Article

A Definition of Mediation?

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1 Introduction

There are as many perceptions about what mediation is or ought to be as there are mediators. A survey that was undertaken in the year 2000 into reasons why in-house counsels and their managers would believe in the utilisation of mediation showed that mediation was not perceived to be a very clearly defined notion. The researcher – John Lande – concluded that it was best to refer to the potential of mediation, rather than to one specified notion. According to Lande, mediation is something extremely malleable and it is quite possible – perhaps even likely – that processes called 'mediation' will evolve over time. For one thing he called it a collection of various procedures in diverse settings with some common features and a lot of variability.[1]

What are those common features referred to by Lande? Is it at all possible to formulate a definition of mediation?

In an attempt to formulate what mediation may entail, it is helpful to look at the family tree which mediation is part of. In the United States, it is the family of Alternative Dispute Resolution (ADR). The definition of ADR in the United States is 'The use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute.'[2] Similarly in England and Wales arbitration and mediation are categorised as ADR.

This is different – with the exception of England and Wales – in Europe where arbitration and binding advice (neutral evaluation) are seen as a form of adjudication and mediation as a different concept. In case of arbitration and neutral evaluation the resolution of a dispute is left to a third party. The comparison with dispute resolution according to the public judicial or administrative process is that the parties leave the decision of their dispute in the hands of a third party based on a consensual agreement.

Mediation can be distinguished from resolution by a third party because in case of mediation the parties themselves decide whether or not they want to settle their dispute and in what manner. They retain ownership over the solution. This is why in case of mediation it is more apt to talk about dispute solution rather than dispute resolution. Nevertheless, in many instances in the United States, England and Wales as in Europe and elsewhere in the world, the notion of ADR is used for those processes and proceedings that do not involve litigation before government-appointed adjudicators. Litigation then is the 'strategic attempt to resolve a dispute through the involvement of the judicial apparatus'. Given the various forms in use, it has been recommended to speak of appropriate dispute (re)solution.

According to research both in the United States (98%)[3] and in the Netherlands, the vast majority (95%)[4] of

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1. J. Lande, Getting the faith: Why business lawyers and executives believe in mediation. *Harvard Negotiation Law Review, 137* (2000), p. 137-232.
2. D.B. Lipsky & R.L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*. Ithaca: Cornell/PERC Institute on Conflict Resolution (1998).
3. Vide J. MacFarlane, *The New Lawyer. How Settlement is Transforming the Practice of Law*, Vancouver: UBCPress (2008), p. ix.
4. Geschillenbeslechting Delta, WODC, Den Haag.

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commercial disputes ultimately end in a settlement.[5] If these findings are even remotely accurate, it becomes clear that litigation is at best not more than a means to finding a settlement rather than a goal in itself. This may be different in very principled cases where precedents are at stake or there is a clear counter-indication to favour ADR. This may – apart from the cases where setting an example is important to avoid precedent – be the situation where the claimant is clearly opportunistic (the so-called Jackpot Syndrome), suffers from a personality disorder or some other indication that settlement is not to be expected no matter what.

It is important to understand that the notion of mediation does not entitle it to the exclusive right to be applied to the various alternative ways to resolve disputes. Neither do the various alternative ways to resolving disputes necessarily constitute mediation. As explained, in general, a distinction can be made between adjudication and dispute solution. In case of adjudication it is a third party who decides the outcome of the dispute and not the parties themselves. Dispute solution intends to express that it concerns a manner of dispute resolution whereby the parties themselves decide the outcome. All these notions are not entirely clear-cut, since nuances matter. For example in the case of adjudication there will be a solution to the dispute (assuming no higher instance will be addressed in which case a solution may first result after every appeal possibility will have been exhausted).

Let's take a closer look at the what, why and how of a definition of mediation.

