

Intro

Judge in civil courts for around 25 years, vp court of appeal, I still serve as a substitute judge (cultural aspect). I also act frequently as an arbitrator. For the last 5 years I've been a certified mediator with the Dutch commercial mediation provider ACBMediation.

I see the roles played by a judge and an arbitrator as being quite similar. The approach taken by a judge or arbitrator is certainly different from the approach of the mediator.

The court has to look into the past to assess the facts. The mediator has to look into the future of the parties. In other words:

"The problem developed in the past and you can't change the past. So the solution should be found in the future.

In The Netherlands, a judge or arbitrator is not allowed to add issues other than those raised and addressed by the parties themselves.

There is no legal authority for a judge to bring up new topics. A mediator, on the other hand, has to explore the future. He or she must be inventive and original. Please be aware. Since the starting point for a judge or arbitrator is different than for a mediator, it is not surprising that, inevitably, the end result is also different.

Approach of the mediation process

In The Netherlands the dominant style of mediating is a facilitative approach. A former judge will be naturally inclined to evaluate more. And this is not done for a Dutch mediator. So heavy reality testing and educating the parties about the legal implications is 'not done' for a Dutch mediator.

The mediation landscape in figures in The Netherlands

In about 80% of civil proceedings, the judge will invite the parties to come to the court after the first of written pleadings. The aims are to get information and to investigate the possibility of a settlement.

About 10 years ago I worked on a litigation workload measurement system for all courts in The Netherlands (Iamici). By this system it is now possible to track how many litigations end in a settlement. Roughly there are about 60.000 civil cases each year decided by the courts or court of appeal. And 600.000 in the district courts.

- About 35% of the cases in the civil courts ended in settlement
- About 60% of the cases in court connected mediation successfully ended in settlement.
- About 65% of all mediations registered by the Dutch mediation institute, NMI ended in a written settlement.
- Finally, about 80% of the large commercial mediation cases handled by Medal member ACBMediation ended in a amicable settlement. This is for large corporate and commercial disputes with an

average financial interest of 5 million dollars or more, remarkably, the average cost of the mediation was only about 3000 dollars per party. On average the process took no longer than 16 hours of mediation.

Mediation is an option if there is at least a **minimum** of trust in the other party and **maximum** trust in the mediator. The strength of ACB is in matching the appropriate mediator for these special complex business disputes. The parties must have the confidence that the process will not harm them. The good track record of the well-known mediators of this provider can give the parties that confidence.

The figures of Dutch mediations

On a yearly base there are between 7-8000 mediations.

- About 25% are business cases, most of them employment cases.
- For all courts court connected mediation is implemented from april 2005 on. On a yearly base it concerns more then 1000 cases. At this moment in 2006, there are about 700 court connected mediations.

In The Netherlands mediation is very well regulated, this means among others:

- A certification of mediators including registration and permanent education.
- A formal complaint procedure and disciplinary rules for mediators including a well established disciplinary court.

Special hints in case of a mediation in The Netherlands or with a Dutch party

- The predominant style is the facilitating mediation style. Like I said before.
- Moreover the mayor part of the mediation takes place in joint sessions. The caucus is only a mediation instrument if needed.
- Both a judge and a mediator will ask questions directly to the parties. The parties make the opening statement themselves in a mediation. The lawyer is more the coach of the party. Be aware that in ligitation, arbitration and mediation it is necessary to prepare your client to be able to speak directly to the mediator or judge.
Except for the complex business cases, in most mediations the lawyers do not attend the mediation session.
- There is no legal base for the confidentiality so there is no 100% guarantee that the mediator or a party can refuse to answer questions as a witness. Although the mediator is obliged to

confidentiality based on the mediator code of conduct and the disciplinary rules. In practice the judges has until now decided in favor of the confidentiality.

- Recently the supreme court decided that a claim is admissible and a judge is competent even if the parties are contractually bound to try mediation prior to other methods of resolving the dispute. The decisive argument was the voluntary character of mediation.