The Judiciary Quarterly is published by the Netherlands Council for the Judiciary. The object of the periodical is to address issues concerning the role of the Judiciary in present-day society. It contributes to the ongoing debate on the necessity for further development of the judiciary.

This issue presents the history, results and spin-off of referral to mediation by the Netherlands judiciary. Court-connected mediation has proven to fit well within our legal culture and judicial organization. It has contributed to a client-focused approach by the courts in which tailor-made solutions are sought to address the underlying issues of legal disputes: Customized conflict resolution.

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The Judiciary Quarterly

Customized conflict resolution:

Court-connected Mediation in The Netherlands 1999-2009

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Customized conflict resolution:

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The Judiciary Quarterly

Scientific magazine for the judiciary organisation of the Netherlands

The Judiciary Quarterly is published by the Netherlands Council for the Judiciary.
The magazine aims at making scientific research into the present legal and organisational developments within the Dutch Judiciary Organsation accessible to judges and legal support staff.
The Judiciary Quarterly is published in Dutch, but some issues that are relevant to the international judiciary community are also published in English.

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Printed by
Sdu Publishers BV, The Hague

Edition
400 ex.

ISSN 1573-5322

Foreword

In 1999 the Netherlands Judiciary started a pilot project to examine the possibilities of referral to mediation. This publication recounts the story of that project. It starts with the enthusiasm of the project leaders and ends with properly functioning referral services in each court. Together these services were responsible for over 4,300 referrals to mediation in the year 2010.
I had the privilege to be the project leader and later on the director of the Netherlands court-connected mediation agency, where we worked together with many judges, lawyers, mediators, researchers and policy-makers.

I remember sitting at my empty desk in front of an empty bookcase in September 1999, with plenty of ideas and not knowing what would or could happen as a result of the pilot to come.
I was curious and I knew from my twenty years experience as a judge that judicial decisions do not always solve the conflict at hand. The question was whether court-connected mediation could be an effective and efficient addition to adjudication and court-supervised settlement agreements. The answer turned out to be a straight-forward 'yes'.
Not surprisingly, some resistance had to be overcome. A process of trial and error and systemized education, inspiration and evaluation proved to be key to the acceptance of court-connected mediation. The results of five pilot projects were very promising and referral to mediation, once fully implemented in the Netherlands judiciary, proved to be a success. Testament to the accomplishments of the courts is not only the number of referrals but also a tangible shift in attitudes of judges with regard to dispute resolution. The concept of 'customized conflict resolution', in which tailor-made solutions are sought to address the issues underlying legal disputes, has been embraced by many. So in the end, the launch of court-connected mediation has had a far greater effect than the introduction of the referral services as such; it has led to new thinking about the role and tasks of judges in court procedures.

When we started the pilots we learned a lot from experiences abroad. We gratefully utilized expertise gained in the US and England, although we made sure our referral services fit within our legal culture and corresponded with our working practices. Especially our monitoring system, financed by the Ministry of Justice, was unique in systematically gathering data of all cases referred to mediation. This monitoring system proved to be a very important source for improvement and was essential in convincing users of the referral system on

the basis of real life experiences instead of made-up dream outcomes. Many visitors from abroad have shown an interest in our system and several of our co-workers have acted as experts on court-referred mediation in different countries in Europe and other continents.

By publishing this volume we hope to further contribute to developments in the Netherlands and abroad and we hope to exchange many more results in the future.

Machteld Pel

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Frame for a Dutch portrait of mediation

Rob Jagtenberg & Annie de Roo

1 The international antecedents of mediation

Court-connected mediation is generally regarded as a 20th century American invention. Paternity tests lead towards Frank Sander, the birth certificate being Sander's paper on the 'multi-door courthouse', presented in Minnesota during the 1976 Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.[1]
Some would argue, however, that court-connected mediation is a *Dutch* invention, dating back to 1597 AD, when the city of Leyden launched the Leyden Peacemakers' collegial body. Intending litigants first had to present their case for a mediation attempt, before they could litigate their case in court.[2] It could also be argued that mediation was already present in ancient Rome, where *Praetor* could take conciliatory duties upon himself. The Chinese, however, may have an even better case, hinting at their millennia-old and widespread practice of mediation. In contrast to the ages of imperial ruling and Confucian philosophy, the purpose behind the Chinese mediation practice may however have changed in the Maoist era and again in the era of the Open Door policy.[3]

Faced with this multi-faceted legacy, it makes sense to distinguish between mediation as a generic term and *modern* mediation.[4] By modern mediation we mean mediation as a professional activity. Mediators need to be able to demonstrate that they have mastered a new body of expert knowledge; they must be certified (at least in some countries); and they are expected to know how to navigate through a negotiation on the basis of their expertise. This sets modern mediation apart from generic or traditional mediation, where anyone could assume a mediatory role as a side-activity, operating on the basis of intuition, authority or one's life experience.

1 F.E.A. Sander, Varieties of Dispute Processing, p. 65 ff. in: A.L. Levin & R.R. Wheeler (eds.), *The Pound Conference: Perspectives on Justice in the Future*. St.Paul: West, 1979. Also R. Lee, The Profession Looks at Itself – The Pound Conference of 1976, in: *Brigham Young University Law Review*, 1981, pp. 737-740.
2 C.M.G. ten Raa, *Conciliatie en Justitie*, Rotterdam: MJI, 1986.
3 R.W. Jagtenberg & A.J. de Roo, The 'New' Mediation: Flower of the East in a Harvard Bouquet, in: *Asia Pacific Law Review*, Vol. 9, Nr. 1, 2001, pp. 63-82. Thus a mediatory approach can befit different political priorities, as equally illustrated *intra* through the access to Justice movement.
4 N. Alexander, *Global Trends in Mediation*, p. 1 ff, in: N. Alexander (ed.), ibid., Alphen aan de Rijn: Kluwer Law International, 2006.

This generic mediation has always been – and still is – around in court rooms, particularly in continental Europe. In many European countries judges have a statutory power to make an attempt at reconciling litigants before they may proceed with deciding the case as a judge. Such mediation as a (statutory) side activity may be limited to merely hinting at parties (by lifting one eyebrow) that swiftly settling outside the courtroom is an option preferable to a likely adverse judgment. The judge may also remain more directly involved, setting the parameters for a settlement, or actively probing and mollifying the parties in front of him. This practice could be viewed as the 'multi-hat (court) judge', as opposed to Sanders' multi-door courthouse, where mediation was presented as a job for an outside specialist.
One should remember that while the Pound Conference took place in the US, Europe was developing its own ideas on how to cope with Popular Dissatisfaction. Here alternatives within the court were considered just as valuable as alternatives outside the court system – at least initially.

The period around 1975 was the era of legal activism, of idealistic initiatives to 'fill the gap in legal assistance' for the disadvantaged in society. In the Netherlands the movement received a lift-off through a landmark socio-legal survey by Kees Schuyt and his colleagues, entitled *De weg naar het recht,* 'The road to justice'.[5] This activism was not only prevalent in the Netherlands but elsewhere in Europe as well. In Italy, for example, the situation was worse, also with regard to subsidized legal aid. It was this defective legal aid system that inspired civil procedure expert Mauro Cappelletti to produce his 6-volume standard work entitled *Access to Justice* (1978), in which legal academics from many countries cooperated.[6] Besides the *financial barriers* faced by the disadvantaged, Cappelletti and his colleagues focused on the *barriers within the law itself*, for example the limited scope for class actions and the vindication of collective rights secured by the welfare state. This automatically led to the next problem: resources that could be invested in the regular court system were finite. The next subject the Access to Justice team therefore concentrated on was how to create accessible alternatives for the inaccessible standard procedures of regular courts in order to level the playing field for the disadvantaged and to achieve justice. The team's attention centred on alternatives *within* the court system (shorter and simplified procedures) as well as alternatives *outside* the court system, such as Ombudsman-like arrangements and – indeed – creating opportunities for reaching an amicable settlement with the help of a neutral.
A procedure often described in those days as 'conciliation' rather than mediation. These three focal points (financial barriers, barriers in the law itself and barriers erected through

5 K. Schuyt, K. Groenendijk & B. Sloot, *De Weg naar het Recht.* Deventer: Kluwer, 1976 (an English version has been published in European Yearbook in Law & Sociology, 1977, p. 111 ff.)
6 M. Cappelletti (ed.), *The Florence Access to Justice Project, Volumes I-IV*, Alphen aan de Rijn: Sijthoff, 1978.

ponderous standard procedures before the regular courts) were also referred to as the 'three waves' in the Access to Justice movement.

In the 1980s the climate changed. These were the years of Reaganomics, Thatcherism and Milton Friedman, in which the collective rights movement of the 1970s was heavily attacked. Nonetheless, even in this period two waves emerged, which were also brought under the flag of Access to Justice. These were: the *liberalization* of the legal services market (fourth wave), which was expected to result in more competition and hence reduced lawyer fees, and the increasing role of *self-regulation* by common interest groups (*fifth wave*) instead of government legislation.[7]

Clearly, the first two and the last two waves reflect opposite ends of the political spectrum. In particular financial barriers to access to the courts have been raised in recent years (often deliberately and in a variety of ways) due to scaling back by the state. Increasingly, authorities have come to regard the administration of justice as just another service to be delivered. However, the third wave, concerned with alternative forms of dispute resolution, continued to forge ahead in the years in which the public sector shrank. Yet in many debates emphasis shifted almost imperceptibly from the accessibility motive to the need to make efficient and effective use of scarce government resources, including those available for the courts.

Moving back to the US, Sanders' concept of a multi-door courthouse could obviously be conducive to enhance court efficiency. This concept anticipates delegation of services to providers operating in the private sector. But how could this be reconciled with the principle of administration of justice as a public good?
It may be worthwhile to briefly dwell on the context of Roger Fisher's and William Ury's work on effective negotiation, which became the basis of the professional body of expert knowledge for the modern mediators.[8]
Mediation is after all a derivative of effective negotiation. Effective negotiation is, in essence, based on a return to the (possibly common) underlying interests of the parties, disregarding the personalized positions they adopted in the usual course of conflict escalation. The modern mediator came to be regarded as being able to impart the effective negotiation skills in a structured process to parties mired in a dispute: the dimension of empowerment. Fisher and Ury's early work on effective negotiation dealt mainly with problems between nation states: an area where a legal framework was essentially absent.[9]

7 Aspects of the 4th wave are dealt with in R. Susskind, *The End of Lawyers?*, Oxford: Oxford University Press, 2008, pp. 181ff.

8 R. Fisher & W. Ury, *Getting to Yes. Negotiating Agreement without Giving in*. New York: Penguin, 1981 and later editions.

9 Roger Fisher, *International Mediation, A Working Guide*. New York: International Peace Academy, 1979.

Yet, looking back through the debates in the late 1970s and early 1980s, it seemed to be the aspect of empowerment that caused many people to conclude mediation might also be suitable for application in disputes between individuals, in their capacity as (ex-)spouses, neighbours and so forth. Unlike conflicts between states, individual relationships of this kind were strongly governed by the law, and litigation therefore always constituted an option.

With the advent of Reaganomics a shift took place in the United States. In addition to the emancipatory potential of mediation, the focus became centred on the desirability of relieving the burden on the courts. In keeping with the ideas enunciated in the Chicago school of Milton Friedman, efficiency and effectiveness came to be regarded as the key principles for managing the judicial system on an apolitical basis. Mediation seemed to be an excellent method to reduce the caseloads of the courts (the demand side). And the ideas connected with new public management could also help to reform the supply side of the regular court system. Influential publications such as Lieberman's *Litigious Society* (1981) and Manning's *Hyperlexis* (excessive reliance on the courts diagnosed as an illness – 1977) contributed to the efforts to deploy mediation – ever more coercively – as an instrument for reducing the demand for judicial services.[10] At the same time, mediation frequently evolved from a facilitating to a more evaluative mode in the US.[11]

However, a countercurrent emerged in the American literature as writers took issue with the privatization of dispute resolution, particularly in disputes with a legal dimension. Owen Fiss (*Against Settlement*, 1984) was among the authors who first pointed out the risk for society if legal disputes were removed from the public realm to the privacy of a conference room. There was also the issue of whether weaker parties who were protected by the law were sufficiently equipped to resist a more powerful opponent in these secluded surroundings. From time to time the foremen of this countercurrent made their voices heard. In the 1990s, for example, Anthony Kronman, dean of Yale Law School, attracted attention with his book *The Lost Lawyer* (1995), in which he outlined how the role of American judges had been shaken to its very core by the demands of the State to do 'ever more with ever less'.[12] The publication in 2004 of a survey by Marc Galanter entitled *The Vanishing Trial* fuelled a debate on whether mediation and arbitration as methods of private dispute settlement had become so successful that the cornerstone of civil procedure in America – the trial – was

10 J.K. Liebermann, *The Litigious Society*, New York: Basic Books, 1981. B. Manning, Hyperlexis: Our National Disease in: *Northwestern University Law Review*, 1977, p. 767ff.

11 Nancy Welsh, The Thinning Vision of Party Self-Determination in Court-Connected Mediation, in: *Harvard Negotiation Law Review*, 2001, pp. 1ff.

12 A. Kronman, *The Lost Lawyer, Failing Ideals of the Legal Profession*. Cambridge MA: Harvard University Press, 1995.

marginalized.[13] This called into question the very legitimacy of the administration of justice by the regular courts.
That same year (2004) saw the publication of a special issue of the Conflict Resolution Quarterly, which took stock of the role mediation actually played in American society, in both qualitative and quantitative terms, according to a variety of research sources.[14] Although this role was certainly judged to be impressive, the existing data was not deemed sufficient to establish a causal connection with the alleged phenomenon of a 'vanishing trial'.

13 M. Galanter, The Vanishing Trial, in: *Journal of Empirical Legal Studies*, 2004, pp. 459ff.
14 *Conflict Resolution Quarterly*, 2004, vol I & II Special Issue 'Conflict Resolution in the Field'.

2 The Dutch receptivity to mediation

Dutch legal culture is often described – following a characterization by Erhard Blankenburg – as 'pragmatic' in comparison with that of neighbouring countries such as Germany.[15] Mechanisms for resolving legal disputes relatively quickly and informally have existed in the Netherlands for many decades. Examples are the spectacular development of interim injunction proceedings (*kort geding*) within the regular court system in the 1970s (due to the enthusiasm of a few presidents of the Amsterdam District Court) and, more recently, a comparable development of the post-statement-of-defence hearing (*comparitie na antwoord*). In such a hearing, the parties are required to appear in person before the court and major emphasis is placed on reaching a settlement under the direction of the judge. Other examples are the numerous disputes committees, complaints committees and consultative committees that divert many potential legal disputes away from the courts.[16] The history of mediation is no exception in this respect.