2 Is a Definition Relevant?

Boulle and Nesic[6] have posited that a definition of mediation – however fallible or generic – is of practical use. If mediation is to be recognised in its relevant market it will be helpful that a certain consensus exists as to what it entails. Otherwise it will be difficult for sellers of mediation services and their potential clients to find each other. Although there are strongly opposing views as to what the benefit of legislation can be in regulating/prescribing a total liberal form of voluntary dispute solution such as mediation, there are avid advocates in favour of such regulation. Lande[7] pointed out that efforts at regulation are likely to increase standardisation and decrease the diversity of mediation practices. It is his opinion that in many ways such standardisation, if done wisely, would be a good thing. It should reduce the incidence of poor mediation practices, improve communication between mediation buyers and sellers, and provide more predictable interactions and results for mediation.

Jarrett[8] feels it to be of importance that there will be a communal standard concerning the core values of mediation which can serve as a basis for the various ways in which mediation is used. This is required given the doctrinal fights taking place especially in the United States between mediators and scholars representing various schools of mediation. He emphasises that the construct of a mediation market – even though it will exist in various segmented parts – requires a strong basis. This market can be compared to a house with various rooms which all are under one roof in which there ought not to be any locks on the doors. He points out that there is a substantial gap between theory and practice and an unduly constrained conception of what mediation can be. A significant part of the problem, as he sees it, stems from a reluctance on the part of the mediation community to challenge claims of brand distinction emerging in the mediation field. While branding may serve to increase market share for its respective brand proponents, if unchallenged it risks unduly restricting and thereby impoverishing mediation as a coherent and integrated professional activity. The challenge for the mediation community is both modest and ambitious at the same time. It is modest in that it requires the mediation community to acknowledge and validate what is already happening in the practice of mediation. It is ambitious in that it invites the mediation community to explore and clearly articulate integral possibilities, which according to Jarrett call into question claims of brand exclusivity and superiority. In a nutshell, integral mediation represents the brand-free open source alternative. As such it invites both scholars and practitioners to work in concert to explore, expand and interrelate various aspects of mediation theory and practice in order to unlock mediation's great potential.

Integral mediation will require the integration of theory and practice and a reconciliation between the various schools of mediation. It is my belief that the desire of practitioners to differentiate themselves in the marketplace for mediation services will continue the trend towards distinctive approaches to mediation and the marketing thereof. This does not exclude that a certain definition may serve the purpose – thinking outside in – of reaching out to potential buyers of mediation services who will want to know what to expect when they opt for mediation. It will mean, however, that a definition will necessarily have to limit itself to a certain generic description that will not subsequently fall victim to scholastic battles between scholars or practitioners.

The most simple of what would best be referred to as core mediation values – but even those are challenged

5. These figures are not entirely accurate because certain parties do not start mediation or do not pursue a case until the end so these are not included in the count.
6. L. Boulle & M. Nesic, *Mediation, Principles Process Practice*, London, Butterworths (2001), p. 6.
7. J. Lande, Getting the Faith: Why Business Lawyers and Executives Believe in Mediation, *Harvard negotiation Law Review 137* (2000), p. 225.
8. B. Jarrett (2012). Exploring and Practising Integral Mediation. *Dispute Resolution International. Vol. 6*, (No. 1), 37-81.

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by various schools of mediators and, in their suit, legislators – would be front-end and back-end consent of the parties to mediation. Mediation consent then will have two elements: front end, participation consent, which should occur at the beginning of the mediation process and continue throughout the process; and back end, outcome consent, which should be present when the parties reach an agreement in mediation.[9]

Now that there are different approaches to mediation and working styles, it is conceivable that a mediator will inform the parties beforehand of the choices available in order to allow them to make an informed decision as to what to expect when engaging a particular mediator. Experience has it that professional parties are well-aware of differing styles and talents, for example specific subject matter expertise or the particular experience of mediators. It is particularly in the interest of pro se parties who may be uninformed in this respect that a certain degree of direction is rendered by a definition of mediation that will contain as a minimum the most relevant core values of mediation.

Finally a certain definition of mediation may be relevant with respect to deontological and legal perspectives. In those countries where privilege is granted to mediators it needs to be clear when this privilege will and will not be applicable. If courts wish to refer parties to mediation, it must be clear what that means. In terms of the recourse for parties in mediation to complain to bodies entrusted with compliance to local or international rules (of professional conduct) – and for mediators to defend themselves against complaints – t is also relevant that there is no doubt as to what happened inside or outside a mediation process.

