Promotion and legislation on mediation in The Netherlands

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Promotion and legislation on mediation in The Netherlands
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I would like to present an update about the promotion and legislation on mediation in the Netherlands and the possible influence of promotion and regulation on the use of mediation.
Since the end of the nineties, the promotion of ADR has been an active part of the Dutch judicial policy. The four main goals in promoting ADR were: out-of-court resolution of disputes; attaining the best quality or the most effective way of settling disputes; the realisation of various forms of access to justice that make the parties primarily responsible for dispute resolution; and, lastly, less pressure on the judicial system. (Court-Based mediation in the Netherlands: research, evaluation and future expectations, Bert Niemeijer and Machteld Pel, Penn State Law review, 2005, nr 2 p 345 – 378).
One of the hypotheses in setting up the projects was that, as mediation gains in popularity, due to successful referrals by judicial organisations among other things, more people will probably opt for mediation of their own accord, and will possibly do so at an earlier stage. The presence of an organisational referral provision can serve as a stimulus for the use of mediation due to the fact that those who repeat on a large scale will deal with their conflicts differently. Since then, this has resulted in government bodies using mediation or mediation elements in handling conflicts with individuals.
Despite the policy to stimulate ADR, the Justice Minister did not support regulation with regard to mediation because he thought it would hamper the further development of mediation. With the exception of the legally regulated Legal Aid possibility for mediation, the government mediation policy was aimed at allowing mediation as much opportunity as possible by issuing as few rules as possible. (Explanatory Memorandum TK bill 32555 no 3, introduction) According to the minister, it was the responsibility of the professional group to develop quality standards and as long as they have not been crystallized out he has not been a supporter of the privilege of non-disclosure. The government has subsequently subsidized the Netherlands Mediation Institute over the years to help them reach these goals. Mandatory mediation did not fit into the Dutch mediation policy either, according to the minister.
This minimalist approach towards regulation even led to the initial endeavours of the Dutch government to block the EC Commission's effort to come up with a European mediation directive.
The Directive of the European Parliament and of the council of 21 may 2008 has prompted the Government to change this policy and to regulate mediation by law. The Law was adopted by the Lower House and is now under review in the Netherlands Parliament Upper House. (Bill 32555)
The new law comprises:
• New limitation rules, namely that a mediation stops the expiry of limitation and prescription periods (article 3: 316 paragraphs 4 and 5 and 3, 319 paragraph 3 BW),
• A new article in the Code of Civil Procedure (22a rv) which stipulates that the judge can advise mediation in all cases, and
• The privilege of non-disclosure for the mediator. (protecting confidentiality: no parties/mediators shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process).
• And with regard to enforceability of written agreements, a gap in the law has been closed: an agreement in a referred mediation can now be enforced in all types of procedures.
It is important to note that its application is not limited to cross-border mediations. The Bill to implement the European mediation directive is, as we speak, still before the Senate. But until implementation, there is hardly any regulatory framework for mediation; the relative success of mediation in the Netherlands is due to the bottom-up approach (as De Palo calls it: pragmatic): first do it, then (if really necessary) regulate it. So far, mediation has been entirely subject to private regulation by contract. In the nineties there was not much information on mediation in figures. It is thought that the figures up to 2001 were not very substantial. The promotion of court referred mediation led to the introduction of statistics on mediation figures. The latest publication on mediation figures shows that there were about 52,000 mediations taking place in the Netherlands in 2011, in the following categories:
Family 33% 17058
Labour 25% 12922
Community 18% 9304
Government 8% 4135
Business to Business 8% 4135
Other 8% 4135
These figures outnumber the amount of arbitrations by far, so this supports the idea that mediation (more than arbitration) really allows an extra possibility for parties to overcome their conflicts and that arbitration is only really suitable for a comparatively small number of cases (no more than several thousands).
Due to the fact that the Netherlands has exceeded the time limit for implementation to a large extent, it is to be expected that this incomplete law will pass the Senate unchanged, because it only has the power to reject, not to amend, the law. My expectation is that a rejection is not to be expected, not only because of the time frame, but also because of the minor political impact of this law. Moreover, the Minister of Justice has recently announced supplementary legislation regulating, among other aspects, quality standards and a national register for mediators to be put into effect in 2014. Also, a private member's bill on mediation was announced by a Representative in the Second Chamber (House of Commons), so for the first time in history it is to be expected that we will have a considerable amount of legislative activity concerning mediation.
The minister will also campaign for a greater familiarity with mediation with the aim that for individuals, businesses and government bodies, mediation should become the norm.
We will see if this legislation will further influence the use of mediation.