Three decades ago the Anglo-American terms 'ADR' and 'mediation' were unknown in the Netherlands. In legal discourse, 'dispute resolution' meant court administered, judicial dispute resolution; a prefix 'regular' as opposed to 'alternative' was therefore entirely superfluous. A collection of essays published by Nijmegen law school in 1974 on the theme of the administration of justice contained only one article on arbitration and expert valuation and one article on informal dispute resolution, but in a non-Western country. 'ADR' and 'mediation' did appear in a collection of essays published by the Rotterdam law school in 1988, but even then they did not take a prominent position.[17] Only the occasional pioneer familiar with the theories of American mediation employed the term 'mediation', and then for a limited audience only.[18]

The first specialized professional organization to be involved in mediation was established in the field of family law. This was the Association of Divorce Mediation Lawyers (VAS), which was set up in 1989. It was soon followed by a foundation for alternative dispute resolution in the rapidly growing ICT industry (SGOA). From 1993 onwards meetings were held by, initially, a small group of lawyers, mainly from the construction industry, joined by a few academics. They were impressed by the Centre for Effective Dispute Resolution (CEDR), which had been set up in London shortly before. CEDR aimed to fulfil a hub

15 E. Blankenburg & F. Bruinsma, *Dutch legal culture*, Deventer/Boston: Kluwer Law & Taxation Publishers, 1991, pp. 3-9.

16 J.G. van Erp & C.M. Klein Haarhuis, *De Filterwerking van buitengerechtelijke procedures, een verkennend onderzoek*, WODC Cahier 2006-6, Den Haag: Ministerie van Justitie, 2006.

17 H.J. Snijders, C. Fijnaut, H.Th.J.F. van Maarseveen, *Overheidsrechter gepasseerd Conflictbeslechting buiten de overheidsrechter om*, Arnhem: Gouda Quint, 1988.

18 One such a pioneer was professor Peter Hoefnagels, one of the first Dutch family mediators.

function, mainly in commercial disputes, by training mediators and monitoring their professional quality, by making mediator services accessible, and by representing the interests of the mediator community. The Dutch group wanted to establish a similar but broader organization in the Netherlands to draw attention to Harvard-style mediation. Two years later the Netherlands Mediation Institute (NMI) was established. The English term 'mediation' was used instead of the Dutch term *'bemiddeling',* which has different connotations, including 'matchmaking'.

Besides this substantive impetus there was also a need for organizational change. At the 1993 annual meeting of the Netherlands Bar Association the Minister of Justice clearly stated the need for greater efficiency in civil procedures. The draft of a bill to review the law of civil procedure was already under discussion. Subsequent vigorous calls for more effective communication between judges and litigants opened the way for judges to refer litigants to external mediators during court proceedings.[19]

The debate in the Netherlands gained momentum. In 1995 the Netherlands Bar Association devoted its annual meeting to mediation and over the course of the next two years virtually all professional journals – particularly those for the judiciary and the Bar – devoted attention to mediation. In 1996, the Ministry itself came up with the idea of establishing an ADR committee (*ADR Platform*) consisting of representatives of the Ministry, legal practice and academia. The role of the committee was to advise the Minister on strategic policy choices concerning the entire area of alternative dispute resolution methods and the areas of law in which these methods could be used successfully.

A private research agency was commissioned by the committee to study the possibilities of ADR in the Netherlands. This resulted in the publication of a report entitled *Kansen voor conflictbemiddeling* (Opportunities for mediating disputes).[20] This report outlined the various possibilities and obstacles from the perspective of a litigant who must constantly make decisions. Not only the regular courts, but also various civil society organizations were seen as possible agents for referring disputants to mediation. To activate this potential for civil society organizations, the report recommended coordination between the Ministry of Justice and other government departments such as Social Affairs and Employment and Economic Affairs. For the time being, however, this strategy failed to materialize.

19 Various lead articles appeared late 1994, early 1995 in the influential Nederlands Juristenblad (NJB) weekly; the linkage from courts to external mediators was introduced in R.W. Jagtenberg & A.J. de Roo, De A van ADR, in: *NJB*, jrg. 70, nr. 3, 1995, pp. 81-87.

20 M. Verberk, H. Geveke & E. Boiten, *Conflictbemiddeling*, Den Haag: B&A, 1997.

Another task of the ADR committee was to prepare proposals for possible experiments. At that time, small-scale mediation experiments were under way, partly at the district courts in Zwolle and Amsterdam and partly at the (then) Legal Aid Offices in Arnhem and Den Bosch. The Research and Documentation Centre of the Ministry of Justice (WODC) carried out an initial evaluation of these experiments, which clearly showed that unfamiliarity with the concept of mediation and defective referral methods were taking their toll. The volume of mediations was still too small to draw definite policy conclusions. Experiments on a larger scale would therefore be necessary.

The parties involved realized that support for this larger, nationwide experiment would have to be generated carefully. For this purpose, a conference *Mediation, the Alternative?* was organized by the Ministry of Justice in cooperation with the University of Amsterdam in the spring of 1998. As a result of this initiative, the judiciary was won over to the idea of cooperating in a national experiment for referral to mediation. But it required the official elevation of mediation to the status of policy goal. This official step was taken in a policy letter published by the Ministry of Justice in November 1999 entitled *Meer wegen naar het recht* (More paths to justice), dealing with ADR in the 2000-2002 planning period. The ministerial letter stated that measures to promote Alternative Dispute Resolution (ADR) within the Netherlands legal system now formed part of the envisaged policy. ADR was to serve four policy objectives:

- combating the juridification of disputes;
- disposing of disputes in the best and at the same time most effective way;
- meeting the social need for more varied access to the law, in which the parties themselves initially bear responsibility for solving disputes;
- reducing the caseload of the courts.

The ‘More paths to justice’ policy letter opened up the way for nationwide experimentation with court-connected mediation. It was also decided to house the Netherlands Court-connected Mediation Agency (*Landelijk Bureau Mediation, LBM*) in the building of the Arnhem District Court. The LBM was to coordinate the pilot projects within the various courts and to supervise the dissemination of all information relevant thereto. The LBM was chaired by a knowledgeable and energetic court of appeal judge, Mrs. Machteld Pel, who, due to her unique mix of qualities soon became “the face” of court-connected mediation in the Netherlands.

Returning to the policy letter for a moment: the main objectives were disposing of disputes in the best and most effective way possible and enhancing the parties’ responsibility for resolving disputes. To quote the Minister: ‘Naturally, this is not to say that the outcome of mediation is better than that of a court judgment, let alone that judges deliver work of

insufficient quality (…) But this does mean that it may be more satisfactory for the parties to some disputes, particularly those in which they have an interest in maintaining an ongoing relationship, to reconcile their differences rather than seek to be proved right in a court of law at the expense of the other party.'[21]

The objective of reducing the caseload of the courts has been interpreted by many, both inside and outside the judiciary, as the only real reason for introducing mediation. In other words: the introduction of mediation as a cost saving operation. However, this has always been denied by the Ministry and much effort and expense has indeed been devoted to introducing a customized system of conflict resolution, where mediation and adjudication are – as such – equally valued.
Needless to say, the objective of increasing the parties' own responsibility and not always giving precedence to a strictly legal assessment of disputes attracted not only support, but also criticism from the judiciary. The introduction of mediation could, after all, be interpreted as criticism of the functioning of the judiciary itself. This was indeed the view taken by some observers and this was also the reason why training courses were designed by the LBM at the outset of the nationwide program of experimentation. These courses especially highlighted the differences between traditional court supervised settlement (the multi-hat court judge) on the one hand, and modern mediation on the other.

As mediation was not yet generally known around 2000, the LBM in those years focused strongly on providing information about mediation. This led many people to feel that they were being subjected to a form of advertising designed to 'sell' the concept of mediation, despite the fact that mediation had immediately been placed alongside judicially supervised settlements and judicial decision-making. This was also why the term 'ADR' was abandoned in publications on mediation. Use of this term created the impression that the courts were the butt of criticism and that mediation was a panacea for the possible ills of the court system. Instead of ADR, the term 'customized conflict resolution' was introduced, implying that handing down verdicts is just one option in a wider array of dispute resolution methods, alongside mediation, arbitration, negotiation and expert opinions. In this philosophy, the aim of court proceedings is to choose, together with the parties, the most adequate method(s) to resolve the actual dispute, i.e. to choose between a court judgment, settlement or (referral to) mediation. This phrasing was adopted in later policy letters and has become accepted in the broader circle of professionals involved in dispute resolution.

When one reflects on these achievements, the manner in which the national introduction of court-connected mediation was organized and indeed the choice of a national experiment in

21 Quote from Policy Letter 'More paths to justice'.

the first place, one is tempted to characterize the entire approach as unique and typically Dutch.
Typically Dutch in three ways. First of all, on account of the decision to experiment before making a final decision on investing public money, let alone initiate legislation: this is the well-known Dutch 'look before you buy' approach. Secondly, on account of the public-private cooperation between the Ministry of Justice, the Judiciary and the Netherlands Mediation Institute in organizing a system of recruiting and supplying qualified mediators for the court-referred mediations. And thirdly, on account of the integral approach of diligently monitoring the support, both internally and externally, for court-connected mediation, through the compact LBM office in Arnhem. Experimentation through a public-private initiative backed by research: that is the typical Dutch way of (introducing) court-connected mediation.

Systematic attention has been paid to providing guidance for referring judges and participating mediators alike. Nearly every conceivable possibility has been anticipated. This approach has met with international acclaim, which is indicated by, for example, the large number of delegations that have visited the National Agency for Court-connected Mediation (LBM) over the years. In alphabetical order, they are Albania, Belgium, Bosnia, Bulgaria, China, Croatia, England, France, Germany, Indonesia, Macedonia, Montenegro, Norway, Poland, Romania, Serbia, Slovenia, Switzerland, Turkey and the United States.
And in at least as many countries the LBM has been represented at conferences or played an important role in consultancy programmes.[22]

22 Pel's Referral to mediation has been translated into four different languages: English, Russian, Turkish and Slovene.

3 The shadow of the referral

We will not examine the concrete results achieved in the past ten years in detail here. These results are reported in the second part of this volume, where those interested can learn about the number of referrals, the motives of the referring agents and the parties to the dispute, the course and results of the intervention and the assessment by those concerned of what has been achieved. Also, the costs and consequences for the courts in terms of processing time are discussed there.

By and large the results are positive. But some objections could be raised if we single out three particular results:

1. only a small percentage of all pending cases are referred to mediation;
2. the net savings achieved by referral are largely offset by the costs of the referral services;
3. looking back two years after signing a mediated settlement agreement parties tend to be markedly less enthusiastic about mediation.

This could lead to the conclusion that, ultimately, the results of mediation are rather disappointing. However, such a conclusion would be unwarranted if only because even a few percent of all pending cases still represents a number in the thousands. Moreover, even if some litigants, looking back after two years, have doubts about the agreements they have made – the data are from a very small-scale survey and therefore cannot be regarded as representative – there are still many parties who are satisfied with the achieved results.

The above conclusion would also be unwarranted for another reason– arguably an even more important reason. The flow of new cases into what has been termed the 'Dispute Resolution Delta' (*Geschilbeslechtingsdelta*, Van Velthoven and Ter Voert, 2004; the Dutch landscape is that of a large river delta) must be assessed in terms of its effect within the entire "catchment area".[23] It seems likely that court referrals to mediation have stirred the 'upper reaches' of the court system (the area where the juridification of disputes is prepared) into action to an extent that should not be underestimated. Although these 'upper reaches' do not, formally speaking, fall within the remit of the Ministry or the LBM, increasing use of mediation 'upstream' would most certainly have an effect on the inflow of cases into the court system downstream. A check on the websites of a number of law offices chosen at random shows that eight out of ten firms state that they 'naturally' have in-house mediation expertise and would be glad to deploy it for the client when appropriate. This development could of course be described as defensive marketing in an increasingly competitive profes-

23 B.C.J. van Velthoven and M.J. ter Voert, *Geschilbeslechtingsdelta 2003*, Den Haag: BJU 2004. The research format is largely based on the landmark English survey designed by Hazel Genn. H. Genn, *Paths to Justice, What People Do and Think about Going to Law*, Oxford: Hart Publishing 1999.

sional services market. But whatever the motive, the mere fact that a lawyer may encounter a referral proposal at a court hearing means that he *must* prepare professionally for the possibility. He must think about the advantages and disadvantages of mediation and about the advantages and disadvantages of rejecting the proposal. Anyone with a nodding acquaintance with the Bar knows the stories about formerly hard-boiled litigators suddenly proposing mediation, perhaps not out of the goodness of their hearts but for tactical reasons, for example to present themselves to the judge as the epitome of reasonableness. Yet even such calculating behaviour on the part of lawyers appears to result in actual mediations. Mediators report that they are gradually receiving more cases *directly* from attorneys. This is not really surprising.
A well-known phenomenon in the literature is the 'shadow of the law': even though only a small fraction of all potential disputes may be heard by the courts, a decision that bears the imprimatur of the court has an impact that extends well beyond the case in point.[24] Parties involved in comparable cases that are not yet at such an advanced stage will be swayed by the results. This same phenomenon also occurs with regard to referrals, in particular referrals by a judge. Precisely because the judge who proposes mediation has the power to give a final and binding ruling, parties are obliged – even where the referral is of a voluntary nature – to take account of mediation as an option and to anticipate this possibility.

The effect of this 'shadow of the referral' will be even greater when important institutions or trade associations commit to mediation under standard terms and conditions, collective agreements and so forth. This practice is slowly expanding, and always with the shadow of referral in the background. For the time being, this conclusion is based on what can be generally observed in day-to-day practice. It could be tested as a hypothesis in various ways, for example by studying the proliferation of mediation clauses and protocols, examining changes in how cases reach mediators and exploring the views of lawyers.

The aforementioned 2004 survey of the Dutch 'Dispute Resolution Delta' contains some general mediation figures for the period 1998 to 2002. The survey showed, in brief, that 48% of respondents confronted with a potential legal problem ultimately succeeded in reaching agreement with the other party (compared with, for example, 4% of respondents who opted to have the matter decided by the regular courts). This figure of 48% also included successful mediations. When the respondents were asked how they had come to consult a mediator it became apparent that in 40% of cases the respondents themselves had taken the initiative, in 20% of cases the initiative was taken by the other party, in 12% of cases it had been the employer and in 8% of cases a family member or acquaintance. The

24 R. Mnookin & L. Kornhauser, Bargaining in the Shadow of the Law, in: *Yale Law Journal*, 1979, p. 88ff.

researchers therefore concluded that – at that time – there was no evidence of frequent referrals from legal practitioners.[25]
It should be pointed out that the system of court referrals to mediation did not really gain momentum until the end of the period covered by the 'Dispute Resolution Delta' project. The attention the Ministry of Justice paid to mediation, however, had generated much publicity during the research period. One may wonder whether the respondents in the 'Delta' project would still have chosen mediation of their own volition if the authorities had not already committed themselves to mediation. This, of course, is the 'what if' question. The data from the Delta project do not allow further analysis in this respect. The answer will vary according to the specific area of law concerned. Divorce mediation, for example, was introduced as early as the 1980s (the Association of Divorce Mediation Lawyers (now vFAS) was founded in 1989), long before the introduction of the referral facilities in the courts. It is now reported that in a substantial percentage of divorce cases the parties themselves turned directly to a divorce mediator, prior to the court authenticating the divorce. The question arises whether this is entirely due to cost saving incentives, or whether it is also due to the increased publicity for (the successes of) mediation as a result of the referral services.
In brief, it is plausible that the referral provision has had a certain impact on the flow of cases 'upstream' in the 'delta'. After all, this is predicted by the theory of the 'shadow of the law' and it is also confirmed by evidence from day-to-day practice. However, further research is necessary in order to determine the exact scope of this important knock-on effect.

