

# Mediation on trial: Dutch court judgments on mediation\*

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## Introduction

Searching the official Dutch court system database [www.rechtspraak.nl](http://www.rechtspraak.nl) by the keyword 'mediation', yields more than 3000 hits these days. This is not to say that in all these 3000 identified judgments mediation occupies a predominant place, let alone that it was the main issue in controversy. Still, in several hundreds of judgments mediation *did* occupy a central place, and this may be surprising, for several reasons.<sup>1</sup>

First, the Dutch have a reputation for being pragmatic and tolerant, reflecting the origin of the Netherlands as essentially a merchant nation.<sup>2</sup> This culture of achieving pragmatic consensual solutions has resulted in a vast array of informal dispute resolution mechanisms. Second, and as a corollary, there is hardly any statutory regulation of mediation in existence. The Dutch government has thus far been abhorrent of regulating mediation and of 'juridification' generally. The European Mediation Directive 2008/52/EC, for example, has been implemented in the narrowest sense, that is: through merely four scant provisions applying to cross-border disputes only.<sup>3</sup> Domestic mediation has, as yet, no statutory basis at all.<sup>4</sup>

In the Netherlands, mediation – or perhaps one should say: modern, professional mediation – has been organized 'bottom-up' by enthusiasts from within and from outside legal practice, resulting in a national umbrella organization – the Netherlands Mediation Institute (NMI) – in 1995. From 1995 onwards the NMI accredited training courses, maintained a register of accomplished mediators, issued codes of conduct and model texts (e.g. for mediation agreements) and acted as the interface towards government, representing the growing mediator commu-

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1 Whether this is much for a relatively small jurisdiction can only be established once comparison to other jurisdictions is possible; still then, intermediate factors may distort the picture such as the extent of (digitalized) court reporting.

2 J.F. Bruinsma, ADR als praktijk in Nederland en als mode uit Amerika, in: M. Kleiboer et al. (Ed.), *Alternatieve Wegen naar het Recht?*, Nijmegen: Ars Aequi Libri 1997, p. 91 e.v.; F. Weber and Chr. Hodges, *The Netherlands*, in: Chr. Hodges et al. (Eds.), *Consumer ADR in Europe*, Oxford: Hart Publishing 2013.

3 Wet van 15 november 2012 tot implementatie van de richtlijn, Stb. 2012, nr. 570.

4 Except for an isolated provision in the section on family disputes in the Code of Civil Procedure, art. 818 Rv, which provides that the judge may also refer litigants to mediation.

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ity. On 1 January 2014, the NMI was transformed into the MFN, the Mediators Federation of the Netherlands.<sup>5</sup>

It is important to note that these private initiatives met government interest soon, and *enabled* government support: in 1996, the Dutch Ministry of Justice established an 'ADR Platform' to investigate the prospects for mediation annexed to court proceedings. It was decided to launch a large experiment involving 5 out of 19 district courts, whereby judges would suggest mediation as an option to litigants. NMI registered mediators were readily available to refer litigants to. Different referral varieties (at the hearing, through a letter) were experimented with, but always on a voluntary basis. The whole process was monitored, including the settlement rates and the opinions held by participants in regard of the mediator, the process and the outcome. The overall success (and compliance) rates were promising and it was felt that referral to mediation by the courts would contribute to effective and customized conflict resolution. Hence, in 2004 the Minister of Justice officially announced that mediation facilities would be implemented nationally, notably through mediation bureaux attached to each court (except the Supreme Court). Further training opportunities were made available to judges. The court mediation bureaux would liaise with NMI – now MFN – certified mediators if requested. *Certified* mediators are registered mediators meeting additional requirements, notably in regard of practical experience.

The number of NMI/MFN registered mediators has increased enormously over the past 20 years, to approximately 4500; out of these approximately 900 are certified mediators. On average, the mediators handle 11 mediations a year, which brings the total number of mediations well over 50,000. Of these mediations, approximately 33% concern family disputes, 25% concern employment disputes, 15% neighbourhood disputes, 8% disputes with a government agency or (other) public authority, and another 8% concern business-to-business (commercial) disputes. The remainder concerns a wide variety of areas, such as 1% personal injury cases, and 2% school-related mediations.<sup>6</sup>

It is interesting to juxtapose these figures to the data on the baseline of (potential) legal disputes that the research unit of the Ministry of Justice publishes at regular intervals since 2003, the Dispute Resolution Delta (*Geschilbeslechtigingsdelta*) series. These surveys explore the strategies that people adopt when confronting a conflict involving legal aspects. It is noteworthy that the great majority of respondents say they will just lump their case or negotiate a solution with their opponent; going to court is rather exceptional.<sup>7</sup> Individuals appear to be involved mostly in consumer disputes and employment disputes, followed at some distance by family disputes. This lack of symmetry between the Delta and the NMI-NMF figures tells us that mediation must be doing relatively well in the family domain, and reasonably well in employment cases, while being almost absent in consumer disputes. The divergence as to family disputes can be explained by the

5 Reference is made to the official website: <https://mediatorsfederatienederland.nl>.

6 According to the Stratus surveys; which can be consulted via the MFN website.

7 B.C.J. van Velthoven and M.J. ter Voert, *Geschilbeslechtingdelta* 2003, WODC serie Onderzoek en Beleid nr. 219, Den Haag: Boom Juridische Uitgevers 2004; and later editions.

fact that many divorce mediations are initiated wholly out-of-court by the spouses jointly, with the courts' role being confined to mere rubber-stamping the divorce. The divergence as to consumer disputes can be explained as most such cases are handled through other ADR channels, notably a system of tripartite consumer complaint commissions that will decide cases using quasi-arbitration. Conversely, neighbourhood disputes apparently lack a legal dimension most of the time, and as a consequence these only play a very modest role in court statistics.

One should be aware that NMI/MFN statistics or court reports for that matter do not provide us with a complete picture. In the Netherlands, mediators do not yet constitute a legally designated profession; there are mediators who are not registered with MFN and yet quite active. A fascinating example is the 2006 mediation conducted by former European Central Bank director Wim Duisenberg in the mass damage dispute between Dexia Bank and consumer organisations, representing some 165,000 individual claimants over a defective financial product that Dexia had sold to them; this mass settlement was endorsed by the Amsterdam Court of Appeal early 2007, under the Dutch Act on collective settlement of mass damage.<sup>8</sup> Conversely, published court reports will not normally feature cases that were successfully referred to mediation – as such cases will then be struck from the docket list and 'disappear' from the judicial radar – unless further legal issues requiring judgment were at stake. Furthermore there are mediations that are 'wrapped' into other legal devices, such as court ordered expert reports (*deskundigenbericht*). We will address such 'forensic mediation' in some judgments below.

