

Mediation Country Report

Netherlands

by
ADR Center

1) Definitions

What are the definitions for mediation and conciliation in the legal framework of your jurisdiction?

Mediation is a specific form of conflict resolution where the mediator, as an impartial third party, tries to help the parties reach a solution based on mutual interests. This type of conflict resolution has two main characteristics.

The legal framework does not appear to separate conciliation as a different notion.

2) Legal Framework

- *What are the Statutes, procedural rules and case law that demonstrate how intertwined mediation is with the legal system in your jurisdiction?*
- *What are the protections provided to confidentiality of mediation proceedings under the law?*
- *Are the commercial contracts and mediation settlement agreements enforceable in your jurisdiction?*
- *Are the parties bound by terms of contracts that require mediation and is a settlement agreement they may reach enforceable?*

In Dutch law, there are no specific statutory provisions pertaining to mediation, and only a few court decisions on the subject have been published so far. Therefore, the 1995 NMI Mediation Rules (as amended in 2000) thus fill a gap, providing standards for mediators, disputants, and judges.

Three basic principles have been written into the NMI Mediation Rules:

1. mediation is based on the continuing voluntary consent of all parties;
2. the mediator must be independent and impartial; and
3. confidentiality and secrecy are to be observed during and after the mediation, by all parties concerned.

Judgment by the court of first instance in Utrecht, 2 February 2005, LJN: AS5144. A **confidentiality** clause must be considered to be an agreement of documentary evidence in the sense of art. 153 Rv, which means that a judge in principal may not hear witnesses with regard to any information considered to be confidential in accordance with the confidentiality clause. However, art. 21 Rv contains the obligation for parties to be truthful and exhaustive about all facts that might be relevant to a judgment. Only in exceptional circumstances will a judge order a conciliating party to disclose confidential information. This may only be the case when the need for truth prevails over the prejudice that might be suffered by a personal disclosure. Furthermore, it is imaginable in some cases that a mediator has a statutory duty to testify. This might be the case when a third party who is not bound to the confidentiality clause (art. 191 Rv) summons the mediator as a witness, or when the mediator is summoned to testify in a criminal case (art. 213 Sv) Unlike some professions, a mediator does not have a right of non-disclosure or legal privilege in such case.

According to article 87 Rv, parties can request a judge to order the emergence of parties in a court session in order to come to a **settlement**. If a settlement is reached and upon the request of a party, an official report containing the parties' engagements under the settlement may be drafted. Such a report is to be considered an enforceable award (art. 87 subsection 3). It is also possible to record a settlement agreement by means of an arbitral award (art. 1069 Rv).

Agreements can also be entered as deeds, a notarial deed in which the settlement agreement is incorporated is enforceable. [Handboek Mediation 2003, p. 169]

3) Mediation Schemes and Providers

- *What is the basis and the procedure for court-annexed schemes?*
- *Who are the major mediation providers in your jurisdiction?*

In the Court Encouraged Mediation project, mediation is provided as an extra service during a court procedure. At the hearing, the judge handling the case may refer the parties to a mediator. If such mediation appears unsuccessful, the court procedure will be resumed. The judge is not informed of the negotiations during the mediation in the event that the court case is resumed.

Project *Mediation in de Gefinancierde Rechtsbijstand* (Mediation within the Legal Aid Scheme), which only started in May 2001. The main goal of this project is to resolve disputes by mediation, before a court procedure is initiated.

The *Nederlands Mediation Instituut* (Netherlands Mediation Institute) NMI maintains a register of accredited NMI-mediators and liaises with other institutions and government departments. To be registered as a NMI-mediator one must have attended (with success) one of the NMI-accredited mediation training courses. In addition, there is an annual contribution of approximately 200 EURO due. NMI has its own mediation and disciplinary rules, code of conduct, and complaint procedure, which the NMI-mediator has to comply with. Considering its activities, NMI can be regarded as an umbrella organization.

4) Regulation of Mediators

- *What training courses and accreditations are required for to be an accredited mediator in your jurisdiction?*
- *How many training hours are required for accreditation?*

At present, there are approximately 10 programmes, which have been certified by the NMI. The conditions for NMI-certification, however, are obscure.

These 10 NMI certified programmes differ in length, costs, and contents, which makes the selection of the right programme by an interested applicant cumbersome. The average length is six days, while the costs may amount up to 3600 Euro. Usually, training institutions are free in selecting the topics to be taught. The majority, however, seems to pay attention to the Harvard style of negotiation, generally considered to be a useful tool for the mediator.

5) Uptake and Future Developments

- *What is the success rate of mediation? Please reference statistics, where available.*
- *Is there any potential future legislation, plans or court-annexed schemes? If so, please discuss in detail.*

Mediation is becoming more popular in the Netherlands, however, data on success rates is not available and there currently are no new proposed legislative developments for the future.

6) Costs

What are the costs of mediation? Please assume that the duration of the procedure is one day for a dispute valued at 100.000 €.

The Court Encouraged Mediation procedure is free of charge for the parties. The mediator, however, receives a fixed fee, which is directly paid by the Ministry of Justice.

A major requirement in Mediation within the Legal Aid Scheme is that at least one of the parties is entitled to legal aid. This is determined on the basis of the income of the parties. If both parties are entitled to legal aid, they both pay a fee based on their income akin to the fee for a court procedure. If a procedure is initiated following mediation, this fee does not have to be paid again. If one of the parties is not entitled to legal aid, half of the costs of the mediator will be borne by that party.

7) Mediation Advocacy Training

Training schemes and providers are outlined, including the distinction between mandatory and optional training, length of the training and percentages of lawyers who have completed the courses.

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