

Dutch Mediation Bill: Pushing the River?

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Everywhere judicial policy makers are seeking new ways for the distribution of justice. In the Netherlands a project is underway to abolish all paperwork from the courts. Litigation will before long be conducted entirely digitally. In order to curtail government spending, experiments are being conducted to steer claimants away from the courts and become more self-reliant in solving disputes with the help of mediation.

Some facts and figures

In the Netherlands there are various (specialised) professional organisations of mediators. The most relevant of these are combined in a federation, the Mediators Federatie Nederland ("MFN"). The MFN maintains a register. This is open for consultation by the public. In order to qualify for registration a mediator will have to have followed a training with a recognised training institute and passed an exam taken by the MFN. After registration there is annually a permanent education requirement, a minimum number of supervision sessions to partake in and once every three years a peer review. In order to remain registered a minimum number of mediations of 3 per year (9 in three years) have to be done. There are MFN By-Laws and Rules of Professional Conduct to be observed. Supervision is exercised by the MFN and where it comes to professional conduct, there is a body called the Stichting Kwaliteit Mediators ("Mediators Quality Foundation"). Complaints are dealt with by the Mediators Quality Foundation in the first instance. Failing a solution, there is a Complaint Commission ("Stichting Tuchtrechtspraak Mediators") and higher up a Board of Appeals (both chaired by a member of the judiciary). This system functions well.

There are about 2900 MFN registered mediators. 1225 (42%) responded to a questionnaire recently. This showed that:

24.9% have a full-time or almost full-time mediation practice;
23.3% combine their mediation practice with a practice as "advocaat" (solicitor or barrister);
19.4% combine their mediation practice with a practice as a consultant;
15.8% work as volunteers (e.g. community mediation);
14.5% have a part-time job in combination with being a mediator;
9.5% are internal mediators;
9% have a full time job in combination with being a mediator;
3.7% combine their mediation practice with a practice as a coach; and
1.8% combine their mediation practice with a practice as a civil law notary.

Of the registered cases being mediated:

54.9% concern families (divorce & parenthood);
21.2% concern employment;
7.6% are business cases;
5.8% are government related;
1.7% are criminal cases; and
8.8% are various others (e.g. community, health care, personal injury or education).

Pilots are now being organised in a number of courts in the field of insolvency and bankruptcy.

The conclusion is that there is an enormous variety of mediation activities, all across the board. There is a clear dominance for family and work-place issues. These are also the issues - together with small claims - which clot the court system.

Act to promote mediation

Presently a bill is in preparation which features the following:

- the organisation of a register of sworn-in mediators under the supervision of the government;
- an advisory body to the Minister of Justice half consisting of mediators but under chairmanship of a non-mediator with a casting vote;
- the introduction of the supervision of mediators;
- recommendation to the courts and government bodies to use or refer to sworn-in mediators;
- adjournment of limitation periods and staying of proceedings during a mediation process;
- the introduction of the right to ask for an intermediary judgement during mediation on incidental issues;
- an obligation upon the introduction of a court case to explain whether mediation has been tried and if not, why not; and
- regulations pertaining to the number of mediations per year or hours of mediation (12 mediations or 120 hours) which a mediator must do in order to qualify for a place on the register.

The proposals have not been met with much appreciation from the mediation community. The outcome of the 2016 survey of 1225 mediators shows that of the 1225 certified mediators responding to the questionnaire of the survey only 160 - not even 15% - will qualify for the newly to be introduced governmental register. Certainly educational standards and quality may here and there deserve improvement, but the whole idea to demand 12 mediations per year - whereas in most European countries two per year is the norm - can foremost be explained as an attempt to create a small elite which hopes to receive all the referrals from courts and government agencies as the preferred supplier of mediation services. The Bill also tries to fix a problem that does not exist. Mediation developed well in the Netherlands on its own in a structured environment with quality standards, supervision and permanent education. The policy makers will hopefully think twice and come up with more balanced proposals if they insist on pursuing legislative measures, if only to buy in the support of the mediation community.