Having mentioned the lack of legal definition, and status for mediators: it was exactly the EU Directive's provision requiring professional privilege to be granted to mediators that triggered a debate on the need to solidify the professional standards for mediators, introducing a register to be kept under the auspices of the Ministry of Justice. A 2013 Private Member bill catered for such a system as well as for a duty for prospective litigants to explain to the court first whether they had attempted mediation, and if not, why not.<sup>9</sup> This bill however was withdrawn and re-introduced in a modified version by the former cabinet, but put on hold during the long-drawn-out new cabinet formation during 2017.

In the impression of case law that follows, we will see therefore that the basis is often contractual (mediation agreement) although a key role is also reserved for the ubiquitous general principle of 'reasonableness and fairness', from which near-duties to attempt mediation are frequently derived by the courts.

This takes us to the structure of this contribution. We will touch upon some 30 judgments, including the three judgments handed down thus far by the Nether-

8 A. de Roo and R. Jagtenberg, *Shadow of the Law or Shadow of the Settlement*, in: A.Uzelac and C.H. van Rhee, *Transformation of Civil Procedure*, (forthcoming in 2018), Dordrecht/Heidelberg/New York: Springer.

9 Note this is also recommended as 'best practice' by the European Commission in its Report on the application of Directive 2008/52/EC. Brussels, COM(2016) 542 final.

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lands Supreme Court (*Hoge Raad*), on voluntariness, confidentiality and binding effect/enforceability respectively. These themes, together with neutrality of the mediator, constitute the four main tenets of mediation, and we will organize the case law under these headings.

Most cases are in the domain of family law or employment, although we have also included some other areas (notably personal injury, commercial and administrative); to the extent interesting cases in these areas have presented themselves. We have left out the criminal law domain, as, in contrast to the private law and administrative law domains, the development of victim-offender mediation in the Netherlands is advancing only with great difficulties, jumping from one prematurely terminated pilot project to another – although in practice isolated success stories can be recorded.<sup>10</sup>

### Recourse to mediation: voluntariness Dutch style

How do disputants arrive at mediation? Obviously, they can agree *themselves*, or a third entity (notably a court judge) may suggest or refer them to mediation. If parties have agreed themselves, then obviously something went wrong as otherwise the court would not have become involved.

We will discuss cases representing two varieties:

- 1 Disputants themselves included a mediation clause in a previously concluded contract; the courts are called upon by one disputant to enforce the clause against the other side, who is now unwilling to resort to mediation.
- 2 Mediation has been prescribed or recommended by intermediary organisations relevant to the disputants. They are, as members of such organisations, expected to adhere to such provisions (in e.g. general terms & conditions, collective agreements or branch-specific codes) in their dealings with the opposing party.

When *courts* suggest mediation, three varieties can be distinguished:

- 1 The court suggested mediation as an option that parties might consider; this option was seemingly accepted, but one or both disputant(s) changed his/her mind and refused to cooperate yet.
- 2 The court indicates that in its view mediation must be attempted and appoints an independent expert as mediator (“forensic mediation”).
- 3 The litigants have forgone mediation as an avenue to resolve their problems (e.g. because the proposal was never made or was made by one party but rejected by the other); the litigants thus end up in court, but the court weighs in each party’s behaviour as to (non-)acceptance of mediation in its judgment, inferring with hindsight relevant duties from the general principles of reasonableness and fairness.

10 A.J. de Roo and R.W. Jagtenberg, *Het Maastrichtse succes met bemiddeling in strafzaken*, TMD 2011, nr. 3.

We will refer to these varieties as *ex contractu* 1 and 2 and *ex officio* 1, 2 and 3. We will start with judicial referrals, as these are particularly mentioned in the European Directive. While reaching a mediated settlement agreement is no doubt a consensual, voluntary process, the Member States are explicitly allowed to exert some pressure on litigants to attempt mediation at least. De Palo's study for the European Parliament, and the 2010 *Alassini* and 2017 *Menini & Rampanelli* judgments handed down by the European Court of Justice (ECJ) even appear to *advocate* more mandatory regimes for referral of litigants.

The Netherlands however have thus far stuck to the principle, embraced and proven effective in the national experiment, that a court referral of litigants to mediation can only take place based on the litigants' voluntary consent.<sup>11</sup>

#### *Ex officio – variety 1*

The principle of voluntariness was fully reconfirmed in the first Supreme Court judgment on mediation, delivered on 20 January 2006, in a divorce case.<sup>12</sup> The man had requested a reduction to zero of his obligation to pay alimony for his ex-wife and children. During the hearing before the Court of Appeal, the presiding judge suggested that a mediation attempt might be worthwhile. Both parties agreed at the spot, but nearly two weeks later the wife informed the court that on second thought she had to decline mediation for (mainly) 'emotional' reasons. The court regretted her decision but continued to rule on the merits of the appeal and declared the man's claim inadmissible. Thereupon the man lodged an appeal in cassation, arguing *inter alia* that the wife had defaulted on her obligation to attempt mediation and that therefore the Court of Appeal should have refused to rule on the merits. Instead, it should have referred the parties back to mediation. The Supreme Court dismissed this appeal considering summarily that

'(...) this is a dispute between two individuals and it is in the nature of mediation that both parties' ongoing consent is required. Parties are thus free to refuse to attempt mediation or to withdraw from a mediation that has already started, at any time and for whatever personal reason.'

In his Opinion, the Advocate-General (A-G) Mr Huydecoper had gone somewhat deeper into the matter, considering that forcing a party into mediation could be counter-productive, turning mediation e.g. into a mere opportunity for blaming and hurting the other side. The A-G further considered that a spontaneous positive reaction to a suggestion made by the judge in the solemn environment of a courtroom has to be treated with care anyway. On the other hand, the A-G imagined there could be situations where parties acting in a *professional* capacity could

11 During the nation-wide experiment, a 'self-test' was developed for litigants to fill out in order to make them double-check whether they are genuinely interested in mediation; an English version is included in: R. Jagteberg, A. de Roo, M. Pel and L. Combrink-Kuiters: Customized conflict resolution: court-connected mediation in the Netherlands 1999-2009, The Judiciary Quarterly (special issue). The Hague: Council for the Judiciary.

