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An innovative approach to mediation in the ADR environment

The Italian Mediation Law Reform

Rachele Gabellini

Introduction: the Italian paradox

The growing interest in alternative means of dispute resolution has been much needed in Italy for many years, especially with regard to mediation.¹ In the light of European Union regulations, most recently, EU Directive No 52/2008 regarding civil and commercial mediation ('the Directive') and the broader context of the reform of civil justice, the Italian legislature recently implemented Law No 69/2009 ('Law No 69'). In March 2010 the Italian Government approved and published Legislative Decree No 28/2010 ('the Decree') which, according to Law No 69, definitively sets forth the objectives and effects of the mediation reform with regard to all civil and commercial disputes in Italy.²

The Decree takes a pragmatic approach, by contrast with the utopian debates of the past.³ Given the poor results obtained from pre-existing legislation (mainly focused on limited sectors),⁴ the legislature has approved a more exhaustive and complete regulation by taking into account all the social, cultural and substantial issues that, previously, likely prevented mediation from becoming an established element of the Italian civil justice system.⁵

The Italian mediation reform also represents a novelty within EU member states, Italy being one of the first countries to have implemented the Directive.⁶ Hopefully, the Italian experience will become a precedent for other EU member states.

As analysed below, the aim of the reform is, in substance, to increase the efficient administration of civil justice by referring to the judicial process only if no other dispute resolution method can be pursued.⁷ Its approach is to increase the instruments and methods available to solve disputes 'in support' of the judicial system and to grant access to mediation (and ADR

providers) in addition to — not as an alternative for — the judicial process.⁸

In fact, increasing the number of judges and dedicating public resources to the judicial crisis has so far proved inadequate.⁹ To relieve the overcrowded and overwhelmed Italian judicial system and offer citizens easier access to justice, the legislature creatively included mediation as a third choice — an alternative to the well-known dispute resolution methods: direct negotiation among the parties (voluntary and not binding); and arbitration or judicial trial (both adjudicative and binding).¹⁰

To fully understand the aim of the Decree, we should look at what happened in Italy in the past with regard to the *how mediation was accessed*. The first system for accrediting ADR providers was formally established in Italy in 2007 within the corporate law reform. A number of ADR providers were publicly listed in a register ('the Register') and officially recognised by the Ministry of Justice. Under the corporate law reform, parties could voluntarily opt to attempt mediation before going to court and select one of the ADR providers available from the register. Notwithstanding the expectations, this legislative intervention generated no more than 150 mediations, proving ineffective in leading mediation to flourish in Italy.¹¹

Practitioners agree that the mediation process under the corporate law reform was based on a wrong assumption: that parties (and their counsels) were willing to opt voluntarily for mediation.

In fact, statistics show that voluntary mediations in Italy (including those generated outside the corporate law reform) have not exceeded 3,000 cases so far. In the last ten years:

- fewer than 0.1% of trials pending in court were voluntarily submitted to ADR providers by parties; and
- 80% of the cases submitted to ADR providers ended with a settlement.

The Italian paradox lies in the fact that, notwithstanding the statistical success of mediation (average of 80% of cases settled), parties and counsel did not access mediation to resolve their disputes on a voluntary basis.¹²

To resolve this paradox the legislature began with a mathematical formula. It was determined that the decrease in cases pending depends on the following calculation:

$$\begin{array}{c} \text{Number of mediations performed} \\ \times \\ \text{Percentage of settlements} \end{array}$$

By way of example, if we estimate that approximately 10,000 cases are brought to the mediator's room and that an average of 65% of such cases settle,¹³ then at least 6,500¹⁴ cases may potentially 'migrate' from the courts to the mediator's room.¹⁵

In the legislature's view, the first factor (number of mediations performed by ADR providers) will only increase by regulating access to mediation within the context of legislative reform.¹⁶ The second factor (percentage of settlements) depends on the quality of ADR services and providers.

The 'double-track' model

Given this scenario, the legislature's programmatic intervention was to 'move' at least one million cases pending in court to the mediator's room in the ensuing two to three years. To pursue its goal, the legislature decided to act on a 'double-track' by implementing both factors in the above formula.

