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Referral to mediation and private mediation market in the Netherlands: Data and developments

Machteld Pel (Pel Mediation) · Tuesday, May 1st, 2012

Since April 2005 there have been two structural provisions for referral to mediation: via the Legal Desk and via the Judiciary. Besides, conflicting parties can start mediation on their own initiative or after referral by other bodies. Other referring bodies comprise, for instance, occupational health and safety services, social services, youth services, the police, social advisors, legal aid insurers or governmental bodies. Recent data on the period January to April 2011 (Council for the Judiciary) regarding referrals to mediation via the judiciary show that the number of referrals has dropped sharply compared to previous years. The total national decrease is almost 28%, and that, when from the time the judiciary started referrals in 2005, there was a constant increase. One possible cause of the drop is the scrapping of the incentive contribution (the first 2.5 hours of the mediation free for the paying party) per 1 January 2011.
At the end of 2011, the Netherlands Mediation Institute had a report published (Vogels 2011) on the number of mediators, the numbers of mediations and the developments over the past five years. At the end of 2011 there were 4493 registered mediators of whom 931 were certified. From 2012 the registration system has changed, from now there are only registered mediators: currently there are about 2500 registered mediators. A small minority of mediators works exclusively as a mediator, only 9.8 %, the rest has additional functions. For certified mediators this is 21 % and for registered mediators it is 6.8 %. In 2011, certified mediators performed 29 mediations on average (14 in 2004) and registered mediators performed 7 (3 in 2004). The total number of mediations in 2011 is estimated at 51,690 by the Dutch Mediation Institute (in 2009 it was 47,300).

2011: Mediations took place in the following categories:

Family 33% 17058
Labour 25% 12922
Community 18% 9304
Government 8% 4135
Business to Business 8% 4135
Other 8% 4135

The total mediation turnover in 2011 has been estimated at almost 55 million euro; in 2009 it was 51.1 million euro. The average mediator fee is 138 euro. The average minimum hourly fee is 111 € and the average maximum fee is 160 €.
The average success rate is 69.8: full agreement, 13.8: partial agreement and 16.4: no agreement. Over the years these percentages have remained more or less constant.

Enrolment for mediations is mainly through individual channels, i.e. via referrals within the individual networks or individual acquisitions. For certified mediators, 21.7 % of cases are referrals through the Judiciary. This is a decreasing occurrence.

Mediators were also asked what the developments in the market were expected to be.
70% of the mediators is expecting (strong) growth. The reason mentioned most frequently is the increased familiarity with mediation and the increase of costs in judicial procedures.
Mediation is still not generally known as a method for conflict resolution. (Van Veldhoven 2009) However, 21% of the conflicting parties referred by the Legal Desk were familiar with mediation, while this was 50% in 2008 among parties referred by the Judiciary.

