

Mediation as a Component in Land Consolidation

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ABSTRACT

The land consolidation service is now being restructured in Norway. In this paper we discuss three different organizational models which are under consideration: (1) a specialized court; (2) a model structured as an administrative body; and (3) a hybrid. The purpose of this paper is to discuss which of these models provides the best environment for negotiation and mediation for land consolidation officers. Research shows that interest-based mediation provides better solutions for the parties than rights-based adjudication. The paper is based on fieldwork in several countries, literature reviews, and an in-depth study of land consolidation in Norway.

Theoretically, we have used transaction cost theory and the competence perspective. Moreover, we have drawn from resource-based theory so that our analyses have combined four effectiveness criteria for dispute resolution: fairness, efficiency, wisdom, and stability. We found that with court administered mediation the special court would provide the best environment for mediation. The crucial point is that in order for the land consolidation service to be effective, it must retain the opportunity to make decisions when the parties disagree.

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1. INTRODUCTION

Mediation is gaining popularity generally as a dispute resolution technique (Kressel and Pruitt, 1989), and in planning and land use disputes in particular (Rubino and Jacobs, 1990). Mediation, it is argued, can be efficient (Wall and Rude, 1991) and can produce high quality settlements (see Galanter, 1985; Moore, 1996). There is however, limited knowledge about the practice of mediation in land use disputes and in land consolidation. In this paper we focus on three different organizational models for land consolidation: (1) a specialized court; (2) a model structured as an administrative body; and (3) a hybrid. Our goal is to discuss which of these models provides the best environment for negotiation and mediation for land consolidation officers.

In most countries land consolidation is a part of an administrative body with right of appeal to the ordinary courts or a higher level in the administrative body. In Norway, land consolidation courts are organized within the judicial system. As far as we have been able to discover, Norway is the only country in the world that has organized its land consolidation process completely within the framework of its judicial system. The Norwegian model integrates both court power and administrative authority. Iceland had the same system up to 1981 (Nordmann and Sky, 2002). The land consolidation service in Norway was established in 1859 and the land consolidation courts in 1882 (Sevatdal and Wannebo, 2000). Today, approximately 100 judges and the same number of engineers are employed in the courts (35 local courts). The engineers provide the technical services needed by the courts.

We define land consolidation as reallocation of holdings by pooling and redistribution. This definition express the fact that many land parcels are pooled or put together, and from this pool the same numbers of holdings emerge but in new physical and legally-recognisable shapes. At the same time, these new parcels retain their old values, broadly conceived. Land consolidation is normally carried out for all the holdings in a specific, geographically limited – but defined – area. At a fundamental level, the land consolidation process is intended to restructure outdated or unsatisfactory ownership patterns. Any disputes concerning boundaries, right of ownership, right of user, or other matters within the land consolidation area or with outsiders shall be decided by the judgement of the land consolidation court if this is necessary for the purpose of land consolidation.

There are two situations in which mediation is crucial in land consolidation: A) disputes concerning boundaries, right of ownership or right of user in the land consolidation area; and B) decisions regarding the land consolidation plan. Rognes and Sky (1998) report on the extent of mediation in the two situations in Norway. Falkgård et al (2001) give an overview of the setting for mediation in the two situations. Interviews of land consolidation officers in Cyprus show that mediation is important, and in Spain it was said that they needed better methods for mediation in connection with land consolidation (Sky, 2001a). In other words,

mediation is an important task for the land consolidation officers without regard to whether it is organized within an administrative organization or a specialized court.

2. MEDIATION ACTIVITY IN THE NORWEGIAN LAND CONSOLIDATION COURTS

Mediation is the most typical method of settling cases in the land consolidation courts. In 1996, for example, 58% of the cases were settled through mediation in Norway (Rognes and Sky, 1998). In 1997 we interviewed 23 judges regarding their mediation behavior. They described among other things what type of techniques they used and how they mediated. In 2000 we expanded the study with several case studies and participative observations in two local courts (Falkgård et al, 2001). We classified the observed behavior according to the framework of Wall and Rude (1989). They divide the mediation techniques among judges into four strategic styles: logical strategies; aggressive strategies; paternalistic strategies and client-oriented strategies. In addition we have added two types of strategies. First, a technical strategy that is specific to the land dispute setting. All together we found 49 different techniques. In choosing decision making procedure the judge can mediate, adjudicate or combine the procedures. Combination of the two procedures can either be in a mediation-adjudication process where he first mediates and then adjudicates if mediation is unsuccessful, or the judge can mediate some issues and adjudicate some issues. The latter form of combination is most likely to take place in complex cases.

