

## **SUMMARY: Lessons learnt and recommendations based on the 2018 "ZAM / ACB Research into opportunities and obstacles for commercial mediation"**

The purpose of the research was to provide knowledge and gain insight into opportunities and barriers to commercial mediation in The Netherlands. For that reason, this study was conducted among lawyers (in their capacity of referrers to mediation and advisers to companies) and companies (users of the services) that have experience with business mediation and also among judges (a mix of judges with and without experience with referral to mediation). However, this summary mainly reflects the opinion from experienced users.

### ***The "mediation paradox" was confirmed: companies like mediation, but rarely use it***

The majority of companies and lawyers are positive about their experience with mediation, which contrasts sharply with their assessment of the effectiveness of a trial. The average score for the mediator, the solution and the process fluctuate around 7.5 (on a scale from 0-10) and in more than three-quarters of the cases it has succeeded to make an arrangement (in whole or in part). Almost all lawyers in this investigation state that they see the added value of a mediator, even in cases where they themselves failed to reach an agreement with the other party. Most companies and also their lawyers are not convinced of the effectiveness of legal proceedings. Asked about the most effective form of only 2% of companies and 4% of lawyers prefer litigation as their first solution in dispute resolution. Even judges are not convinced that a court case always helps. Only about 30% of the judges indicate that through a judicial ruling the actual dispute between the parties is resolved. Mediation especially in combination with legal proceedings or arbitration (hybrid procedures), is often mentioned as attractive option. Finally, many users indicate that they are willing to use mediation more often once they have experience with it. Do these results also suggest that commercial mediation will take off in the Netherlands and will soon be the logical first step to resolve a dispute?

The big question that remains after this research is why companies in practice still rarely use mediation, while there are many lawsuits and arbitrations. Why were the lawyers in this survey who have more than ten years of work experience only been involved in no more than five mediations during their careers? From the 62 commercial court judges involved in this research 40 judges had experience with referral to mediation and 22 had no experience at all. The majority of these judges

has over 10 years of experience as a judge. 60% referred 1-5 times a commercial case to mediation, 25% 6-10 times, and only 15% more than 10 times. This offers food for thought and for further research.

***It is important that a mediator is affiliated with a mediator association that ensure about his/her professional training and expertise***

It also appears to be important that a mediator is affiliated with a mediator association such as the Mediatorsfederatie Nederland (MfN), the International Mediation Institute (IMI), the ADR Register, or that the mediator is part of a mediation office or partnership of mediators. A business look is necessary and also a business approach. A positioning as specialized, an experienced and professionally working mediator is an advantage. Both lawyers as well as companies are less enthusiastic about mediators who do this profession outside of a professional setting.

***Commercial mediation has a lot of potential for businesses***

The ZAM / ACB study teaches us that there is a need for a different way of dispute resolution than the traditional legal process. There is a lot of potential for business mediation if this is offered in an attractive way for companies and their lawyers. This research provides starting points and business mediators would do well to take this to heart. Nevertheless, responding to the needs of the market does not guarantee that business mediation then automatically becomes a fully-fledged and commonly used method dispute solution.

***It is still unclear why the majority of disputes go to litigation or arbitration and not to mediation first***

From this research there is no clear reason why compared to the number of cases that go to court in only a small part of the number of business conflicts mediation is deployed. While there is a much higher rating compared to arbitration or a lawsuit before this method of conflict resolution is pronounced. Food for psychologists?

In any case, an interesting issue for further research. Possible part of the solution lies in combinations of legal proceedings with mediation. It should be investigated how this can best be implemented. Perhaps lawyers have an important role to play. If they have mediation skills and use their involvement to continue asking about the real - also not legal - interests of their client and the other party and these, with the help of a mediator, can translate into sustainable solutions, then we are already well on our way.

- Summarising article in Dutch of Manon Schonewille and Marc Simon Thomas (Utrecht University) in the Dutch-Flemish magazine for mediation and conflictmanagement (Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement 2019 (23) 1).