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# Mediation in Europe at the cross-road of different legal cultures

*edited by*  
Antonello Miranda

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## Preface

ANTONELLO MIRANDA

Mediation has been increasingly recognized in a great number of Countries as an important technique to settle disputes arising between people coming from different cultures, traditions, religions and juridical systems and so, professionals, must be now be very well proficient.

In addition, mediation system is strongly recommended by EU according to the Dir.IP/2008/52 that obliges Member States to encourage the training of mediators and gives every Judge in the Community, at any stage of the proceedings, the right to invite the parties to have recourse to mediation if the Judge deems it appropriate.

But mediation is usually “legally” defined as

the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. Mediation differs from arbitration in which the third party (arbitrator) acts much like a judge but in an out-of-court less formal setting but does not actively participate in the discussion. Mediation has become very common in trying to resolve domestic relations disputes (divorce, child custody, visitation), and is often ordered by the judge in such cases. Mediation also has become more frequent in contract and civil damage cases. There are professional mediators, or lawyers who do some mediation for substantial fees, but the financial cost is less than fighting the matter out in court and may achieve early settlement and an end to anxiety. However, mediation does not always result in a settlement<sup>1</sup>.

Furthermore if we look for a synonymous we find that “alternative words” for mediation are: adjustment, adjustment of difficulties, arbitration, conciliation, finding a middle course, interference, intervention, intervention to facilitate a compromise, negotiation, negotiation process, parley, settlement of difficulties, settlement of dispute.

As a consequence it is obvious that it is practically impossible to give an unambiguous definition of mediation and the institute in itself may be declined in different ways and shapes according to the different approaches of researcher, practitioners, lawyers, psychologists and so on; and of course of the different legal systems and legal traditions.

1. Copyright © 1981–2005 by Gerald N. Hill and Kathleen T. Hill.

This is particularly evident if we look not only at the “history and the origin” of the mediation but also at the last Directive on mediation: in my opinion the Directive uses the word “mediation” in a “non-technical” way or in a common sense meaning so that it can include all the different alternative disputes resolutions systems diffused in the Member States of the UE.

The principal aim of the E.U. research project EMEDI@TE is to find the guidelines and common standards (if any...) of “mediation” in Europe: this is of course possible only if we may study and compare the real and practical application of mediation in the different legal system but also, as I said, the different meaning and approach to the culture of mediation that each society had.

According to the project our research group realized a interactive web site ([www.emediate-justice.eu](http://www.emediate-justice.eu)) and this first edition of the “state of art” of the research on mediation that, through the comparative and multidisciplinary studies, will help not only to set common standards for mediation inside UE but also share the know-how among professionals from EU countries in the field of ADR, improving also, we hope, the exchange of information and networking among them.

I think that the added value of this book consists in the contribution of so many different researchers each of them with their background and cultural and professional experience: the multidisciplinary approach means that we can read and immediately compare the different ideas of mediation and the different problems that mediation may meet, approaching this phenomenon not only from a narrow legal point of view but also from the point of view of the real society.

In this way, this research contributes to create a genuine European area of “soft law” in civil matters where ADR system is a considerable instrument to prevent disputes arising even between people coming from different cultures, traditions, religions and juridical systems, helping individuals to assert their rights throughout EU in a more responsive way avoiding costs and traumas.



# The Origins of Mediation and the A.D.R. tools

ANTONELLO MIRANDA

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## 1. Origins and basis of (mandatory) mediation

“Googling” on the mine of not always true or truthful data and information, it is easy to find thousands of websites on “mediation”.

The search of the English word “mediation” in any search engine gives at least 22.800.000 results against the “only” 1.200.000 given by the Italian word “*mediazione*”. So, it is possible to learn, through the well-known but often untrustworthy and scarcely verifiable “Wikipedia”, that this “activity has been carried out since ancient times”.

Historians assume that earliest cases go back to Phoenician commerce (even though its use we suppose it was also used in Babylon). Similar cases referring to mediation have been found in ancient Greece (where the “non-marital” mediator was known as *proxenetas*) and also in Roman society.

The Romans called mediators with various names such as *internunciarius*, *medium*, *intercessor*, *phlantropus*, *interpolator*, *conciliator*, *interlocutor*, *interpres* and finally *mediator*. In some cultures, the mediator was a “sacred” figure worthy of special respect and whose role sometimes overlapped with that of the traditional “wiseman” or “chieftain”.

I have to admit that, notwithstanding the cautious phrase “this article may require cleanup to meet Wikipedia’s standards” and the total lack of bibliography (it refers to historians without mentioning their names or works) the article on “mediation” from Wikipedia is rich in information and ideas. Little or nothing is, however, said about the “social” origins and features of this institute that is, today, a real phenomenon (the search on “online mediation” gives 8.000.000 websites).

It is certainly important that in Roman Law (and in Latin) there are references like the above mentioned ones because in our legal tradition they

represent an original and clearly articulated reference point: the expressions used, indeed, let us immediately understand that mediation may assume many forms and contents.

It is easy and comes as no surprise, anyway, after talking with any expert on Roman Law, to discover that examining “the sources of Roman Law” everything is foreseen and nothing new exists. However, perhaps because it is in fashion or because something more about “non-Western” countries (if this term has any meaning) is today again known, it is not rare to find authors who attribute the authorship of mediation to this or that particular country and especially to China (and India).

We can thus read in an article by Cao Pei<sup>1</sup> that, in China, references to mediation go back 4000 years when Shuen, a king mythicized since the earliest history, reigned over a community of the Yellow River. In this community

people living in the mountains quarrelled about the borders of their land, people living beside the lakes argued about the ownership of their houses, and people living along the rivers made and sold pottery of very bad quality. In order to solve these problems, Shuen himself went to each area to farm, to fish, and to make pottery with his people. After one year of his instruction, the mountain dwellers started offering their lands to each other; the lakeside residents started conceding their houses to each other; and those living along the rivers started making and selling pottery of a very good quality.

Cao Pei’s study continues with an interesting reference to the Confucian thought that usually influences the Chinese legal tradition and in particular is perceived by imperial officials. Wu You — writes Pei — who was an official of the Han Dynasty (206 BC–24 AD), even having the power to decide, used to retire in meditation if there were conflicts among the people subject to him

to reflect on his negligence and his responsibility, since he thought that if he had fully and properly taught the principle of ethics to his people, they could never have argued or competed one against another.

Also in the Ming Age (1368–1644 AD) it had been established that every village must have a “Hall of shining reason”, a place where the most elderly and wisest men could listen to the inhabitants’ disputes and before deciding they could mediate and convince parties to find a peaceful and shared solution.<sup>2</sup>

With regard to the Qing dynasty (1644–1911), the last before the final “con-

1. C. PEI, (1999), pp. 32–35.

2. C. PEI, (1999), p. 33.

tamination” with Western systems, a complex and articulated procedural system based on the “three steps of mediation” had been foreseen:

- i) a private agreement before the law suit (e.g. requesting for the intermediation of relatives and the village leader or elder etc. was encouraged and generally foreseen by local customs. If the dispute had been “mediated” and the agreement had been reached, the latter was definitive and of course legally recognized).
- ii) the order to send the dispute to the village leader, chieftain, head of the household, elder of the group etc. so that they could mediate between parties aimed at avoiding “unnecessary and useless causes”.
- iii) the mediation carried out by an imperial official was a very residual hypothesis to which they resorted when the first two steps had not been successful. In these circumstances, the official exercised all his authority and prestige inviting the parties to reason and, however, to reach an agreement.

The reference to the ethics of behaviour and the desire to resolve disputes, or better to the evidence that if one behaves “well” no disputes arise because in the end it is a duty to recognize the other’s reasons (if correct), are constant in the history of the Chinese legal tradition and generally in the Eastern tradition, even though — one must admit — in practice the Ethics referred to were not respected so much. It should also be noted, however, that despite the very long period of time the social structure of China and the East in general had remained more or less the same just as particular values — sometimes very different from those of today and to which we refer in the West — had remained strong and deep-rooted.

According to Confucius, harmony represents the ideal social order because there are no disputes, since everyone behaves rightly. There are disputes, on the contrary, when in that social group the ethics of relations is not firm and moreover “someone” behaves “incorrectly”: this explains why to have a dispute or a law suit is considered unseemly and shameful if not immoral.<sup>3</sup>

It is thus obvious that these principles

were derived from a stagnant, conservative social outlook. In keeping with this idea, the governor would tend to preserve the small-scale farming economy, the social

3. In our country, where certain social groups often consider it even “offensive” to apply to the Court in order to resolve a dispute, according to me the reason does not lie in respect of morals and ethics, but rather in a very negative idea of the state and the power, that makes citizens not apply, to get justice, to those who are seen and perceived — rightly or wrongly — as a kind of oppressor that is poorly tolerated, or as a power that is “distant” and foreign.

structure, and the position of the emperor, rather than pursue any development of society, as the feudal imperial reign had little magnanimity and little flexibility. This social philosophy presents a striking contrast with the Western idea of civil law. The latter would rather indemnify individual rights and create new social relations in which to promote vigorous economic and social development.<sup>4</sup>

As a matter of fact, considering the numbers, after the growth of the market economy and the modernization (or “Westernization”) of the legal system, the use of mediation has certainly been reduced although the tradition is still very strong.

The Italian doctrine has noted this process and Cavalieri, for example, says that today if

it is true that with regard to the law the cultural background of a Chinese, Korean or Japanese is almost similar and certainly different from the background of a European or American citizen, and that in any case oriental languages cannot reproduce the refinement of the western legal lexicon, it is also true that both the procedural rules currently in force in the East Asian countries, and the assumptions or principles from which these rules in general move are today similar to the Western ones. [...] The principles, the institutes, the techniques, the language and the formalisms of law, the methods of teaching and selecting jurists, the criteria to organize legal studies, to draft contracts and to establish sentences, and in general all the main juridical components are increasingly similar or even identical.<sup>5</sup>

Nevertheless, the introduction of these elements — as often happens in transferring rules — results in importing “defects” (and qualities), since when laws increase and the forensic–judicial system evolves there is consequently an increase in conflicts and disputes as well as an increase in proceeding costs and duration (and an exponential increase in the roles and fees of lawyers, legal advisers and notaries). This results in a very great risk for the Civil Law systems, that is to widen the gap between the real society and the society of laws, between the society of law and that of abstract rules.

It seems then that modern China has at least partly forgotten Confucius’ teaching:

If you direct your people through laws and rule it with penalties, the people will disobey and will not be shamed of doing so; if you direct it with virtues and rule it with rites, it will feel shame and obey the rules.<sup>6</sup>

4. C. PEI., (1999), p. 35.

5. R. CAVALIERI (Ed.), (2009), pp. 11–12. Note that, as highlighted by Cavalieri himself, in the modern Chinese civil law there are very few references to the institutions of the Anglo–American Common Law system, if we consider that the implementation, although mediated by Japanese Law, was inspired by Franco–Germanic Law and so it is of a *latu sensu* Romanistic nature.

6. R. CAVALIERI (Ed.), (2009), p. 18.

It is however interesting to underline that, in the resolution of civil disputes, conciliation entrusted to the People's Committees in the city quarters and villages is still foreseen today, and above all the "informal" conciliation of the basilar social nuclei where solidarity, social community and the unity of social groups are still more important than the sterile and aseptic (however "impartial" and "blind" they may be) enforcement of laws.

The consideration is that « when a legal system tries to bridge the gap between law and real facts and tries to protect both the material interests of individuals and the emotional perception of society, mediation with its principles of Eastern Philosophy may still have a role in balancing of these interests ». <sup>7</sup> And this is the lesson that, perhaps, we should learn too.

## 2. The mediation in the Common Law experience

This study, focusing mainly on the English judicial experience (or "new British" to use an expression which, belonging to the "age of Blair", is still very common) started by dealing with mediation in the Far East not only because mediation seems to have originated there, but rather because it has been highlighted that the importation of judicial "technics" and structures of civil law systems has resulted in a gradual rejection of mediation (mandatory in fact) and a corresponding increase in litigations.

I am not absolutely asserting that where there are rigid legal rules disputes increase and controversies are facilitated; I just want to underline that often the legislative production — especially if imported from different legal systems with different social schemes and political necessities — produces the opposite effect when it aims at regulating social relations abstractly even through forms that are as general and abstract as possible. This gives a large margin for interpretation and application by analogy on one hand, and depends for its effectiveness on the unpredictable fate of the process and procedural machine rather than on the accuracy and rightness of its predictions and its consonance with society. The issue of access to justice and of the judicial system efficiency is, whether we like it or not, a sore and heated point of the question on which we may well measure the difference between "civil" and "common law" systems.

In this sense, even mediation (especially mandatory) should be analysed with regard to the justice access and efficiency. Of course, I do not refer only to the evident and unnatural "duration" of trials, but to the whole context of justice access from the standpoint of both "intrinsic" and economic costs such as those due to the uncertain outcomes, those due to procedural regu-

7. C. PEI, (1999), cit., *ibidem*.

lations that can modify the real datum<sup>8</sup> and so on including the considerable social costs due to the alteration in the relationship of trust between society and justice and, therefore, between society and institutions.

It seems that the above observations have not, however, inspired our legislators when providing substantial legal reforms and it seems to me that even for the law on “civil mediation” our legislators have focused more on reducing the number of disputes than on encouraging and facilitating a real mediation.

This appears clear when the legislator states that the mediator can “propose” a solution which parties, evidently, have not agreed on up to that point, and which will probably displease both, increasing the risk of recourse to the ordinary trial and giving society the perception that mediation is a “first instance” and that the mediator is a sort of “lower court judge” or a “justice of peace”.<sup>9</sup>

If we then compare mediation and its evolution among the alternative dispute resolutions (ADRs) in those countries where they have been more successful, especially in the Common Law legal systems, we will realize that the success of mediation is proportional to the ability of the mediator to get the parties together, rather than to propose/impose a solution.

In these countries, indeed, mediation is suggestively at the start of the Qing Dynasty scale where the private agreement, before the court action resorting to relatives or the clan leader, village elder etc., was encouraged and usually foreseen by local customs and above all considered important and effective for the mediator authority.<sup>10</sup>

As briefly shown later, in some of those countries mediation, even though it is successful, clashes with the general reluctance to negotiate and the

8. With regard to our legal system, I think, for example, of the rules on evidence that can sometimes alter the reality by sacrificing the right to the rules of justice: e.g. the case of the holographic will whose authenticity has to be given in judgment by who gets advantage from it and not by those who simply “doubt” the holography of the document. Thus, the strange consequence is that since it is often impossible to verify the holography (no handwriting expert can be really sure of the author of a paper. He/she can only be almost certain, but it depends on the quantity and quality of the testable and comparable material). This leads to an annulment — without referring to technical terms — of the will and a violation of the deceased’s intention. It is not by chance that a will is not recognized as authentic, even though it is almost certain that the counterpart who is unable to demonstrate the authenticity of the will — ends up by “capitulating” and reaching an agreement.

9. With the risk, according to the Neapolitan tradition that as my father reminded me, to “end up as the peacemaker”, basically in proverbs, you know, there is a grain of truth, and if you say “between husband wife not to put a finger “perhaps there might be some truth.

10. For example, at the beginning of the modern age in Sicily examples of “social control” were exercised by the social group of the litigants. Once a Professor of Modern History told me about a case involving a married couple about the exercise of powers on their children and on their education. When the father questioned the housewives of the neighbourhood on the “legitimacy” of their mediation on the matter, they answered that they were members of the “vicinaggiu” (neighbourhood), that is the social group interested in resolving disputes.

more effective and “close felt” is the ordinary court system or the ADR private one, the less the parties resort to mediation that, instead, becomes “mandatory” in emotionally delicate situations such as those referring to family and inheritance, or however the “personal” and “emotional” ones.

From research on “ARM” or Automatic Referral Mediation carried out some years ago by Professor Hazel Genn<sup>11</sup> it has resulted that in England:

- a) In around 80% of cases, one or both parties objected to being referred to mediation;
- b) When parties were called on to explain their objections to a judge, judicial pressure was unlikely to persuade them to mediate;
- c) Only 14% of the cases initially referred to the scheme actually ended up in mediation;
- d) The settlement rate followed a broadly downward trend over the year, from 69% to 38%;
- e) The majority of cases in the ARM scheme settled out of court anyway, without going to mediation;
- f) In cases where mediation took place, but which did not settle at mediation, parties found that they added £1, 000 — £2, 000 to their costs;
- g) Parties who settled during mediation were generally positive about the process;
- h) Parties who failed to settle during mediation complained about compulsion, pressure, and the risk of revealing their hand to their opponents. They also criticized the hot and cramped mediation rooms at the court;
- i) Judicial time spent on mediated cases was lower, but administrative time was higher.

In recent years the English scholars of mediation have raised the question as to why the parties are reluctant to undertake “voluntary” mediation. And the conclusions of most of them are largely in line with the above statements. The efficiency and effectiveness of judicial access (as broadly defined) and the existence of effective ADR methods allow parties to use mediation when the “emotional” involvement is the main element of the dispute and where, for this reason, a less rigid, formal and strictly “judicial” approach is required as well as where the ability and authority of the mediator is equally important.

11. G. DAME HAZEL *et al.*, (2007).

### 3. The alternative dispute resolutions in the Common Law systems

To better understand the role of mediation, it seems appropriate to set it, although briefly and obviously summarily, in the context of the Common Law ADRs and in particular in the English system that is its model.

It should first be said that, although generalizing and playing on an uncontrollable datum, society considers the judge as an arbitrator and an “oracle” of the law, as the one who, being an ordinary citizen and equal among peers, under mandate of the parties and with the support of his/her lawyer colleagues, decides who is really right or wrong, by using as much as possible his/her common sense and becoming interpreter and spokesman of common feelings, since he himself is the personification of the ordinary man.

This “spirit” of the Common Law is often incomprehensible to continental jurists, but it is also at the basis of the good relationship between citizens and the judiciary. The citizen, knowing that the judge will understand his/her requests and will consider them with fairness, reasonableness and common sense, places his/her confidence in the rapidity and reality of the decision and does not need to look elsewhere for alternative ways to solve controversy.

Of course, the freer the judge is to rebuild the system and to issue up-to-date if not new rules, the better this mechanism works; the less necessary it is to resort to ordinary courts and in particular to the high degree of judgement the better it works; and it works still better when the judge knows he can comprehend, at a given historical moment, and interpret correctly the feelings and needs of society.

The first condition is satisfied by the system. The second condition is satisfied by the structural division between ordinary and special courts that are outside the system and have particular competences, and the distinction between the higher courts (i.e. House of Lords, Court of Appeal and High Court) and the lower ones.

The third condition is fulfilled by the particular mechanism of selecting judges, among those who, for their experience in the field, offer the best guarantees of professionalism and above all stability. Thus, not only are judges of higher courts chosen among the barristers with 20 (or usually more) years of experience, but also the judges of lower courts, coping with 98% of criminal and civil litigations, are chosen among lawyers and solicitors with at least 10 years of forensic experience.

In concrete terms, the judges have only forensic origin and experience: judges and lawyers, even though they have different functions in the administration of justice, belong to the same professional and social order, and above all to the same “class”. The judges themselves maintain their con-



nection with the legal circles and the Inns of Court they belonged to, and where they had the opportunity to start their legal practice and continue their legal career.

It should be added that, even today, a considerable part of “solicitors and barristers” have no degree or have studied disciplines other than law: their education is therefore mainly based on a long apprenticeship and on the deep knowledge of the concrete questions submitted to them.

As Judge Taylor said

if judges are not chosen among lawyers who for more than twenty years have been involved day by day in the problems of people of every rank and social class, where should they be found?

In a case system, embodied by the English one, where the use of “reasonableness” is — as above said — almost constant, it is obviously unthinkable to entrust the power of decision on disputes to those who lack a long and concrete experience so becoming effective and sensitive interpreters of the community requirements and needs.

The judge, or rather the judicial system (that as above mentioned includes the important work of barristers and solicitors), is not conceived as an “antagonist” or as the representative of a cold and distant “power”, but as one of us, “particularly wise, well-educated, authoritative and able to suggest the best solution for both litigants.

Moreover, the system is characterized by a large group of “lower” courts that, based on the authority of the judge, on his/her broad education and common sense almost always, succeeds in meeting the decision requests. In this apparently idyllic but certainly functional context, it is understandable why, the ADRs have developed and been accepted slowly.

The context is, however, different in the United States, where the phenomenon of ADRs is certainly and more closely related to a particular judicial and decision-making system: we should also remember that, even in civil cases, the “jury” (that is a group of non expert and untrained people) always issues the verdict and determines the quantum. Thus makes parties — and often the economically stronger party — prefer an agreement or transaction rather than run the risk of suffering an emotional decision that is not technically pondered. In addition, an important role is played by the activity and strength of different lobbies that are in contrast with each other, from the industrial to the consumer one (and their powerful lawyers) and so on.

If in the United States the tendency to use alternative dispute resolutions is due to special needs owing to the judicial system and to the education and selection of the lawyers, in England and, generally in the Common Law

world, it is fundamentally due to the need for cost reduction rather than for rapidity. According to Palmer and Roberts, “ADR offers to sustain disputants who seek to recover control, disengaging themselves from unwelcome relationships of dependency with legal professional and leaving themselves free to construct more satisfactory and less costly outcomes.”<sup>12</sup>

As already said, the English system has answered to the needs for rapidity and concreteness through the subdivision between “ordinary” and “special” courts, “low” and “high” courts. Special courts are by definition alternative to ordinary courts and they are established to deal with particular cases.

Three kinds of special courts are known:

- a) Courts of Special Jurisdictions, viz. “Industrial Tribunals”, Employment Appeal Tribunal, “Naval Courts”, Criminal Injuries Compensation Board and so on, all with special jurisdiction;
- b) Administrative Tribunals such as “Agricultural Land Tribunals”, “Land Tribunals”, “Tribunals of the National Health Service”, “National Insurance Tribunals”, “Rent Tribunals” and “Immigrant Tribunals”;
- c) Domestic Tribunals or tribunals for the internal justice of professional bodies, associations and unions, such as the “Medical Practitioners Tribunal Service” “Solicitors Disciplinary Tribunal”, “Forensic Disciplinary Tribunal” and “Trade Unions Disciplinary Tribunal”.

As easily understandable, most of the litigations are resolved by these bodies that structurally collaborate with the ordinary justice, without coming into conflict with it. Their value lies in the simplicity of procedure and discussion that are totally informal and in the rapidity of decision that is very effective since it specifically refers to the needs and customs of those “social groups” of litigants.

On the other hand, there is the distinction between higher and lower courts. The latter, such as the Magistrates’ Courts and the County Courts are designed to do the “dirty work”: to deal with small issues that are, however, very numerous. Consequently there is the need for fast and plain procedures on the one hand, and a reasonable number of suitable judges.

The former, that are well known, are on the contrary the only ones that can set “precedents”. And, dealing with disputes that, although of interest and importance are reduced in number, do not require particularly plain procedures but lawyers skilled and above all “honest” as well as a small number of good judges.

Unlike our legal system, there are about a hundred judges in the ordinary courts, for about 58, 000, 000 civilians (a population numerically very

12. M. PALMER & S. ROBERTS, (1998), p. 45.

similar to ours). Assuming that British people “quarrel” at least as much as Italians, it is clear that in the UK the function of “filter” is carried out by the lower courts that, as already said, are in fact “alternative means of dispute resolution”. Together with the Circuit Judges and the lay justices of the peace (even chosen among non lawyers), these courts solve over ninety per cent of both civil and criminal disputes, allowing in practice higher courts to deal with those (few) disputes which really deserve to be discussed in detail.

Obviously, all that glitters is not gold. The British system is today suffering from the issue of the high costs of justice. Judges come from “advocacy” and therefore they are the most talented and well educated among lawyers. The latter, in turn, to win in court have daily to cope with those former lawyers who are now judges and this results in a constant updating and fierce competition. This causes very high barristers’ fees that are slightly mitigated by a system, although imperfect, of legal aid.

From this, the request was born for new forms of ADR that substantially aim at avoiding disputes by preventing them, and above all that would diminish transactional costs. There are four main ADRs in the Common Law system: arbitration, conciliation, mediation and Ombuds.

I will deal with them briefly, describing effectively and in detail the operability of the last two that from a comparative standpoint appear particularly interesting for their peculiarities.

### *3.1. Arbitration*

Arbitration is such a well known institution that it would be superfluous to examine it in detail here. Basically in the English system, it does not really differ from our counterpart institution, re-proposing vices and virtues. Nevertheless, it should be said that this institution has not been very successful with regard to simple and less important disputes. As a matter of fact, one of the weaknesses of arbitration is represented by the high costs often handled by the parties. In a system as fast as the English one, the rapidity of arbitration is not considered important and consequently does not make it a “tempting” alternative resolution.

However, the system has recently developed a more “economic” sub-species of arbitration, the mini-trial. This is a composite form of negotiation, mediation and arbitration. Parties shall, by common agreement, appoint an arbitrator who will only direct the procedure, without judging it. After the “advisors” of parties expose the issues of the case, the arbitrator expresses a kind of opinion indicating the way to follow for a possible transaction.

As already said, however, apart from the classic international arbitration, this tool is not widely used. Some signs of novelty, without going into

details beyond the aims of this work, come from the so-called “electronic arbitration” that is among the on-line arbitration forms spreading through Internet.

Surely, arbitration is more favourably considered in the United States, where notwithstanding the existence of unusual, rather fanciful, kinds of “private” arbitration, (I mean the so-called High-Low arbitration in which, without informing the arbitrator, the parties agree to the range in which the award must fall, i.e. a minimum and a maximum within which the out-of-quota award will be given; or the “Baseball” arbitration in which each party proposes a monetary award to the arbitrator who will choose one of them without modifying it), a procedural rule has been recently introduced by the “Alternative dispute resolution Act” of 1998. This rule, after placing among the ADRs “any proceeding or procedure in which a neutral third party, other than the competent court, participates to facilitate the dispute resolution through instruments of neutral evaluation such as mediation, minitrial and arbitration”, “authorizes” each district court of the United States to permit the use of ADR procedures in any civil case”. In addition, “the Law requires the parties to the dispute to consider the use of an ADR procedure”, also establishing that each court shall provide them with “at least an alternative dispute resolution procedure”.

For its part, during the approval of the above-mentioned Act the Senate had stated that:

- 1) “alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements”;
- 2) “certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently”;
- 3) “the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs”.

### 3.2. *Ombudsmen*

A significant method of alternative dispute resolution developed in the Common Law system is the recourse to the ombudsman.

In England, ombudsmen represent a very large group, destined to grow thanks to the success that this institution of Swedish origin has been having. In addition to the well-known “Ombudsmen” (Defenders of the People) there are the Financial Services Ombudsmen that are the banking ombudsmen (to protect the relationships between bank and customer), insurance (to protect the relationship between the clients and the insurance companies), financial (to protect the relationship between investors and financial intermediaries), and legal ombudsmen whose function is to assist and protect people dissatisfied with their lawyers, those who have reason to complain about the work of their Lawyers (who — as well-known — in England have functions that in our country are traditionally reserved to notaries, and however not limited only to defence or counsel in legal proceedings).

The fortune of ombudsmen is due to the low cost, flexibility, rapidity and simplicity of their decisions and procedures that both attract common people, industry, capital and government and characterize the institution if compared to the judicial system or the arbitration itself. Moreover, this is possible because most of the issues presentable or presented to the numerous categories of ombudsmen are matters of scarce economic value, even if not of limited importance and interest.

For example, some believe that most disputes, involving solicitors, are due to the lack of consultation with clients and the resulting lack of answers to the latter’s needs; those involving barristers, are due to the “rudeness” and “intractability” in extrajudicial relations with clients. These issues are not, therefore, related to the professional abilities, or to possible compensations for damages caused by professional negligence, but to issues in which the role of the legal ombudsman is considered effective to resolve cases placed “under the threshold beyond which common people think it is appropriate to turn to the courts”.

Another strength lies in the simplicity and concreteness of ombudsmen’s decisions, not given with absolute and uncontrolled discretionality. People say that the Ombudsman is neither a judge, nor an arbitrator, nor a conciliator, nor a mediator. He/she does not reach a right decision from a legal or procedural standpoint, he/she cannot “fire from the hip”, that is he/she cannot simply decide off the cuff, but as his function is to determine or suggest a compensation, a certain grade of accuracy, reliability, responsibility and common sense is required.

The strength of the decisions issued by Ombudsmen is given by their

ability of persuasion towards parties, that are those, who interested in avoiding lengthy and complex disputes regarding their professional behaviour, agree to submit to an ombudsman's judgment. Substantially, for the "great powers" (contractually and economically speaking) it is convenient to take the requests of their clients into account, by providing or resorting to a "problem-solving mechanism that is external and unrelated to the parties, ready and quick in providing an unbiased and equitable solution, reasonably satisfactory and at the same time non bureaucratic and without the unavoidable costs of the ordinary judicial remedies".

Note that the ombudsman's decision is binding only on the strong contractor since the client may always resort to ordinary justice. This allows the ombudsman himself, although "salaried" by the strong contractor, to be actually free and then to propose the most favourable solution to the client.

No company, indeed, would invest on such an apparatus if the ombudsman does not succeed in reaching the hoped results, i.e. the reduction of litigation and costs. And on the other hand, no client would turn to the ombudsman if even he/she vaguely suspected the "partiality" of the arbitrator, which would defeat the real purpose of the institution itself.

### 3.3. *Conciliation*

If arbitration is not so attractive for the public at large, conciliation seems to be a tool of easier access and use. Even more, if we think that the US courts themselves in the period before the entry into force of the 1998 Act had abandoned arbitration to use conciliation in most cases. Also in England, conciliation had a considerable success because it is really inexpensive and especially for its "non-contentious" nature, that is very useful in commercial relationships.

Unlike arbitration, conciliation foresees a dispute (public or private) assigning the conciliator the task of assisting the disputing parties by looking for a transaction that is convenient and satisfactory to both. The conciliator does not replace the parties, but he/she should guide them through his experience, trying to achieve a fair and sustainable agreement. The use of the conciliator does not necessarily imply the existence of a dispute, but it may be useful to avoid future disagreements.

It is clear that such a tool does not require legal experts or representatives: therefore it is really inexpensive and flexible. If, in addition, we say that thanks to its non-contentious nature this tool keeps the business relations between customers, suppliers, partners, employees and so on good, resolving quickly but also preventing possible disputes, it will be easy to understand the success of this institution especially in the business field.

### 3.4. *Mediation*

If conciliation is especially useful to resolve business matters, the use of mediation will also be necessary for all those very delicate issues that, even in a controversial context, require the maximum conciliatory effort and expertise not only of a legal kind, because of the “vital” (I dare say) importance of the interests involved, i.e. in all matters referring to personal relations and in particular those between spouses, or “parent–child”.

It is clear that, unlike the conciliator, the role of the mediator is not “to pacify” a contrast. If anything, the opposite is true: in the first place, the mediator helps parties to resolve all the issues that may arise from the irreconcilable contrast by underlining the consequences of the relationship breakdown and preventing its aggravation.

The use of mediation, especially family mediation, belongs to the traditional Common Law systems. Originating in Australia, it is now legislatively accepted also in the English system that, through the famous 1996–2000 reform of family law, has established the obligation to turn to a mediator in all cases of separation and divorce, especially where there are no specific agreements on the relationship between the former spouses and their children.

## 4. “Mandatory” mediation in the Common Law systems

If what has been dealt with here is really true, it is clear why, notwithstanding the apparent suitability and efficiency of the English judicial model, in England not so much the institution of mediation itself as that of voluntary mediation has been questioned.

Dame Genn’s detailed analysis has highlighted how difficult it actually is to prompt parties to use mediation, so that — as already happened in many of the Common Law countries — most of the scholars (and it seems also the legislator’s intention) agree with the introduction of both a mediation “suggested” by the Courts (as in the second step of the Quing dynasty) and a mandatory mediation.<sup>13</sup>

As already said, the question is that in the English system there are effective decision–making methods, so quick and inexpensive from a social and economic standpoint, that the citizens feel it is almost useless to resort to mediation. They are usually mechanisms different from the “norm–generating” model of “classic” mediation (in which parties are en-

13. Cfr. C. IRVINE, (2009), pp. 352–356; P. RANDOLPH, (1997), 7412, [www.newlawjournal.co.uk/nlj/content/litigation-v-mediation](http://www.newlawjournal.co.uk/nlj/content/litigation-v-mediation).

couraged to create the rules that will guide them in the resolution of their disputes)<sup>14</sup>, but substantially they recall mediation or in this way they are perceived by society.

There are also those who underline that the use of mediation is the consequence of a “psychological and biological problem”. According to Randolph<sup>15</sup>

As a species, we are not programmed to compromise, we are programmed to win and in winning we want to see blood on the walls! We have an innate aggression, which, when we are in dispute, transforms itself from a mere instinct to “survive” into an acute need to crush the opposition. We no longer act rationally or think commercially; instead we are driven by an emotional craving to triumph over our opponent.

The emotional approach to these issues goes well beyond “family quarrels” and extends into many other fields even in business matters. According to a survey of 2007, given us by Randolph, 47% of respondents involved in business disputes “admitted that a personal dislike of the other side had driven them into costly and lengthy litigation”. As if to say that dislikes or the impression that the other party has not acted according to our standards, often plays a significant role.

All this, Randolph explains, is due to the amygdala, a part of our brain that controls our automatic emotional responses to the fear of an attack and is consequently cause of the “alteration” in our rational perception. This ancestral and emotional reaction makes us react and fight against any attack on our physical and also economic and personal integrity:

In a legal context, few attacks can be more deeply penetrating than a Compulsory Mediation: allegation of individual or corporate negligence or breach of contract. It is for this reason that parties in dispute find themselves unable to approach the matter rationally— particularly in the initial stages of the dispute, when the emotions are raw, self esteem has suffered a battering, and the parties are driven by feelings of anger, frustration, humiliation, and betrayal. It is at this stage that the lure of litigation is at its most powerful, offering everything a litigant yearns for: complete vindication, outright success, public defeat and humiliation of the other side, and vast sums of money.

I do not know if these are well-grounded statements, but they seem convincing enough for that author to affirm that “it is time to fix a form of compulsory mediation in order to protect litigants from their own madness”. In fact, the question lies in the “emotional issue” and in how up to now “classic mediation” has responded.

14. E. WALDMAN, (1997), pp. 703–769.

15. [www.newLawjournal.co.uk/nlj/content/litigation-v-mediation](http://www.newlawjournal.co.uk/nlj/content/litigation-v-mediation).



It is not by chance that the English system is moving towards mandatory mediation that is “preventive” (in relation to any judicial case) especially for all those cases in which “emotional” and “irrational” implications are obvious: in the civil field, in addition to family issues we can consider those regarding inheritance, ownership disputes, business issues between companies and customers. In short, all those situations where research and statistics tell us that it is more tempting to “act” and “fight”, for biological reasons, or for social impacts or also for a simple (but very harmful) matter of principle.

Nevertheless, as already said, this kind of mediation is really effective when it does not aim only to drive parties towards a shared solution of the dispute. As a matter of fact, in these cases parties are rather unwilling to share something because their break is almost “irredeemable”. It is not necessary to act by deciding for the parties, but to eliminate as much as possible the contrast and above all to drive parties towards the respect of ethical, legal and logic rules.

In this direction, the modern mediation follows a double approach: it informs people of the law and defends the law. In the former case, “The mediator exercises a more forceful role, adding to her standard repertoire of facilitative techniques the option of ‘educating’ the parties about the norms that may apply to their situation. S/he may not, however, tell the parties what to do — the choice to apply these norms remains with them”;<sup>16</sup> this helps to inform parties by clarifying the doubts of the question and giving the rule to apply to the situation without suggesting to the parties what to do.

In the latter case, “the mediator not only informs the parties about (social and ethical) norms, but ensures they are observed” becoming a sort of “guarantor of social and ethical rules” that, far more than the merely legal ones, represent the basis of civilized life. In a sort of “feedback”, the recall to statements of social ethics and to the respect of community rules reviving Confucius’ teaching and applying it.

We cannot imagine to what extent mandatory mediation will extend in the English system. We know, however, that it is a reality useful to overcome the resistance of recourse to a resolute mechanism different from the proven and efficient one of the English legal system.