A general finding was a considerable difference between judges in mediation activity. This is not a surprise given that the Act recommends mediation in boundary disputes and requires it in planning issues, but does not specify mediation techniques. Neither is there any formal training in mediation for judges. Their choice of techniques is therefore up to their own discretion given the general boundaries of the judicial system. Rognes and Sky (1998) found some judges act intensively as deal makers in the court, using an extensive number of tactics and varying their techniques across cases. Other judges were more careful, taking on a passive mediation role and only proposing mediated settlement when the stakes were low. The passive mediators argued that it was inappropriate to mediate extensively given their role as judge if mediated settlement was not reached. This is a key issue when we discuss mediation activity in different organizational models. Judicial pressure, can of course, call the judge's impartiality into question (Schiller and Wall, 1981:53-58). Some judges in the Norwegian land consolidation courts expressed their concern regarding playing an active role during mediation, because of the fact that their impartiality could be questioned. To avoid this, some judges—but not many—describe their conduct as passive, particularly in cases where they felt that mediated settlements were unlikely. The more active judges informed the parties directly that their suggestions were an attempt to help the parties reach an agreement which resolved the parties' disputes in more creative ways than a verdict allowed for. In a verdict the judge has to decide based on the demands put forward by the parties. In mediation there is more freedom. This can be illustrated with an example. An owner put stones in the sea in order to make the area for his boathouse larger. After its completion he found out that he had also filled out on the neighbours property. He brought the case to the land consolidation court. The judge soon found out that a verdict, which in this case only can deal with the property boundary, would not be a good solution for the disputing parties. The judge

explained this to the parties and proposed mediation instead. The final mediated settlement in the land consolidation court included a division of the area that was filled out, rights of way to each property, and a clause as to how many boathouses they were allowed to build in the area. A verdict could of course not end like this. Another general finding in our prior research was that the disputing parties were satisfied with a mediated settlement (Rognes and Sky, 2000: 106).

3. ORGANIZATIONAL MODELS

The land consolidation service is now being restructured in Norway. In this paper we discuss three different organizational models which are under consideration: (1) a specialized court; (2) a model in the administrative body; and (3) a hybrid.

In short the *specialized court* follows a normal court procedure in all kinds of decisions, even in matters like valuation and physical planning. The land consolidation court integrates judicial decisions in disputes with planning competency and administrative decisions. The judge must have a special degree from the Agricultural University of Norway after a course of study comprised of a variety of relevant subjects. It is also expected that a prospective candidate for a judgeship will have gained some practical experience as a surveyor in the Land Consolidation Services before appointment. Cases can be appealed to the ordinary courts of appeal or the land consolidation court of appeal depending on the grounds of appeal (see section 61 of the Land Consolidation Act).

The typical practice is to handle land consolidation issues through *administrative bodies*. The administrative body can give statutory administrative orders in, for instance, a boundary dispute within the land consolidation area, and it also has planning competency. The appeal system is different from the specialized court. Decisions in boundary disputes can be appealed to the ordinary court (first level) or to a higher level of the administrative body. Complaints in planning issues are often handled by a higher level of the administrative body and after that, if the parties still do not agree, the ordinary courts.

A *hybrid* system or organization means that boundary disputes (or all kinds of disputes) have to be solved in ordinary courts. The land consolidation issues are handled through administrative bodies. Decisions in boundary disputes can be appealed to the court of appeal. Complaints in planning issues are handled in the same way as in the administrative model.

One of the disadvantages regarding mediation in a specialized court like Norway's is that the judge has different roles. The judge acts as a mediator and as an ordinary judge in each separate case. This distinction is difficult both for the disputing parties and for the judge. A result of the different roles is that the judge mediates less effectively than if he or she did not have to render a verdict if mediation fails. A clearer distinction between the two roles and training in mediation would most likely have a positive effect on the results of mediation. This is an ongoing project in court administered mediation in the ordinary courts in Norway. Mediation is done by a judge other than the one that will render a verdict if mediation fails. The results so far have been positive. A similar procedure in the land consolidation court would be recommended.

Another aspect is that the land consolidation courts formulate and decide their own plans in cooperation with the parties. The ordinary process in planning is that experts formulate the plan while the politicians decide which plan to choose. The land consolidation judge has therefore three different roles which all make the process more effective, but this effectiveness is perhaps difficult for the parties to perceive.

4. CHARACTERISTICS OF A GOOD MEDIATED SETTLEMENT

Susskind and Cruikshank (1987:21) have identified four characteristics of a good negotiated settlement: fairness, efficiency, wisdom, and stability. We will use these criteria in our analysis of mediation in the three organizational models.