Two related observations are in order. The nominal number of mediations today is considerably higher than in the period of the Delta survey. The total number of mediations (i.e. both inside and outside the court system) has exceeded the number of arbitrations and expert valuations for some considerable time. This is evident from a survey by Brenninkmeijer et al. entitled *De aard en omvang van arbitrage en bindend advies in Nederland* (The nature and scope of arbitration and expert valuations in the Netherlands) (2002).[26]

This large number of mediations allows the use of creative research methods, for example in measuring developments over time. One such development is the increased familiarity with mediation among the up-and-coming generation of lawyers. Research has shown that the attention paid to mediation in the curricula of the Dutch university law schools has

25 Van Velthoven & Ter Voert, op.cit., pp. 118ff.
26 A.F.M. Brenninkmeijer, M. van Ewijk & C. van der Werf, *De Aard en Omvang van Arbitrage en Bindend Advies in Nederland,* Leiden: Research voor Beleid & E.M. Meijers Instituut, 2002; H. Sprangers, Kwantiteiten in Mediation. Een Verkennend Onderzoek naar Aantallen Mediations, in: *TMD,* 2004, nr. 2, p. 43ff.

increased significantly in recent years.[27] There are also indications that the subject is highly rated. This trend is bound to impact future legal practice. And, once again, the referral services have had a knock-on effect, since it was the integration of mediation into the regular court system that first convinced the more traditional doctrinal members of Dutch law schools that this subject should henceforth be covered in the curriculum.

27 R.W. Jagtenberg, Onderwijs Mediation en Conflictmanagement anno 2008, in: *TMD*, 2008, nr. 4, p. 12ff.

4 Criticism and constraints

Given the number of mediations upstream and downstream in the 'Dispute Resolution Delta', we must now consider the objections raised by critics of mediation in recent years. These objections have generally been twofold.

First, it has been argued that mediation does not meet a real need; it has been said to be a supply-driven service.[28] This criticism has now faded and rightly so. The proof that mediation does meet a need is apparent from the fact that this method is also frequently chosen by parties in mutual consultation, without a judge anywhere in the vicinity, while the sheer number of mediations easily exceeds that of other methods which tend to be (contractually) agreed, such as arbitration and valuation.

The other point of criticism takes us back to the first part of this essay. This is the criticism that was previously voiced in the United States by Fiss and his supporters, namely that mediation constitutes a threat to society as it exports legal dispute resolution from the public domain into private conference rooms. Other critics have added that mediation will reinforce unequal bargaining power.
Similar criticism has been expressed in the Netherlands, *inter alia* by Jan Vranken, a prominent member of the committee for reassessment of procedural law.[29]
At first glance, the criticism that mediation is a threat to society does not seem justified. Every day people engage in direct negotiations in which they waive their entitlement to sue, and the same occurs in traditional settlements in the presence of a judge. However, the criticism that mediation will reinforce unequal bargaining power deserves more attention. As shown in our survey of European mediation practices, also in countries neighbouring the Netherlands, this aspect surfaces fairly often as a contraindication in court referral criteria.[30] Legal rules may have been designed exactly to compensate for inequality in specific cases. This is an aspect that also bothers the proponents of mediation. 'Only in the shadow of an easily accessible court procedure does a negotiating area occur in which inequality is levelled and a mediator can do excellent work,' comments Maurits Barendrecht in the NJB journal special issue on the Dispute Resolution Delta.[31] And Machteld Pel states in her book

28 N.J.H. Huls, De aanbod-economie van ADR, in: *Justitiële Verkenningen,* nr. 9, 2000, p. 99 ff.

29 J.B.M. Vranken, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Algemeen Deel, een Vervolg.* Deventer: Kluwer 2005, p. 134.

30 A.J. de Roo & R.W. Jagtenberg, ADR in the European Union: Provisional Assessment of Comparative Research in Progress, in: *Médiation et Arbitrage: Alternative à la justice ou justice alternative? Perspectives Comparatives*, (L. Cadiet ed.), Paris: Litec, 2005, pp. 179-189ff.

31 J.M. Barendrecht, Ervaringen van Mensen met Geschillen. Harvard-onderhandelen in de Schaduw van een Kadi?, in: *NJB*, nr. 1, 2005, p.1.

Het belang van belangen (The importance of interests*)*: 'Without a good court system other forms of dispute resolution would not produce fair negotiating results.'[32]
It is often argued that a competent mediator can – to a certain extent – neutralize inequalities between the parties. Where it is the purpose of the law to do so, a mediator can actually use the law as an objective outside lever to alter the balance of power accordingly, but negotiating such a narrow and slippery path would involve risking the loss of neutrality. And mediators also have to make a living. What would happen if the stronger party, for example a large company that is in dispute with an individual employee, were in a position to offer the mediator a series of follow-up assignments? It is the classic problem of remuneration and independence, which is exemplary of the private sector.

Meanwhile, this debate on unequal bargaining power in mediations 'in the shadow of the law' is based on the fundamental premise that courts of law *are* accessible and always *do provide* compensation for inequality. But the question that must be asked is whether this is correct. As explained at the outset of this essay, mediation began as a 'third wave' under a political constellation devoted to the eradication of inequalities, and has progressed under another and entirely different constellation involving privatization and deregulation. Now consider this paradox: the very climate that has created room for mediation has also destroyed much protective legislation, and has actually resulted in the erection of higher financial barriers outside the door to the courthouse. This leaves a somewhat bitter taste indeed.

It should be noted though, that in a situation of major inequalities, the stronger party would probably not even consider mediation. The typical reaction of such a party would be to deny the existence of a dispute and simply order the other party to do as it was told. The 'topdog' would regard the mediator as an interloper who had no business meddling in its affairs. Its attitude would therefore be 'What I say goes!'.

As long as the referral by courts to mediation takes place on a voluntary basis, this topdog attitude would come out in the open. Things may become considerably less transparent, however, once courts made the referral to mediation of unequal parties *compulsory*. Then the unwilling top dog would likely use every available trick to force the underdog into an 'empty hands' settlement.

As a consequence of the financial crisis, the current plans of the Dutch Ministry of Justice are to reduce its expenditure on the judicial system by 10%. Will this require further supply

32 M. Pel, Belangen in de Strijd en in de Tijd, Belangenhantering in de dagelijkse Praktijk, in: M. Pel & J.H. Emaus, *Het Belang van Belangen*, Den Haag: Sdu 2007, p. 112.

adjustments in the procurement of judicial services (judges have to do even more with even less) or will it require demand adjustments (more mandatory referrals to mediation)?[33]
Or would the supply side and the demand side of the justice system both be tackled? That seems the most probable outcome, given the magnitude of the financial problems. And what will happen then?
Sufficient challenges lie ahead, and perhaps the problem solving skills inherent in mediation will provide us with the creativity to come up with solutions. *Customized* solutions, to be perfectly clear.

33 R.W. Jagtenberg & A.J. de Roo, From Traditional Judicial Styles to Verdict Industries Inc., in: *The Legitimacy of Highest Courts' Rulings*, N.J.H. Huls, J. Bomhoff, M. Adams (eds.), The Hague: T.M.C. Asser Institute/Cambridge University Press, 2008, pp. 301-322.

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Referral to mediation by the Netherlands judiciary

Machteld Pel & Lia Combrink[1]

1 The development of the Referral Service

In this paragraph we will present a short history of referral to mediation by the Netherlands judiciary. Three different phases can be distinguished: the pilot phase, the implementation phase and the consolidation phase. At the end of this paragraph we turn our attention to the role and functioning of the Netherlands court-connected mediation agency.

1.1 Pilot phase: September 1999 - April 2005

September 1999 marked the beginning of referral to mediation by the Netherlands judiciary. The objective was to develop and implement referral services in at least four courts during the period 2000-2002. It could then be decided whether a structural facility for referral to mediation within the judicial organization was justified and if so, how this could be organized most effectively and efficiently.[2] The 'raison d'être' of introducing court-connected mediation was to expand the options for litigants so they could choose the most appropriate method of conflict resolution. Court-connected mediation was introduced as, and still is, a completely voluntary option in addition to adjudication and court settlements.

The responsibility of the project management during the pilot phase lay with Machteld Pel (vice-president of the Court of Appeal in Arnhem) and Madeleine Spliet (vice-president of the Utrecht District Court). They were accountable to the Steering Group of the mediation project, which in turn advised the Minister of Justice. Frequent contact was maintained with the Assembly of the presidents of the district courts and the courts of appeals (hereafter: the

1 This contribution is a translated adaptation of '*Op maat beslecht, Mediation naast rechtspraak 1999 – 2009*', by L. Combrink, L., H. Dellink, R. Jagtenberg, A. Klijn, S. Praagman, M. Pel, B. Vastenhoud, & S. Verberk, Research Memoranda nr. 2, 2009 jrg. 5, Den Haag: Sdu Uitgevers 2009.
The authors express their thanks to the contributors of the Dutch publication.

2 A similar project was set up within the field of subsidized legal aid where cases were referred by Legal Aid Advice Centers. Currently, these Centers are no longer in operation. In this publication, referral to mediation by the Legal Aid Advice Centers will be left aside.

Assembly of presidents of the courts) as well as with the Society of judges-mediators (*Kring van rechters-mediators)*.[3]

The Arnhem District Court provided the space to set up a national project organization: the Netherlands Court-Connected Mediation Agency (abbreviated: LBM according to the Dutch name *Landelijk bureau Mediation naast rechtspraak)*. The LBM became operational on the 13th of September 1999. Its first task was to "recruit" courts that could actually start referring cases to mediation. Five first-tier courts (the courts of Assen, Amsterdam, Arnhem, Utrecht and Zwolle) as well as the Court of Appeal in Arnhem indicated their willingness to participate and took part in the experiment. By July 2000 all of them had a referral service in place. The Research and Documentation Centre of the Ministry of Justice (WODC) was responsible for the evaluation of these six pilot projects and explored the possibilities for nationwide implementation. The WODC published its findings in a report with the telling title 'Room for mediation' (*Ruimte voor mediation*) and concluded that a permanent system of referral to mediation within the judicial infrastructure was warranted.[4]
In the meantime, the LBM had executed a forecast study in 2002. Based on extensive consultation with many parties involved, this study contained a description of all the necessary steps for successful implementation of the referral services in the courts. In agreement with the Assembly of the presidents of the courts a decision was made for a phased implementation, so that after a few years every court could have a referral service in place.
The 'Quality Report of the referral facilities in the Judiciary and Subsidized Legal Aid' outlined the use of external mediators and the financing thereof. This report was drawn up in consultation with the referral services in the judiciary and subsidized legal aid, and with the Netherlands Mediation Institute (NMI). It was decided to register mediators via the Legal Aid Councils.

In April 2004, the Minister of Justice officially announced the nationwide implementation of the referral services. It was felt – by the Ministry of Justice, the Netherlands Council for the Judiciary and the Assembly of presidents of the courts – that referral to mediation by the courts would contribute to effective and customized conflict resolution.

1.2 Implementation phase: April 2005 - May 2007

The purpose of the implementation phase, which started in April 2005, was to have a referral service in place in all courts by the first of April 2007. The actual implementation occurred

3 The 'Society of Judges-Mediators' was set up in 1998 as an informal forum of judges who had been trained as a mediator. Its objective was to explore the possibilities of institutionalizing mediation within the judicial system.

4 L. Combrink-Kuiters, E. Niemeijer & M. Ter Voert, *Ruimte voor mediation*, Den Haag: WODC/ Boom Juridische uitgevers, 2003.

in different stages and according to a fixed schedule. Thus while some courts had already completely integrated the referral service in 2007, other courts had just started.
The courts received manuals describing all the steps to be taken and containing guidelines for the implementation and operation of the referral services. Training courses were offered, information brochures distributed and information meetings organized within the courts and for the bar. Each court was allocated a coach by the LBM; this person could be approached for advice and in case of questions. About seven coaches provided these consulting services, which contributed greatly to unity of working practices of the different referral services. During the implementation phase, preparations were made to register mediators by inviting those interested to sign up as mediator for court-connected mediation. Once they were registered, mediators received information on the specifics of mediation in a court setting.

1.3 Consolidation phase: May 2007 - October 2009

The implementation of the referral services was complete in 2007. From then onwards the focus was on embedding its organization, strengthening the support base and developing best practises. A long-term plan *LBM 2007-2010* was drawn up to accomplish this. The plan was approved by the Council for the Judiciary and the Ministry of Justice early 2007. In this plan referral to mediation was envisioned as an efficient and effective way to resolve legal disputes in addition to adjudication and court settlements. Mediation was to be seen as a regular, "normal" means of dispute resolution by the judiciary, the bar and litigants. The focus during the consolidation phase shifted from "promoting" referral to mediation to sensitizing judges and court staff to choose, in cooperation with the litigants, the most appropriate method of conflict resolution, in short: 'customized conflict resolution'. New teaching courses and new pilots evolved.

1.4 Looking back: the pivotal role of the LBM

This short historical account of referral to mediation within the Netherlands judiciary would not be complete without paying specific attention to the LBM. The efforts of this organization have been of crucial importance to the institutionalization of the referral services. The front person of the LBM was its director, Machteld Pel. The director, the manager and the staff of the LBM took care of the daily operations of the Bureau. Over the years, the scope and the composition of the LBM staff has been adapted to meet the specific demands of each of the three phases as described above. To support and give guidance to the LBM, a team of advisors was formed: four judges and the portfolio holder mediation at the Council for the Judiciary. These four judges, supported by LBM staff, advised and coached the courts with regard to the implementation and operation of their referral service.

