

Article

Should Mediation Be a Core Part of a Legal Degree in the Netherlands?

An Opportunity Not to Be Missed, Especially for Corporate General Counsels of the Future!

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To feel and to experience: third-year students on the bachelor of law degree course begin to arrive for their first tutorial on 'Mediation in Dutch Legal Practice' (Utrecht University). Each student is asked to form a pair with another student who he or she does not know and to sit with their knees almost touching, facing each other in silence for 5 minutes.¹ Initially they whisper and giggle about this 'strange' exercise. After 5 minutes, students look up with surprise. They are present in the moment, and they feel as if they really know the person sitting opposite, despite knowing nothing about them. This may appear to be a strange exercise for students seeking a bachelor of law degree. Why should they learn to 'be present' and to 'feel the other'? Did they come here to learn something about mediation and other methods of dispute resolution?²

Most law graduates³ go on to work in a legal environment. The majority become lawyers, judges or corporate general counsels.⁴ However, it is clear that mediation is gaining a more permanent position in the Dutch legal system, for a variety of reasons. Firstly, society is becoming increasingly autonomous.⁵ Citizens are more likely to take legal action than before, yet they also want a greater say in the outcome of their disputes. Secondly, the European Union has a long-term commitment to mediation and other forms of alternative dispute resolution (ADR) and is regulating them into Europe's legal framework.⁶ Several European member states (including

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1. I started using this in tutorials after watching Marina Abramović's documentary *The artist is present*. Retrieved from <www.npo.nl/marina-abramovic-the-artist-is-present-avro-close-up/26-06-2012/AVRO_1529983> (accessed on 30 March 2017).

2. 'Mediation in Dutch Legal Practice', Utrecht University. Description of subject content for 2014. Retrieved from <https://www.osiris.universiteitutrecht.nl/osistu_ospr/OnderwijsCatalogusSelect.do?selectie=cursus&collegejaar=2012&cursus=RGBOM0250> (accessed on 30 March 2017). Unfortunately, the subject was discontinued in 2015.

3. This article is limited to the law faculties of universities in the Netherlands.

4. I am aware that there are many professions that have a legal context. I have mentioned the three most common; this article deals mainly with the 'in-house counsel/ general counsel' position. I am also aware that there are many professions in the area of mediation outside the legal context and that mediators do not necessarily have to have legal training.

5. Hol A.M. (2011). *Rechtspraak: Tussen heteronomie en autonomie*. In M. van Boven (Ed.), *Tweehonderd jaar rechters*, Hilversum: Verloren, pp. 350-368.

6. In guideline 2008/52/EC of the European Parliament and the Council of the European Union dated 21 May 2008, Member States are encouraged (in Art. 4 of the guideline) to promote by any means they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as the development of other effective quality control mechanisms concerning the provision of mediation services. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

the Dutch government) actively promote mediation and seek to mandate mediation into the litigation process.⁷ The rapid progress mediation has made reflects society's real needs when resolving conflict: finding a solution that is satisfactory to both sides, preventing conflict from escalating further than is necessary and using a process that is fast and relatively inexpensive.⁸

That there is increasing interest in resolving disputes beyond the courts is not in doubt. This is why it is important for law students to appreciate that it is possible to opt for alternative forms of dispute resolution, also called ADR.^{9,10} Being informed about the potential of ADR in general, and mediation in particular, will improve understanding of how best to resolve disputes, irrespective of the outcome chosen. Students can also prepare for future careers, such as becoming a corporate general counsel, where they will regularly have to make decisions about how to resolve conflicts both for the party they represent and for parties they are confronted with.¹¹

Baarsma and Barendrecht believe that mediation can continue to exist only in the form of a service that is integrated into the administration of justice.¹² So why do so few university law faculties in the Netherlands integrate mediation¹³ into their programmes? We have the opportunity to incorporate it into degree courses. In this way we can ensure that, in addition to their traditional legal training, students will receive an introduction to and build the skills for mediation and other forms of conflict resolution. It can become integrated into their thinking (second nature). It would then also be reasonable to expect corporate general counsels who were introduced to mediation and other forms of conflict management during their academic studies to apply this later on in their professional practice. What is learned in the cradle is carried to the tomb.