One way to evaluate the *fairness* of a settlement is to judge the fairness of the process by which the resolution was reached. It is important that the disputing parties are given an opportunity to express their views, that the process is fair, and that the parties have the ability to affect the final result. What counts most in evaluating the fairness of a negotiated outcome are the perceptions of the participants. The key question is, “Were the people who managed the process responsive to the concerns of those affected by the final decision?”

An *efficient* process is important. A fair agreement is not acceptable if it takes an inordinately long time to achieve, or if it costs several times what it should have. Important issues are the backlog, the length of the court proceedings, and waiting time from the main proceedings to the result for the disputing parties. The last issue is not important when the parties settle in court, because the results in this case are immediate.

What is a “wise” outcome? In a sense, wisdom is only obvious in hindsight. Most dispute resolution processes involve forecasts of some sort, but it may take years before the wisdom of such forecasts and the accuracy of the assumptions upon which they were based can be ascertained. The key to *wisdom* is what has been called “propective hindsight.” This criterion implies that decisions should be of good quality (Susskind and Cruikshank, 1987:28).

Stability is a key attribute of a good settlement. An agreement that is perceived as fair, is reached efficiently, and seems technically wise is nevertheless unsatisfactory if it does not endure (Susskind and Cruikshank, 1987:31). A good settlement must not be based on unrealistic expectations and one must be able to implement it practically.

5. DISCUSSION

This analysis is mainly based on Falkgård (2001). In the analysis we assume that fairness and stability are highly correlated. A stable result is most likely to be understood as fair. In the following analysis we therefore do not go into great detail regarding fairness.

An outcome is counted as stable if it is lived up to and if it is not appealed. The result has to be formed so that it can last in the long-term and is not based on unrealistic expectations. A high frequency of “similar” cases leads to, according to transaction cost theory, the development of procedures that make the process more effective. Each year approximately

1000 cases of all kinds within the jurisdiction are closed in the land consolidation courts, and with 100 judges that means 10 cases for each judge each year. We doubt that this can indicate high frequency. We must add that the size and scope of land consolidation varies from minor adjustments of boundaries between two holdings, to complete rearrangement of hundreds of holdings with planning and investments in new infrastructure. The number of cases closed must be seen in light of this. We hypothesize that the hybrid model will give room for the most efficient mediation techniques. A mediated settlement can give a more stable result than a verdict, because the parties to a great extent can influence the final result. But the process can be dull because of the separation of jurisdictions in the hybrid model. The process in the ordinary courts are also more formal than in the land consolidation court (Falkgård et al, 2001:186). A long lasting process can influence the implementation of the land consolidation plan, but it can also trigger the disputing parties' willingness to negotiate because they know the transaction costs will rise considerably if the case is brought before the ordinary courts.

As we mentioned earlier, land consolidation in Norway is organized in a specialized court, and disputes and planning issues are handled in one organization. The backlog in the land consolidation court is 2.2 years. That is, of course, too long. The Ministry of Agriculture argued in a report (Ministry of Agriculture, 1995) that this backlog existed because land consolidation was organized in a specialized court, that the handling of the different issues was too circumstantial, and that another organizational model would be more effective. Sonnenberg (1986) came to a different conclusion in a report to the European Union. He concluded that specialized courts would increase the efficiency of land consolidation.

The combination of transaction cost theory and competence perspective predicates that it is cost effective to integrate when certain conditions are present, but not in cases when transactions demands tacit knowledge. It is efficient if you expand the existing knowledge base. Transactions that assume tacit knowledge should be solved where they are. The land consolidation court has tacit knowledge regarding the hearing of boundary disputes and land consolidation planning, because surveyors and judges have experience in land tenure and cadastral issues. This expertise is difficult to transfer to the ordinary courts. The majority of all boundary disputes are solved in the land consolidation courts (Falkanger, 2000), and this means that there is a high frequency of these cases (an average of 5 cases per year for each judge) compared to the ordinary courts. High frequency of cases and human asset specificity, at the same time that the results of cases are uncertain, make it more effective to organize the transaction inside the organization according to transaction cost theory and the competence perspective. We can therefore argue that it is efficient to organize land consolidation in a specialized court like it is today, and not as a hybrid model. Examples from Spain (Galicia) show that a boundary dispute can take up to 5 years before it is solved in the ordinary courts (Sky, 2001a).

