International Journal for Court Administration
Vol. 9 No. 1, December 2017
ISSN 2156-7964
URL: http://www.iacajournal.org
Cite this as: DOI = 10.18352/ijca.235


# *Mediating Judges in China and the Netherlands: An Empirical Comparison*

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**Abstract:**

This article compares the judicial mediation practices in the Netherlands and in China. It analyzes original and rich data obtained through in-depth fieldwork in courts in both China and in the Netherlands. Through comparison, we find Dutch and Chinese judges share similar mediation skills and techniques in judicial mediation. However, the interviewed litigants give contrasting evaluative opinions to the judicial mediation and to the on-going litigation procedure: the Dutch litigants are generally satisfied while the Chinese litigants are less so. This paper seeks to explain what caused the opposite outcomes. We attribute the cause to different judicial environment, judges' motivation promoting mediation, and how mediation is conducted. The article concludes by challenging the ideas of promoting the "settlement judge" in a developing legal context.

**Key words:** mediation; judicial mediation; court; judges encouraging settlement; empirical legal studies, China, the Netherlands

## 1. Introduction

The matter of judges mediating cases assigned to them for trial is a source of controversy among scholars and sitting benches around the world.[2] Theoretically, the combination of being a judge and a mediator drifts away from the debates on the literature of contemporary mediation, as judges as mediators easily have a negative impact on the due process experience of the litigation.[3] Chinese trial judges are traditionally well-known as the combination of adjudicators and mediators, but owing to the reasons set out above, this combination is often negatively evaluated by the Chinese and international scholarship.[4] However, Chinese judges are not unique in engaging in various forms of judicial dispute resolution during the on-going litigation processes. Many civil law countries have a conciliation tradition of requiring judges to settle disputes during the litigation processes,[5] despite that those countries prefer to use the word "encouraging settlement" rather than "mediation". The Netherlands, for example, is one of those countries.

Traditionally, those civil law countries' "encouraging settlement" is incomparable to the Chinese trial judge "mediation", as they are two extreme scenarios. The civil law trial judges traditionally abide by their role of being adjudicators: they see themselves as judges rather than - as they sometimes scoldingly say - "some sort of psychologist".[6] Even if the judges are required by law to encourage settlement, studies have shown those attempts are "very legalistic and interventionist",[7] and the judges are required to lead parties towards a solution consistent with the relevant legal norms.[8] On the contrary, Chinese judges used to rely completely

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2 Judith Resnik, *Managerial Judges*, 96 Harv. Law Rev. 374 (1982); Marc Galanter, *"... A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States", 12 Journal of Law and Society* 1 (1985); Tania Sourdin, *Five Reasons Why Judges should Conduct Settlement,* 37 Monash U. L. Rev. 145 (2011); Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 Harv. Negot. L. Rev. 97 (2012); Tania Sourdin & Archie Zariski, *Introduction, in The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* 1 (Tania Sourdin & Archie Zariski eds., 2013); Kwai Hang Ng & Xin He, *Internal Contradictions of Judicial Mediation in China, 39 Law & Social Inquiry* 285 (2014).

3 *Global Trends in Mediation* (Nadja Alexander ed. 2006), p. 22.

4 Hualing Fu and Cullen, R., 2011. *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China*. In: M.Y.K. WOO and M.E. GALLAGHER, eds, *Civil Dispute Resolution in Contemporary China*. p. 25. Carl Minzner., 2011. *China's Turn Against Law. American Journal of Comparative Law*, 59, pp. 935.

5 For example, Section 278 (1) of the German Code of Civil Procedure ( *Zivilprozessordnung*, ZPO) requires the court to make an amicable resolution of the dispute.

6 Freek Bruinsma, *Kadirechtspraak in postmodern Nederland*, 1995, Oratie Utrecht. This study shows that judicial mediation was apparent in the practice of the civil judge, but only in a minority of cases. The study distinguishes between three types of judges. One of them is 'the kadi' (active and focussed on a settlement). The two other types of judges were much more common: 'the sphinx' (passive and focussed on the verdict) and 'the active judge' (active and focussed on the verdict).

7 Global Trends in Mediation (Nadja Alexander ed. 2006), ibid., p. 22.

8 Alexander, Nadja, Walther Gottwald, and Thomas Trenczek. "Mediation in Germany: the long and winding road." (2003): 179-212.

on mediation to solve civil disputes. The Chinese tradition of using mediation derives from a combination of Confucianism and Communist ideology.[9] Mediation achieved its full potential as an inevitable choice in the legal vacuum for civil dispute resolution before 1978.

However, caused by the judicial reforms in the past 30 years, there seems to be a high degree of convergence between Dutch and Chinese judges' involvement in mediation. Dutch judges are striding from "judgment-making judges" to "multi-tasking judges"; [10] while Chinese judges are transforming from "mediators" into "multi-tasking judges". From a Dutch perspective, the actual practice of judicial mediation began to get the attention of the judiciary and others in the Netherlands during the 1990s. The revision of the Dutch Code of Civil Procedure in 2002 led to an increase in oral hearings in Dutch civil court proceedings and thus of the direct interaction of the civil law judge with the parties themselves, a situation in which judges have to investigate whether a settlement between the parties is feasible.[11] Existing studies have shown, many Dutch judges have somehow become more actively involved in the settlement process. Some of them consciously apply mediation techniques.[12] A study conducted in 2014 shows that settlement percentages vary between the courts from roughly 30 to 50%.[13] Meanwhile, China, which used to be an enriching example of relying solely on mediation, has established and continues to enhance a formal litigation procedure,[14] even if mediation still infiltrates the court proceedings. As the formal legal channels are established, a Chinese judge can choose whether to close a case through a mediation agreement or through a dichotomous judgement. The official statistics show that nationally 63.1% of first instance civil cases were closed through the mediation agreement in 2013.[15]

Those judicial reforms grant judges much leeway in how to solve a civil case. Both Chinese and Dutch judges are in the tension of being formal as judges, and being helpful as dispute resolvers. This convergence both challenges on our understanding about what judges really do in court, and paves the way for our comparison. Given the different background, it is questionable whether the Dutch judges and the Chinese judges are conducting the same practice, if not what the differences are. Furthermore, under what conditions the judges' activities could pose questions on their neutrality and their role under the rule of law.

To answer these questions, we compare the judicial mediation on two aspects: what do judges actually do, and how is that evaluated by litigants. Through intensive empirical work in both countries, we find that even though the judges in two countries share similar judicial mediation techniques, but the evaluation of the disputants is opposite. The interviewed Dutch litigants are generally satisfied with judicial mediation, and the mediation does not have a negative impact on the procedural justice of the litigation procedure; while Chinese litigants are not so satisfied and the mediation has a negative impact on the Chinese litigants' perception of the justice of the on-going litigation process. Based on the comparison, we aim at understanding what caused the interviewed Chinese disputants' mistrust of judicial mediation, and their mistrust of the fairness of the litigation procedure should mediation fail.

After the introduction, we first introduce the legal framework of the judicial mediation in the Netherlands and in China respectively. Then we describe the methodology for the in-depth empirical data collection in the two countries. In section four, we compare the judges' strategies and techniques in judicial mediation in both countries, and the comparison shows that the judges' strategies and techniques in two countries show great resemblance, while the litigants' reaction shows divergence. Section five explains why there is a divergence in litigants' reactions, and section six concludes.