Access to mediation was expanded by implementing a complex system that, in addition to voluntary mediation, includes mandatory mediation, mediation proposed by judges, tax incentives and sanctions (discussed below).

The quality of both the process and



practitioners of mediation has been improved. Pre-existing rules under the corporate law reform were reasserted and implemented to assure minimum requirements for accreditation of ADR providers and high levels of training for mediators.¹⁷

... if a mediation clause is included by parties in a contract or company by-laws and mediation is not attempted before starting judicial proceedings, upon request of one party at trial the judge may assign the term of 15 days to commence mediation and the trial is postponed to the end of the mediation process.

Access to mediation: the crisis of courts and the Italian solution

To increase demand for mediation, the legislature deemed it necessary to regulate and apply the mediation process on a broader basis, extending its application to all civil and commercial matters rather than focusing on specific practices or sectors.

Access to mediation is now promoted through the following concurrent means:

- mediation mandated by law;
- mediation invited by a judge;
- voluntary mediation;
- duty of the lawyer to inform the client about the process;
- tax incentives; and
- sanctions in the event of negative outcome of the mediation process.

Quality of mediation: requirements for mediators and ADR providers

To assure the quality of the process, the legislature confirmed the approach taken under the corporate law reform. ADR providers and mediators are subject to continuous scrutiny by the Ministry of Justice. A Register is kept by the latter to certify the accreditation and the compliance of ADR providers under the Decree. In addition, a number of ministerial decrees (the 'Ministerial Decrees') are in the process

of being approved by Parliament to set out the requirements in detail and ensure that ADR providers and mediators carry out their activities (including training) properly.

The Ministerial Decrees will set forth the costs and expenses of mediation and

specific criteria will be established to determine the minimum and maximum items. Clear principles of neutrality, impartiality and confidentiality have been established to maximise effectiveness and transparency.¹⁸

Changes introduced by the Decree

It is worth mentioning in summary the main changes introduced by Legislative Decree No 28/2010.¹⁹

Applicability

The Decree will apply to any authorised private or public ADR provider and with regard to any civil and commercial dispute including international disputes.

Mediation mandated by law

From 20 March 2011 (that is, 12 months from the entry into effect of the Decree), mediation will be mandatory with regard to disputes relating to:

- condominiums;
- property;
- inheritance;
- family agreements;
- tenancy;
- loans;
- lease of business;
- compensation for damages in connection with medical

responsibility, defamation and car accidents; and

- insurance, banking and financing agreements.

The legislature's rationale behind the matters above is the nature of the disputes that in practice arise from

relationships among the parties. Some matters imply long-lasting relationships and a need to safeguard them (condominium, property, loans, business leases). Others involve members of the same family and the need to protect the family circle (inheritance, family agreements). Others may involve highly emotional matters

(damages for medical responsibility, car accidents and defamation). The last group (insurance, banking and financing agreements) is generally intended for mass services and often implies the need to renegotiate terms and conditions on an individual basis. All the above scenarios fit with mediation aims and purposes and the legislature expects that the mediation process will positively and effectively lead parties to resolve disputes through settlement, reducing the need to access ordinary justice.²⁰

Mediation invited by a judge

From 20 March 2010 (the date of entry into effect of the Decree), judges can invite parties to attempt mediation through an ADR provider so authorised by the Ministry of Justice, taking into account the status of the case and the conduct of the parties.

Voluntary mediation

From 20 March 2010 if a mediation clause is included by parties in a contract or company by-laws and mediation is not attempted before starting judicial proceedings, upon request of one party at trial the judge may assign the term of 15 days to commence mediation and the trial is postponed to the end of the mediation process.

**Duty of the lawyer to inform the client about the process**

From 20 March 2010, lawyers have a duty to inform their clients in writing about mediation. In the event of violation, the mandate between attorney and client can be deemed void.

Length of mediation

The mediation procedure cannot last more than four months starting from the date of submission of the mediation request to the ADR provider.

Tax incentives

Any document and act relating to the mediation procedure is exempted from any tax or fee. The mediation agreement is also exempted from any registration fee up to the value of 50,000 Euros.