The tasks and role of the LBM have changed over the years, depending on the development phase of the referral services. During the *pilot phase* the LBM took it upon itself to organize the pilot projects, provide the necessary coaching and also to monitor and evaluate the progress of the pilot projects. Furthermore, the LBM provided training courses, recruited qualified mediators and maintained contact with all relevant external parties, including the bar. The LBM was also responsible for developing criteria for referral to mediation and for setting up a referral protocol.
During the *implementation phase* the LBM continued to support the courts by providing expertise and advice, monitoring the referral services and mediators, organizing training courses and by developing best practices. An 'Info desk' was set up, accessible for the courts on all working days, both by e-mail and telephone. Courts could contact LBM staff members via the Info desk to get answers to their questions about the implementation and operation of their own referral service.
During the *consolidation phase* the LBM strengthened its role as a knowledge centre where expertise and information was generated, received, exchanged and disseminated for the benefit of the courts and everyday working practices. And while the implementation phase emphasized communication, the consolidation phase gave prominence to research and also to setting up the new pilot projects 'customized conflict resolution'.

From the start, exchanging information, acquiring knowledge and gathering data about referral to mediation and the mediation process itself have been very important. At first, input was sought from an international network of mediation experts. Once the referral services were in place, the LMB organized several platforms where the courts could exchange information, among themselves and with the LBM. The 'mediator coordinators' (the former implementation leaders in the courts) met twice a year at the LBM premises. Also, the 'mediation officers' (the former project secretaries and organizational backbone of the referral services) met twice a year. In addition, the advisors and staff members of the LBM visited the courts approximately two times a year. The objective of these different meetings was to exchange experiences and ideas. This promoted unity among the different referral services and the LBM was able to develop best practices based on the information these meetings provided. While in the beginning expert knowledge was gathered from international networks, over the years the director of the LBM was consulted as an expert herself and the LBM has made a considerable contribution to the development of referral services abroad.

In October 2009, as foreseen, the LBM-office was closed and its tasks handed over. The advisers were succeeded by 'the Expert group Customized Conflict Resolution' and the LBM staff was succeeded by staff members of the Council for the Judiciary. They will continue to be a source of support and information for the courts.

2 The big five: important issues

Several important issues had to be addressed to make referral to mediation the success its has become. We will examine five of these issues in this paragraph: the activities carried out by the LMB to create a support base for mediation; the quality standards put into place to ensure the quality of the referral process as well as the quality of the mediation itself; the research and monitoring activities to evaluate results and adjust working practices; the funding of the referral services, the funding of the LBM and the financial incentives introduced for litigants; and organizational prerequisites for the referral services, such as training and education courses made available to judges, court staff and mediators.

2.1 Support base

In 2000 mediation was barely known in the Netherlands among legal professionals and litigants. At first, this lack of knowledge created some resistance against mediation in a court setting. For example, judges resisted mediation because 'we are already doing the same thing during settlements'[5] and lawyers because they doubted "these mediators" could do something they could not. There was also resistance among litigants because they wanted a decision from a judge and did not see the advantage of 'yet another discussion' with the other party.
With the introduction of referral services in the courts it was therefore necessary to educate and inform all those concerned about the possible advantages of mediation. This was done by organizing information meetings – for judges, court employees, lawyers and mediators. Also, meetings were organized to educate specific target groups about the potential benefits of mediation, such as in-house lawyers of (large) companies, representatives of the government, medical doctors, et cetera. The public relations efforts were continued by providing information through films, brochures, folders, and letters. And once the results of the mediations become known, sharing information about the successes of mediation proved to be an effective communication tool as well.

At first, the communication efforts to create a support base for mediation were focussed on "selling" this method of conflict resolution and stressing its potential advantages. Later on, the support base among legal professionals was enhanced by clearly positioning mediation alongside adjudication and judicially supervised court settlements. The concept of 'customized conflict resolution' proved to be instrumental in this regard and helped to anchor referral to mediation within the legal system. Mediation was not to be seen as the cure-all, but instead as one of three options to be considered when people bring their disputes to the

5 It should be noted that since the 1980s judicially supervised settlements have become common in civil cases. At present, approximately 40% of all civil cases end with a settlement agreement. The introduction of post-statement-of-defence hearings (*comparitie na antwoord*) has greatly contributed to the high percentage of settlements (see also the contribution of Jagtenberg & De Roo in the first section of this volume).

courts. Together with the litigants it should be decided which of the three options would provide the best method for an effective and sustainable solution. The concept of 'customized conflict resolution' was introduced during a conference organized by the Council for the Judiciary and the LBM in November 2007: 'What suits best?' (*Wat schikt het best?)*. The conference was well attended by representatives from all courts and was closed with a speech by the Minister of Justice, who invited those present to think about future legislation to support customized conflict resolution.

The vision of the Council for the Judiciary as expressed in the 'Agenda for the Judiciary 2008-2011' is testament to the support generated for mediation within the judiciary: *'Social relevance and effectiveness require that the courts provide dispute settlement in a way that contributes, as much as possible, to the solution of underlying problems of litigants and society. (…) Mediation can sometimes be a suitable option to enable parties to reach a satisfactory solution.'*

2.2 Quality standards

The referral

There are several ways in which legal disputes pending before the courts can end up in a mediation: the option can be suggested in a letter to the litigants (written referral), the option can be presented during a court hearing (oral referral) or litigants themselves can opt for mediation (self referral).

In case of a written referral the litigants receive a letter prior to the court hearing in which they are encouraged to consider mediation. A brochure and a so-called 'self-test' accompany this letter. The self-test is a tool to help parties to determine whether mediation might be a suitable option. Filling out the self-test has turned out to be the first step for many people towards finding a solution for their problem. Mediation is indicated as a possible option if one of the questions in the test is answered affirmatively. The self-test has proven to be a very important instrument because it appeals to the commitment of litigants – commitment is one of the main success indicators for a successful mediation.[6] The self-test is attached as Appendix 1.

Once a case has been referred to mediation, further processing of the case by the court is suspended for a period of three months, i.e. the maximum processing time of a mediation (although this period of three months may be extended when the mediation takes more time).

6 Pel, M., *Referral to mediation. A practical guide for an effective mediation proposal*, Den Haag: Sdu Uitgevers, 2008.

The quality of the referral process

To guarantee the quality of referral to mediation, it is important that referrers within the courts (judges as well as court staff) are well educated about mediation in a court setting. This issue is further elaborated in paragraph 2.5. Here we would like to discuss the crucial role of the mediation officer in guaranteeing the quality of the referral process. The mediation officer heads the 'mediation administration office' in the courts and is the contact person for litigants with questions on mediation. He or she is also the person to maintain the network of mediators.

In case of oral referral, the judge will engage the mediation officer once the litigants have agreed to consider the option of mediation. The mediation officer is also the contact person in case of written referrals or self referrals. He or she provides the litigants with information about the mediation process, such as its voluntary nature, the confidentiality of the mediation process, the efforts expected of both parties and the difference between mediation and a judicial decision. The mediation officer also assists parties in choosing a mediator and arranges the first appointment between the mediator and the litigants. This intermediary task of the mediation officer is very important, since experiences in other countries have shown that litigants often fail to approach a mediator after being referred to mediation by the courts: it proved too difficult for them to choose a mediator together or even to agree on a good time for the first session.

Generally, the first mediation session takes place within two weeks after the referral. A quick start may limit further escalation and have a positive effect on the course and outcome of mediation. Once the mediation process has actually started, the mediation officer monitors its progress and is responsible for the mediation administration. The latter involves: keeping a 'mediation file' of each case in which all relevant procedural steps are registered, documenting the outcome of the mediation (no agreement, partial agreement, full agreement) and informing the referring judge and the court registry of this outcome.

Quality of the mediation process

The Netherlands Mediation Institute (NMI) had been in existence for just a few years when the referral services within the Dutch courts were set up. At present, the NMI provides independent quality assurance of mediation and mediators nationwide and holds a public register of mediators. But in 1999 there were no quality standards available. There was not yet a reliable system of mediator registration and certification, nor had a complaints procedure been established. So in close collaboration with the NMI, the LBM set up:

- quality requirements for the participating mediators;
- a complaints procedure;
- a procedure to select mediators for court-annexed mediation;
- coaching, group intervision and training for mediators focussing on the dynamics of mediation in a court setting.

Regarding the quality assurance of mediators the 'Mediator Quality Report' was an important document. This report, drawn up in 2004 (prior to the implementation phase), stipulated that only NMI-qualified mediators would be entitled to act as a mediator during court-connected mediations. A number of organizations were consulted in the process of determining the quality criteria that NMI-certified mediators would have to meet, including the Ministry of Justice, the Council for Legal Aid, the Netherlands Council for the Judiciary, representatives of mediator associations and the NMI itself. Furthermore, standard memoranda of agreement were developed – to be signed once the parties have come to an agreement during the course of the mediation process.

2.3 Research and monitoring

One of the firm convictions from the start was the importance of monitoring results and empirical research. Therefore, a database was developed to register relevant data of cases referred to mediation at the beginning of the pilot phase. The Research and Documentation Centre of the Ministry of Justice (WODC) based their 2003 study 'Room for Mediation' (*Ruimte voor mediation*) on this database. Two years later, in 2005, a user-friendlier and more efficient database was developed for future data gathering. The input for this database was generated with questionnaires for: the referrer, the mediation administration office, the mediator, the parties, and the person providing legal assistance. These questionnaires are attached as Appendix 2.
Prior to the sunset of the LBM, representatives of the Council for the Judiciary and the LBM worked together on setting up a modified system of data gathering (within a high-quality digital infrastructure) for future monitoring and research of court cases referred to mediation.

In addition to the quantitative data gathered with questionnaires an important focus of qualitative research was on the 'judgement-settlement-mediation' continuum. This refers to three different ways of dispute resolution: adjudication by a judge, judicially supervised settlement-agreements and agreements resulting from mediation. Comparative research on this subject matter started in 2007. The central research questions were related to the determinants for one of the three dispute resolution options and the relationship between the method of dispute resolution on one hand and the outcome, litigant satisfaction and litigant compliance on the other hand. Qualitative research also focused on the method of conflict diagnosis. This method offers judges a tool to determine, in consultation with the litigants, which of the three options of dispute resolution is most appropriate. To provide judges with feedback on the way they applied the method of conflict diagnosis, observations of court hearings took place at the request of various courts. Also, videotaped simulations of a civil procedure were part of the research.

2.4 Funding

From start to finish, the Ministry of Justice provided the financial means for the day-to-day operations of the LBM. In addition, all courts got initial funding for housing and staffing their own mediation administration office. Furthermore, financial means were provided for judges to attend relevant training courses. With the money made available by the Ministry of Justice, the LMB provided mediation officers with the opportunity to become a certified mediator, and much use was made of this offer. Also, the money made available to the LBM was used to organize expert meetings, conferences and a host of studies.

Until the first of April 2005, taking part in court-referred mediation was free of charge for litigants. Mediators were paid by the courts that received grants towards this goal from the Ministry of Justice. From April 2005 onwards, litigants entitled to legal aid within the framework of regular court proceedings were (and still are) also entitled to legal aid for court-referred mediations. Their sole financial contribution is an income-related client's fee. In order not to create financial obstacles for litigants not eligible for legal aid, the Ministry of Justice subsidized the first 2.5 hours of the mediation. This temporary provision expired on the first of January 2011.

2.5 Organizational prerequisites

No matter how important the external infrastructure, the success of the referral services ultimately depended on the way these services were organized within the courts themselves. Of course the referrers, mainly judges, are of crucial importance. It is their task to present the option of mediation to litigants at the right moment and they are also responsible for organizing written referrals. The important role of the mediation officer has already been memorized. Here we would also like to stress the significance of the mediation coordinator. Within the different sectors of law (the civil law sector, the family law sector and the administrative law sector) the mediation coordinator (a judge) is responsible for promoting mediation and he or she is the contact person for other judges and staff who have questions relating to mediation. Together with the mediation officer, the mediation coordinator is the link between the court management and the mediation administration office, in other words: between policy and implementation. The mediation officer and the mediation coordinator report periodically to the management of the courts and in the past have made proposals for improvement of the referral service. The quality of the referral service has been subject of discussion during nationwide meetings of representatives of the different sectors in the courts (civil law sector, family law sector, administrative law sector). In addition, courts have organized consultations with professional partners, for example lawyers and mediators, to improve the quality of their referral services and also to strengthen the support base for mediation. To ensure the courts were aware of developments elsewhere in the country from which they could derive ideas and inspiration, meetings were held several times a year for the mediation coordinators and mediation officers respectively.

Taking note of the different experiences and working practices within the courts, the LBM in 2009 provided a final outline of the organizational framework for the referral services in: 'The organization of the referral service to mediations within the courts'. At the same time the policy document 'The future of court-connected mediation after 2009' (*De toekomst van mediation naast rechtspraak na 2009)* was conceived in close collaboration with the management of the courts and the Council for the Judiciary. This document outlined the future nationwide structure of the referral services within the courts. In March 2009, the Council for the Judiciary and the Assembly of the presidents of the courts approved both policy documents.

Training and education

It goes without saying: a properly functioning referral service requires qualified people. To ensure the quality of referrals during court hearings, all judges were offered a referral course. From 2008 onwards they were also given the opportunity to attend the training course 'conflict diagnosis'. This course educates judges on how to explore the underlying issues of legal disputes. It also provides judges with tools on how to decide, together with the litigants, which of the three methods of conflict resolution is the most appropriate. To increase the lifelike quality of the course, it involves role-playing with professional actors playing the litigants.

Mediation officers received appropriate training as well. The LBM has strongly encouraged mediation officers to take a mediator certification course. In addition, they were given the opportunity to attend courses aimed at referrers. Specific attention has also been paid to mediators. For example, they were given the chance to participate in a series of workshops entitled 'ethical dilemmas in court-referred mediations'. The report that was published as a result of these workshops provides tools for both the referral facilities and mediators to appropriately address dilemmas occurring during the mediation process.

To safeguard the future quality of the referral services and to promote 'customized conflict resolution' the referrer's course and the course 'conflict diagnosis' have been included in the programme offered by the Netherlands Centre for Education of Judges (SSR) from 2010 onwards.