12 HR 20 January 2006, LJN: AU3724.

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be mandated to mediate first, such as unions and employers who are made to adhere to an agreed 'cooling off' period before calling a strike.

In more recent cases in the family law domain, the (lower) courts appear to follow the voluntary consent principle laid out by the Supreme Court.

Thus in a 2015 case, the Court of Appeal in Arnhem/Leeuwarden was confronted with a petition asking the Court to instruct the parties to go to mediation.<sup>13</sup> The case involved an 18 years old claimant with psychological problems, requesting that his (biological) parents – defendants – continue to remit an allowance despite the fact that he now lived with a girlfriend and did not want to see them anymore. The court stayed proceedings to enable the parties to restore contacts with the aid of a psychologist and a mediator; but two weeks later claimant's lawyer requested the court to render verdict. The parents' lawyer then asked the court to *instruct* the parties to go to mediation. The court disallowed this petition since the claimant had asked for a verdict while his psychologist did not recommend reinstatement of contact.

In a 2014 divorce case the Amsterdam Court of Appeal confronted an appeal by the man to annul (inter alia) the arrangement pronounced by the district court regarding access to the two children; he also asked the court to *order* the parties to go into mediation.<sup>14</sup> The wife entered a counterclaim, requesting an increase in the amount of alimony that had been determined by the district court. She added that she and her ex-spouse had already been involved in a mediation process aiming to improve their communication. The Court of Appeal disallowed the man's petition, deliberating *obiter dicta* that compelling disputants to mediation could have adverse effects.

It may be useful to know that for divorces involving minor children as in the latter case, the Civil Code provides an incentive to instil a sense of responsibility in the parents while stimulating them to communicate: the parents are under an obligation to make a parenting plan (*ouderschapsplan*) in which each parent's duties towards the children are detailed and access arrangements are specified.<sup>15</sup> In the *travaux préparatoires*, the government indicated that the plan essentially embodies a duty for each parent to actively enable the development of the children's natural ties with the other parent.<sup>16</sup> Should parties fail to agree on such a plan, then the court will decide about the necessary arrangements, possibly (but not necessarily) through involvement of a mediator. When parents did agree but one of them defaults on the plan, this may have consequences, as in the case dealt with by the Hague Court of Appeal in 2015. Here a penalty of € 250 was imposed on the wife for every time she would not honour the agreed access arrangement; thereby the court reproached the wife for having refused to attempt mediation to solve the access problems.<sup>17</sup>

13 ECLI:NL:GHARL:2015:6521.

14 ECLI:NL:GHAMS:2014:1369.

15 Art. 815 Rv en art. 1:247 BW.

16 Kamerstukken I 2007/08, 30145, C (MvA).

17 RFR 2016/9.

A commercial dispute with a family aspect was decided by the district court of Zwolle/Lelystad in 2006.<sup>18</sup> The case was about distribution and agency contracts that had been terminated summarily by the principal, a Dutch relative (cousin) of the distributor/agent who resided in Canada. In this case, the court intimated to the litigants that it was under the impression that mediation might be a very suitable mode of solving the problems at hand. The court stayed proceedings in order to allow parties to give their views on this idea, and from the court report, we cannot tell whether they agreed or not. What makes this case interesting though is that the court itself lists a number of criteria that would seem to make mediation the appropriate option here. The criteria were, that mediation might be beneficial for the family relations involved as well as for the continuation of the business relationship between the cousins, that the amount in controversy could hardly justify the major financial outlay to be incurred if the litigation would continue; and that these costs might be particularly high as experts would have to be engaged to instruct the court about the law of the Canadian state of New Brunswick, the law applicable to this dispute.

#### *Ex Officio – variety 2*

The judgments discussed thus far demonstrate a cautious position taken by the judge, although signals already transpired that judges sometimes blame a party for turning down mediation. Judges however can, and do, assume a more robust role, if necessary. In escalated family disputes, courts occasionally pronounce that ‘mediation’ is the appropriate option – period.

An early example is the 2004 Hague Court of Appeal judgment where the presiding judge considers that in this particular case, where the court feels that the parents hardly communicate, *transformative* mediation is indicated.<sup>19</sup> The judge impresses on both parties it is high time they gain some ‘insight into their own quarrelsome behaviour’. The parties bashfully concede they will cooperate. To this end the court appoints a specific expert, and orders the expert to carry out a mediation with the aim to get answers to a series of questions that the court enumerates in its verdict (e.g. what kind of behaviour did each parent develop? Is it possible to observe any change in conflict styles during the mediation sessions? What would be the ideal post-divorce parenthood situation?). In the verdict, the court also orders each parent to pay an initial deposit of 50% of € 4000 for mediation costs, having established that the parents prefer to split the costs on a 50/50 basis.

What we see here is termed ‘forensic mediation’; this is not genuine mediation but rather a novel way of courts using one of their traditional powers to take evidence, i.e. the power to order an independent expert report (or expert opinion; *deskundigenbericht*). The expert will make use of mediation techniques to find answers to the questions posed by the courts. The expression derives presumably from the more current concept of ‘forensic accountancy’. Obviously, this is not genuine mediation, as it is the judge who selects the mediator/expert, sets the

18 ECLI:NL:RBZLY:2006:AY5734.

19 ECLI:NL:GHSGR:2004:AQ6572.

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agenda for the mediation, and expects the mediator to report to the court about how the parties behaved and the way the sessions unfolded. Sometimes, divorce parties who gained some experience with genuine mediation are confused, as in the 2009 case decided by the Haarlem district court.<sup>20</sup> At the court hearing that followed the forensic mediation sessions, the man commented that in his view the expert/mediator had been very passive; it had seemed 'this was just an ordinary voluntary mediation'. The court reconstructed from the expert report that the man lacked in self-reflection and tended to become aggressive. The children had made it clear they preferred a safe and stable environment with just their mother. The court therefore decided to deny the father access to his children for the period of 1 year.