We know, however, that in our country mediation is useful to overcome, at least in an early first phase, the mistrust and sometimes the “malice”

16. C. IRVINE, (2009), *Mediation and Social Norms: A Response to Dame Hazel Genn*, *op. loc. cit.*; Cfr. E. WALDMAN, (1997), p. 718: « Contrary to the norm-generating model, where discussion of societal standards is thought to impede autonomy and distract parties from their true needs, this model’s consideration of social norms is thought to enhance autonomy by enabling parties to make the most informed decisions possible ».

of lawyers and clients. Notwithstanding a different situation for access to justice, the operational rule seems to become the same. To be really effective, mediator should be able to cope with the “emotions” of the dispute exercising with authority and expertise the role of “guarantor” of social rules.

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PART I

MEDIATION IN PATRIMONIAL MATTERS



# Mediation

## An overview of the functionality of Alternative Dispute Resolution in the English legal system

CINZIA VALENTE

CONTENTS: 1. Introduction, 29 – 2. The essence of mediation, 32 – 3. Towards the contemporary mediation system, 36 – 4. Is mediation compulsory?, 40 – 5. Some concluding remarks, 45.

### 1. Introduction

In the last few years, the phenomenon of privatisation of the law has affected all areas of the legal systems, including branches in which the intervention of the State would generally be required to protect superior interests.

In the substantial branch of law, the reference is to Family Law, where we have registered the trend of encouraging and facilitating the autonomy of the parties in the settlement of the family assets, and avoiding the imposition of judicial power in the division of property, even if there are one or more children<sup>1</sup>. In these cases, the interest of the offspring represents an element of evaluation of the agreement's legitimacy, destined to acquire significance in the hypothesis of an ascertained violation of law.

A broad component of freedom of choice characterizes other areas of law, such as contractual branch, in which, generally, the autonomy of the parties encounters few and very specific limitations.

Even, at an international level, the autonomy of the parties is the guiding principle<sup>2</sup>, above all, in the commercial area; in this context, the intervention of the national or international institutions is possible and may be delayed, according to the parties' initiatives and when other remedies have not provided solutions to disputes.

Also, in the area of Procedural Law the idea of privatising the adminis-

1. On the theme of the privatisation of the family relationships see: J. MEEUSEN, M. PERTEGÁS, G. STRAETMANS, F. SWENNEN (2007); K. BOELE-WOELKI (2003); P. ZATTI (2002), pp. 9 ff.; G. FERRANDO (2003), pp. 561 ff.; and before, J.B. SINGER (1992), pp. 1443 ff.

2. M. BERNARDO, S.L. PLEHN (1983–1984), p. 317 where the autonomy has been defined as « the power or right of self-government »; in general on the role of the autonomy in the international transaction see: H. HANNUM, R.B. LILICH (1980), pp. 858–889; A. REDFERN, M. HUNTER (2004), p. 315.

tration of justice”<sup>3</sup> is common, in the sense of removing the dispute from the public power and assigning it to private sector litigation management, with recourse to conciliation, mediation, or arbitration.

And, in effect, both at national and international levels, the will of the parties to resolve the dispute via an agreed-upon transaction, has become more frequent in the European Common Market during the last century, and has pointed towards a widespread approach to use of Alternative Dispute Resolutions.

ADR reduces the cost of managing the “battle”, removes the dispute from the judicial path, and, above all, from the constraints of the national jurisdictions in cross border relationships. The legal instruments to realize these purposes are different, and range from the arbitration<sup>4</sup> (more common at the international level) to the conciliation, from the mediation to the med–arb<sup>5</sup>, from the activities of ombudsman<sup>6</sup> organism, to mini trial procedures<sup>7</sup> and other similar measures<sup>8</sup>.

3. An interesting economic analysis on the privatisation of civil justice is: R. KULMUS (2013), pp. 205 ff.; H. GENN (2012).

4. Simplifying arbitration is a procedure in which both the parties empower a third party (or a collegium) to solve the dispute according to the law; the decision is binding and can be enforced; J.D.M. LEW, L.A. MISTELIS, S. KRÖLL (2003), p. 3 ff. On the evolution of arbitration see: Y. DEZALAY, B.G. GARTH (1996), The University of Chicago Press, pp. 117 ff.; see J.C. BETANCORT, J.A. CROOK (2014); J.F. POUURET, S. BESSON (2007); L.A. MISTELIS (2001), p. 167. A peculiarity to underline is the distinction in the Italian system between “common” arbitrate and arbitration in company matter, see: R. GUIDOTTI (2010), p. 675 ff. On the relationship between mediation and arbitration, see also: N. ANDREWS (2012), pp. 250 ff.; R. BARBERIO, D. LUPO, A. SIROTTI GAUDENZI (2011).

5. Med–arb is the acronym of mediation and arbitration because the procedure is an amalgam of the two forms of ADR. Generally the parties agree to go through mediation and if it fails they are obliged to adhere to binding arbitration. See N. ALEXANDER (2009), pp. 25 ff.; H.J. BROWN, A.L. MARRIOTT (1993), pp. 19 ff.; P. GIANNITI, R. PICCIONE (2012), p. 37 ff.

6. Ombudsman is a particular system which generally deal with public complaints against administrative power. Its activity is restricted to investigate about injustice and maladministration with the immediate scope of divulgate the illegitimate conduct and finally to stimulate the improvement of public service. In this field ombudsman is subjected to the statutory regime (for example we have to refer to the Parliamentary and Health Service Ombudsman, see [www.ombudsman.org.uk/home](http://www.ombudsman.org.uk/home)). The development of this organism has guided the growth of other similar service in the private sector such as happened in the field of insurance, banking ([www.financial-ombudsman.org.uk/default.htm](http://www.financial-ombudsman.org.uk/default.htm)) or legal service. In both cases the organism is independent from public and private institutions. Summarizing the essence of the service, we can say that an ombudsman analyzes the complaint and, if he finds it justified, suggests the organisation involved the fair conduct to assure the rights of the citizen. The “decision” is not mandatory but the experience shows the organisations often agree to. On these themes see: M. SEVERINATNE (2002), pp. 4 ff.; L.C. REIF (2004), pp. 299 ff.; *Parliamentary and Health Service Ombudsman* (2007), *The Parliamentary Ombudsman: withstanding the test of the time*, IV report 2006–2007, London, The Stationery Office; P.P. BIANCONE (2011), pp. 166 ff.

7. See: E.A. DAUER (2000), pp. 8–54; it is a remedy known above all in the common law tradition.

8. I refer, for example, to the ENE, Early Neutral Evaluation: it is a way to delegate an independent subject (with specialist knowledge and skill) appointed to make an evaluation of the dispute. The result is non binding and represent a starting point for a constructive negotiation; see C. HOWELL, Q.C. WILLIAMS (2013), pp. 406 ff.

Even if these instruments are known in the national context, the impetus of the international trade has given a new impulse to Alternative Dispute Resolution. Thus, the national legislators have had to intervene, renovating existing laws, and sometimes introducing new forms of ADR in the local legislation. Generally, the development of the international institutions run parallel to the national ones; but it has happened that, for some aspects and in several countries, this evolution has been incited by the introduction of international<sup>9</sup> or European regulation. This is the case of mediation, which has seen a renovated power thanks to the introduction of the European Directive 2008/52/EU<sup>10</sup> and the national transpositions of its conditions.

Even if the scope of European regulation is to discipline the cross-border disputes and to improve judicial cooperation between member States, it allows the local legislators to apply its disposition in a national context for internal procedures. Some member states have recognized a more important role to mediation and incentivized its use by making appropriate regulation. However, other systems have a short history in the field of mediation and have developed an internal model based on the foreign experience and stimulated by the necessity of the introduction of the European directive.

Among the countries which have a relatively long history in the improvement of mediation we can mention the English legal system,<sup>11</sup> where the interest in testing the efficiency and the practicality of mediation has been confirmed by the attention of the national institutions, which have formulated proposals and given incentives for a wide use of ADR instruments.

In this text, attention will be focused on the civil mediation<sup>12</sup> procedure in the English system and on some problematic aspects regarding its functionality, and in particular on the potential power in terms of deflective effect on the judicial costs and time, with the clarification that this present contribution refers only to internal mediation<sup>13</sup>.

9. We do not ignore the UNCITRAL Model Law on International Commercial Conciliation of 19 november 2002 (available on the follow website [www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90933\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90933_Ebook.pdf)) which expressly covers mediation area and has inspired some national legislators.

10. German and Franch law are an appropriate example of this situation; in the Italian system the ratification in the internal legislation of cross border mediation has offered the occasion to provide for the introduction of a referral model of mediation and for the first organic discipline of the institute; see F. CUOMO ULLOA (2013); R. FAVALE, M. GAMBINI (2013); M.A. LUPOI (2012).

11. The present contribution refers essentially to the England discipline; however, we have to underline that the evolution of the mediation phenomenon in Scotland traces partially that in England.

12. The bibliography on the theme is vast, for some lectures see: A. COLEMAN (2003), p. 303 ff.; R. NAZZINI (2004), pp. 91 ff.; M. PARTINGTOM (2004), p. 99 ff.; V. VARANO (2007).

13. The distinction is necessary as different rules concerning confidentiality, limitation period and enforceability apply to cross border mediation according to the european mentioned directive which limit the disclosure of information relating the procedure and grants the enforceability of the settlement resulted at the end of mediation.

## 2. The essence of mediation

Mediation is an ambiguous term that, in general, refers to the anticipatory method of solving a dispute (out of court mediation<sup>14</sup>), as well as an instrument to find solutions to a pending civil procedure (court annexed mediation<sup>15</sup>); in any case the procedure takes place without any further involvement of the court.

In the English legal system the definition of mediation is placed in a statutory instrument, rather than as a primary legislative act. The references to this remedy are disseminated in different statutes among which we have to quote, as the most important, Civil Procedure Rules (CPR) and Family Procedure Rules (FPR), as amended, with reference to cross-border mediation, after the introduction of the European Directive 2008/52/EU<sup>16</sup>.

A unique definition of mediation is not available in a sole legislative context, and its meaning has to be constructed in an interpretative way, including reference to case law.

As to regards to civil mediation<sup>17</sup>, the point of departure is the CPR's Practise Directions on Pre-action Conduct, in which mediation is described, par. 8.2, as a « form of negotiation<sup>18</sup> with the help of an independent person or body ».

A series of interventions of the Ministry of Justice give us the possibility to enlarge and better define the scope and the function of mediation: the essence is that it is a confidential instrument, initially non binding, to find solutions to a dispute through a private and structured form of negotiation, which is assisted by a third and impartial party, in order to reach a binding contract<sup>19</sup>.

14. It operates apart from litigation and without the parties have recourse to Tribunals.

15. It is necessary to distinguish the mediation *stricto sensu* by the judicial mediation which is a particular procedure similar to court proceedings that ends with a judicial determination; the most famous example is Employment Tribunal which is involved in disputes between employers and employees over employment rights. See information on [www.justice.gov.uk/tribunals/employment](http://www.justice.gov.uk/tribunals/employment).

16. Cross Border Mediation (EU Directive) Regulations 2011 came into force on 20 May 2011 and does not extend its effect to internal mediation. An analysis of the regulation see. E.M. APPIANO (2009), p. 59 ss., M. GORGA, G. VERTUCCI (2012); G. COSI, G. ROMUALDI (2010), p. 185 ff. As to Scotland we refer to Cross Border Mediation (Scotland) Regulations 2011 came into force on 6 April 2011.

17. On the English system see: P. BROOKER (2013); S. SIME, D. FRENCH, M. KAY (2012); N. ANDREWS (2008); D. SPENCER, M. BROGAN (2006); L. BOULLE, M. NESIC (2001).

18. Some authors identify a difference between mediation and negotiation even if the latter represents the precursor of the first. Negotiation is considered a less impartial instrument as it doesn't require the presence of a third party and the task to find an amicable solution belongs to the solicitor's parties. See: Crawford E. B., J.M. CARRUTHERS (2013), pp. 516 ff. Also relevant is the difference between mediation and conciliation; generally the distinction is recognized in the circumstance that conciliator propose a solution while mediator tries to empower the parties themselves to find an end to the dispute; see: F. STEFFEK (2012), pp. 1162–1167.

19. Ministry of Justice and Attorney — General's Office (2011), *The dispute resolution Commitment*:



The intermediary does not have adjudicatory power, and this flexible procedure, characterized by a voluntary element, can cover all aspect of the conflicts (not only the legal components).

The aim is to find a balance of the interests in contrast, and to guarantee a satisfactory solution for the parties<sup>20</sup>. This might not necessarily correspond to the application of formal and legal criteria. The scope of mediation is to achieve substantial justice for the specific case, with respect to the exigencies of the litigants, including cost efficiency, speed and flexibility of the procedure, all of which have to be taken into account.

This procedure can take a variety of forms: face to face, by telephone, on line; in any case the mediator's role is to act in an independent<sup>21</sup> manner to encourage the dialogue between the parties, in view of reaching an agreement.

After having drawn attention to the voluntary element and to the final scope of mediation, not only in terms of legal relevance, and in a more general context finalized towards the solution of frictions between the parties by resolving the problems and, at the same time, preserving the relationship, some authors have emphasized the "social" function of mediation. Thus, it is considered to be a constructive procedure, involving the chance for personal development as well as social growth for all parties of conflicts<sup>22</sup>.

The characteristics mentioned above are reflected in the procedure itself, which is intentionally flexible, to meet the needs of the parties. The structure, as well as the qualifications and training of a mediator, are entrusted to private regulation which has the task of substituting for the absence of an institutional control. A pre-eminent position belongs to the Civil Mediation Council, an independent organism, which promotes the use of mediation and maintains a list of accredited mediation providers<sup>23</sup>.

The approach of the mediator<sup>24</sup> could assume a facilitative scope, insofar

*guidance for Government Departments and Agencies*, par. 5.5.

20. Some authors supposed that the letter A in the acronym ADR stays for "amicable" and not "alternative"; for other the correct form should be EDR namely "efficient dispute resolution"; see: M. KALLIPETIS, S. RUTTLE (2006), pp. 192 ff.

21. Some authors substeined that the mediator has to be endowed with six qualities: empathy to understand parties' positions, patience to await the best moments to take care of the parties, self-assurance to gain the confidence of the parties, clarity of thought to propose new perspectives for the parties, ingenuity to capitalize any information of the parties to achieve a solution and stamina to subtain the sessions of meeting; see p. NEWMAN (2000), pp. 183-4.

22. F. STEFFEK (2012).

23. The requirements for obtaining accreditation are: adequate training qualification for mediators, appropriate code of conduct, insurance, efficient administrative equipment. See [www.civilmediation.org](http://www.civilmediation.org).

24. The role of mediator is not disciplined in a specific regulation except for the limited mention contained in the CPR and Practise Direction on Pre-Action Conduct where he has the task to "help" and "assist" the parties. The exact comprehension of his function is traceable in the code of conduct

as this role is limited to promoting the communication between the parties, or it could encourage a concrete solution (with or without legal advice), giving relevance to an evaluative approach<sup>25</sup>. There are no fixed standards for mediators, although the accreditation organism imposes a training course for admission to this function. This course provides, among other elements, for the acknowledgement of the European Code of Conduct for Mediators.

The controversy about the legal training of mediators is still topical, with the tendency to overemphasise legal expertise in mediation, as opposed the non-lawyer model. Generally, the lack of a legal degree helps the parties in the facilitative mediation, where the dimension of legal relevance is more reduced; on the contrary, in the evaluative approach this element becomes more apparent, because the mediator's involvement could entail a minimal legal assistance in reaching the agreement.

On the other hand, it has been highlighted that complete ignorance of the legal context could lead to inappropriate (or illegal) agreements, or to the other extreme, such as when legal expertise could undermine the mediator's neutrality or create a predisposition towards more standardized legal solutions, to the detriment of the needs of the parties. The debate<sup>26</sup> has not yet been settled. However, an overview of the policies of the most representative organisations in mediation reveals that none of these groups limit their access only to lawyers.

Another problematic point is the dimension of confidentiality of information and of documents in the mediation process, which is regulated by procedural law and a significant numerous of judicial decisions. The general rule is to preserve the confidentiality but in the recent years the demands for the disclosure of mediation evidence have grown<sup>27</sup>. Judges' behaviour has revealed a very restricted trend towards disclosure, as public policy encourages the settlement, and to avoid the risk that a negotiation position could be used against the same party. On the other hand, it appears necessary to keep the evolution of the negotiation secret, if it has failed<sup>28</sup>.

of the different associations and in the mediation agreement.

25. Really the style of mediation approach are different and various, from facilitative to evaluative, from settlement driven mediation to cognitive sistem mediation. On a deeper approach see Riskin L. LEONARD (1996), p. 25 ss. A transformative approach was elaborated by Baruch Bush R. A. and J.P. FOLGER (1994); the authors underlined the power of mediation driving the parties to evaluate, in the research of the better solution, the needs of the counterparty as to elaborate an accetable solution. A recent analisys is C.W. MOORE (2003).

26. See, for example, ADR Group, CEDR, CIARB, UK Mediation, Academy of Expert. About the discussion see L. RISKIN (1982), p. 45; S. PURNELL (1984-1985), p. 986.

27. A distinction between internal mediation and cross border mediation has to be made; the european directive has guarantee a high threshold of protection so the discovering is allowed only if the parties agree and the evidence is necessary for public policy or to emplement or enforce the mediation agreement.

28. *Aird v. Prime Meridian Ltd* [2006] EWCA Civ. 1866 and *Reed Executive Plc v. Reed Business*

This rule governs the position of the parties, who could waive that privilege. Some different considerations affect mediators, as the English law recognizes a duty of confidentiality for them, which is generally contained in the mediation agreement. However, judges have tended recently to make similar obligations enforceable, even in the absence of a confidentiality clause<sup>29</sup> indicating that the secrecy of the procedure is a fundamental element for the success of mediation system. To this end, the Court can order disclosure within given limits and in particular when it is in the interest of justice<sup>30</sup>.

As said above, mediation is not subject to comprehensive regulation, so the structure of the procedure is not well defined; in the absence of fixed models a general technique identifies some phases which are described as “best practise” by the most representative national organisations<sup>31</sup>.

At first, the mediator gives information to the parties, explaining the role of mediation and the aim of the procedure. Then, the gathering and exchange of data regarding the dispute is required.

In a successive phase, the mediator analyzes the interests of the parties and their expectations. That stage, together with the following one, in which the mediator and the parties develop a solution, are the central points of mediation. The last step may provide for the drafting of an agreement, which is legally binding. Generally, the mediator proceeds to meet individually with each party in separate sessions, to acquire all the information on the case and gathering the needs and expectations of the parties; if it appears suitable he leads a joint session. The procedure could end with a written or oral agreement or without a settlement, but in any case is destined to end in few days.

The speed, the informality, the confidentiality and the low costs of the mediation procedure, as opposed to the duration, formality and high cost of a civil justice case explain the reasons of the fast growth of mediation in the UK<sup>32</sup>.

It should be added that the winning party in a civil process (or arbitration

*Information Ltd* [2004] 1 WLR, 3026 (CA).

29. *Farm Assist Ltd (in liq) v. Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC); *Cumbria Waste Management Ltd v. Baines Wilson (a firm)* [2008] EWHC 786 (QB).

30. In addition to the this mediator’s right to confidentiality some exceptions are admitted when it is necessary to prove the settlement and its contents (*Unilever PLC v. Procter & Gamble Co* [2000] 1 WLR 2436) or when the agreement is the result of misrepresentation, fraud or undue influence: “*Cattley v. Pollard* [2007] EWHC Br6 (Ch)”.

31. For example, see the guidelines elaborated by The Law Society of England and Wales (Civil and Commercial mediation accreditation Scheme, [www.lawsociety.org.uk/accreditation/specialist-schemes/civil-commercial-mediation](http://www.lawsociety.org.uk/accreditation/specialist-schemes/civil-commercial-mediation)) or by CEDR (Model Mediation Agreement, [www.cedr.com/solve/mediationservices](http://www.cedr.com/solve/mediationservices)).

32. Also the dissatisfaction of the arbitration solution contributed to the increase of ADR instruments; we don’t forget that arbitration is expensive, too.

action) has modest possibilities to recover what he has the right to receive, along with the legal costs; furthermore, the enforcement of the decision against the losing party is a difficult path that, nowadays, because of the economic crisis, often leads to an inconsistent result.

Not least in evaluating the benefits of mediation is the problem of the uncertainty about the result of a civil/arbitration procedure and, in general, its consequences. The process provides for a decision that will establish a winner and a loser, on the basis of the proof, and this result can be unpredictable. The dispute can cause the breach of any and all relationships between the parties, because litigation produces additional effects in terms of resentment and bitterness. From a commercial perspective, this situation can induce the interruption of profitable business relationship.

On the contrary, the essence of mediation is to force the parties to a dialogue towards a shared solution, detracted to a third party with power' position; the aim is not to establish a winner but to find a resolution. Obviously, the role and the expertise of the mediator is fundamental for guiding the discussion of the parties regarding the most important elements. The mediator's capacity to understand the requests and the need of the litigants, and their breaking points, while using confidential information, is crucial to the success of the procedure.

### 3. Towards the contemporary mediation system

In the UK the most essential developments in mediation were registered between 1995 and 2005, and afterward we saw a finalizing phase, in which the importance of this remedy became unquestionable.

At the beginning of the 1990s, the alternative dispute resolution practise grew in the USA, but was seen with suspicion because of the widespread mentality that disputes should be solved by a court judgement.

Mediation was defined a "soft" option, to refer to the circumstance in which there was not a winner or a loser, but instead there was a compromise solution that could not guarantee a clear-cut result.

Despite the negative conception of this interpretation, mediation was adopted in the commercial law area at first, where it registered a certain success; its use immediately showed an evident efficiency of this system. So, the approach to this remedy evolved.

National institutions became more conscious of the potentiality of mediation<sup>33</sup> and a radical reform of the Civil Justice System took place with the

33. Lord Woolf's report on civil justice system in 1995–1996 signalled a change in court procedure about the inclination of the judges to inform the parties on the existence of alternative dispute

implementation of the Civil Procedure Rules (CPR), which came into effect on 26 April 1999<sup>34</sup>.

The target of CPR, as recommended by government Justice Department<sup>35</sup>, was the introduction of fairness, speed and economy into the solution of disputes, and so the parties were encouraged to cooperate in the search for a practical result.

The new dispositions provided the Court with a series of evaluations in the management of the litigation; in particular, the overriding object now includes, specifically, the faculty of the judge to propose the use of mediation<sup>36</sup>. And analogous discipline belongs to the Tribunals, Courts and Enforcement Act 2007 s. 24.

Moreover, CPR introduced a different regulation on the basis of diverse legal areas, for example, a series of pre-action procedures were inaugurated to apply to specific types of disputes. Initially, these included personal injury, clinical negligence, construction and engineering, defamation, professional indemnity and judicial review. Now, they also embrace disease and illness, housing disrepair, possession claims based on rent arrears, possession claims based on mortgage arrears, dilapidations commercial property.

In the UK, the pre-action procedures are endowed with procedural requirements that are a pre-requisite to commencing litigation and are generally finalized towards a settlement or, failing agreement, to facilitate a

resolution. The final report related «... the court will encourage the use of ADR at case management conferences and pre-trial reviews and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR», Lord Woolf, Master of the Rolls, Access to justice. Final Report, July 1996, available at the web site [www.dca.gov.uk/civil/final/index.htm](http://www.dca.gov.uk/civil/final/index.htm).

34. I refer to the introduction of Civil Procedure Rules 1998 (CPR).

35. In 1998 the Civil Justice Department published its report named "Modernizing justice" which required a reform with the scope of limit the access to jurisdiction so the court has to be the last resort.

36. Sec. 1.4: « Court's duty to manage cases (1) The court must further the overriding objective by actively managing cases; (2) Active case management includes: (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution (GL) procedure if the court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently ». The Civil Procedure Act is available at the following website: [www.justice.gov.uk/courts/procedure-rules/civil/rules](http://www.justice.gov.uk/courts/procedure-rules/civil/rules). This rule has a correspondent in the Practice Direction on Pre-Action Conduct, par. 2.1 « The aims of this Practice Direction are to — (1) enable parties to settle the issue between them without the need to start proceedings (that is, a court claim); and (2) support the efficient management by the court and the parties of proceedings that cannot be avoided. 1.2 These aims are to be achieved by encouraging the parties to — (1) exchange information about the issue, and (2) consider using a form of Alternative Dispute Resolution (ADR) ».

more efficient and cost-effective trial process.

In the cases not covered by protocol, the court is obliged to act in accordance with the overriding objective and to stimulate the parties to evaluate the necessity (or not) to engage in litigation. This was renewed in 2003, when new rules were enacted regarding non-protocol cases; the Pre-action Protocol Directions require the parties to exchange sufficient information and «[...] make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so»<sup>37</sup>.

This rule is reflected by the duty<sup>38</sup> prescribed for solicitor and barrister to inform clients of their alternative resolution options and in general to act in the best interests of the clientele.

A synthesis of the mediation process seems to demonstrate the evident intention of the legislator towards the use of the ADR form (and mediation in particular); this has brought about a specific, even if not complete, regulation at the legislative level, in which mediation has been officially considered to be non-compulsory.

In this context, Central London County Court tested a first pilot scheme on mediation in 1996<sup>39</sup> and others courts followed closely behind, formulating different services and fees, according to the recommendations of Woolf's report and the instruction of the CPR<sup>40</sup>.

Unfortunately, not all the courts established mediation schemes because of the lack of resources in terms of financial means and because of the absence of administrative staff dedicated to this.

The gap between the most important and the biggest judicial departments and the smaller ones became evident. In effect, the first application of court based mediation were introduced in larger centres where the parties' discussion concerned major financial cases. The latter disputes were adapted to the mediation process, which promised to reduce costs and time of the litigation.

37. Sec. 6.1, Practice Direction — Pre-Action Conduct, available to the following website: [www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct#1.1](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#1.1).

38. Solicitor Regulation Authority provides the obligation in the Code of Conduct 2011 ([www.sra.org.uk/solicitors/handbook/code/content.page](http://www.sra.org.uk/solicitors/handbook/code/content.page)). In the same direction the Bar Standards Board operates in Code of Conduct of the Bar of England and Wales and written Standards for the Conduct of professional Work (<https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct>).

39. An interesting report on the activity of the Court and the results of the project is in Genn J. HAZEL (1998), where the author underlines the importance of two aspects of mediation procedure (time and costs) which are attractive for the parties.

40. Before, the Commercial Court issued a Practise Statement in 1993. The regulation stated the judge had to invite the parties to consider the ADR solution. There were a list of hypothesis that the parties had to evaluate prior to the beginning of the trial, in particular, the mediation was strongly suggested, when the costs of litigation were superior to the final result. See M. KALLIPETIS, S. RUTTLE, *op. cit.*, pp. 204 ss.

Nevertheless, the management of small money claims, widespread in all parts of the country, can be well-applied to the mediation solution. Many people were prevented from the use of mediation, and from receiving any information about the mediation procedure and its advantages.

To avoid the risk of elimination of ADR remedies, another important project was promoted in 2004: an efficient model of mediation, committed to the National Mediation Helpline, was created<sup>41</sup> to offer a low cost and time limited mediation to serve users anywhere in the national territory, including the use of a telephone modality, in small claims issue, too.

At the beginning, this service was used by the litigants of smaller courts, but later it was opened to all citizens. To this scope, the National Mediation Helpline has organized some panels of intervention corresponding to the HMCS (Her Majesty's Courts Service) areas where local, regional and National mediation providers<sup>42</sup> are placed .

As stated above, the growing importance of the phenomenon is demonstrated by a series of activities and initiatives that have taken place during the last decade in the major local courts. For example, an additional pilot scheme was launched in Central London County Courts<sup>43</sup>, based on an automatic referral to mediation between 2004 and 2005; in 2005 Manchester County Court<sup>44</sup> launched a one year pilot project on in-house mediation for small claims cases (free for users), and also the Exeter County Court previously provided a scheme for small claims affairs<sup>45</sup>.

The attention to the benefits of mediation, above all for its deflective effects on litigation, led the English Government to promote a wide-ranging alternative dispute resolution<sup>46</sup>. In particular, the results of the Manchester pilot scheme demonstrated that 85% of small cases referred to mediation have been settled<sup>47</sup>. In other words, in the small claims cases mediation helps the parties to avoid the trial in nearly three quarter of the cases<sup>48</sup>.

The natural evolution of these paths was the creation of in-house small

41. It represents a very good standard of procedure so the project has been revisited in 2006; see [www.nationalmediationhelpline.co.uk](http://www.nationalmediationhelpline.co.uk).

42. The service is accredited by Civil Mediation Council, a recognized authority for mediation; see: [www.civilmediation.org](http://www.civilmediation.org).

43. Automatic Referral to Mediation (ARM) has been modelled on the Canadian Ontario Mediation Scheme; this project approaches a mandatory model of mediation, see, for a comment, H. GENN, P. FENN, M. MASON, A. LANE, N. BECHAI, L. GRAY, D. VENCAPPA (2007).

44. M. DOYLE (2006).

45. J. ENTERKIN, M. SEFTON (2006), and S. PRINCE, S. BELCHER (2006).

46. A more recent institutional study on the effects of mediation is L.J. JACKSON (2009).

47. J. TAGG, p. 3 ff.

48. The data have been published in Ministry of Justice (2012), *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system, A consultation on reforming civil justice in England and Wales. The Government Response*, London, February 2012.

claims mediator services in all courts by April 2008<sup>49</sup>. A service of mediation is also available for the Court of Appeal's Civil Division<sup>50</sup>.

#### 4. Is mediation compulsory?

Access to the mediation service entails a series of problems concerning the *modus operandi* of the judicial system in general, and also due to the absence of a comprehensive regulation of the ADR system.

As previously said, a partial discipline of mediation is contained in the CPR, regarding the civil and commercial areas, while separate rules are available for specific sectors like Family Law. Thanks to the intervention of independent bodies, the use of mediation has been promoted, and an integrated discipline has been developed and inserted in codes of practise. This includes the regulation of mediator training, quality assurance, etc.; such regulation is entrusted to the private sector and, in particular, to the associations and societies which deal with mediation. A sort of homogenisation of standards was granted by the Civil Mediation Council, established in 2003; this is an independent body which promotes and incentivises the use of mediation, in collaboration with representatives, and which maintains a list of accredited mediators providers.

Procedural questions can arise in managing a dispute when we focus attention on the mediation scheme. At the base, there is the problem regarding the compulsoriness of mediation, which appears associated to a series of evaluations and consequences with other connected aspects. These can include the potential agreement to mediate, the effectiveness of a mediation clause in a contract signed by the parties, and the potential sanctions considered by the judge in the case of a missed mediation.

The mandatory nature of mediation has constituted a source of discussion for a long time and a remarkable sequence of case law on the theme has been developed.

To find an answer to these issues, we have to remember what said above, and particularly that CPR and pre-action protocols encourage the parties recourse to mediation; they also reinforce such indications and provide for potential consequences of litigation costs. In other words, refusal of mediation can be relevant in order to obtain a decision to condemn to the legal fees, also at the expense of the winning party.

49. We noted the County Courts' Small Claims Mediation Service; the service is voluntary for the parties and generally is conducted by telephone.

50. In 2003 a mediation scheme was launched by the Centre for effective dispute resolution (CEDR) under the Court guidance; see [www.cedr.com](http://www.cedr.com).



The enthusiasm which became diffused after the Woolf report, and the positive publicity about the mediation service produced, at the beginning, a strong signal in favour of ADR procedure. Some decisions seemed to orient the judicial power towards a mandatory system. In *Kinstreet Ltd v. Balmargo Corp Ltd*<sup>51</sup> the judge imposed an alternative dispute resolution order despite the strong resistance of one party.

A few others decisions<sup>52</sup> followed this one, and it looked as though the courts had the power to order mediation.

On the contrary, a different conception underlines the voluntary character of mediation service which is opposed any form of coercion; the essence of mediation is based on the consent of the parties to evaluation of a common solution.

The latter theory became established and the *Kinstreet's* principle was overruled in 2004 when the Court of Appeal stated<sup>53</sup> that mediation is not mandatory and clarified that the judges cannot order recourse to alternative dispute resolution. The judges specify that, as the regulation provides for, the judicial authority can encourage the use of mediation but that the English model is not thought of as a mandatory system<sup>54</sup>.

Once verified that the tribunal cannot oblige the parties to use mediation, it should be remembered that the judge has the duty and faculty to encourage it<sup>55</sup> but it is very difficult to distinguish the mere suggestion to mediate from the case in which the advice is so strong as to seem an order to mediate<sup>56</sup>.

51. *Kinstreet Ltd v. Balmargo Corp Ltd* [1999] ADR.L.R. 07/23

52. *Shirayama Shokusan Co. Ltd v. Danovo Ltd* [2003] EWHC 3006, (Ch); *Muman v. Nagasena*, Court of Appeal — Civil Division, [2000] WLR, 299.

53. *Halsey v. Milton Keynes NHS Trust* [2004] EWCA 3006 Civ 576. That analysis was supported by a correct interpretation of art. 6 of the European Convention on Human Rights that guarantee a free access to the judiciary system. The case of a contractual limitation (for example arbitration clause) is different because the party has freely decided to waive the access to the court; what is unacceptable is the constraint to renounce a judicial action.

54. An interesting aspect was underlined in *Frank Cowl v. Plymouth CC* [2001] EWCA Civ 1935 where Lord Woolf appeal to the lawyers to encourage the recourse to mediation; the attorneys have the important role to explain the potentiality of ADR and to discourage the access to the court when the litigation can be mediated.

55. A particular position has brought the Court in *Cowl and others v. Plymouth City Council* [2001] EWCA Civ. 1935 when a real obligation is established at the expense of the lawyers avoiding the litigation and persuading the parties to use ADR.

56. A typical case is *Dyson and Field v. Leeds City* available on the following website: [www.cedr.com/library/edr\\_law/Dyson\\_v\\_Leeds\\_County\\_Council.pdf](http://www.cedr.com/library/edr_law/Dyson_v_Leeds_County_Council.pdf). The pilot schemes realized in some English Courts concern automatic referral system in the Central London County Courts (2004) amplified the phenomenon because it seems that the legal system have ratified the power of the judge to make an order to mediate; in the same way the Admiralty and Commercial Court Guide (2011) — in [www.justice.gov.uk/downloads/courts/admiraltycomm/admiralty-commercial-courts-guide.pdf](http://www.justice.gov.uk/downloads/courts/admiraltycomm/admiralty-commercial-courts-guide.pdf) — provide for that kind of provisions. It necessary to precise that the first hypothesis has remained circumscribed to the experimental cases and the official studies (H. GENN, P. FENN, M. MASON, A.

Generally the courts, conscious of the voluntary character of mediation, stimulate the parties by illustrating the consequences of the refusal: the threat of the condemnation to pay legal costs and the Stay (suspension) of the process<sup>57</sup>.

As to the first aspect, general rule imposes the losing party to pay the legal costs; however, the judge has the power to make an exception to that disposition, by considering to the conduct of the parties before, as well as during, the procedure<sup>58</sup>.

In this matter, a leading case is *Dunnet v. Railtrack Plc.*<sup>59</sup> whereby the Court denied the winning party the right to recover the costs because of its refusal to settle a dispute out of the court; the same approach is registered in *Hurst v. Leeming*<sup>60</sup> where the court required that the parties should seriously consider the use of ADR to resolve their dispute.

A partial revision of the aforementioned principle was produced in two decisions, already quoted, *Halsey v. Milton Keynes NHS Trust* and *Steel v. Joy & Holiday*<sup>61</sup>, which specify that only the unreasonable refusal of the mediation can bring to the forced assumption of legal costs, and this has furnished some criteria (not exhaustive) regarding the considerations to make regarding refusal<sup>62</sup>.

The reference is to:

a) the nature of the dispute<sup>63</sup>: some disputes are not adapt for mediation

LANE, N. BECHAI, L. GRAY, D. VENCAPPA, *Twisting arms: court referred and court linked mediation under judicial pressure*, op. cit., p. 3) on the scheme revealed as the legal operator perceived the referral like a “bureaucratic hurdle”. As to the commercial matter it is a common opinion to consider the lettering “mediation order” in its non-technical significance but a formulation designed to give entrance to mediation in the hypothesis of the parties’ consensus; on this theme see M. KALLIPETIS, S. RUTTLE, p. 204 ff.

57. *Couwenbergh v. Valkova* [2008] EWHC 2451 (Ch), the Judge has affirmed that the case imposed the use of an alternative dispute resolution like in the case *Lewis v. Barnett* [2004] EWCA Civ. 807.

58. Rules 44.3, 44.4 and 44.5 CPR.

59. *Dunnet v. Railtrack Plc.*: *Practise note* [2002] 1 WLR 2434 (CA).