3 Wide Scope

In various acts and treaties mediation is described in a very generic sense, which may be appreciated given the variety of ways in which a mediation can be conducted. For example, in the U.S. Uniform Mediation Act as amended in 2003, Section 2, Para (1) says that mediation 'means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute'.
The European Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 defines in Article 3 sub (a) mediation as 'a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute'. The definition in the Directive includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge to settle a dispute in the course of judicial proceedings concerning the dispute in question.
The UNCITRAL Model Law on International Commercial Conciliation (2002) has it in Article 1 sub 3 that

> "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

In the text for the UN Convention on International Settlement Agreements Resulting from Mediation (2018) mediation is 'a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably'.

4 Zooming in on the Scope

Mediation can pertain to many topics involving, and it can involve only two parties or multiple parties (group mediation). A very generic distinction is made between one or more specific, defined issues or individuals (referred to as 'narrow') and pertaining to something which (although perhaps specific) touches an entire group or community (referred to as 'wide'). The dynamics of each type may be completely different. Riskin[10] has explained this nicely, saying that in studying farm-credit mediation he discerned two patterns of mediation, which he called 'broad' and 'narrow' differing from each other so radically 'that they could both be called mediation only in the sense that noon meals at McDonald's and at Sardi's could both be called lunch'.

Mediation (both narrow and wide) knows many applications. There are numerous views on how best to perform mediation.
The most well-known schools – overly briefly mentioned – vary from *facilitative* (the mediator is passive and restricts his or her contribution to facilitating the process and the conversation but stays out of the discussion entirely where content is concerned); *directive* (which may be facilitative but the mediator is more actively orchestrating the procedure and the discussion, still while staying away from any influence where content is concerned); *transformative* (the mediator stimulates the parties to find solutions within themselves on the basis it takes two to tango) and *evaluative* (whereby the mediator often avails over subject matter expertise

9. J. Nolan-Haley, Mediation exceptionality, *Fordham Law Review*, 78 (101), 1247 onw.

10. L.L. Riskin, Understanding mediator's orientations, strategies and techniques: A grid for the perplexed, *Harvard Negotiation Law Review*, 1(7), 35-36 and 90-91.

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which he or she also brings to the table to either help things move forward or to influence the parties to move things forward). There are more schools and there is much more to say about these other schools and the ones mentioned, but that goes beyond the topic of this contribution. Suffice to say that there are no hard and fast rules as to how to conduct a mediation, although certain core values will have to be observed. In my view these core values serve as the anchor for any definition of mediation, even if they are not in so many words expressed in the definition.

Since mediation knows multiple ways of being performed, a very narrow definition would quickly invite all sorts of exceptions to be made or a wide range of very specified definitions. A more generic description can relate to (i) avoidance of a conflict, (ii) the analysis of a situation (which topics are to be included or excluded), (iii) making enduring conflicts malleable,[11] (iv) bringing about agreements (deal mediation),[12] (v) the formation of policies[13] or (vi) restorative mediation in criminal cases. Mediation may pertain to almost every dispute in a variety of forms. This explains why the various definitions mentioned earlier are of a relatively generic nature. The downside of this sort of definition is that mediation may remain to be somewhat of a black box to the public. If reference to legislation, treaties or disciplinary rules is to offer guidance for the evaluation of what a mediator did or of what happened in a mediation, the lack of specificity may cause uncertainty. If every involvement of someone with a conflict of third parties can be called mediation and everyone taking a role in a conflict between third parties can call him or herself a mediator, this will lead to a lack of transparency, which may confuse the public. It also may stand in the way of a wider acceptance of mediation by the public.

According to the 2008 European Directive on Mediation (Art. 3 sub b) a mediator is

> any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Although one of the core values of mediation is mentioned in the description of who qualifies as a mediator ('impartiality of the mediator'), it is not very helpful to the public when it comes to selecting a mediator or understanding what to expect when opting for a mediation. This touches upon the question what constitutes a good mediation and who is a good mediator? It is my belief that some sort of – be it even relatively generic – definition which expresses the elementary core values of mediation may satisfy these concerns, as I will detail further on in this article.