It has been argued, *inter alia* by the Childrens' Ombudsman, that in seriously escalated divorces – diWARces – referral to 'regular' mediation should be made mandatory. The research unit within the Ministry of Justice carried out research into this matter, but concluded that there are insufficient leads to assume that mandatory mediation will contribute to swift and better solutions.<sup>21</sup>

### *Ex Officio – variety 3*

Genuine or not, the foregoing examples of 'mediation-like' intervention do raise some doubts about the Dutch courts' embrace of voluntariness. Similar doubts may arise where courts infer a duty to propose or to accept mediation from the general principle of reasonableness and fairness that permeates all aspects of Dutch private law. This approach has particularly gained significance in employment disputes. Here the vague norm has translated into the requirement for each party to behave as a good employer and good employee respectively. How this works out in practice can be illustrated through the 'situational disability' case law.

It is not uncommon for an employee involved in a workplace conflict to report ill at some stage; medical problems may indeed result from daily involvement in conflict. Unique about the Dutch situation is that an employer is statutorily obliged to continue paying such an employee's salary during two full years, while being prohibited from terminating the contract during this period. Only after two years, the contract can be validly terminated and the employee will then qualify for a disability benefit, administered by the UWV public authority, the Employee Insurances Implementing Agency responsible for the execution of employee benefits. Around the turn of the century, the increased social costs of this rather attractive avenue to ignore workplace problems inspired legislation requiring both the employer and the employee to make a best effort to 'reintegrate' at work. A key role in this process is reserved for the company medical officer who has to examine the unfit employee at regular intervals. When conflict is the real

20 ECLI:NL:RBHAA:2009:BJ9031.

21 For references and a methodological discussion see: A. de Roo and R.Jagtenberg, Private Justice in the family law domain: the place of family group conferences within the range of ADR methods, in: A. Uzelac and C.H. van Rhee 2018 o.c.



source of problems, mediation rather than medical treatment is to be advised. An employer is allowed to discontinue payment of salary when an employee obstructs his reintegration. Therefore, whenever mediation can be reasonably expected to take away the real cause of the problems, there is a severe sanction hovering above a refusal to cooperate.<sup>22</sup>

In a 2012 case, the Zwolle-Lelystad district court elaborated on this aspect.<sup>23</sup> The employee had applied to the court for a preliminary injunction ordering the employer to restart paying his salary. Employer had discontinued payment in view of employee's obstruction of his reintegration at work. The employee had notably refused twice to take part in a mediation, although the company medical officer had advised that mediation would be appropriate to solve the conflict-part of employee's absence; there was however also a medical problem, to be addressed by the usual medical treatment. The employee argued that his medical situation did not allow him to confront the employer in person during mediation; the employer replied that the medical officer did not see any medical obstacles. The court deliberated that the duty to cooperate in reintegration efforts in case of illness has a broad remit that may indeed include a *duty to cooperate in a mediation* effort. To assess whether such a duty exists or not in a concrete case, the court presents a three-point checklist:

- 1 Is mediation an appropriate avenue to solve the conflict?
- 2 Is it likely that mediation will add to the recovery of the employee?
- 3 Can employee's cooperation be reasonably required, e.g. in view of medical considerations?

The court is of the view that in this case it is unlikely that mediation will be conducive to the recovery of the employee, The court explains its conclusion with reference to the severely disturbed relationship between employer and employee and the fact that their points of view are very far apart; it is then likely that a direct confrontation during mediation will only cause further stress and deteriorate employee's medical situation. Cooperation in a mediation can thus not be reasonably required in this case, employee can thus not be said to obstruct his reintegration, and employer is summarily ordered to continue payment of employee's salary.

When an employee is no longer ill, but does not resume work on a normal basis without employer's consent, this may constitute a refusal to perform the (amount of) work as contractually agreed, with all its consequences. This issue was at stake in a 2013 case decided by the Amsterdam district court.<sup>24</sup> The employee was an investment consultant employed by a financial institution. When his wife sud-

22 In an unfair dismissal case, the Rotterdam cantonal judge deliberated on this point: 'Although an individual is basically free to accept or refuse mediation, the duty for an employer to continue paying salary as long as the employee claims to be unable to work makes that an employee may be required to take part in a mediation as this can take away the real cause of the problems.' Ktr. Rotterdam 6 January 2012, LJN: BV5469.

23 Rb. Zwolle-Lelystad 16-2-2012, LJN: BV6626.

24 ECLI:NL:RBAMS:2013:BZ5149.

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denly died, he had to take over the care of their young children. He fell ill but he was reported to have fully recovered after 1 year. Having returned to work, the employer allowed the employee to temporarily arrange his own working hours, in order to cope with the new situation at home. After half a year the employer informed employee that this transitional period had to end now, because the situation at work required the employee to resume work according to the normal working hours. When it appeared that employee continued to work at irregular hours, warnings were issued. Employee's lawyer replied to these that his client had serious stress complaints, and that the company medical officer had thereto advised mediation to be undertaken. The lawyer concluded his letter to employer stating that he expected the employer would follow-up this advice to attempt mediation immediately.

The employer reacted, that according to the medical officer there were no medical restrictions that would prevent employee to resume work as normal, and invited him to discuss a reduction to part-time as an option. Employee repeated the need to start mediation, and in reply the employer started to deduct the number of hours that employee had not appeared at work from his monthly salary.

The employee now applied to court for a preliminary injunction demanding employer to cooperate in a mediation on pain of a penalty of € 500 per day. He moreover requested a continuation of his flexible working hours as an acquired right. The court considered that granting an order to cooperate in a mediation against the employer would not square with the on-going voluntary consent of all parties as a leading principle of mediation. Moreover, the mere desire of one party that the other party accepts a mediation proposal does not entail a legally binding obligation for that other party; the request for an injunction thereto thus lacks a legal basis. Moreover, a factual basis for having a mediation appears to be absent as the most likely key issue (the working hours) constitutes the subject of the employee's other claim. The request for an injunction is thus dismissed.

