Summary, Conclusions, and Recommendations of the ZAM/ACB Study of opportunities and impediments in commercial mediation in the Netherlands

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Introduction

The study was executed in the summer of 2018. The research was done by distribution of online questionnaires among lawyers, companies, and judges with experience in commercial mediation. The purpose of the study was to obtain relevant information on the opportunities and impediments in commercial mediation. Managers of companies were interviewed because they are the clients of commercial mediators. Lawyers and judges were interviewed as the main referrers to these mediators. The study contained different questionnaires for the different groups, all with approximately 60 questions, mainly multiple choice questions.

The study was conducted by the Vereniging Zakelijke Mediation (ZAM) and the Stichting ADR Centrum voor het Bedrijfsleven (ACB), in cooperation with the Montaigne Centrum voor Rechtsstaat en Rechtspleging van de Universiteit Utrecht.

The complete study, including appendixes, is published on the website of ZAM: www.vereniging-zam.nl/zam-acb-onderzoeksrapport.

Summary

The aim of this qualitative, empirical study was to acquire knowledge about, and gain understanding of, the opportunities for, and impediments to, commercial mediation, from the perspective of commercial mediation clients (companies) and referrers (lawyers and judges), *with* experience in commercial mediation.[1] The study addressed the following main question: *Based on the practical experience of the three target groups, what are the needs and possibilities for commercial mediation in the Netherlands?* Below a summary of the key conclusions that can be drawn from the study is given, supported by recommendations and lessons learned.

1. Commercial mediator's qualities

The target groups say they prefer a specialised and experienced mediator:

- Both lawyers and companies consider it very important for a commercial mediator to have experience.

[1] The majority of lawyers surveyed had more than ten years' work experience, were based in the Randstad conurbation, and had extensive experience with commercial mediation. The companies taking part in the study were mainly small or large enterprises, most of them also based in the Randstad. A sizeable majority of companies indicated they had been involved in commercial mediation 1-5 times. The judges participating in the study were experienced judges, also often practising in the Randstad, with experience in referring cases to commercial mediation, two thirds of them saying they had done between 1-5 times.

- Lawyers, and certainly companies, consider it important for a mediator to have worked in business.
- Both lawyers and companies prefer a mediator with legal expertise, judges also find this important.
- Lawyers and companies consider it important for a mediator to be a member of an association of mediators, such as the Federation of Dutch Mediators (MfN) or IMI, and to work with a mediation firm or group of mediators. Judges find the former aspect to be important, the latter less so.

→Recommendations and lessons learned:

Commercial mediation requires a commercial image and a professional approach. That is why many lawyers and companies say they prefer a mediator who works with a firm or group of mediators. Being positioned as a specialised, experienced and professional mediator is seen as preferable.

Many lawyers and companies want their mediator to have a sufficient knowledge of the law and appreciate being able to discuss the legal aspects with them (see commercial mediator's working procedure). It would therefore be preferable if the commercial mediator has a legal background or subject-matter knowledge, or can work well with attorneys and other lawyers, who can provide that information. This is in line with what we know from international surveys on commercial mediation user requirements.

2. Commercial mediator's working procedure

Lawyers and companies - the users of commercial mediation - are in favour of having a proactive and 'steering' mediator, one who is in firm control of the process and, if necessary, explains the risks and chances of success, or comes up with a mediator's proposal so as to speed up progress.

- Lawyers and companies do not find it complicated to find a good mediator.
- Lawyers and companies prefer a mediation to start with individual intake interviews.
- A sizeable majority of lawyers and a majority of companies prefer to have the legal strengths and weaknesses explained before engaging in commercial mediation.
- Both lawyers and companies want the mediator to take firm control of the process (the course of affairs).

- A majority of lawyers and companies express a preference for a ‘steering’ mediator, one who explains the risks and chances of success of a case. Judges are not in favour of a ‘steering’ mediator.
- Half of the lawyers who responded to the survey are in favour of a mediator who acts as a go-between, companies appear to be less in favour of a mediator who does so.
- A majority of both lawyers and companies say there should be room in a commercial mediation process to discuss the legal aspects of the case in detail.
- A majority of lawyers are in favour of a mediator's proposal if too little progress is made in the negotiations; an even larger majority of companies share that opinion.
- All three groups that were surveyed agree that one of the single most important tasks of a mediator is to facilitate the talks between parties and defuse the tensions and emotions of the parties .