**2. Legal Framework: Judicial Mediation in the Netherlands and in China**

This study compares the Dutch judges "encouraging settlement" with the Chinese judges' "mediating" activities. Inspired by Tania Sourdin and Archie Zariski's definition of "judicial dispute resolution", the two types of activates hereafter are both referred to as "judicial mediation", to refer to the work undertaken by judges to encourage, direct or engage in settlement processes for the cases assigned to them for trial.[16]

Court hearing plays an important role in the Dutch civil procedure. After a subpoena and a written reaction of the defendant, a court hearing will follow in most Dutch civil court cases. Both parties have to be present. The goals (from the judge's perspective) of this hearing are: (1) obtaining all the information possible needed to write a thoroughly motivated written court ruling later on,

9 Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 Cal. L. Rev. 1201 (1966)
10 The ideas include that courts adopt a "problem solving" and "therapeutic" approach. See Winick, Bruce J., and David B. Wexler, eds. *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*. Carolina Academic Press, 2003. Berman, Greg, and John Feinblatt. "*Problem□solving courts: A brief primer."* Law & Policy 23.2 (2001): 125-140.
11 Machteld W. De Hoon & Suzan Verberk, *Towards a More Responsive Judge: Challenges and Opportunities,* 10 Utrecht Law Review 27 (2014).
12 S. Dijkstra, '*De rechter nieuwe stijl; De achterliggende filosofie en enkele kritische kanttekeningen',* 2014 Nederlands Juristenblad, 674, pp. 841-847.
13 Marseille, A. T., Winter, H. B., Batting, M. & Bloemhoff, C. E., *Korte En Effectieve Kantoncomparities?: Uitdaging Voor Reflexieve Rechters* (Korte En Effectieve Kantoncomparities?: Uitdaging Voor Reflexieve Rechters (2014).
14 Hualing Fu & Richard Cullen, From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China, in Civil Dispute Resolution in Contemporary China 25 (Anonymous Margaret Y. K. Woo & Mary E. Gallagher eds., 2011)
15 Ma, Jian. 2015. Shixian Shenpan Fuwu Jingjishehuifazhan de Xinchangtai-2014nian Quanguo Fayuan Shenli Minshangshi Anjian Qingkuang Fenxi [An Analysis of the Civil and Commercial Cases in Chines Courts]. People's Court Daily, May 14, A5.
16 Tania Sourdin & Archie Zariski, Introduction, in The Multi-Tasking Judge: Comparative Judicial Dispute Resolution 1 (Anonymous Tania Sourdin & Archie Zariski eds., 2013), p. 2.

(2) exploring if a settlement is expedient and possible.[17] In theory it's possible scheduling a court hearing for only one of these two goals, but in practice these goals are always combined in one hearing.

The judicial mediation is scheduled during the court hearing, after the facts-finding phase. One of the most relevant procedural principles of law applies fully to judicial mediation: audi et alteram partem. All the actions and interventions of the judge can only be done in the presence of both parties. The usage of caucus is out of the question, indeed any contact with one of the parties without the other being present is a deadly sin. This principle also applies to judicial mediation, since court hearing is the only arena in which judicial mediation takes place. In most court hearings the information phase is followed by the settlement phase. Usually the court sessions are adjourned for a relatively short time (in practice between 5 to 90 minutes, but there are no official time limits) in order to give the parties and their lawyers the opportunity to negotiate without the judge being present. After this break the court session is resumed. If an agreement "in the hallway of the courthouse" is reached, it will be recorded officially in the courtroom, formulated by the judge and undersigned by the parties. The case is immediately closed. If there is no agreement the conclusion after resuming the court hearing can be that no results are to be expected. Then the court hearing will end and the court case will go on, mostly by giving a written court ruling a few weeks later. If the conclusion is, after resuming the court hearing, that further negotiating could be fruitful, the judge probably will resume his/her judicial mediation, beginning with the question how far the parties have come in their settlement talks 'in the hallway'.

In a relatively short time (mostly 1 to 3 hours) the case itself is discussed (facts and legal aspects), as is the possibility of a settlement. It is very well possible that during this court hearing the two goals, obtaining information in order to give a court ruling later on and exploring the possibilities to settle, are intertwined. For instance judges can provisionally give their opinion about a certain aspect of the debate during or at the end of the information phase, which helps the parties to determine their positions in the settlement negotiations later on during the court session (and 'in the hallway').[18]

A settlement is a form of agreement, which cannot be reached without the mutual consent of the parties involved. Although there are no specific rules guiding the way trial judges try to reach a settlement between the parties, the ground rule is that both parties ought to enter voluntarily into a settlement. They should not be coerced by the judge. There are no specific regulations in case a party states he/she is coerced into a settlement by the judge. If the settlement is actually reached it is binding. The coerced party can only try in a new proceeding against the same opponent to annul the court settlement on grounds of coercion by the judge. We do not know of any published court rulings in such a proceeding. If coercion is experienced - and the party involved nevertheless did not settle the case - the court has to rule about the original claim of the plaintiff. It is possible that the party that felt coerced goes for a recusal of the judge. But then it will be necessary that the experienced coercion can more or less objectively be established and gives reason to assume the judge is no longer impartial. Only if the recusal is granted, there will be a retrial before another judge.

Compared with Dutch judicial mediation, Chinese judicial mediation is more flexible and does not follow a certain model. Chinese judges have more autonomy in deciding the timing and methods they use in mediation. Pursuant to Article 94 of the Chinese Civil Procedure Law, Chinese trial judges can legitimately claim that they can "mediate" the case. Regarding the timing, mediation permeates the entire trial process. According to the Chinese Civil Procedure law, trial judges can mediate a case any time prior to the rendering of a judgment.[19] In practice, a judge's words illustrate how mediation and adjudication intertwine in trial judges' work: "I think the processes run through each other. They are like two ropes; they are twisted, and develop in spirals. In the end, the two processes end up in one: the end of the case. It doesn't matter which rope leads to the end. The processes are interwoven: mediation, adjudication, mediation again,… However, at the beginning, without knowing which rope will work, I have to proceed with them both and get myself prepared for them both."[20] Even if the Supreme People's Court (the SPC) issued that "where the parties … make use of mediation to postpone the litigation, a timely judgment should be made according to law",[21] judges have full discretion.

There is no concrete regulation guiding what judges can or cannot do in the mediation process. Generally speaking, protecting "parties' voluntariness" is the guiding principle for judges' self-regulation.[22] According to Article 201 of the Chinese Civil Procedure

17 These two goals are laid down in the articles 87 and 88 of the Dutch civil procedural law. If a settlement is not reached, the judge must decide what is the best way in moving on with the proceedings. Mostly this will be a written court ruling a few weeks later. But there are more possibilities, for instance a second round of written statements of both parties, because the case is too complex to be argued in only one written round, or a second court hearing because the first one was too short to discuss all the relevant aspects of the case, or a second court hearing combined with a judicial inspection of the site the parties (such as neighbors) are arguing about.

18 Dutch judges use more types of interventions, see Janneke van der Linden, Zitten, luisteren en schikken, Research Memoranda, nr. 5, 2008, Den Haag.

19 Civil Procedural Law, article 133 states "Where mediation may be conducted before trial, mediation shall be conducted to timely solve the dispute." Civil Procedural Law, article 142 states: "Where mediation is possible prior to the rendering of a judgment, a session of mediation may be conducted."