Within the domain of employment law, the issue of offer and acceptance of mediation also plays a significant role when termination of employment is at stake. Until recently an employer would not encounter too much difficulty in persuading a court (i.e. the cantonal judge) that a contract ought to be terminated through dissolution; such dissolution could be judicially endorsed, as a 'necessary practical measure' at short notice without an opportunity of appeal, but the reverse side of this system was that where the employer would be to blame somehow for the cause of termination, the employee would qualify for a (sometimes considerable) compensation.

Dutch dismissal law was reformed as per 1 July 2015, and now the grounds for dismissal have become more strict and exhaustive. As a corollary, also the situations where an employee qualifies for compensation have become more limited (as do the compensation amounts). Simultaneously, a wider group of dismissed employees (including those with short-term contracts) are now entitled to a modest 'transition-compensation' to enable them to re-train and increase their opportunities on the labour market.

The Brielle cantonal judge provides a telling case under the former dismissal system. In 2011, the judge had to decide employer's request to dissolve the contract with employee without any compensation, as in employer's view, employee was seriously to blame for the problems.<sup>25</sup> Employee however argued the reverse; an extensive jumble of major and minor conflicts had come into existence for which employer was to blame, and normal communication was no longer possible. The court held, that if communication is disrupted, 'a modern employer may be expected to propose mediation'. Employer had failed to do so, whereas there was no reason to believe that employee would have been unwilling to cooperate in a mediation. The contract was dissolved, but compensation (though a limited amount) was awarded to the employee.

Under the new system, thus far several employer requests for dissolution have been disallowed by the courts, as employer had not done sufficiently to restore the relations at work. The Rotterdam district court considered in a 2016 decision, that 'employer has not only demonstrated too little initiative but has plainly refused an offer made by the employee to attempt mediation. Therefore, it cannot be decided now whether the relationships at work are irrevocably disturbed or whether there is still a prospect for restoring these.

Where the courts do endorse dissolution of the employment contract, employer's obstruction of mediation may lead to granting a compensation as is shown by the Zeeland-West-Brabant court's judgment of 2015, where the court considered that opportunities towards restoring the working relations had not been utilized as the employer had made mediation conditional upon the employee contributing financially to the mediation costs.<sup>26</sup>

More generally, one might wonder when exactly a suggestion to attempt mediation (made by the other party or by the court) is accepted or refused, really. Several court decisions, in a wide range of areas from commercial law (the case of the *Nijmeegse IJzergieterij*) to administrative law suggest that stipulating conditions beforehand may be interpreted as a refusal: 'yes but' is 'no'.<sup>27</sup>

#### *Ex Contractu – variety 1*

We now turn to the situation that the disputants had already agreed to attempt mediation in case a dispute would arise in the future. The first variety is where the disputants themselves inserted a clause to that end in a previously concluded contract; the Courts are subsequently called upon by one disputant to enforce the clause against the other party, who has appeared unwilling to resort to mediation as soon as an actual conflict did arise.

From two early judgments, one might be tempted to conclude that courts differentiate between the status of the contracting parties (corporate repeat players or individual one shotters) when it comes to deciding whether such a mediation clause is enforceable or not. In a 2002 employment case, the Amsterdam Court of

25 Ktr. Brielle 4 January 2011, LJN: BQ3318, Prg. 2011/164.

26 Rb. Zeeland-West-Brabant 2015, JAR 2015.

27 A commercial law case is Pres. Rb. Arnhem 16 March 2001, LJN: AB0557; an administrative law case is CRvB 10 June 2004; TMD 2004/nr.3, p. 76 e.v.

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Appeal held that the employee had the right to submit his claim before the court straightaway without trying mediation first (as stipulated in the mediation clause), as mediation is fundamentally different from e.g. arbitration: mediation is a consensual process, requiring the on-going willingness of parties to search for solutions together. When one party obviously is no longer interested, it does not make sense to impose a duty thereto, the court held.

In a 2004 case between two commercial companies, the Arnhem District Court however was called upon to decide on the enforceability of a mediation clause that the claimant himself had made applicable to the contract as part of his own general terms and conditions. In this case, the court denied the claimant a legal interest to pursue his case further without first making a serious effort to have the dispute resolved through mediation.<sup>28</sup>

More recent court decisions appear to confirm that there is a marginal difference between individuals and (corporate) players acting in a commercial capacity. Yet the propensity to allow a bypassing of mediation clauses appears to have grown all along the line, even in commercial disputes. The 2006 Supreme Court judgment discussed *supra* has likely played a role here. For example, in 2012 the Utrecht district court explicitly considered that the party invoking the mediation clause to prevent the court from assuming jurisdiction, could not – according to the court – simply rely on the Supreme Court judgment, as that judgment had been geared to individuals in a family dispute, whereas the present dispute was between commercial actors, and the claimant was theoretically bound by the clause.

Nevertheless, the court continued, now that claimant is apparently no longer willing to cooperate in mediation, this cannot be a reason for the court to deny claimant an interest in pursuing his claim before the court.<sup>29</sup>

Effectively, therefore, the difference between individuals and corporate actors seems to be extremely limited. Further cases include the one decided by the Den Bosch district court, where the court repeated in a dispute between individuals, that mediation is a consensual process from which each party can withdraw at any time.<sup>30</sup>

And in a dispute between two commercial companies, where one of the parties sought to rely on a more elaborate and more stringently worded mediation clause than had hitherto reached the courts, the Overijssel district court, in 2014, still held itself competent to receive the claimant and rule on the merits of his claim.<sup>31</sup> This particular clause said:

‘Mediation will be resorted to as a first step, and only if mediation does not lead to any result, then only will each party turn to a lawyer.’

28 Rb. Arnhem 14 January 2004 (One Stop to Knowledge BV), LJN: AO3003.

29 Rb. Utrecht 21 March 2012 (SDG), LJN: BV9146.

30 Rb. Den Bosch 23 February 2011, ECLI:NL:RBSHE:2011:BP5647.

31 ECLI:NL:RBOVE:2014:6437.

Even this clause however was of no avail; the court deliberated that mediation can only be pursued on the basis of voluntary consent by each party with explicit reference to the 2006 Supreme Court judgment (discussed *supra*).

#### *Ex Contractu – variety 2*

Mediation can also be mentioned, recommended or prescribed as an option in provisions which have not been drafted by the disputants themselves earlier on, but which have been incorporated by intermediary organisations relevant to the disputants (e.g. because one of them, or both, are member) in general terms & conditions, or collective agreements, or recommendations or codes of conduct that apply to the disputants and their dealings with each other.

