

Court-annexed Mediation in the Netherlands: the Dutch approach (I).

Probably the reason why so many countries are interested in the Dutch model in mediation is its approach to this new phenomenon.

It can be concluded that mediation is gradually gaining foothold here, although according to many the pace is not quick enough.

The reason for mediation's relative success in the Netherlands might lie in the fact that until now no legislation has been enacted. The government has chosen for a bottom-up approach by first staging several experiments in order to find out whether mediation could be a successful instrument for dispute resolution next to the traditional types like litigation and arbitration. The projects which ensued were closely monitored by the Research and Documentation Centre of the Ministry of Justice in the Netherlands. An excellent report of these projects by the main research official, Bert Niemeyer and the director of the Netherlands' court annexed mediation office, Machteld Pel, is published in the Penn-state Law Review vol. 110:2¹.

A short summary is given here, limited to the court-annexed project.

Vital for a court-annexed mediation project is the understanding and cooperation of judges. Several courts were involved of which the judges were trained, not to become mediators, but to identify cases possibly suited for mediation. The judges' task was to inform the parties and their counsel, about mediation during the oral hearing in such cases which they identified as suitable for mediation.

The project involved some 70 mediators who were selected according to criteria set by the Ministry of Justice together with NMI, the Dutch Mediation Institute.

During the project the parties did not have to pay for the mediator's services: their payment came from the Ministry of Justice. The only obligation which the parties and their counsel had, was to fill in monitor forms after termination of the mediation. Some 1000 of these forms have been processed and evaluated by the Research and Documentation Centre. This report noted a 68% success rate, which in Dutch circumstances, is not a bad result at all.

In order to properly evaluate the result, the following factors should be born in mind:

- only 4% of all the conflicts eventually go to court;
- compromise is for the Dutch as sex is for normal people;
- an abundance of existing pre-trial settlement mechanisms are already in place;
- attorneys often reach settlement before trial;
- judges settle 50% of the cases at the oral hearing themselves.

Some categories of mediated cases were:

- civil:
 - labour cases;
 - conflicts between neighbours;
 - consumer conflicts;
 - rental and lease conflicts;
 - wills and estates;
 - healthcare;
 - problems about cooperation within companies and firms;
 - family conflicts: divorce, marital property, child custody, visiting rights;
 - problems concerning business contracts.
- administrative/governmental:
 - civil service labour disputes;
 - social security;
 - social benefits;
 - taxation: conflicts with central and local tax agencies.

¹ www.justitie.nl/english/themes/more_themes/mediation/themes/index.asp click pdf-file "court based mediation in the Netherlands – Pel en Niemeyer".

Some interesting figures:

- even when mediation proved unsuccessful there is a satisfaction rate of approximately 80% with parties and attorneys;
- the average duration of a mediation was from one day up till four months;
- the average amount of “contact hours” (actual hours in which the mediation took place, be-it in plenary session or in caucus) was 6,3;
- in 50% of the mediations two sessions were sufficient; only 20% had more than three sessions.

The result of this research prompted the government to provide court-annexed mediation in all courts in the Netherlands. The program started April last year; all courts will be involved in spring 2007. Mediation will be provided by NMI-certified mediators with additional qualifications, who may apply for accreditation with a court.

The costs are to be:

- the first 2,5 hours are paid by the state (€200,--, the so-called “habituation contribution”);
 - further hours payable conform hourly (commercial) tariff of the mediators. It should be noticed that the mediator is only entitled to charge his “contact hours”, so his/her hourly tariff is to be augmented by a percentage covering other costs and activities. This regulation is based on the Ministry’s opinion that parties should be able to make an assessment of the costs involved with mediation beforehand. This assessment can be made on the basis of conclusions published by the Scientific Research and Documentation Centre: amount of “contact” hours to be expected: 4 - 8, so the amount payable should cover 1,5 – 5,5 hours.
- It should be noted that fully state-financed mediation is available for parties eligible for legal aid. The parties should pay a contribution up to €90,-- based on their taxable income.

