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## Netherlands

# Encouraging mediation in the Netherlands

Annie J de Roo and Robert W Jagtenbergw

The Anglo-American term *mediation* first surfaced in the Netherlands in the early 1990s and has become part of Dutch (legal) language since. This does not mean that mediation as a mode of dispute resolution was hitherto unknown in the Netherlands. Mediation, as a process of third party assisted bargaining, had existed for several centuries, albeit under different Dutch terms, such as *bemiddeling*, *verzoening*, *conciliatie* or (sometimes) *comparitie*.<sup>1</sup> These methods of dispute resolution were commonly practised as a side-activity by judges, mayors, or other functionaries, using their intuition, experience of life, or mere authority.

So what is so 'modern' about modern mediation? In modern mediation, the techniques have been systematised and refined on the basis of experimental, predominantly American, research.<sup>2</sup> The benefits of *principled bargaining*, focussing on interests, have been analysed and practical insights have been accumulated. On this basis, mediation has evolved into a professional activity: mediators must demonstrate that they master the new body of expert knowledge, they must be certified, and they are assumed to know how to navigate on the basis of their expertise. They must be associated with professional bodies that monitor quality and guarantee status. Another novelty is the institutional place of mediation. Modern mediation is propagated by specialised mediation agencies, which are increasingly annexed to the courts.

In the 1970s and 1980s Dutch citizens became increasingly dissatisfied with the operation of the law due to inaccessibility of the courts, overcrowded court lists, increased formalism, long delays and high costs.<sup>3</sup> These factors were strong incentives to consider other modes of dispute resolution.

## Private initiatives

The year 1992 was important in the recent history of modern Dutch mediation. For the first time a group of people, mainly legal professionals, came together to discuss the promise and prospects of mediation. From the very beginning they sought contact with the government, which resulted in a lively exchange of ideas and views. This governmental participation was mainly directed at initiating and financing experiments.

In 1993 the *Nederlands Mediation Instituut* (Netherlands Mediation Institute — NMI) was formally established as a foundation, with the main purpose of informing the public at large about mediation and stimulating and furthering the practice and quality of mediation. It was the first sign of the institutionalisation of modern mediation in the Netherlands.

## Government interest

The view that people should assume responsibility for the resolution of their own conflicts fits well with the general move towards privatisation by the Dutch Government. Accordingly, the Dutch Government has been very supportive of court-annexed mediation procedures. The foundation of NMI was an impetus for the Government, in particular the Ministry of Justice, to engage in mediation. One of the first actions of the Ministry of Justice was the installation of the so-called *Platform ADR* in August 1996. A major recommendation of the *Platform ADR* was to initiate long-term experiments with court annexed mediation.

## Experimental research

Following the final report of the *Platform ADR*, the so-called *Meer Wegen naar het Recht Beleidsbrief ADR 2000-2002* (More Ways to Justice ADR Policy Letter 2000-2002) was prepared

by the Ministry of Justice and presented to Parliament.<sup>4</sup> As a result of these two initiatives, the umbrella project *Alternatieve geschilafdoening en mediation* (Alternative Dispute Resolution and Mediation) was established. The project spans 2000 to 2003 and is headed by a national co-ordinator from the ranks of the judiciary. The main purpose of the project is to advise the Government on the desirability of court-annexed mediation. It encompasses two specific projects: *Mediation naast rechtspraak* (Court Encouraged Mediation) and *Mediation in de Gefinancierde Rechtsbijstand* (Mediation within the Legal Aid Scheme).

## Professional publications

With the rise and interest in modern mediation, the need for more information and exchange also increased. In 1997 the *Tijdschrift voor Mediation* (Journal for Mediation) was launched as the first Dutch journal focussing purely on mediation. An important aim of this quarterly is to serve as a forum for mediators and all others who have an interest in the practice and academic study of mediation.

Another carrier of mediation information is the *ADR Nieuwsbrief* (ADR Newsletter), which is published eight times a year. Its main focus is to serve the reader with brief, up to date mediation information; it is sent to all NMI mediators.

## Mediation training and university education

The recent history of mediation teaching in the Netherlands largely runs parallel with the development of modern mediation itself and has become a booming business for private training institutions. The first, fully-fledged training programs took off in the early

1990s and there are currently 12 programs that are certified by the NMI. As yet, there are no rules or legislation laying down minimum requirements for the teaching of mediation.

