ADR Bulletin
ADR Bulletin

Volume 6
Number 3 *Global trends in MEDIATION*

Article 3

7-1-2003

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Recommended Citation
Vindeloev, Vibeke (2003) "Mediation in Danish law — in retrospect and prospect," *ADR Bulletin*: Vol. 6: No. 3, Article 3.
Available at: http://epublications.bond.edu.au/adr/vol6/iss3/3

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ADR Bulletin

Denmark

Mediation in Danish law — in retrospect and prospect

Vibeke Vindeloev

In Denmark, as in most of the Western world, mediation is not a new phenomenon. However, the requirements of qualifications for mediators and the mediation process have changed over time. Furthermore, the question as to whether mediation ought to be an out of court procedure or part of the legal system is again under serious debate and will be addressed in the closing chapter of this essay. Before discussing the current state of mediation in Denmark a short retrospective of its historical background is provided to facilitate a deeper understanding of recent developments.

King Christian V's *Danish Law of 1683* was the first Danish law to make mediation optional in all civil cases. In 1795 mediation was mandated for all civil cases with the aim of encouraging citizens to be less quarrelsome.[1] In spite of the legal nature of the regulation, mediation had to occur in a format and environment designed especially for mediation and not in any way attached to the courts. Furthermore, the mediators were not to be legal professionals. On the contrary, emphasis was placed on men's respectability in the community and their common sense. Women were not accepted as mediators. Parties to a mediation were obliged to attend in person and were not allowed to bring representatives. There was no salary for mediators as the role was considered both a public duty and a duty of honour. However, those who were particularly successful as mediators were granted 'majestic rewards' by the King.

Early in the 19th century a debate emerged concerning how mediation should be integrated into the legal system. In addition attitudes to mediator qualifications were changing. The increase in the number of educated lawyers, combined with the increasing complexity of cases, were two significant factors that encouraged ideas of integration and professionalisation of mediation within the broader context of the Danish legal system.

The next decade witnessed a growing specialisation of third party neutrals and, as a natural consequence, an even greater acceptance of party representatives in mediations with or without their clients. Finally, as late as 1952, the structures specifically designed for mediation were abolished[2] and attempts at amicable settlement by judges were made mandatory in all civil cases. This rule still exists in the present *Law of Civil Procedure*.[3]

The mediation movement in Denmark, as with the Netherlands,[4] has been inspired not only by trends in the United States but also from the world-wide peace movement inspired by Gandhi. The Danish peace movement was the first to introduce ADR approaches back in the early 1980s.

Development in civil and criminal cases over the past 50 years

A characteristic feature of the development of civil conflicts in Denmark is that the number of new cases filed in court has decreased significantly in the past 25 years. After a steady increase in the post-war era, the number of cases filed decreased from 224,000 in 1988 to approximately 100,000 in 1996. The number now appears to have stabilised at a level that is, in fact, actually lower than in the 1940s. The decrease in the number of cases has primarily, but not only, occurred in cases with commercial value.

Possible explanations as to why this change in case load has occurred include the high fees charged by the courts and attorneys as well as delays in court proceedings. There has also been an increase in the number of administrative conflict-handling councils and tribunals. However, these bodies do not handle the number of conflicts that would correspond to the decline in the number of cases before the courts.

Arbitration is a widely accepted method of dispute resolution in the commercial world. However, the number of cases dealt with at arbitration, compared to the total number of civil actions, is relatively small. For example, the Arbitration Tribunal for Building and Construction Activity settled 171 cases in 1994 and 1995.

Accordingly it is impossible to establish whether parties involved in civil conflicts choose ADR because they are dissatisfied with the courts or because they proactively seek another type of conflict handling. In any event it is a common perception that the Danish courts are in crisis because the public is increasingly choosing ADR options.

Mediation laws and the institutionalisation of mediation

In 1998 the Danish Ministry of Justice set up a committee to reform the Danish *Law of Civil Procedure*. In 2001 the committee delivered proposals on general civil procedure for the district courts and also submitted further proposals regarding mediation in other courts.

The attitude of the legal profession and the judiciary towards mediation is most accurately described as hesitant. At the same time change seems inevitable. Following the Danish Presidency of the European Union in the latter half of 2002, an international seminar on Civil Litigation in the 21st century was arranged jointly by the Ministry of Justice, the Danish Court Administration and the Danish Bar Association. The main theme of the conference was ADR with a special focus on mediation. In addition to sharing experiences and ideas, a European Commission Green Paper was presented.[5] The Green Paper posed many question of principles and values in the context of ADR and has

Published by ePublications@bond, 2003

been distributed for public comment in Denmark.