Some interesting examples of court decisions in this category can be found in the field of personal injury claims. Here, the party liable for the injury is mostly represented by an insurance company; the victim sustaining the injury might or might not be represented by an insurer (through subrogation). It is well known that insurance companies tend to take their time to scrutinize any claim submitted to them, sometimes justifiably so, but sometimes not. And then such a go-slow approach is very much to the detriment of a victim already finding himself in deep trouble. Key players in the field, such as the Association of Insurance Companies and the Association of Personal Injury Lawyers have, therefore, launched an initiative to promote a swift, dynamic and humane handling of claims: the Code of Conduct for the Settlement of Personal Injury Claims (GBL – *Gedragcode Behandeling Letselschade*), where s.10 provides that if bilateral negotiations have not substantially moved forward after 3 years following the accident, the parties should feel free to engage a third party to help them out.

Media reports revealed some doubts about the effectiveness of this non-binding code of conduct and in 2012, the government stepped in, introducing a unique Dutch procedure: the 'partial dispute court' (*deelgeschilprocedure*). Through a minor amendment in the Code of Civil Procedure, the parties involved in the often long drawn-out negotiations towards settlement of a personal injury claim are now entitled to turn to the district courts, and ask the judge to intervene in a specific issue that appears to be an obstacle to resolving their dispute out of court, such as initial deposits to be advanced by the liable party (c.q. his insurer) to cover the lawyer fees of the victim. The costs if this special procedure are to be borne by the liable party and there is normally no opportunity to appeal. Next to the partial dispute court, there is the avenue of a preliminary proof procedure in case the parties cannot agree on an independent expert. A party may apply to the court to appoint an expert, without the need to bring a main procedure (yet).

In 2016, the Rotterdam district court had to decide a case, where the victim and the defending insurance company could not agree on the medical causal relationship between the accident and the victim's injuries. The victim invoked s. 10 of the GBL and asked the court to order the insurance company to cooperate in a mediation. The insurer argued that in this case the third party mentioned in s. 10

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GBL should be a medical doctor. The court deliberated that a party should not lightly be forced to mediation in view of its consensual character.<sup>32</sup>

A few months later, the Rotterdam court was again confronted with a request to order an insurance company to agree to a mediation. The insurer underscored his commitment to the GBL Code, and intention to pursue a solution, but not via mediation. The court considered that the GBL as such does not constitute 'law', but does create an (unspecified) obligation for the company. The key question according to the court is whether there are sound arguments based on which the insurer can reasonably refuse mediation? It turned out that the issue in controversy was whether the necessary premature sale of a house resulted in a lower than reasonable price/income for the victim. The court considered that first some research by an estate agent would have to be done as the parties' positions were too wide apart yet. So at this stage, the court concluded, the insurance company cannot reasonably be expected to cooperate in mediation.<sup>33</sup>

So far examples of court decisions pertaining to the aspect of recourse to mediation. There are other important aspects of mediation waiting, notably the concepts of neutrality and that of confidentiality.

### Is the mediator (perceived as) independent and neutral?

Mediation as neutral-assisted bargaining will only be attractive to disputants if the neutral is indeed perceived as neutral, or in legal terms, perceived as independent and impartial.

Where a mediator's behaviour during a mediation session gives rise to the suspicion of bias, this may lead to a complaint (based on the code of conduct) and eventually to a decision by the disciplinary tribunal. There are indeed such cases, but we will concentrate on two court judgments. These judgments highlight two instances where independence and impartiality may have become questionable: the situation where one of the disputants has undisclosed further dealings with the mediator; and the situation where one (corporate) disputant puts forward an employee of his as a mediator.

The first situation occurred in an employment dispute, where the Arnhem cantonal judge decided in 2008, in line with employer's request, to dissolve the employment contract without any compensation for the employee.<sup>34</sup> Earlier on, the employee had reported ill and the company medical officer had suggested to resort to mediation (the process is described *supra*, at 'variety 3'). The employee turned down the proposal by the employer to look for an NMI qualified mediator; instead the employee insisted that someone from within his own network with considerable experience mediating disputes, should be appointed as an unofficial mediator (here the generic Dutch word *bemiddelaar* was used). The employer how-

32 ECLI:NL:RBROT:2016:2802.

33 ECLI:NL:RBROT:2016:8088.

34 ECLI:NL:RBARN:2008:BC5837.

ever made it clear that he had serious doubts about the *bemiddelaars'* neutrality, whereas the employee should realize the importance of neutrality, all the more so as (salient detail!) the employee himself had been trained as a mediator. The employee replied that his *bemiddelaar* was prepared to take the NMI code of conduct as a guideline; but repeated he would not accept anyone else but this person. After lengthy discussions the employer reluctantly agreed to the *bemiddelaar* proposed by the employee. Several months after completion of the mediation (end of September 2007), it coincidentally appeared that the *bemiddelaar* had sent an invoice to the employee for a project agreed on 30 July that year. Suspecting a shadow agreement between the employee and the *bemiddelaar*, the employer turned to court applying for dissolution of the employment contract due to a fundamental breach of trust. The court considered that although a shadow agreement could not be proven, the employee was to blame here for breach of trust, as he should have avoided even the appearance of bias, knowing only too well that neutrality was so important to the employer.

It will be appreciated that in employment disputes, it is more likely that the reverse situation will occur: it is not uncommon for *employers* to resort repeatedly to specific mediators, who have demonstrated their effectiveness and reliability during previous assignments.

Definitely, one would be well advised to disclose any previous dealings with a mediator to the other side, prior to the mediation taking off.

Now if the appearance of bias may already play a role in regard of external mediators, is such bias not even more likely to occur when a corporate disputant insists on deploying his 'own' internal mediator?