In the event of settlement, each party is granted a tax credit of up to 500 Euros which may vary depending on the fees paid by parties to the ADR provider. In the event of a negative outcome, a tax credit is granted of up to 250 Euros.

subsequent judicial proceedings. Any information or statement rendered during the mediation process cannot be used as evidence at trial.

ADR providers' requirements

ADR providers authorised and compliant with requirements in the Decree are listed in the Register held by the Ministry of Justice. The requirements and modalities for registration will be regulated by Ministerial Decrees currently under approval. ADR providers can be both private and public entities, including professional bars and chambers of commerce.

Mediators

Mediators cannot work privately. To assist at mediation, mediators must belong to lists of the ADR providers authorised by the Ministry of Justice. To be included on such lists, mediators must attend and successfully pass a training course. The training requirements are regulated by Ministerial Decrees.

- assists two or more parties to find their own agreement for the amicable resolution of their dispute; or
- makes a *proposal* to facilitate their settlement.

The possibility for a mediator to make a proposal (under the second limb) illustrates the peculiarity and distinctive nature of the Italian reform.

There are a number of concerns regarding the extent to which this provision (the mediator's proposal) will apply and affect mediation in practice. This relates to the ongoing debate between facilitative and evaluative mediation — which this analysis will focus on.

The mediator's proposal

When parties are unable to reach an agreement, s 11(2) of the Decree further provides that the mediator:

- has a duty to make a proposal to facilitate the amicable settlement of the dispute, upon the parties' request; and
- *in any case*, is free to make such a proposal of their own discretion, depending on the circumstances of the case.

Formally the parties must accept or refuse the mediator's proposal within seven days of its communication. In the absence of an explicit acceptance the proposal is considered as being refused.

The Decree in its original draft even provided for a mediator duty to make the proposal *in any circumstance in which parties were unable to reach an agreement*. The current version is the result of a vivid debate among practitioners that raised serious concerns as to risks connected with the use (or potential abuse) of such an evaluative mediation style.²¹

Negative outcome

In the event of negative outcome, s 13 of the Decree provides that upon refusal of the mediator's proposal by the parties the mediator can verbalise their proposal by certifying that the parties were not able to reach an agreement.

Should this be the case, if the final judgment in the following proceedings

The possibility for a mediator to make a proposal [to facilitate settlement] illustrates the peculiarity and distinctive nature of the Italian reform.

Mediation agreement

If the parties reach a settlement agreement, the mediator drafts a minute summarising the parties' willingness and intention. The settlement agreement is separately drafted and signed by the parties themselves (and their counsel) and attached to the minutes to form the mediation agreement. The mediation agreement entitles the parties to proceed with any injunctive action if needed.

Confidentiality

The mediator, and anybody working for the ADR provider, is subject to a duty of confidentiality with regard to any information or statement rendered during the mediation process. The mediator cannot testify as witness in

The mediator's proposal

If parties are unable to reach agreement, the mediator has a duty to make a proposal on an explicit request of the parties and, in any case, can make any proposal the mediator deems appropriate in the circumstances.

Sanctions

If parties did not reach agreement after refusing a mediator's proposal, the party winning the subsequent judicial process may be required to bear all the expenses at trial.

Definition of 'mediation'

According to the definition in s 1 of the Decree, 'mediation' is a process in which a third party neutral:



is equivalent to the mediator's proposal, the judge may deny the winning party's entitlement to recover expenses to which they would otherwise have been entitled under Italian law. The winning party may also be required to pay the losing party's expenses.

Even when the final judgment is not equivalent to the mediator's proposal, the judge may still require the winning party to pay their own expenses. Such a decision must be grounded on valid reasons (such as gross negligence, malice or fraud or any other reason that reasonably justifies the sanction).

The rationale for applying the sanction under s 13 is to condemn a winning party who, by refusing a proposal equivalent to the final decision during mediation, has unduly made use of ordinary justice — thereby wasting time and incurring additional costs. The legislature has further clarified that this provision is aimed at preventing a party from using mediation in a way which hinders and obstructs the process without making serious efforts to amicably settle the case.