1 Integrating Mediation Skills into a Law Degree

1.1 Analysing and Becoming Aware of Conflicts

As mentioned in the introduction, undergraduate students starting the course 'Mediation in Dutch Legal Practice' will have only indirectly come into contact with alternative forms of dispute resolution in their first 2 years. They are already trained to approach conflict from a legalistic perspective. Their approach is based on law and jurisprudence, and they put together a plan to 'win' the dispute. They often fail to realise that they are transforming a 'conflict' directly into a 'dispute'. When this is pointed out to them, they are surprised to discover that their thinking has become so legalistic (institutionalised). It is critical for students to learn to approach conflict with a broader view. Training them only with something firm (such as the normative framework of the law¹⁴) does them a disservice in today's rapidly evolving legal world. Today, the real skill is learning how to 'make the pie bigger' and thinking in terms of interests instead of positions. Sometimes this will involve proceedings before a judge; at other times it means creating space and using a facilitator/negotiator/mediator to find creative ways to reach reconciliation.

1.2 Experience and Reflection

The subject of 'Mediation in Dutch Legal Practice'¹⁵ has a broad orientation and is interdisciplinary, theoretical and practical. The subject has a socio-psychological and legal approach. By the end of the course, students will have an understanding of the following: the difference between adjudication and mediation; the legal aspects of mediation; that a mediator's working methods are different from giving legal advice or making settlements; what mediation entails and the best known mediation techniques; Harvard negotiation and how it works; the different types of ADR; and the ethical dilemmas that can play a role in mediation. In addition, students practise the subject material through role play and learn to give constructive feedback to each other.

The students study cases to understand the differences between being a judge and a mediator, a lawyer and a mediator and so forth. Cases may involve the parties reaching an agreement together, with the mediator or lawyer acting as a negotiator. It is extremely useful for students to learn that both their strategy and their tactics in handling a conflict are quite different if they are working as a judge, a corporate general counsel or a

7. Latest update: Letter dated 16 January 2017 from the former minister for security and justice. Retrieved from <<https://www.rijksoverheid.nl/regering/inhoud/bewindspersonen/klaas-dijkhoff/documenten/kamerstukken/2017/01/16/tk-voortgang-wet-bevordering-mediation>> (accessed on 30 March 2017).

8. Syllabus 'Mediation in Dutch legal practice' under course description, Utrecht University, 2014.

9. Alternative Dispute Resolution – dispute resolution methods outside national courts. For example, arbitration, mini-arbitration, mediation, binding advice, etc.

10. Or rather additional forms of conflict resolution. With additional ways of resolving conflicts, I mean to say that it is also possible to combine methods of conflict resolution in different ways. The use of the word *alternative* or *different* may give the impression of an 'either/or' situation. I would prefer to view it as additional – which method(s) provide(s) the best solution?

11. Draaijer A. & Schonewille M. Learning module *Mediation Advocacy*, ACB Foundation with financial support from the Ministry of Security and Justice, p. 5.

12. Baarsma B. & Barendrecht M. *Mediation 2.0*. Retrieved from <www.hiil.org/data/sitesmanagement/media/Mediation%20%200_Baarsma_Barendrecht_5%20juni%202012_definitief.pdf> (accessed on 30 March 2017).

13. With the subject of mediation I also mean other ADR conflict resolution methods, such as arbitration, mini-arbitration and binding advice, etc. However, mediation is the most commonly used form of ADR and is therefore highlighted in this article.