20 Chinese Interview L2013.

21 The Notice of the Supreme People's Court on Issuing Several Opinions on Further Implementing the Work Principle of "Giving Priority to Mediation and Combining Mediation with Judgment" (The SPC opinion), Article 17.

22 Civil Procedural Law Article 9, the people's courts may mediate the disputes according to the principles of voluntariness and lawfulness. In practice, the mediation agreement breaching the interests of third parties is often the ground for a retrial.

law, the violation of the principle of parties' voluntariness is one of the grounds for litigants to apply for retrial.[23] The breach of parties' voluntariness can only stand when litigants can prove that they are threatened or deceived in the mediation process. However, in courts' mediation record, disputants' willingness will be confirmed in written form (nowadays video recorded) when they sign the mediation agreement,[24] thus in practice almost no mediation agreement was revoked through retrial on the grounds of the breach of the parties' voluntariness.

## 3. Methodology

The above comparison of the legal framework points to the importance of the practice. Judicial mediation, as both countries' law regulates, allows much leeway in the judges' discretion, and the practices are mainly self- regulatory by the judges. In this way, empirical data play a key role in understanding the practices.

This study collected its original data in an intensive way. The data were collected by the authors respectively in China and in the Netherlands in two parallel empirical studies. In the data collecting processes, the researchers shared similar methods. They did participant observation when judges were doing judicial mediation either during or after the hearing. After the participant observation, the researchers interviewed the participants involved, such as lawyers, disputants, judges, and mediators. We have 49 cases collected for the Chinese part and 100 cases for the Dutch part.

For the Dutch part, two researchers (the names are anonymized here) worked with five master students of the (the name is anonymized here) University master in Legal Research. The students were trained in observational and interview techniques. All 100 cases covered a broad range of civil cases, but not about family law. Those cases were analyzed individually and furthermore a substantial number of characteristics of each case were assembled in order to discover the threads on a level above the individual case. In each case in our research we used a questionnaire for the judge, the two parties[25] and their lawyers. Then we observed the court session. Afterwards the same persons filled in another questionnaire and then we interviewed the judge and each party.[26] We observed and analyzed each case with two researchers in order to insure a more objective and precise description.

The collected cases cover 37 different judges, appointed in 5 different courts of first instance around the country. Each judge was interviewed up to 3 times. We asked them why they became judges, what is pivotal in their work, what are their primary goals and what do they think is relevant to aim at are during the court hearing, if their responsibilities include the exploration of the underlying interests, needs and wishes of the parties in connection with the legal standpoints, etc.

For the Chinese part, the data were collected by (the name is anonymized here), who did participant observation in 49 judicial mediation cases in 2 local Chinese courts in 6 months (2011 and 2013 respectively). The cases collected are all routine labor cases without clear political significance. For this type of cases, the Chinese judges have full autonomy over the dispute resolution process, so they are comparable with the collected Dutch civil cases. As mentioned in the legal framework, Chinese judges' mediation work is not limited to the trial time. Therefore, the researcher also took notice of the contact judges made with the disputants outside the trial (for example, making calls from the office), if the purpose was to promote mediation.

Following the participant observation, she conducted 96 semi-structured interviews. 35 interviews were with litigants, 27 interviews with lawyers and 34 with judges, court staff and officials. As the fieldwork was conducted on a daily basis, the researcher often did several semi-structured interviews with one judge on different occasions. Most interviews with disputants and lawyers took place directly after the mediation sessions. If the parties changed their minds and reached an agreement a few days later, the researcher conducted a follow-up interview. The interview time scales varied: with judges, the interviews lasted on average 3 hours or more. With lawyers, the interviews were shorter, but still about 40 minutes to 2 hours; with workers and company representatives, the interviews lasted approximately 20 minutes. All of the notes were taken during the interviews while the informants were answering the questions. Since litigants are not obligated to attend the court hearing in China, the researcher could not interview those litigants.

## 4. Comparing Dutch and Chinese Judicial Mediation in Practice

### *The Similar Strategies and Techniques in Judicial Mediation*

Judges' strategies and techniques in judicial mediation we observed in China and The Netherlands show great resemblance.

23 Pursuant to Articles 15 and Article 16 of the SPC opinion, the judges should conduct mediation upon the parties' own free will. The SPC's Code of Conduct for Judges (2010) Article 39 (2) also expressly prohibits mediation against the will of the parties.
24 Chinese Interview F2016.
25 Upfront we asked both parties for cooperation, but we included also cases if only one of them did (43% of all cases). Mostly the lawyers cooperated if their client did.
26 These were semi-structured interviews. So the judge was interviewed after each court session we observed. And also we conducted an interview with each party cooperating with our research (so depending the cooperation one or two interviews more). In total 257 interviews after the hearing, sometimes immediately afterwards (live), sometimes one day or a few days later (by phone). The time scale of the interviews varied from almost 20 minutes to more than one hour. We recorded all interviews. Of course all interviews were held separately. For budgetary reasons we did not interview the lawyers.

Inspired by Riskin's mediation strategy grid,[27] we divide the practices into three categories, namely facilitating negotiation, narrow intervention, and broad intervention.

*Facilitating Negotiation*

In this type, judges simply intended to allow the parties to communicate with and understand one another. They (implicitly) assume that the parties are intelligent, able to work with their counterparts, and capable of solve the dispute by themselves. Since mediation is considered as part of the trial process, we observed judges facilitating negotiation in almost every single Chinese and Dutch trial. In the Dutch research we counted and recorded every such attempt the judges made. In some cases, we observed up to 25 or more of those actions in one single trial.[28]

The intensity of the facilitation differs from case to case. It can start and finish by no more than giving a platform to the parties to negotiate. For example, after hearing, one Chinese judge said, "Do you still have any intention to settle?" When one party expressed reluctance in settling the case, the judge said, "Since one plaintiff does not want to, the trial is adjourned."[29] In another case, the Chinese Judge said: "Both parties, would you like to settle?" Worker's lawyer answered: "We want to, but the company seems to be applying the litigation strategy and trying to delay the process." The judge asked: "Defendant, would you like to mediate?" The defendant's lawyer said: "So far, the company doesn't intend to settle the case. It's not just about the plaintiff, it's not just about money…" Then the judge announced: "Ok, ok, you go back and ask for the company's offer for mediation." [30]Comparing with Chinese judges, some Dutch judges are more reluctant to put pressure on the process of judicial mediation and tend to limit their interventions to a minimum. Especially if the judges do not yet know what the outcome of the case in terms of a court ruling will be[31] or, the opposite, if they are very much aware of what the outcome will be and are convinced that one of the litigants is fully and totally right.[32]

Other than providing the platform, judges also clarify and enhance communication between the parties in order to help them decide what to do. For example, we observed that the Dutch judges asked whether the parties were willing to continue the negotiations, if they negotiated before the trial; what was needed for the disputants to get the discussions back on track; whether the disputants were sure everything necessary within their negotiation discussions had been said and done; what hinders their wishes to settle; whether the judge could be sure that there was not a single chance left for settlement. Facilitating negotiation is very common in the trials. In these court sessions, if the judges had reason to assume the parties were still willing to settle, but had not been not successful yet, the judges would leave the disputants continuing their negotiation. In short, when judges facilitate, they aim at initiating the negotiation between parties, encouraging the continuance of such communication, and closing the negotiation properly.