In 2002 the NMI introduced the so-called P(ermanent) E(ducation) system and PE rules. Mediators registered with NMI must obtain 12 PE points yearly. The purpose of the PE system is to ensure that the knowledge and skills of the mediator are maintained and broadened.<sup>5</sup>

### The regulatory framework for mediation

In Dutch law there are no specific statutory provisions pertaining to mediation, and only a few court decisions on the subject have been published so far. Therefore, the 1995 NMI Mediation Rules, as amended in 2000, fill a gap, providing standards for mediators, disputants and judges. There are three basic tenets to be found in the Mediation Rules: voluntariness, impartiality and confidentiality. These can also be found in the 1980 UNCITRAL Model Rules on Conciliation, arguably the world's primary set of modern mediation rules.<sup>6</sup>

### The practice of mediation in family, labour, and administrative disputes

Through regular surveys, NMI seeks to ascertain the use and *success* of mediation in a large number of practice areas. According to the 2002 NMI data, three areas stand out in terms of caseload: family disputes (635 cases registered since 1999, being 44 per cent of all registered cases), labour disputes (367 cases, being 25 per cent of all registered cases) and commercial disputes (208 cases, being 13 per cent of all registered cases).<sup>7</sup>

#### Family disputes

Most disputes in this area are centred on divorce. Modern family mediation is primarily concerned with the consequences of divorce. The purpose is to assist parties in terminating their relationship in an acceptable way, without unnecessary damage and bitterness, thereby facilitating the negotiation of necessary, future arrangements, especially those which

will affect any children of the marriage.

An important development in family disputes was the establishment of the *Vereniging van Advocaat-Scheidingsbemiddelaars (VAS)* (Association of Divorce Lawyers mediators) in 1989. VAS is essentially composed of lawyers who specialise in handling divorce cases, who have successfully completed a special mediation training course.

The current trend in family mediation is to move away even further from the judicial process. In 1996 a Commission on the Reform of Divorce procedure, chaired by Professor de Ruiters, suggested in its final report that the courts should be left out altogether in cases where the spouses can agree on all major terms. It would suffice to have a lawyer or notary public review the agreement, and to have the divorce certified and registered.<sup>8</sup>

#### Labour disputes

Labour disputes constitute the second major practice area for mediators in the Netherlands. However, there is no one organisation catering for modern mediation services for labour disputes in all sectors of the economy. Furthermore, specific models do not, as yet, exist for labour disputes.

An important forum where experts in mediation and labour relations regularly meet is the *NMI groep Arbeidsverhoudingen*, the labour relations discussion group within the NMI. Here, lawyers, psychologists, union leaders, personnel officers and management consultants, all certified NMI mediators, meet every six weeks to discuss recent developments in the area.

#### Administrative law and planning disputes

Dutch administrative law is constructed around the substantive concept of *besluit*, commonly translated as a public law juridical act (as opposed to a private law juridical act). Such public law juridical acts constitute a key instrument for public administrators to balance particular interests against the general interest they are assumed to represent. This applies particularly to *besluiten* of a general nature, such as plans or policy rules. During the preparation of such *besluiten* of a

general nature, interested parties may enjoy a statutory right to comment. Such a stage is commonly termed *beleidsvoorbereiding* (policy preparation).

Mediation is a method tailored to achieve individualised justice. Individualised justice presupposes that all interested parties have been identified, and participate in the process. Many administrative law experts in the Netherlands regard the (im)possibility of involving all interested parties as the key criteria for the suitability of mediation. At the same time many experts see opportunities for introducing mediation, or mediation techniques, during the *beleidsvoor-bereiding*, the preparation of public acts of a general nature, and during the *bezwaarfase*, the internal review of official decisions.

Mediation is a relatively new phenomenon in each of the aforementioned varieties of administrative dispute handling. A single organisation offering mediation services in the administrative law area is currently lacking in the Netherlands. Neither are there any specific, nationwide standards for handling such disputes. A few private organisations have been set up recently to cater for mediation in the administrative and planning area; a good example is the *Stichting Mediation in Milieu en Ruimtelijke Ordening* (Foundation for Mediation in Environmental and Planning disputes).