Also in 2008, the Court of Central Appeals, a senior administrative court, decided a social security claim brought against the Social Insurance Administration Office (UWV) by a person who had become unemployed ever since his contract had been dissolved by the cantonal judge.<sup>35</sup> The cantonal judge had considered that the employer and the employee each were to blame in part. Under the Unemployment Benefits Act (WW) at that time, the UWV however decided that the former employee was not entitled to a benefit at all, as he himself had played a preponderant role in the termination of his employment. The Court of Central Appeals reconstructed which steps exactly had been taken by the former employer and employee to de-escalate the problems that had arisen. Of key significance to the Central Court was, that the employer had proposed his human resource manager as a mediator. Exactly for this reason, the person proposed as mediator was unacceptable for the employee. Thereupon, back in March 2005, the employer had informed the employee he would engage a new (and different) mediator. Nothing was heard of this initiative however since. The Central Court concluded that thus the employer has had a major share in escalation of the conflict; a more 'active and effective' approach in following up on the mediation was due by the employer.

35 ECLI:NL:CRVB:2008:BC1472.

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We cannot tell from the succinct format of the judgment whether the human resource manager was a fully qualified NMI mediator or another generic *bemiddelaar*. At any rate, what was decisive for the employee was the candidate's position as a manager within the company. The Central Court apparently regards employee's decline of his employer's proposal, in *this* situation, as self-evident. Yet in the Netherlands, internal mediators have become commonly used, notably by some major public authorities. The Inland Revenue Service (*Belastingdienst*), the Social Insurance Administration Office (*UWV*) and a number of municipalities have enabled some of their staff to specialize in mediation. Within the embrace of NMI, a special Charter has been devised to reinforce the status of internal mediators.<sup>36</sup> Thus it is provided, inter alia, that the internal mediator must be NMI qualified and that the employer is prohibited from interfering substantially in the internal mediator's conduct of the mediation. Importantly, it is also provided that the civilian party who is distrustful of the internal mediator, has an option to resort to an external mediator instead. In that scenario, the civilian party will be required to pay his share in the costs of mediation, whereas an internal mediator is fully paid by the public authority concerned.

### Confidentiality and privilege

It is a prerequisite for frank and creative discussions, that parties can rest assured that nothing said during mediation will be used in the outside world, particularly not in the courtroom in the event a mediation fails.

The most detailed provision in the NMI-MFN standard mediation rules is exactly the one on confidentiality. As these rules will apply to a mediation agreement concluded under the aegis of NMI-MFN, everyone involved, that is: the disputing parties as well as the mediator will thus be *contractually* bound not to disclose anything discussed during mediation.

During the first decade of mediation practice, the lower courts in the Netherlands took a unequivocal supportive attitude, by disallowing evidence emanating from a (failed) mediation. Thus in a 2005 case, the Utrecht district court deliberated that although it had an *ex officio* duty to ascertain the material facts (*materiële waarheidsvinding*; literally: material truth), this *ex officio* duty had to give way to what the parties had agreed earlier on in their mediation agreement.<sup>37</sup> Notably, under the Code of Civil Procedure, parties are at liberty to agree to *exclude* particular types of evidence being introduced in court, provided that the subject-matter concerns rights that the parties can freely dispose of (*bewijsovereenkomst*).<sup>38</sup> A confidentiality clause in a mediation agreement constitutes such an agreement to exclude particular evidence. The Utrecht court considered in 2005 that by signing the mediation agreement at the time, the party that now sought to rely in court

36 Fer Kousen, *De interne mediator – interne mediation en beroepsethiek*, Den Haag: Sdu Uitgevers 2006.

37 Rb. Utrecht 2 February 2005, NJF 2005/152.

38 Art. 153 Rv.



on such confidential information, had knowingly and willingly accepted the risk that the court would prevent him from doing so.

In 2009, however, the Supreme Court rendered a judgment where it let its *ex officio* duty to ascertain the material facts *prevail* over the contractual duty of confidentiality.<sup>39</sup>

In this divorce case, the central issue was whether the parties had or had not completed a mediation addressing some necessary arrangements accompanying the divorce itself. According to the man, the mediation was actually completed; the wife denied, referring to the fact that she had not signed the mediated settlement agreement. The man then asked the court to call in the mediator as a witness, but the mediator refused to testify under reference to her contractual duty of confidentiality. The confidentiality clause concerned read as follows: ‘The divorce attorney has professional secrecy and shall not provide, without prior permission, any information about the case (...).’ So, interestingly, the person appointed by both parties as a mediator, uses her other professional qualification here, i.e. that of divorce attorney. To be sure, the attorney was qualified as a NMI mediator, but apparently the agreement was not drafted under the aegis of NMI. At the outset of the mediation agreement it was provided that ‘the divorce attorney shall act in the best interests of both spouses, and not just defend the interests of one of them’. The abovementioned confidentiality clause appears rather loosely drafted though, compared to a genuine NMI-NMF agreement.

The district court upheld the clause using the same arguments as the Utrecht court earlier on. Thereupon the man filed an appeal in cassation, arguing that the district court had characterized the said clause as an agreement to exclude evidence (*bewijsovereenkomst*) without giving the parties an opportunity to express their views on this qualification first; and that the court had deployed an unjust standard in interpreting the confidentiality clause.

The Supreme Court allowed the appeal and annulled the decision of the district court, considering that a court may not lightly characterize a confidentiality clause as an agreement to exclude evidence, notably not the clause in this agreement, as a major societal interest is at stake in a court’s duty to ascertain the material truth. The Supreme Court adds, *obiter dicta*, that a mediator could refrain from testifying in court if a right to professional privilege would accrue to her. Such a right – as an exception to the overall duty to testify, has thus far only been granted however to medical doctors, priests, notaries and attorneys. Mediators, by contrast, constitute a rather diverse group where uniform professional quality requirements are hitherto lacking, while even a formal demarcation of the very concept of ‘mediation’ is lacking. The Supreme Court continued that a case like the present one where an attorney (who *does* hold professional privilege) acts as mediator, makes no difference since the attorney acted here not as an attorney but in another capacity, i.e. as a mediator.

This Supreme Court judgment was received with mixed feelings in the Dutch mediator community; although the casual drafting of the specific mediation

39 ECLI:NL:HR:2009:BG9470.

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agreement at stake may have played a role, the primary emphasis now put on the societal interest in the court ascertaining all material facts created uncertainty how lower courts would now deal with contractually agreed confidentiality. On the other hand., the *obiter dicta* considerations were seized as a catalyst to vigorously start pushing for regulation of the profession of mediators.

In a 2011 decision by the Hague district court, a mediation agreement drafted under the NMI aegis, was, taken together with the NMI mediation rules, held to constitute an agreement to exclude evidence.<sup>40</sup> So, things are indeed never as black as they seem.