60. *Hurst v. Leeming* [2001] EWHC 1051 (Ch); the words of the Court were: “*Mediation is not in law compulsory, and the protocol spells that out loud and clear. But alternative dispute resolution is at the heart of today’s civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences may be attracted*”. In the same direction *Royal Bank of Canada v. Secretary of State for Defence* [2003] EWHC 1479 (Ch) despite the fact that the object of the controversial was, in the case, the specific interpretation of a contract, that is exactly a legal question; and *McMillan Williams v. Range* [2004] EWCA Civ 294

61. *Halsey v. Milton Keynes NHS Trust*, *Steel v. Joy & Holiday* [2004] EWCA 3006 Civ 576 also available in [2004] 1 WLR 3002 (CA), para. 30.

62. It is important for the party to have a coherent explanation for the refusal capable to overcome the critical examen of the court. The *Halsey* case introduced the Ungley Order which provides for the parties unwilling to mediate to prepare a justification to remove the risk of condemn to the legal costs.

63. In *Al-Khatib v. Masry* [2004] ADR. L.R. 10/05 1 (CA) the court sustained that all commercial

- because they require a binding precedent, or because they deal with a point of law in a strict sense, or because they require an injunction, or involve violence or human rights;
- b) the merits of the case are relevant under two aspects; on the one hand, the real possibility of success of the claim (or the counterclaim) and, on the other hand, the perception of the parties their success. This represents (together with the reasonable prospect of success of mediation) a most problematic point of evaluation; generally the consciousness about having a strong case has justified the refusal of mediation; on the contrary, the belief that a case is watertight is often unreasonable;
  - c) the cost of mediation: if it appears to be disproportionate, the refusal is considered justified;
  - d) other alternative ways to settle the dispute: generally, the offer of a settlement may show the good intentions of a party and the other's unrealistic position;
  - e) the evaluation of an eventual delay in attending mediation and the consequential delay of the trial: the judge has the task to consider the reason for the delay and the judge's perception of this is not predictable;
  - f) the reasonable prospects of success of mediation<sup>64</sup>: this test is difficult to apply and depends on the specific circumstances of the case<sup>65</sup>.

Other elements, even if not expressly listed, can be considered in the refusal of mediation. These can include the stage of the process; in complex disputes, in which the economic interests are numerous and significant, it could be preferable to consent to the first dissertation of the fundamental points, so a preliminary decision on some issues can be made possible; then, more realistically, in term of success, it is possible to have a recourse to mediation<sup>66</sup>. Implementation of the scheduled elements has to be admitted in the concrete evaluation of the specific cases.

dispute are suitable for mediation because workers in the sector need resolving the dispute rather than winning it. This approach was stressed in *C v. RHL* [2005] EWHC 873 (comm) where the judge made an ADR order. On the function of ADR in commercial area see: R. CALLER (2002); D. FOSKETT (2005); K. MACKIE, D. MILES, W. MARSH, T. ALLEN (2000); P. BROOKER, A. LAVERS (2000), p. 353 ff.

64. Of course we don't ignore that analogues consideration are valid in the case of the parties are partially successful (the dispute provides for a claim and a counterclaim) or both parties are unsuccessful; see *Burchell v. Bullard* [2005] EWCA Civ 358; *Hickmann v. Blake Laphorn and Fisher* [2006] EWHC 12 (QB).

65. It can be a good reason to refuse mediation when the other party is obdurate; on the contrary, when the obdurate party refuse mediation proposed by the other party can be considered an unreasonable element. See *McCook v. Lobo* [2002] CA.

66. In this direction *Multiplex Constructions (UK) Ltd v. Cleveland Bridge UK Ltd* [2006] EWHC 1341 (TCC).

The Halsey case had the merit of resolving a serious debate about the nature of mediation<sup>67</sup> and to clarify the criteria for establishing the consequences of a refusal, as well as to highlight the advantages of mediation, such as its being cheaper way to put an end to litigation, compared to a judicial procedure, and finally to illustrate a wide range of solutions which are impossible to achieve in a court process, such as new terms for an agreement or, more simply, an apology.

A second form of pressure to encourage the parties to use mediation is the “Stay” order, which is a suspension of the process. Generally, this provision presumes a mediation agreement by the parties and represents the instrument for suspending the litigation starting the mediation procedure. Sometimes, a Stay can be used by judges to constrain the parties (which have not entered into a contractual obligation to mediate) to reflect on the potential of alternative dispute resolution. In this latter hypothesis, the order is limited to a brief time (generally, a month) and the decision belongs to the judge’s discretionary power.

The attention of the English system to an amicable settlement is demonstrated by the approach to another problematic issue; that is when the dispute arises in connection to an agreement containing a mediation clause. Here, the discussion moves to the enforceability of that obligation.

This question was debated in 1998 when the court<sup>68</sup> refused to grant a Stay, thus establishing that the agreement could not be considered as a precondition to proceeding. Also in this field, a change in the jurisprudence has been registered. The leading case is *Cable & Wireless Plc v. IBM United Kingdom Ltd*<sup>69</sup> where we find a distinction between the agreement to negotiate, which in the English system is considered unenforceable because of its nature<sup>70</sup>, and the agreement to follow a particular procedure<sup>71</sup> such as mediation<sup>72</sup> which today is valid with respect to the value recognized to the alternative dispute resolution model.

67. Despite the declared non binding nature of mediation some judge nowadays force the use of ADR: see *Burne v. “A”* [2006] EWCA Civ 24.

68. *Halifax Financial Services Ltd v. Intuitive Systems Ltd* [1999] 1 All ER 664.

69. *Cable & Wireless Plc v. IBM United Kingdom Ltd* [2002] EWHHC 2059, (COMM).

70. An agreement to negotiate is an “agreement to agree” and so void for its uncertainty, too; the nature of the clause and then the inspection of the parties’ will is reserved to the judge during the examination of the case.

71. A discussion had been risen about the need that the clause had to indicate a specific remedy; it has been considered that it is sufficient any reference to a set of standards which consent to identify the ADR (for example ICC ADR Rules, CEDR Rules, ecc.). A comment on the case is in M. KALLIPETIS, S. RUTTLE (2006), pp. 223 ff.

72. The distinction is justified by the fact that the mediation clause is not a way to enforce cooperation and consent but an instrument to participate to a procedure in which consent could be express.

## 5. Some concluding remarks

As explained above, the issues about the mandatory nature of mediation has been long discussed in England. While the idea of a compulsory procedure is still generally rejected, the increasingly incentives for the use of mediation<sup>73</sup> and the “sanctions” for non-use lead us to think that English legislature is oriented towards a strong support of mediation.

We do not ignore that a recently published consultation paper examined, among other matters, the role of mediation, above all, with respect to a proposal to introduce an automatic referral to mediation (ARM) in all small claims tracks. The responses was positive<sup>74</sup> to the proposition, but the non compulsory nature of mediation was reaffirmed: « All small claims should be automatically referred to mediation, on the basis that this is not compulsory mediation, but rather a requirement to engage with a small claims mediator »<sup>75</sup>.

The reason for this is essentially that the mediation procedure is destined to work well when the parties accept to cooperate with a third party researching a solution; this result is often granted in the hypothesis in which both the antagonists want to preserve the relationship for future contacts<sup>76</sup>, most often in the commercial area.

The nature of mediation requires the *consensus* of the parties; it is essential because the role of mediation is not to impose a solution but to provoke the dialogue between the parties and to stimulate their agreement.

Giving the parties a possibility to test an alternative method to the civil procedure represents, without any doubt, a form for privatising the resolution of a dispute; this approach is coherent with the general idea that mediation is an institution which is not yet sufficiently disciplined. So any form of strict regulation has to be avoided because it would be in opposition to the development of that same institution. In this context, the evolution of the system is transferred to an “extra-institutional” circuit where associations and private initiatives work on models for the diffusion of mediation systems.

The English system, in fact, belongs to those national systems, including the Dutch legislation, which have developed a more flexible approach for

73. *Recently Eggar v. Motor Sevicees (Bath) Ltd* [2007] EWCA Civ. 1002.

74. Since october 2012 another pilot scheme involved the small claims (less than £ 5.000) for a automatic referral at the County Court Money Claims Centre.

75. *Solving Disputes in County Courts: creating a simpler, quicker and more proportionate system. A consultation on reforming civil justice in England and Wales. The Government Response*, Ministry of Justice, p. 11. Interesting data on results of ARM are reported in J.M. SCHERPE, B. MARTEN, p. 433 ff.

76. See *County Court Mediation Schemes. A toolkit to provide a better dispute resolution service*, Her Majesty's Court Service, 2005.

the discipline of mediation, which is regulated for only a few aspects<sup>77</sup>, to avoid the risk of a too formalized procedure.

That methodology which removes the dispute from the natural judicial power to consign it to a private organism has been deeply criticized. First, some authors<sup>78</sup> have highlighted the assumption that mediation constitutes the other face of an imperfect justice system. In other words, the necessity to evoke an instrument which is alternative to a civil procedure system discloses the lack of an efficient judicial response to the needs of the citizens.

A starting point is the realization that mediation does not promise a fair and just result as the judicial proceedings is obliged to do; on the contrary, mediation furnishes the optimal result for the parties' needs, but this does not necessarily correspond to the achievable result of a legal process. Mediation aims for a personalized solution and not to the rigid application of legal rules.

Upon closer analysis, the evolution of mediation and the improvement of the English civil system run on parallel binaries because, even considering that the scope of both the procedures is the resolution of a dispute, the ways to reach this objective are extremely different.

The opposition term winner-looser does not adapt to mediation's purpose and, on the other hand, an extra legal solution is rejected by the ordinary civil justice.

Without ignoring the criticisms addressed to the standards and levels of competence of mediators, a more general opposition has been presented by some authors<sup>79</sup> who interpret the process as a form of a coercion, because it requires a sort of "capitulation". The parties might not be able to fully understand their position and to foresee the result of a civil procedure and the legitimacy of their respective claims. Moreover, the position of the parties is not equal and the financial predominance of one could produce unfair results. Similar risks might be avoided in a civil procedure which provides for adequate methods and measures of equal protection. The limit of this negative vision is evident in the light of the modern system of a civil system of justice, which has placed the pre-trial settlement as a solid base for the process. So, the system of alternative dispute resolution receives indirect legitimacy; that condition does not impede the civil court to carry out its important role in the administration of justice, above all in some contexts which require a coercive power.

77. On an opposite level some nations have opted for a high regulatory density (Austria); in the middle some systems where the legislative discipline is oriented in specific sectors. An interesting comparative studies between different model of mediation in the international panorama are: M. MCLWRATH, J. SAUVAGE (2010); N. ALEXANDER (2009); K.P. BERGER (2009).

78. H. GENN (2009).

79. O. FISS (2003).

The growth of mediation, on the contrary, has been promoted by the general perception of the unpredictable justice founded on the results of a difficult and expensive legal process, where the direct participation of the parties is limited, and which always conclude with the victory of only one party<sup>80</sup>.

Mediation « is presented as cheaper, quicker, less risky, more creative and more harmonious than legal proceedings. Mediators do not give a decision on legal cases but adopt a problem solving approach which helps disputing parties to reach a settlement that they can live with »<sup>81</sup>.

In the English legal system, a valid objection to the expansion of mediation could be the risk of the loss of common law precedent, as the case law has always been, in the anglo-saxon structure, a fundamental element in the development of law. As it is known, the decision in a specific dispute offers the occasion to clarify basic values and general rules of the civil organisation, so the trial assumes the function both of resolving the specific debate, and of articulating the law, and finally to deter future illegitimate conduct.

In other words “revealing” the significance of the law, which serves individuals as well as the community, belongs to the judicial power and not to a private institution<sup>82</sup>; so, reducing the intervention of the public justice system could lead to uncertainty and, paradoxically, to an increase of disputes in the long term.

Our hypothesis is that ADR instruments guarantee an adequate result for the parties, which might not coincide with the legal effect of the application of law; on the contrary, the purely judicial solution could be inadequate for the parties, although it furnishes the regulation of the matter in question and corresponds to the exact execution of the law.

The UK’s public approach is manifestly oriented towards promoting ADR, and mediation in particular, because a legal process should be considered as a last resort. Economic reflections guided the government’s idea, which was motivated by the need to reduce the judicial work load and legal costs in the current historical period.

Though noting the increase of the phenomenon, and the potential consequences on the civil justice system, which cannot be ignored, we must at the same time understand its benefits in terms of fairness in a specific case and the reduction the costs and time. These are elements which are not to be neglected<sup>83</sup>.

80. On a positive approach to mediation: G. COSI, G. ROMUALDI (2010).

81. H. GENN (2012), p. 11.

82. On the american evolution of the civil justice on the matter of adjudicature power of the courts see: J. RESNIK (2003), p. 173 ff.

83. A comparative analysis can be found in F. LEE, S. ALI (2011), pp. 37 ff.

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# Mediation in Greece

A new approach in the delivery of civil justice

CORNELIA DELOUKA–INGLESSI

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## 1. Introduction

Greece is experiencing substantial changes in the field of Alternative Dispute Resolution (hereinafter: ADR) recently. These changes were predominantly, though not exclusively, motivated by the Directive “on Certain Aspects of Mediation in Civil and Commercial Matters” which was issued in 2008 by the European Parliament and the Council<sup>1</sup>, <sup>2</sup>. In fact, the EU has intentionally promoted mediation and other forms of ADR over the last two decades in order to advance access to justice goals<sup>3</sup>. As probably well known, mediation, in which a neutral third person, namely the “mediator”, assists parties to work towards a negotiated settlement, is a very effective process of ADR as it provides a cost-effective and quick extra-judicial resolution

1. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation on civil and commercial matters, Official Journal L 136, ff. Member States were required to transpose the Mediation Directive into their legal systems by May 21, 2011. Nonetheless Denmark did not take part in the adoption of the Mediation Directive, according to Recital 30 of the Preamble and Art. 1(3).

2. Note that the objective of the Directive is « to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings » (Article 1).

3. See *inter alia*: K. HOPT, F. STEFFEK (eds) (2012), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford University Press, pp. 5 ff., Nolan-J. HALEY (2011).

of disputes, tailored to needs of the parties<sup>4, 5</sup>. Less known may be the fact that mediations' roots are found in ancient Greece, whilst the influence of ancient Greek philosophy served as the foundation for the mediation movement<sup>6</sup>.

Greece's judicial system is notoriously slow and courts are over-loaded with suits that can take years to be resolved. Therefore, the improvement of the functioning of the legal system, particularly as regards the speeding-up of the administration of justice by facilitating out-of-court settlement mechanisms is of great importance. Moreover, a well-functioning judicial system is of course of paramount importance and a crucial prerequisite for the attraction of investments and economic growth.

Despite the fact that there are several ADR schemes dispersed throughout the Greek legislation and that mediation had already been practiced in specific areas of Law even before the transposition of the Mediation Directive<sup>7</sup> (yet very timidly and with a great deal of hesitation), mediation as a formal procedure for resolving disputes in civil and commercial matters was officially introduced into the Greek legal system only in December 2010, i.e. when Law 3898/2010 implemented EU Directive 2008/52.

In addition, one more big step forwards to the path of the improvement of the functioning of the judicial system in Greece was made with the enactment of Law 4055/2012 on "Fair Trial and its Reasonable Duration"<sup>8</sup>, as recently amended by Art. 102 par. 2 of Law 4139/2013. Said Law introduced significant reforms in the administrative trial in order to improve the efficiency of judicial proceedings. Subsequently, aspiring to promote peaceful dispute resolution and reduce courts' workload, Law 4055/2012 established, inter-alia, judicial mediation in the Greek legal system<sup>9</sup>. The recourse to judicial mediation is optional for the litigant parties. Yet, if they do recourse to this procedure and conclude to an agreement, the relevant minutes constitute an enforceable title which may be executed in the same

4. It is important to keep in mind that the mediator only helps the parties to come to an agreement and does not formally express an opinion on one or other possible solution to the dispute.

5. According to the Directive's Preamble « Mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. . . ».

6. S. ANTONILOS and E. PLESSA, (2014), pp. 3–5, Athens–Thessaloniki, Sakkoulas Publications, A. GUTIERREZA (2012).

7. Thus, e.g., a successful mediation was conducted already by the Hellenic Mediation Centre in October 2010 between a) The New York Times and The International Herald Tribune and b) a natural person, who claimed having been harmed by the publication of an article in the newspapers aforementioned. See: *The Introduction of the Mediation Directive in the Greek Legal System*, [www.gemme.eu/en/news/download/329](http://www.gemme.eu/en/news/download/329), accessed September 2013.

8. Official Gazette of the Hellenic Republic. 51/12–3–2012.

9. K. PAPADIAMANDIS (2013), in R. Clark (ed.) *The Dispute Resolution Review* (5th edn.), London, Law Business Research, p. 302.

way as a Court decision.

The impetus behind Law 4055/2012 was the alarming record on delayed administration of justice in Greece. Awkwardly, Greece has the sad “privilege” to rank fourth among the forty-seven Members of the Council of Europe for violations of the right to speedy administration of justice, and was condemned for unjustified delays in trials, in more than 365 cases by the European Court of Human Rights (ECHR) since 1997<sup>10</sup>. Most importantly, Greece had to pay 8.420.822, 00 Euros for compensation and reparation of moral damages arising from denial of justice<sup>11</sup>.

So far, the most common form of ADR used in Greece has been arbitration, mostly with respect to international transactions. The Greek Code of Civil Procedures (hereinafter: CCP) sets out the principles for national arbitration in Arts. 867–903 of the 7<sup>th</sup> book, while international arbitration is regulated by Law 2735/1999, which, in fact, introduced the UNCITRAL Arbitration Rules into Greek legislation<sup>12</sup>.

Lastly, it should be underlined that an attempt of mandatory out-of-court consensual dispute resolution was provided in Art. 214A of the CCP since 2001<sup>13</sup>. Nevertheless, this provision had extremely poor results as between 2010–2011 it was applied to only 0.5% of all pending cases<sup>14</sup>. Hence, Law 3994/2011 (which made a number of amendments to the Greek CCP) changed the mandatory character of this provision to an optional one<sup>15</sup>. More specifically, according to Article 214A of CCP, after the occurrence of its pendent and until a final decision is reached, litigants may attempt to reconcile through negotiation efforts regardless of the standing stage of the trial and by acting out of its proceedings with or without the engagement of a third person. This last amendment is still in force and out of court dispute resolution is up to the choice of the parties in every pending first-instance case and until a final decision is reached<sup>16</sup>.

10. As well known, the “right to a fair trial” through access to justice is a major part of the architecture of the ECHR (see Art. 6).

11. See also Preamble of Law 4055/2012.

12. N. KLAMARIS and C. CHRONOPOULOU (2012), in K. Hopt and F. Steffek, 587, 590.

13. According to Law 2915/2001.

14. N. KLAMARIS and C. CHRONOPOULOU (2012) in K. Hopt and F. Steffek (eds), *op. cit.*; p. 588.

15. According to Art. 19 of Law 3994/2011. See, Spyros Antonelos and Eleni Plessa, *op. cit.*, pp. 62–63.

16. *Ibidem*.

## 2. Non–Judicial Mediation in Greece

### 2.1. *The impact of the Mediation Directive*

As already mentioned, non–judicial mediation is regulated by Law 3898/2010 (hereinafter: “the Mediation Act”) under the title: “Mediation in Civil and Commercial Matters” in Greece. It applies to any mediation regarding civil and commercial matters which take place in Greece regardless to whether the dispute is a domestic or a cross–border one<sup>17</sup>.

By Law 3898/2010 Greece incorporated EU Directive 2008/52/EC of the European Parliament and the Council “on certain aspects of mediation in civil and commercial matters” (hereinafter: “the Directive” or “the Mediation Directive”) into Greek national legislation. Nonetheless, said Law is actually the result of intensive consultation that started in 2008 not only in response to the EU Mediation Directive but also to face the devastating delays in the administration of justice in Greece<sup>18</sup>. Finally, the Mediation Act, following more or less literally the EU Directive had been enacted on 16th of December 2010<sup>19</sup>.

The “Mediation Act” regulates only the basic issues of mediation. Therefore, additionally, several other supplementary by–laws solving certain procedural matters have recently been issued: (i) Presidential Decree 123/2011 “on the conditions and requirements for licensing and function of the mediation training providers in civil and commercial matters”<sup>20</sup>. (ii) Ministerial Decision of the Ministry of Justice, Transparency and Human Rights 109088/12–12–1011 concerning the “procedure for the certification of mediator’s accreditation titles and the adoption of the Code of Conduct for the accredited mediators and determination of sanctions for its violations”, (iii) Ministerial Decisions of the Ministry of Justice, Transparency and Human Rights 34801 and 34802/26–4–2012 concerning the Regulations about the functioning of the committee of mediators and the functioning of the examination committee of candidate mediators, respectively (iv) Ministerial Decision of the Ministry of Justice, Transparency and Human Rights 109087/12–12–2012 which constitutes the Mediators Certification Commit-

17. See *inter alia*: I. ANASTASSOPOULOU (ed), (2011); *Mediation in Civil and Commercial Disputes* (in Greek), I. ANASTASSOPOULOU and C. COTSAKI (nd) [www.adrcenter.com](http://www.adrcenter.com), and , V. SKORDAKI (2012) *Mediation and Law 3989/2010 — One Day of Mediation* —.

18. A. ANTHIMOS (2012), *Mediation in Greece*, in G. DE PAOLO and M. TREVOR (eds), *EU Mediation Law and Practice*, Oxford University Press, 148. See also the Preamble of Law 4055/2012 (to be discussed in Part II of this paper) which notifies that Greece had to pay more than 8.420.822, 00 Euro for compensations for these delays.

19. Official Gazette of the Hellenic Republic A 211/16–12–2010.

20. Official Gazette of the Hellenic Republic A 255/9–12–2011.



tee, and (v) Ministerial Decision of the Ministry of Justice, Transparency and Human Rights 1460/27-1-2012 that determines mediators' fees.

As already mentioned, Law 3898/2010 transposed the Mediation Directive in Greek national legislation almost literally and on time<sup>21</sup>. So, it fulfilled the Directive's requirements. Yet, one should keep in mind that the Directive provides Member States with a quite flexible regulatory framework that enables them to enact a variety of mediation laws. Although some Articles are concrete and provide for full harmonisation of the laws of Member States most of them are formulated rather softly and express desired than clear rules to implement<sup>22</sup>. The Directive does not comprise exhaustive guidelines for the conduct of a mediator and does not provide high level principles, so it envisages that Member States will form their own mediation rules in accord with their own procedure.

Consequently, some differences in the Greek "Mediation Act" compared to the Directive can be detected. Firstly, whilst the Directive applies only to cross-border disputes<sup>23</sup>, it does not restrict Member-States to enact laws that cover national mediation as well<sup>24</sup>. As a result, the "Mediation Act" applies to both domestic and cross-border civil or commercial disputes which take place in Greece.

Moreover, until recently, specifically in case of national disputes only lawyers could act as mediators (after their certification, which is awarded after examination before an examination committee). However, according to a very recent amendment of the above "Mediation Act", by Law 4254/2014 (par. IE, sub par. IE.2)<sup>25</sup>, from the 7th of April 2014 and onwards, mediation can be conducted by any third person, as long as he/she meets the specific qualifications required by the relevant legislation, i.e., has been trained adequately, assessed accordingly and has been accredited as a mediator by the "Mediator Certification Board", which operates under the auspices of the Ministry of Justice, Transparency and Human Rights.

Contrariwise, when it comes to cross-border disputes, the "Mediation Act", fulfilling the Directive's requirements, had always allowed also professionals other than lawyers to serve as mediators once they are certified and accredited in line with the relevant law<sup>26</sup>.

21. Member States were required to transpose the Mediation Directive by 21 May 2011, apart from Denmark, which had opted out of the Directive (see Recital 30 of the Directive).

22. F. STEFFEK (2012), *Mediation in the European Union: An Introduction*, [www.diamisolavisi.net/kiosk/documentation/Steffek\\_Mediation\\_in\\_the\\_European\\_Union.pdf](http://www.diamisolavisi.net/kiosk/documentation/Steffek_Mediation_in_the_European_Union.pdf).

23. See Art. 2 of the Mediation Directive.

24. See point 8 of the Preamble.

25. Official Gazette of the Hellenic Republic A' 85/07-04-2014.

26. See Presidential Decree 123/2011 which regulates the requirements for the authorization and the operation of the training organizations for mediators.

Unlike the Directive which appears to require that both parties agree to the enforceability of the mediation agreement by a court, the “Mediation Act” appears to allow enforceability based on the consent of only one of the parties<sup>27</sup>.

In any case mediation can be an option for resolving a very wide range of disputes of civil or commercial nature, such as family law disputes, labour law disputes, consumer, intellectual property, trade law disputes, etc. Administrative and Criminal disputes and matters are of course excluded as in the EU Directive.

To conclude, the Greek Mediation Act does not provide a comparison of mediation to other ADR schemes. Actually mediation is expressly dissociated from other ADR mechanism as e.g. the attempt to settle the parties made by the judge of peace or the court during a trial as well as arbitration.

## 2.2. *An overview of the Greek Mediation Act*

Mediation as governed by Law 3898/2010 encourages parties to use mediation as an alternative dispute resolution method. It is provided by as private or court-annexed mediation and is structured as follows:

### 2.2.1. Objective and Scope of Application of the Law — Disputes Subjected to the Law (Arts. 1, 2)

Briefly, the “Mediation Act” serves to: a) transpose the “Mediation Directive” into Greek legislation and b) institutionalize national procedures for mediation (Art. 1).

A significant feature of the Directive is its voluntary nature as it does not impose an obligation on parties to mediate. In accordance, the “Mediation Act” explicitly states that mediation falls within the discretion of the parties<sup>28</sup>. So, the Greek legislator opted for a voluntary character of mediation. Moreover, the Directive is restricted to disputes in civil and commercial matters and applies, as mentioned above, to cross-border disputes only, leaving, however, freedom to Member States to extend the scope of application of related provisions to domestic affairs. In consequence to these EU’s legislator provisions, the “Mediation Act” applies to both domestic and cross-border disputes. Lastly, there exists a general limit to the application of the Directive even in disputes of civil and commercial matters, as it cannot be applied to legal situations in which rights and obligations are not

27. A. ROVINE (2011), p. 417, G. DE PAOLO and M. TREVOR (2011), p. 19, [www.kluwermadiationblog.com/2012/03/28/greece-lost-in-mediation](http://www.kluwermadiationblog.com/2012/03/28/greece-lost-in-mediation).

28. See point 14 of the Preamble.

at the parties' disposal.

In consequence of these EU's legislator provisions, Art. 2 of the Greek Mediation Act states: "Private law disputes can be submitted to mediation if the parties agree and if the dispute relates to rights and obligations over which the parties have the power to dispose. The agreement to submit the dispute of mediation is established by writing or by the court's minutes if of Art. 3(2) is applicable and is regulated by the substantive law on contracts on agreement"<sup>29, 30</sup>.

### 2.2.2. Recourse to mediation (Art. 3)

The "Mediation Act" opens several paths to mediation process<sup>31, 32</sup>:

- i) Firstly, parties can agree to use a mediation procedure before, after or during the pendency of a lawsuit. Clearly, such an arrangement of the parties, i.e. to pursue mediation, rests within their discretion (Art. 3(1)a.).
- ii) Moreover, the court in which the case is pending, can invite the parties at any stage of the trial to use mediation (Art. 3(1)b.). This court's invitation is not compulsory, but if the parties comply with such an invitation, the court adjourns the hearing of the case for at least three but not more than six months (Art. 3(2)).
- iii) Recourse to mediation is possible when ordered by another EU Member-State's court (Art. 3(1)c.).
- iv) When mediation is mandatory by Greek Law (Art. 3(1)d.). This provision refers to mediation schemes regulated mainly by: *a.* Law 3588/2007, as amended by Law 4013/2011 (see Bankruptcy Code: Arts. 99–106)<sup>33</sup>, *b.* Law 1876/1990 on collective bargaining, *c.* Law

29. The Directive provides for voluntary mediation as well. Nonetheless, Art.5(2) makes clear that the "Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions.

30. See also Art. 1(2) of the Mediation Directive according to which: "This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)".

31. See also Art. 5 of the Mediation Directive.

32. A. ANTHIMOS (2012), *Mediation in Greece* in Giuseppe De Paolo and Mary Trevor (eds), *op. cit.*; 150.

33. By virtue of Article 102 of the old Law 3588/2007, the court, *ex officio* or upon petition of the debtor or his creditors, could appoint a mediator to facilitate an agreement between creditors and debtors. If a debtor requested the appointment of a mediator, the court was obliged to honour such request. See: K. PAPANIAMANDIS in R. CLARK (ed), *op. cit.*; 310. Nevertheless, on September 15, 2011, a wide-ranging amendment of the Greek Bankruptcy Code brought extensive changes to the

2251/1994 (as amended by Law 3587/2007) on consumer protection, which institutionalized out-of-court resolution panels, *d.* Law 3869/2010 (as amended by Law 4161/2013) on debt settlement with individuals with excessive debt (see Art. 2), and *e.*, Law 4013/2011 (Art. 15) which provides a mediation scheme exclusively for commercial rent review disputes<sup>34</sup>.

Lastly it must be underlined that the recourse to mediation interrupts the statute of limitations and prescription periods for as long as the mediation process lasts (see also Art. 11).

### 2.2.3. Definitions (Art. 4)

Consistent to the Directive's definition<sup>35</sup> mediation is defined by Art. 4(b) as: "A structured process, however named, whereby two or more parties to a dispute attempt to resolve a dispute on a voluntarily basis, by an agreement with a view to reaching an agreement on the settlement of their dispute with the assistance of a mediator. Attempt to settle made by the judge of the peace or a judge in the court during a trial, pursuant to Arts 208 ff. and 233(2) of the Greek Code of Civil Procedure is not included".

This last definition differentiates mediation from conciliation as well as any other ADR method. Note that Articles 208 ff. and Art 233 Par. 2 of the Greek Code of Civil Procedure provide that consensual dispute resolution and settlement (whether or not via the judiciary) are methods to terminate or abolish the trial<sup>36</sup>. As for "conciliation", it could be defined as "a process whereby parties, either acting by themselves or assisted by lawyers or a third person try to settle a dispute out of court. The third person is not a mediator, and, therefore, is not trained or accredited as a mediator. However, the "third person", not only facilitates the parties, but also intervenes by openly giving advice to the parties and suggesting concessions or solutions. According to the Greek CCP, it is possible for any party to resolve a civil or commercial dispute by means of a conciliation agreement, via e.g., Article 871 of the CCP, and Articles 208, 209–212, 214A, 233 para. 2, 293, and 667 of the CCP. The same applies to Articles 681A, 681B, and 681D of the CCP concerning disputes about traffic accident damage claims, alimony, child

pre-bankruptcy tools available. See: Potamitis S. and A. ROKAS (2012), pp. 235 ff.

34. More specifically, it is an out-of-court dispute resolution system, based in the country's administrative regions. These mediations are supervised by a three-member panel, whose members are a judge, a representative of the professional associations and a representative of the Pan-Hellenic Federation of Immovable Property Owners. See: A. ANTHIMOS (2012), *op. cit.*; 150.

35. Art 4.b of the "Mediation Act" replicates the wording of Art. 3(a) of the Mediation Directive.

36. N. KLAMARIS and C. CHRONOPOULOU (2012), in Hopt K. and F. STEFFEK (eds), *op. cit.*; 587.

custody, and libel, respectively<sup>37</sup>.

Until the enactment of Law 4254/2014 (which as already mentioned very recently amended the “Mediation Act”), the definition of a “mediator” given by Art 4(c) of the “Mediation Act” differed from the Directive’s one. Whereas the Directive in its art 3(c) defines a “mediator” as “any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation”, the Greek “Mediation Act” in its initial version had added one more condition, i.e.: “. . . the mediator had to be a lawyer, accredited as mediator by a competent Accreditation Body (according to Art 7 of the “Mediation Act”). However, the recent amendment, quite correctly, deleted this limitation and ex-nunc, mediation can be conducted by any third person, as long as he/she meets the specific qualifications required by the relevant legislation. On the other hand, there had not been such a provision in case of mediation in cross-border disputes. Thus, if the dispute was an internal matter, in the sense that only Greek parties were involved, the mediator had to be a lawyer. This lawyer’s monopoly was clearly against EU and Greek Competition Law. Contrary, when the dispute had a cross-border character, the parties were free to choose an accredited mediator, who was not a lawyer of profession if they wished. One must admit that this requirement of Art 4(c) in its initial wording was one of the most striking features in the “Mediation Act”, as those wishing to act as mediators in domestic disputes should be lawyers, whilst in cross-border disputes there was not such a requirement! Thus, the deletion of lawyers’ monopoly to assume mediation duties in case of domestic disputes is obviously a step to the right direction.

Concluding, it should be noted that the definition given to “Cross-border disputes”, in the “Mediation Act” replicates the one given in Art 2 of the Directive<sup>38</sup>.

37. A. ANTHIMOS (2012), *Mediation in Greece*, in G. DE PAOLO and M. TREVOR (eds), *op. cit.*; 145 Note that the Mediation Directive includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

38. More specifically, Art 4 of the “Mediation Act”, defines Cross-border disputes as follows: “1. A cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court of a Member State; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Art. 3(2) an invitation is made to the parties. 2. For the purposes of Arts 10 and 11 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c). 3. For the purposes of paragraphs 1 and 2,

#### 2.2.4. Quality of Mediators (Art. 5 — Training Institutions, Art. 6 — Accreditation Institutions, and Art. 7 — Accreditation)

Safeguarding the quality of mediation is definitely of paramount importance, therefor Art. 4 of the Mediation Directive addresses methods of ensuring it. In this respect, Member States are required to adopt effective quality control mechanisms, including codes of conduct and mediation training. Yet, the Directive does not address the exact level of qualification and training that the mediators should acquire and allows Member States to freely decide on the requirements, qualifications and other regulations applicable to mediators. This omission is quite problematic as it could have a negative influence on the qualifications of mediators in Europe.

Still, as far as the “Mediation Act” is concerned, Articles 5–7 which regard the measures taken to assure mediators’ quality in Greece are quite strict. More specifically, there are provisions regarding the training bodies, the certifying body and the accreditation system. In addition, specific issues regarding how exactly these bodies are formed, the programme and the content of the training of mediators are provided by Presidential Decree 123/2011. According to this Presidential Decree mediators’ Training Centers bear the legal form of non-profit civil companies and have to be founded jointly by at least one Bar Association and one Chamber of Commerce. In fact, it has to be noted that these public law entities have been chosen by the Greek legislator, correctly from our point of view, for the scholarly and professional skills of their members. The assumptions of obtaining a license to found such training institutions and the specific conditions and requirements needed for the trainers, the duration of training, etc. are also regulated by the above Presidential Decree<sup>39</sup>.

Moreover, Art. 6 of the “Mediation Act” provides for the foundation of the “Certification Committee”. It certifies the sufficiency of mediator candidates and supervises the training institutions as well as the mediators regarding their compliance with both their obligations and the code of conduct. The Certification Committee is under the auspices of the Greek Ministry of Justice. Note that mediators are certified following examinations before the relevant Committee. More specifically, in order to receive the certification, the candidate must stand successfully before an Examining Committee, consisting of two members of the Certification Committee and a Judge.

Pursuant to Art. 7, the accreditation body for mediators that is in charge of the accreditation of mediators is the Department for lawyers’ Function

domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.”

39. N. KLAMARIS and C. CHRONOPOULOU (2012), in Hopt K. and F. STEFFEK (eds), *op. cit.*; 600.

and Bailiffs attached to the General Directorate for the administration of Justice at the Ministry of Justice. Moreover, by virtue of Ministerial Decision 109087/14.12.2011 and Art 7(2) of the “Mediation Act”, a number of important issues are additionally regulated, such as: The quality control mechanisms for the assessment of mediators, the accreditation requirements for foreign mediators, the code of conduct which accredited mediators must respect<sup>40</sup>, as well as other issues related to accreditation.

#### 2.2.5. The Mediation Procedure (Art. 8)

In order to avoid excessive formality of the mediation procedure and thus make it unattractive, the “Mediation Act” sets only general rules on the mediation procedure. Yet, it must be underlined that pursuant to Art. 8(1), parties must participate in mediation with the assistance of their lawyer, while the wording of this Article assumes that the parties themselves must be present at the mediation procedure<sup>41</sup>. The mediator is chosen by the parties or by a third person that they appoint (Art. 8(2)).