The legislative intent behind the mediator's proposal

Section 11 of the Decree in its final version was, according to the legislature, grounded on the following reasoning.²²

The aim of the Decree is to promote amicable settlement of disputes among the parties, preferably and mainly through a facilitative approach;

Only in the event that a settlement agreement cannot be reached and facilitated through the assistance of the mediator, the latter *shall* make a proposal if the parties jointly request them to do so;

Besides the circumstances above, a mediator can still discretionally determine whether there are grounds for settlement and make in any case a proposal or exclude such possibility. This provision should be used by the mediator as *extrema ratio* only to prevent obstructing behaviors of one party to avoid settlement.

Evaluative or facilitative mediation?

In light of the above clarifications, it can be inferred that in the legislature's opinion:

- (i) the mediator's proposal should be intended as a safeguard for the mediation process against possible bad faith conduct by the parties; and
- (ii) the parties are always free to refuse the proposal. However, the legislature intends to let parties carefully evaluate their refusal before deciding to go to court, thus providing for the sanctions under s 13 of the Decree.

Option (i)

Considering that a certain degree of evaluation is endemic to all human activities and therefore, in some respect, also to facilitative mediation,²³ it would seem that in the legislature's intention the mediator's effort to structure the process and directly influence the mediation outcome with a proposal should be residual to facilitative mediation itself, as it should be used more as a strategy rather than systematically.²⁴ The solution offered substantially promotes an evaluative mediation style in the event that the facilitative approach proves to be insufficient to reach agreement.

The broad provision under s 11 of the Decree implies that the mediator may adopt both an *evaluative narrow strategy* and therefore may work with the parties by making predictions regarding the reactions of a judge or jury,²⁵ and an *evaluative broad strategy* in which the mediator informally recommends consequences and results of cases, emphasises the parties' interests over their positions, proposes their own understanding of the circumstances and suggests possible solutions in a view to accommodate these interests.²⁶

In substance, in this type of mediation the mediator will be more focused on the legal issues of the controversy than on the parties' personal interests and needs and will be inclined to focus more on a cost-benefit analysis and similar analytic tools for guiding parties to an acceptable agreement.²⁷

Option (ii)

Notwithstanding the soundness of the legislative intention, the concern raised by practitioners about this provision is that it may potentially prevent a spontaneous and sincere trust of the

parties over the process, negatively affecting the validity and effectiveness of the entire reform. Also, any rejection of the proposal may interfere with subsequent judicial proceedings as the party winning at trial may be required to pay all court expenses.

The argument is that, regardless of the fact that the proposal is 'mandatory' (as provided in the original version) or 'discretionary' as now provided in s 11, the voluntary nature of the mediation process can be affected, especially when a proposal is not expressly required by the parties. Much criticism has been raised against evaluative mediation as being, among other things, coercive, competitive and adversarial — and hence incompatible with the goals of facilitation — and not impartial, potentially capable of undermining principles of due process and quality of justice.²⁸

These effects may undermine Italian mediation reform, even if s 11 is intended as an *extrema ratio*. In fact under option (ii) the mediator may discretionally decide to verbalise their proposal if they deem that a party is in bad faith or is obstructing the process. In theory, there is a risk that a party may accept the proposal only to avoid the subsequent sanction when the proposal is not satisfactory, thus indirectly interfering with the party's freedom to choose.

In this respect however, I agree with the doctrine that admits and accepts evaluative mediation, to the extent that it is properly used as a continuum from least interventionist to most interventionist.²⁹ Indeed it seems to me that, rather than pushing the sole evaluative style, the legislature's intention is exactly that of leading the mediation process to a sort of continuum from facilitative to evaluative mediation, which is not limited by one technique or another.

I believe that as a general principle, evaluative mediation should be used — but not as a preliminary strategy. To this extent, and in the light of the Decree, I agree that in Italy the evaluative approach under s 11 may be a solution, especially looking at the cultural barriers to promoting mediation within the civil justice system.

In summary, in my opinion the



approach is acceptable on the assumption that the evaluative style is actually used in practice as *extrema ratio* and the mediator has appropriate experience in terms of legal and business knowledge to give an informed professional and impartial opinion to the parties.