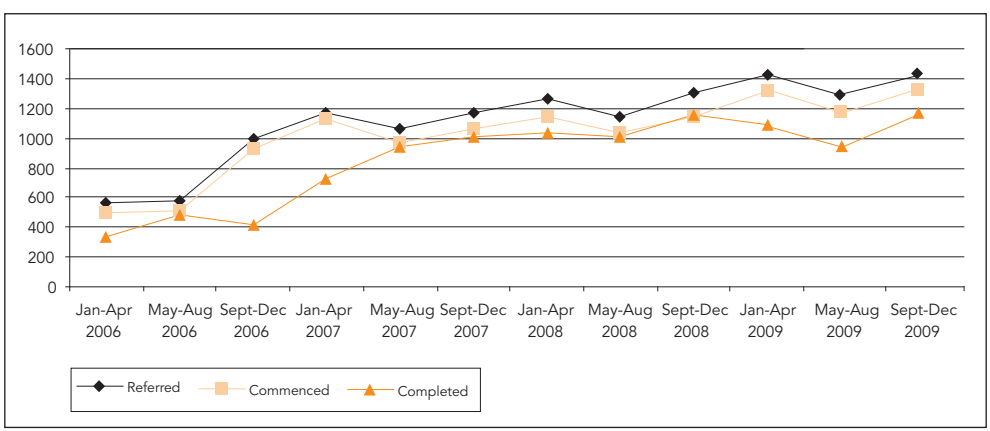
3 Results: figures and facts

In this paragraph we will present the most relevant statistics on court cases referred to mediation. We will report on the implementation and consolidation phase and leave the pilot phase aside. Most statistics are based on the 7,237 cases that have been entered into the LBM database. We will start with an overview of the number of cases referred to mediation and the number of mediations that have actually been realized. We will then concentrate on the referral process and report on: the types of cases involved, the referrers' view of cases they referred to mediation, the litigants' reasons to opt for mediation, as well as the lawyers motives to advise this method of conflict resolution. After that we will discuss the important topic of the success rate of court-referred mediations and shed some light on the predictors of successful mediation. We will continue our account with a retrospective view of the mediation process by both litigants and lawyers. We will end with an analysis of the costs and time-related aspects of court-referred mediations.

3.1 Number of cases referred and mediations realized

From January 2006 until December 2009, 13,420 cases have been referred to mediation. Figure 3.1 shows the increase in the number of referrals per four-month period for the years 2006 - 2009. Up until the consolidation phase (2007) the number of referrals continued to rise. Once every court had a referral service in place, the number of referred cases levelled off. A total of approximately 3,700 and close to 4,200 cases were referred in 2008 and 2009 respectively. In at least 90% of the referred cases the mediation process was actually started. Of these started mediations 84% have been completed.

Figure 3.1 Number of referrals, started mediations and completed mediations: 2006[7]–2009



7 The first of April 2005 marked the start of the implementation phase. From April 2005 – December 2005 830 cases have been referred to mediation. Since these statistics cannot be broken down by four-month period, the referrals of 2005 are not included in figure 3.1.

3.2 The referral process

Types of referral

As described in paragraph 2.2 the option of mediation can be suggested in a letter (written referral) and during a court hearing (oral referral). In the case of written referrals, when a case has been brought to court, court staff evaluates its suitability for mediation. This type of referral is quite common in cases of administrative law in which a government agency is one of the two parties: in over 80% of court-referred administrative mediations the mediation was proposed by letter. For the government agency the time invested in mediation can offset the time that would otherwise be necessary for the preparation of a written defence. Also, a (substantial) part of the administrative cases have been brought to the court primarily to comply with procedural deadlines while the conflicts themselves are not seriously escalated. This increases the likelihood that the offer of mediation will be accepted. While administrative cases are particularly suitable for written referrals, this is not true for civil cases. In the majority (two thirds) of court-referred civil mediations the suggestion of mediation was made by a judge during a court hearing. In civil cases, and especially in family law disputes, when litigants bring their case to the court, they usually have already tried to come to an agreement – in many instances assisted during the negotiations by their respective lawyers and at times by a mediator as well. In these cases, conflicts quite often are severely escalated, which is why the litigants are not very likely to accept a written proposal for mediation.

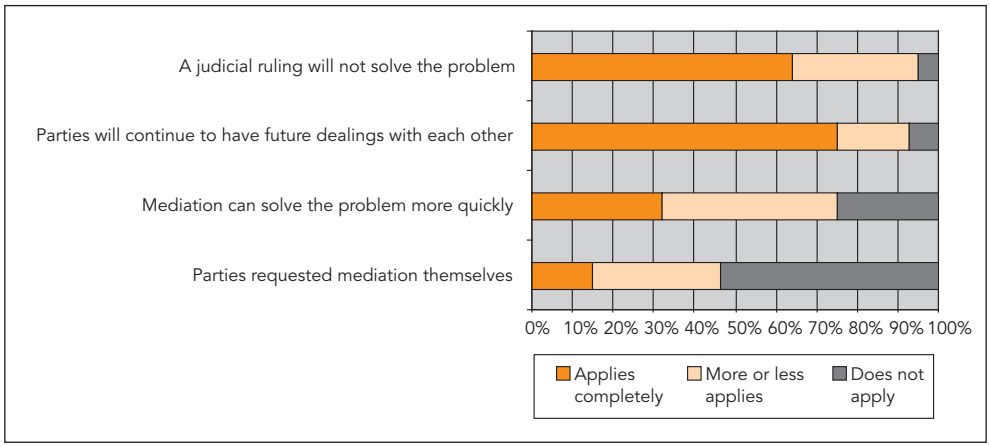
The chances of a successful mediation in case of a written referral are thought to be better than for an oral referral – and rightly so as the research results discussed in paragraph 3.3 show. One explanation is that written referrals occur earlier on in the legal process, when conflicts are less likely to have escalated. Also, in case of a written referral parties choose mediation independently of the referrer. As discussed in paragraph 2, the so-called 'self-test' accompanying the letter in which mediation is suggested, can be very helpful in making this decision. It is plausible that in case of accepted written referrals litigants take more responsibility to solve their conflict and thus stand a better chance to reach an agreement.

The referrer's view of the case

For each case referred during a court hearing, the judge was asked to estimate: (1) the degree of conflict escalation, (2) the willingness of both litigants to negotiate and (3) the room for negotiation. According to referrers, 41% of the cases referred to mediation are highly escalated, 21% of the cases are characterized by a high willingness of the litigants to negotiate, and in 26% of the cases there is ample room to negotiate. Based on the referrers estimates there is a correlation between the degree of escalation and the willingness to negotiate. Referrers see a high willingness to negotiate in only 12% of the highly escalated conflicts. At the same time they see a high willingness to negotiate in 40% of the cases characterized by a low degree of escalation.

Judges were also asked to indicate their motives for referral. The primary motive to refer litigants to mediation is the consideration that the litigants will continue to have future dealings with each other. According to the referring judges, this motive is applicable in 75% of all referred cases and even in 83% of family disputes and 85% of neighbour disputes. As Figure 3.2 shows, the expectation that a judicial decision will not solve the real or underlying problem is a motive for referring judges in almost two thirds (64%) of the cases. In about one third of the cases judges refer to mediation because they think mediation will provide a faster solution than a court ruling. Only 15% of the cases are referred to mediation because the litigants themselves have requested this method of conflict resolution.

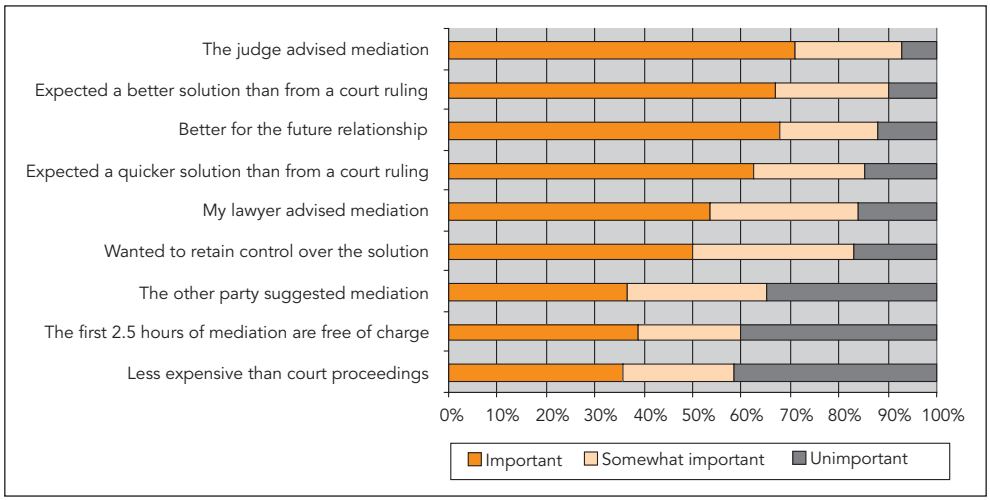
Figure 3.2 Motives of judges for referring to mediation



Motives of the litigants

Just like the referrers were asked to indicate their motives for referral, litigants were asked to state their reasons for accepting an offer of mediation. Litigants were presented with nine possible choice drivers and were asked to indicate to what degree each had influenced their decision to opt for mediation. It should be noted that litigants were asked about their motives after completion of the mediation process.

Figure 3.3 Motives of litigants to opt for mediation

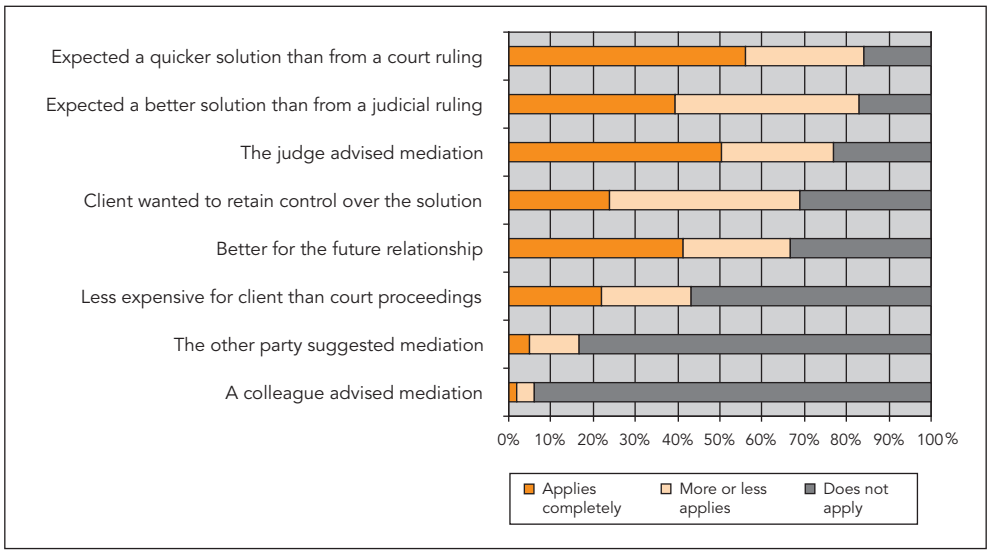


As figure 3.3 shows, the advice of a judge or the advice of legal counsel plays an important role in the litigants' decision to opt for mediation, in 71% and 52% of the cases respectively. To a large extent litigants who opt for mediation do so because they think this is better for the future relationship with the other party (a motive in 68% of the referred cases) or because they expect a better solution from mediation than from a judicial decision (a motive in 67% of the referred cases). Economic considerations proved to be the least important to litigants: only 36% of the litigants chose mediation because they thought this would be less expensive than a court proceeding, and 39% chose mediation because the first 2.5 hours of mediation were pro bono.
In mediations of civil cases, of which the greater part is comprised of 'divorce and family', the expectation that mediation will result in a better solution than a judicial decision was important for 70% of the litigants as opposed to 61% of the litigants who chose mediation in an administrative case. Also, the expectation that mediation would be better for the future relationship with the other party was more important for litigants in civil cases (69%) than for litigants in administrative cases (64%).

Advice from counsel
A survey among lawyers revealed that a majority considered mediation to be a suitable alternative to adjudication. This does not imply that all lawyers advise their clients to resolve their disputes through mediation, but only 3% of lawyers did not advise mediation because they had no confidence in mediation as a method of conflict resolution. Figure 3.4

shows the motives of lawyers to advise their clients to opt for mediation. It should be noted that practical reasons for advising mediation ('swiftness of procedure' and 'the recommendation by the judge') exceed more substantive ones. So lawyers' motives are quite different from their clients' motives – as we have just seen, litigants primarily opt for mediation because they think this will be better for the future relationships with the other party. The two most important reasons for lawyers *not* to advise mediation are: poor communication between the parties and lack of room for negotiation.

Figure 3.4 Motives of lawyers for advising mediation

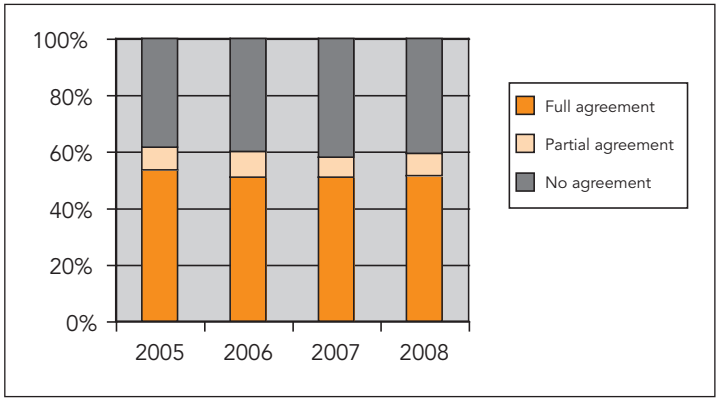


3.3 Success rates

A very important question to answer is whether court-referred mediations are successful. We define a successful mediation as one in which the litigants reach an agreement (either partial or full agreement).

Of all mediations between the first of April 2005 and the first of May 2009, 59% resulted in either full (51%) or partial (8%) agreement. As figure 3.5 shows, success rates have changed relatively little over time.

Figure 3.5 Success rate of mediations: 2005 – 2008



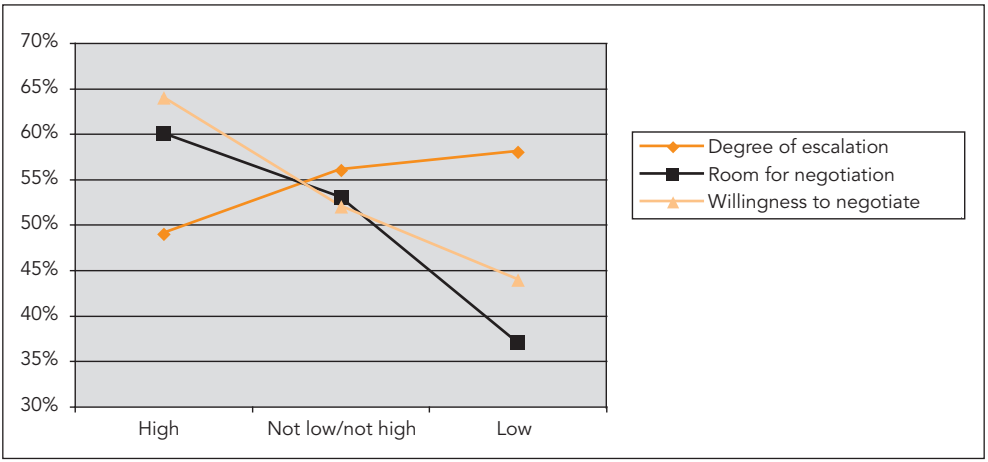
Broken down by type of mediation (mediation in civil cases and in administrative cases) the success rate of mediation in civil cases (45% full agreement and 9% partial agreement) is relatively low compared to the success rate of mediation in administrative cases (69% full agreement and 5% partial agreement).
As shown in table 3.1, mediations in administrative cases are more successful, irrespective of the method of referral. Further analysis has shown that mediation in disputes that are primarily about money-related issues (as is the case in many administrative cases) have a (much) higher chance of resulting in agreement between litigants than mediation in disputes revolving around personal relationships. From table 3.1 we can also conclude that the success rate of written referrals is generally higher than that of oral referrals.