14. Holding onto the normative framework of the law can be compared with Kahneman and Tversky's 'certainty effect' from 1979. In general, people much prefer certainty. When analysing a conflict, students opt for methods that they are used to and that have worked well in the past. They prefer to opt for the certainty of normative law, rather than the new (creative), and therefore to them uncertain, ways of analysing a conflict. See also Brenninkmeijer about Zygmunt Bauman in: Brenninkmeijer A. (2009). *Reflectie op mediation*. In G. Frerks (Ed.), *Reflectie op mediation*. Maklu: Apeldoorn-Antwerpen, Conference proceedings, pp. 13 and 17.

15. And other forms of ADR.

mediator. They learn to feel and to inhabit their position in their intended future profession (and to discover which of these professions they are best suited to).

As Brenninkmeijer wrote,

We cannot say that mediation is a particular skill we can hold onto as if it were frozen in time and say: this is the best way to handle conflict. Mediation is a developmental process.¹⁶

Students become familiar with the theory, experience the material and become aware of how best to develop themselves. They learn to give each other feedback and to reflect on their own actions and those of others. What do they observe? What are they feeling? The characteristics of a good negotiating mediator and the ethics involved become clear during role play. Crucially, students are challenged to ask different questions from the ones they normally pose. Legal questions such as ‘Which law has been contravened by whom and what should this person’s punishment be?’ are entirely different from ‘Who has been affected by a punishable offence, what are their needs, and who has obligations to help effect a recovery?’¹⁷

As students learn to think creatively, they come to appreciate the wide range of possible approaches and outcomes.¹⁸ They start to think ‘outside the box’. Furthermore, through role play and feedback, students are confronted with their own behaviours and tendencies. They learn how to conduct themselves in a conflict situation and to recognise their own strengths and weaknesses.¹⁹ Finally, they learn to develop a professional attitude. They learn which requirements best fit the professional role in question for conducting contract negotiations, assisting parties, coaching and advising, and making decisions in a conflict.²⁰ In short, the subject of mediation is a combination of psychological, analytical and legal qualities, skills and empathy. These approaches are useful to students for mediation itself, but they are also valuable in their legal studies as a whole and in their subsequent career.

2 Mediation (Skills) and the Corporate General Counsel of the Future

2.1 Conflict Management

The positive developments of the past 15 years in the area of ADR in general, and mediation in particular, deserve greater attention from industry. As Eijsbouts wrote,

Knowledge of these developments offers companies and their advisors the possibility of designing and implementing integral conflict management systems, which do justice to the specific character of the company, to the nature and scope of its activities and, finally, to the requirements arising from a responsible risk control system as an important part of the company’s governance.²¹

Several large multinationals have incorporated mediation and other forms of conflict management into their own methods.²² This holistic approach is known as integrated conflict management – the methodical management of conflict at an organisational level, seeking to recognise disputes early, prevent escalation, manage risk and use the positive potential of conflict. It involves an understanding, both from management and legal advisors (internal and external), of the value of making active decisions as to how best to resolve a given conflict. In this framework, the individual who decides on the best method of conflict resolution (litigation, mediation, arbitration) is a different person from the one bringing the conflict to a conclusion, avoiding personal preferences/biases and optimising outcomes.²³ Companies identify the optimal path to move forward and conflict is juridified only to the extent that it is necessary.²⁴ An integrated conflict management approach is a valuable tool for an organisation because conflicts can have important legal and commercial consequences, in both the short and the long term.²⁵ Integrated conflict management reflects the fact that conflicts are business issues as well as human interactions. They are not purely legal disputes, but a joint process involving the business, human resources and legal departments of a company.²⁶

16. Brenninkmeijer (2009), p. 13, *supra* note 14.

17. Taken from a presentation by Maria Leijten, ‘Strafrecht en Herstelrecht’, guest speaker at ADR Kennisnetwerk on 18 April 2014.

18. van Gelder N. (2012). Creativiteit en de mediator. In G. Frerks (Ed.), *De ervaren mediator: kwaliteit, identiteit en ethos*, Maklu: Apeldoorn-Antwerpen, Conference proceedings, p. 107.