The main question here is how mediation can be perceived as an effective process by users and how users can resort to mediation as a valid, trustworthy and clearly identifiable process.

Some practical tips

Undoubtedly the debate is still vivid in Italy, and at the same time unresolved as there cannot be found a common univocal solution. However, in attempting to provide at least a thoughtful assessment of what would ideally be common ground for the development of mediation in Italy in the light of the Decree, I wish to emphasise a number of practical solutions that ADR providers and practitioners are proposing in light of the Decree's implementation.

To come across the potential risks underlying ss 11 and 13 of the Decree, it is interesting to see how practitioners — including those belonging to ADR providers already accredited — are offering practical tips to face or mitigate the evaluative approach introduced by the mediator's proposal provision.

To avoid the mediator's proposal mechanism turning mediation into a hybrid dispute resolution method which cannot be clearly identified by the parties themselves (thereby impacting the effectiveness and trust of the parties in the entire process), there are a number of interpretations and actions that practitioners may wish to consider. For example:

- ADR providers can provide within their rules that their mediators will not make any proposal unless explicitly requested by both parties. This would ensure a clearer use of the proposal and exclude the mediator's discretionary power.³⁰
- It is also worth noting that under s 3 of the Decree, the subsequent judicial process is affected by the proposal (for example with regard to the sanction) only in the event that the

mediator verbalises their proposal. Rather than excluding the possibility of making a proposal, ADR providers can prohibit mediators from verbalising their proposals unless requested by the parties.³¹

- The mediator's proposal can, in any case, be made according to the offers and proposals made by the parties during the mediation procedure thus excluding the mediator's discretionary evaluation.³²
- Sanctions under s 13 of the Decree would apply in the event that the final judgment at trial is *equivalent* to the proposal refused by the parties. Indeed, it is not yet clear what is meant by the term 'equivalent', especially in cases where the proposal does not include economic solutions only. It is therefore reasonably arguable that this provision will be less intrusive³³ in practice than expected.

Conclusions

The legislature's policy and intent under ss 11 and 13 of the Decree are to some extent logically valid and desirable. However, the effect of the proposal provision on the mediation process is unpredictable. There is undoubtedly a risk of reducing the parties' trust in the quality and validity of the mediation process as a facilitative and voluntary dispute mechanism. However, I think that the novelty of this approach makes it at least worth an attempt.

To bring greater nuance to this debate, the key point is not to privilege one style of practice over another, reducing the debate to little more than facilitative–good/evaluative–bad. Considering that the Decree is already in force, the first step is to assist parties, lawyers, mediators and those looking for ways to resolve their disputes more effectively, to know how to opt for, propose and manage mediation under the Decree. In substance the message is: we now have a broad legislative reform in our hands, as never before. To make the most of it, it should be implemented in the most practical and useful way possible.

More generally, it is also worth noting that there are high expectations in Italy of this reform — both in



relation to reducing the number of cases pending in court and increasing general awareness of and trust in mediation. The Decree is clear and simple and the legislature has explained the rationale for and expectations of each provision.

For the first time after many attempts at providing a uniform discipline on mediation in Italy, the Decree considers mediation not only as an instrument for managing the litigation crisis but also as a stable tool of dispute resolution in Italy, both within and outside the courts.

Given the cultural intransigence obstructing the expansion of mediation use in Italy to date, the lead of the Italian parliament was undoubtedly a necessary component to any development. By making mediation a prerequisite to the pursuit of civil action in many matters, legislators are effectively promoting the use of the procedure. This is, in the view of many, the only way to overcome the tendency in Italy to prefer the court system as the avenue to deal with disputes, regardless of the extensive time and effort usually involved.³⁴ Furthermore, the reform, along with its peculiarities,³⁵ also attempts to overcome Italy's lack of a modern culture of negotiation, which is the basis of ADR. Legislation, however, is not sufficient for the wholehearted adoption of mediation, the international experience³⁶ suggesting the importance of investing in educational efforts to promote a real culture of mediation.³⁷

One essential requirement for the success of this mechanism is the professionalism of mediators and ADR providers. Only well-trained mediators will be good enough to determine when it is appropriate to make use of the mediator's proposal provision.