One of the disadvantages with the Norwegian organization is that the judge has several different roles (judge, mediator and planner) and that can be a difficult distinction both for the parties and sometimes for the judge. We assume that a settlement is more cost-effective than a judgment. The judge's competency in mediation varies because there is very little formal training in mediation. A result of the different roles is that the judge mediates less effectively than if he or she didn't have to render a verdict if not successful in mediation. A clearer

distinction between the roles and training in mediation would most likely have a positive effect on the results of mediation. This is an ongoing project in court administered mediation in the ordinary courts in Norway. Mediation is done by a judge other than the one who will render a verdict if mediation fails. The results so far have been positive. A similar procedure in the land consolidation court would be favourable. One could argue that it is easier to mediate when land consolidation issues are organized as a part of administration because the land consolidation officer can't render a verdict (if that is how the process is organized).

A model in which land consolidation is organized as an administrative body will change the process in some ways. The land consolidation act has to be totally rewritten. We suppose that the act relating to procedure in cases concerning public administration (The Public Administration Act) will be important. The act relating to the courts of justice and the act relating to judicial procedure in civil cases (The Dispute Act) which is central today will be less relevant. Our experience is that the land consolidation procedures will be less formal when organized in an administrative body. We can also assume that there will be a closer relationship between the land consolidation authority and administrative authority. This closer relationship can be helpful in the authorization of land use plans and masterplans which often are necessary before adoption of a land consolidation plan. These are arguments which give support for an increase in efficiency.

There is often little difference between an administrative decision and a judgment. What is important is if the decision is legally binding or not. The other important issues relate to the appellate procedure. Several countries which organize land consolidation as an administrative body have a multilevel appellate procedure (Sky, 2001b:49-50). In Norway there are today three levels.

One of the greatest challenges in Norway is the huge backlog. Can a new organization reduce this backlog, and can the process become simpler within another type of organization? In the model we have named "hybrid" all kinds of disputes have to be solved by the ordinary courts. The land consolidation authority cannot decide when parties disagree. Decisions can be made by the parties themselves by a majority of votes, for example regarding adoption of the land consolidation plan (Sky, 2001b). This is not the case in boundary disputes. A survey from a municipal surveying department is not legally binding for the parties. To get a legally binding property boundary one has to go to the ordinary courts or to the land consolidation court. We assume that it is more efficient, in economic terms, if an organization can make all necessary decisions regarding an issue. This favors the specialized court and to a lesser degree the administrative model.

The introduction of a system with an independent mediator or judge as the first step in the dispute resolution process could be an important way of reducing the backlog. It is obvious that it is not economically efficient to wait 2.2 years before the case is begun in the land consolidation courts. But this is not unique to Norway. We often see longer backlog in other countries (Sky, 2001b).

The combination of transaction cost theory and the competence perspective (see Nelson & Winter, 1982; Winter, 1988) predicts interaction between investments in equipment specific

for production and nearness in competence. This affects the probability for vertical integration because it encourages effectiveness. In relation to land consolidation this means that the combination of a special degree in land consolidation, and nearness in competence, promote quality because in this context both tell us something about competency. The land consolidation courts' jurisdiction covers land consolidation in rural areas, boundary disputes in both rural and urban areas, and valuation in connection with expropriation and exchange of properties in rural areas. The court has long experience in handling these types of cases. In boundary disputes, where the disputing parties can choose between the ordinary courts or the land consolidation courts, the majority of parties choose the latter. We assume that this is because the land consolidation courts produce better results than the ordinary courts. The greater number of mediated settlements also indicates that the parties are satisfied with the quality of the process.

If the land consolidation authority handled only land consolidation issues, and all disputes had to be solved in the ordinary courts, the land consolidation officers could concentrate on fewer issues. We assume that this would improve the quality of land consolidation planning. The disadvantage is that dispute resolution would be time consuming. It is important to note that on average there is a dispute in most land consolidation cases in Norway.

6. CONCLUSION

Our study of the Norwegian land consolidation courts confirms that mediation is an integral part of the judges' work on land issues. The judges mediate frequently, but our study indicates also that judges are in need of mediation training. Knowledge in mediation will improve the mediated settlements and solutions will be easier to implement and be more stable.

What type of organizational model will give best environment for mediation? Without any other changes the hybrid model will be best, but with the introduction of court administered mediation the two other models will give the same opportunities. We do not think that the administrative model or the hybrid model would reduce the backlog. We do, on the other hand, think that the backlog would likely increase because of the number of disputes in connection with land consolidation, and this figure is slowly rising. The crucial point is that in order for the land consolidation service to be effective, it must retain the opportunity to make decisions when the parties disagree.

We do think that a specialized court involving the use of court administered mediation will be the most efficient model for handling land consolidation cases in Norway. This conclusion is based on our analysis of all types of disputes, but specifically because of the difficulty in transferring the tacit knowledge of land consolidation disputes to another organization.

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