19. Uitslag M. & Breukelaar M. (2012). Education and training in mediation at the Utrecht University of applied science. In G. Frerks (Ed.), *De ervaren mediator: kwaliteit, identiteit en ethos* (Conference proceedings). Maklu: Apeldoorn-Antwerpen, p. 126.

20. Based on the subject taught at the VU, *Verdieping Conflictoplossing, mediation en onderhandelen*. Retrieved from <<https://www.vu.nl/nl/studiegids/2016-2017/master/p-r/rechtsgeleerdheid/index.aspx?view=module&origin=50056717&id=51104486>> (accessed on 30 March 2017).

21. Eijsbouts A.J.A.J. (2008). Structureel conflict management als corporate governance tool. In G. Frerks (Ed.), *Mediation is volwassen! Actuele toepassingen en ontwikkelingen*. Maklu: Congresboek UU/HU 2008, p. 15/16.

22. Including organisations such as AkzoNobel, Bombardier, Shell, Nestlé, Motorola and British American Tobacco.

23. Presentation of Prof. Dr. Lars Kirchhoff at the annual conference of Vereniging Corporate Mediation, Amsterdam, 2015.

24. van Beukering-Rosmuller E.J.M. (2007). *Geschilddoening in zakelijke contracten*. The Hague: Boom juridisch, p 1.

25. Eijsbouts (2008), p. 14, *supra* note 21.

26. Schonewille M.A. (2014). Business Mediation onderzocht. *Tijdschrift Conflictantering*, (2), 7.

2.2 Benefits

Research carried out on European companies by the English law firm Herbert Smith in 2007²⁷ showed that early conflict interventions based on ADR can i) lead to time and cost savings, ii) lead to earlier resolution of business disputes and iii) even generate incremental business for companies.²⁸ Other benefits for an organisation investing in mediation (skills) include maintaining business relations, focusing on economic interests and the future instead of legal standpoints and the past, and a commercial resolution that parties can control.²⁹ Research in both the United States and France³⁰ demonstrates the economic benefits to corporates that make use of ADR. 'Dispute wise organisations' have more satisfied employees and better relationships with both clients and business partners. Similarly, the American Arbitration Association conducted interviews with corporate general counsels, and other individuals in senior positions in corporate legal departments. It showed that a legal group that makes active use of ADR is more likely to be:

- highly integrated into the general corporate planning process;
- understanding of the broader business issues facing its company and industry;
- spending a lot of time on highly complex and technical issues;
- involved in cross-border, international disputes (the apparent goal being to avoid the risk involved in the uncertainty of judicial processes outside the borders of the home country) and
- working in an environment where senior management is focused on preserving relationships and settling disputes rather than just on winning cases and, therefore, less concerned about aggressively litigating every case.³¹

2.3 Today's Limited Use of Mediation

As a true trading nation, the Netherlands attaches great value to long-lasting relationships. However, mediation and other forms of conflict management are at present

only used in a limited way. The ACB Foundation³² studied Dutch corporations' conflict management methods and use of mediation. It came to the following four conclusions (i) conflict is not approached from a commercial perspective (conflict management is seen as a legal, not a management issue), (ii) the time spent on conflict and the cost of conflict are unknown,³³ (iii) companies rarely have concrete guidelines as to how to manage conflicts (when should legal aid be asked for; when should one opt for mediation or negotiation?), (iv) the knowledge base and skill levels in the area of modern conflict management are currently insufficient (mediation is seen as soft and not 'top of mind'³⁴; it is viewed as a formal legal process with associated time and financial costs).³⁵

Corporates in the Netherlands have not recognised the added value of mediation: 'We are able to negotiate quite well ourselves' is a typical refrain.³⁶ The CEDR/CMS research (referenced in footnote 33) suggests that managers often lack sound conflict management skills.³⁷ The aforementioned research by Herbert Smith also showed that the deciding factor in a company adopting a systematic approach to conflict resolution/mediation seems to be the attitude of the legal department. In particular, at least one 'ADR champion' who takes on a leadership role is crucial for the success and use of mediation (skills).