A 2014 decision by the North Holland court related to special circumstances in which a party (*casu quo* his attorney) can justifiably override a confidentiality clause.<sup>41</sup> Back in 2009, an employer had summarily dismissed his employee for outright refusal to perform the work assigned to him, a few days after a mediation had been terminated. In a procedure for injunctory relief, the employee argued that there were special circumstances, notably the way how the mediation had been conducted and terminated, that could not possibly warrant a summary dismissal in this case. To substantiate this argument, the attorney had submitted documents used in the mediation. From this it appeared, that the entire mediation was directed at terminating the employment. The Court of Appeal found this information was indeed relevant to understand employees' refusal to perform the assigned work. As a consequence there was no 'urgent cause' that justified a summary dismissal here. In the main procedure for the North-Holland district court, the employer argued that employee's attorney had violated the confidentiality clause by submitting the mediation documents in the procedure challenging the summary dismissal. The district court however agreed with the employee, that the mediation documents were the only means to provide an insight into the real intentions of the parties. Under these circumstances, the attorney was justified to submit these documents before the court, although theoretically this constituted an infringement of the confidentiality clause.

A salient detail: in 2012 the disciplinary tribunal for Dutch attorneys had held that the particular attorney concerned had not acted according to due professional standards by submitting these mediation documents without prior consultation of the other side. The North-Holland district court refers to this tribunal decision, but adds that it does not consider itself bound by that decision when it comes to the question of an attorneys civil liability.

In a 2011 case before the Hague district court, the claimant had submitted documents that had been used by himself during a preceding mediation.<sup>42</sup> The defendant tried to persuade the court it should disallow these documents in view of the agreed confidentiality. The court however considered, that the mediation agreement does not prevent a claimant to submit documents that he himself had introduced in the mediation. It would have been different, the court continued, if the

40 ECLI:NL:RBSGR:2011:BQ6155.

41 ECLI:NL:RBNHO:2014:13082.

42 ECLI:NL:RBSGR:2011:BU6144.

other side had submitted these documents before court; *that* would have constituted a breach of the confidentiality clause.

### The status of a mediation outcome

The only Supreme Court judgment to date on mediation outcomes dates from 2013. A private person and the Inland Revenue Service had been disputing about the proper valuation of an apartment and the consequences thereof for the person's tax assessment.<sup>43</sup> The parties agreed to try mediation (March 2008) under the aegis of the NMI rules. The agreement provided that parties can advance proposals without prejudice; only agreements in writing duly signed by both parties can create new obligations. And: intermediate agreements (in writing) will only bind parties (prior to or simultaneously with) the final settlement agreement, if this is explicitly stated; the mediator must co-sign such agreements.

The parties soon agreed that as a first step the correctness of a 1998 valuation should be checked; the mediator sent his notes of what was agreed in more detail in a letter to each party. The parties themselves then concluded an agreement under the heading 'settlement agreement' on 3 April 2008 providing they had agreed on one surveyor each to value the said apartment by the 1998 situation.

A few months later both surveyors had agreed on a value of € 400,000, but the Inspector wrote to the other party that this value was obviously too low. Since no agreement was reached on this preliminary step the mediation failed.

The private party then applied to court asking a judgment to declare the agreement of 3 April 2008 legally binding. The Court of Appeal eventually granted the declaratory judgment, deliberating that the heading 'settlement agreement' clearly differentiated this intermediate agreement from a mere floating of ideas without prejudice; the fact that the mediator had not co-signed the agreement did not change the binding character, as from the letter the mediator had sent to the parties shortly before the 3 April agreement it appears that the gist of this agreement had his consent.

The Inland Revenue Service lodged an appeal in cassation, and found the Supreme Court on its side. The Court considered that in view of the voluntary and consensual character of mediation, for a legally binding effect to ensue from mediation documents it is essential that agreed requirements as to form are met. In this case, the 3 April agreement did not explicitly state it *was* binding on the parties (as required by the initial mediation agreement) and neither had the mediator co-signed the agreement itself. The declaratory judgment of the Court of Appeal was hence quashed.

Another judgment on the binding effect of mediated settlements is a family case decided in 2003 by the Amsterdam Court of Appeal.<sup>44</sup> The spouses had taken part in a divorce mediation during two sessions that had extended over a whole day. In the end, both spouses had signed a settlement. Four weeks later however, the

43 ECLI:NL:HR:2013:2049.

44 Hof Amsterdam 18 December 2003, NJF 2004/164.

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man argued, that he had erroneously put his signature, as he had been exhausted. Neither the district court nor the Court of Appeal allowed this request to void the mediated settlement for defect of consent. Important factors to the Court were the fact that both parties had been accompanied by their respective lawyers, while the mediator had given each of the parties ample opportunities to confer with their counsel.

It should also be noted that the settlement agreement (*vaststellingsovereenkomst*) is a named contract in the Dutch Civil Code, particularly meant for bringing a dispute or uncertain situation to an end. By its very nature, voiding such a settlement for reasons of error will not easily be allowed by Dutch courts.

### **Rounding off**

The foregoing selection of court decisions gives a first broad impression of how mediation is received by the courts in the Netherlands. Obviously, only a limited number of subjects could be targeted within the confinements of this article, but we felt these themes were rather essential to mediation. Further, more isolated themes have cropped up of course, varying from mediator liability<sup>45</sup> (in a divorce case where the mediator – an accountant – had distilled too high an amount of alimony for inclusion in the settlement agreement necessitating the man to incur legal costs in a substantial court procedure undoing this term of the settlement) to a court's recognition that a mediation agreement does not preclude a request for a preservation order being made to court.<sup>46</sup> Cross-border mediations are occasionally handled too, mainly in the context of international child abduction cases. Such cross-border mediations tend to be facilitated through the Mediation Bureau of the International Child Abduction Center. An example of a case where the court endorsed a settlement agreed through such cross-border mediation is the Hague district court decision of 13 November 2017.<sup>47</sup>

Definitely, what has become clear is that mediation and the law have developed into a rich field for academic study.

45 ECLI:NL:RBROT:2012:BY3754.

46 ECLI:NL:RBBRE:2008:BF7611.

47 ECLI:NL:RBDHA:2017:13725.