Table 3.1 Success rate of mediations by type of case and method of referral

	Written	Oral	Total
Administrative	75%	66%	74%
Civil	60%	52%	54%

Conflict characteristics and success rate
As discussed in paragraph 3.2 referrers were asked to estimate: (1) the degree of conflict escalation, (2) the willingness of both litigants to negotiate and (3) the room for negotiation. It is interesting to analyze the relationship between these indicators and the success rate of mediation.

Figure 3.6 Three indicators for referral and success rate



The results of our analysis are rather surprising as figure 3.6 illustrates. The most useful predictor of success is not, as one might think, the degree of escalation: in almost 50% of highly escalated conflicts (according to the referrer) mediation still results in (partial) agreement. In other words: in the hands of qualified mediators the negative impact of highly escalated conflicts is not an insurmountable barrier. As it turns out, it is the willingness of litigants to negotiate that is the most accurate indicator of success. Also, 'room for negotiation' turns out to be a valuable predictor in this regard.

Looking at the relationship between the litigants' motives to choose mediation and the success rate (figure 3.7) there obviously is not a strong correlation. This also implies that the chances of reaching an agreement when litigants are intrinsically motivated to opt for mediation are not higher than when other motives predominate. Litigants can be said to be intrinsically motivated when they choose mediation because they want to stay in control of the process, expect mediation to be better for the future relationship with the other party or expect mediation to lead to a better solution. These motives are marked in figure 3.7 with '**'.

Figure 3.7 Motives for litigants to opt for mediation by outcome

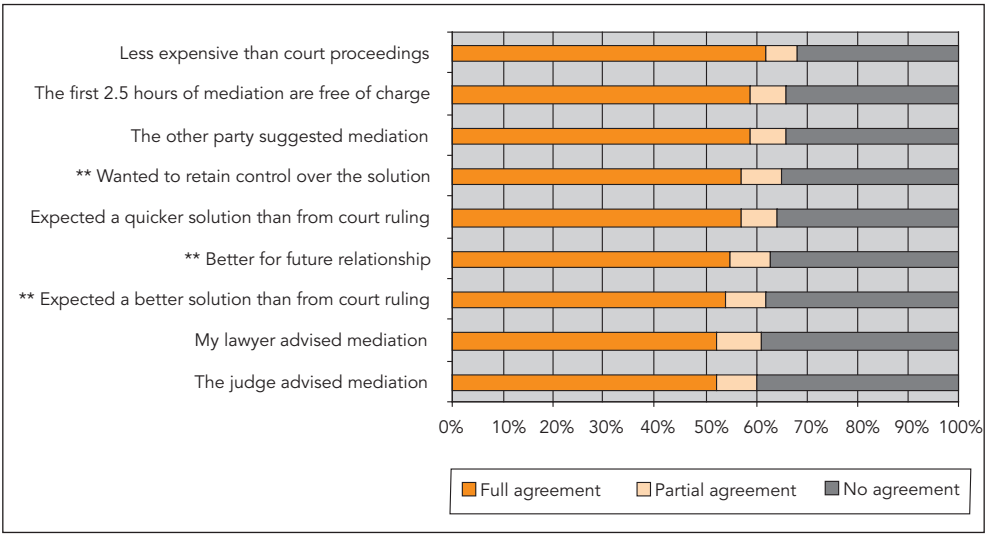
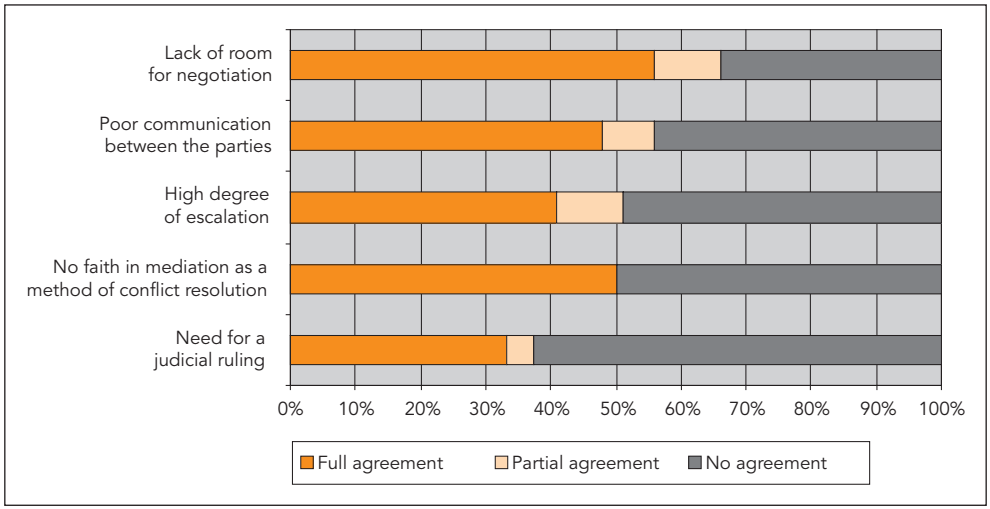


Figure 3.8 gives food for thought as well. This figure shows the relationship between lawyers' motives *not* to advise mediation and the outcome of mediation (which has taken place despite the negative advice given by lawyers). In cases where lawyers advised against mediation because they felt there was not enough room for negotiation, over 60% of the mediations nonetheless resulted in (partial or full) agreement. When the lawyers advised against mediation because they felt the litigants needed a judicial ruling, only 37% of the mediations resulted in (partial or full) agreement.
The results as depicted in figure in 3.8 show that legal counsel could be overlooking the potential of mediation. With regard to four of the five motives of lawyers to advise *against* mediation, it turns out that when these mediations nevertheless take place, at least 50% of them result in (partial or full) agreement.

Figure 3.8 Motives for lawyers not to advise mediation by outcome



3.4 In retrospect: evaluation of mediations by litigants and lawyers

Once the mediation had ended, both the litigants and their lawyers of all court-referred cases were questioned on the mediation process as well as on the mediator's performance. We discuss the most important findings in this paragraph.

The litigants' perspective

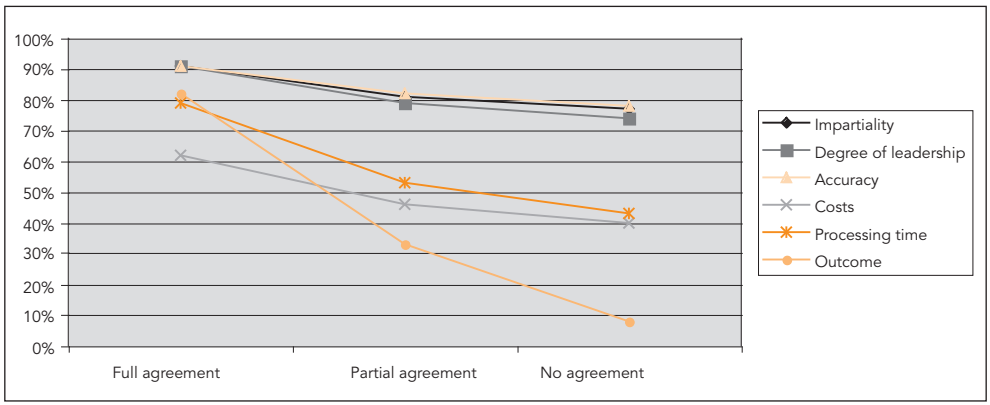
Litigants were asked to rate the performance of the mediator with respect to impartiality, accuracy and degree of leadership on a scale of 1 (very dissatisfied) to 5 (very satisfied). The average score on all three aspects was identical: 4.1, which signifies a high degree of satisfaction. This score has remained very constant over the years. When full agreement was reached during the mediation, approximately 90% of the litigants were (very) satisfied with the mediator's performance. But even when no agreement was reached, roughly three quarters of the parties were still (very) satisfied in this regard.

Litigants were asked, again on a scale of 1 (very dissatisfied) to 5 (very satisfied), to rate the mediation process with respect to processing time, costs and outcome. The average scores were 3.6, 3.5 and 3.2 respectively and these scores have also remained constant over the years. In and of itself, the fact that litigants were least satisfied with the outcome of the process is not very meaningful. The level of satisfaction with the outcome of mediation is, not surprisingly, closely related to whether or not an agreement has been reached. In case mediation results in full agreement, 81% of the litigants were satisfied with the outcome, whereas only 8% of the litigants felt this way when no agreement had been reached.

As one would expect, it turns out there is also a clear relationship between the level of satisfaction with the processing time and the duration of the mediation. The more mediation sessions, the less satisfied litigants are about the processing time.

Figure 3.9 visualizes the relationship between the litigants' satisfaction with the mediator's performance and the mediation process broken down by the level of agreement (full agreement, partial agreement and no agreement). The results are rather remarkable: The appraisal of the mediator's performance has little to do with on the outcome of the mediation. However, the evaluation of the costs of mediation, processing time and outcome correlate (strongly) with the level of agreement reached during the mediation.

Figure 3.9 Performance and process indicators: percentage (very) satisfied litigants by level of agreement



The findings presented thus far reflect the level of satisfaction immediately after completion of the mediation. However, given the underlying premise of mediation that this method of conflict resolution leads to more durable results, it is interesting to review the degree of satisfaction some years after the mediation. In order to answer this question the Research and Documentation Center of the Ministry of Justice (WODC) studied the degree of compliance with the agreements reached during mediation and the satisfaction of the parties some years later.[8] Table 3.2 summarizes the findings.[9]

8 Tumewu, M., *Factsheet 'Naleving mediationafspraken'* (concept), Den Haag: WODC, 2008.

9 Cases included in the study relate to mediations that have ended in full or partial agreement at least one year but no longer than two years before the start of the research. Of the cases included in the sample 87% of the mediations had resulted in full agreement en 11% in partial agreement. In 86% of the cases the dispute was related to divorce proceedings.

Table 3.2 Performance and process indicators: percentage (very) satisfied litigants by point in time

		Satisfaction immediately after mediation T0 N=5506/5743	Satisfaction 1-2 years later T1 N = 175	Difference T0-T1 %
Mediator	Impartiality	87%	66%	-21%
	Degree of Leadership	87%	62%	-25%
	Accuracy	88%	67%	-21%
Mediation process	Costs	55%	42%	-13%
	Processing time	72%	53%	-19%
	Outcome	72%	47%	-25%

Source: LBM Mediation Database and WODC Compliance assessment

The results reveal that across the board the level of satisfaction decreases substantially over the years, but most significantly with regard to the mediator's performance. One possible explanation might be that litigants over the years have become dissatisfied with the other party's compliance with the agreement and project this disappointment onto the mediator.

Compliance

Compliance with the obligations as agreed upon during mediation would be a good and objective indicator of the sustainability of the results accomplished with this method of conflict resolution. Unfortunately, there is little conclusive information with regard to this indicator. We have to rely on a compliance study by the WODC among 175 litigants who reached an agreement during mediation. Respondents felt they themselves had complied significantly better with the mediation agreement than the other party: 66% indicated they had largely or completely fulfilled the obligations arising from the mediation agreement, whereas 51% felt this to be true for the other party. This is a well-known bias in social science research: people have a more positive view of themselves than of others.

Also, in order to assess whether the degree of compliance with agreements reached through mediation is high or low, we would need information on the compliance rates of similar cases in which agreement has been reached during a court-supervised settlement and the compliance rates of similar cases in which obligations have imposed by a judge through a court ruling. Unfortunately, this information is not available.

There is, however, a pilot study by Eshuis that compares compliance with judicially supervised settlement agreements with judicial rulings in 1,500 civil cases in two courts.[10] These cases mainly revolved around financial obligations as family cases were excluded. Eshuis' study shows that two years after completion, 85% of the settlement agreements had been complied with. Compliance with obligations imposed by a judicial ruling was significantly lower: 72% of the defendants complied when they were present during the court hearing, and only 25% of the defendants complied when they were not present at the court hearing (default judgment).
This implies that when litigants come to a joint agreement, they are more likely to comply with the obligations resulting from that agreement than when the court unilaterally imposes obligations. This is, as Eshuis concludes, in line with expectations.

The lawyers' perspective
Lawyers, as well as the litigants, have been asked to evaluate the mediator's performance and the mediation process. They rated the mediator's performance on impartiality, accuracy and leadership capacity with an average 4.3, 4.3 and 4.2 respectively (again on a scale from 1 (very dissatisfied) to 5 (very satisfied)). This is similar to the average score of 4.1 by litigants on all three performance indicators. With regard to the mediation process, lawyers were asked to rate the processing time and outcome of the mediation process (they were not asked, as litigants were, about the costs of the process). The processing time was rated an average 3.8 by lawyers (3.6 by litigants) and the outcome of the mediation was rated an average of 3.4 (3.2 by litigants).

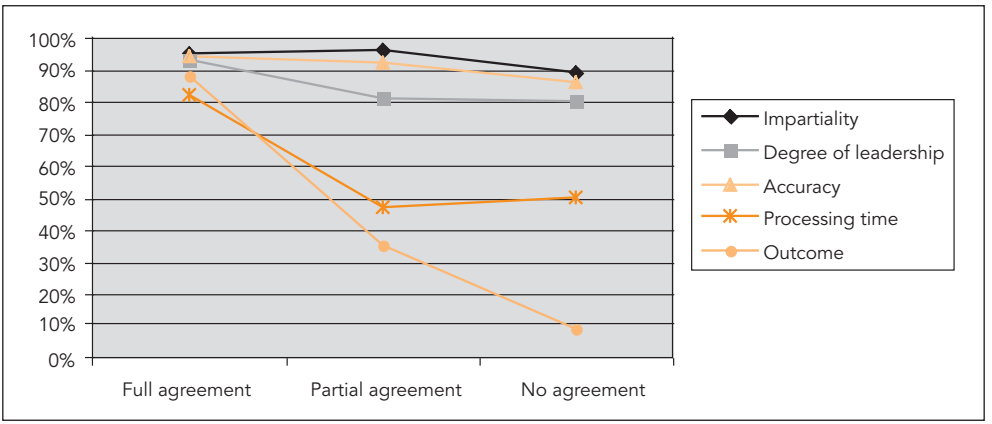
Other sources, such as a survey among lawyers organized by the LBM, have confirmed that lawyers have a positive perception of mediation. Of the lawyers that took part in the survey 73% felt mediation to be a good supplement to adjudication (either in general (22%) or in certain cases (51%)). About a fifth of the lawyers (19%) were still undecided and only a small minority (8%) expressed a negative attitude towards mediation.