According to Art 8(3), the mediation procedure is defined by the mediator in consultation with the parties, the latter being able to terminate the mediation procedure whenever they wish. As the mediation procedure is of a strictly confidential character, no minutes are kept. The mediator can conduct discussions and meetings with each of the parties. Nevertheless, information acquired during these meetings cannot be disclosed to the other party without the concession of the relevant party.

#### 2.2.6. Enforceability of Agreements Resulting from Mediation (Art. 9)

The enforcement of agreements reached by mediation is perhaps the most important aspect of the whole mediation procedure. It is self-evident that compliance with agreements resulting from mediation should not depend on the good will of the parties. Initially, it is helpful to make a distinction between a successful mediation and a non-successful one<sup>42</sup>. Also, as to the enforceability of the written agreement resulting from mediation, one

40. The Greek Code of Conduct for accredited mediators was enacted by Ministerial Decision 109088/14/12.2011. It actually transfers the relevant European Code of Conduct in Greek Law, though, contrary to the European, the Greek Code of Conduct being a statutory Law has binding power. Thus, its violation entails penalties, which, in some occasions, can extend to the revocation of the mediator’s accreditation. See: Avlogiari E. and K. TERZIS (nd.), Code of Conduct for Accredited Mediators, Legal Dimension–Ethic Matter, [www.diamesolabisi.com](http://www.diamesolabisi.com), accessed December 2013.

41. Therefore, lawyers should face mediation as an opportunity and not as a threat. In this context, lawyers are challenged to represent their clients effectively exactly as they would do in litigation.

42. S. ANTONELLOS and E. PLESSA, (2014), *op. cit.*; 148–151.

should keep in mind Art 6 of the Mediation Directive that states: “Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others to request that the content of a written agreement resulting from mediation be made enforceable”. Undoubtedly, enforceability is one of the key points holding the law together. If no enforceability is ensured, mediation will never become an attractive alternative to resolve disputes<sup>43</sup>.

According to Art 9(1) the mediator has to draft a Minute regardless if the parties reached a settlement or not. The content of the final report must include: *a.* The Mediator’s full name, *b.* the place and time the mediation was conducted, *c.* the full names of those who participated in the mediation, *d.* the agreement for mediation, upon which the mediation session was based, and, *e.* the settlement the parties have reached, or, in case mediation was unsuccessful, a report stating that mediation had failed.

Pursuant to Art 9(2) at the end of the mediation procedure, the mediation agreement record is signed by the mediator, the parties and their lawyers. Nonetheless, if mediation fails the report may be signed by the mediator only. The publication of the records or its filing in the court is not compulsory, that meaning that where parties agree so, the settlement is not published; in that case it has the power of a simple agreement only<sup>44</sup>. Nevertheless, if the parties reach an agreement in mediation, upon the request of even only one of the parties, the mediator must file the original of the settlement record in the secretariat of the Court of First Instance where the mediation took place. In that latter case, the party seeking to file the record has to pay a state filing fee<sup>45</sup>, <sup>46</sup>. Once submitted in this manner, the mediation agreement becomes enforceable, thus obviously the “Mediation Act” has strong provisions for enforcing the mediated agreement.

Most importantly, according to Art 9(3), if the final mediation report contains a settlement regarding a claim subject to enforcement, then, after having been filed and duly certified, the report serves as a title of execution according to Article 904(2.c) of the Greek Code of Civil Procedure<sup>47</sup>. In other words, it has the binding force of a court decision.

Conversely, the “Mediation Act” does not provide for explicit criteria or a specific procedure in case the mediation fails and does not result in an

43. N. BOURAS (2011). *Mediation in Civil and Commercial Matters: An Overview of the New Greek Law 3898/2012*, [www.arbitration-adr.org](http://www.arbitration-adr.org).

44. N. KLAMARIS and C. CHRONOPOULOU (2012), in Hopt K. and F. STEFFEK (eds), *op. cit.*; 595.

45. Currently set at 100 Euros (See: Ministerial Decision No 85485/2012, Official Gazette of the Hellenic Republic B’ 2693).

46. On the other hand, the EU Directive, at least at principle, requires that, in order for the agreement to become an enforceable title, the consent of both parties is in order (Art 6(1)).

47. N. KLAMARIS and C. CHRONOPOULOU (2012), in Hopt K. and F. STEFFEK (eds), *op. cit.*; 595.



amicable resolution agreement. In this case, however, it is self-understood that the parties can still bring their dispute to court.

### 2.2.7. Confidentiality of Mediation (Art. 10)

Confidentiality is of course fundamental to mediation, whilst the disposition of the parties to disclose information being the basis for a solution favorable to all involved in the dispute is a key factor to the success of mediation. Confidentiality encourages parties to speak freely and frankly and gives them the feeling that their conversation will not be used against them or be revealed to an outsider, e.g. a judge in a court or a market competitor<sup>48</sup>. While court proceedings are mainly open to the public in most jurisdictions mediation is a strictly private Directive titled “confidentiality of mediation”, provides for a minimum degree of procedure and encompasses confidentiality and secrecy<sup>49</sup>. Nonetheless, Art. 7 of the Mediation compatibility and very basic standards only<sup>50</sup>.

On the other hand, the Greek “Mediation Act” provides quite strict confidentiality-related regulations. More specifically, pursuant to Art 10(1) mediation has to be conducted so as not to violate confidentiality, unless the parties have agreed otherwise. Before the mediation procedure begins, all persons participating shall agree in writing to respect the confidentiality of the procedure. Should they wish to, the parties can also bind themselves to maintain confidentiality as to the content of the settlement reached, unless the disclosure of the content is necessary for its enforceability, pursuant to Article 9(3) of the Mediation Act<sup>51</sup>.

Moreover, Art. 10(2) provides that mediators, the parties, their lawyers and any other person participating in the mediation process are not to be summoned as witnesses.

Likewise, none of the above persons are obliged to produce any facts of evidence that came in light during the mediation procedure or that are connected to it at any future trial or arbitration<sup>52</sup>. Nonetheless, the “Mediation Act” provides for an exception to the rule. Thus, according to Art. 10(2) in fine, confidentiality does not apply in cases where the disclosure

48. R. MOREK (2013), *Nihil silentio utilius: Confidentiality in mediation and its legal safeguards in the EU Member States*, “ERA Forum”, p. 422.

49. *Ibidem*.

50. Pursuant to Art 7(1) of the Mediation Directive, natural persons obliged to keep confidentiality are only “mediators (and) those involved in the administration of the mediation process”. Hence, the parties to mediation are not, at least expressly, bound by the confidentiality obligations. *Ibid*, supra, 427.

51. See also Art 7(1)b of the Mediation Directive.

52. Note that the Mediation Directive confines the limits on service as witnesses and production of evidence to civil and commercial proceedings (Art. 7 par.1).

of information arising out of or in connection with a mediation process is necessary in account of overriding public policy considerations, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person<sup>53</sup>.

#### 2.2.8. Suspension of limitations and Prescription Periods (Art. 11)

Art. 11 of the “Mediation Act” provides the effects of mediation on limitations and prescription periods<sup>54</sup>. As already mentioned above<sup>55</sup>, the use of mediation interrupts the statute of limitations and prescription periods for as long as the mediation process lasts. Article 11 clarifies that, in reserve of Article 261 ff. of the Greek Civil Code, the limitation and prescription period that had been interrupted starts again when the report concerning the failure of mediation is authored or when the mediation procedure is terminated by any way.

It should be underlined here that the beginning of mediation procedure only blocks the opening or the continuation of a trial before the courts, while the “Mediation’s Act” preamble clarifies that the mediation agreement hasn’t got any procedural consequences with respect to the exclusion of actions before state courts. Hence, the agreement to submit a dispute to mediation does not exclude resort to state courts<sup>56</sup>.

#### 2.2.9. Cost of Mediation / Mediators’ Fees (Art. 12)

Undoubtedly, one of the most crucial factors in the success of mediation is the overall cost, based on the fees and costs involved in the process. Indeed, in peoples’ minds mediation should be understood as a quick and inexpensive alternative to the lengthy and costly court proceedings<sup>57</sup>.

Art. 12(1) of the “Mediation Act” provides for the mediator’s compensation, which is on an hourly–rate basis and pro–rated at a fee cap of 24 hours in total, including preparation time. However there is an exception to the main rule of hourly–based compensation, i.e., if the parties agree otherwise; time will of course show if this exception stays as is, or finally becomes the rule.

Unless the parties agree otherwise, the parties share the burden of the fee equally (Art. 12(2)). Moreover, it is defined that each party bears the

53. Such reasons are also addressed in Article 7(1) of the Mediation Directive.

54. See also Art 8 of the Mediation Directive.

55. See Art 3 of the “Mediation Act” discussed above.

56. N. KLAMARIS and C. CHRONOPOULOU (2012), in Hopt K. and F. STEFFEK (eds), *op. cit.*; 594.

57. G. ORFANIDIS (2006) 457, A. ANTHIMOS (2012), *Mediation in Greece*, in G. De Paolo, M. Trevor (eds), *op. cit.*; 156.

cost of his/hers own lawyer. Therefore, parties must keep in mind that they will have to cover both the fees of their lawyers, whose participation is mandatory as already mentioned pursuant to Art. 8(1), and the half of the mediator's fees.

Note the amount of the hourly mediator's compensation was recently defined by the Decision of the Minister of Justice, Transparency and Human Rights No 1460/2012<sup>58</sup>, as 100 Euros per hour<sup>59</sup>.

### 3. Judicial mediation

As underlined above, Law 3898/2010 does not provide for judicial mediation<sup>60</sup>. Nonetheless, quite recently, Law 4055/2012 on "Fair Trial and its Reasonable Duration"<sup>61</sup>, as amended by Art 102 par. 2 of Law 4139/2013 (under the title "mediation")<sup>62</sup>, introduced judicial mediation in the Greek legislative system. The main aim of Law 4055/2012 is to rationalize and improve the delivery of civil justice, whereas reform of the Greek legal system, predominantly as regards the speed of proceedings has been waited impatiently particularly within the context of the deepening economic crisis. It is widely admitted that a well-functioning judicial system is a vital prerequisite for economic growth and the lure of investments.

Consequently, aiming at the improvement of the efficiency of judicial proceedings and particularly at a faster and fairer trial, substantial changes were introduced by Law 4055/2012. Among the key changes which were introduced was the establishment of Judicial Mediation into the Greek legislative system, aspiring to promote peaceful dispute resolution and of course reduce regular courts' workload<sup>63</sup>. Worth noting is the fact that the Greek legislator opted for a flexible and quite simple way to settle judicial mediation probably in order to ease and enforce the newly introduced scheme. Indicatively, court annexed judicial-mediation is regulated by means of simply one Article which contains six paragraphs only<sup>64</sup>.

More specifically, Art 7 of Law 4055/2012 added a new article in the

58. Official Gazette of the Hellenic Republic B' of 13-02-2012.

59. See more details in D. TRIANTAFYLLOU (2013). *Alternative Dispute Resolution-Mediation*, [www.greeklawdigest.gr/judicial-system/item18-alternative-dispute-resolution](http://www.greeklawdigest.gr/judicial-system/item18-alternative-dispute-resolution).

60. The scope of the "Mediation Directive" also excludes attempts made by the court or the judge of the pending proceeding to settle a dispute in the course of judicial proceeding concerning the dispute in question (see Art. 3(a) par.2).

61. Official Gazette of the Hellenic Republic 51/12-3-2012.

62. Official Gazette of the Hellenic Republic 74/20-3-2013.

63. K. PAPADIAMANTIS, in R. Clark (ed.) *op. cit.*, 302.

64. I. STRATSIANI (2014), *Judicial Mediation in Family Disputes*, in *Procedural Issues in Family Law*, p. 39.

Greek CCP, i.e. Art 214B “on Judicial Mediation”. This Article initiates a non-compulsory judicial mediation scheme in the Greek legal system in disputes of private law nature. Consequently, each First or Second Instance Court in the country has to appoint one or more presidents of the respective court, or senior judges, as full or part-time mediators for tenure of two years. Interestingly enough, the preamble of said Law clarifies that judicial mediation is not supposed to be “competitive” to other ADR schemes but functions in parallel with them.

Judicial mediation involves a quite similar to the “Mediation Act” procedure, except of the fact that it is performed by a judge<sup>65</sup>. In other words it is a court based settlement procedure that is aided by a senior judge and the “mediator” is not a “third person” freely chosen by the parties<sup>66</sup>. Moreover, in judicial mediation the judge–mediator seems to have more flexibility and freedom to approach each case while he may propose non-binding suggestions to the parties and support parties’ logical proposals<sup>67</sup>. As a consequence, judicial mediation as it functions in Greece actually resembles more to ‘conciliation’<sup>68</sup>. Yet, it should be kept in mind that the most significant gain in the case of non-judicial mediation is parties’ participation and self-determination as it is them that take the final decision, not the mediator.

Pursuant to Law 4055/2013, as amended by Law 4139/2013, judicial mediation will be conducted by either (an) experienced Judge(s) presenting in Courts of First Instance or, in the Court of Appeal, or, respectively, (a) senior judge(s). Thus, it is assumed that independence and impartiality in the conduct of the procedure is guaranteed. However, quite surprisingly, neither any training nor any kind of certification or accreditation is needed for the exercise of judges’ mediation duties (Art. 7(2)). Conversely, as highlighted above, pursuant to the “Mediation Act”, only trained and certified mediators are allowed to assume mediator duties. Pursuant to the Law’s explanatory report, the judges’ seniority has been considered sufficient.

The Court where the trial is pending, either before the Court of First Instance or the Court of Appeal (Second Instance) can “invite” the parties to attempt for a judicial mediation settlement of their dispute at every stage of the trial, until the final decision is reached (Art 7(4)). Upon approval of this “invitation”, the initiated trial may be postponed, if the parties agree. Yet, the adjournment cannot exceed a six months period. As in the “Mediation

65. Note that, pursuant to Art. 7 par. 3 of Law 4055/2012, there is also an obligation to take part in the presence of the party’s lawyer, as is the case in the “Mediation Act”.

66. S. ANTONILOS, E. PLESSA, (2014), *op. cit.*, 63, K. FRANGOU (2014), *Judicial Mediation*, in A. Kaissis (ed.), *Problems and Aspects of Mediation*, pp. 15–22.

67. Stratsiani, *op. cit.*, 40.

68. *Ibidem*.

Act”, there is an obligation to take part in the mediation procedure in the presence of the parties’ attorneys at law (Art. 7(3)).

Judicial mediation is optional for the litigant parties (Art 7(1)). Yet, if the parties recourse to it and accomplish an agreement, this agreement constitutes an enforceable title, according to Art 904 (2.c.) of the Greek CCP (Art 7(5)).

Besides, mediation procedure must be conducted so as not to violate confidentiality, except if the parties have agreed otherwise (Art. 7(6)).

It must be underlined that judicial mediation is provided for free to the parties, except of course of the lawyers’ charges and an amount of just 20 Euros (entry fee) in the occasion the procedure leads to an agreement. Obviously, this very low cost makes judicial mediation even more attractive.

Concluding, and as far as the Court of First Instance of Athens is concerned, an “Bureau for Judicial Mediation” is operating since May 12, 2012. Two Chairs of the Court of First Instance of Athens have been appointed as mediators, yet, unfortunately, in parallel with their other duties. At this point, it has to be emphasized that although judicial mediation is a new domain in Greek legislation omens are very encouraging as until the end of August 2013, ninety–three mediation cases of private disputes had been initiated whereas forty–nine of them leded to settlement.

It seems that, contrary to non–judicial mediation which still does not seem to be commonly used in Greece, the newly implemented scheme of judicial mediation is a “success story” in Greece and that at “the end of the day” judges do enjoy the trust of the parties. However, it still has a long way to go as lawyers in Greece seem not encourage their clients to this “direction”. Moreover, as the whole procedure is strictly confidential there cannot be any access at all at the mediated agreements.

#### **4. Conclusions**

First of all it must be underlined that it is very encouraging that Greece has finally instilled both judicial and non–judicial mediation in its legal system. There is no doubt that mediation facilitates and improves the functioning of the judicial system and that it reduces significantly the time and cost of setting civil and commercial disputes. But Greece has a very short history of mediation legislation and mediation is still far from being in common use, although we must admit that efforts for the diffusion and divulgation of this attractive ADR method are quite intensive lately. The percentage of non–judicial mediation users is disappointing small in Greece whilst there seems to be a difficulty in collecting sound data about the exact number of mediation cases held up–to–day.

So it appears that up-to-day, the enactment of the Greek Mediation Act has not delivered the results which the lawmaker had intended to achieve. The legislators' choice to retain an optional character of mediation could, hypothetically, be one of the reasons for its very slow development, although it must be emphasized that in most jurisdictions the choice to engage in mediation is optional and remains entirely to the parties. Also, the hint that the dominant ideology of mediation is voluntariness is, indeed, a widespread one<sup>69</sup>. Besides, Article 5 of the Mediation Directive actually supports the understanding of mediation as voluntary process. Consequently, a more effective alternative could be an obligation to lawyers and other legal practitioners to inform their clients about the possibility mediation.

On the other hand, lawyers in Greece seem to show an intensive interest in non-judicial mediation as they have massively been enrolled in training courses and actively participate in conferences and events which take place all across the country<sup>70</sup>. It should be noted that the Mediation Directive demands from Member States to encourage the training of mediators and the development of voluntary codes of conduct as well as other effective quality control mechanisms concerning the provision of mediation services. Actually, Greece has gone quite far to this direction: A concrete legal framework, four well-esteemed Mediation Training Centers in different cities all over the country<sup>71</sup> and well organized kick-off events and conferences. These efforts can only be considered as good energies. Hence, in our opinion, what really has to be done is to improve awareness and insist in promoting out-of-court settlement culture in Greece probably through a wide reaching communication campaign so that all people can realize and understand the benefits of mediation. It is true that up-to-day, seminars, conferences and specialized lectures have taken place all around Greece but most of these initiatives are addressed to lawyers and entrepreneurs not to the "Greek public" who either ignores or has not yet realized the great benefits of cost and time-effective mediation.

Still, the results from the newly introduced judicial-mediation into the Greek legal system are encouraging. Senior judges exercising mediation duties seem to gain publics' confidence and trust. It remains to be seen whether the changes introduced by Law 4055/2012, as recently amended, will improve the efficiency of the national courts and lead to timely awarding of justice.

Despite of any objections and criticism one may have about the practical

69. M. KARAMELA (nd). Mediation in Greece: an Overview, [www.arbitration-adr.org](http://www.arbitration-adr.org).

70. M. KARAMELA, *op. cit.*; 7.

71. Currently (December 2013), Mediation Training Centers are established in Piraeus, Thessaloniki, Athens and most recently in Larissa, while it is estimated that from March 2014 there will be approximately 500 accredited mediators in Greece.

implementation of the newly introduced ADR schemes into the Greek legal system there can't be any doubt that "the new approach in the delivery of civil justice" described in this paper can only be considered as an ambitious step in the right direction. Indeed, mediation is a perfect default choice for a dispute resolution process, especially for a country like Greece which has an extremely slow and cumbersome judicial system.

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# Mediation in Italy

## The main changes to the framework

ANNALISA ALONGI

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### 1. Introduction

Italy was one of the first EU member states to implement the EU Mediation Directive (2008/52/EC). In the Italian Legal system, for a long time, the term conciliation referred to different types of court-annexed conciliations (judicial procedures administrated by a judge), in civil and commercial matters.

Different provisions of the national rules of civil procedure are still referring to such expressions (articles 185, 320, 410 of the Italian Civil Procedural Code).

In the context of the civil procedure, the principle of supporting conciliation between the parties of a dispute and, at the same time, the general duty upon the judges to try conciliation between the parties of the procedure during the trial, were established and strengthened after the reform of the Civil Procedural Code (CPC) of the 1990s.

Nevertheless this kind of judicial conciliation was not much in demand, because the parties, during the trial, are not inclined to be confident with the person (the Judge) called to decide the dispute.

This is a limit of judicial conciliation in ordinary proceedings: the judge is, at the same time, mediator/ conciliator and authoritative party deciding the dispute; such circumstance is able to affect party autonomy which is a central element in the conciliation procedure<sup>1</sup>.

1. See I. QUEIROLO, Carpaneto L. and S. DOMINELLI, (2012) pp. 254 ff.

## 2. The framework before the implementation of Directive No 2008/52

Article 320 of the CPC for the Peace Judge and Article 185 CPC for the ordinary judges, establish the power of the Judge to order the appearance of the parties at the hearing in order to encourage a friendly resolution of the dispute; this applies at every stage of the trial, even after the discussion of the merits of the case (Article 117 CPC).

The parties can also settle their dispute through conciliation without an order of the judge, if in previous hearings conciliation was at least taken into account. This is possible until the parties submit their final conclusion at last hearing of the trial.

In the Italian Legal system, before the implementation of Directive No 2008/52, the word “mediation” referred, on the other hand, to procedures in family and criminal matters which were not necessarily adjudicatory in nature and whose aim was the resolution of disputes through the delivery of assistance, also therapeutic, to the parties in conflict.

Special provision on mediation are established in:

- a) Labour law: art. 420 c.p.c. established for the judge the duty to try conciliation of the parties during a hearing where their presence is mandatory. Nevertheless non negative consequence arise from the failure to try conciliation so the rule has never been enforced.
- b) Company law: The Legislative Decree No. 5/2013 introduced an extra-judicial conciliation procedure which was the reference model taken in consideration by the legislative during the draft of the law implementing the Directive No. 2008/52 that, with its coming into force, repealed the latter by extending its application to companies law dispute.
- c) Family law: In cases of legal separation and divorce, during the first appearance hearing, the President of the Court has the duty to try the conciliation of the spouses. This duty is absolved with the fulfilment of some formalities and the frequent failure of conciliation offers essential proof about the impossibility to save the marital life and indicates the rupture of the marital affection, which is the condition under which legal separation and/or divorce is granted. In the abovementioned proceeding, conciliation take place in an autonomous segment of the trial in front of the President of the Court who is going to be the judge deciding on the merit of the case. This is the greatest limit of judicial conciliation. Family Mediation is considered in the Italian legislation. Article 155-*sexies* of the Italian civil code establishes upon the Judge the power to postpone the adoption of decisions concerning the chil-

dren in order to give the spouses the chance to try conciliation with experts that should help them to reach an agreement that takes into account the interest, material and moral, of the children of the couple, but, the profession of mediator is not regulated. A series of associations exist with their own members. Even the judges have the option to invite the parties to participate in mediation, this is not yet a common occurrence and there is no list of mediators readily available to the judges to facilitate this option.

- d) Criminal law: In this field mediation is conceived as a path to reparation between the victim and the offender of their position and interest, thanks to a procedure replacing or taking place side by side to the punitive criminal proceedings (Legislative Decree No. 274/00). The peace judge has the power to invite the alleged offender and the victim of the crime, in the criminal proceedings under his/her jurisdiction, to take a mediation procedure in specialised centres for reparation of the crime and to restore peace between the parties.

These court-annexed conciliation/mediation procedures are complementary and accessory to the ordinary civil trial and their aim is, in practice, reducing, as all ADR system, the number of trials, encourage access to justice by extending the protection of those weak categories in need of protection and diversify the method of protection and of dispute settlement by foreseeing different and more functional procedures for the solutions of particular claims that are not finding in the ordinary mechanism of judicial protection a solution fitting enough<sup>2</sup>.

In the field of disputes of the market between companies and between companies and consumers, the Commercial Chambers were entrusted by Law No. 580/93 with the competence to encourage the friendly settlement in the matter of claims related consumer contracts (Law No. 281/1998 now transposed into Italian Consumers Code Legislative Decree No. 206/2005), subcontracting contracts (Law No. 192/1998), tourism contracts (Law No. 135/2001), laundry contracts (Law No. 84/2006)<sup>3</sup>.

In the field of services of public interest (services of telecommunications) Law No. 249/1997 established the Authority for telecommunications, with the mediation procedures to be held in front of its organisms, and the Comitato Regionale per le Comunicazioni (so called Corecom).

In the field of finance and investment services between investors and financial agents, Law No. 262/2004 established a mediation procedure in front of the Commissione Nazionale per la Società e la Borsa (so called Consob).

2. See I. QUEIROLO, L. CARPANETO and S. DOMINELLI, (2012), pp. 255 ff.

3. See G. DE PALO, L. KELLER (2013), pp. 883 ff.

In this legal framework the Legislative Decree No. 28/2010 implementing Directive No. 2008/52, performed a kind of *reductio ad unum* of the previous two concepts of conciliation and mediation.

In the context of Legislative Decree No 28/2010 “mediation” is the activity of a third party to assist the parties in the search of an agreement; conciliation is considered the result of the activity carried out by the mediator and in particular the agreement reached by the parties thanks to the activity of the mediator. This agreement of the parties is comparable to a contract attached to the record of the procedure, which is written by the mediator under his personal liability, at the end of the meeting.

A private mediator who is not working for a Centre or a mediator who is not registered in the Minister’s registry, can carry out, in principle, an activity of mediation. The result of this mediation however will not enjoy the benefits established for regular mediation, such as this procedure is not considered to fulfil the requirements for access to the court of law when mediation is condition to the *vocatio in ius* or to the prosecution of the case; even if mediation is successful the parties cannot enjoy tax relief as is the case in mediation carried out in accordance with the provisions of the Legislative Decree (Article 17), nor do they have the ask for enforcement of the agreement (Article 12).

According to Article 7 of the Ministry Decree No 180/2010, mediations organisms have the right to use the results of the activity done during the procedure in front of joint committees between representatives of consumer and entrepreneur classes, without the activity of an impartial party.

Furthermore the Legislative Decree No. 28/2010 established the so called court-annexed mediation that is the possibility for the judge to defer the parties, if s/he thinks it might be useful, to a mediation centre in order to try a friendly settlement of the dispute and avoid taking an authoritative decision.

### **3. Evolution of mediation in civil and commercial matters in Italy**

The European Union directive 2008/52/EC, imposed on Member States the introduction of mediation procedures for cross-border disputes.

Italy, constantly engaged in the reform of its frozen legal system, seized the opportunity.

In 2009 the Italian legislature implemented Law No 69/2009.

The Law delegated a mandate to the Government to introduce an organic regulation of civil and commercial mediation also for domestic disputes that provided a series of guarantees for the protection of citizens’ rights and ensured the quality and professionalism of the bodies providing mediation services.

The Government issued the regulation on mediation by legislative decree 28/2010 which introduced mandatory pre-trial mediation of civil and commercial cases (providing enforceability of mediation agreements, confidentiality of the process, training of mediators)<sup>4</sup>.

In order to show its intention to intervene on the judicial backlog, it further provided that in a wide list of cases the parties were compelled to submit the dispute to a mediator, failing which legal action could not be taken.

The Mediation Law, (Legislative Decree 28/2010) provides that a large range of disputes cannot be brought before a civil court unless the plaintiff has attempted mediation beforehand (or as a condition of continuing legal proceedings, if they have already been started). The declared aim of introducing mandatory mediation was to reduce the enormous backlog of cases pending before the Italian courts.

Therefore, some of the types of dispute selected for mandatory mediation are among those that arise most frequently. These include disputes relating to:

- real property;
- division of assets;
- inheritance;
- family estates;
- leases of real property and of going concerns;
- gratuitous loans for use;
- medical liability;
- defamation in the press and other media;
- insurance, banking and certain other financial agreements.

Mediation became mandatory for such disputes in March 2011, one year after the enactment of the law. As of March 2012, the mediation requirement was extended to disputes relating to tenancies in common (eg. in condominiums) and road and shipping accidents.

Reactions to mandatory mediation have been varied.

The response in business circles and from institutions was very favourable, reflecting a view of mediation as a vital means of minimising litigation.

Among lawyers, mandatory mediation prompted heated debate and even open opposition, particularly over the absence of provisions requiring the presence of lawyers in mediation proceedings. It was argued that the absence of a lawyer would result in a lack of protection for the weaker or less informed party.

4. See P. ARMERIO, E.M. APPIANO, L. BOGGIO, D. COMBA, G. SAFFIRIO, (2011), pp. 293.

It was initially reckoned that these sectors generated about 1 million new proceedings per year. This gave rise to a harsh polemic, carried on in the first place by the bodies representing lawyers, which affirmed that a risk was being incurred for the citizen's defence in the proceedings (mediation bodies may even be private bodies, thus lacking the necessary guarantees) and presumably also for their own professional prerogatives (the assistance of a lawyer was not required to turn to a mediator).

Many mediators have found that the benefit of experiencing mediation tends to change most lawyers' approaches to it. Often lawyers come to mediation without a clear understanding of what it involves. They think (or fear) that the mediator will issue a ruling of some sort, or a quasi-binding proposal, which might imply a criticism of the legal strategy that they have recommended to their clients. A greater understanding of the structure, aims and results of mediation often brings with it a change of attitude.

The opinion of the judiciary remains ambivalent. Before the enactment of the law, some Italian courts had launched pilot projects, which had enjoyed a degree of success. However, many judges still appear to have reservations about mediation, fearing that it will not protect the weaker party and may induce parties to abandon their rights.

In contrast, proponents of the new law argued that notorious delays in Italy's civil justice system cost Italy around 16 billion euro, and contributed to Italy's drop to 158th ranking in the World Bank's Doing Business report. When implementing mandatory mediation in 2011, the Italian Government hoped to shift over one million disputes out of the court system within five years.

Between March 2011 and October 2012, when mandatory mediation was in operation, according to statistics of the Ministry of Justice, 215, 689 mediations started, with an average success rate of 12% (but close to half of which settled when the defendant accepted to mediate).

On December 6, 2012, the program was frozen when the 15 judges of the Italian Constitutional Court ruled (award no. 272/2012) that the decree 28/2010 did not comply with the Constitution. The reason of the decision was not, as requested by lawyers associations, the breach of the citizen's right to defense (Article 24 of the Italian Constitution) but rather "over-delegation": the Government had not been expressly delegated by the Parliament to introduce the compulsory pre-trial mediation system.

The provision establishing the obligatoriness (article 5) was challenged before the Constitutional Court, which in December 2012 stated the unconstitutionality of the compulsory mediation attempt and of certain other provisions directly connected to the obligatoriness of the attempt.

However, the reason of the decision was not, as requested by lawyers associations, the breach of the citizen's right to defence (article 24 of the Ital-



ian Constitution) but rather overdelegation: in fact the Government had not been expressly delegated by the Parliament to introduce the obligatoriness of the mediation attempt.

In the following months, standpoints have proliferated for the reinstatement of the compulsory attempt: European institutions, representatives of the newly settled government, top judiciary and finally the new minister of justice.

They all agreed on the need to correct the regulations, but also on the fact that, after all, the results of the compulsory mediation were not negative and that the mechanism was starting to work.

The “to Do” Law Decree (no. 69 of 2013) reintroduced the provisions declared unconstitutional, along with certain amendments to the previous regulations.

The amended version of Legislative Decree 28/2010 came into effect just recently on 20th September, 2013, again opting for mandatory mediation, but with several important modifications<sup>5</sup>.

Now the law has been rewritten, with significant modifications.

Pre-trial mediation remains compulsory in a listed category of cases. This catalogue has been narrowed down compared to the previous version, to exempt e.g. car accident disputes.

Litigants are now allowed to withdraw from the mediation process at the initial stage if they deem settlement unlikely. This opt-out system provides an actual “mediation experience” to litigants. The first meeting with the mediator is for preparatory and information purposes (article 8, I): should the parties not be willing to continue after the first meeting, they shall incur no costs for the mediation (article 16, *V bis*). At the same time, however, the new law re-introduced a controversial mechanism to ensure that parties think twice before withdrawing from mediation. Upon a party’s withdrawal, the mediator may propose a solution to the dispute. When it is rejected and the case goes to trial, the judge may shift onto the rejecting party all mediation and litigation costs, should the judgment be consistent with the proposal.

The new law requires that parties be assisted by counsel in mediation. This amendment was vigorously advocated for by members of the Italian bar during the legislative process. The compulsory mediation attempt shall be necessarily performed with a lawyer’s assistance (article 5, I). The requirement to engage legal counsel in mediation, however, appears highly doubtful.

In addition, lawyers also enjoy preferential treatment as mediators. While it is necessary to attend a course and pass a professional examination to

5. See C.M. FERRI (2014), pp. 2 ff.

achieve an accredited mediator qualification, lawyers are mediators “by right”. However, the decree establishes that also lawyers will be required to receive proper training. Moreover, lawyers shall limit themselves to the mediation of cases in which they have specific legal competence, in compliance with the provisions of new article 55–*bis*, introduced in 2011, of the lawyers code of ethics (article 16, IV *bis*).

Mediations, either voluntary or by order of the judge, shall take place before a mediator whose seat is within the territorial jurisdiction of the competent judge (article 4, I). Until today, instead, there was complete freedom of choice. However, it is worth remembering that mediation is, in principle, a free activity due to its voluntary nature. Without prejudice to the compulsory attempt, each dispute may always be mediated also outside the rules and limits established in legislative decree 28/2010, obviously waiving the advantages granted by such regulation.

Except for compensation claims arising out of the circulation of motor vehicles, the compulsory attempt has been reintroduced for all matters that were already provided for (condominium disputes, property rights, division of goods, trusts and estates, family–owned business, landlord/tenant disputes, loans, leasing of companies, medical malpractice, libel and slander, insurance, banking and finance contracts).

The compulsory attempt will be in force for the next four years and upon the expiry there of its continuation will be evaluated (article 5, I). The duration of the mediation attempt is reduced from four to three months (article 6, I).

The settlement agreement reached upon conclusion of a mediation before an accredited body is automatically enforceable if executed also by the party–appointed lawyers. Otherwise, it shall have to obtain the approval of the court to take such effect (article 12, I). As it is known, settlement agreements reached by mediation outside the system provided for by legislative decree 28/2010 have the same effect as a contractual agreement and are, therefore, not directly enforceable.

The judge, based on its evaluation, may decide *ex officio* that the parties already involved in a judicial proceeding make an attempt of mediation before an accredited body: previously it was provided that the parties received a mere invitation to proceed in such respect, and that the proceedings were suspended (article 5, paragraph 2). The wording of the law stipulated that this invitation should not impose any particular pressure on the parties, which were free to accept or decline it.

On this point the attitude of the courts will be crucial to the future evolution of mediation. The experience of other jurisdictions has shown that in the beginning, lawyers were opposed to mediation and judges were sceptical of it. Attitudes have changed over time, and mediation has become

a widespread success, being vigorously promoted by the courts, even to the point of making it all but mandatory in practice.

#### **4. The “mandatory mediation in civil and commercial disputes” reintroduction: the main changes to the framework**

In Italy, the valued time for the conclusion of a civil proceeding in all its status of litigation is almost 8 years in contrast with the Section 6 of European Convention for the Protection of Human Rights which provides for the right to a fair and public hearing within a reasonable time.

For these reasons the Italian government has redesigned the already well-known institution of the civil mediation by means of Section 84, Law Decree no.69/2013.

This context has been taken into due consideration by the Italian legislator in occasion of the drafting of the Law decree dated June 21, 2013, no. 69, so-called “Decreto del fare” (“Law Decree No.69/2013”, converted with amendments by law no. 98/2013, published in the Official Gazette no. 194 on August 20, 2013), entitled “Urgent measures to revive the economy”<sup>6</sup>.

The Italian Government, following the declared unconstitutionality of Legislative Decree 25/2010 in the section introducing the institution of the so-called “mandatory mediation” (Supreme Court decision n. 272 of 6/12/2012), has reintroduced such institution, even though partially amended, by mean of Law Decree 69/2013 on “Urgent dispositions to relaunch the economy” (so called “Decreto del Fare” — “Decree of Making” — of 21/6/2013, converted by Law n. 98/2013, edited in the “Gazzetta Ufficiale” n. 194 of 20/8/2013), specifically throughout Article 184 bringing amendments and integrations to Legislative Decree 28/2010.

The reintroduced civil and commercial mediation entered into force since 19/9/2013 will be mandatory for an experimental period of four years, during which the Ministry will have to carry out a follow upon the results concretely detected and will supervise on the outcomes actually occurred in practice.

Now the experiment of procedure is “a condition for the admissibility of the petition” in civil and commercial disputes regarding the following subjects:

- joint ownership;
- rights in rem;
- division;

6. See Spina Giulio (2014), pp 235 ff.

- inheritance;
- family agreements;
- lease;
- commodate;
- rent of companies;
- damages arising from medical and health liability and defamation by the press or by other means of advertising;
- insurance, banking and financial agreements.

The inadmissibility of the petition shall be objected by the defendant, under the penalty of forfeiture, or raised by the Judge, no later than the first hearing.

