The practice of mediation in eleven countries neighbouring the Netherlands

A. de Roo, R. Jagtenberg
Rotterdam, Erasmus University, Faculty of law, 2003

Summary

The aim of this research project was to describe and analyse the practice of mediation in eleven countries neighbouring the Netherlands. The focus was on mediation within the ‘administration of justice infrastructure’. This particular perspective includes referrals of litigants – by a court – to mediation, during any stage after proceedings have been instituted. Mediation initiatives in earlier stages have been excluded, unless prospective litigants were referred to mediation from within a legal aid scheme.

The scope of research was on disputes in the private law area (including family and employment disputes) and the administrative law area. The research was carried out in two consecutive stages. During the first stage, a quick scan was made of mediation in eleven European jurisdictions, i.e. France, Belgium, Spain, Italy, Germany, Austria, Switzerland, Denmark, Sweden, Norway, and England. Building on the quick scan, four jurisdictions were then selected for a more thorough analysis of data regarding the local practice of mediation. The availability of empirical data on mediation practice was a key criterion for selection. Thus, for the second stage of this research, France, Germany, Norway and England were selected. This particular selection had the advantage that all the European legal traditions (the Romanistic legal family, the Germanic legal family, the Nordic legal family, and the Common law legal family) were represented in the research project. The existing empirical data for these four countries were complemented with new, direct information, collected through interviews with ‘local’ ADR experts from the respective Ministries of Justice, the judiciary, and the academic community. By doing so the reliability of the available research data could be extended.

1. During the first stage of the research, information with regard to legislation and regulations on mediation was collected in 11 European countries. Here the leading question was: Are there rules and/or legislation applicable to mediation? It was found that nearly all countries have a regulatory framework in situ for mediation or conciliation in labour disputes. For this type of disputes there are often separate settlement institutions. In nearly all of the researched countries, statutory referral regimes for family disputes are being prepared, in which the court compulsorily or voluntarily refers disputants to external, professional mediators. For other civil disputes, some countries have legislation authorising the handling judge to explore, together with the parties, the possibilities for reaching a friendly settlement. In addition, there is, however, a clear trend to assign this task also to others than the handling judge, thereby creating the opportunity of bringing in specially developed negotiation and mediation techniques. Just a few countries do have a statutory duty of confidentiality for mediators and/or parties. In some countries, the results of a successful mediation can be made enforceable through the regular judge. Thus far, however, this opportunity is not often made use of. In none of the countries mediation regulations were found in the area of administrative law, and as yet there is also no mediation practice other than the occasional use of mediation techniques in preparatory procedures in planning and zoning (inquiry procedures). It is however relevant to note, that in 2002 all the ministries in England signed a covenant, by which they agreed to settle their differences primarily through mediation. Finally, it should be recorded that there is a provision in English law, which makes the granting of legal aid in family disputes dependent on a preceding mediation attempt by the legal aid applicant. Recently, however, this provision was once more brought up for discussion.

2. The second research question was as follows: What qualifications are to be met by mediators? For labour disputes, it was found that, in particular, branch specific knowledge - know-how - is required. For mediators involved in family disputes mostly professional
organisations have determined stringent training requirements, which include legal and psychological skills. In other areas of law, there is a multitude of introductory and secondary training, offered by diverse institutions and organisations. Consequently, views on the minimum length of training, contents, and the necessity of éducation permanente are varied. Nevertheless, there is agreement that quality control and (government)-supervision are necessary.

3. The third research question was: What variations of ‘referral’ to mediation exist within the various jurisdictions? The answer to this question is that six (sub-) variations of referral can be distinguished:

1. The parties themselves propose the idea for mediation as an option;
2a. The judge proposes the idea, in a non-committal way;
2b. The judge (or mediator) proposes the idea, but accompanied of professional explanation;
3a. The judge initiates and the parties can refuse without a sanction being imposed;
3b. The judge initiates, but a sanction may be imposed upon refusal;
4. Access to court is denied, as long as mediation has not first been attempted.

Only in variation 1 there is full voluntary (self-) referral, while only in variation 4 there is complete mandatory referral.

In the past, mandatory referral was widespread. At present, however, it is only practiced in those disputes where huge social costs and/or interests of vulnerable, weak third parties, like children involved in a divorce or the public at large confronted with a general strike, are at stake.

The difference between variation 2 and 3 is that variation 2 requires the consent of both parties before the mediation option can be further explored, while in variation 3 the judge may refer without the consent of the parties. In this variation, parties can still halt the referral, but by doing so they may run financial risks.

In particular, variations 2 and 3 are widespread.

By now, it is clear that variation 2b is less voluntary than variation 2a. Here parties shall have to come forward with well-founded arguments, if they seek to counter the professional overview of the possibilities that mediation may offer in the dispute at hand.

In the second stage of the research project empirical evaluations of mediation practices in France, Germany, Norway and England were discussed. It appeared that in these countries, by far the largest quantity of empirical data was available.