It is undisputed, however, that the majority of mediation practitioners in Italy now substantially agree that expanded use of mediation will inevitably come from the implementation of such innovative legislation and that, along with a parallel increase in education for all users, the system will hopefully make the future of the ADR movement in Italy more promising. ●

Endnotes

1. De Palo and Cominelli, 'Crisis of courts and the Italian mediation debate' in Alexander N, ed, *Global Trends in Mediation* Otto Schmidt Publishing 2003 p 213. See also Azzali S and Caruso S, 'The mediation service of the Milan Chamber of Arbitration' 2009 <www.cameraarbitrale.it/Documenti/azzali_caruso_03_mediation.pdf>.

2. Chiarloni, 'Prime riflessioni sullo schema di decreto legislative di attuazione della delega in materia di mediazione ex art 60 della Legge n 69/2009' <www.mondoadr.it>. See also Cassese S, 'L'esplosione del diritto. Il sistema giuridico italiano dal 1975 al 2000' (2001) 1 *Sociologia del diritto* 55-56 and *Il Mondo Nuovo del Diritto* Il Mulino 2008.

3. ArbIT, 'Il decreto legislativo in tema di mediazione commerciale: urge una correzione' 2010 <www.mondoadr.it>.

4. For example under Legislative Decree No 5/2003 (corporate law), Article 141 of the Consumer Code (consumers rights), Law No 262/2005 (financial markets).

5. Italian Journal Review, *Guida al Diritto*, 12/2010, 52; see also Auletta, 'Rapporti tra processo e mediazione' Conference materials Paradigma 2010.

6. The only other EU member state that has implemented the Directive in Europe is Slovenia.

7. Italian Journal Review 'La conciliazione' *Italia Oggi* Special supplement 8/2010, 3-14.

8. Chiarloni, above note 2.

9. De Palo and Cominelli, above note 1 at p 213.

10. Ibid at p 213; see also Harley DP, 'Mediation in Italy: exploring the contradictions' *Negotiation Journal* (2005).

11. Chiarloni, above note 2.

12. De Palo, 'Cross-border commercial mediation: how legislation affects mediation use' <www.europarl.europa.eu/comparl/juri/hearings/20071004/depalo5_en.pdf>. See also De Palo and D'Urso, *Il Manuale del Conciliatore Professionista* Giuffrè 2009.

13. Which is a conservative estimate compared to the percentage of settlements recorded in Italy: 80%.

14. $10,000 \times 65\% = 6,500$.

15. Italian Journal Review, above note 5 at 56; see also Auletta, above note 5.

16. De Palo, above note 12.

17. Italian Journal Review, above note 5 at 56; see also Auletta, above note 5.

18. Italian Journal Review, above note 5 at 64.

19. D'Urso, 'Approvato dal Consiglio dei Ministri il decreto legislativo sulla mediazione' 2010 <www.mondoadr.it>.

20. Informative comment on Legislative Decree No 28/2010 art 5, *Italian Official Journal*, 4 March 2010.

21. Italian Journal Review, above note 5 at 52.

22. Informative comment to Legislative Decree No 28/2010 art 11, *Italian Official Journal*, 4 March 2010.

23. Roberts and Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* 2008 p 162.

24. Alfini, 'Evaluative versus facilitative mediation: a discussion' (2004) 1, 2.

25. Roberts and Palmer, above note 23.

26. See the explication made by Riskin with regard to the four orientations strategies (evaluative narrow, evaluative broad, facilitative narrow and facilitative broad) in Riskin 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed' (1996) 25.

27. Roberts and Palmer, above note 23.

28. See in this respect comments in Roberts and Palmer, note 23 above, 185 and 186, and Kovach and Love, 'Evaluative Mediation is an Oxymoron', (1996) *Alternatives*.

29. Riskin, 'Decision making in mediation: the new old grid and the new grid system', (2004) *Notre Dame Law Review*. See also N Alexander, 'The Mediation Meta-Model: Understanding Practice', (2008) 26 (1) *Conflict Resolution Quarterly*, 97-123.