The subject of damages arising from sanitary professions liability (and not only from medical liability) has been introduced with further amendment.

The cases related to the compensation for damage caused by the traffic of vehicles and boats, as well as the procedures of prior technical advice for the settlement of the dispute provided by Article 696-*bis* of the Italian Code of Civil Procedure are, instead, excluded.

The Judge — taking into consideration the nature of the proceeding, the level of inquiry and the conduct of the parties — can also order the recourse to the mediation to the parties before the hearing in which the parties define their petitions or, if such hearing is not scheduled, before the final discussion of the case, also within the appeal proceedings.

The choice of the mediation body which to apply has been left to the free determination of the parties against the former provision which reserved such choice to the sole discretion of the Judge, furthermore, a territorial jurisdiction criteria has been introduced in accordance with the principles of civil procedure. In case of more than one application relating to the same dispute, the body where the petition was first filed prevails.

With regard to the limit of duration, the single mediation will last for no more than three months (instead of four, according to the previous discipline), starting from the date of the filing of the mediation petition or from the expiration date granted by the Judge for the filing thereof (such limit term is not subject to the so called “procedural terms Summer suspension” period — running yearly from 1st of August to 15th of September — as it has no judicial nature).

The responsible of the body, who has received the submission of the request, appoints a mediator and schedules a preliminary meeting with the parties.

The preliminary meeting has to be held not later than thirty days from the filing of the mediation petition. Just then the mediator shall verify

the possibility to continue the mediation. Following to such meeting, the parties are able to formalize the failure of the negotiation or to continue the mediation proceedings which may lead to an agreement or not.

The absence of a party on unjustified grounds, can represent for the Judge an evidence by Article 116, Italian Code of Civil Procedure and the Judge can order to the constituted party who did not take part to the procedure on unjustified grounds to pay a sum having an amount equal to the contribution due for the filing of a petition.

In case of negative outcome of the first mediation meeting, i.e. without the reaching of any agreement, the condition of admissibility is to be considered as satisfied and no compensation is due to the mediation body.

No compensation is due, in any case, by any party who is eligible for the free legal aid in accordance with Article 76, para. 1, of the Presidential Decree dated May 30, 2002 no. 115.

If an amicable agreement is reached between the parties, the mediator drafts the minute of the mediation hearing to which the text of the same agreement is attached; if such agreement has not been reached, the mediator may make its proposal for conciliation. In any case, the mediator makes a proposal for conciliation if request by the parties. Before expressing the proposal, the mediator informs the parties of the possible consequences in terms of procedural costs.

The agreement, properly undersigned by all parties and their lawyers (see below), consists of an enforceable title.

The lawyer has to inform his client in relation of the duty to set up the mediation process and to assist him whenever the latter is provided as a condition for the admissibility of the petition (the assistance was not compulsory under the previous discipline).

Lawyers who assist the parties involved in mediation procedure have to sign the minutes of the mediation hearing and the agreement reached by the parties before the mediator, so that the latter may be homologated and become an enforceable title.

The qualification of mediator is assigned “ex lege” to the lawyers who are regularly enrolled into the Italian Lawyers’ Register (such automatic qualification did not exist under the previous discipline).

Eventually, with amendments, the following provisions have been introduced:

- the duty for Lawyers to provide technical assistance in the event that the mediation is provided as mandatory by law;
- In order to practice as mediator the lawyers have however to enter mediation bodies enrolled into the relevant Register kept by the Ministry of Justice, and to attend specific training and update courses.

- The recognition of enforceability to the conciliation agreement signed by the Lawyers in the event that all parties are assisted by a Lawyer.

## 5. Conclusion

Mediation is considered a pre-condition to initiate the litigation and not a real possibility to solve the dispute, probably for the lack of information about this instrument and its potentiality.

The absence of networking and dialogue between the institutions (private and public) involved in the promotion and implementation of mediation severely compromises the public acknowledgement of mediation. In the same time, such compulsory mediation cannot be deemed as sufficient, nor result successful, if not accompanied by further reforms of the Justice system.

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# Mediation in Italy

New discipline, old-style logic

GIANFRANCO AMENTA

CONTENTS: I. The Constitutional Court's decision and the European Union guidelines, 87 – 2. The new discipline, 90 – 3. Observations on modifications, 92.

## **I. The Constitutional Court's decision and the European Union guidelines**

It is an irrefutable fact how the Constitutional Court's decision, which censored the implementing mediation measure, formulated by the executive branch of government, in force of Legislative Decree no. 28/2010, for misuse of the delegated power, had disappointed the expectations of both the supporters of such new institute and those who simply intended to put a tombstone on these resolution process disputes.

The supporters of the above mentioned measure are being bitterly disappointed, suffering relevant economic damage. Indeed, relying on that new institute, they had contributed to form organizations, recruit staff, provide costly training courses for participants and deceived young people who were hoping, in accordance with the Government declarations, to find a new path for their careers. Those who opposed the instrument of conciliation, perceived how a lack of radical censorship, preceding from the Constitutional Court, could have pushed towards its re-proposal.

To fully understand the framework, as it emerges from the ruling of the Council, it is therefore appropriate to make some brief references to the issues the Court had been invested with as well as the grounds for the related ruling.

Indeed, beyond the issue of excessive delegation, — highly publicized and absorbent though — other questions had been raised before the Court and particularly those concerning the mediation costs. Mediation was proposed because the borrowing costs constituted a limitation to the access to justice, as they were unreasonable for the causes of lower economic value, and were discriminating against who had to initiate a mediation procedure imposed as a condition of admissibility for the proceeding.

As far as the motivations of the verdict are concerned, our constitutional

Judge's decision could be said to consist of two parts: one concerning the European Union law, the other the national law.

Firstly, the Court noted that both the delegation<sup>1</sup> and the delegated<sup>2</sup> law refer to compliance and coherence with the European legislation<sup>3</sup>. The legislative decree submitted to constitutional scrutiny is designed as a measure by which the implementation of the mediation directive on civil and commercial matters as enacted by the Council<sup>4</sup> and the European Parliament is to be carried out.

The Court, in examining the considerations of the Directive noted that, in accordance with Community law, mediation can indifferently be optional, provoked or mandatory. In this latter case, provided that the arrangement of the individual State legislation does not prevent the parties from exercising the right of access to the judicial system.

This position has been endorsed by the European Parliament<sup>5</sup> which in 2011, through two resolutions declared, on one hand, the opposition to any generalized imposition of a mandatory system, in order not to affect access to justice<sup>6</sup>. On the other hand, it noted that the introduction of mandatory mediation into the Italian legal system seemed to reach the aim of reducing the congestion in the courts but, according to the Parliament, this dispute resolution devise should be promoted as a form of alternative justice, faster and cheaper than the ordinary one, rather than being implemented as a mandatory element of the judicial procedure<sup>7</sup>.

Concerning the framework which is going to be outlined, it should not be omitted that the Court of Justice<sup>8</sup> has excluded the existence of any conflict between European law and the Italian rules of law which require a

1. Art.60, sub-paragraphs 2 and 3, let. c) L. 69/2009, available at [www.parlamento.it/parlam/leggi/09069l.htm](http://www.parlamento.it/parlam/leggi/09069l.htm), accessed 2.9.2014.

2. Preamble to d.lgs. n. 28/2010, available at [www.camera.it/parlam/leggi/deleghe/10028dl.htm](http://www.camera.it/parlam/leggi/deleghe/10028dl.htm), accessed 2.9.2014.

3. The obligation to comply with the restriction related to the Community legal order is provided by art. 117 of the Italian Constitution.

4. Directive of April 23, 2008 (No. 2008/52/EC), available at [eurlex.europa.eu/legalcontent/EN/TXT/?qid=1406528678782&uri=CELEX:32008L0052](http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1406528678782&uri=CELEX:32008L0052), accessed 2.9.2014.

5. It is also true that European Parliament's resolutions are not binding, only having persuasive force, given the authority such institution has and being the Parliament itself — together with the Council — the author of those acts.

6. European Parliament's resolution of October 25, 2011 (2011/2117 Ini), available at [www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0449](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0449), accessed 2.9.2014.

7. European Parliament's resolution of September 13, 2011 (2011/2026 Ini), available at [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+Vo/EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+Vo/EN), accessed 2.9.2014.

8. ECJ, March 18, 2010 (Cases C-317/08, C-318/08, C-319/08, C-320/08). It is quite evident how the Court of Justice's judgments are binding in our legal system too. For an in-depth discussion on such issue see G. Amenta (2001), p. 44 ff.



conciliation procedure between users and network operators and service providers, pointing out that in this case there wouldn't be a clear discrepancy between the results at which that disposition aims and the disadvantages of compulsoriness.

At this point, although the Constitutional Court seems to outline that the EU law allows the other member State to articulate mediation freely, a European model institute is to be delineated in its judgement, which is different from the one carried out by the Government through the law currently subjected to constitutional scrutiny. The Court considers that the European mediation could be mandatory with regards to disputes in which parties have a concrete interest to preserve the mutual legal relationship such as, for example, in family or condominium relations. Still, the Court feels that European mediation would appear as to be under the judge's discretion. With relation to the case presented to him, the judge should examine the opportunity and convenience for the parties to undertake the mediation process.

The other part of the grounds on which the judgement is based examines the national law and particularly the delegating act. The Constitutional Court, with regards to the literal exegesis, makes plain how the intent of the legislature was to delegate the Government to draft a law designing the opportunity to implement the mediation procedure as an alternative device. Briefly, this Parliament's measure is to be intended as a delegation to create an optional and not mandatory mediation. It is also stated that the constitutional legitimacy<sup>9</sup>, declared for the mandatory settlement with regards to the privatized public employment disputes, cannot be allowed to become a precedent because that discipline constituted a coherent development of a principle already present in that specific field.

To summarize, the judgement, whilst pronouncing the declaration of unconstitutionality regarding article 5 of the Legislative Decree no. 28/2010, has struck the assumption of mandatory mediation; accordingly, it follows that the entire system of the alternative disputes resolution is not deleted, even if it is not practised voluntarily by the parties in conflict.

The arguments included in the response, in accordance with the objective need for the transposition of the directive, and the inadequate voluntary recourse to such means suggested that, in the near future, a new legislation could provide for a mandatory mediation process, in the same matter or

9. As above mentioned in the ruling n. 276 of 2000, the Constitutional Court declared the constitutional legitimacy matter of the articles 410, 410-bis, and 412-bis of the Code of Civil Procedure, as modified, added or replaced by the articles 36, 37 and 39 of Legislative Decree no. 80 of March 31, 1998 and the article 19 of the Legislative Decree no. 387 of October 29, 1998 not founded, given the mandatory settlement with regards to the privatized public employment disputes. The decision in comment is available at [www.giurcost.org/decisioni/2000/0276s-00.html](http://www.giurcost.org/decisioni/2000/0276s-00.html), accessed 2.9.2014.

even in other cases.

One last note to outline a comprehensive and clear framework.

The European Union Council has examined the 2012<sup>10</sup> report on the state of implementation of the directive, in order to verify the problems of enforcement met by member States, which actually have proceeded in a random order. The report has pointed out the difficulty in giving cognizance of the degree of implementation carried out, since it isn't easy to obtain verified information neither on the number of mediators nor on the number of mediations carried out, given that the same are often organized and conducted outside the judicial system.

Having entrusted mediation to private bodies outside the judicial system is one of the negative<sup>11</sup> consequences of the original intent, on the part of the legislator in certain states such as Italy, to use mediation for the decrease of the judiciary load, forgetting that in reality such new instrument, in the intention of the European legislator, aims at promoting the introduction of an inexpensive and fast alternative system of justice and not of a mandatory element in the judicial procedure.

A further important element will be the Court of Justice's judgement on the preliminary ruling, formulated by some Italian Courts, concerning the mandatory mediation issue in relation to the legal protection right, especially with reference to procedural sanctions for the party who refuses to participate in mediation. It might have been better to wait for the Court of Justice's response<sup>12</sup>, before reforming the institute.

## 2. The new discipline

According to the Legislative Decree no. 69 of June 21, 2013, converted with modifications in the law no. 98 of August 9, 2013 mandatory mediation re-entered into force and further innovations were applied to the Legislative Decree no. 98/2010.

It seems necessary to point out those modifications, even if in brief.

The mediation organism will be identified in relation to the court which is territorially competent to hear disputes and where the first proceedings had been submitted. Therefore, it will no longer be the organism which was applied first in a trial, regardless of the future jurisdiction.

Yet again, as a condition to conduct a proceeding — in one of the matters

10. See the 2012 CEPAJ Report pp. 129 et seq., [www.giustizia.it/giustizia/it/mg\\_6\\_6\\_1.wp?contentId=NOL771675](http://www.giustizia.it/giustizia/it/mg_6_6_1.wp?contentId=NOL771675), accessed 3.9.2014.

11. As remarked by the European Parliament in the resolutions referred to in footnotes 6 and 7 of the present article.

12. See footnote 8.

as referred to in art. 5 of the Legislative Decree no. 98/2010 — mediation shall be carried out in advance. To summarize, matters are unchanged with respect to the previous list and those concerning damage compensation caused by the circulation of vehicles and boats are excluded.

The lawyer — who, as stated in art. 4 of the above-mentioned legislative decree, must inform his client about the admissibility conditions in writing and clearly, under penalty of nullity of the mandate contract, under the combined provision of articles 5 and 8 of the cited Legislative Decree — must necessarily assist the party during the mediation.

The effectiveness of the new institute of mediation is programmed for a period of four years following the date of entry into force. At the end of the first two years of enforcement the Ministry of Justice will monitor the development of the new discipline. A significant modification, according to the second sub-paragraph of the above cited art. 5, is expected in order to provide the judge with the opportunity to carry out the mediation procedure effectively. It will also be the proceedings admissibility condition before the Court of Appeals. In other terms, in this case, the delegated mediation will be mandatory.

The admissibility condition, as stated in the already examined art. 5 sub-paragraph 2-*bis*, shall be considered respected even though the first mediation meeting ends without any agreement.

In this hypothesis, according to the provision contained in art. 17 sub-paragraph 5-*ter* of the many times quoted Legislative Decree, no compensation would be due to the organism.

After the amendment of article 6 of the Legislative Decree no. 28/2010, the mediation process cannot last longer than three months instead of the four provided in the previous version.

In accordance with art. 8 modification, the fixation of the first appearance should occur within thirty days. This meeting, in the intention of the *novella*, is designed to allow the mediator to clarify features and benefits agreed, so that parties could concretely verify its convenience, this procedure being linked to the availability of the parties themselves and their lawyers.

The already mentioned Legislative Decree, art. 12, has been modified in the sense of making the agreement executive, provided that the parties have signed it with the obligatory assistance of a lawyer. In this case, the lawyers will attest its conformity in compliance with mandatory rules and public order. In all the other cases, the mediation agreement will become executive after the Court's approval solicited by the party's instance, as it was in the past.

In force of the cited Legislative Decree, art. 16, sub-paragraph 4-*bis*, the lawyers have been qualified as mediators by law.

### 3. Observations on modifications

Before making some additional comments on the new discipline, it seems appropriate to make some wide-range annotations. Once again, therefore, it is useful to highlight the *ratio* at the basis of the alternative dispute resolution process both at the European and at the national level, as it emerges also from the grounds of the judgement of the Constitutional Court. Just following this consideration, it is possible to estimate the significance in our legal system of the recently adopted legislation.

In the first system, the European one, both the protection of the parties' interests and social pacification are more considered, a faster way to solve disputes involving essentially economical matters, given that a rapid dispute resolution is most useful to the trade in all senses, in order to get an immediate economic advantage, although limited, rather than a more convenient result through a judicial pronouncement in a longer — even if not exorbitant — time.

In the Italian legal system, the legislating institution essentially pursues a particular interest: providing for a deflationary device to deal with the overflowing judicial request; cutting out litigations in order to have quicker proceedings, and thus answering in a more effective way to the request for justice which, if not satisfied, makes the citizen unhappy and humiliated.

Now, following this intention, we do not consider mediation as an adequate solution. Being the Italians a pettifogging people who intend to pursue personal affirmation even if at the expense of any economical benefit, and turn the chronic delays in justice in an indirect financing system, with an exorbitant number of lawyers, the mandatory mediation process will not be able to stop the use of legal disputes in Italy. In our opinion, interventions more focused on the trial process would have a more relevant incidence. Just to give an example, we aim at showing how the unification of the procedures and the first grade admissibility judgement would be more selective as they would eliminate all the manifestly unfounded and unorthodox requests.

It should be stated quite clearly that the alternative dispute resolution is adopted as much as possible where efficient justice subsists. In other words, the debtor, for example, is better to go to mediation finding out a mutually agreed solution when it's positively sure that, within a reasonable period of time, he will be condemned.

From this preliminary consideration, it cannot fail to be noted how the rules that have been introduced by the Reformer in 2013, as we have briefly indicated, stands for confirming how the newly introduced process does not bear at all a new logic and above all it is not able to generate in the user a new approach to the institute, a new attitude towards the alternative dispute

resolution method.

To begin with, it must be pointed out that having entrusted mediation to private parties makes the primary objective that the legislator should pursue as difficult as possible to achieve: to lead to consider such regulation as right, shared with the partners, and therefore to be used with confident participation. Indeed, the private, as already mentioned, manages the organism for profit. Now, it seems to be somewhat utopian to believe that there are mediators who, at the first meeting, would devote their energies in making the party aware of the mediation procedure advantages, to verify in a second time that the parties haven't reached an agreement and then, them not being obliged to any payment in favour of the organism, the mediator — most probably — will not receive any compensation.

The organism must be imposed a time restriction, such as three months, in which it should carry out the procedure; but maybe this time limit is still not long enough for the parties to come to an agreement when personnel could be required to opportunely carry out all fulfilments or if there were demanding issues to solve or in the case in which there are more parties. All of this at particularly low costs not fit to give those profits that the organism's operators are expected to earn.

These elements might affect the quality of the mediators' intervention and the subsequent Ministerial verifications could not succeed in singling out the distortions of such an articulated system, excepting the illegal ones.

In my opinion, another element which is not in line with the idea of mediation as the composition of interests and not as the protection of rights is having made the lawyer a mediator, by law.

The Lawyer, due to his acquired culture, will be mostly inclined to examine the matters submitted to him in terms of the rules of law; without any adequate competence he will be unable to evaluate with caution, for example, those fundamental psychological aspects that are crucial in making mediation a shared agreement. Following mainly the rules of law, in order to solve the conflict, will turn the mediation system into a fourth degree of trial justice, an obligatory step in front of a lower-ranking Judge. The mandatory legal aid, furthermore not considered at a European level, makes that distortion as concrete as possible, abjuring the spirit which animates the institute.

The lawyer's cost having become mandatory, and weighing on the assisted party is the perfect legislator's finishing touch making mediation even more difficult.

I do not think that having disposed a time-limited mediation, declaring overtly the intention of testing it, is the better way to promote a convinced approach to it. On the contrary, it confirms diffused precariousness feelings and uncertainty related to the legislator's issue. Nor the verification after

a period of two years will provide any significant data. If you examine the impact on the proceedings, they will certainly be decreased but not thanks to the definition of a relevant number of disputes by means of a mediation agreement.

The data we can obtain from the first hypothesis of application of the mediation are not encouraging, the new proceedings reduction between 2010 and 2011 is very restrained and it is part of a trend started in 2007, highly related to the economic crisis rather than to the mediation supposed beneficial effects.

In my opinion, there are two remarkably positive elements of the new regulation that deserve to be highlighted.

The first concerns the possibility that the agreement signed up by the contracting parties and their lawyers will constitute the document of execution for bound mediation matters. The transition to the Court's typed approval was a further burden on the parties, with undue costs. Maybe lawyers, given the way their professional responsibility is outlined, will encounter some difficulties in drawing up the settlement agreement, unless they do not notice the contrast concerning the mandatory or otherwise public order rules.

A further positive element is having transformed mediation from delegated to mandatory. I refer to the hypothesis in which the judge deems appropriate to solicit the parties to mediation. Indeed, the previous draft of the rule stated that "the judge may invite the parties" to attempt mediation, while currently it states that "the judge may perform the necessary formalities in the attempt to reach mediation". This difference in wording made the parties unable to decline the judge's invitation and ask him to continue the proceedings. Today it has become a new admissibility condition.

However, if the judge, having weighed at what stage are the matters in court, the nature of the issues and the behaviour of the parties, disposes to mediation, he will have obviously considered how it is more profitable for both opposing parties to appeal to mediation rather than a judicial dispute resolution, in terms of solutions, time limits and costs.

It is essential in this respect that the judge shall be animated with a great sense of balance, assess the advantages the parties could get from mediation, and not appeal this device simply to lighten his own case list. Whereas the judge will be able to manage the power he has been entrusted with, he will assume a strategic function as he will be able to carry out the essential work for the effective introduction of this new methodology: spreading among the citizens the non-judicial dispute resolution culture and making them appreciate the undoubted advantages that such a device can offer. In compliance with the legislative provision, it would be appropriate for the judge to formulate a proposal which may also be justified, even if not

required, to make the parties aware of its convenience in a more effective way<sup>13</sup>.

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AMENTA G., (2001), *La professione forense nell'Italia comunitaria*, Turin, Giappichelli, 2001, p. 44 ff.

13. In this sense we highlight the twin ordinances issued by the Tribunale di Roma, sez. XIII, 23.9.2013, available at [www.adrmaremma.it/news132.pdf](http://www.adrmaremma.it/news132.pdf), accessed 2.9.2014.





# The European Union policies on access to justice and ADRs

Good intentions are not enough as “the way to hell is paved with...”

ALESSANDRA PERA

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## 1. Introduction

Forms of extra-judicial dispute resolution are widespread in legal systems belonging to the western legal tradition<sup>1</sup> and in the systems based on religion and tradition.<sup>2</sup>

With regard to the study this article refers to, cultural movements spreading and promoting ADR models have found place in legal systems based on the rule of law<sup>3</sup> over the past fifty years, although with the necessary distinctions of institutional and, before that, socio-cultural nature.

The United States of America<sup>4</sup> can be considered as the mother-country of the ADR movement, but in the past fifteen years the European Union

1. On the concept of western legal tradition see J.M. MERRYMAN (1969), p. 2. According to the author, «A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective». See also M.A. GLENDON, M.W. GORDON and P.G. CARROZZA (1994), pp. 6–8; P. STEIN and J. SHAND (1974); H.P. GLENN (2000), pp. 117 ff.; P.G. MONATERI (2000), pp. 490 ff.; A. SOMMA (2004), pp. 169–205.

2. For further information on such peculiar models, see H. WANG (1959); B. SCWARZ (1957); J. WOODBURN (1972); I. SHAPER (1956).

3. With regard to families under the *rule of law*, *rule of politics* and *rule of religion or tradition*, see the Italian doctrine Mattei U. and G.P. MONATERI (1997), *passim*; U. MATTEI (1994 b) pp. 775–797; U. MATTEI (1997), pp. 5 ff.; U. MATTEI (1994 a), pp. 222 ff.

4. *Administration of Justice, 29 American Bar Association Report 1*, 1906, pp. 395–417; R.L. ABEL

has also promoted policies aimed at spreading the ADR systems, through institutional initiatives of legislative and non-legislative nature that have also imported a culture which was unknown to the legal systems of some Member States.

In a first phase, the European Union opened a broad debate to sensitize public awareness on the issues concerning the access to justice, the reduction of time and costs of a trial if compared to those when using ADRs, the respect of the weak parties in the legal-economic relations.<sup>5</sup> On the other hand, in a second phase the EU carried out some early non-binding<sup>6</sup> legislative initiatives, and later obliged Member States to legislate on the mediation in civil and commercial disputes.<sup>7</sup>

This step by step procedure, besides its respectful attitude towards the legal traditions of the Member States and the community rules of procedural laws, as well as the mental attitudes and the categories of European jurists (especially civil lawyers), has avoided the EU approach to these themes from being influenced by the occasionally “maximalist” character of the U.S. homologous procedure.<sup>8</sup>

More specifically, as far as mediation is concerned, it should be highlighted that these dispute resolution devices were brought to light and introduced mainly through the consumer protection legislation.<sup>9</sup> As a matter of fact, the establishment of new substantive consumer rights resulted in the need for design models of dispute resolution, especially cross-border models,<sup>10</sup> which protected these rights as rapidly and effectively as possible.

In particular, the Green Paper on consumer access to justice<sup>11</sup> focuses

(1982); S. ROBERTS (1993), pp. 452–470; S. ROBERTS (1994), pp. 9–27; S. ROBERTS (1996); F.E.A. SANDERS (1985), pp. 253–261.

5. Resolutions and communications such as the Tampere European Council Conclusions of 15–16 October 1999 can be considered. For their analysis see M.F. GHIRGA (2006), pp. 474 ff., and the European Code of Conduct, which in fact, as shown below, cannot actually be considered as a legislative act of the European Union since it doesn't have a regulatory nature and is not coming directly from EU institutions.

6. I refer to the Recommendations of March 30, 1998 (No. 98/257/EC) and April 4, 2001 (No. 2001/310/EC), to the Green Paper on the access to justice of November 16, 1993 (No. 1993/576/EC) and to the later Green Paper on the methods of alternative dispute resolution in civil and commercial matters of April 19, 2002 (No. 2002/196/EC); all available at [eurlex.europa.eu/legalcontent/EN/TXT/?qid=1406528678782&uri=CELEX](http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1406528678782&uri=CELEX) (different identification numbers for each document), accessed 27.7.2014.

7. See Directive of April 23, 2008 (No. 2008/52/EC), available at [eurlex.europa.eu/legalcontent/EN/TXT/?qid=1406528678782&uri=CELEX:32008L0052](http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1406528678782&uri=CELEX:32008L0052), accessed 27.7.2014.

8. See C. SILVESTRI (2001), pp. 71 ff.

9. See R. DANOVI (1997), c. 326; F. AMBROSI (2005), pp. 208 ff.

10. On the concept of cross-border dispute see the Report of the Commission proposing a Directive on certain aspects of alternative dispute resolution in civil and commercial matters of October 22, 2004 — EC (2004) 718, *passim*.

11. Available at [eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52002DC0196](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52002DC0196), accessed

on the idea that these devices of protection can be found outside the judicial and procedural circuit<sup>12</sup> also for practical reasons, since ADR systems overcome the difficulties of access to justice that arise from the overwork of courts, from the costs of the trial in terms of time and economic resources employed.

In addition, the growth of legislative activity, the foreseeing of new categories of substantive rights, and the increase of special procedures in the Member State legal systems, make the consumer's access to justice more and more critical, especially for disputes of small value (small claims) and for the cross-border ones.

Moreover, in the internal market both a growth of trade and an always increasing circulation of goods, services, people and capital can be noted, which consequently cause the growth of disputes between citizens and/or persons (both natural and/or legal) anyway residents or domiciled in the different Member States, also thanks to the development of e-commerce.

Therefore, the cross-border disputes (especially the ones of small value) brought before the national courts, as well as the disputes that are more important from an economic standpoint increase, causing jurisdictional conflicts or language and logistic difficulties.

In this context, mediation and the other ADRs represent possible solutions to improve the access to justice and complementary — non-substitutive — means to judicial procedures.

The use of ADR systems, therefore, unlike the U.S. model, is not conceived in Europe as an alternative tool aiming at the total exclusion of the process, but rather as a means aiming at facilitating a dialogue between the parties that would otherwise be impossible, and at assessing the opportunity to apply the judge at a later stage in case of failure of the ADR procedure.<sup>13</sup>

What deserves consideration here is that in the Community policies on mediation the anti-judicial motivation, which has instead encouraged the ADR American movement, does not arise. On the contrary, all the legislative interventions here-in-after analysed seem to conceive ADRs as an element diversifying and completing the protection of European citizens, to whom the effective recourse to judicial protection must be guaranteed.<sup>14</sup>

27.7.2014.

12. For a detailed analysis of the contents in doctrine see B. CAPPONI (1994), pp. 361 ff.; P. MARTINELLO (1994), pp. 333 ff.

13. It is a tool that can help promote and ensure social peace, especially in a climate of economic crisis, such as the one the European Union is currently experiencing, in which the economic difficulties often exacerbate social conflict between different actors in the market and among the categories which most traditionally take opposing positions (consumer-entrepreneur, employer-employee, public administration-user . . .).

14. It is a fundamental right stated in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in Art. 47 of the Charter of Fundamental

## 2. Recommendations

This is certainly the *ratio* characterizing the EC Recommendations of 30 March 1998<sup>15</sup> and 4 April 2001<sup>16</sup>, which poses the general principles applicable to all bodies responsible for the non-conciliatory (rather decisional) out-of-court settlements of consumer disputes, and to all bodies involved in the consensual resolution of consumer disputes, with a function which is neither decisional nor conciliatory.

Both regulatory actions, although not having a binding character, identify the basic safeguards that should be guaranteed at the level of Member States in the ADR procedures for consumers, and indicate the procedural standards protecting the consumer and user rights effectively and efficiently.

In particular, the *ratio* of the 1998 Recommendation refers to the need to “strengthen consumer confidence in the functioning of the internal market and the ability to draw full advantage from the possibilities that the latter offers”; and — according to the Community legislator — in order to ensure “the possibility for consumers to resolve their disputes in an efficient and appropriate way, through extra-judicial procedures” that must meet the “minimum criteria guaranteeing the impartiality of the extra-judicial body, the effectiveness of the procedure, its promotion and its transparency.” The use of these procedures is functional to the Community goals if we consider that “the majority of consumer disputes, for their nature, are characterized by a disproportion between the economic aspect of the dispute and the cost of its judicial settlement”.

To be more precise, the Recommendation provides the principles of:

- a) independence and impartiality;
- b) transparency;
- c) adversarial principle;
- d) effectiveness;
- e) legality;
- f) fliberty;
- g) representation.

These are principles that the out-of-court bodies responsible for the resolution of disputes between business and consumers should conform with.

Rights of the European Union. It has been recognized repeatedly as such by the case law of the European Court of Justice.

15. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:en.pdf>, accessed 27.7.2014.

16. Available at [http://ec.europa.eu/consumers/archive/redress/out\\_of\\_court/adr/acce\\_just12\\_en.pdf](http://ec.europa.eu/consumers/archive/redress/out_of_court/adr/acce_just12_en.pdf), accessed 27.7.2014.

In particular, the independence principle is to be intended in the sense that the decision-making body or the individual decision maker, should ensure that:

- the person appointed possesses the abilities, experience and competence required to carry out his function, particularly in the field of law;
- the person appointed is granted a period of office of sufficient duration to ensure the independence of his action and shall not be liable of being relieved of his duties without just cause;
- if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not have worked for this professional association or for one of its members or for the enterprise concerned during the three years prior to assuming his present function.

When the decision is taken by a collegiate body, the independence of the body responsible for taking the decision must be ensured by giving equal representation to consumers and professionals or by complying with the criteria set out above.

Transparency means right to access written information (or in any other suitable form) concerning:

- a) the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute,
- b) the rules governing the referral of the matter to the body, including any preliminary requirements that the consumer may have to meet, as well as other procedural rules, notably those concerning the written or oral nature of the procedure, the attendance in person and the languages of the procedure,
- c) the possible cost of the procedure for the parties, including rules on the award of costs at the end of the procedure,
- d) the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.),
- e) the decision-making arrangements within the body,
- f) the legal force of the decision taken, whereby it shall be stated clearly whether it is binding on the professional party or on both parties. If the decision is binding, the penalties to be imposed in the event of non-compliance shall be stated clearly, as well as the means for making redress available to the losing party.

In compliance with the adversarial principle, the procedure to be followed must allow all the parties in concern to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statement.

Effectiveness is ensured through measures guaranteeing that:

- the consumer has access to the procedure without being obliged to use a legal representative,
- the procedure is free of charges or of moderate costs,
- only short periods elapse between the referral of a matter and the decision,
- the competent body is given an active role, thus enabling it to take into consideration any factor conducive to a settlement of the dispute.

Legality is to be intended in the sense that the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applicable under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

Moreover, all decisions are communicated to the parties in concern as soon as possible, written or in any other suitable form, stating the grounds on which they are based.

According to the principle of liberty, the decision taken by the concerned body may be binding on the parties only if they were previously informed of its binding nature and specifically accepted this.

The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

Last but not least, the procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

The same guarantees and principles are repeated in the subsequent Recommendation of 2001, in which no reference to the adversarial and legality principles, typical of the decisional procedure, is made.

Nevertheless, the principle of fairness in the procedure is mentioned here and considered as a guarantee for a series of rights of information and freedom for the parties.

In detail, the Community legislator believes that impartiality should be

granted by ensuring that those responsible for the procedure are appointed for a fixed term and that they can be relieved from their duties only for a right cause. In order to guarantee impartiality, the assumed conflicts of interest between the person in charge and the parties, which could be real or apparent, are always governed and for this reason, from the beginning of the procedure, the former is obliged to reassure the parties about his impartiality and competence. Transparency refers mainly to the procedure.

Therefore, the parties must be informed about the activities of the Centre they have applied, how the procedure will operate, the typologies of disputes that this procedure may resolve, and the restrictions to its use; other information the parties are due are those concerning the objective and subjective rules or requirements that parties have to meet, language used, costs, timetable of the procedure, applicable substantive rules (legislative provisions, commercial customs, criteria of equity), the role of the procedure in showing the position of the parties and their interests, and the substantial effects of the resolution of the dispute, whether it is indicated by the third party (Recommendation 1998) or it is agreed to by the parties (Recommendation 2001).

The effectiveness of the procedure has to be granted by ensuring that it will be easily available to the parties. Costs must be moderate and, however, proportional to the value of the dispute. In addition, the parties have the right to access the procedure without being obliged to use a legal representative. Nevertheless the parties may choose to be represented or assisted by a legal representative or by an expert (e.g. professional representative) in any phase of the procedure.

The procedure should be handled in the shortest time possible fitting with the nature and complexity of the dispute. The body or institution responsible for the process must control the related procedure to guarantee that all is going on quickly and correctly.

The person in charge also verifies that the parties respect the rules of the procedure and that their behaviour is functional to the research of an appropriate and shared solution to the dispute.

Otherwise, both parties should be informed of the other party's misbehaviour in order to enable them to decide whether to continue or not the dispute resolution procedure.

The fairness of the procedure is granted by informing the parties about their right not to take part at the ADR procedure, to leave it any time they decide so and to apply to the court or any other out-of-court mechanism of dispute resolution foreseen by any Member State.<sup>17</sup>

17. Consider, for example, the role of Chambers of Commerce, as provided by art. 140 and 141 of the Consumer Code or the *Autorità Garante per la Concorrenza ed il Mercato* (the Italian Antitrust

In addition, the parties must be helped in submitting freely their own claims, interests, information and evidence relevant to their case. The confidentiality of some information parties may decide not to give to the other party and the right to receive communication of the information each party decides to share with the counterpart have to be ensured, in order to establish a correct and useful collaboration aiming at an objective and shared solution, whether imposed by the third party or consensual.

In the case of a consensual solution, the Recommendation of 2001 provides that the parties are given a reasonable period of time to evaluate the possible solution before accepting it definitively.

In any case, the consumer has to be informed with a clear and understandable language about the substantive and procedural effects following the proposed out-of-court resolution of the dispute, about the opportunity to get an opinion from a third party before accepting the said solution, and about the possible judicial and extra-judicial remedies, that are alternative to the proposed solution.

### 3. The information and operative networks

Among the initiatives to identify simple, swift and effective solutions for the resolution of disputes, which are also inexpensive and alternative to the court system and aim at ensuring the consumer the access to justice, it is necessary to refer to the extra-judicial network (EEJ-NET),<sup>18</sup> a communication and support structure made up of national contact points — *Clearing Houses* — activated by each Member State.

The network is designed in such a way that, in case of disputes between consumers and professionals, the consumers may contact the National Clearing House of reference for advice and assistance in the preparation and start of a complaint against a body of another Member State.

Thus, in cross-border disputes the *Clearing Houses* should be able to overcome the difficulties and obstacles arising from language differences and from the lack of information, by transmitting the complaint through the network to the most appropriate body.

According to the EU recent legislative intervention of 2013<sup>19</sup>, the EEJ-Net

Authority) with regard to unfair commercial practices, under the Decree No. 2 of August 2<sup>nd</sup>, 2007; For the doctrine see M. DONA (2008), pp. 53–56; F.A. GAGLIARDI (2009), pp. 33–44.

18. The project is based on the EC decision of May 28, 2001 — No. 2001/470/EC and it is shown in detail on [www.ec.europa.eu/consumer/redress/out\\_of\\_court/cej\\_net/index\\_en.htm](http://www.ec.europa.eu/consumer/redress/out_of_court/cej_net/index_en.htm).