2.4 Opportunities for Greater Input from Integral Conflict Management

A growing number of multinationals recognise the commercial value of mediation skills and conflict management. Research on Fortune 1,000 companies' use of ADR showed that nearly all companies have recent experience with mediation and the great majority of companies expect to use it in the future.³⁸ By initiating mediations, signing codes of conduct, and training com-

27. Including BP, GE, KPMG, Merrill Lynch, Morgan Stanley, UBS, Zurich, Virgin, and PwC.

28. Smith H. (2007). The research report 'The Inside Track – How Blue-Chips are Using ADR' shares practical experience of in-house counsel and gives unique access to their learning on the effective use of ADR in managing business disputes.

29. Eijsbouts & Schonewille (2013). pp. 454-465, *supra* note 21.

30. American Arbitration Association. (2003). *Dispute-Wise Management. Improving Economic and Non-Economic Outcomes in Managing Business Conflicts*. Retrieved from <https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004327> (accessed on 30 March 2017) and Fidal & ICDR/AAA. (2013). *Dispute-Wise Business Management – 2nd Study, Latest Trends and Best Practices in Conflict Management from Corporate Law Departments*. Retrieved from <<https://imimediation.org/dispute-wise-business-management-survey>> (accessed on 30 March 2017).

31. American Arbitration Association (2003), *supra* note 30.

32. Stichting ADR Centrum voor het Bedrijfsleven (ACB), (thanks ACB Corporate ADR & Mediation). Schonewille M.A. (2004). *Winst maken bij het oplossen van geschillen: conflictmanagement en mediation in Nederlandse ondernemingen, onderzoeksrapport*. Den Haag: ACB Mediation.

33. Research by the Centre for Effective Dispute Resolution (CEDR) and the legal firm CMS showed that commercial conflicts cost British industry 40 billion pounds a year, of which only 9 billion pounds is on legal aid. CEDR & CMS. *The EU Mediation Atlas: Practice and Regulation*. Retrieved from <https://www.cedr.com/library/Mediation_atlas.pdf> (accessed on 30 March 2017).

34. Stoop J. (2015). Pakt het bedrijfsleven zelf de mediationrol? *Tijdschrift Conflictmanagement*, (4), 40.

35. Smith H. (2007). *The Inside Track – How Blue-Chips are Using ADR*, on which: A.J.A.J. Eijsbouts and M.A. Schonewille, *Integraal Conflict Management en Mediation*, Forum, voor Conflictmanagement, 2008/3 and 'The Inside Track – How Blue-Chips are Using ADR'.

36. Boot L. (2014). Mediation in het bedrijfsleven vraagt andere aanvliegroute. *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement*, (28), 27.

37. Eijsbouts A.J.A.J. & Schonewille M.A. (2013). Zakelijke mediation. In A.F.M. Brenninkmeijer (Ed.), *Handboek Mediation*. The Hague: Sdu Uitgevers, pp. 456-458.

38. Stipanowich T.J. & Lamare J.R. (2014, Spring). Living with ADR: Evolving perceptions and use of mediation, arbitration, and conflict management in Fortune 1000 corporations, *Harvard Negotiation Law Review – Multidisciplinary Journal on Dispute Resolution*, 19, 1.

pany lawyers in mediation advocacy, they are driving greater adoption of mediation globally.³⁹ The increased demand for mediation and mediation skills has major implications for law firms. Research from IMI indicated that 80% of corporates expect their external lawyer to be trained in mediation-advocacy skills.⁴⁰ At the annual Singapore Mediation Lecture of 2014, Brad Berenson, vice president of litigation at General Electric, captured this significant shift:

For the lawyers in the room, my message is that mediation is now an important tool that should become part of your skill set, or you will soon find yourself unable to fully and thoughtfully serve your clients' true interests and needs.⁴¹