→Recommendations and lessons learned:

In order to mediate a commercial dispute between companies successfully, mediators must have specific mediation skills and sufficient knowledge of the relevant commercial and legal issues. This is also necessary to be able to be an equal partner in interactions with commercial users of mediation such as managers, legal councils, and litgation lawyers.

Offering individual intake sessions appears to be an attractive option to users. It is also important that a commercial mediator should be open to the parties’ specific wishes in an individual case. For example, in terms of providing an estimate of the risks and probability of success, drawing up a mediator's proposal, or issuing a binding opinion. Mediation training should perhaps focus a little more on using steering instruments. The next logical step would be to review the current rules of conduct for mediators – specifically commercial mediators – to see whether these are sufficiently flexible to accommodate users’ wishes.

However, for all their professionalism, mediators should also able to handle the emotions of clients and reflect on the underlying issues and interests. In fact, lawyers, companies and judges say one of the single most important tasks of a mediator is to facilitate the debate between parties and address their emotions.

3. Role of lawyers in commercial mediation

- Lawyers, companies and judges agree that lawyers should explore the possibilities for mediation and discuss these with their clients.
- Companies consider it important that lawyers have mediation skills.

- Half of the representatives of companies surveyed prefer not to have a lawyer present at a mediation.
- A lawyer's advice to choose mediation does not appear to be of a decisive importance to companies.

→Recommendations and lessons learned:

Companies want a lawyer who has mediation skills. At the same time, half of companies say they would rather not have lawyers present during mediation. This might have to do with a lack of mediation skills on the part of the lawyers involved. In the IMI 2013 survey cited above, companies indicated that, in their experience, external lawyers were often an obstacle to the mediation process. Proper training in mediation skills for lawyers may be the key to greater professionalism and might encourage the use of mediation.

4. Mediation combined with other forms of dispute resolution

- Mediation combined with other forms of dispute resolution is generally viewed as a positive option. As to what is the best combination, lawyers, companies and judges have different views.
- Both lawyers and companies say litigation or arbitration alone is not the most effective form of dispute resolution. They prefer mediation, or mediation combined with litigation or arbitration.
- Judges also say they are not convinced that a court case will always help parties move on.
- When asked specifically about the combination of mediation and arbitration (Med-Arb), lawyers, companies and judges all took a neutral view.
- Companies take a positive view on mediation coupled with a binding opinion (i.e. possibility of the mediator issuing a binding opinion to solve the dispute when the mediation itself fails to produce a settlement). Lawyers and judges are less enthusiastic advocates of that option.
- Judges consider a combination of mediation and litigation as a way of increasing the social effectiveness of the administering of justice.

→Recommendations and lessons learned:

A legal process combined with mediation was often cited as an attractive option. How to provide this option in practice would need to be explored in more detail.

5. Main reasons for/against commercial mediation

The most important reasons for choosing mediation are the speedy process and possibility of maintaining or improving the business relationship with the other party. The presumed lower costs play a role, but much less so than the other reasons cited for choosing mediation. The most important reasons for *not* choosing mediation are not clear-cut and vary between the lawyers, companies, and judges surveyed.

- The most important reasons for lawyers to recommend mediation are the speedy process and maintaining/improving the existing business relationship. Contrary to what can be inferred from the literature, lower costs appear to be a less important consideration for lawyers.

- The most important reasons for companies to choose mediation are also the speedy process and maintenance/improvement of the business relationship. The lower cost is also less important for companies.

- The most important reasons for judges to refer a case to mediation are maintenance/improvement of the business relationship and the understanding that there is often more to a case than just legal issues.

- The most important reasons cited by lawyers for not recommending mediation are 'client resistance' and 'ability to exert greater pressure through litigation'. However, the overall conclusion appears to be that lawyers have difficulty giving general reasons for not recommending mediation. The possibility of mediation affecting their wallets did not play a role, according to the lawyers taking part in the study.