19. The reference is to Regulation no 524/2013 and Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, both published on the 18.6.2013



Network will evolve in the short term, including new systems of dispute resolution, based on new technologies, which may be the basis of synergies with third countries.

Moreover, the system of “network bodies” had already been tested on financial services. The reference is to FIN-NET (Financial Services complaints NETwork), which today completes EEJ-Net by directing all systems responsible for alternative dispute resolution in the field of financial services at the national level, in order to form the Community Network, based on a wealth of knowledge and experience which already exists at the national level.

The function of these networks is twofold: on the one hand, they want to ensure flexible tools to the consumers in order to obtain compensation for the damages caused by the misconduct of a professional; on the other hand, they encourage the exchange and flow of information between the various bodies, national points of contact, through uniform procedures of cooperation agreed on by all the Member States.

#### **4. The Green Paper**

Another Community Act this study wants to deal with is the Green Paper on the methods for dispute resolution in civil and commercial matters. It gave origin to the legislative initiative followed by the issue of the Directive 52/2008/EC, referred to below. The Green Paper examines the situation of the alternative methods for dispute resolution in Europe, in order to promote the use of mediation.

The Commission pointed out how the specific advantages of these forms of alternative justice on the one hand, and the crisis and collapse of traditional forms of justice on the other, have led to a renewed interest in these methods for dispute resolution, characterized by a greater autonomy of the parties and the consensual decision if compared to the proceedings before a Court or to arbitration.

However, it is necessary to remember what has been said above about the limits of mediation and of the other forms of ADR. We refer to those issues (personal and inalienable rights, status and capacity of persons, etc.) for whom the autonomy of the parties is not considered as an absolute value, but gives way to higher values and principles. In other words, it has to be remembered here that parties are not free to dispose of their rights, or at least not of all of them.

It is also important to remember that the Commission recognizes a

further limitation if the parties are not actually free or cannot always make voluntary choices. This is what happens in *hard cases* or in *extreme disputes*, characterized by particular forms of hatred and bitterness between the parties or by an economic, informative or socio-cultural discrepancy.

## 5. The Code of Conduct

To go beyond the policies of consumer protection it is important to mention also the European Code of conduct referring to Mediation, presented in Brussels on 2 July 2004<sup>20</sup>.

The Code is not an institutional text in the technical sense, because its drafting — although encouraged by the European Commission — was carried out by a group of people who were not interested in interfering with the Member State legislation, and it was conceived as the basic model interested institutions and bodies may have completed.

The code consists of four articles that lay down some ethical principles to which mediators should adhere voluntarily under their own responsibility. As a matter of fact, in the light of the above mentioned regulatory cross-references, the conformity is actually compulsory. It is addressed to bodies that, offering services of mediation and conciliation and administering the following procedures, comply with it and commit themselves to respect the contents of their conciliators.

The idea of a European code of conduct, as a discretionary tool to improve the quality of mediation and the trust of individuals towards this system of dispute resolution has been strongly supported by the European institutions.

Many of the measures taken so far in this subject are characterized by the fact that they focus on two main objectives:

- to ensure the mutual respect of the judgements and decisions within the European Union countries;
- to improve the access to justice of both ordinary citizens and professionals, in particular when the four freedoms characterizing the common internal market are at stake.

This topic — the access to Justice — leads us to review the role of ADR systems, because according to the Commission, even if it is true that to grant an efficient and fair judicial system is among the prerogatives of the single Member States, it is also true that the traditional legal systems are

20. Available at [ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm), accessed 27.7.2014

no longer able to provide for the best solution of all conflicts occurring in modern society.

For certain disputes other forms of disputes resolution may better respond to the wishes and intentions of the parties. These forms may allow an interest-based approach to the resolution of the conflict and can allow swifter and more cost-effective processes, to name just a few of the often quoted advantages.

It is also important to say that one form is not necessarily better than another and that it must not necessarily take the place of the other. Considering the existence of an efficient judicial system indisputable and essential, citizens should rather be ensured to have the opportunity to choose freely what form of dispute resolution more satisfies them, being previously fully informed about their rights and the different forms of protection provided by the legal system.

Such freedom of choice has also to include self-regulation forms, considered as the possibility that business operators, social partners, non-governmental organizations or associations have to adopt — among them and for them — common guidelines at the European level, such as codes of conduct or deontology and category agreements.

The Commission has, however, highlighted that the so called self-regulation, when respecting the transparency and representativeness of the parties involved, not only meets the Community law, but also “represents an added value in the general interest”.

What has been absent at the European level so far, was properly the development of common guide lines (e.g. a code of conduct) and this is what the European Commission services have promoted in the works that have taken place since the enactment of the Green Paper.

The legislative instrument, however, should be used in those cases in which the legal system aims at establishing principles, rights and obligations for the community of citizens, and procedures making the conferred rights effective, especially when all this implies large and important social changes and requires a democratic legitimacy at the Community level.

Legislation obviously gives a high level of legal certainty and becomes a necessary instrument to standardize and harmonize legal solutions, considering the high degree of divergence between the different disciplines in force in the different Member States.

It can also be essential in those situations where alternative solutions had already been tried out but were not effective, as it actually happened, so that such intervention was followed in time by the debate on whether or not to act through a Community Act and the debate itself has resulted in the issuing of the directive 52/2008/CE, whose analysis can be found below.

The aim of the rules in the European Code of Conduct is to establish

greater confidence in the use of mediation and, at the same time, to improve the quality of mediation services in Europe.

The Code of Conduct should also contribute to avoid, or at least, minimize the fragmentation of the internal market respecting the freedom to provide a particular service and to receive the same kind of service.

And actually, as a model of self-regulation the code of conduct has shown its weakness: lack in tools to ensure the respect and the effectiveness of the conduct rules, also because, not being a Community Act, the Commission cannot exercise control over the respect and the effectiveness of the rules therein contained.

As a matter of fact, although a self-regulatory initiative is encouraged and promoted by the Commission, including the form of a recommendation, the Commission itself cannot do anything if there is no compliance with the rules referred to.

Actually the EU Directive on mediation in civil and commercial matters, which will be analysed in the next paragraph, expressly mentions the Code of Conduct, as many national legislative intervention, through which Member States have enacted the EU Directive in their legal systems.

What is certain with regard to this aspect is that the secret of the success of the Code is bound to and conditioned by the attitude that will be assumed in the future by those who will join it and who will continue to adhere to it. Therefore, the European Code of Conduct is a great opportunity — for mediators and organizations providing mediation services — to promote greater confidence and renewed quality in the provided services and to ensure a functional system and an internal market for mediation in Europe.

## **6. The EU directive on mediation in civil and commercial matters**

At a Community level, mediation is governed by Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters<sup>21</sup>.

The Directive binds all Member States — with the exception of Denmark — to implement it by 21 May 2011.

The review process will be managed, as usual, by the European Commission, which by 21 May 2016 will be required to submit a report on each Member State application to the European Parliament, the Council and the European Economic and Social Committee.

As a matter of fact, the European Union's efforts to establish uniform mediation rules — in particular for cross-border disputes — is based on

21. Published in the Official Journal of the European Union of 24 May, L136.

the special meeting of the European Council, held in Tampere on 15 and 16 October 1999, to create an area of freedom, security and justice in the European Union, on the occasion of which (par. 30) “The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims.

Alternative, extra-judicial procedures should also be created by Member States”<sup>22</sup>.

In a nutshell, the legislator’s goal is to harmonize the different forms of mediation by posing certain milestones<sup>23</sup> with the need — at the same time — not to encroach on the individual national experiences in which mediation and conciliation have been widely diffused and regulated<sup>24</sup>.

It should be considered, indeed, that in many EU countries, mediation — and in general the ADR — had spread out between the end of the nineteen seventies and the first half of the nineteen eighties (i.e. the Dutch and Danish models): the Directive, therefore, could not wipe out the status quo, but had necessarily to cope with, conform and adapt to the traditions of the single state.

The EU legislator, in a certain way, seems to follow three different regulatory approaches, as some articles of the Directive contain soft rules for the Member State to transpose into their national laws (such as art. 6 on the enforceability of settlement agreements or art. 7 on confidentiality), while others seems to express a desire or a wish rather than an order and require to implement a peculiar model (as art. 4 on ensuring the quality of mediation and art. 5 on the relationship between court proceedings and mediation). A third approach is the voluntarily (perhaps not) absence of any provision on crucial issues, such as the liability of mediators or the regulation of professional mediator associations.

Nor can it be forgotten that with regard to mediation EU Member States situations had been characterised by absolute heterogeneity, ranging from experiences in which mediation and ADRs in general were widespread on the basis of the US model<sup>25</sup> (e.g. English and Scandinavian countries) to legal systems in which the ADRs were almost unknown or very differently

22. Full text is available on [www.europarl.europa.eu/summits/tam\\_en.html](http://www.europarl.europa.eu/summits/tam_en.html).

23. Uniform Approach, 2 European I. J., p. 36 (2008).

24. *Eye on the future*, 15 JIML, p. 512 (2009).

25. See D.J.A. CAIRNS (2005), p. 62.

conceived (e.g. in general in Mediterranean countries)<sup>26</sup>.

Nevertheless, it would be short sighted to limit the interest of the Directive “to ensure an easy access to justice, as part of the EU policy to establish an area of freedom, security and justice”.

As a matter of fact, mediation is also an incentive for cross-border transactions. One of the main limits to transactions between residents of different States is given by the high costs and difficulties of access to judicial means: it is enough, for example, to think that when a subject wishes to claim his/her rights beyond national borders, he/she is obliged to have the judicial act translated and to identify the competent authority for the notification of that act.

These transaction costs — added to the regular costs of justice — end up by discouraging those interested in performing a specific transaction across borders: the proof is that in e-commerce only few online contracts are between subjects operating in different countries<sup>27</sup>.

The opportunity of using an inexpensive and speedy tool which, although not leading to a decision, allows the parties to reach an agreement, could be a solution (or could at least provide a solution) for these issues. Besides, it seems right to highlight that both parties are often interested in reaching an agreement: think of online purchases for example, and the importance of business reputation in such context.

It is clear that an entrepreneur, investing in e-commerce, will be more interested in reaching an agreement with an unsatisfied customer — regardless of any faults or reasons of the customer himself — rather than in spreading negative feedbacks — about his own commercial reliability — which could negatively influence the choice of other potential customers/users.

The agreements resulting from mediation have a double benefit: they are more likely to be respected voluntarily, on the one hand; they are more likely to preserve an amicable and sustainable relationship between the parties, on the other hand; those are all benefits which become even more pronounced in situations where cross-border elements are present.

### 6.1. *Scope of application of the Directive and definitions*

The application of the Directive is restricted in three ways.

26. For a general overviews on different models, with a comparative approach, see K.J. HOPT and F. STEFFEK (eds.) (2013); C. HODGES, I. BENOHR and N. CREUTZFELDT-BANDA (eds.) (2012); F. STEFFEK, H. UNBERATH, H. GENN and R. GREGER (eds.) (2013).

27. On E-commerce and ODR, see R.A. BARUCH BUSH and J.P. FOLGER (1994), pp. 77 ff.; V.C. CRAWFORD (2001); B.G. DAVIS (2002); B.G. DAVIS (2006); L. EDWARDS and C. WILSON (2007), p. 315; M. FABRI M. and M. VELICOGNA (2007); Y. FARAH (2005), p. 123; C.M. HANYCZ (2008), p. 99; E. KATSH (2002); E. KATSH (2004), p. 271; E. KATSH (2007), p. 97; E. KATSH and J. RIFKIN (2001); S.S. RAINES (2006), p. 359; S.S. RAINES and M. CONLEY TYLER (2006); A. RAMASASTRY (2004), p. 164.

First of all, the definition of mediation offered by art. 3 (a) is a functional one, drawing this ADR tool as a “process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator”.

In respect of such a general definition, according to art. 3 (b), it includes “mediation conducted by a judge who is not responsible for any judicial proceeding concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceeding the dispute in question”.

Moreover, the Directive protects the single national experiences, establishing the principles of the institute and showing indifference for the *nomen* given to mediation and conciliation by national legislators. Letter a) then specifies that the procedure “may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State”.

The Italian legislator has implemented all these possibilities, including both mandatory and voluntary or private mediation, as well as mediation suggested by the court at any time until the last day in Court, in the d.lgs. no. 28/2010.

The Decree of enforcement, however, has not considered the possibility of “a mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question”. The mediator, according to Art. 3, point b), is instead “any third person that is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation”. Also in this case, it is possible to consider that the Directive wanted to preserve the previous legislative experiences: for example, those legal systems which allow access to the list of mediators to people without any legal training (e.g. psychologists)<sup>28</sup>.

Secondly, the Directive is conceived for cross-border disputes, and a general principle of private international law is suitably taken into account to determine the cross-border nature of a dispute. Perhaps in a tautological way, Art. 2, par. 1 of the Directive indeed states that “a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party”<sup>29</sup> on the date

28. A possibility that seems also to have been accepted recently by the Italian national legislator through the Ministerial Decree (DM) no. 180/2010.

29. In order to identify the place of residence, national law is applied in accordance with provisions of Art. 59 of EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The same Regulation also states how to determine the residence of companies or other legal persons or associations that, pursuant

on which a) the parties agree to use mediation after the dispute has arisen; b) mediation is ordered by a court; c) an obligation to use mediation arises under national law; d) under art. 5, an invitation by a Court to use mediation or attend an information session is made to the parties.

The “voluntary element” does not refer to the typology of mediation, but to its voluntary nature even when national legislation — as in Italy — considers it a condition of admissibility in front of a Court Judge for certain kinds of disputes.

In other words, the Directive regards negotiations in which parties are free to agree or not and, for this reason, they are among the non–adjudicative ADRs and negotiations in which an impartial third party exists, assisting the parties in their decision making processes.

As the Directive requires Member States to ensure a minimum level of harmonization, it expressly applies to cross–border litigation, which mainly affect the EU economic market goals, but it does not prevent the States from enacting laws that cover cross–border as well as purely national mediations.

The Directive also highlights the different objectives to be achieved at Community and national levels. In the first case, indeed, the Directive aims at adding a further element for the effective realization of a unified market and at eliminating barriers to the free movement of services: anyway, cross–border mediations are the subject matter of the Directive.

Actually, one set of rules for national and international mediations is desirable, as this would foster the understanding and practice of mediation and avoid arbitrarily different regulations.

Moreover, in terms of time costing, the use of mediation — both for national and transnational disputes — can solve or reduce the impact of litigation. Not by chance, Italy has been repeatedly penalized for the procedural delays<sup>30</sup> which violate Art. 6.1 of the European Convention for Human Rights.

This is proved by the limited residual space reserved by the d.lgs. no. 28/2010 to cross border mediations which, in comparison with domestic

Art. 60, will be located in the place where they have their headquarters, or central administration, or principal place of business. With regard to a European society, former EC Regulation no. 2001/2157 the possibility of identifying alternative locations fails in presence of art. 7, which establishes that “the registered office of an SE shall be located within the Community, in the same Member State as its head office”. In Italy those provisions have been interpreted and applied by Courts in some leading cases, such as Cass., 14 April 2004, n. 7037, in *Ced Cassazione*, 2004; Cass. SS.UU., 5 May 2006, n. 10312, in *Foro it.*, 2006, I, 3388, note V. Porreca; Cass. SS.UU. 1 February 2010, no. 2224, in *Ced Cassazione*, 2010.

30. Italy is the European country that has the highest number of outstanding disputes — nearly six million cases in the civil sector alone at the time of writing — according to the Report of the CEPEJ, European Judicial Systems — Edition 2012, at [coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport\\_en.pdf](http://coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf).



mediations, are considered as an exception, and by the inclusion of the joint ownership, whose cross-border profiles are difficult to imagine, among the matters for which mediation is foreseen as a condition of admissibility.

Thirdly, pursuant to Art. 1, par. 2, the Directive is applied in « cross-border disputes to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law ».

Of course, legitimate rights considered such by Member States and frequently related to family and labour law are excluded.

If, for example, the applicable Member State law requires a court decision for the divorce as such but allows for private autonomy in other fields of family law, such as the pecuniary effects of a divorce, only the latter is dealt with in the Directive.

The same provision specifies (but perhaps it is a superfluous clarification) that the Directive does not apply to “revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority”.

Coming back to the first “(de-)limitation” arising from the definition of mediation, it is important to stress that no. 10 states that “processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator”.

So the EU definition deals only with the concepts of mediation and mediator; unlike the Italian implementation decree, the Directive does not define conciliation.

This is a choice that perhaps, observing the Italian experience, can be explained. Art. 1 of the Decree no. 28/2010 describes mediation as the process of negotiation between the parties and conciliation as the phase, if any, in which the agreement is reached.

This dichotomy is not found, however, in the Community Directive and in the opinion of the writer it is a solution as admirable as the one adopted by national legislation.

Mediation and conciliation, as defined by the national law (d.lgs. no. 28/2010), are two sides of the same coin since they represent two different phases of a case which, however, maintains its unity. Reasoning by analogy, there is no difference between this situation and what happens in the contractual field when negotiations (corresponding to mediation) and the conclusion of the contract (corresponding to conciliation) are separated and yet the regulatory scheme is unitary without being split up from the progressive formation of the case. Similarly, the distinction between mediation and conciliation seems to have a merely classificatory value, without any substantial effect on the applicative level.

## 6.2. *Relations with the process and with litigations*

Art. 8 of the Directive deals with the relationship between mediation and the judicial trial stating that “Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process”. In other words the Directive demands the States to ensure that parties who choose mediation to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. Thus would consent parties to concentrate on the research for mutually beneficial solutions without the worry of suffering disadvantages from the mediation attempt.

According to art. 5 the Court can invite the parties to use mediation in order to settle the dispute or to attend an information session on the use of mediation. The Directive, in fact, does not implement a compulsory model of mediation, but gives priority to party autonomy and the principle of voluntariness. Yet art. 5 (2) expressly does not keep the Member States from making the use of mediation compulsory, from foreseeing incentives to use mediation and sanctions for not using it. Limits to those incentives and sanctions are connected to the superior and fundamental guarantee of the right to access to justice, which cannot be violated or sullied, in the sense that such measures cannot have in any case the effect of preventing the parties from exercising their right for the access to the judicial legal system<sup>31</sup>.

Moreover it is worthy of note that the Italian legislator has provided that the request for mediation prevents the “expiry on one occasion” (Art. 5, par. 6 of d.lgs. no. 28/2010), suggesting that mandatory and voluntary or optional mediations may coexist. To be more explicit, there could be a case in which mediation is a condition of admissibility but the parties do not reach an agreement; thereafter, the court may invite the parties to a second mediation because of the stage of the case and the specificity of the dispute, or the parties themselves could ask the court to suspend the proceedings (for four months) in order to allow them to perform a mediation.

Art. 6 of the Directive also regulates the enforceability of the agreements resulting from mediation. This is a fundamental aspect that had already been widely considered by the two EC Recommendations in 1998 and 2001.

31. Such measures can consist, for example, in binding Court orders to try mediation which are common in Norway; financial assistance to use mediation, as foreseen in Austria; possible cost sanctions for rejecting mediation without a good reason, implemented in the United Kingdom and in Italy.

Generally speaking, mediation agreements should have a higher chance of compliance compared with Court decisions, as they are based on party autonomy instead of an authoritative third party decision. In fact, parties only settle if they really like and want the solution, which can possibly be more elastic than the judicial ruling in taking into account financial difficulties, ethnic origins, cultural identities and peculiar needs of individuals.

In any case, it could be necessary for the parties to have at their disposal an enforceable agreement, especially in those situations when the obligations agreed on are far in the future or if any party has peculiar financial or emotional security needs.

Also in this case, the generic statements of legislative expressions may be justified by the large discrepancies between national legislations and the well known difficulties to harmonize the procedural law.

The second paragraph of the above cited article, for example, refers comprehensively to the possibility to make the agreement enforceable « by a court or other competent authority in a judgement or decision or in an authentic instrument in accordance with the law of the Member State where the request is made ».

Moreover, the general rules on cross-border and national enforcement can be applied. Therefore, if a mediation agreement leads to a settlement in court, it is enforceable under the national rules and art. 58 Brussels I Regulation<sup>32</sup>; as the agreement is settled totally out of court, it is enforceable both under national rules and art 59 Brussels I.

There is, however, a substantial difference between the Directive and the Italian implementation model.

The faculty to make the agreement enforceable is given by the Directive to the parties or to “one of them with the explicit consent of the others”.

Under Italian law, on the contrary, a similar agreement is not necessary: the homologation of the minutes, although it is a possible phase (referring only to the possibility that parties do not fulfil the obligations put forward in the minutes themselves) does not require the consent of the party that, so to say, will have to undergo the executive procedure.

Moreover the recent reform of the Decree has recognized the lawyers, who assist all the parties involved in the mediation procedure, the power to certificate the coherence of the minute to public order and imperative rules, so that it could be considered as homologated by the judge<sup>33</sup>.

32. Regulation 2001/44/EC, available at [eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML), accessed 27.7.2014.

33. Art. 12 d.lgs. 28/2010.

### 6.3. *The confidentiality of mediation*

Generally speaking, parties' will to disclose and share pieces of information is the keystone for an agreed solution to mediation.

But, at the same time, it can also be that the discussion between the mediator and only one of the parties can be favourable, especially when it offers an opportunity to put on the table sensitive issues, which the mediator may use to suggest hypothetical solutions.

In both cases, plenary mediation session and separate ones, statutory and contractual rules on confidentiality have the function to avoid a fundamental risk connected to the disclosure. In fact, parties are quite often afraid of sharing pieces of information with the others. Their reluctance comes from the fear that such pieces of information can be used against them out of the mediation procedure (in front of the court judge or during an arbitration procedure).

The Directive also devotes a specific article to the confidentiality of mediation processes. It is expected that "neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process"<sup>34</sup>.

But this shall not apply if the parties want so, for reason of public policy and order, or if the disclosure is functional in order to enforce or give execution to the final agreement.

In this regard a significant difference in the Italian implementing legislation appears clear.

As the Directive does not "preclude Member States from enacting stricter measures to protect the confidentiality of mediation"<sup>35</sup>, such measures could be rules that limit the rights of the parties to testify and introduce evidence in court proceedings.

More rigorous provisions are, therefore, admissible, such as the one adopted by Legislative Decree 28/2010, to protect confidentiality.

In fact, Art. 10 of that Decree states that parties cannot use the information coming from mediation during the judicial proceedings regarding the same matter, "except with the consent of the party who stated them or from whom information originated".

In the final part of the first paragraph it is established that on the statements and the information obtained during the mediation process "the testimonial evidence and the decisive oath are not admitted".

Confidentiality, nevertheless, can be ignored for "overriding considera-

34. Art. 7, para. 1, of the EU Directive in comment.

35. Art. 7, para. 4, of the EU Directive in comment.

tions of public policy”, when it is necessary “to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person” or where “disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce the agreement”<sup>36</sup>.

Art. 9 regulates information for the public providing that Member States shall facilitate and encourage “the availability to the general public, in particular on the internet, of information on how to contact mediators and organisations providing mediation services”.

This is a prediction that will be easily applied in the Italian system, where the mediation organizations and bodies work in a competitive environment and, therefore, should be interested in providing information on their services.

But, generally speaking, mediation actually does not achieve its potential because of a lack of information about its characteristics, requirement and practical implementation also among relevant groups: judges, lawyers, stakeholders and parties.

## 7. Conclusions

After this brief overview on the main Community actions with regard to access to justice and to alternative dispute resolution systems, it is necessary to reflect on the impact of the ADRs considering the phenomena of globalization from the economic and legal standpoint.

In order to spread a global legal culture, taking into account the opposition to multicultural instances and the identity claims of some religious, cultural and social components,<sup>37</sup> globalization tends to reduce the differences between modern legal systems, and in the European frame, to determine a progressive harmonization and unification of legal models.<sup>38</sup>

The political choices beyond all those actions are oriented in the direction of promoting alternative means of out of court settlements of disputes without devaluing litigation, trying, firstly, to trace a balanced relationship between ADR systems and judicial proceeding and, secondly, to improve institutional cooperation between Member States; thirdly, to facilitate citizens’ access to justice.

But these aims can be and have been pursued at national levels with

36. Art. 7, para. 1, points a) and b).

37. E. COLOMBO (2008); Z. BAUMAN (1999); R. ROBERTSON (1999).

38. We share here the considerations by F. CUOMO ULLOA (2008), pp. 44–46 and, more generally, C. GEERTZ (1999); M. MARTINELLO (2000); F. CONSTANT (2000). With regard to legal sciences see N. IRTI (2006); S. CASSESE (2003); S. CASSESE (2009); Y. and G. DEZALAY (1996); G. TEUBNER (1997).

different approaches and strength.

Some Member States have considered the “mediation Directive” of 2008 as an occasion to reflect in a comprehensive way on the regulation concerning conflict resolution, so that States as Germany, France and Italy have promulgated new, comprehensive laws and regulations, which do not follow the limitation of the EU Directive in scope, especially having regard only to cross-border disputes.

Other legal systems, as England and Austria, have limited the legislative reform only to cross-border disputes.

The latter choice determines a dichotomous set of rules, respectively for internal disputes and cross-border ones and demonstrates in itself that national attitude and traditions are far from each other and that the call for harmonisation is not necessarily shared and welcome in such area of law.

Many good intentions — at a European level — are not enough, as “the way to hell is paved with good intentions”.

In fact, the harmonizing process certainly concerns models of conflict resolution which are closely linked to our economic and social context, and for this reason inclined to follow the same dynamics and to become global phenomena, but this can probably be done with greater difficulty in the case of judicial models of trial, which are often strongly related to the national culture and legal tradition, a typical form of the exercise of State sovereignty.

Actually, it has to be said that these legal irritants<sup>39</sup> are less critical as long as the forms of conflict resolution based on assent and, therefore, on private autonomy, rescind the application of legal rules in a rigid and exhaustive way, and can better meet the needs of the market and of globalized relationships, responding to more flexible principles of regulation.<sup>40</sup>

In fact, not by chance the dissemination of the Emedi@te questionnaires in Italy and the answers — both by the general public and the professionals addresses — have shown a scepticism and disapproval of legal professionals and potential users versus mediation. There is a strong movement of opposition to ADR’s implementation amongst lawyers and other qualified operators (judges, companies, insurances...) and such attitude provokes strong hindrances to its diffusion. On one side, the legal sector was characterized by an over-load in judicial procedures, which runs parallel to the idea that litigation is the unique way to solve a dispute.

The Italian legislation has a relative brief history in mediation experiences. Even if some forms of conciliation were known since the first codification

39. The expression is used improperly, with regard to a (not totally) foreign model (mediation) imposed on a domestic culture, which is not transplanted into another organism rather it works as a fundamental irritation. The father of such expression is G. TEUBNER (1998).

40. On the specific topic of the interactions between the globalization phenomena and the ADR systems, see K. VAN WEZEL STONE (2001).

(in 1865) mediation was introduced in the civil procedural law only in the second part of the last century. The initial applications were in labour law, followed by the commercial area and the small claims disputes. The possibility to provoke a settlement with the supervision of the judge was considered in the civil procedure code, but its use remained in the sphere of the discretionary power of the Court and, for this reason, a remote option.

In 2003 the trend moved towards a wide use of mediation, which received a stimulus in the commercial area thanks to the enactment of the Legislative Decree 5/2003. However, the institution remained unknown to the majority of potential users and the number of mediation did not increase. The recent development of mediation has been characterized by an animated discussion about its scope, limits and, above all, compulsoriness. The European Directive on Mediation 2008/52/EC gave new impulse to the growth of the ADR model and it clarified the relationship between mediation and judicial procedure.

The Statute n. 69 of 19 June 2009 and the Decree 28/2010 established a mandatory system which provided for the compulsoriness of mediation for many civil and commercial disputes and an optional recourse to mediation in the residual areas of law; later, others legislative instruments<sup>41</sup> disciplined the practical aspects of mediation such as organism of mediation, requirements for mediators, mediators training and costs. Beside the statutory instruments, private regulations disciplined other aspects of mediation in the form of a code of conduct.

After an intervention of the Constitutional Court<sup>42</sup>, which stated the illegitimacy of the mediation compulsoriness<sup>43</sup>, the interest of the Italian government in ADR prevailed and the importance of a fair and fast remedy to solve dispute has brought to a new regulation of mediation.

The decree 69 of 21 June 2013, which has reintroduced the mediation procedure as pre-action in the matters listed at the art. 5 of the Decree 28/2010 since 20 September 2013, represents a compromise between opposite points of view; the deflective effect pursued by the legislative power and the interests of the lawyers for an active involvement in the ADR procedure have been the main elements considered.

Actually, generally speaking, the legal culture has been strongly influenced by the winner-looser vision in resolving the divergences and this

41. Decree 180/2010; Ministry of Justice n. 145/2011, both available at [www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.wp?contentId=SDC470966](http://www.giustizia.it/giustizia/it/mg_1_8_1.wp?contentId=SDC470966), accessed 28.7.2014.

42. Constitutional Court, 6 December 2012 n° 272, available at [www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2012&numero=272](http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2012&numero=272), accessed 28.7.2014.

43. We do not ignore that the question was debated by the European Court of Justice, which has declared the legitimacy of mandatory mediation (R. ALASSINI and others [C-317/08 and C-320/08] 18 march 2010).

does not facilitate a settled solution. On the other side, the mandatory mediation attempt was thought, at legislative level, without considering the attorney's role inside mediation procedure.

Lawyers stand opposite the procedure and raise doubts about its legitimacy, as it limits the right for the access to justice<sup>44</sup>. The uncertainty which has characterized the development of the mediation phenomenon, as well as scepticism towards the interference of a third private party (even if impartial) have severely affected the diffusion of mediation and will continue to do so. Furthermore, the number of cases handled by mediators is not relevant yet, as the recourse to this remedy has been interrupted in 2012 after the Constitutional Court's decision.

This datum is confirmed by the Emedi@te questionnaires judges or lawyers (non mediators) respondents, who have recommended or ordered mediation just because mediation is mandatory in some areas of private law disputes and since in the major part of such cases no agreement was reached mainly because of the immovable conduct of the parties.

Moreover neither the judges or lawyers (answering) can propose themselves as mediators and, in appointing a mediator, they think it might have the following characteristics: experience, certification, references, registration, training.

The parties' attitude or — better said — non attitude towards mediation is also proved by official statistic studies carried out by the Ministry of Justice. In particular, the data now available show an increasing number of mediation (due to its compulsoriness), which doesn't find a correspondent growth of settled cases; on the contrary, the mandatory system has produced the aberrant result of a decrease of reached agreements<sup>45</sup>.

Those results reflect a general approach to mediation, which is considered as a pre-condition to initiate the litigation and not as a real possibility to solve the dispute, probably for the lack of information about this instrument and its potentiality.

Yet, the absence of networking and dialogue between the institutions (private and public) involved in the promotion and implementation of mediation severely compromises the public acknowledgement of mediation.

These "political" evaluations could partially explain the approach of the interviewed persons and the deficiency of information about mediation showed through the questionnaires.

Not by chance, the majority of interviewed has declared itself not famil-

44. Also formal problems were denounced: the decree 28/2010 exceeds the power delegated by law; in addition the procedure was too expensive and the training of mediators was not sufficiently guaranteed.

45. See the data collected at 31 December 2013 compared with data available at 31 December 2012: <http://webstat.giustizia.it/AreaPubblica/Analisi%20e%20ricerche/Forms/Mediazione.aspx>.



iar with mediation; a great number of persons abstained in the reply and more than half of the interviewed is not involved in mediation procedures.

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# ODR as Growth Factor of Confidence in the Digital Dimension of the Internal Market

Some questions

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## 1. Introduction

This study aims to highlight some of the issues relating to the alternative dispute resolution methods. It is known that in the digital age, the internet development has seen the expansion of communication, exchange and trade between people.

The birth of this Global Platform does not know time and space limitation, and it places in direct competition the traders (individuals, companies) that it want to offer, through this mean, goods and services to the variegated group of e-consumers. With the development of e-commerce, both in its business to business (B2B), business to consumers (B2C), consumers to consumers (C2C), and consumers to business (C2B) conception, it is growing a new category of controversy, the e-disputes.

The e-disputes include all disputes that arise in the network. In this area, the traditional means offered by the law, to protect consumers rights, show the limits for their effective use; the instruments of protection appear to require a radical revision, this new type of instruments must be based on convenience, confidence and competence.

The attention is focused on the Alternative Dispute Resolution (ADR), in particular on the Online Dispute Resolution (ODR); the use of technology is therefore characterized as the real innovation driver of online system for dispute resolution.

The European Union moves toward the protection of consumers, in this context on 22 April 2013, the Council of the European Union adopted a

Directive 2013/11 on Alternative Dispute Resolution or ADR Directive<sup>1</sup> and a Regulation 524/2013 on Online Dispute Resolution or ODR Regulation<sup>2</sup>, that together, they should offer to all EU consumers equal access to consumer redress in all types of consumer dispute.

The aim of the new legislation is to ensure that consumers have fast and cost-effective means of resolving, without going to court (out-of-court mechanism), all kinds of disputes: contractual, domestic or cross-border that they have with traders, these measures are significant step towards the re-balancing of civil redress system.

ADR Directive aims to guarantee to consumers the opportunity to submit, on a voluntary basis, a claim against the other contractual opposing party before them to « entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures »<sup>3</sup>.

The Directive is designed to aid harmonization of ADR across the EU and, in particular, to help consumers by providing them with information on how to file a complaint with an ADR entity, as well as ensuring that any such ADR is carried out in a consistent manner<sup>4</sup>.

The ODR Regulation empowers the Commission to establish a pan EU-wide ODR platform that facilitates the resolution of consumer disputes related to online sales of goods and services arising from e-commerce, that enabling consumers and traders to access to the online ADR services from every single State of European Union; the Platform aims to become a single point for solving online cross-border consumer complaints arising from e-commerce<sup>5</sup>, this Regulation has a special focus on e-commerce, and it has been developed, according to art. 2 ODR Regulation, to apply to:

- disputes arising out of online sales or service contracts between an EU consumer and EU trader;
- disputes initiated by a trader against an EU consumer where the Member States in which the consumer is resident allow for such disputes to be resolved via ADR;
- disputes between a trader resident outside the EU if such trader engages in sales or service contracts, including sales contracts having as their object both goods and services, with a consumer resident in the EU and such EU Member State allows for such disputes to be

1. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011&qid=1409689935167&from=EN>, accessed 20.8.2014.

2. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0524&qid=1409690414995&from=EN>, accessed 20.8.2014.

3. Art. 1 ADR Directive.

4. S. WELLS and S. MCLEAN (2013).

5. Cfr. E.M. APPIANO (2009), p. 966–967.

resolved through the intervention of an ADR entity<sup>6</sup>.

Consumers, who encounter a problem with an online purchase, are able to submit a complaint online through the ODR platform, it helps to speed up the resolution of the dispute by allowing ADR entities to conduct the proceedings online and through electronic means.

The ODR Platform will offer to the consumers a single point of entry indicating an ADR center which is competent to offer ADR services and to resolve complaints. In essence, the Platform interface is like a website that offers a single point of entry to individual who seeks to resolve disputes out-of-court. The Platform will link all the national ADR entities and will operate in all official EU languages, free of charge, this simplifies the dispute resolution proceedings, particularly when the parties live in different Member States and speak different languages.

The European Commission establishes through the ODR Regulation (Article 7 Regulation) the *points of contact*, this has a central role in the functional network of ODR system: each Member State shall designate an ODR point of contact and every point of contact has, at least, two ODR advisors (art 7.1); the contact points play important functions of connection between the parties and competent ADR entity, facilitating the relationship and also performing a role in raising awareness and cultural orientation towards the informal justice (art. 7.2–4).

The *online* promotion of alternative dispute resolution methods, seems to be the most suitable approach to resolve conflicts between consumers and traders that arising from e-commerce, in this regard, it is important to emphasize the fact that ODR Regulation and ADR Directive have been negotiated and approved in parallel on the same date; this explains very well the functional relationship between these two legislative interventions.

On the technical–operational level, the creation of the ODR Platform is now in progress: despite institutional lines have been fully described, a series of profiles has yet to be translated into specific instruments.

Among the multiple critics profiles, some of these deserve special emphasis and will be studied in the following pages, these are:

- The creation and facilitation of a widespread culture of mediation, which passes through the basic knowledge about the capabilities and resources of the techniques of *out-of-court justice* as opposed to the *traditional justice*.
- The concrete faces of the *principle of confidentiality* of mediation, in their interface with the written vehicle of the ODR procedure.