*Narrow Intervention*

The "narrow" intervention means that the judges mainly focus on the litigation related issues. Unlike facilitating negotiation, the judges here assume that the participants want and need their help and guidance to ground settlement. As judges, they are more than qualified to do so. The practices may be discerned into three types, the judges (1) propose compromise agreements, (2) assess the strengths and weaknesses of the litigation and the alternative, and (3) inform the litigants the outcome of the litigation.

Judges sometimes propose compromise agreements. When the disputants come very close to a settlement, many judges propose, with various degrees of directives, a figure or a range upon which they think a reasonable settlement could be reached. A Dutch judge for instance carried out a judicial mediation in three stages. First he said: "You have heard what was said in the first part of this court session gathering information about the facts of the case. This information may shed light on the case and may influence your views about your positions. Do you, given all these possibilities, want to make an effort to settle?" The parties were willing to give it a try, but after the discussions in the hallway the litigants came back without an agreement. Then the judge himself explicitly evaluated the parties' positions and offered to 'call a spade a spade' if the parties still could not settle. Then the parties tried to settle again in the hallway, yet still without success. Then the judge entered the third stage: on the spot he calculated the total amount, including the interest, and said: "I end up at about € 2.660,- or something". At exactly this figure the case was settled a minute later in the courtroom.[33] A similar scenario happened in Chinese courts. After the two parties were going back and forth for a long time, the judge said: "Now, you 8000 yuan, you 10,000 yuan. I make a decision for both of you: 9000 yuan. How do you like it? Both parties, you have spent the whole afternoon dealing with the dispute, don't let just 1000 yuan

27 Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996);
28 In Dutch case Leeuwarden 26 we even counted 30 procedural actions.
29 The judge mentioned "the trial is adjourned", since the mediation is considered as part of the trial process. Chinese Case 40(O).
30 Chinese case 19.
31 Dutch case Amsterdam 12. The explanation is that judges cannot steer effectively if they do not know (yet) in what direction to steer. If the judge does not yet know who has the strongest case, it would be a guess to say to one of the litigants to consider a settlement because his/her case is not very strong.
32 Dutch case Zwolle 07. The explanation is that judges do not want to cause the litigant who is in the right making concessions. These judges believe it is better to give a court ruling than to steer towards a compromise. Other judges prefer to give their provisional view on the matter - in order to steer a possible settlement, so as a part of their judicial mediation - even if this is strongly in favor of one of the parties, for instance in Dutch case Amsterdam 13.
33 Dutch case Leeuwarden 04.

get in your way... I mean if you can solve the dispute soon, you'd better do it."[34] It appears sometimes that the judges themselves are negotiating with one of the parties, just to keep this party moving in the direction of the last bid of the other. For instance, in a Dutch case the defendant offered to pay off the debt to the plaintiff with € 50 a month. The judge proposed to lower the total amount and to increase the monthly payment. The judge said to the defendant: "If you make it a 100 euro per month, I think that would probably convince the plaintiff to make a deal with you." [35]

Next, owing to their legal training, many judges assess the strengths and weaknesses of the litigation and the alternative. The information first covers the uncertainty of the litigation proceeding and what litigants should expect from the coming procedures. For example, when it is necessary to give (further) proof, or to ask an expert opinion about a relevant aspect of the case[36], the parties should be aware of the time and costs the rest of the proceedings will take. The personal circumstances of the parties can also be relevant for the choice to make, for example, a Chinese judge pointed out a Chinese worker's extremely limited capacity for litigation, and the judge provided information on likely consequences of non-settlement, as well as the costs of litigation which include expenses, delay, and inconvenience.[37] The judge also can point out that the on-going proceeding could be a psychological burden for both parties. For example, the judge said to the plaintiff, after a bid of € 7.500 of the defendant: "If you think that this judge is steering too much towards a settlement, then you can go for a verdict. But the next question then is: are you going to collect the money? (...) A verdict of € 14.000 may be more, but can you actually collect this amount?"[38] Similar scenario happened in Chinese court when a Chinese judge said to the plaintiff: "If the judgment comes to enforcement, it's highly likely that you cannot collect anything. It doesn't matter whether you prefer a judgement, but what really matters is what is in your best interests."[39]

Thirdly, the judges can also provide (provisional) judicial opinion on the litigation. The opinions can be on the final judgement, or a key legal issue within the case. A Chinese judge spoke of the legal features of how the parties were related: "I tell you, your relationship is a labor relationship. (…) I think your evidence is not strong enough to overthrow this labor relationship (then the judge talked for 3 hours about why the legal relationship is a labor one)".[40] In one Chinese case, after failing to mediate the case several times, to enhance his authority, the trial judge asked the company to come to court and showed them the draft judgment without the official stamp and said, "If you are not going to settle, this is how I'm going to rule." Then the company accepted the proposal, and the case was closed through a settlement.[41] In a Dutch case the judge gave her provisional view during the court hearing on the principle claim: "This is a written agreement between the parties about the amount that was actually paid. This agreement is signed by the former chief executive officer of the defending company, who was in charge then. That is hard proof and the plaintiff may rightly rely on this written agreement."[42]

Of course we also observed the judges combined the all strategies mentioned above, sometimes within a few lines. For example, in a Chinese case the judge proposed an amount he thought was reasonable and at the same time gave an insight of the court ruling ahead, pointing at similar cases: "I'm the judge who just had the trial with you. I feel 8000 yuan is fine, you can accept it, can't you? Actually, we have been dealing with a large number of cases similar to yours. If you are not going to mediate now, it will be more difficult when the judgment is made."[43]

All these (provisional) views of the judges, be it broad and specific or smaller and with more space for interpretation, can be relevant for the parties to determine their position in the negotiations about a settlement, so expressing these views in relation to this negotiations comes down to actions and interventions of the judge in the context of judicial mediation.

*Broad intervention*

"Broad intervention" means the judges' focus is on interests broader than the litigation, but which might be influenced by the resolving of disputes. As discussed by Prein and by Giebels & Euwema, when two or more parties feel dependent on each other, there is a conflict if these parties have aims, aspirations, interests or values that cannot be unified.[44] With this type of interventions the judges are searching for possible underlying broader issues, which lie outside the legal dispute and block a settlement. The

34 Chinese Case 28.
35 Dutch case Leeuwarden 22.
36 What caused the ships motor to fail: a default in the design or insufficient maintenance? Does the ventilation of the house meet modern professional standards?
37 Chinese Case 10 (O) (Then the judge explained how the plaintiff should present the case in litigation, i.e., how to explain the legal grounds, how to make an argument in court.)
38 Dutch case Leeuwarden 05.
39 Chinese Case 8(O).
40 Chinese Case 11(O).
41 Chinese Case 45(I).
42 Dutch case Amsterdam 13. A settlement was not reached in this case, by the way, for reasons unknown to the researchers.
43 Chinese Case 24(O).
44 See H.C.M. Prein, '*Conflicten*', in A.F.M. Brenninkmeijer et al., *Handboek Mediation*, 2013, p. 69 and see also E. Giebels & M. Euwema, '*Conflict, belangen, (de)escalatie en partijen in de rechtszaal: een psychologisch perspectief*', in M. Pel & J.H. Emaus (eds.), *Het belang van belangen*, 2007, p. 22. A shorter definition is the following: there is a conflict when someone feels obstructed or frustrated by another, see M. Pel, '*Belangen in de strijd en in de tijd, belangenhantering in de dagelijkse praktijk*', in M. Pel & J.H. Emaus (eds.), *Het belang van belangen*, 2007, p. 96. In her definition of 'conflict' personal and/or affectional aspects play a role, besides aspects of content and cognition.

underlying issues can be a simple need of one party for recognition by the other, the need to be trusted again, the need for an apology, or the need of restoring open communication.

