EU Mediation Law Handbook

Regulatory Robustness Ratings for Mediation Regimes

EDITED BY
Nadja Alexander
Sabine Walsh
Martin Svatos

Wolters Kluwer

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EU Mediation Law Handbook

Global Trends in Dispute Resolution

VOLUME 7

Series Editor

Nadja Alexander, Academic Director, Singapore International Dispute Resolution Academy; Visiting Professor, Singapore Management University; Hon. Professor, The University of Queensland; Senior Fellow, Dispute Resolution Institute, Mitchell Hamline School of Law. Professor Nadja Alexander has written more than 10 books and 100 articles in the field of negotiation and dispute resolution. She is known for the passion, energy and creativity she brings to her various roles as scholar, policy adviser, mediation practitioner and trainer.

Introduction

Global Trends in Dispute Resolution offers readers a garden rich in ideas and insights into contemporary dispute resolution principles, processes, and practices. The series leads the way in first-class debate and analysis of dispute resolution trends across our rapidly globalizing world. More particularly, its volumes analyse dispute resolution developments in various geographical regions around the world and in relation to diverse transnational practice areas. These practice areas include not only well-established legal categories such as intellectual property, construction, and resources law, but also emerging dispute resolution trends ranging from dispute systems design to cross-border mediation in private and public law.

Objective

With a particular focus on new initiatives and ADR practices, the *Global Trends in Dispute Resolution* series aims to provide practitioners, scholars, policymakers, and 'pracademics' (that elusive yet rapidly emerging category of practical academics and academically-oriented practitioners – you know who you are) with the resources both to cultivate the dispute resolution gardens of the world and to explore new paths within and beyond them.

Frequency

A volume is published whenever an interesting topic presents itself.

The titles published in this series are listed at the end of this volume.

Editors

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Sabine Walsh is a practicing mediator and academic specialising in cross-border mediation. She has primary and Master's degrees in Law, is a qualified lawyer and advanced member of the Mediators' Institute of Ireland. She has additional qualifications in cross-border mediation and online mediation. She practises mediation and leads innovative postgraduate courses in Mediation and Conflict Management at St. Angela's College, National University of Ireland. She is a co-founder of the Prague Summer Mediation Academy at Charles University, Prague. Her interest in cross-border mediation stems from her binational, Irish-German background. She is currently serving as the President of the Mediators' Institute of Ireland. She provides mediation education, training and consultancy for state and private agencies and is a regular presenter at national and international mediation conferences.

Martin Svatos, PhD, is a mediator and arbitrator based in Prague, Czech Republic. He has been involved in more than 100 mediation cases, both domestic and international. In addition to his rich dispute resolution practice, he teaches at Charles University in Prague and several other universities around the globe. He also acts as a legal expert of

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Foreword

To a lawyer encountering mediation today, whether in Europe or elsewhere, it is difficult to adequately convey why this book is an important milestone. Such is the growth and change in the field of mediation that, twenty years ago, such a book could not even be imagined. Today, it is an essential tool for dispute practitioners.

Two decades ago, I attended a luncheon presentation hosted by the New York law firm that had hired me after law school. The presenter was David Shapiro, an American lawyer who was then working in London, and a legend of the civil rights movement in the USA. He described a simple, common sense process for resolving commercial disputes. His presentation rattled my sense of purpose about the expensive work I was routinely performing to prepare cases for trials that rarely took place.

But I had no opportunity to test this innovative idea in the half dozen or so cases I managed. What our clients wanted and needed, we sincerely believed, was vigorous legal work to prepare for trial and create leverage for settlement, not experimentation with innovative legal procedures.

In 1999, however, General Electric appointed me as the in-house litigation counsel for a former state-owned industrial company, the company had recently acquired in Italy. With at least 143 active litigations around the world, each unique in its way (and more continuing to arrive), I quickly discovered that my highest priority was not to win every case, but to implement a systemic and predictable approach to conflict resolution. Fortunately, GE had already begun a programme of reducing the costs of conflict in the United States, with mediation as a strongly encouraged tool. We adopted the same approach in our European-headquartered business.

In the first decade that we attempted to include mediation in all phases of dispute resolution – from contractual dispute resolution clauses to proposing mediation in pending cases – we were met with far more rejection than actual mediation. Michael Leathes, who was then the head of intellectual property at British American Tobacco, and I once informally estimated that we were conducting no more than one mediation for every twenty disputes for which we had proposed it. Michael would go on to found the International Mediation Institute (IMI), an organisation dedicated to improving that rate.

Except for the UK, mediation was little known by lawyers in most of Europe two decades ago, or was misunderstood as a non-binding form of arbitration. It was not uncommon to be scolded by opposing counsel that, 'we already have the assistance of a neutral third party to help us settle....the judge!' This was how a senior lawyer showed me the door at a settlement meeting in southern Italy. The dispute for which I had proposed mediation ultimately went on for twenty years in the courts, outliving both the opposing lawyer and his client.

Gradually, of course, the benefits of mediation drove demand for it, as did the congestion of the court systems around the world. As the number of mediators, mediation institutions, and forms of mediation grew, so did the need for professionalisation. Yet, when IMI was founded in 2007, concepts such as 'standards' and any form of regulation were controversial and there was fierce resistance from within the mediation community, in particular from law professionals.

Today, mediation is not just widely practised across Europe, it is supported by legislative frameworks and the methods of regulation that are described in this book. There are still controversies being faced by the mediation community, but the debate about the fundamental utility of mediation as a dispute resolution process belongs to the history books of the twentieth century. The current debate focuses on *how* to implement mediation schemes and encourage its use by parties.

No one is better placed to describe the current state of mediation play in Europe than the authors in this volume, so much that their short biographies cannot do them justice. Many of them have been actively involved in shaping legal policy and practice in their respective countries. This book is more than an academic description of the mediation status quo. It boldly answers the practical questions that should be in the minds of legal practitioners: what should I expect if my client has a dispute in particular EU jurisdiction? And, in relation to situations for which I can plan, which jurisdiction offers the best legal framework to support a potential future mediation of my client's dispute?

The approach adopted by the book's editors, the 'Regulatory Robustness Rating' ('RRR'), offers a best practice for multi-jurisdictional summaries. It provides a straightforward way to understand and compare jurisdictions by how 'friendly' they are to the practice of mediation. In relation to what dispute resolution practitioners need to know, the RRR system, like mediation itself, features a user-friendly format. Its insightful ratings will prove useful not only to parties and their counsel, but also to legislators in each of the countries who will appreciate the identification of areas in need of improvement.

At the time of writing, the Global Pound Conference – a multi-stakeholder event spanning over thirty-five cities around the world in 2016 and 2017 – has indicated a universal appetite for change in civil justice. In relation to mediation, change means more than the formal introduction of mediation into laws and legal systems. Change challenges dispute resolution stakeholders to implement and apply mediation in practice.

The EU Mediation Handbook is the best available map of mediation law in practice with indications of future trends in cross-border mediation across Europe. At

the rate of change that mediation is experiencing, it will be fascinating to read the updates to this volume in the coming years.

Michael McIlwrath
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