Specialised court-procedures sometimes seem to be so successful that the users prefer adjudication over mediation. The ”specialisatie loont” (specialisation pays off) report (Böcker et all 2011, 29) presents an analysis of experiences of big commercial enterprises with specialised adjudication as offered by the “Ondernemingskamer” (Commercial Chamber) of the Amsterdam court of appeal, for instance
The interviewed companies indicate the quality of the specialised courts as good to very good. Alternative forms of dispute resolution are (therefore) found to be less attractive than the procedures at the civil courts. Quality here means a well-motivated verdict, which takes the necessary decisive action, moving matters forward. Less satisfactory are the turn-around times, including the time needed for the verdict (Giesen en Coenraad, 22, p 956). This report (29) also concludes that the lawyers in the researched cases are themselves specialists and so they want the judges to be as well. They claim that specialization comprises asking the appropriate questions and being a good interlocutor. This could also be the reason why arbitration is used in specific cases.
This makes me wonder whether specialized lawyers are aware of the fact that in their cases too, the underlying conflicts are often the reason why agreements cannot be reached on the contents. Another question is whether this fact of experience concerning the wish for specialization also pleads the use of technical experts and specialized mediators regarding mediations in commercial conflicts, even if only to meet market demand. There is a niche organization for mediation in IT conflicts, the SGOA (Foundation Settlement of Automation). It always uses two mediators, one of whom specializes in IT cases.
From 2000, the government policy has been to stimulate the use of mediation. All courts are familiar with a mediation referral system. This has led to an increasing number of referrals since 2005, an increase which in 2011 has been adjusted to fewer referrals in that same year. The general policy has anchored mediation as a method in itself and has stimulated the mediation market share. However, the growth is not to the extent that there is a question of such growth that mediation is actually adequately used in appropriate situations. Only 1.7 % of all legal aid cases is awarded for mediation and the referrals from the administration of justice only concern about 1 in 1000 cases.
There is a recent publication by Professor Barbara Baarsma (2012) “de mediationmarkt in economisch perspectief” (the mediation market in an economic perspective). She states that mediation in the Netherlands is still in a developmental stage and that mediation, because of the unfamiliarity with the public at large, is still used (much more) infrequently than would suit this innovative product, and which, with exponential growth, could take work from the hands of the legal profession and other advisors. She concludes that the question has not actually been raised and that there is an oversupply. This conclusion fits in with “Paths to Justice” (Van Veldhoven 2009) which also proves that mediation is used in only 2.7% of the cases where parties reach an agreement.
Baarsma calculates a market potential of 62,000 plus 147,000 mediations if, instead of 2.7 % a percentage of 5 to 10% of the current sources of mediation cases (dismissal, divorce and

guardianship, rent disputes, conflicts with the government, neighbour disputes, commercial disputes, referrals by legal aid insurers, trade unions, dispute committees, government bodies, rents commissions, ombudsman, community mediation and the business market) would be solved through mediation.

In her analysis of why there is no potential growth, she mentions the following:

1. Unknown is unloved (60 to 40% of potential mediation users are insufficiently familiar with mediation).
2. The quality of mediators is insufficiently transparent. Currently, a small group of mediators have made a good name for themselves, and so have built up good practices. This leads to a winner-takes-it-all market which may make mediators with fewer qualities and a smaller market share pull out.
3. Partly, the advantages of mediation do not directly fall to those who buy mediation. Moreover (I add) the advantages that the government had fall to parties that were referred by the judge him/herself which were that the first 2.5 hours of mediation were free of charge, have been cancelled.
4. There is too little repeat demand. According to the “paths to justice”(10), only 53 % of the mediation participants would choose for mediation again (compared to 70% in 2003)
5. The referrals from the legal profession (judges, lawyers) have fallen in number, which, according to Baarsma, is due to the decrease in their own turnover when they show preference for mediation. My comment is that this cannot be the case for judges: at the most they might worry about the decrease in their own work and possibly about future work and income. This hypothesis has not been tested.
6. Finally, Baarsma mentions the insurance paradox (18) as a reason why mediations via trade unions and property insurance companies lag behind. The insurance paradox says that insurers have an incentive to decrease claim levels, because this increases the difference between premium-income and expenses, but at the same time they need the incentive to maintain claim levels. If solving a judicial dispute becomes too cheap, insurance will no longer be necessary. Consequently, insurers have an incentive not to keep the costs at too low a level.

I add to this analysis that currently, if one of the parties does not want to comply, mediation clauses in agreements are not considered binding in some court judgments. The reason is that according to this jurisprudence, it is useless to force parties to go to a mediator when they are not committed to solving their problems. This could also be the reason that such clauses are less prevalent, and not observed as much as would be effective, as I firmly believe. Besides, I believe that Baarsma underestimates the significance of referrals. I firmly believe they are the gateway to mediation.

The sombre mood about the market share or the development in the market with regard to mediation is not shared by the professional group of mediators. The NMI research questioned the mediators (Vogels 2011) about the development in the market. 70% of the mediators expect (strong) growth. The most frequently quoted reason for an expected increase is the greater familiarity of mediation and the rise in the costs of court-procedures.

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