The degree of the lawyers' satisfaction with the mediator's performance and the mediation process is related to the outcome of the mediation (see figure 3.10). Just like litigants, lawyers are more satisfied with the mediation process when the mediation results in an agreement. The lawyers' perception of the mediator's performance varied only slightly with the outcome of mediation, i.e. whether or not agreement had been reached. A plausible

10 Eshuis, R.J.J., *De daad bij het woord. Het naleven van rechterlijke uitspraken en schikkingsafspraken. Een pilotstudie binnen het domein van de civiele rechtspleging*, Research Memoranda nr. 1, 2009 jrg. 5, Den Haag: Sdu Uitgevers 2009.

explanation is that as professionals, lawyers have no (or in any case, less) interest in the outcome and are more objective in their judgment of the mediator's functioning.

Figure 3.10 Performance and process indicators: percentage (very) satisfied lawyers by level of agreement



Mediation a second time around?

Yet another way to measure the degree to which litigants and their lawyers are satisfied with the mediation process is to ask them whether in similar circumstances they would again opt for mediation or recommend it to others. Without hesitation, approximately 40% of the litigants said they would do so. Another 40% said they would at least consider mediation again. Lawyers were even more explicit in their endorsement of mediation: 60% of the lawyers indicated that in a similar conflict they would definitively advise their clients to opt for mediation, whereas 33% said they would advise their clients to consider this option. As is to be expected, whether litigants and lawyers would again choose mediation depends in part on the outcome of the mediation, as table 3.3 shows. Still, even when the mediation did not result in an agreement, almost half of the lawyers would still recommend mediation in a similar case and another 40% would advise their client to consider it.

Table 3.3 Choice for mediation in a similar case by level of agreement

	Full agreement		Partial agreement		No agreement	
	litigants	lawyers	litigants	lawyers	litigants	lawyers
Yes	63%	73%	36%	66%	30%	47%
Maybe	33%	26%	47%	32%	49%	41%
No	4%	1%	17%	2%	21%	12%

3.5 Processing time and costs

Both the costs and time involved with the processing of a legal case are commonly used as quality indicators of the judicial system. As such the processing time and the costs of cases referred to mediation are relevant to consider. The Netherlands Council for the Judiciary commissioned 'SEO Economic Research' (SEO) to study these two subject matters in 2009.[11] The LBM database also provides information on time-related aspects of mediation.

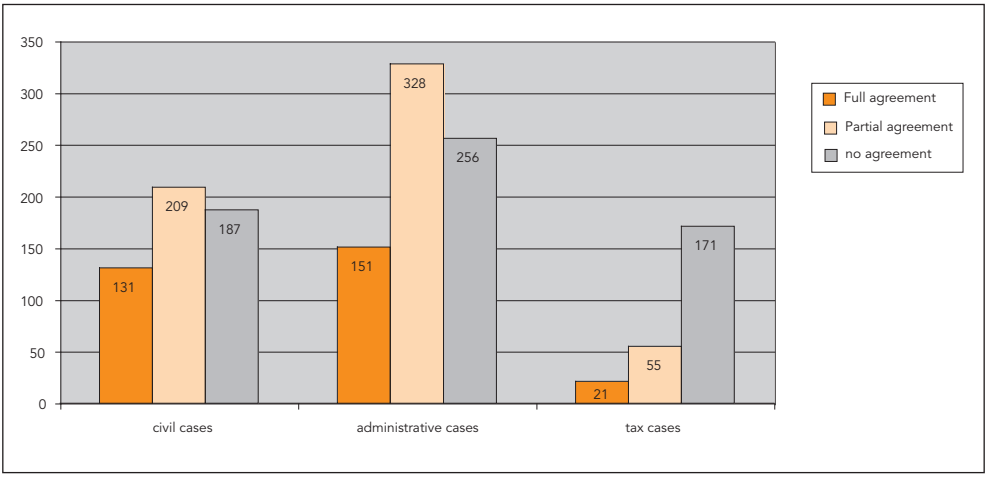
Processing time: SEO

SEO defined the processing time as the time between the official start of the court procedure (in most cases the date when a petition or appeal has been filed) and the date of the formal completion of the case (the date of a judicial ruling or the date when a case is withdrawn). The results of the SEO study show that the processing time of cases referred to mediation is longer than that of similar cases handled solely by the court. This was to expected: after all, more than half of the cases are referred during or after a court hearing so these cases inherently have a longer processing time. The extra time involved in court-referred civil cases (N = 1,099) is 160 days, for administrative cases excluding tax cases (N = 667) 205 days and for tax cases (N = 295) 61 days. When cases are referred to mediation prior to a court hearing, the extra processing time as compared to regular cases decreases sharply. In that case, the extra processing time in civil cases is 114 days, in administrative cases 152 days and in tax cases 33 days.

Cases where full agreement is reached involve the least extra processing time. In civil and administrative cases most extra processing time is required when the litigants arrive at a partial agreement. Tax cases require most extra processing time when the litigants do not come to an agreement. (See figure 3.11)

11 Gerritsen, M. Janssen, K. Jansen, J. Poort & J. Weda, *Mediation via rechtspraak. Kosten en doorlooptijden*, Stichting Economisch Onderzoek, 2009.

Figure 3.11 Extra processing time of cases referred to mediation by level of agreement (in days)



Source: SEO, 2009.

Processing time: LBM database

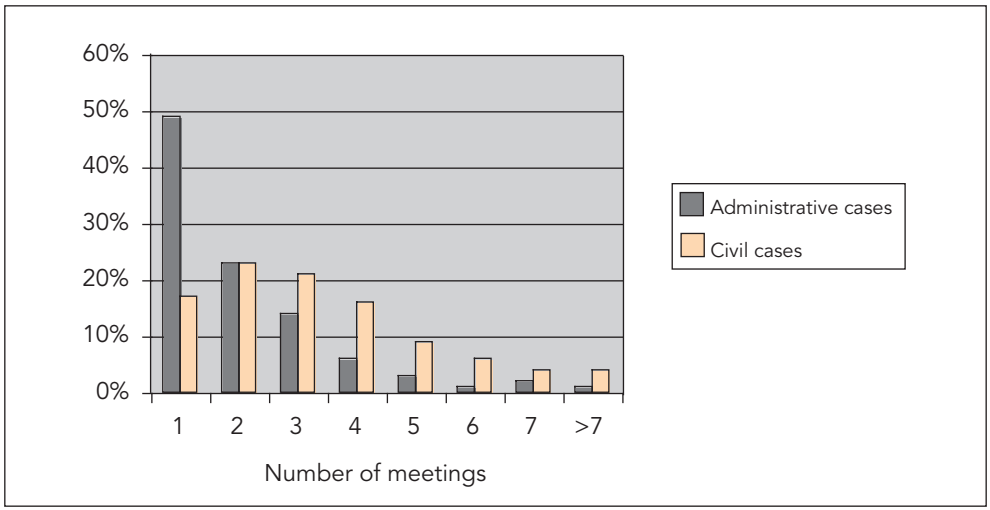
To a large extent the extra processing time of cases referred to mediation has to be attributed to "administrative activities". The actual processing time of the mediation itself (*the net processing time*) amounts to an average of to 57 days: 65 days in civil cases and 31 days in administrative cases. The median processing time is 35 days.[12] In cases of administrative law the median processing time is 0 days, i.e. the mediation is completed on the same day it started; in civil cases the median processing time is 46 days. The relatively high number of divorce and separation cases among civil disputes contribute to the difference between the net processing time of administrative and civil cases. In mediation of divorce disputes it is not uncommon to try out arrangements concerning parental access, which contributes to a relatively long processing time.

On average a mediation consists of three mediation sessions. However, there are quite substantial differences between civil and administrative cases, as can be concluded from figure 3.12. Almost half of the mediations in administrative cases involve just one

12 We prefer the 'median time' to 'average time' because the average time is likely to be distorted by a small number of extreme values, i.e. mediations that have taken an exceptionally long time.

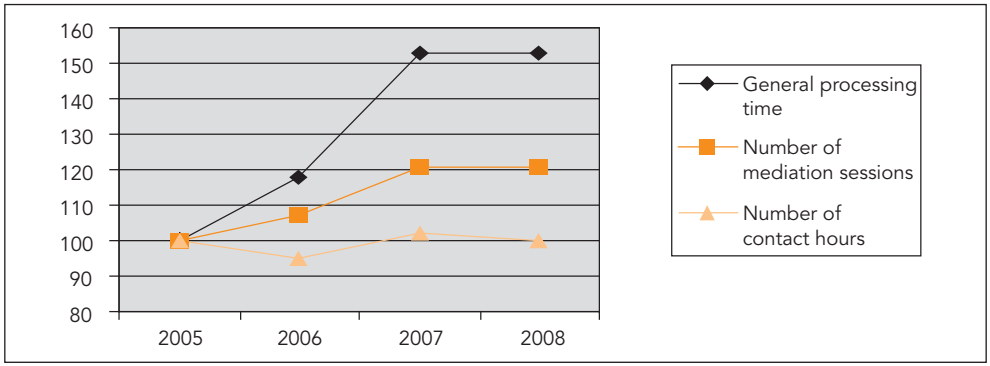
mediation session whereas in civil cases less than a fifth of the mediations is concluded after one session.

Figure 3.12 Number of mediation sessions in administrative and civil cases



The number of contact hours between mediator and parties is also relevant. Court-referred mediations involve an average of 6 contact hours. Civil mediations involve an average of almost 7 contact hours and mediation in administrative cases an average of slightly more than 4 hours. Figure 3.13 shows indices of all three time-related aspects (general processing time, number of mediation sessions and number of contact hours) over the years 2005-2008. Both the general processing time and number of meetings have stabilized after a sharp increase between 2005 and 2007. The number of contact hours has remained stable over time. Hence, mediation sessions have generally become shorter yet at the same time the process from start to finish takes longer.

Figure 3.13 Three time-related indices of mediation

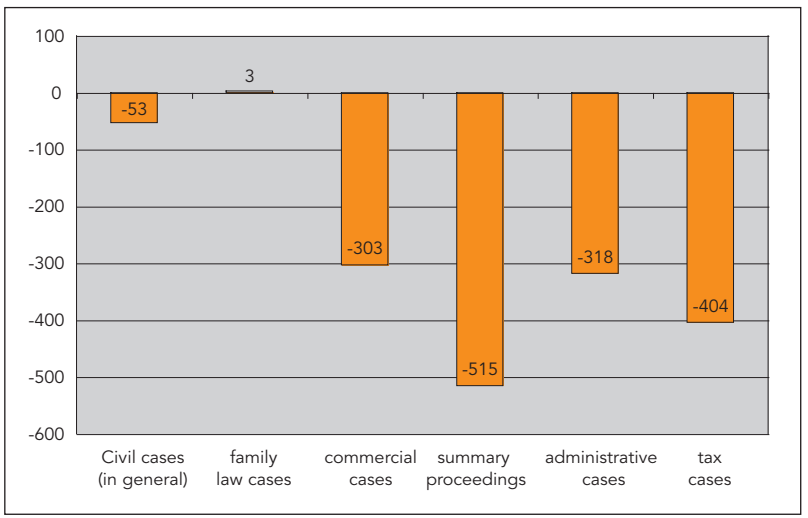


Costs

With regard to the costs, only the costs for the courts have been taken into account: the costs of cases referred to mediation for litigants, for the government (legal aid and the grant provided by the Ministry of Justice in order to subsidize the first 2.5 hours of mediation) and society at large were excluded from the SEO research.

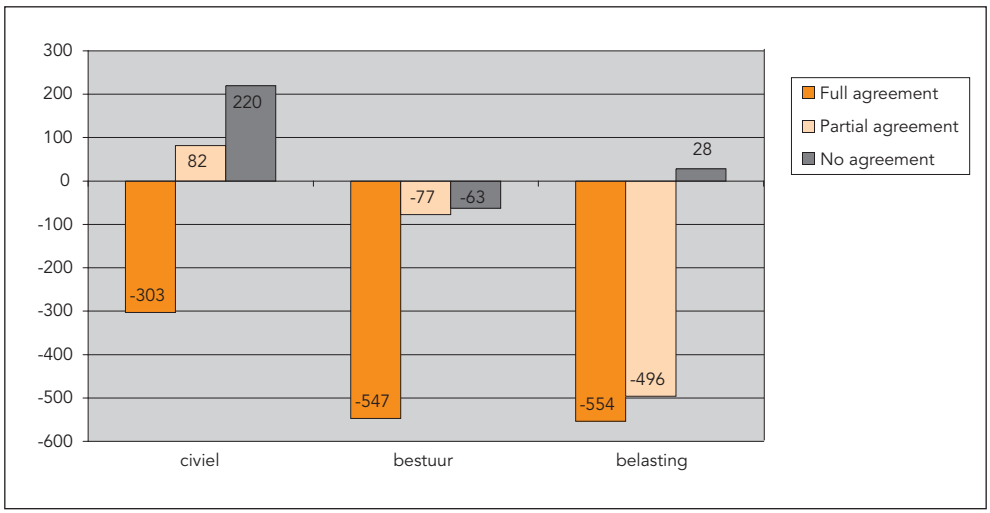
From SEO's findings it can be concluded that the average costs of cases referred to mediation are lower than those for regular cases. The cost savings amount to € 53 in civil cases; € 318 in administrative cases and € 404 in tax cases. Fig 3.14 provides a visual overview of these savings broken down for different court procedures.

Figure 3.14 Cost savings (in Euros) per case referred to mediation by court procedure



These cost savings can be largely attributed to those mediations in which the litigants have come to a (partial) agreement as figure 3.15 shows. If the litigants do not arrive at an agreement, the extra costs for civil cases referred to mediation amount to an average of € 220 and the extra cost for a tax case amount to an average of € 28. In administrative cases, all cases referred to mediation result in cost savings: even when the litigants do not reach an agreement, the average savings are € 63.

Figure 3.15 Cost savings (in Euros) of mediation by level of agreement and type of case



So far we have not taken into account the costs incurred by the courts to maintain the referral service. The results of a survey by the LBM provide us with a good approximation of the costs involved. On average, a mediation officer spends 4.6 hours on a case referred to mediation and a staff member of the mediation administration office spends an average of 4.1 hours per case. Based on information from the Council for the Judiciary, the labour costs of the mediation officer and the staff member of the mediation administration office are € 41 and € 29 per hour respectively. If these costs are taken into account, the extra costs for a civil case referred to mediation amount to € 254. In administrative and tax cases money is being saved by referring cases to mediation: € 11 and € 97 respectively.
Adding up all costs and savings, the referral service is almost cost-efficient. However, given the gradually increasing number of referrals, the costs per case will decline in the years to come. When this becomes a reality, referral to mediation by the courts is not only an effective way of resolving disputes, but also one that is completely cost-efficient.