Currently there is no uniform mediation law in Denmark. There are a number of mediation regulations, however, which address specific dispute areas. For example, the *Tenants Law* contains a provision encouraging mediation between tenant and lessor. Unfortunately this provision is rarely used and accordingly does not warrant further comment. The *Labour Laws* have provided for mediation since 1908.

In the last several years state-funded mediation pilot projects have been established in the areas of family and criminal law. These pilot projects were initiated on the basis of the recommendations from the Ministry of Justice and not on the basis of any legislative requirements.

The range and nature of disputes where mediation is used

In addition to some court-related pilot programs, mediation is also carried out in the private sector by attorneys, although almost entirely in the family law area and only rarely in business cases. Recently, the role of attorneys in partnering has emerged.

With respect to commercial mediation, the Danish Arbitration Institute and Danish Bar Association jointly published a report in 2001. The report was a result of work done by a committee established in late 1999 with the aim of 'promoting ADR in commercial disputes'.

A brief historical background is useful here. In 1995 the Danish Arbitration Institute agreed to *Rules for Voluntary Settlement*. These were never used. Mediation had been debated for many years and, as outlined above, had been introduced in areas other than commercial disputes. The 2001 report reached a confusing conclusion, defining mediation with reference to interest-based principles and defining *settlement* (Danish: "forlig") as any systematic effort in bringing about a compromise between the parties with the assistance of a neutral third party. As a result the distinction between mediation and settlement remained blurred. The Report concluded that mediation will continue to grow in importance in commercial disputes in Denmark.

While the Danish Arbitration Institute is not proactively pursuing mediation practice and projects, it appears to consider it a mistake to be seen to resist the introduction of mediation practice in the Danish legal system. Accordingly the Institute has not found it necessary to develop a standard mediation clause. Rather it has recommended that an arbitration clause would of itself include scope for settlement (forlig) if the Institute finds it appropriate to do so. In other words there has been very little progress since 1995. The Institute still does not recommend mediation; rather it encourages parties to use a voluntary settlement model, which is of course inconsistent with the interest-based principles of mediation.

Mediation organisations

There are a number of private organisations that offer mediation for various types of civil conflicts. The two main organisations are:

(1) the Danish Centre for Conflict Resolution, an NGO founded in 1994, with mediators of different professional backgrounds such as lawyers, psychologists, teachers and therapists; and

(2) Danish Mediation founded in 1993 by attorneys and reorganised in 2001, still with a majority of attorney members.

A third organisation is the Association of Family Advocates, which consists of attorneys specialising in family mediation and who offer mediation as supplement to their normal practice in family law.

Standards for mediation practice and the role of lawyers

As there are no uniform laws on mediation in Denmark, there are also no uniform mediation standards. The Danish Arbitration Institute has adopted a set of guidelines, referred to earlier in this article, but no use has been made of them to date. Nevertheless, various types of mediation standards exist in practice throughout Denmark.

Perspectives

The Danish legal system is part of a Western European development moving towards integrating mediation and other forms of ADR into national and international dispute resolution systems. In discussing whether or not mediation is an appropriate dispute resolution process, and if so, in what context, one must always keep the end aim in mind. In other words, it is important to consider whether mediation is offered as a means to reduce court caseloads, or rather as a means to offer qualitatively different dispute management options to consumers.

In Spring 2002 the Danish Minister of Justice suggested that mediation ought to be offered in civil cases as part of the court system. She explicitly stressed the alternative and, hopefully, more satisfactory ways of resolving conflicts than the court system is currently able to offer. She added that she saw the possible economic advantages of mediation as secondary to the advantages of a more substantial character, for example, parties taking ownership of their dispute, and parties maintaining amicable working relationships. In emphasising this point, the Minister was clearly pointing out the differences between mediation and the judicial compromise referred to above. A trial program of mediation in civil cases began in early 2003 in four Civil Courts and one High Court. Eight judges and eight attorneys will be given five days of mediation training in order to mediate the cases referred to mediation.

Whether the Danish legal system will follow the Justice Minister's vision for quality mediation practice alongside and within the Danish legal system remains to be seen. ●

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Endnotes

1. Fr. July 10. 1795.
2. Bill 220 1952.
3. Bill 905, Nov. 10. 1992.
4. See the contribution on The Netherlands in this volume.
5. See http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=173079.