In both countries, judges do pay attention to the underlying issues. For example, in a Dutch neighborly dispute, although the litigants' two claims were only limited to a couple of overhanging branches and a wrongly placed fence, the judge gave space to the wish of both parties to talk about the a giant oak tree, too much neighborly noise and first and foremost about what the neighbors/parties were irritated about in their relation.[45] The judge helped the litigants expand the discussion to all neighboring conflicts, instead of merely focusing on the submitted claims. In a case about a domain name of an internet site, the judge brought into the discussion if the defendant would be interested to give up his domain name if the plaintiff would arrange a professional upgrade of the defendant's internet site. This upgrade was not a part of the case of claims as formulated in the legal case, but could have served the underlying interest of the defendant.[46]

However, this broad intervention did not always work, since the litigants might not be willing to address the underlying issues to a judge. The following dialogue demonstrates such a scenario. The judge: "What would a settlement mean to you?" Plaintiff: "Nothing." Judge: "What would you rather have?" Plaintiff: "A verdict." His lawyer explains that his client feels first tricked and then abandoned by the defendant. Judge: "Would it be possible to restore the relationship?" Plaintiff: "The defendant left it all to sort it out for myself. That is the reason we are sitting here [in the courtroom]. I still cannot cope with that, so to say."[47] Needless to say a settlement was not reached in this court case. A similar scenario also appeared in China. A plaintiff was suing the company to terminate the labor contract, claiming that the social insurance as a mandatory clause for a labor contract was missing. However, during the judicial mediation, the judge found out the real reason for him terminating the contract was that he felt pushed aside by other managers of the company, and he was using the suit as a leverage for bargaining with the firm. Since he was still bargaining with the firm, there was no way that he would make a compromise in the present case.[48] By expanding issues under discussion beyond the litigation related issues, those judges do more than adjudicators, but tend to show inclination to play more active role in dispute resolution.

**5. The Difference in Litigants' Reaction to Judicial mediation**

Although the practices and interventions observed in the two countries show convergence, the interviewed litigants show divergent evaluative remarks to those practices. The interviewed Chinese litigants tend to form a less positive opinion to judges' roles in the judicial mediation and in the litigation process than the Dutch litigants.[49]

First, in the mediation process, the interviewed Chinese litigants tend not to trust the judges' evaluative words said in the judicial mediation. Among 12 lay interviewees who all experienced the narrow intervention, three of them trusted the judges' words,[50] whereas nine told the researcher that they doubted what the judge had said about the result of the case.[51] All of the disputants mentioned that they trusted other evaluative opinions more than the opinions from the adjudicators. The "other" evaluative opinions included, for example, an earlier labor arbitral award[52] and their own understanding about law.[53] Some of the disputants said "I don't think the judge has a solid legal ground for his interpretation",[54] or said "The judge can say anything he wants in mediation. I don't believe what he says". [55]The lawyers seemed to trust the judges' words even less: "The judge would say anything to make me settle. That's it."[56] "The judge will always say something against us to make us settle."[57] This finding was confirmed by several lawyers[58]

Next, the interviewed Chinese disputants and lawyers also showed some signs of mistrust of the on-going litigation process. Even if the judge gives the exact result of the judgment, the lawyers cannot trust it fully because "the judges could be bluffing".[59] The lawyers have their own perception of cases, "We cannot tell whether the judge invented a story or told the truth, so we can only count on ourselves in the dispute resolution process."[60] When the lawyers were asked to guess whether the judges would adjudicate in the way that they said during mediation if the mediation fails, the lawyers said, "Not necessarily. We need to judge

45 Dutch case Utrecht 03.
46 Dutch case Den Bosch 11.
47 Dutch case Utrecht 18.
48 Chinese case 14.
49 In Dutch civil court proceedings the litigation and the settlement are not different processes, but combined at the same court session, as is explained above in this paper, see the section about the legal framework.
50 Chinese Case 9(F); Chinese Case 10(F); Chinese Case 24(W).
51 Chinese Case 1(F1); Chinese Case 1(F2); Chinese Case 11(W); Chinese Case 3(W); Chinese Case 6(W); Chinese Case 48(F);Chinese Case 11(F); Chinese Case 28(W); Chinese Case 43 (W).
52 Chinese Case 1(F1); Chinese Case 28(W).
53 Chinese Case 11(W).
54 Chinese Case 1(F1).
55 Chinese Case 6(W).
56 Chinese Case 42(WL).
57 Chinese Case 37(F).
58 Chinese Case 24(L); Chinese Case 20 (L); Chinese Case 10 (L).
59 Chinese Case 44(L).
60 Chinese Case 4(L).

for ourselves."[61] Another example is the case that ended up in a fierce physical collision, the worker thought that she had given up a great amount of money based on the judge's opinion, and the judge promised to settle the case on that day. But the other party did not accept the proposed settlement result by the judge in the end. With the failure of mediation, the worker thought the judge was corrupted, and she believed that the coming judgment would be against her interests, so she got physical to get what she thought was fair.[62] In fact, as far as the researcher knows, the judge was not bribed at all, but only wanted to close the case as soon as possible.

These results were not found in the Dutch research; on the contrary. Overall there is a positive and interconnected evaluation of litigants of the interventions of the judge both in the litigation phase as in the judicial settlement phase of the court session. More specific, the (provisional) view of the judge on the case is one of the most important incentives for disputants to settle. This means that the litigants and their lawyers trust that the provisional opinion is sincere and that, if it should come to that, this opinion will also be given in the written verdict later on. In other words, everybody expects that the provisional opinion will stand. In only one case, the plaintiff mentioned the doubt in the interview: "Yes, this (the opinion of the judge on the matter) was the determining factor (to settle). Stupidly enough, in hindsight. [The researcher: Why?] Because there is not a 100% certainty that the judge will indeed rule the same in his verdict. He could have ruled that further proof (by the defendant) was necessary. In hindsight I have not used my last chance (on a better result)." However, later in the interview the plaintiff had overcome his doubt: "Of course then the judge has to stick to this opinion. Otherwise you risk damaging the interest of people. I assume that the verdict would have been precisely the same as was the basis of our settlement, that is the opinion the judge gave now." [63]

## 6. Analysis of the Comparison

Given the similarities in practices and the differences in feedback, the question is why similar judicial mediation leads to different evaluation of the disputants. Apparently there are differences in handling cases by the judges in these two countries that are more determining in this respect than the similarities. In this section, we try to understand why in the observed procedures, Chinese judges' evaluative words were not completely trusted both during the mediation process and during the litigation process.