- The most important reason for companies not to choose mediation is the ability to put pressure on the other party by means of litigation.

- The most important reason for judges not to refer a case to mediation is parties' resistance.

→Recommendations and lessons learned:

Lawyers and companies have no difficulty citing reasons in favour of using mediation. They have much greater difficulty citing reasons for not using mediation. Be that as it may, the speed of mediation - a feature that lawyers and companies find particularly important - should remain ensured. Arrangements should be made with parties in the short term and follow each other in rapid succession, allowing the mediation to be wrapped up in a few sessions.

The question that arises is why the presumed lower cost does not play a decisive role in choosing mediation. A further study will need to look at whether the companies surveyed are perhaps large enough so as not to be concerned with costs, or whether, in the

experience of this group of seasoned users, mediation can also be (fairly) expensive, or whether other considerations play a part, such as the additional costs of a court case on top of the mediation costs if mediation fails.

6. Other

From a number of other questions and statements that we put to the lawyers, companies and judges, the following points are worth noting:

- Mediation can also be useful even if there is no long-term business relationship between parties, according to lawyers and companies.
- Mediation can also be useful if a case has already severely escalated, according to lawyers, companies, and judges. This refutes the idea that a severe degree of escalation would render mediation inappropriate.
- Lawyers and judges also say mediation can be useful if a case has already gone to court.
- Lawyers and companies say they can see a mediator being able to solve a dispute, even if they themselves fail to arrive at a settlement with the other party.
- Companies say they will always want to negotiate first, but will explore the option of mediation before taking a case to court or arbitration.
- Even if they themselves have mediation skills, judges still appreciate the added value of mediation, for example because a mediator may bring non-legal expertise that the judge does not have.
- If there is a mediation clause, lawyers, companies and judges consider it desirable to try mediation first before taking a dispute to court.
- Lawyers say it is usually not much of a problem for them to convince their client or the other party to try mediation. Nor do companies have a lot of difficulty getting the other party to accept mediation. Judges say parties' resistance is the main reason for them not to refer a case to mediation.
- 'With knowledge comes appreciation' holds true for lawyers, companies, and judges. Once you have experienced mediation, you are more likely to use it again.

→Recommendations and lessons learned:

It can be concluded that lawyers, companies and judges with experience in commercial mediation look upon this form of dispute resolution favourably. Lawyers and companies have a need for specialised professional 'steering' mediators, preferably with experience in

business and certainly with experience in commercial mediation and a sufficient knowledge of the law. All target groups appreciate the added value of engaging a mediator, especially (but not exclusively), to facilitate the talks between parties and address their emotions. Mediation can also be a good option if a dispute has severely escalated. All target groups agreed on that. The key advantages of mediation are the speedy process and the possibility of maintaining or improving the business relationship. The chances of mediation being successful are high, with both lawyers and companies reporting success rates around 75%.

On that basis, one would expect commercial mediation to have expanded rapidly. So the question remains – even after this survey – why that has not happened and why commercial mediation is still not a full-blown, naturally sought, and much-used dispute resolution tool. It has been suggested that the reason for this is that mediation is often a financially less attractive option for lawyers than litigation. This study does not suggest that money is a major consideration for lawyers in seeking mediation. However, other studies, including the one published by ACB in 2004, suggest that financial considerations do play a role. What is also striking is that half of companies say they prefer bringing certain matters to court because they want to know whether they are right. The question is whether parties always have a correct idea of what is right and what it takes to get the court to judge in their favour.

It might well be that, in order for commercial mediation to truly break through in the Netherlands, an external incentive is needed. For example in the shape of legislation, or by discouraging litigation. This has also been the experience in countries where mediation has been positioned as the first port of call in dispute resolution. These countries operate an *opt-out* system (in which parties have to take action if they do not want mediation) instead of an *opt-in* system, currently applicable in the Netherlands (where parties have to take action if they want to initiate mediation). It would nonetheless be advisable for commercial mediators to accommodate the wishes and requirements of those involved as best they can: companies, lawyers, judges, and other referrers. Mediation training programmes should also better reflect corporate market needs. This report provides key recommendations to support those developments.