30. This is for example a solution offered by the ADR Center Rules and Code of Conduct, <www.jamsadrcenter.it>.

31. Italian Journal Review, *Guida al Diritto*, No 12 of 20 March 2010, 68..

32. See AULETTA: "Rapporti tra processo e mediazione", Conference



Materials — Paradigma, March 2010.

33. Italian Journal Review — Italia Oggi — “La Conciliazione” 3 -14; Special supplement No 8 of 15 March 2010.

34. De Palo, above note 12.

35. For example s 11 (the mediator’s proposal), s 5 (mandatory mediation, mediation delegated by judges and mediation by contract).

36. Such as in Switzerland, which offers thorough training in mediation and a number of programs specialising in training commercial mediators. In addition, many international organisations with long histories of dealing with mediation have offices there (see Meier I, ‘Mediation and conciliation in Switzerland’ in Alexander, note 1 above) as well as in the

Netherlands and Denmark (see De Palo, above note 12).

37. Pompei T, ‘La cultura della giustizia e la promozione dell ‘ADR’ in Bonsignore V, *Secondo Rapporto sulla Diffusione della Giustizia Alternativa in Italia* Camera Arbitrale di Milano 2009 <www.camera-arbitrale.it/Documenti/secondo_rapporto_giustiziaalternativa.pdf

BOOK REVIEW

David Bryson

Window Open to the World

Nadja Alexander

International and Comparative Mediation: Legal Perspectives Global Trends in Dispute Resolution series

Wolters Kluwer Law, The Netherlands, 2009

This impressive book, solidly researched and comprehensive in its scope, throws a window open to the world of mediation and light into our own habitation. It makes us think again about how we work locally while existing globally in a fast-expanding and dynamic mediation context. We can forget that mediation is ‘at the forefront of contemporary social and legal development and is finding a place in both physical dispute resolution forums and worldwide electronic-based communities’.

What *International and Comparative Mediation* makes clear is that the much-cited reason for the growth of mediation — problems with the legal system — is myopic, both culturally and philosophically. Mediation is a response to the alienation of legal systems and a lack of social cohesion as much as it is about delays and costs associated with litigation. Mediation reflects an increasing plurality of social values and ‘the changing face of the international business community to include traditional owners of resources, e-traders, more women and

small entrepreneurs’. Its aetiology can be traced in one line through intuitive or information traditions practised in Arab and Muslim countries, Asia, the Pacific and Africa, and emerging in another line via the cognitive scientific or western traditions.

International and Comparative Mediation focuses on three cross-border legal instruments and six national jurisdictions: three countries from the common law tradition (Australia, England and the United States); and three from the civil law tradition (Austria, France and Germany). From regional histories and their interaction with the globalisation of trade and law in the last 30 years, international collaborative initiatives in mediation have grown beyond the borders of nation states and different legal systems have both contributed to and been influenced by the results.

And the results should inform us all, even in relatively ‘mature’ mediation jurisdictions such as Australia. How many of us know about the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters (2008), the UNCITRAL (United Nations Commission on International Trade Law) Model Law of International Commercial Conciliation (2002) or the International Mediation Institute and its focus on international standards for mediator accreditation and mediation practice? Or the centrality of mediation in law reform projects



designed to assist transitional democracies and fragile states to manage disputes?

The book contains an interview between Alexander and Mr Jernej Sekolec, Former Secretary of UNICITRAL. If you do nothing else with this book of over 500 pages, read this interview and discover on the way what ‘dinner party mediation’ is in the context of voluntary versus mandatory mediation attendance! The interview topics range from how the regulation of mediation should be approached given the civil law and common law traditions; cross-cultural aspects of mediation law encompassing indigenous concepts as well as western notions; mediator training; the balance between facilitative and evaluative models of mediation practice; and international business implications. Sekolec explains the three pillars of the UNCITRAL Model Law — confidentiality, party autonomy and fair treatment — and how different legal and cultural systems were interwoven through the efforts to achieve consistency and certainty. The author makes one of her few didactic points on this subject, defining the fundamental question as neither one of diversity at the expense of consistency nor flexibility over form, but rather decisions about which