6. S. WELLS and S. MCLEAN (2013).

- The *linguistic profiles* that affect both the promotion of the cultural patterns of informal justice, both on the participation guarantees of the parties in an ODR procedure.
- The absence of a *face to face* confrontation between the parties, which would seem to be a limit, but in reality it could be a strategic resource of the system.

The pages that follow do not constitute a complete inventory, rather it is only a few critical insights for reflection, aimed at enhancing the out-of-court resolution method.

## 2. General Information and Cultural Basis on ADR Procedure and ODR Platform: a Proposal

Nowadays, one of the most important EU priority is to stimulate the stagnant internal market. The EU believes that the provision of effective redress mechanisms is necessary to boost competition and growth in e-commerce, which is expected to play a key role in increasing economic growth in the Internal Market.<sup>7</sup>

E-commerce is a major, sometimes disruptive, driver of change in the world of retail and wholesale, and in that of the consumer. It offers major new opportunities in many sorts of ways for businesses which serve consumers. Consumers themselves, with their increased use of the computer and of mobile devices such as tablets and smartphones, are changing dramatically in terms of behavior and expectations as shoppers. For traders, e-commerce offers new ways to interact with their customers and to serve them through different channels and platforms.<sup>8</sup>

Over 493 million people are in the European internal market, even though many of the consumer are reluctant to use the web, especially if that involves a cross-border transaction. An important step of e-commerce depends on the confidence in the cross-border transaction. Confidence in the network is measured in terms of security: consumers will only be able to evaluate the advantages that e-confidence is also based on a responsive system of conflict resolution, perhaps more intensely than in offline relationships.<sup>9</sup>

Despite economic downturns, the *e-commerce* data showed a significant

7. P. CORTÉS (2013), p. 1.

8. Euro commerce, *E-commerce, omni-channel retail, and EU policy*, Policy guidance, Mar. 2014, available at [www.eurocommerce.be/media/86151/omnichannel\\_policy\\_guidance\\_final\\_mar\\_2014.pdf](http://www.eurocommerce.be/media/86151/omnichannel_policy_guidance_final_mar_2014.pdf), accessed 20.8.2014.

9. I. BARRAL VIÑALS (2014), p. 149.



trend in growth. In accordance with Netcomm Forum (IX edition, May 20, 2014, Milan), the projections for 2014 show that the *online* sale of goods are 3.6% of total sales in Italy (the assessed value is 3% for 2013), while the projections totaled 6% for France, 8.5% for Germany and 15% for the United Kingdom; should be noted that the e-commerce operations, almost always, are cross-border.

In this context, the *strengthening of consumer protection* and the *user-friendly nature* of out-of-court resolution mechanisms, are an important factor of market stabilization and online operations reliability, that become, therefore, the propulsion instruments in the propensity of European actors to e-commerce and in the global development of the economic traffic.

In the perspective of e-confidence consolidation, an accurate informative dimension assumes the prerequisite role of market orientation, toward electronic trading: it refers both to the aspects of consumer rights protection in e-commerce; to the basic knowledge of the ADR method; and to the security and simplification characters of the ODR Platform *under construction*.

It must be emphasized that, to the consolidation of consumer propensity for e-commerce in the common *way-of-life*, in our *current mentality*, and in the *cultural basis*, we need to create a cultural process, *layered over time*.

Nevertheless, the expansion of e-commerce is limited by the traditional, court-based, channels for resolving disputes. These systems are unable to resolve high-volumes of low-values claims, let alone, for disputes, where parties are far from each other. Both, the EU and the UN, with the goal of enhancing cross-border trade, have recently recognized the need to promote extrajudicial consumer redress by promoting the use of ODR mechanisms.<sup>10</sup>

European business operates, and consumers live, in an environment where the diversity of culture, tradition, lifestyle, and language are a source of richness. At the same time, this diversity generates differences in requirements, and, therefore, barriers that prevent businesses from enjoying the benefits of a real, large, single, EU market. In turn, consumers are deprived of benefits enjoyed by consumers neighbouring countries. Any differences in rules and regulations should only be justified on truly objective grounds.

Barriers that are unintended or unjustified should be removed. It is unacceptable, for example, that to be fully compliant one retailer needs 28 different websites with 28 terms and conditions. Or that, to trade online cross-border he must have a brick-and-mortar presence in other members states, due to VAT, establishment or waste collection rules, at present the diverse regime on legal guarantees in the 28 Member States is a major

10. P. CORTÈS (2013), p. 3.

disincentive to cross-border online and offline selling.

Further barriers to the development of e-commerce or omni-channel retail persist because existing legislation was designed in the age of brick-and-mortar retail and wholesale, or to cater for different forms of distance or direct selling. Some legislation is therefore no longer fit for the diversity of commerce business models in the digital age.<sup>11</sup>

The entrepreneur, rather than, implement your own website in 28 different languages, should be free to choose their own relevant market, and implement your site as you want.

The European Union works to break down these barriers, in fact, this new European law (ADR Directive and ODR Regulation) will significantly facilitate cross-border online commerce for businesses, while providing robust protection standards and thus prompting greater consumer confidence in online commerce. It is important to support this process and to assess the implementation a few years down the line.<sup>12</sup>

The basic informative dimension, addressed to economic operators and, above all, to consumers, assumes crucial importance in order to ADR mechanisms and *user-friendly character* of ODR Platform: all of the law sources, in order to Consumer Disputes emphasize that, the meditative perspective is a *viable chance*, then one of the possible routes, and not a necessary way; so this *chance* to conquer a real protagonist role in the choices of the actors of the e-commerce market, is necessary to create a relevant cultural consciousness in the operators class. The awareness of the imminent birth of the ODR Platform and its characters, are an indispensable basis for the initiation of large-scale cultural consciousness of that which we just referred to: it's just the essential first act, it is not enough to know that the mechanism exists, it must be culturally appreciated; it must be aware of the opportunities that it offers in terms of: *readiness, efficiency, easiness, friendly oriented dimension, cost-effective*; the cost-benefit balance is firmly focused on the slope of the benefits. But, of course, we must start from the *information*: the *instrument exists*, you have to understand *how it works* and *how it will work*, clarifying what the date will be, not far away, in which the platform will begin to operate at full speed.

On the other hand, if the information is intended to operate only when the instrument will be developed, the *cultural running*, that the operation will absorb rather long time, resolves in *cultural waste*, but also, inevitably, in the *economic waste*.

The advent of internet, the big network, and the space communication, have characterized the so-called 'society of information', a society in which

11. Euro commerce, *E-commerce, omni-channel retail, and EU policy*, cit., p. 4.

12. Euro commerce, *E-commerce, omni-channel retail, and EU policy*, cit., p. 8.

the use of technological tools is not only a necessary step to complete, (through an *electronic culture* and through a proper use of the *internet machine*), but also a natural course of that progress, in terms of modernization, which in every field of our daily life is manifesting.

And so, the combination of *new technologies* with those *systems of dispute settlement*, such as ADR systems, involves the setting up of procedures for ODR (online dispute resolution), in which the material space that governs the '*physical contacts*' between the mediator and the parties, leaving the field to the virtual space, cyberspace, where it is the ODR to be able to play a role of undoubted importance, thanks to its *easy to use, and easy to access*.

The advice that the *online mediation system* want to give is that: first of all you need a basic level of computer literacy, you must be able to use the computer at least, to connect to the Internet and to use systems of electronic transmission of messages, chat line and whatever else can put them in communication.<sup>13</sup>

Therefore, assuming most of the other tools that could be used by all would be the e-mail, the focus should be on those techniques that allow a truly effective communication in online environments.

The spread of a phenomenon implies that there must be *good cultural roots* at the base, to be understood as a *human predisposition, intentions, behavioral and social approach* towards a conciliatory and mediating.

The information technology culture and knowledge must grow day after day, cannot arise from today to tomorrow, everything must go up against a *mindset* that seeks to be right at any cost, which does not recognize the space of action to the opponent, in a perspective of perfect '*litigiousness*'.<sup>14</sup>

The implementation of this *Basic information technology culture and knowledge*, has a very important role, an example of primary importance in this direction was "The 2008 International Forum on Online Dispute Resolution", the ODR Forum consisted of two days of plenary and breakout sessions. It sought to assemble the world's leading practitioners, academics, students, and civil society to discuss the resolution of disputes through online technologies. Such disputes may range from B2C (business-to-consumer) issues to the prevention of human rights violations in conflict regions, and from reconciliation of opposing groups in armed conflict to the resolution of disputes over intellectual property on the internet. It also brought together the leading technology developers who design conflict resolution platforms for use in legal, commercial, or insurance related disputes.<sup>15</sup>

13. The websites that manage this methodology in the composition of online disputes are, *inter alia*, [www.eresolution.com](http://www.eresolution.com); [www.onlineresolution.com](http://www.onlineresolution.com); [www.squaretrade.com](http://www.squaretrade.com).

14. Cfr. A. MASCIA 2005.

15. D. LEIGH and F. FOWLIE (2014), p. 113.

The ODR Forum held as its objectives increasing participants' knowledge of ODR and peace, socio-cultural aspects of ODR (including gender issues), ODR and technology, ODR and aboriginal peoples, ODR and legal systems, and ODR and business.

These objectives were pursued through the pre-conference website, the conference itself, and post-conference communications between participants. Activities carried out during the conference included two keynote addresses, sessions conducted by leading academics or practitioners in the field, and group panels and discussions. These aimed at providing the opportunity to discuss the use of information communications technology (ICT) as a pathway for the resolution of disputes, increasing information-sharing across sectors, fostering ongoing dialogue between participants, and providing for mentoring between developed and least developed countries.<sup>16</sup>

Both ODR Forum participants from developed countries and the CIDA fellows reported that the ODR Forum was useful for obtaining first-hand information from the experiences of practitioners and their institutions, and for familiarizing themselves with ODR technologies.<sup>17</sup>

Promoting democracy was the aim of a respondent whose interest in using ODR technologies was in its application to real-time election monitoring.<sup>18</sup>

Waren Burger, who was Chief Justice of the US Supreme Court, with the typical and concrete immediacy of American lawyers said:

*The notion that most people want robed judges, well dressed lawyers, and fine court room settings to resolve disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and as inexpensively as possible.*

The mediative procedures are based on this logic: the European Commission institutional website on ADR and ODR, although widely summary and a bit incomplete; summed up the practice philosophy of ADR and ODR systems with specific words "in a quick, low-cost and simple way". The characteristics of ADR Directive, and the ODR Platform, are required by EU Regulation, and show how the two systems complement each other: with respect to the disputes arising from the sale of goods or the provision of services online, is just the ODR Platform which ensures the *user-friendly nature* of the out-of-court resolution mechanism. The ODR Regulation constitutes an essential complement of ADR practical philosophy.

The positive synergies between ADR and ODR have multiple and fundamental relapses in the economic environment and in the functioning of

16. D. LEIGH and F. FOWLIE (2014), p. 107.

17. D. LEIGH and F. FOWLIE (2014), p. 108.

18. D. LEIGH and F. FOWLIE (2014), p. III.

the justice system, as a whole:

- a) *an efficient reliable*, quickly and low cost time method to resolve disputes that may arise between consumer and trader, increases consumer confidence in the market, increasing the propensity for online purchases of goods and services, and thereby stimulating the international legal and therefore the economic development;
- b) *the smooth and efficient* access to out-of-court dispute resolution systems allows to reduce the amount of litigation, to be borne by the traditional justice: so that it can focus its energies on smaller portions of disputes, increasing the quality of service in terms of efficiency and reasonable length of traditional judicial proceedings; in this sense, therefore, the optimal functioning of ADR and ODR plays a "virtues role" in the stabilization of the justice in the macro-system.
- c) *the social peace*, it must not be forgotten, that the practical philosophy of ADR schemes leads to goals of social peace: the success of ADR mechanisms generates, in short, a culture more inclined to the composition, than to the opposition.

The ODR Regulation sets the start of its full implementation in January 9th, 2016 (Art. 22), but provides that the Commission will verify the technical functionality and ease of ODR Platform use, and the complaint form, also about language resources, later than January 9, 2015: this is, therefore, the first reporting date, within which the technological profiles of the platform must be fully implemented in the system, making eve from the start of the functional mechanism.

The Regulation also provides that the ODR Platform is made available, together with a knowledge base that illustrious character and purpose, and that clearly outlining the cultural background of reference: the access to these resources is made available by the Commission "through its websites which provide information to citizens and businesses in the EU and, in particular, through 'Your Europe Portal' "(art. 5.3 Reg. ODR).

It also provided that the ODR Platform is the "single point of entry", and it consists "*in an interactive website*" which can be accessed electronically and free of charge in all official languages of the institutions of the Union" (art. 5.2 ODR Reg.).

A few months after the date of the first technique check, the information base about the ODR procedures, accessible from the EU institutional website is somewhat lacking, maybe is not operative and definite.

The "Your Europe Portal", to date, does not highlight (ODR, Reg.

“whereas” n. 21) the ODR resource and the ADR methods: ADR page<sup>19</sup> is not at all made visible with priority; the short text — although in reality undoubted clarity in terms of the basics — it is all too brief and it is only available in English (in fact, the website user is redirected to the English–language); the links on the page refer only to the English texts of the ADR Directive and ODR Regulation, as well as English–language documents refer the more links, that refer to materials prior to 2011 and therefore already largely exceeded; it is not sufficiently valued MEMO document, it is present on the Union’s institutional website as the Press Release and usable in 22 languages, on “A step forward for EU consumers: Questions & Answers on Alternative Dispute Resolution and Online Dispute Resolution” (2013).<sup>20</sup>

The times seem ripe, in a sign of the essential base of cultural reference indicated above, because we proceed with care to full dissemination of basic information that can anticipate the developed technology platform, ensuring the maturation of its cultural background so that the system is in a position to get up to speed immediately as soon as you make it accessible in practice.<sup>21</sup>

It may, therefore, formulate a proposal that:

- “*Your Europe Portal*” can accommodate, ensuring the evidence of collocation underlined by the spirit of the ODR Regulation, a more detailed page which outlines the essential features of the ADR procedures and ODR Platform, implemented in construction, indicating the essential characteristics and the time to deployment, if necessary also by capitalizing through a special link on the MEMO mentioned;
- web page on ADR and ODR must be available in all EU languages and it must contain the links to the texts of the ADR Directive and the ODR Regulation and, where appropriate, to the MEMO document just indicated, in their own language reference.

19. Route: [europa.eu/youreurope/citizen/index\\_it.htm](http://europa.eu/youreurope/citizen/index_it.htm); consumers; your rights online, what to do in case of problems; alternative disputes resolution, alternative procedure or online procedure of dispute settlement.

20. The English page of this memorandum (called MEMO), published as press release, is available at [europa.eu/rapid/press-release\\_MEMO-13-193\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-193_en.htm), accessed 20.8.2014.

21. In general key worth highlighting the fact that the communication strategies within the EU, particularly with regard to the field of justice, are of such paramount importance that they have led, recently, the Directorate General for Justice of the European Commission to launch an invitation to tender (for which the notice was published in the Official Journal EU 2014/ S140 of 24 July 2014) “to support the design and the implementation of communication activities Relating Mainly but not Exclusively to the area of EU Justice”.

### 3. Confidentiality and written ADR Procedure: some notes

“Confidentiality and privacy should be respected at all times during the ADR procedure. Member States should be encouraged to protect the confidentiality of ADR procedures in any subsequent civil or commercial judicial proceedings or arbitration”: in this way the, “whereas” n. 29 of the ADR Directive emphasizes the meaning of the principle.

Already since their abut in a recent scenarios, the context of informal justice were always characterized by the central role of *the principle of confidentiality*. The separation between the meditative dimension and judicial contexts, guarantees the physiology of the relationship between these two worlds, protecting the one and the other: if there weren't the mediation principle of confidentiality, on the one hand the material produced in the mediative informal office invade the judicial context, with respect to which the material is spurious, and would cause irreparable damage.<sup>22</sup>

Moreover, if the parties were afraid that what happens in mediation then casually throw in the judicial side, especially in the event that the mediation has not produced a positive result, the parties themselves would be strongly discouraged from accessing to the mediating context, that would consider highly risky.

For example, in the context of Mediation in Criminal Matters, the principle of confidentiality, according to the Basic Principles of the Use of Restorative Justice in Criminal Matters (United Nations, 2002), is generally easy: the operating protocols of the Mediation Offices usually involve a total secret of what is being said verbally in mediation, in the event that the mediation is carried out, or the mediation is conducted with negative results, the Office is restricted to communicate, when referring to the judicial authorities sending, the formulas “negative” or “mediation is not carried out”, making matt what happened in mediation.

In short, the absence of written protocols facilitates the efficiency of the *principle of confidentiality*, preserving the judicial contamination with materials formed out the contradictory and, at the same time, encouraging the willingness of the parties to access to a mediating course, opening the assurance that a possible negative outcome will not project any kind of prejudice to the continuation of judicial proceedings.

On the contrary, technology facilitates the flow of information that can create huge challenges in keeping dispute resolution processes confidential<sup>23</sup>.

22. On the principle of confidentiality of mediation see, *inter alia*, J. DEMARS, S. NAUS EXON, K.K. KOVACH and C. RULE (2010), p. 9 f.; see also, in this collective volume, the study of A. PERA, *The European Union policies on access to justice and ADRs: good intentions are not enough as “the way to hell is paved with...”*.

23. J. DEMARS, S. NAUS EXON, K.K. KOVACH and C. RULE, (2010), p. 9.

All this, raises the question of the movement of personal data in the network, between the parties and on the web<sup>24</sup>. The essentially written nature of data, concerning the individual dispute handled in ODR ways, poses a complex of issues concerning the protection of privacy.

The problem is well experienced in the ODR Regulation, which provides that the processing of information happens in compliance with “strict guarantees of confidentiality” and with the observance of the European standards of personal data protection (“Whereas” n. 27 of ODR Regulation), it is also provided that “those rules should apply to the processing of personal data carried out under this Regulation by the various actors of the ODR Platform whether they act alone or jointly with other such actors” (so still “Whereas” n. 27 of ODR Regulation).

There is no doubt that the formal guarantees of the system are not in themselves sufficient to exclude any risk of unlawful movement of data relating to individual disputes: on the one hand such data circulate freely between the parties, on the other hand, as regards the guarantees of network security can be laid down solemnly and rigorously; the experience shows that the phenomena of illegal access by third parties unrelated to data covered by privacy, are not uncommon.

Confidentiality poses complex issues. Technology can both address and exacerbate these issues. As Orna Rabinovich noted at the Cyberweek conference 2009:

*While the digital trail created in ODR poses a serious challenge to confidentiality, it also presents a real opportunity for enhancing the accountability and fairness of ADR processes, answering many of the critiques voiced against ADR. Given the dearth of empirical research on ADR, the vast amounts of data collected in ODR could offer a real opportunity for empirical insights on disputes and dispute resolution efforts.*<sup>25</sup>

The data that can be extracted from ODR processes can be immensely valuable, far more valuable than data pulled from face-to-face processes, because of the volume of cases flowing through ODR and because the data is collected in such a structured format.

24. More specifically, privacy among parties: each party can decide whether if some data or information mustn't be shared with the other part, but can be known by the third institutional subjects (mediator, arbiter), clearly, especially in light of the provisions of the ODR Regulation (Article 6, 12, 13) the distinction between: Privacy vs. Web involving the confidentiality of the data with regard to outside third parties, and any data on the web; Privacy vs Parties concerning the access for parties to ODR process data that is in progress: the parties shall have the full availability, they share among each other data and information concerning the dispute, and it is up to them deciding on the extension of the procedure, first of all by putting them at the disposal of body mediation; then the body of mediation will be bound to the confidentiality obligations.

25. The speech of Orna Rabinovich to Cyberweek Conference 2009 is available at [cyberweek.umasslegal.org/forum/?vasthtmlaction=viewtopic&t=19.0](http://cyberweek.umasslegal.org/forum/?vasthtmlaction=viewtopic&t=19.0).



Traditional ADR ethics operate with near absolute confidentiality, which may prove shortsighted in the ODR context. ODR providers face enormous challenges in becoming self-sustaining. Insisting on ethical requirements with diminishing benefits may further limit providers, especially if those ethical requirements represent adherence to traditional models while ignoring the new realities of online practice.<sup>26</sup>

The ODR mechanism, laid down in the EU Regulation is structured on a course that is based on writings routes: the *electronic complaint form* must be filled out in its field, which is necessary (art. 9.1) and electronically transmitted in accordance with the procedures laid down by ODR Platform; the applicant may attach any relevant documents in support of the complaint (art. 8.2); the defendant will be informed of the complaint that was lodged by the ODR Platform (art. 5.4 letter. b) and will be given an opportunity to intervene in writing; the ADR entity, which has been assigned the complaint, on one hand, if he agrees to deal with the dispute, concluding the procedure without imposing physical presence of the parties and their representatives (unless the rules of procedure provide for such a possibility and the body parts are in agreement: art. 10 letter. b), and on the other hand is not required to conduct the ADR procedure via the ODR Platform (art. 10 letter. d).

Precise confidentiality obligations imposed on ADR entities (art. 12) and points of contact (ODR art. 13) exist as well, but these concern the ‘external’ secret; however, in relation to the parties, upon the acts of the counterpart, an “internal” secret does not seem conceivable — at least on a large scale — since the pleading cannot not be placed at the disposal of both parts, being this knowledge preparatory to the conduct of the dialogue procedure itself. The ability for each parties to know the documents produced by the other parties, acts that take almost all writing (the virtuality of electronic documents does not affect, of course, the nature of the concept), determines the major risks on the premises of the *principle of confidentiality*: there may be a situation in which narrative data “exported” in the futuristic legal proceedings, subsequent to a possible failure of the mediating context, they could become a serious breach by the party itself, that has produced those narrative data, those supplied materials or those statements.

The shadow of these biases could result, in total contrast with the very meaning of ODR mechanisms, in a disincentive for the use of the ODR platform, based on written input.

It seems appropriate, therefore, strengthen the confidentiality dimension of ODR procedure also providing:

26. J. DEMARS, S. NAUS EXON, K.K. KOVACH and C. RULE , (2010), p. 9.

- a penalty of radical uselessness, for the purposes of the judicial process, test data from the ODR procedure;
- a case — which protects the first perspective — of disciplinary responsibility born by the defender who should spend, before the ordinary judicial authorities, information from ODR procedure, as those covered by secrecy.

Confidentiality is a central feature of mediation, written into mediation standards of conduct as well as many (perhaps most) state statutes. It's the primary subject of the Uniform Mediation Act. Yet the larger question is how to maintain confidentiality in ODR proceedings, and when it is appropriate not to do so.<sup>27</sup>

#### 4. Linguistic assistance, participatory guarantees and ODR fairness

The ODR procedure was established in order to facilitate the out-of-court disputes resolution arising from the sale of goods or the provision of online services, having particular regard to cross-border transactions: in such contexts, it is significantly elevated the possibility that the claimant and the defendant of the ODR procedure use different languages codes from each other.

The need of linguistics protection assumes a central character, the focus is primarily on *fairness*, in terms of minimum guarantees of participation of each party.

The Regulation provides for the creation of standard complaint and response forms in all the languages of the EU but, once a dispute escalates to an ADR entity, the Platform will simply inform the consumer about the language in which the available ADR procedure will be conducted. This could potentially be an insurmountable limitation if parties do not agree on the language. Although the Regulation designates ODR facilitators as intermediaries to assist parties with language barriers, the manpower of this resource will obviously be quite limited. Indeed, a more useful role for ODR facilitators would be not to act as language interpreters but as true managers of the Platform, enabling ODR technology to assist parties settlements.<sup>28</sup>

The ODR Regulation does not seem to neglect the profile of linguistic codes as irreplaceable participatory basis of the parties to the ODR procedure and indeed as a prerequisite to ensure the fairness of the trail. In this

27. J. DEMARS, S. NAUS EXON, K.K. KOVACH and C. RULE , (2010), p. 9–10.

28. P. CORTÉS, (2012).

sense, it is expected that the platform can be electronically accessed and free of charge “in all official languages of the institutions of the Union” (art. 5.2 Reg. ODR). It is expected that the complaining party, fill in the complaint form, specifies the language or languages of the same applicant or representative, as well as the language of the respondent, if known (Annex to Reg. ODR, nn. 5–6).

The rules state that the language of the proceedings can be the same as the language of the transaction, as it assumed that this will be the mutual language of the parties.<sup>29</sup> However, the language used by the seller and buyer when making the transaction might be different, depending on their respective locations.<sup>30</sup> The rules allow parties to agree to an alternative language but if the parties are unable to do so the neutral is required to choose the language of the process. This approach might clash with consumer protection laws, particularly in the EU, which allow consumers to employ their own languages when filing a complaint.<sup>31</sup>

Sellers often offer consumers in other countries the possibility of using their own language to complete a transaction. Consumers may, however, also make online purchases in a foreign language. Whilst it may not be a major challenge to make an online transaction in a foreign language, it could represent an insurmountable obstacle when seeking redress. Hence, in cross-border disputes parties may need to rely on text translation software provided by multilingual ODR Platforms. As automatic translation software may not produce optimum results<sup>32</sup>, limiting the Rules’ scope of application could facilitate the use of standardized forms which would enable the parties to read and write in their own languages.<sup>33</sup>

Everything would be some limits without the resource of electronic translation function alluded to the “whereas” n. 19 of the Reg. ODR implemented in the ODR Platform: this feature allows to “the parties and the ADR entity to obtain, where appropriate, the information translation that is exchanged via the ODR platform and that is necessary for the resolution of dispute”; the digital translation function “should be able to handle all the necessary translations”, according to a *principle of effectiveness*, and “should be supported by human intervention”, in order to avoid the device being approximate and not suitable for its purpose (due to the inevitable rigidity of its architecture, typical of any digital system); the European Commission should implement the platform, as well as the linguistic interface, essential

29. See A/CN.9/WG.III/Wp. 112/Add.1, paras 20–25.

30. *Ibid.*

31. See draft rules art 5 of the proposal for an ODR Regulation.

32. It should be noted that instant translation is already offered by several sites free of cost: see, for example, *translate.google.com*.

33. P. CORTÉS and E. DE LA ROSA, (2013), p. 417.

for the ODR Platform success, through “information to the users upon the possibility of requesting assistance at the ADR contact points”. The Regulation requires the ODR Platform to be user-friendly and accessible to all, including vulnerable consumers<sup>34</sup>. The platform will provide an electronic translation function supported by human intervention that will assist parties and ADR entities to exchange information<sup>35</sup>.

Once the complaint is sent to an ADR entity, the platform will simply inform the consumer about the language in which the available ADR procedure will be conducted.

Language is a key challenge for many cross-border cases, particularly those of small-claims. Consumers expect to participate in a dispute resolution process conducted in their own language or in the language of the transaction<sup>36</sup>. It should be noted that, while consumers may manage using a foreign language in an online transaction, their language level of the majority may not be sufficiently nuanced to take part in ADR process. Although, the Regulation designates ODR advisors as the intermediaries to assist parties communications with the ADR entities<sup>37</sup>, their manpower will obviously be quite limited.<sup>38</sup>

The strategic importance of the electronic translation function as network resources of the ODR Platform, does not need to be particularly emphasized, we should hope, in this sense, in an adequate organizational and financial commitment to support, on strong levels, the functions and the digital resources of language interface and its ramifications in terms of linguistic service.

This is a profile on which hangs in the balance the success or the failure of ODR as truly user-friendly method of dispute resolution: a malfunction of the language interface affect the propensity of consumer to choose the ODR procedure in case of dispute, diverting the settlement of the conflict on the ground of traditional judicial proceedings.

34. Art. 5(1) Odr Regulation. In this theme, Report of the Committee on the Internal Market and Consumer Protection of the European Parliament on a ‘Strategy for strengthening the rights of vulnerable consumers’ (2011/2272(INI)) According to the CJEU in *Allassini*, if online redress processes were imposed inappropriately on consumers, it would impede their right of access to justice: see *Rosalba Allassini and Others v Telecom Italia C-317/08-C-320/08* (18 March 2010).

35. Art 5 and 6 ODR Regulation.

36. Cfr. Flash eurobarometer report cross-border and consumer protection (March 2011).

37. The vehicular language is normally English for the European Consumer Centres (ECC). The ECC Protocol on Case Handling IT Tool states that the problem description should be written in English by the Consumer ECC unless another language is agreed between the ECCs sharing the claim. See Art. 6 ODR Regulation. In this theme see P. CORTÉS (2013), p. 11, foot 42.

38. P. CORTÉS (2013), p. 10 f.

## 5. ODR vs. face-to-face proceedings: a limit or a system resource?

The ODR, in its being as a tool of the electronics resolution disputes, sacrificing the dimension of communicative face to face relationship between the key stakeholders of the procedure (the claimant, the defendant, and the ADR body).

We live in turbulent times, especially where technology is concerned. Face-to-face conversations are increasingly giving way to communication over the Internet and mobile devices. As a result, the way we communicate with each other, whether personally or professionally, is constantly evolving.<sup>39</sup>

The internet may be perceived as an established tool of communication, research, and entertainment, the most important characteristic of the internet which offers most potential, namely, interactive characteristics, is often not fully appreciated. Interactivity implies establishment of dialogue between the distant users through e-mail, chat conference rooms, and web forums such as audio and video conferencing. The internet makes it possible for participants to communicate interactively without being present in the same place. Indeed, the internet has changed the image of the computer as something that calculates and computes to an image of a machine that enables interaction between individuals. Although the level of interactivity online may not be able to match the level of interactivity in face-to-face encounters, the online environment can enable internet users to express themselves efficiently and appropriately. Interactive technologies may bring people together and move them from behind their computer screens to a virtual setting. It is not the same quality as being in the same room, but it will bring many of the same benefits.<sup>40</sup>

Technological applications can enhance the expertise of the third party neutral and thus do more than simply deliver the expertise of the third party neutral across the network. In this regard, it is important to recall that technological applications are metaphorically called the “fourth party” by Katsh and Rifkin, two leading authors on ODR<sup>41</sup>*passim.*, because they can add authority, quality, trust, and enhance the chances of the success of the process.<sup>42</sup>

In a face-to-face setting, communication is enhanced by nonverbal nuances not visible in many types of ODR techniques. For example, individual meetings are able to leverage the full array of communication techniques: facial gestures; voice inflection and intonation (which might reveal sarcasm);

39. J. DEMARS, S. NAUS EXON, K.K. KOVACH and C. RULE (2010), p. 6.

40. About this question see H.A. HALOUSCH and B.H. MALKAWI (2008), p. 332.

41. See E.E. KATSH, M.E. KATSH and J. RIFKIN (2001),

42. See H.A. HALOUSCH and B.H. MALKAWI (2008) p. 333.

and body movements, including some that demonstrate signs of embarrassment, such as reddening of a face, a palpitating leg, or the squeaky chair as someone squirms with nervousness. These nonverbal cues are absent in ODR settings. Email meant to be sarcastic and it may not come across with the intended tone when we read without verbal inflection. For example, others have noted that a number of additional modifications may be necessary when individuals transition negotiate in person with all kind of communication by email.<sup>43</sup>

The question is whether the loss of face-to-face immediacy, replaced by electronic methods of fitting through the ODR Platform resources, setting a limit that empties the very meaning of the ADR concept, in which the neutral third party tries to mediate and to reach an agreement between the two parties; the informal justice symbol is the node that should be reconnected, the neutral third party has the task to re-establish this rope that is broken.

It is often assumed that just the absence of face-to-face contact is a better chance to use because you might be more free to communicate, “have your say” on every issue, with all the “pros and cons” that this setting can lift.

Moreover, participants in e-mediation do not need to respond immediately as they are compelled to do in face-to-face discussions. Participants can more thoroughly consider proposals and develop options. One’s immediate response, as participant or as mediator, in face-to-face mediation is not always one’s best response. In fact, most mediators purposefully break into caucus because they know the benefits of allowing each side the ability to think without the penetrating gaze of the other side, and the impact of this on reducing the imbalance of emotional power between the parties. Virtual mediation may offer an opportunity to avoid some possible biases occasioned by face-to-face mediation because online mediation has its implication on equality between disputants.<sup>44</sup>

The fact remains that today, unfortunately, the entry on electronic protocols of alternative dispute resolution displays unavoidable weaknesses, even if compensated by the positive features of ODR procedures: *quick, low cost and simple way* are guaranteed by the absence of face-to-face fittings between the parties and the ADR entity, just as these fittings that lead to a waste of time.

It must be emphasized that the structure and the adequacy of electronic complaint form are crucial and depend essentially on particular data, that the ODR Regulation (Article 8.5) identifies as: « accurate, relevant and not excessive ».

43. J. DEMARS, S. NAUS EXON, K.K. KOVACH and C. RULE (2010), p. 6 f.

44. H.A. HALOUSCH and B.H. MALKAWI (2008), p. 339.

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# Mediation in Taiwan

## The ideology of harmony v. the ideology of justice

SALVATORE CASABONA

CONTENTS: 1. Introduction, 145 – 2. The Chinese legal legacy in Taiwan, 147 – 3. The *administrative mediation* under the Japanese rule and the growing of the *adversial mood* of Taiwanese, 149 – 4. Taiwanese mediation today at the crossroad between spontaneous and coercive harmony, 152 – 5. Concluding remarks: from the myth to the reality, 156.

### 1. Introduction

The attitude of the foreign observer to oversimplify what is the object of his observation, if understandable from a cognitive point of view (allowing to collect the fundamentals which are assumed to be connotative and denotative of the alien reality), it is not admissible from a scientific point of view.

From one side, the repeated western assumption that Asians, because of their Confucian traditions, mostly have been preferring mediation regimes over formal adversial proceedings has indeed rarely been examined and verified; from the other side, the ideology of social harmony through mediation processes that has been always presented as undisputable positive in itself, very seldom it was submitted to a serious scrutiny, deepening those aspects of mediation that could make itself as a mean of hegemonic control of the stronger social part over the weaker one<sup>1</sup>.

Moreover, it goes to say that if it is undisputable that the Confucian tradition has to be assessed valuable as an important factor in understanding many East Asian societies<sup>2</sup>, such as Taiwan; nevertheless it still remains uncertainty on which part of Confucian legacy plays a concrete role on the actual configuration of the legal systems, with particular attention to that part traditionally considered more sensitive to the Confucian philosophy: the conflicts' resolution<sup>3</sup>.

1. L. NADER (2002); L. NADER (1990).

2. C. HAHM (2003), p. 270.

3. For insightful considerations at this respect, see A. CHEN (2003), pp. 257–287.

Much has already been written on the subject of mediation, and on the Chinese mediation in particular<sup>4</sup>, nevertheless it seems to me that something still flies out of radars of the scientific debate, in particular I wonder (a) whether the Asians' favour toward mediation has to be considered exclusively an attitude due to their Confucian tradition or whether it can be also explained in a more articulated social and institutional background of access to justice<sup>5</sup>; yet, I ask (b) whether the supposed Asians' mediation-attitude has mutated in consideration of the historical evolution of the societies and institutions or, on the contrary, whether it persists unchanged irrespective to the time passing (as it seems to appear from maybe too hasty Western reconstructions).

The above questions do not want express any disruptive approach toward mediation in itself, neither to unreasonably negate the historical and social importance of the harmony' ideology in some Asian countries (such as China and Taiwan); the only limited and humble purpose of this short essay is to try to better contextualize mediation from an historical and institutional point of view, seeking to take distance from too easy representations and conclusions about the Asian's mood and attitude toward compromise.

The geographical and political context in which the research has been conducted is Taiwan that appears particularly interesting from a comparative point of view at least for three main reasons: beside its social and cultural collocation into the Chinese tradition<sup>6</sup> that proudly and paradigmatically expresses the ideology of harmony, the development of the Taiwanese system of access to justice shows a interesting encroachment and overlapping between adjudication and mediation, formality and informality, *ideology of formal justice* and *ideology of social harmony*.

Furthermore, the formation of Taiwanese legal system has been conditioned by important processes of legal transplants<sup>7</sup> due the imposition of foreign models (mostly German) under the Japanese colonial rule; or due

4. Among others, see A.J. COHEN (1967), pp. 1 ff.; S. LUBMAN (1967), pp. 1284–1359; M. PALMER (1987), pp. 219–277; M. PALMER (1989), pp. 145–171; About “didactic conciliation”, see also Hsiao Kung-Ch'uan (1979).

5. M. CAPPELLETTI, J. GORDLEY, E. JOHNSON (1975); M. M. CAPPELLETTI (1982), pp. 234–245; M. CAPPELLETTI (1979), pp. 54–59.