Mediation in the Netherlands: the Dutch mediation landscape.

Another unique feature of the Netherlands is the existence of the Netherlands Mediation Institute (NMI)², an independent foundation since 1995, having as its main goal to stimulate and structure mediation as a form of dispute resolution.

In its general board 20 persons represent all parts of society involved or interested in mediation. The NMI has set itself the following main tasks:

- to broadly make Mediation known as a method of dispute resolution;
- to offer a platform for consultation on Mediation among all interested members of society;
- to stimulate effective training opportunities for Mediators;
- to maintain a Register of Mediators who meet certain quality standards;
- to offer Mediation Rules designed to ensure a smooth progress of Mediations;
- to offer Rules of Conduct to which registered Mediators must adhere;
- to supervise the quality of Mediations and the quality of the performance of Mediators listed in the Register;
- to recommend for appointment Mediators who are listed in the Register at the parties' request in actual cases;
- to administer (the results of) Mediations held under the NMI - Mediation Rules or under rules of organizations affiliated with the NMI;
- to maintain contacts with persons and organizations in the Netherlands and abroad which are engaged in dispute resolution in general and in alternative forms of dispute resolution in particular.

² www.nmi-mediation.nl

In 2005 there were ± 4000 NMI-registered mediators of whom ±1100 were certified.

The NMI's mediators register on the internet, on which all the registered mediators appear, is consulted 16.000 times per month. The NMI-website notes 100.000 page views per month.

To ensure a reliable and transparent structure for mediation in the Netherlands at a national level, NMI provides, among other things:

- the NMI Mediation Rules
- the NMI Complaints Procedure
- Rules of Conduct for NMI-registered Mediators
- a model Mediation Clause
- a model Mediation Agreement
- independent information and documentation on mediation
- independent disciplinary rules for NMI-registered Mediators
- a protocol for the assessment and recognition of mediation training institutes;
- protection and licensing of the titles **NMI Mediator** and **NMI Certified Mediator (ISO 1702)**
- a public Register of Mediators listing the NMI-accredited Mediators

The rules and models developed by NMI are public and are available in English, inter alia, on the NMI website. The NMI Register of Mediators, too, can also be consulted on this website. Those who consult the register on this website are afforded the opportunity to themselves make selections from the register. For those who are looking for a mediator in case of a conflict to be resolved through mediation, it is also possible to ask the NMI to supply a detailed selection.

Mediation is an act of intervening in conflicts between persons and/or organizations, by a neutral third party possessing the necessary qualifications: the mediator. A crucial condition for this is trust. For the engendering of trust at least three aspects play a significant role: impartiality, expertise and professionalism. To achieve professionalism a sound infrastructure is required (rules, registration and code of conduct), a complaints procedure plus disciplinary rules, and independent quality assurance. It is the task of the independent NMI to provide these in the Netherlands nationwide. NMI does this through the NMI Quality Assurance System.

The demand for mediation quality and independent quality assurance has, apart from NMI itself and from the Dutch Ministry of Justice, also come from society, for example, the members of the Standing Parliamentary Committee for Justice (quality and supervision), market demand (the potential users of mediation) and the mediator professionals themselves (in particular with a view to further increasing professionalization).

The purpose of the Quality Assurance System developed by NMI is to provide a transparent, objectifiable, dynamic, testable and independent system for mediation and mediator quality assurance nationwide.

Next to the NMI there are national associations for mediators with specific professional backgrounds, such as the Dutch Association of Mediation Attorneys, the Dutch Association of Psychologists, Section on Mediation, the Association of Attorneys in Family Mediation and the Association of Civil Law Notaries – Family Mediators.

Furthermore there is the Dutch Association of Mediators.

Special mention is to be made of ACB Mediation, the mediation organisation provided by the Confederation of Netherlands Industry and Employers and some major law firms. It serves as provider for business mediations.

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