the
assistance of a **mediator**”.