The good thing about a wide definition of mediation is that it will not be confined to one single procedure or approach to so that mediation practitioners may follow new paths to helping people solve problems both in their personal and professional lives. This is something that may weigh heavily in the balance against regulating mediation within the tight boundaries of a detailed definition.

Given the relatively abstract notion of mediation, the public will seek certain points of reference when considering whether to engage in a mediation process. What should one expect when opting for mediation? I keep emphasising that it is extremely important to mandate that certain core values of mediation should be governed by professional rules of conduct, legislative measures or simply by the agreement appointing a mediator. As said, I will come back to this later, but for now I summarise these core values as voluntariness of front-end and back-end participation consent, impartiality of the mediator, respecting party autonomy, confidentiality and the empowerment of the parties to make decisions. Observation of these core values will determine whether a mediation is mediation and if these core values will be set in stone such that everyone will know and can expect mediation to be mediation, irrespective of the form or shape in which it is conducted.

How to find a good mediator then? Teaching mediation to a class of international students is sometimes a frustrating activity. It happens almost every time that after explaining mediation and its many benefits hoping this will enlighten their life, one or more hands are raised with the observation 'that is something we already do in our village for over four hundred years'. And so it is. Plus, in that village it was a no brainer how to find a good mediator. That would be the council of village elders or some other sage person, respected by everyone. How to find a good mediator in modern society where there are no such obvious choices as to whom to turn to mediate between disputing parties? As with other professions, the answer will have to be found by inquiring after the training, certification and experience of the relevant professional. Inevitably attention will also go to specialisation and subject matter expertise.
These are all factors that will be taken into account when deciding whether or not to trust the expertise of a mediator. Given the somewhat abstract notion of mediation, subject matter expertise is the logical substitute of our modern age for the trust formerly placed in the village elder. It is one of the means to find a modern village elder, although Thierry Garby elsewhere in this journal points out that subject matter expertise per se is not a prerequisite to be a good mediator.

11. B. Mayer, *Staying with Conflict*, San Francisco, Jossey Bass (2009).
12. L.M. Hager & R. Pritchard, Deal mediation: How ADR techniques can help achieve durable agreements in the global markets. First published in *ICSID Review – Foreign Investment Law Journal* and M.A. Schonewille & K.H. Fox, Moving beyond 'just' a deal, a bad deal or no deal in Ingen Housz (Ed.), *ADR in Business*, (p. 81-117) Alphen a/d Rijn, Kluwer (2011).
13. L. Susskind & G. McMahon, The theory and practice of negotiated rulemaking, *Yale Journal on Regulation*, 133-165.

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Just like attorneys, doctors etc., not all mediators are good mediators. Most attorneys at law and doctors are registered and certified and follow permanent education courses, yet it is not that which makes them good at their jobs. A high degree of specialisation will normally add to the confidence that a professional will know what he or she is doing. Certification, an official brand and membership of a professional organisation, subject matter expertise, information in registers and on websites and personal references will all add to the comfort that one is selecting a professional qualified to do what is being asked of him or her. There may always exist a difference between certification/qualifications and competence.

Mediation has grown precisely because of its flexibility as an alternative to more or less tightly regulated proceedings such as litigation before judicial or administrative authorities or arbitrators. The free spirit of mediation is its very *raison d'être*. While it is not without cost/consequence that certain aspects of mediation are not written into laws and regulations, in my view it is a price well worth paying. Professional organisations provide certification programmes. Research by the International Mediation Institute has shown that many organisations already know their way to find a suitable mediator, even on their own accord without referral from outside counsel. In today's transparent world more and more feedback on the abilities and performance of professionals becomes available to the public, so finding the right mediator for a certain case becomes more readily accessible to the public.