#### The future of mediation in the Netherlands: some considerations

The various mediation developments discussed in this paper suggest that a mediation infrastructure is evolving in the Netherlands. Of particular interest is the role of NMI as a national umbrella organisation concerned with quality assessment and benchmarking, hovering above various specialised mediation institutes and professional associations of mediators. This structure may be interesting for the development of cross-border mediation in the near future. Cross-border mediation will depend on the existence of national clearinghouses, such as NMI. This is borne out clearly by the European ADR Model Rules, which seek to facilitate cross-border mediation in Europe, using national clearinghouses as a starting point.<sup>9</sup>

In the meantime, it is not clear in what direction modern mediation will develop in the Netherlands. This is partly due to the unclear role of the government. Perhaps the interplay between private mediation initiatives, government — particularly the Ministry of Justice — and researchers is characteristic of the way things are typically done in the Netherlands.

The Ministry of Justice is interested in mediation as an additional method of conflict resolution which could, at the same time, reduce judicial caseloads. Through the ADR Platform, the Ministry has first mapped out the areas where mediation might be used with some success; it has then proceeded to subsidise experiments in these areas. The Ministry relies on private mediation schemes and training program to actually conduct mediation. For monitoring and measurement, researchers are engaged from various universities and private institutions. Conversely, mediators in private mediation schemes are interested in these governmental experiments as a means of securing a steady influx of cases. Researchers, on their part, are in need of research assignments. The resulting picture is that of an overall symbiosis.

As in many other countries this approach starts with experiments and not with legislation. It seems a prudent approach; the beneficiary is said to be the *rechtzoekende*, the citizen involved in a dispute and looking to achieve justice.

The enthusiasm for mediation among private parties seems to be growing, as evidenced by the proliferation of standard mediation clauses in the business community.<sup>10</sup> Nevertheless, we would make one criticism. There is much that remains unknown about the personal characteristics of disputants and dispute characteristics that may be determinants of the 'success' or 'failure' of mediation. In this respect we welcome the experimental approach. Yet it appears that some policy makers in the administration of justice are already

in favour of mandatory referrals to mediation because it would make courts more accessible.

We believe this to be a misguided strategy because it presupposes that we know all there is to know about changes in the baseline of conflicts in society. The truth is that we know very little about this. Law can be regarded as an instrument of risk management. Other, traditional forms of risk management, such as family networks or social security, are on the wane everywhere. Accordingly, the demand for legal services is likely to increase. Citizens seem to be willing to allot significant portions of their income to legal dispute resolution, for example, by investing in

or her in order to assess the opportunities for reconciliation, whereby the degree of intervention by the judge may vary.

2. D Golann *Mediating Legal Disputes*, Little Brown, New York, 1996; S B Goldberg et al *Dispute Resolution*, Little Brown, New York, 1985.

3. F Bruinsma and R Welbergen, *Hoge Raad van Onderen* (Deventer: Tjeenk Willink, 1988); A F M Brenninkmeijer, *Burgerlijk procesrecht als publiekrecht* (Deventer: Tjeenk Willink, Deventer, 1993).

4. Ministry of Justice *Meer wegen naar het recht Beleidsbrief ADR 2000-2002*.

5. The NMI PE-rules can be found at

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legal expenses insurance. We contend that mediation can only be truly facilitative, if it is structured against the backdrop of an accessible legal system.<sup>11</sup> It is not a question of mediation *or* law. Rather, it is about mediation *and* law. ●

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### Endnotes

1. In English these words can be best translated into 'mediation' (*bemiddeling*), 'reconciliation' (*verzoening*), 'conciliation' (*conciliatie*). *Comparitie* designates an option open to the judge to order the parties to appear before him

<[www.nmi-mediation.nl](http://www.nmi-mediation.nl)>.

6. UNCITRAL Conciliation Rules, A/RES/35/52, 10 December 1980; reference is made to articles 2, 7, 14 and 20.

7. NMI Informatie (2001) *Tijdschrift voor Mediation* Vol. 3.

8. Commissie Herziening Scheidingsprocedure *Anders Scheiden – Report* (Ministerie van Justitie/SDU, Den Haag, 1996).

9. R Jagtenberg, 'Cross-border mediation in Europe' in G Barret 'Creating a European Judicial Space' (2001) 30 *Series of Publications Academy of European Law Trier*.

10. R Jagtenberg and A de Roo 'Mediation in het Bedrijfsleven' in *Mediation* (2000) 9 *Series Justitiële Verkenningen*.

11. R Jagtenberg and A de Roo 'The "New" Mediation: Flower of the East in a Harvard Bouquet' (2001) 9/1 *Asia Pacific Law Review*.