### *Why Some Chinese Disputants Stop Trusting Judges as Judicial Mediators*

Procedural justice is a key to keep the satisfaction of the litigants.[64] An important way to do that is to convince the other party (particularly the losing one) that the neutral third is not working together with the winning one.[65] As Shapiro mentioned, the logic of the courts' role in dispute resolution of "preventing the triad breaking down into two against one".[66] There are many reasons why the neutral third could be working together with one party: the neutral third can develop his/her own interest or he/she was bribed by one party. If the neutral third was not bribed, his/her own interests must be related to his job such as "cleaning dockets" or that the judge finds it inconvenient to deliver a judgement.

Compared with the Dutch judges, the neutrality of the observed Chinese judges is damaged in two ways. First of all, with some Chinese courts'/judges' interests of promoting mediation, those judges do become interested thirds instead of neutral thirds in dispute resolution, which creates mistrust in the social context. Second, this mistrust is magnified in the eyes of litigants through two different mediation settings in China compared with the Netherlands, namely (1) the repetitive mediation sessions that happen at every stage of litigation; and (2) caucuses.

#### *The Interests Embedded in Mediation*

Judges in both countries believe that mediation can solve disputes better than adjudication for litigants, for example, the compliance rate of the mediation agreement is higher comparing with that of the judgements.[67] However, it is undeniable that mediation also benefits courts' interests. Mediation helps to clear dockets and accelerates the speed of case solving. As an American empirical study has found, courts' institutional interests help explain why appellate courts impose ADR participation notwithstanding mixed results on ADR efficacy.[68] In the Netherlands, Dutch courts' budget depends on the yearly output number of cases, and party-settlement during the hearing is the most efficient way to solve the court cases.[69] The realization of courts' interest counts for a reason of the global surge of judicial mediation.

However, Chinese courts and judges' interests regarding mediation are more profound and complicated. First, some Chinese judges also use mediation to avoid some of their judgments being held accountable, or they use mediation to avoid making

61 Chinese Case 4(L).
62 Chinese Case 21(O).
63 Dutch Case Leeuwarden 04.
64 Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model.* 57 J. Pers. Soc. Psychol. 830 (1989)
65 Niklas Luhmann, *Lob Der Routine*, in Politische Planung 113 (Anonymous 1971)
66 Martin Shapiro, *Courts : A Comparative and Political Analysis* (1981).
67 For The Netherlands after 3 months 55,5% of the verdicts were fully complied with against 72,4% of the settlements. After 36 months the percentages are 73,5% and 85,1%. The research included only cases ended in the second half of 2004. See R.J.J. Eshuis, *De daad bij het woord, Het naleven van rechterlijke uitspraken en schikkingsafspraken,* Research Memoranda 2009/1, p. 45.
68 Michael Heise, *Why ADR Programs Aren'T More Appealing: An Empirical Perspective*, 7 Journal of Empirical Legal Studies 64 (2010).
69 See the end of the above section.

difficult judgments. As one judge said, "If you see a judge trying hard for mediation, he must be faced with a difficult case."[70] The tendency of avoidance comes from the quality of judges and the accountability of judges derived from the bureaucratic control of the judiciary. Chinese judges' work is not only evaluated through legal channels, such as case appeal, but also through a bureaucratic evaluation to show if their cases reached certain measurements, such as the time they spend on solving the case; how many cases were overruled by higher level courts; how many cases' litigants went petition to higher authority etc.. The result of such an evaluation has a direct impact on grassroots courts' operation and on the career path of the judges, and the bureaucratic evaluation determines the promotion of judges, the disparity among judges' payment scales, personal honors and other social benefits.[71] This is clearly different from the Dutch judges who are internally independent from their courts, and whose work is only evaluated by the legal channels.

In this context, some Chinese lawyers feel that concluding the case through mediation means "taking care of the relationship with the court and doing the judge a personal favor"[72]. As one lawyer said, "The judges have their evaluation system, and making some verdicts are not beneficial for them. If the law is ambiguous, then it is logical that they prefer not to take risks.[73]… since they are under great pressure to deal with cases." The lawyers believe that in order to uphold sustainable relationships with the judges, agreeing to mediation is one of the favors that have to be done.

Secondly, personal relationships (also known as guanxi, its extreme form is corruption) also motivates some judges into mediating some cases.[74] If a disputant has some personal relationship with the judge, then the judge is biased for this party. If, during the trial, the judge feels like the coming judgment is not in this party's interests, the judge is more likely to persuade the other party to settle or to spend more time on mediating. This is confirmed by two cases: case 20 and case 27. In case 20, the judge told the researcher that if it were not for he had some guanxi, he would not have spent up to 60 minutes on mediation.[75] The other example is case 27, in which the defendant had some informal contact with an official in court. After the mediation, the plaintiff's lawyer told the researcher, he felt it was clear that the other party had guanxi with the judge, he said "The judge cannot adjudicate in a way that is significantly biased towards the other party, because even if they do, the intermediate court will overrule the judgement in an appeal. But if it's mediation, then it's disguised by the disputants' consent to the result. In my case, the law and facts are clear, so the judge tries to mediate the case."[76] The mediation result was more in the interest of the party with a personal relationship with the judge.

*The Timing of Mediation Sessions*

The above-mentioned interests influenced judicial mediation through different mediation settings in the two countries. In the Netherlands judicial mediation only takes place at a court hearing. Although it is possible to order such a hearing with the attempt of a settlement as its only purpose, in practice these court sessions are only convoked with a second purpose at the same time: gathering further information in order to come to a written verdict later on. This combination almost spontaneously leads to the practical order that in the first part of the court session the case itself is discussed (gathering information), followed by the second part which is about a possible settlement. The content of the information gathering part is of course connected with the settlement part: the parties hear each other's arguments and reactions, their lawyers can judicially interpret what the parties are saying as can the judge, the judge could probably give a (provisional) opinion about the case, based on an evaluation of all the information, which opinion helps the parties positioning themselves in possible negotiations.

China is another case. Since the Chinese Civil Procedural Law allows mediation at any stage of the litigation process, many cases have already been mediated by independent mediators at the court-annexed mediation, or by judicial clerks before they meet the trial judge. During those mediation sessions, the litigants have already received many evaluation opinions from everyone involved (as in China, evaluative mediation is common).

After the case reaches the trial-division, some judges started contacting the litigants for mediating from the moment they received the files, without knowing too much about the case at stake yet. The judges' mediation intervention techniques can change as they gather more information about the dispute. This brings the issue that judges began with vague and indefinite opinions to the litigants, as the case goes further, they might give contradictory opinions. For example, in the above-mentioned Chinese case 21, the judge changed his suggested settlement amount to the disputants a couple of times during the two trial sessions. So the

70 Chinese Interview X2013.
71 Xiaolin Peng & Jun Zhang, "*Zhixiao" Hua Cui Hexie Guo ("Case Quality Evaluation" Flower Brings Hamounious Fruit)*, Legal Daily, 11-12-2012, 2012 , at 009; Yizhong Yang, *Shaoxing: Zhua Guanli Qiangduiwu Tizhixiao (Shaoxing: Improve the Management, Enchance the Personal Growth and Upgrade the Case Quality)*, People's Court Daily 007 (2014); Xingjun Zhao, Zi Gong; *Qidong Zhixiaoyuesheng De "Zongkaiguan" (Zi Gong:Turn on the Switch to Upgrading the Case Quality),* People's Court Daily 008 (2014); Yedan Li, *Why Chinese Trial Judges Opt for Mediation*, in Rechtspleging En Rechtsbescherming 221 (Reyer Bass et al. ed., 2015)
72 Chinese Case 39(L).
73 Chinese Case 24(L).
74 For the features and patterns of corruption and informal behaviors of judges, see Ling Li, Legality, Discretion and Informal Practice in China's Courts (2010) (unpublished thesis, Leiden University). See also Ling Li, *The 'Production'of Corruption in China's Courts–The Politics of Judicial Decision-Making and its Consequences in a One-Party State, Law & Social Inquiry* 848 (2012).
75 Chinese Case 20(J).
76 Chinese Case 27(L).

disputant said to the judge, "Last time you told me you would grant me 9,000 yuan if the verdict comes out, so you suggested that I settle with 7,000 yuan. Now you say 6,000 yuan? You are so inconsistent."[77] The judicial mediation activities can last until the moment when the verdict was ready.

