

Summary

Mediation in civil and administrative cases

The promotion of alternative dispute resolution methods is part of justice policy. Its objectives are:

1. conflict settlement out of court;
2. best possible standard of conflict settlement;
3. creating more forms of access to justice;
4. reducing pressure on the justice system.

Within the framework of the above, a number of concrete mediation projects have been initiated. Among them: the National Judiciary Mediation Project and the National Mediation Subsidised Legal Aid Project. Conflicts which have been submitted to the civil law or administrative law sections of the courts or law centres, are referred to these mediation projects. This research serves to support the evaluation of the mediation projects mentioned above. It aims at mediation pertaining to civil and administrative legal practise.

The objective of this research is to get an overall picture of the mediation types pertaining to civil and administrative law both in The Netherlands and abroad, of the way in which cases are referred to mediation, of the effectiveness and efficiency of mediation and the factors which influence or are otherwise related to the effectiveness and efficiency of mediation.

It is typical of mediation that participants settle their conflicts together, supervised by an independent and neutral third party. During their negotiations they may be driven by their own interests, which often goes further than the legal aspects of the conflict.

There are differences in the various mediation programmes. These differences concern for instance the extent in which parties are free to refuse to take part, the stage the conflict is in and the stage of the procedure at the moment of referral of the case, and the duration and frequency of mediation sessions. Besides, there are various styles of mediation: the facilitating style which has been chosen for the Dutch projects and the evaluative style which is often used in the United States. In the first instance the mediator only acts as process supervisor and in the second instance he is also allowed to state his opinion of the case, including what the parties may expect in court. In evaluative mediation the boundaries between mediation and settlement in court may be harder to define.

There are differences in the referral systems for the various mediation programmes that concern the referral criteria, the moment of referral and the person officially responsible for referral.

Many cases which meet the criteria for referral are very often not referred to mediation at all and even cases which are actually referred to a project are not always dealt with.

There is clear evidence that cases referred to mediation more often result in agreement than cases dealt with in court. Parties whose mediation ends prematurely often still manage to reach agreement at a later stage. Research also shows that cases referred to mediation do not end up in court as often as cases not referred to mediation. Moreover, especially immediately after settlement of the conflict, mediation can be an incentive to parties to comply with the conditions under an agreement or ruling (in case parties have not reached agreement during or after mediation). If parties want to change their agreement at a later stage it appears that it is easier in cases where mediation was used, at least as far as child custody and visitation disputes are concerned.

Besides, mediated parties are in general satisfied with the settlement of their conflict. The question whether they have 'won' or 'lost' is less important than is the case with non-mediated parties.

Mediated parties are often more satisfied about the way in which their conflict is settled than parties which have gone to court. Lawyers, however, are more satisfied about going to court than about mediation. They are also inclined to overestimate the satisfaction of their clients with respect to court cases and to underestimate satisfaction about mediation.

Successful mediation, resulting in an agreement, may lead to a reduction of the time it takes to settle a case, but aborted mediation can either be an incentive or may result in a slowing down of the procedure.

Whether introduction of mediation results in a reduction of costs for the parties involved and the courts probably depends on the type of case.

It is not likely that introduction of mediation always results in a workload reduction for the courts because many mediated cases would otherwise not have gone to court anyway and parties who voluntarily take part in mediation frequently decline the offer. There are indications, however, that the introduction of obligatory mediation participation could reduce the workload of the courts. But in order to realise this an amendment of the law is first required in The Netherlands.

It is remarkable that certain methods applied by mediators in practice, but which are in conflict with the principles of classic, facilitating mediation, - for instance coming up with proposals and putting parties under pressure - may sometimes positively influence the chances to reach agreement. It is by no means certain, however, whether these mediation methods also positively influence the satisfaction of the parties (also in the long term) with regard to their agreement (determining the legal relationship between parties) and the extent in which they comply with it. Little research has been done into this to date.

In view of the research results we come up with the following proposals for evaluation of the Dutch National Projects:

- to avoid confusion about the concept of 'mediation' by means of a clear description of the procedures and of what happens in the practice;
- to create as much homogeneity as possible of the categories of investigated cases with regard to the following case and party characteristics: emotions of greater or lesser importance, whether parties have a lasting relationship or not;
- to promote referral to mediation and actual use of mediation in the instance of imminent shortage of mediation cases for the evaluation;
- to gather more detailed information about costs and settlement times of mediated and non-mediated cases in order to get a better overall picture of the causes of possible differences;
- to do further research into the factors relating to the effectiveness and efficiency of mediation.

On the basis of the results of this research we have come to the conclusion that the introduction of mediation as a form of alternative dispute resolution, can be a valuable addition to other forms of settlement of civil law and administrative law cases. Besides, in a wide range of cases mediation has proven to be effective. Further investigation should however provide a clearer answer to the question for which parties and cases mediation can bring about greater efficiency and effectiveness of conflict settlement, and under which conditions the effectiveness of referral to mediation and the effectiveness and efficiency of mediation can be promoted. Perhaps the evaluation of the National Mediation Projects in The Netherlands may help to answer that question.

In conclusion we would like to state that it is remarkable that in the literature no instance of research is mentioned prior to and in support of the legal introduction of mediation, such as is the case with the evaluation of the Dutch projects.