Berenson argues that *any* lawyer in the future will need mediation skills as part of his practice.⁴²

2.5 Training the Corporate General Counsel of the Future

When a student takes on the role of a corporate general counsel in a role play, he first puts together a detailed conflict analysis and then presents his recommendation on which direction to take to his colleagues (human resources manager, finance director and the Board). What is the conflict really about? What is the legal position? Is it purely a legal dispute?⁴³ What is the best outcome from a financial perspective? Are the parties in a long-term relationship? Are the parties prepared to negotiate? What do the parties have to offer each other?⁴⁴ The student learns to understand a series of complex commercial considerations and hones his own mediation/negotiation skills.

The knowledge and experience gained by the students is really useful as part of their formal legal training. Through early training in a neutral environment, students come to see the potential of mediation. It becomes normal to consider mediation when putting together a conflict analysis/risk assessment for their future

employers or when using mediations/negotiating with other parties. A formal education on the approach and benefits of different types of ADR helps to remove significant barriers to ADR adoption. An initial training helps to build confidence and commitment to the use of both mediation and integrated conflict management in a corporate context. Adding another arrow to the quiver of the general counsel of the future can only benefit both him and his future employer. Armed with both high-level awareness and specific skills, he can confidently choose the appropriate solution for the individual conflict situations he will face in future and improve the system together with his peers.

3 Conclusion

It is quite clear that mediation occupies a permanent and growing position in our judicial system. It is a complex field, a combination of psychological insights, analytical and legal skills, and empathy. It has been convincingly argued that mediation can only continue to exist in the form of a service that is also integrated into the administration of justice. Why have so few law faculties integrated the subject of mediation into their programmes? There is an opportunity here to incorporate the study of mediation inside a degree course. In this way, we can ensure that at an early stage students become acquainted with and develop the ability to use mediation and other forms of conflict resolution in addition to their traditional legal training. They will learn to perform a considered conflict analysis and develop their mediation skills. Mediation will become integrated into their thinking and a natural part of their workflow. From here, it is reasonable to expect the next generation of corporate general counsels to apply mediation and other forms of conflict management in their professional practice. It is an opportunity!

39. Schonewille (2014), p. 10, *supra* note 26.

40. Schonewille (2014), p. 7, *supra* note 26 and IMI International Corporate Users ADR Survey, January-March 2013. Retrieved from <<https://imimediation.org/imi-international-corporate-users-adr-survey-summary>> (accessed on 30 March 2017).

41. Berenson B.A. (2014). Vice President of Litigation at General Electric, In *Annual Singapore Mediation Lecture, 2014*. Retrieved from <www.mediation.com.sg/assets/downloads/singapore-mediation-lecture-2014/02-Berenson-Singapore-Lecture-Sept-25-2014.pdf>.

42. For more information, see Schonewille M. (2009). *Kleine Toolkit Mediation Advocacy – De kunst uw cliënt bij te staan in mediation*. In G. Frerks (Ed.), *Reflectie op mediation* (Conference proceedings). Maklu: Apeldoorn-Antwerpen, p. 101 and Draaijer A. (2012). *Mediator, hoe ga je om met advocaten*. In G. Frerks (Ed.), *De ervaren mediator: kwaliteit, identiteit en ethos* (Conference proceedings). Maklu: Apeldoorn-Antwerpen, pp. 79-87.

43. WODC-onderzoek. Pel M. (2003). *Mediation naast rechtspraak. Naar een effectieve geschilafdoening op maat*. Retrieved from <https://www.wodc.nl/images/jv0308-artikel-02_tcm44-57842.pdf> (accessed on 30 March 2017).

44. van den Bos K. & Grootelaar H. *Leidt mediation tot minder druk op de rechtspraak*. NRC, 15 May 2015. Retrieved from <www.nrc.nl/rechtenbestuur/2015/05/15/leidt-mediation-tot-minder-druk-op-de-rechtspraak/> (accessed on 30 March 2017).