The one-shot mediation setting in the Netherlands leads to fewer problems than what happens in the Chinese practice. The judges can be specific without relying on general arguments, and the chance of their later-on change of opinion during the settlement phase of the court session is minimal. As such, unnecessary vague arguments and changes in argument were seldomly heard in these court sessions. But if it happened, it immediately led to a problem. For example, when a Dutch litigant was explaining why he felt coerced into a settlement by the judge, he said: "After the adjournment (of the court session) during which we reached an agreement, the judge made me promise I would stick to that agreement. After that he admitted he was mistaken in his provisional opinion, in my disadvantage."[78]

The above findings from the Netherlands and from China show that judges' ever-changing opinions are detrimental to litigants' perception on judicial mediation.

*Caucuses*

Caucuses undermine the neutrality of the mediation session since one party can impose impact on the judge without the presence of the other party; the other way around, the judge has too much power to interpret messages, define issues, and engineer a result. Since caucus is against the principle of audi et alteram partem, it is forbidden in both countries' trial processes. However, when it comes to mediation, it is another story in the Chinese practice.

We have never observed caucuses in the Dutch judicial mediation practices. As we stated before, this would be a deadly sin against the procedural principle of audi et alteram partem (not only applied in Holland, but also by the ECHR). However, caucuses often occurred in some observed cases of Chinese judicial mediation, and hardly any information was exchanged afterwards. These caucuses were always initiated by the judge, without asking if the parties agreeing with it. The judges often started caucus by asking the other party to step out of the mediation room. The most important strategy used in caucuses is to emphasize the weaknesses of the present party's case. In some judge's' words, he "lowers the present disputant's expectations"[79] by pointing out the weak points of the present party and the strong points of the other.[80] As one judge elaborated, "If the defendant is losing the case, then I ask the plaintiff to give up certain claims to make them compromise."[81] Another judge said, "If the mediation offer has exceeded the adjudication result, yet the obligee doesn't want to give in, then I would say to the obligee, 'If you don't accept the mediation result, I might deliver a verdict that is less.' Or to the obligor, 'If you don't pay this, you might need to pay more or even lose the case completely.'"[82] For example, in Chinese Case 12, the judge kept telling the worker that it might not be easy to get his compensation according to the present evidence, while telling the factory that the termination of a labor contract is illegal, so they have to pay anyway. This technique gave the impression to the disputants that the judge is always talking for the other litigant.

The usage of caucuses heavily sabotages the neutrality of those Chinese judges in judicial mediation. As a disputant said, "One party left the room while the mediator was talking to the other one. The mediation sessions are back-to-back. We don't know what the other party thought. Both parties can discuss face-to-face, but the judge dominates that process. He didn't allow us to meet the other party. We are all protected by the judge and can only meet the other party in a hearing. The mediation process is not so transparent. We don't have adequate information, how can we make a compromise?"[83] According to a lawyer who specializes in labor disputes, disputants often complain about the lack of transparency in mediation. The lawyers said, "Many workers questioned why the judges speak for the other party. Some workers even believe that they are all corrupted. All officials shield one another. Even if the workers reached an agreement through mediation after all, they still don't appreciate what courts do, but think they themselves sacrificed their interests to make a compromise."[84] After caucuses, some workers also echo this concern and have the suspicion that the judges are biased towards the other party.[85]

Dutch judges are inclined to give a nuanced exposé in order to leave room for both parties to settle in their provisional opinions: both parties preferably need space to move in negotiations. But both parties hear the same exposé and judges are - as far as we can see - sincere in what they are saying. Exactly this sincerity makes some judges more reluctant to give a provisional opinion if they think one party is fully in the right: they do not want to suggest otherwise, but cannot leave enough room in their exposé.[86] If insincerity is suspected the reaction of the Dutch litigants or lawyers is negative as it shown by those Chinese cases. A Dutch

77 Chinese Case 21 (O).
78 Janneke van der Linden, *Zitten, luisteren en schikken*, Research Memoranda 2008/5, p.56.
79 Chinese Interview W2013.
80 Chinese Interview P2013.
81 Chinese Interview N2013.
82 Chinese Interview X2013.
83 Chinese Case 1(F). Another example, "I haven't seen the defendant, how can I say if I'm satisfied. The mediation should be held between two parties; altogether, this is what mediation should be". Chinese Case 19(W).
84 Chinese Case 26(L).
85 Chinese Case 26(W) ; Chinese Case 28(W).
86 See also footnote 23.

lawyer, for instance, said about a settlement he felt his client was coerced in by the judge: "The judge presented the arguments of the other party weightier than they were, in our disadvantage."[87]

***Why Some Chinese Disputants Doubt the Fairness of the Trial?***

The procedural issues in the judicial mediation further affect the perceived fairness of the trial should mediation fail. Most existing research studies attribute the judges' potential bias in litigation to the information flows from the previous mediation session to the official hearing. In the Netherlands however, the impact is slight, as the trial phase always precedes the mediation phase, and normally the judges have already come up with a clear vision of the judgement when they are doing judicial mediation. However, we argue there is another important reason why mediation could affect perceived fairness of the trial.

We find both Dutch and Chinese litigants have difficulty in separating judges' adjudicating role from the judges' mediating role. In China, among the 26 interviewees who talked about this distinction, 15 admitted that they did not understand the difference at all. Ten interviewees focused on direct observations of the judges' performance, for example, "adjudication means the parties present their cases with evidence, while mediation means both parties make a compromise, and solve the dispute anyhow"[88]. "Mediation may happen a lot of times, while the trial happens just once."[89] "The judge is serious in a trial, but a bit easy going in mediation… I can feel the difference from her tone and her attitude.[90]" All the interviewees believe that the judges were mediating in their role as "judges", which means their authority was derived from the courts and involved applying rules and possibly adjudicating later.[91]

The litigants' confusion of role-change leads to different consequences. For Dutch litigants, their being fairly treated in the litigation process phase of the court session and the strong connection between the litigation phase and the settlement phase (both during the same court session) enhances their evaluation of the settlement process phase of the court session.[92] On the contrary, the interviewed Chinese litigants brought the procedure problems they experienced during the mediation process to their perception of the whole trial. For the Chinese litigants, it is not difficult to understand why they have even more difficulty in distinguishing mediation from trial, because the mediation and trial processes are intertwined. Some Chinese judges opened the trial processes with an informal chat with the disputants, and closed the trial with more evaluative information. Even if the judges thought they strictly distinguish the trial from mediation by using the mallet in the courtroom or by telling the disputants that they are now having a "trial" instead of "mediation". But for the disputants who are not repeated players in court, they do not know exactly what it meant. Without such a distinction, everything the judges said in court – including informal mediation and formal trial- are perceived as part of the trial process, which of course does not contribute to the perception of the fair trial.