4. The fourth question was as follows: What criteria are used in the referral of cases/disputes to mediation? Are there any contra-indications?

Specific criteria for referral were unknown or were not regarded as useful because of the infinite diversity of cases and party characteristics. There was however a clear contra-indication: no mediation in case there is a power imbalance between the parties. In the respective studies, however, the term power imbalance was not further explained.

5. Question five was crucial: What factors influence the actual acceptation of, or cooperation in, mediation by parties?

In fact, it here concerned the question under which preconditions mediation works. All the time, it appeared that in the various evaluation studies different combinations of factors of acceptation had been examined, which hamper a precise comparison. In general, however, it can be concluded that parties are less prepared to consent to a proposal for referral, if the costs of mediation as such are higher, if the parties are more aware of their rights, and if the dispute itself does not really allow for negotiations. It also appeared that the presence of lawyers might have a negative influence.

The factor ‘costs of mediation’, however, does not seem to play a role in business-to-business disputes. As far as the factor costs is concerned, as yet, systematic information over the costs of pursuing a case further in court as a criterion is lacking.

As to the final acceptation of a settlement proposal resulting from mediation, the following factors play an important role (positively or negatively): the quality of the mediator, the assessment of the mediator, the room for negotiation, and the willingness to negotiate.

6. The sixth research question concerned the quantitative dimension of (referrals to) mediation. The question was: What results does mediation show and how do these results lie to those of the ‘regular’ judicial resolution of disputes?
Here two sets of data are relevant. First, the number of cases that were referred as percentage of the total number of cases brought before the court. When it concerned the variations 2a and 2b (the judge proposes the idea), for a number of instances this percentage was low (<5%) and for others rather high (>30%). For the variations 3a and 3b the percentage was constantly more than 30%, and for mandatory referral the percentage was by definition 100%.

The second set of data concerned the percentage of mediations resulting in a settlement (agreement). Both for the variations 2a and 2b, as well as for the variations 3a and 3b this percentage was constantly more than 30%, and for the majority of instances it was even more than 50%. For mandatory referral, however, the ultimate settlement percentages greatly differed, but compared to (semi-) voluntary referral these numbers were in general significantly lower. Although the settlement number for mandatory referral compared to (semi-) voluntary referral is less favourable in terms of percentage, this does not imply that thereby also the absolute settlement numbers are less favourable.

7. The seventh and last research question read as follows: What are the experiences of others than the parties and their (legal) advisers with mediation? Is there a basis/support for mediation in society as a whole?

There are specific data on record from Norway, and from England regarding labour disputes. In Norway it concerned the probing of interest groups, preceding the introduction of the new mediation programme; in England, interest groups were invited to evaluate a mediation provider, which already functions for more than 25 years. In both cases, the reactions were positive, and the support for mediation apparent. Particularly in France, the support for referral of cases to mediation by judges were their views on the nature of the administration of justice and their part in it. ‘One-dimensional’ thinkers refer significantly less cases, than judges who recognise the importance of individualised justice.

The findings, based on the preceding research questions, led to the following, tentative hypothesis. The following factors, which are of relevance to the success of mediation, can be influenced by policy measures: the structural character of the referral regime, the costs of mediation, and the expertise of the person who refers. In addition, case characteristics and party characteristics play a role, but they can hardly be influenced by policy measures.

As far as the ‘structural factor’ is concerned: most cases were referred on a (semi-) voluntary basis, if the mediation provider had taken root, had been functioning for more than 20 years, or was otherwise familiar to the disputants.

Moreover, it is likely that a structural regime promotes institutionalised quality standards.

As far as the ‘costs factor’ is concerned: in disputes between private or unequal parties, it appeared that mediation free of charge is important for acceptance by the mediation parties. In disputes between commercial parties, however, the costs of mediation seem to be irrelevant, and is mediation also accepted against a commercial fee.

As far as the expertise of the person who refers is concerned: this factor appeared to have a positive effect on the degree of acceptance in proposals for referral. In mediation programmes, which as such were not very successful, the expertise and dedication of the individuals referring contributed to positive peaks. Expertise can be consolidated and optimised by giving permanent providers a structural place within the legal system.

Meanwhile, an important observation is that in all countries the developments head towards the same direction: mediation programmes have already obtained a structural place, or have been recently established, or otherwise such programmes are considered. This development is confirmed by interviews with ADR experts from ministries of justice.

In England and France mediation has already been given a structural place in the legal system. During the past years, it was French policy to visualise this practice by various research projects. Also in England research has been carried out, but not so much under the auspices of the Ministry of Justice. In England, therefore, additional research is required, thereby creating an adequate basis for prospective policy. In Germany, experiments are still in progress - at the level of the Länder. And in Norway the national experiment has been concluded. Here, it has been suggested to give mediation a structural place and statutory basis.

All policy makers agreed that the safeguarding of quality standards is necessary, firstly by private providers,
complemented by a supervisory task for the government. The multitude of organizations and disciplines involved hamper as yet the speedy conclusion of the discussions.