Appendix 1 Mediation Self-test

Below you will find a number of questions that may assist you in deciding whether or not to opt for mediation. A common obstacle is that one party may think, mistakenly, that the other party is unwilling to enter into a dialogue. Filling out this test, do not consider the other party's point of view – please answer the questions from your own perspective.

Are you willing to cooperate in reaching a solution by mutual agreement?

Yes, because
- I see opportunities for a reasonable solution
- a quick solution would serve my interests
- I have frequent dealings with the other party (or parties)
- I would like to retain control of the solution
- poor communication is part of the problem
- I think mediation might solve other conflicts I have with the other party (or parties)
- it probably saves money on legal fees

No, because
- it is extremely important to me to get a court ruling because…
- a previous mediation attempt failed and I do not wish to try it again
- I do not see room for negotiation, because…

I feel uncertain, because
- I do not know exactly what I am letting myself in for
- I do not know how much room there is for negotiation
- I think it will be difficult to sit at the same table with the other party (or parties)
- I do not know whether the other party (or parties) will cooperate
- I see few possibilities

If your answer to one or more questions is 'yes', contact the mediation officer at your court and sign up for mediation.

If you feel uncertain or if you would like to have more information, you can discuss the matter with the mediation officer at your court or visit 'www.mediationnaastrechtspraak.nl'.

Appendix 2 Survey Questionnaires

Questionnaire for referrer during hearing (1)

D 1. **Case number** .....

D 2. **Mediation number** .. - ..... *(to be entered by mediation administration office)*

D 3. **Referral date** .. / .. / .... (day/month/year)

D 4. **Name of referrer:** .....

D 5. **Please indicate the extent to which each of the following reasons was applicable in your decision to refer the case for mediation.**

	not applicable	somewhat applicable	completely applicable
A court decision will not resolve the underlying problem	1	2	3
The parties have to deal with each other in the future	1	2	3
Mediation provides a quicker resolution	1	2	3
The parties proposed mediation themselves	1	2	3

D 6. **Please indicate the degree to which the following characteristics are present.**

	low	not low/not high	high
Degree to which the parties are willing to negotiate	1	2	3
Degree of escalation of the conflict	1	2	3
Degree to which there is room for negotiation	1	2	3

D 7. **Please provide any additional comments or suggestions you may have, as well as indicate other relevant matters not discussed in this questionnaire.**

.....

.....

Questionnaire for mediation administration office (2)

A 1. Case number .....

A 2. Mediation number[1] .. -.....

A 3. Receipt date of notice of end of mediation ...../...../..... (day/month/year)

A.4 Name of team mediator or other mediator .....

A.5 Hourly rate of team mediator or other mediator € .....

A.6 Name of team mediator[2] .....

A.7 Hourly rate of team mediator[3] € .....

Referral characteristics

A. 8 Timing of the referral

civil

a) immediately after the summons/petition
b) after the defence
c) after the reply/rejoinder
d) during the hearing or appearance of the parties
e) after the hearing/after the appearance of the parties
f) during oral arguments
g) after/during the examination of witnesses, on-site inspection by the court, inquiry, expert study
h) after the interlocutory judgment
i) other, namely .....

administrative law

a) immediately after receipt of the notice of appeal/petition
b) after receipt of the documents and defence *(before the preliminary inquiry)*
c) after the preliminary inquiry
d) through the appearance of the parties
e) during the court hearing
f) other, namely .....

tax

a) after the notice of appeal
b) while the case was being prepared for hearing
c) during the court hearing
d) other, namely .....

1 The mediation number should always be entered, here as well as in all other questionnaires.
2 Only applicable is there is team mediation.
3 Only applicable is there is team mediation.

Case characteristics

A.9 Specific case characteristics

Civil and/or Sub-District Court

a) employment
b) neighbours' rights and obligations
c) consumer
d) lease
e) inheritance
f) spousal maintenance
g) division of matrimonial property after divorce
h) division of matrimonial property/spousal maintenance after divorce
i) other matters relating to divorce (including visitation rights)
j) other matters relating to family
k) dissolution of legal entity/termination of partnership
l) health law
m) contract law/agreement/purchase-swap/commercial services
n) other civil matters
o) preliminary relief proceedings
p) petition to President
q) other, namely .....

Administrative law and/or tax law

a) Social Assistance Act
b) Disability Act
c) Social Security – other
d) Subsidies relating to former Administrative Decisions (Appeals) Act
e) Matters other than subsidies relating to former Administrative Decisions (Appeals) Act
f) Preliminary relief
   - Social Assistance Act
   - Disability Act
   - Social Security - other
   - Matters relating to civil servants
   - Matters relating to former Administrative Decisions (Appeals) Act
g) other, namely .....

Tax law, Court of Appeal:

a) State taxes
   type of tax (please specify) .....
b) other government taxes
   type of tax (please specify) .....

Questionnaire for mediator (3)

M 1. Case number ..... *(to be entered by the mediation administration office)*

M 2. Mediation number .. - ..... *(must always be entered)*

M 3. Name of mediator: .....
Acted as:
☐ solo mediator
☐ team mediator (paid)[4]
name of team mediator:.....
☐ supervisor of co-mediator[5]
name of co-mediator .....
co-mediator's training .....

M 4. Date of first session .. / .. / .... (day/month/year)

M 5. Date of last session .. / .. / .... (day/month/year)

M 6. Number of sessions .....

M 7. Location of the session
☐ mediation room in the court building
☐ the mediator's or parties' own space[6]
☐ partly, the mediation room/partly, the mediator's or parties' own space

M 8. Amount of time *hours:minutes)*
../.. (hours/minutes) contact hours (with the party(ies) at the sessions)
../.. (hours/minutes) drawing up the agreement

(If there is team mediation, please specify the amount of time personally spent by you and do ***not*** *count your partner's time)*

M 9. Did someone provide legal assistance for the claimant/interested party at the sessions?
☐ no, go to question M 12
☐ yes, at session 1 – 2 – 3 – 4 – 5 – 6 – 7

M 10. In your opinion, did this person's contribution affect *the course* of the mediation?
☐ yes, favourably
☐ yes, adversely
☐ no, no effect

4 Each team mediator must complete his/her own questionnaire.
5 The co-mediator signs the mediation agreement, but does not fill out questionnaire.
6 Any space other than the mediation room in the court building.

M 11. In your opinion, did this person's presence affect *the outcome* of the mediation?

☐ yes, favourably
☐ yes, adversely
☐ no, no effect

M 12. Did someone provide legal assistance for the defendant/respondent at the sessions?

☐ no, go to question M 15
☐ yes, at session 1 – 2 – 3 – 4 – 5 – 6 – 7

M 13. In your opinion, did this person's contribution affect *the course* of the mediation?

☐ yes, favourably
☐ yes, adversely
☐ no, no effect

M 14. In your opinion, did this person's presence affect *the outcome* of the mediation?

☐ yes, favourably
☐ yes, adversely
☐ no, no effect

Result of mediation

M 15. Has a memorandum of agreement been signed?

☐ full agreement
☐ partial agreement
☐ no agreement

M 16. Was an agreement determining the parties' legal relationship or another agreement concluded?

☐ yes
☐ no

Financial interest

M 17. Is there a financial interest involved?

☐ yes
☐ no

M 18. If so, what is the amount of the financial interest?

If the matter relates to a regularly recurring amount for an indefinite period of time, please indicate the total amount per year (for example, a spousal maintenance of € 100 per month will be € 1.200)

☐ less than € 500
☐ € 500 to € 5,000
☐ € 5,000 to € 20,000
☐ € 20,000 to € 45,000
☐ € 45,000 or more
☐ unknown

M 19. Please provide any additional comments or suggestions you may have, as well as indicate other relevant matters not discussed in this questionnaire.

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Questionnaire for parties after mediation (4)

Please fill out this questionnaire completely.
Please circle your response or tick the appropriate box.

P 1. **Case number** ..... *(to be entered by the mediation administration office)*

P 2. **Mediation number** .. -..... *(to be entered by the mediation administration office)*

P 3. **What is your role in the proceedings?**
☐ claimant/petitioner (or claimant's/petitioner's representative)
☐ defendant/respondent (or defendant's/respondent's representative)
☐ interested third party

P 4. **In what capacity are you conducting the proceedings?**
☐ as a private citizen
☐ as a company/organization (or its representative)
☐ as a government body (or its representative)

P 5. **Before you commenced the legal proceedings, were you familiar with mediation?**
☐ yes
☐ no

P 6. **How did you become aware of mediation?**
(multiple responses possible)
1 ☐ through a brochure
2 ☐ through an attorney
3 ☐ through a judge/court
4 ☐ through the press/media/professional literature
5 ☐ through the municipality/province
6 ☐ through the other party
7 ☐ through family/friends/work/colleagues
8 ☐ other, namely .....

P 7. Please indicate how important each of the reasons below was to you in choosing mediation (if a situation did not occur, for example, if the other party did not propose mediation, you can choose "not applicable".)

	not important	somewhat important	important	not applicable
expected a better resolution than if the court decided the case	1	2	3	4
expected a quicker resolution than if the court decided the case	1	2	3	4
wanted to have control over the resolution	1	2	3	4
less expensive than court proceedings	1	2	3	4
the first 2.5 hours of mediation were free	1	2	3	4
better for the future relationship with the other party	1	2	3	4
my attorney recommended mediation	1	2	3	4
the judge recommended mediation	1	2	3	4
the other party proposed mediation	1	2	3	4

P 8. Please indicate the degree to which you are satisfied with the specific aspects of the mediation. Please circle your response.

	very dissatisfied	dissatisfied	neither satisfied nor dissatisfied	satisfied	very satisfied
duration of the mediation	1	2	3	4	5
the amount of the **financial costs** for me	1	2	3	4	5
outcome of the mediation	1	2	3	4	5

Questions 9 and 10 ask you to evaluate the mediator(s).

P 9. Name of mediator I: ……..

Please indicate how satisfied you are about the following aspects of mediator 1:

	very dissatisfied	dissatisfied	neither satisfied nor dissatisfied	satisfied	very satisfied
Impartiality	1	2	3	4	5
Manner in which he/she conducted the mediation	1	2	3	4	5
Care given to the matter	1	2	3	4	5

Only fill out question 10 if two mediators were involved in the mediation.

P 10. Name of mediator 2: ……..

Please indicate how satisfied you are about the following aspects of mediator 2:

	very dissatisfied	dissatisfied	neither satisfied nor dissatisfied	satisfied	very satisfied
Impartiality	1	2	3	4	5
Manner in which he/she conducted the mediation	1	2	3	4	5
Care given to the matter	1	2	3	4	5

P 11. Would you choose mediation again in a similar conflict situation?

☐ yes
☐ perhaps
☐ no

P 12. Are you litigating with an appointment from the Legal Aid Council?

☐ yes, if yes: appointment number: ……..
☐ no
☐ don't know

P 13. How much have the mediator's costs been for you approximately?

☐ no costs
☐ less than € 200
☐ € 200 to € 400
☐ € 400 to € 600
☐ € 600 to € 800
☐ € 800 to € 1,000
☐ € 1,000 or more
☐ don't know

P 14. Would the costs be a reason for you to choose or not choose mediation in the future?

☐ a reason **to choose** mediation
☐ a reason **not to choose** mediation
☐ don't know

P 15. Please provide any additional comments or suggestions you may have, as well as indicate other relevant matters not discussed in this questionnaire.

……

……

……

……

Questionnaire for person providing legal assistance (5)

Please fill out this questionnaire completely.

R 1. **Case number** ..... *(to be entered by the mediation administration office)*

R 2. **Mediation number** .. -..... *(to be entered in by the mediation administration office)*

R 3. **Are you:**
☐ an attorney
☐ a representative *ad litem*

R 4. **Are you acting on behalf of:**
☐ the claimant/petitioner
☐ the defendant/respondent
☐ an interested third party

R 5. **Before this case, were you familiar with mediation?**
☐ yes
☐ no

R 6. **How did you become aware of mediation?**
(multiple responses possible)
a) through a brochure
b) through a professional colleague
c) through a judge/court or the Public Prosecutor
d) through professional literature
e) through other press/media
f) I am a mediator myself
g) other, namely ……..

R 7. **Did you recommend mediation to your client?**
☐ yes
☐ no (go to question 9)

R 8. **You recommended mediation. Please indicate for each of the following aspects whether they were not, somewhat or completely applicable to you in recommending mediation.**

	not applicable	somewhat applicable	completely applicable
expected a better resolution than if the court decided the case	1	2	3
expected a quicker resolution than if the court decided the case	1	2	3
the client wanted to have control over the resolution	1	2	3
less expensive for the client than court proceedings	1	2	3
better for the future relationship with the other party	1	2	3
the judge recommended mediation	1	2	3
a professional colleague recommended mediation	1	2	3
the other party proposed mediation	1	2	3

Go to question 10.

The following question is only for persons providing legal assistance who did not recommend mediation.

R 9. You did not recommend mediation. Please indicate for each of the following aspects whether they were not, somewhat or completely applicable to you in not recommending mediation.

	not applicable	somewhat applicable	completely applicable
There is a need for a public/legal decision	1	2	3
There was no room for negotiation	1	2	3
The case had escalated too much	1	2	3
Poor communication between the parties	1	2	3
Lack of confidence in mediation as a method	1	2	3

Please indicate in question 10 the degree to which you are satisfied with specific aspects of the mediation. Please circle your response.

R 10.

mediation aspects:	very dissatisfied	dissatisfied	neither satisfied nor dissatisfied	satisfied	very satisfied
duration of the mediation	1	2	3	4	5
outcome of the mediation	1	2	3	4	5

Questions 11 and 12 ask you to evaluate the mediator(s).

R 11. Name of mediator I: .....

Please indicate how satisfied you are about the following aspects of mediator 1:

	very dissatisfied	dissatisfied	neither satisfied nor dissatisfied	satisfied	very satisfied
Impartiality	1	2	3	4	5
Manner in which he/she conducted the mediation	1	2	3	4	5
Care given to the matter	1	2	3	4	5

Only fill out question 12 if two mediators were involved in the mediation.

R 12. Name of mediator 2: .....

Please indicate how satisfied you are about the following aspects of mediator 2:

	very dissatisfied	dissatisfied	neither satisfied nor dissatisfied	satisfied	very satisfied
Impartiality	1	2	3	4	5
Manner in which he/she conducted the mediation	1	2	3	4	5
Care given to the matter	1	2	3	4	5

R 13. Would you choose mediation (again) in a similar conflict situation?

☐ yes
☐ perhaps
☐ no

R 14. Please write down any additional comments or suggestions you may have, and indicate other relevant matters not discussed in this questionnaire.

.....

.....

.....

.....