This perception is worsened by caucuses. As said, in caucuses, some Chinese judges would point out the weak points of the present party and the strong points of the other, the present party therefore would form an impression that the judge was putting a good word for the opponent's interest. If the dispute is closed in a judgment, the judgment is delivered and it happens to be against this party's interests, the judges' words during caucus would "verify" the party's suspicion that the judge has been working with the other party. This scenario precisely coincides with what is described by Shapiro, that the dispute resolution triad breaks down to two against one. If the disputants are not satisfied with the result, they feel coerced and disappointed with the mediation process. Therefore, it is almost impossible for the losing party who experienced caucuses to accept any judgment against him, thus the perceived fairness of trial is in danger.

In Dutch litigation there is a lower chance of this occurring since judges point out strong and weak points of both parties only after gathering all information about the case and in the presence of both parties. So if the mediation fails, there is a lesser chance of a verdict that is the contrary to what was said by the judge during the settlement phase of the court session.

**7. Conclusions**

In this article, we provide a more context-based and practice-based understanding and comparison about a single norm "judicial mediation" in two different contexts: a mature legal system that tries to expand judges' work, and a developing legal system where the formal litigation procedure is under construction. Dutch and Chinese judges are both promoting settlement through the skills and techniques that are common in practice, from providing a platform for settlement, evaluative opinion on the litigation related issues, to the efforts on promoting mutual understanding on broader concerns. We try to understand why experiencing relatively similar judicial mediation process, Dutch disputants are satisfied, while the Chinese ones are less, thus to shed the light

87 Janneke van der Linden, *Zitten, luisteren en schikken*, Research Memoranda 2008/5, p. 56.
88 Chinese Case 8(W)
89 Chinese Case 9(W)
90 Chinese Case 20(W)
91 Chinese Case 9(W); Chinese Case 10(F); Chinese Case 11(F); Chinese Case 25(W); Chinese Case 28(F); Chinese Case 31(F).
92 In the Dutch questionnaire we put forward 11 statements about elements of perceived procedural justice during the settlement phase of the court session, such as voice, due consideration and respect. The vast majority of the litigants were positive about all these elements. In the interviews we asked them about their answers in the questionnaire. Hardly no one made any distinction between the two phases. In fact most of the time the perceived procedural justice proved to be based on what was said and done during the first phase of the court session, the phase about gathering information to be used in the written verdict later on.

on how to understand thus maintain litigants' positive experience with in judicial mediation in a developed legal system, as in the Netherlands, and on how to improve it in a developing legal system, such as in China.

It finds, in the Netherlands, the judges are independent and have established reputation, thus even though the judges interests realized through judicial mediation, such as cleaning dockets- known to the litigants- do not harm their neutrality. However in China, some Chinese judges do promote mediation owing to their own interests or the one party's guanxi to the judge. In the mediation process, the litigants' doubt is not mitigated but enhanced through the caucuses and continued mediation throughout the whole court procedure. This doubt is furthermore transited to the disputants' perception on the litigation, since Chinese litigants- similar to the Dutch- have difficulty in separating judges' adjudicating role from their mediation role. They treat judges' judicial mediation behaviors as part of the trial process.

This study sheds light on the following three aspects of our understanding and evaluation of the multi-tasking judge that is becoming a trend in the developed world and elsewhere. First of all, the opinion that judges can absolutely not mediate the cases they are trying is proven unconvincing by the promising results of the Dutch judicial mediation practice. However, it does not mean some Chinese judges as we observed should continue to mediate the same way as they did. The mistrust of the disputants is a combination of the judicial environment, judges' motivation, and how mediation is conducted. The key challenges are on the one hand, judges should not have interests that are realized through the black box-like mediation; on the other hand, judges' behaviors in mediation should be regulated by ethical codes and procedural regulation. Any arbitrariness and the unregulated caucuses will eventually backfire with regard to the litigants' perception on the justice served by the Chinese courts.

Second, to embed judicial mediation, one jurisdiction's context should be carefully taken into account. In the country like the Netherlands, judicial mediation happens in the context that judges are independent without much bureaucratic evaluation, and no documented cases of bribed judges exist in modern history. Our study on the Dutch part showed no loss of the neutrality, even though litigants know that a settlement brings interests -such as cleaning dockets- to the judge.[93] However, Chinese judicial mediation functions in a different context: judges do not only have their own interests of cleaning dockets and avoiding adjudicating difficult cases, but also because guanxi or judicial bribery is an important challenge facing the Chinese legal system.[94] As a litigant, it is impossible to find out why the judge is promoting mediation, for both litigants' own interests, for judge's own interest of closing cases or avoiding making decisions for complicated cases, or for the interests of the other litigant who has guanxi- if not bribery- to the judge . In particular, the repetitive mediation and caucuses enhance the disputants' suspicion that the judges are trying hard to promote mediation because of ulterior reasons, even though in most cases, we did not observe any guanxi attached to the cases. This is the mistrust in the context of the Chinese judiciary, a fundamental challenge that does not face the Dutch judiciary. In this way, similar judicial mediation practices lead to contrasting outcomes.

Next, judicial mediation happens under the shadow of litigation process, and should not deviate from the requirement of due process. Many judges would like to be therapeutic judges, however, our study has shown, litigants do not treat judges as mediators, and they cannot separate the judicial mediation from the formal legal process. This means any "informal" practices happened in the name of judicial mediation, are interpreted by the litigants as part of the formal trial (or, the whole litigant process becomes arbitrary). For example, the usage of caucus in China deviates from the audi et alteram partem, and it eventually sabotages the litigants' perception on both judicial mediation and litigation.

Overall, this article sheds light on our understanding of behaviors in the name of "mediation" global wide. The lessons we learn from the comparison reminds us, when we are evaluating the global trend or try to learn from other judiciaries, we need to put that into a country's context. In particular, more empirical evidence needs to be collected when we are observing informal judicial behaviors in developing legal systems.

93 We did not ask in the questionnaire if the litigant assumed a personal interest of the judge in reaching a settlement. A few times the parties in the interview spontaneously said they assumed that the judge had his/her own interest in a settlement, in terms of reducing the workload, but then the parties nevertheless did not criticize the sincerity of the provisional view of the judge on the case. They tend to see it the reducing of the workload for the judge more as a side effect of their settlement, a nice bonus for the judge, but not an incentive to actually settle. We did ask the judges though, in the questionnaire after the court session, if their efforts to make the parties settle were influenced by the complexity of the particular case. Sometimes judges answered that this influence indeed existed. In the questionnaire the Dutch judges filled in after the court session we asked if the complexity (high/normal/low) of the case influenced the effort they made (high/normal/low) to make the parties settle. Out of exactly hundred questionnaires only 2 times the answer was given that the high complexity of the case made the judge put more effort in a settlement and 3 times the opposite was answered (low complexity, less effort).

94 Ting Gong, *Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China*, 4 China Review 2 (2004); Ling Li, *Legality, Discretion and Informal Practice in China's Courts* (2010) (unpublished thesis, Leiden University); Ling Li, *The 'Production of Corruption in China's Courts– The Politics of Judicial Decision-Making and its Consequences in a One-Party State, Law & Social Inquiry* 848 (2012).