5 A Definition

I like to explain the existing variety of paradigms about mediation by quoting these two definitions of mediation found in literature:

> What is mediation? [.....] Mediation is a search for the invisible bridge that connects every living being with every other. It is a poem made of intention and vulnerability, of ecstasy and suffering. It is a renewing of souls. It is an opening through which we are able to glimpse the other, naked and divine. It is a synchronisation of heartbeats. It is a fierce, life-and-death struggle of each person with himself or herself. It is a design for creating a different future. It is a gentle, responsive exploration of the space between us. It is a breach in the myth of what we know how to be true, leading to transformation and transcendence.[14]

and

> Mediation is a process of facilitated negotiation.[15]

Both definitions are valid. Each expresses a way of looking at mediation in its own right. It is for parties who are considering a mediation to consider the atmosphere of each definition and ask themselves which appeals to them most. I sometimes reframe that question into, 'Are you interested in healing or dealing?' Of course it is quite possible that parties want both.

After mentioning two more-or-less randomly selected definitions of mediation, it is time to conclude. First those two definitions of mediation:

> [.....] the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual agreement that will accommodate their needs.[16]

and

> [.....] mediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decisions-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute. In addition to addressing sustentative issues, mediation may also establish or strengthen relationships in a manner that minimises costs and psychological harm.[17]

6 To Conclude

It is my belief that doctrine will not be able to prevent that mediation will continue to occur in all kinds of shapes and forms. This is not the place to open the can of worms that is all the possible perspectives on the wrong or right way to conduct mediations. I leave it to mediators and other (non)believers to crush each other's skull about what is right or wrong in this respect. In daily life users of mediation do not always care how their problems are solved as long as they are solved. In a broader sense, this may be correct, but it is useful that a certain understanding about what mediation entails and what to expect when engaging a mediator will be made possible by seeking consensus on a number of core values that will at least have to be observed in order to speak of mediation. These core values, I believe, are of universal value in each and every mediation. As long as these are observed, a mediator can stand on his or her

14. K. Cloke, What are the personal qualities of the mediator? in D. Bowling & D. Hoffman (Eds.), *Bringing Peace into the Room, How Personal Qualities of the Mediator Impact the Process of Conflict Resolution*. San Francisco, Jossey Bass (2003), p. 49-57.
15. N. Kauffman & B. Davis, Matching parties' goals with mediation styles. In *ABA Handbook on Mediation* (2nd edition), New York, American Bar Association (2010), p. 303.
16. J. Folberg & A. Taylor, Mediation: *A Comprehensive Guide to Resolving Conflicts Without Litigation*, San Francisco, Jossey Bass (1984), p. 7.
17. Chr. W. Moore, *The Mediation Process, Practical Strategies for Resolving Conflict* (3rd edition), San Francisco, Jossey Bass (2003).

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head or lie under the table, which is just a matter of personality and style. I already mentioned these core values earlier in this article: voluntariness of front-end and back-end participation consent, impartiality of the mediator, respecting party autonomy, confidentiality and empowerment of the parties to make decisions.

There are also varying views between mediators as to what degree participation in a mediation ought to be purely voluntary. In a number of countries this is no longer the case, since laws or courts can divert people to mediation before they are able to start litigation. Confidentiality is another item that is not absolutely enshrined in every jurisdiction for mediation, but as with voluntariness and the other core values, the core values mentioned here are the only safeguards against abuse and malpractice, given one selects a mediator who is subject to rules of conduct of a professional organisation. Irrespective of what definition of mediation one wants to adhere to, the core values are the anchor to keep the ship of mediation afloat. Given the observation of the core values, it is a free for all. Whether one wants to turn to a mediator in a flowery shirt and on sandals or to one in pinstripes with a necktie becomes a personal choice. The core values will have to be the universal underpinning of what to expect. The overriding element is party autonomy. A more simple and in my view apt definition than one based on these core values is neither required nor necessary. Such a definition might then read as

> a process whereby parties on a voluntary basis engage someone independent from themselves to neutrally assist them in a process that they may abandon if they want, who will confidentially try to solve an issue that divides them by listening to each other, whereby they will make their own decisions.

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