6. Chen Tsung-fu (2003), p. 396: « Taiwan was ruled by Manchu for more than two hundred years and traditional Chinese legal culture had become prevalent throughout the island by the end of its rule. During Japanese colonial rule for fifty years, traditional customs and imperial Chinese law maintained their influence on the people to a considerable degree. During the first four decades of KMT control of island, [...], traditional Chinese legal culture was still dominant among public officials and judges ». See also Wang Tai-sheng (2000a), pp. 128–135; Wang Tay-Sheng (2000b), chapter four; T. ADRADE (2008).

7. A. WATSON (1976), pp. 79–84; A. WATSON (1978), pp. 313 ff.; A. WATSON (1995), pp. 469 ff.; A. WATSON (1983), pp. 1121 ff.; D. NELKEN (2001), pp. 349 ff.; E. ORUCU (2002), pp. 205 ff.; E. GALINOU (2003–2004), pp. 391 ff.

the spontaneous legal borrowings of alien solutions, as it happened during the Martial Law period<sup>8</sup> and, soon after, during the season of the reforms for democratization<sup>9</sup>.

This circulation and spontaneous comparison of ideas, ideologies, and institutions has determined an extremely intriguing *equilibrium*, by definition unstable, between the Chinese legal tradition (with its Confucian legacies)<sup>10</sup> and the Western one<sup>11</sup>.

## 2. The Chinese legal legacy in Taiwan

Some fundamental traits of the Confucian philosophy would express the rooted reasons of the mediation success.

Some of these features would pertain to the Confucian thought, such as 1) preference of the rituals as social regulatory instrument over the formal command: « The Master said, guide them with government orders, regulate them with penalties, and the people will seek to evade them and be without shame. Guide them with virtue, regulate them with ritual, and they will have a sense of shame and become upright »<sup>12</sup>; 2) respect of societal hierarchy: « Let the ruler be a ruler; the subject, a subject; the father, a father; the son, a son »<sup>13</sup>; 3) social disfavour towards the judicial and adjudicative resolution of conflicts regarded as a disturbance of the harmony of society: « In hearing lawsuits, I'm not different from other people. What we need is for there to be no lawsuits! »<sup>14</sup>.

Some other lingering characteristics would belong more to the societal and institutional translation of the Confucianism: from the prevalence of local informal mediation systems historically driven by the leaders of the communities of advanced age and of moral uprightness (*niangao youde*) or

8. On the martial law period in Taiwan, see A. CROISSANT, D. KUEHN, P. LORENZ, P.W. CHAMBERS (2013), chapter IV; J. MANTHORPE (2005), chapter XVII.

9. M.A. RUBINSTEIN (1994), 1994; A.M. WACHMAN (1994).

10. On the *confucianization* of Chinese law, see Ren Xin (1997), pp. 19–36; Chen Jianfu (2008), pp. 8–22; J.W. HEAD (2008), pp. 3 ff.

11. J.M. MERRYMAN (1969); P.G. MONATERI (2000), pp. 479 ff.

12. Confucius, Book II, n. 3. See for more insights Gardner D.K., Zhu Xi's (2003); T.W. SELOVER (2005); F.M. FLANAGAN (2011).

13. Confucius, Book XII, n. II.

14. Confucius, Book XII, n. 13. Interestingly, P.C. HUANG (2010), p. 193 observed: « [...] Qing ideology regarding *civil* disputes among the people has as its foremost concern the resolution of disputes, not the protection of rights. [...] the ideal moral society is characterized by harmony and absence of conflict; no disputes, much less lawsuits, would exist. The moral Confucian Gentleman was someone who would not stoop to disputes; he would rise above them by conciliation (*rang*) and forbearance (*ren*). The truly cultivated gentleman would not allow himself to be drawn into a dispute or lawsuit; such involvement was itself a sign of moral failure ».

particularly trustworthy (*you xinyong*); to the centrality of the compromise as the main principle–method governing mediations<sup>15</sup> with the specific objective to resolve problems, keep peace (*xishi ningren*) and avoid long–term enmity<sup>16</sup>, in other words, to turn big problems into small ones, and small problems into non–problems (*dashi hua xiao, xiaoshi hua liao*)<sup>17</sup>.

Conflicts resolution in Taiwan during the Ch'ing period (1644–1912)<sup>18</sup> was substantially in line with the mainland China's legal tradition<sup>19</sup>: the unofficial resolution for civil disputes was driven by a well routed system of clan mediation and of local mediation (*shiang pao*), respectively presided over by the elders and virtuous and by local notables, and settled in accordance with the local customs. Generally, the mediation was considered socially preferable to official adjudication<sup>20</sup> and bringing disputes to court was deemed to be a *loss of face*, as it proved the inability of the parties to maintain a harmonious relationship<sup>21</sup>.

Even in cases where private conciliation had failed and thus official settlement had been required, the Taiwanese magistrates often operated a form of *didactic mediation* and — if the case — redirecting the parties to solicit mediation from local notables<sup>22</sup>.

However, as pointed out<sup>23</sup>, the didactic mediation in the imperial Chinese justice system was a process of humiliation and disempowerment,

(t)he magistrate–judge acted as fathers to the parties [. . .]. Thus, he handled disputed as if parents handled quarrel between kids. [. . .]. The judge was not bound by the law. Since the judge's authority was basically unlimited, he could use any approach to elicit facts. During the process, if a party appeared to be disobedient, or the judge believed a party was lying, the judge had the authority to discipline

15. Based on considerations of human relation (*qing*) first, and following of the law (*fa*), and of moral rights and wrong (*li*).

16. At this regard, see diffusely P.C. HUANG (2010), pp. 21–61; P.C. HUANG (1996), pp. 58–75.

17. P.C. HUANG (1996), pp. 58–59.

18. See Ho Ping–ti (1967), p. 189: « The general significance of the Ch'ing period is that chronologically it falls between what is traditional and what is modern. However, much the new China changes in the future, The Ch'ing period, , the last phase China's *ancient regime*, has left important legacies ».

19. See in particular P.C. HUANG (1996), chapters III and V. At this regard, extremely interesting is the analysis of the Tan–Hsin Archives (a collection of case files that preserve the records of over one thousand proceedings during the years between 1789 and 1895) conducted by Allee, M.A. (1987).

20. Lin Yun–Hsien Diana (2011), p. 200: « *Hiang pao* were themselves responsible for the behaviour of the local populace and provided local resolution to disputes which erupted within the district. This network of clan leaders and *shiang pao* often overlapped, working hand in hand to ensure social order and harmony ».

21. J.A. COHEN (1966), pp. 1206–8.

22. On the historical evolution of mediation in Taiwan, see Lin Yun–Hsien Diana Lin (2011); Chang–fa Lo (2006), pp. 172–173; Chou I–Hsun, *Mandatory Divorce Mediation in Taiwan: legal regime, judicial attitudes and public opinions*, PhD Dissertation, University of Chicago, 2008.

23. Wang Tay–Sheng (2000), p. 90–91.

the party which was seen equivalent to the discipline by parents of their child.

Thus, until the Japanese colonization, mediation in Taiwan, not dissimilarly to what happened in mainland China<sup>24</sup>, did represent more than an *alternative* mechanism of dispute resolution, the *sole mode* of access to justice because the lack of district courts and — in the case of Taiwan — because of the widespread corruption and incompetence of the officials who were supposed to maintain law<sup>25</sup>.

As Hsu Tsung-kan, Taiwan Intendant (1848–1854), said, « In the empire, the Fukien government is the worst, within Fukien Province, the Taiwan government is the worst ».

All this led to a profound popular disrespect for the *formal* system of law with a consequent confinement of the justice' requests into the borders of the informal mediation, managed at village or clan level on the basis of the locals' customs.

### 3. The *administrative mediation* under the Japanese rule and the growing of the *adversial mood* of Taiwanese

Recent studies concerning Taiwan legal system under the Japanese colonial rule (1895–1945)<sup>26</sup> have underlined the profoundly interesting relation between legal modernization and access to justice through mediation.

Notably, the special legal institution of *administrative mediation*, introduced by Japanese colonial government with the Civil Disputes Mediation Law (1904), was examined either in relation to its impact on the locals in terms of access to justice either in relation to the new system of judiciary apparatus gradually established by the colonizers.

The *administrative mediation* empowered the local administrative officials in Taiwan to personally mediate civil disputes<sup>27</sup> or to direct disputants to reach a voluntarily settlement agreement.

The summons to appear in the mediation process was an administrative order (compulsory for the recipient) so that the party summoned in a filed mediation case could not easily refuse to participate in the mediation.

24. K.B. PISSLER (2012), p. 961: « Jurisdiction was exercised on the basic level by the district official, who had his office — the *Yamen* — in the district's main capital, which meant that the majority of the Chinese population had no contact with state authorities. Most disputes were settled by mediation simply because the district official was too far away and it was in the interest of the village elders and leaders to settle disputes locally in order to avoid attracting the negative attention of state authorities with unnecessary complaints ». See also Ch'u T'ung-tsu (1988).

25. Hsu Wen-hsiung (1975).

26. Wang Tay-Sheng (2000), p. 24.

27. Any disputes involving status law or property law, irrespective of their monetary value.

Yosaburo Takekoshi, in official visit as member of the Japanese Imperial Diet in that time, commented in such a way the introduction of the administrative mediation in Formosa:

The Formosans, like the Chinese, being very fond of litigation, to lessen the work of the regular courts it has recently been ordered that all petty cases be settled by arbitration by the local authorities. Though called an Arbitration Court, it is really a kind of public law court. When it was first introduced much anxiety was felt as to how it would be regarded by the natives, but the results have been unexpectedly satisfactory and the people seem to welcome it<sup>28</sup>.

Having said that, beside the reduction of the judicial expenditure of the colonial government, the new colonial institution, on one hand, allowed to restore the Imperial China mediation to which locals were already accustomed, on the other hand, progressively channelled locals' customs in the conflicts resolution arena.

Once again the voyage diary of Yosaburo Takekoshi does result precious, reporting the confidence of a Japanese judge in Taiwan:

Since I first came here, I have given decision in a large number of cases; but the more I see of Formosan usages and customs, the more I realize how extremely inappropriate many of my decisions have been, and this grieves me sadly<sup>29</sup>.

So that, the administrative mediation, not dissimilarly to what happened in other colonial experiences, appeared to be employed as an instrument of social control<sup>30</sup>: lowering the social tension with the new colonial power, bridging with the locals' legal tradition, filtering local customs at the light of the specific interests of Japanese rulers<sup>31</sup>.

Nevertheless, the role of mediator was pretty far from the common imagine of a person who merely tries to persuade the parties involved to settle the dispute voluntarily:

28. Takekoshi Yosaburo (1996), p. 193.

29. Takekoshi Yosaburo (1996), p. 192.

30. M. CHANOCK (1985); E. CAPULONG (2012). Lin Yun-Hsien Diana (2011), p. 212: « Since traditional Chinese legal culture was so deeply rooted in the minds of the Han Chinese populace, the preservation of certain customs helped to uphold the legitimacy of the Japanese rule and reduced resistance to it from the ruled class ». At this regard, from a political history perspective, it is extremely interesting the working hypothesis, formulated by Wakabayashi Masahiro, who assessed political negotiation and interests' mediation between the Japanese rulers and the Taiwanese upper class as *an indispensable expedient in order to maintain the power*, see Wakabayashi Masahiro (2006), pp. 19–36.

31. Wang Tay-sheng (2002), p. 554: « Civil and commercial matters involving only Taiwanese were to be regulated by the *old Taiwanese custom* influenced by Chinese legal traditions. However, these old customs were likely modified by Japanese jurists with the training of Western jurisprudence when they were accepted as *customary law*. Moreover, some special civil statutes further superseded customary laws ».

The mediator, [...], who was a general administrative official without any professional training, frequently coerced the parties to accede to his official authority and agree with his decision of the disputes [...]<sup>32</sup>.

Thus, it is no wonder that the majority of mediation cases reached the compromise: the administrative mediator exercised the power of adjudication without the application of positive civil law.

However, statistics from 1920s onward about the access to justice in Taiwan reveal not only how the importance of administrative mediation in colonial Taiwan must not be exaggerated<sup>33</sup>; but also that the attitude of the Taiwanese toward litigation over administrative mediation<sup>34</sup> became gradually significant and even prevalent.

Reasons of such development towards the increasing of litigation could be found in several factors from the process of gradual urbanization that lead to the lost of *social foundation values* of the informal machinery of mediation, to a better founded and structured judicial systems with the establishment of district courts and well trained judges, that surely contributed to the increasing of familiarity with the Western style procedure and legal categories.

The more Taiwanese who successfully employed the court to protect their interests, the more Taiwanese brought suits to modern courts. A person who observes that in many instances other people have, without much difficulty, acquired benefits by filling proceeding in court will also be willing to resort to the courts when he or she is involved in a dispute<sup>35</sup>.

32. Wang Tay-Sheng (2000), p. 90. See also Wang Tay-Sheng (2002), p. 557.

33. See in particular data (period 1897–1942) on the hortatory suits, the objected hortatory suits, the civil lawsuits in court and administrative mediation cases reported by Wang Tay-Sheng (2000), pp. 92–93. Nevertheless, see for the opposite conclusion M. MOSER (1982), p. 29. Lin Yun-Hsien Diana (2011), p. 201: « [...] there were also other reasons which served to discourage people from accessing the courts. From their own local perspective, Taiwanese worried about Japanese officials' unfamiliarity with native languages and customs; while from the viewpoint of the Japanese colonial authorities, they were reluctant to increase their monetary investment into the judicial system of the colony and therefore sought to promote mediation as a means of reducing the caseload of the courts ».

34. Wang Tay-Sheng (2000), p. 91: « In the first half of Japanese rule, the administrative mediation was prevalent: because the Taiwanese were not familiar with the Western style procedure in the courts and because the mediation was much more cheaper than the formal dispute resolution. Nevertheless, in the last half of Japanese rule the Courts' summons became dominant ».

35. Wang Tay-Sheng (2000), p. 98.

#### 4. Taiwanese mediation today at the crossroad between spontaneous and coercive harmony

Over the past few decades, the Taiwanese judiciary has suffered — not dissimilarly from many countries in the world — an increase of litigation<sup>36</sup>.

Furthermore, the boost of complexity of the juridical relations, due to the profound process of industrialization of the country (specially since 1960s), co-determined a deluge of judicial controversies<sup>37</sup>.

The system tried to decrease the burden on courts' overflowing turning to alternative dispute resolution methods and providing for an articulated system of mediation mechanisms.

Two kind of mediation do exist in Taiwan.

a. The first one is a in-court mediation, a form of judicial mandatory mediation, that does mean that for the cases ordained by the Civil Procedure Code is obligatory to undergo mediation before proceeding to litigation.

Originally provided only for small value claims, the range of civil disputes subjected to mandatory mediation were gradually broadened, including a variety of cases from neighbourhood and real property controversies to traffic accident and medical treatment ones<sup>38</sup>.

36. Wang Tay-Sheng (2002), p. 598: « During the KMT period, the number of lawsuits in courts continued to grow, and the effect of the Western-style positive law on people's behaviour was stronger than before. In the face of the urbanization of Taiwan, when a dispute occurs, the parties often have difficulty in finding a well-respected mediator [...] ».

37. At this respect, with particular reference to the Korean system, see Kwon Youngjoon (2010), p. 1: « In the past, based on the Confucian heritage, a great number of disputes were settled by *de facto*, informal mediators like elder members of the community or family without making their way to the courts. Yet, with western cultures and thoughts gradually gaining ground in Korean society and a modern legal system standing firm as a central mechanism of dispute resolution, more and more disputes are resolved by law, instead of informal reconciliation ». See also Blomgren Bingham L. *et al.* (2007), pp. 381-2.

38. Taiwan Civil Procedure Code, art. 403: « Except in cases provided in the subparagraphs of the first paragraph of Article 406, the following matters shall be subject to mediation by the court before the relevant action is initiated: 1. Disputes arising from a relationship of adjacency between real property owners or superficiaries, or other persons using the real property; 2. Disputes arising from the determination of boundaries or demarcation of real property; 3. Disputes among co-owners of real property arising from the management, disposition, or partition of a real property held in undivided condition; 4. Disputes arising from the management of a building or of a common part thereof among the owners of the dividedly-shared title or persons using the building; 5. Disputes arising from an increment or reduction/exemption of the rental of real property; 6. Disputes arising from the determination of the term, scope and rental of a superficies; 7. Disputes arising from a traffic accident or medical treatment; 8. Disputes arising from an employment contract between an employer and an employee; 9. Disputes arising from a partnership between the partners, or between the undisclosed partners and the nominal business operator; 10. Disputes arising from proprietary rights between spouses, lineal relatives by blood, collateral relatives by blood within the fourth degree of relationship, collateral relatives by marriage within the third degree of relationship, or head of the house or members of the house; 11. Other disputes arising from proprietary rights where the price or value of the object in dispute is less than NTD 100, 000. The Judicial Yuan may, where necessary,



The pre-trial court mediation is not usually conducted directly by the judge but by a committee of three mediators appointed by him, nevertheless he is allowed to conduct personally the mediation where he considers it appropriate to do so<sup>39</sup>, proposing — if the case — a resolution on its own initiative<sup>40</sup>. Furthermore, the judge has the authority to summon the parties, who can be fined if they fail to appear at mediation session without just cause<sup>41</sup>.

The place of the session is usually the courtroom, although the judge can permit to conduct the mediation proceeding at another appropriate place suggested by the mediator<sup>42</sup>. Mediation « shall be conducted peacefully and sincerely » and « (a)n appropriate proposal should be recommended with a view to a fair and amicable resolution acceptable to the parties »<sup>43</sup>.

A successful mediation has the same effect of a settlement in litigation<sup>44</sup>, while in case of an unsuccessful mediation, after both parties have appeared at the mediation session<sup>45</sup>, the judicial litigation will take place.

Having said that, statistics have proven the modest impact of the mandatory mediation in respect to the adjudicative proceedings: although the law on mandatory mediation has determined an increasing of the number of sustained mediations from almost 6274 (successfully rate around 15% of total) in 2001 to 30.000 in 2010 (successfully rate almost 50% of total)<sup>46</sup>; however, the number of lawsuits handled by Courts are far higher, amounting to 2.246.271 million cases in 2010<sup>47</sup>.

In 2013, for example, the number of successful mediations (amounting to 101.579) does represent barely 4, 2 % of the total amount of procedures for

order the amount provided in the eleventh subparagraph of the preceding paragraph to be reduced to NTD 50, 000 or increased to NTD 150, 000 ».

39. Taiwan Civil Procedure Code, art. 406-1.

40. Taiwan Civil Procedure Code, art. 417. See also art. 415-1.

41. Taiwan Civil Procedure Code, art. 409: « In cases where a party has failed to appear at the mediation session without just cause, the court may by a ruling impose a fine not exceeding NTD 30, 000 on such party. The same principle shall apply even if the agent of a party has appeared but the party disobeys the order provided in the preceding article without giving a justifiable reason. An appeal may be taken from the ruling provided in the preceding paragraph; the execution of the ruling shall be stayed pending such appeal ».

42. Taiwan Civil Procedure Code, art. 410.

43. Taiwan Civil Procedure Code, art. 414.

44. Taiwan Civil Procedure Code, art. 416.

45. Taiwan Civil Procedure Code, art. 419. See also art. 420.

46. See State of Civil Mediation Cases Terminated in the First Instance by the District Courts — by Year (2001–2010), with reference to the *ratio* of the number of successful mediation cases to the number of successful and unsuccessful mediation cases, available at [www.judicial.gov.tw/juds/year99/09/027.pdf](http://www.judicial.gov.tw/juds/year99/09/027.pdf).

47. See Procedures for Civil Cases Terminated by the District courts, available at [www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07](http://www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07).

the civil cases terminated by the district courts (amounting to 2.405.047)<sup>48</sup>.

Similarly, the recent statistic data (January 2014) regarding the state of filings and dispositions of debt discharge civil cases by the district courts<sup>49</sup>, reveals that on the total amount of cases lodged (4.651), only 41 are qualified as mediation sustained, less than 1% of the total (0, 88%)<sup>50</sup>.

Maybe the historical memory of traditional didactic mediation, as well as of the Japanese administrative mediation, still haunts the Taiwanese public, fearing of being coerced to agree during the mediation process; or maybe and more simply, the court are not regarded as the most appropriate place for mediation. A sociological analysis would reveal more information and insights at this regard, nevertheless it does remain the modest impact of mandatory mediation proven by official statistics.

b. The second kind of mediation is managed *outside* the court and it is an entirely voluntary process. Originally established during the Martial Law<sup>51</sup>, several times emended until 2009<sup>52</sup>, the Township and County–Administered City Mediation has in charge civil and criminal case as well<sup>53</sup>. Mediators are appointed by the mayor of township and county–administered city « from the men of eminent fairness, within the administrative district, who have legal knowledge or other expertise and good reputation »<sup>54</sup>.

Mediation has to be initiated with the jointly application of the parties with a written or verbal statement to the mediation committee<sup>55</sup>. There is not any authority to summon the parties who can fail to appear at the mediation session also without just causes: in this case the mediation shall be deemed unsuccessful<sup>56</sup>.

48. See Procedures for Civil Cases Terminated by the District courts, available at [www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07](http://www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07).

49. See State of Filings and Dispositions of Debt Discharge Civil Cases by the District Courts, available at [www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07](http://www.judicial.gov.tw/juds/goa/goa01-1cn.htm?year=103&month=07).

50. I-Hsun Chou (2008), p. 50: « These figures suggest that, over time, Taiwanese are less willing to settle either during court–connected mediation or during trial. If the Taiwanese disputants are uncooperative with the mediators and resist reaching settlement during the mediation, the mandatory mediation regime would not be useful in cutting down the number of cases proceeding to trial. Observing the low settlement rate during mediation, more and more Taiwanese scholars began to question the legitimacy of the mandatory mediation regime. The first issue is whether the mandatory mediation regime is an appropriate answer to the court docket problem. The second issue is whether the Taiwanese public always prefers mediation over trial. A third issue is whether even if the Taiwanese disputants do prefer mediation over trial, the court should replicate the mediation process in courts ».

51. The first Statute for County Mediation was promulgated in 1955.

52. The Township and County–Administered City Mediation Act, 30 December 2009.

53. The Township and County–Administered City Mediation Act, art. 1.

54. The Township and County–Administered City Mediation Act, art. 3. See also art. 4 with regard to the situations for which it is not possible to be qualified as the member of the committee.

55. The Township and County–Administered City Mediation Act, artt. 10–11.

56. The Township and County–Administered City Mediation Act, art. 20.

Usually the mediation sessions take place in the city hall of townships or county-administered cities and are not public<sup>57</sup>:

The members (of mediation committee) shall conduct the mediation peacefully and sincerely, provide appropriate advices to the parties, and propose a fair and reasonable solution based on the opinions from the persons, sitting in on the meeting of the mediation, helping with the party, and working in coordination with the members, for seeking the amicable result acceptable to the parties<sup>58</sup>.

When the mediation achieves success, the mediation committee shall conduct the mediation agreement that has no legal enforceability in itself: within ten days as the mediation has been accomplished, the mediation agreement shall be submitted to the court within its jurisdiction for further review<sup>59</sup> and for the formal approval in force of which the mediation agreement will have the same effect as a binding judgment under the civil litigation<sup>60</sup>.

Looking — through public statistics — at the efficacy and efficiency of the mediation scheme provided by The Township and County-Administered City Mediation Act, some data deserve attention and consideration.

Although also in this case the total amount of mediation cases approved does still result extremely lower than the cases yearly handled by the Courts, nevertheless it appears relevant underlining the extremely high rate of success of this kind of mediation: in 2010, the percentage of cases approved by the Courts (102.848) among cases terminated (106.899) amounted to 96, 21%<sup>61</sup>; yet in 2013, according to the data provided by the Ministry of Interior (sources: Counties and Cities)<sup>62</sup>, on the total of 138.785 mediation proceedings, 108.060 were settled with a percentage of 77, 86%. Interestingly, the analysis of the comparison between civil and criminal mediation statistics reveals that not only the total amount of mediations — both settled and not — regarding civil matters (50.371) did result inferior to the that one regarding criminal matters (88.414); but that, more significantly, the percentage of success of these last one (81, 89 %) surpassed the percentage of success of the civil mediations (70, 78%).

Many could be the explanations of this relative success: from the total absence of expenses for the parties who could induce them to give it a

57. The Township and County-Administered City Mediation Act, art. 19.

58. The Township and County-Administered City Mediation Act, art. 22.

59. The Township and County-Administered City Mediation Act, art. 26.

60. The Township and County-Administered City Mediation Act, art. 27.

61. See State of Examination and verification of Township / Town Mediation Cases Handled by the District Courts — by Year, 2001–2010, available at [www.judicial.gov.tw/juds/year99/09/048.pdf](http://www.judicial.gov.tw/juds/year99/09/048.pdf).

62. Statistical Yearbook of Interior, available at [sowf.moi.gov.tw/stat/year/elist.htm](http://sowf.moi.gov.tw/stat/year/elist.htm).

try first before requesting a trial<sup>63</sup>, to a closer proximity to the traditional Taiwanese custom, sometimes even an obsolete custom<sup>64</sup>.

## 5. Concluding remarks: from the myth to the reality

At this stage, an attempt shall be made to point out certain basic factors which appears to me of primary significance in assessing mediation in Taiwan and inducing some reason of reflections into the pro-mediation mainstream.

1. The relevance of mediation regimes — and overall of the underlying ideology of harmony — has to be pondered over at the light of the modernization of Taiwan.

Several factors lead me to this conclusion.

First of all, the process of urbanization, begun under the Japanese rule and progressively evolved since 1960 onward, has profoundly changed the societal community ties, stretching and blurring them in the sense of a more pronounced individualism: this, if not compromised, modified to some extent the traditional and foundational values of social harmony.

Secondly, Taiwanese history shows that the more the system of courts is efficient, independent and fair, the more people prefer adjudication over mediation, and this not — it is a my opinion — because they became litigious or have *contra*-social harmony mood, but simply because the progressive marketization and modernization of the economy seem to find into the formal justice of the courts' system a more appropriate and developed environment to protect interests and uphold rights than mediation proceedings.

Analogous valuations have been argued with regard to the mainland China, in which the role of the courts has greatly expanded in the last decades and citizens express a « widespread belief that courts are more effective and fair than pre-existing alternatives, such as mediation »<sup>65</sup>.

63. The Township and County-Administered City Mediation Act, art. 3 and 34 (according to which the expenses for the mediation committee shall be compiled by townships and county-administered cities).

64. At this regard, as reported by Chou I-Hsun (2008), pp. 57–58: « [...] in the traditional Taiwanese society, there is a custom that sons get inheritance, and daughters get dowry. This custom is in conflict with the legal intestacy rule which provides that all heirs should have an equal share of heritage. The mediators at the Neighborhood Mediation Center sometimes apply the traditional custom to the inheritance disputes where a married daughter tries to claim her share of inheritance. In some cases it is clear that a married daughter receives an amount of dowry with an implicit understanding that the dowry is her share of the inheritance (based on the amount of dowry, the type of estate, etc.) ».

65. Pierre Landry F. *et al.* (2010), pp. 57–58.

Despite mediation has been long recognized as a successful dispute resolution mechanism representing the value of traditional Confucianism, however

the importance of mediation may inevitably be reduced to give way to judicial efficiency and dispute settlement in strict accordance with the law when the legal infrastructure has significantly improved, with the rule of law being the goal of the national reorientation and professionalism as the direction of modernization of the judicial system<sup>66</sup>.

2. The development of legal systems in the direction either of a more organized and reliable access to justice through the courts, either through a more accessible, understandable and effective apparatus of laws, not only — as argued above — *dampen the enthusiasm* toward mediation, but also it seems to lead toward a process of its formalization and institutionalization.

In Taiwan, the institution of administered mediation entailed a sort of ghettoization of the former mechanisms of informal mediation and, on the other side, the in-court mandatory mediation seems to be a tentative to monopolize the mediation approach.

Analogously, it may be possible to say about mediation in China with the post-revolutionary process of cadre-ization of the mediation personnel that brought changes in the way mediation worked:

When matters of state policy (or policy) were involved, the mediators were in truth more administrative resolution (tiaoche) employing coercive methods than simply mediated compromises (tiaojie)<sup>67</sup>.

The evolution from an informal and traditional societal mediation to a court-based mediation, not only — it seems to me — has involved a less degree of confidentiality (as it was proven by the success of township and county-administered city mediation), but also and even worst has provoked a process of *dehumanization* of mediation, in the sense of its progressive detaching from the foundational societal values that legitimated it in front

66. Yu Guanghua (ed.) (2011), p. 259. See also Randall P. Peerenboom, He Xin (2011), p. 339: «[...] There were many reasons for the decline. Most fundamentally, mediation came to be seen as inconsistent with the rule of law. People's mediators often lacked legal training. Even in the judicial mediation, many cases were decided based on factors other than law, with judges pressuring parties to accept settlements, thus depriving them of their legal rights. In addition, as noted, the increased professionalization of judges and lawyers and the streamlining of the litigation process, made litigation more attractive ».

67. P.C. HUANG (2010), p. 39. Ibidem, at p. 48: « In the triad of qing, li, and fa, its primary emphasis was on state law-policy (fa or guofa), and only secondarily on human relations (qing, or renqing), and moral right and wrong (li or daoli), unlike the traditional system, which made *renqing* primary, and *guofa* and *daoli* secondary »; Ibidem, at p. 218.

of the community and justified its existence and persistence as conflicts resolution mechanism.

3. It is not news that the Maoist propaganda put enormous emphasis on mediatory justice, on uniqueness of mediation in China, on the superiority of harmony-based Chinese justice over adversarial Western justice<sup>68</sup>. It is maybe arguable that the western approach to the mediation regulatory strategy still be deeply conditioned by the Maoist ideology of harmony and pushed on by evocative slogans such as: «mediation first, litigation second»<sup>69</sup>.

The hypothesis becomes more than a suspect after the reading of some opinions on Chinese mediation written by Western observers in '80. Paradigmatic seem to me the words of Kenneth Cloke:

In mediation also, a loving kindness, a care for others' feelings, a sense of refusal to quit or give up on anyone—all these were abundant in China, producing profoundly effective and popularly accepted social intervention. The values of social cooperation, of individual responsibility for social improvement, of denigrating the selfish advancement of one at the expense of all, of unity and harmony, of mutual respect and trust were not just words but real elements in China's dispute resolution system. At a time when values and ethics in the United States seem in eclipse, when hypocrisy and pretense appear endemic, when the first [...] values defeat the sense that each of us is responsible not only for our own lives but for those of others—this sense that China has created something different is intriguing. The direction is right, the sentiment is positive, and the result is one we might do well to examine with an eye to how we might encourage similar processes here<sup>70</sup>.

With the due respect, maybe the Author did not pay enough attention to

68. P.C. HUANG (2010), p. 221: «[...] Chinese figures on mediation are greatly exaggerated. In the Mao Zedong era, mediation was supposed to constitute the main approach of the entire civil legal system, and the courts tried their best to categorize all but the most strictly and narrowly adjudicatory cases as mediations in order to maximise the proportion of supposedly mediated cases». A. HALEGUA (2005), p. 716: «[...] unlike mediation in traditional China, the People Mediation Committee formally established in 1954 were not intended to simply preserve harmony by encouraging mutual yielding and compromise. Rather, Maoists saw mediation as "essentially a political endeavour».

69. S.B. LUBMAN (1999), p. 218–219: «The latter (the mediation committees) were invariably exhibited as embodiments of a uniquely Chinese Communist approach to handling minor disputes. [...] After the Cultural Revolution ended, the Ministry of Justice, re-established in 1979, not only revived mediation but emphasized that it was to be the primary avenue for resolving civil disputes. The formulation of that policy has changed somewhat over the years. Before 1982, the policy was expressed as mediation first, litigation second [...]». With regard to the modern rhetoric of mediation in Western countries Laura Nader (2002, p. 140) noted: «the rhetoric claimed that ADR was associated with peace; judicial processes were associated with war; the law and rules of law were complicated and created uncertainties that stimulated feeling of anxiety; law was confrontational, whereas ADR gently and sensitively healed human conflicts and produced only winners and modern, civilized citizens».

70. K. CLOKE (1987), p. 79.

the Chinese political situation at that time, and so to the context in which this « unity and harmony », « mutual respect and trust » took place.

However, it remains the fact that this kind of *mythological* approach about the superiority and the undisputable benefits of mediation over adjudication still seems to pervade the public discourse and the scholars' reconstructions.

If it is true, it remains to wonder what is so wrong with adjudication in which rights come first and compromise second?<sup>71</sup>

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71. L. NADER (2002), p. 151: « Nineteenth–century legal scholars considered the existence of law courts to be a sign of a people's social complexity and modernity. [...] The popularity of ADR as policy in the 1980s and 1990s signified a paradoxical switch from the more civilized processes of dispute resolution to *softer*, non–adversarial means such as mediation and negotiation ».

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PART II

MEDIATION IN FAMILY AFFAIRS



# Civil Justice in matrimonial matters and the matters of parental responsibility

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## I. General Considerations

In relation to Civil Justice, the European Union has set the objective of creating an area of freedom, security and justice for the citizens of all member states. It has therefore recognised the need that judicial and extra-judicial methods are adopted to deal with some cross-border disputes in civil matters.

Such decision is in line with what stated by the:

- a) Maastricht Treaty of 1992, where judicial cooperation is defined as a “matter of common interest”;
- b) Treaty of Amsterdam, which places judicial cooperation in civil matters at Community level by associating it with the free movement of persons. A discussion was consequently started about the drafting of Community legislation.

The European Union has produced several documents illustrating the topic of alternative methods of dispute resolution — ADR.

### I.1. *Green Paper on alternative methods of dispute resolution (2002)*

In its Green Paper, the Commission recalled that the development of these forms of dispute settlement was not to be regarded as a means of remedying deficiencies in the operation of the courts but as an alternative, more consensus-based form of social peace-keeping and of conflict and dispute resolution which, in many cases, would be more appropriate than the resolution of disputes by a third party as through the courts or by arbitration.

Alternative dispute resolution techniques such as mediation allow the parties to resume dialogue and come to a real solution to their dispute through negotiation instead of getting locked into a logic of conflict and confrontation with a winner and a loser at the end. It is extremely obvious that those different solutions are important, for instance, in family disputes, but they are potentially very valuable in many other types of dispute.

### 1.2. *Proposal for a Directive on mediation (2004)*

On October 2004, the Commission adopted and sent a proposal for a Directive on mediation to the European Parliament and the Council. Such proposal seeks to further the use of Mediation by making certain legal rules available within the legal systems of the Member States.

These rules cover the following areas:

- Confidentiality of the mediation process and of mediators as witnesses;
- Enforcement of agreements for settling disputes as a result of mediation;
- The suspension of the running of prescription periods and limitation of actions while mediation is in progress thus removing one potential disincentive to the use of mediation.

These rules encourage the employment of mediation but do not attempt to interfere with the laws of the Member States. Moreover, they are the foundations of a code of conduct that if adopted would secure the quality of mediation on a consistent basis throughout the Union.

Already in 2004 also, many experts approved and adopted the Code of Conduct of mediators, which set out a series of norms to be applied to the practice of Mediation and which must be adhered to by mediation organisations (principles of independence, impartiality, confidentiality, etc.).

## 2. Introduction

What has been said so far is the background for Regulation 2201/2003 (EC), which was aimed at harmonising Member States' regulations in some civil matters, namely divorce and legal separation. In comparison to Regulation 1347/2000 (EC), the current one develops the idea that quality of co-parenting can be improved by adopting helpful tools to overcome na-

tional and cross-national frontiers<sup>1</sup>.

The current paper is intended to provide for a concise overview of Regulation (EC) 2201/2003 (also called New Brussels II), which is now regulating matrimonial matters. It has repealed Regulation 1347/2000 (Brussels II), which covered the same matters, in order to better regulate paternal responsibility<sup>2</sup> in particular.

In addition to that, the document is to be contextualized within the more general 'Civil Justice Programme for the period 2007–2013'.

The European Parliament and the Council adopted Decision No 1149/2007 (EC) establishing the programme 'Civil Justice' as part of the General Programme 'Fundamental Rights and Justice', in order to foster judicial cooperation among Member States by establishing an area of freedom, security and justice within the European Union.

With this programme, the Commission encourages the use of Mediation and other forms of ADR as they assist in the resolution of disputes and help to avoid the worry, time and cost associated with court-based litigation, and so concretely help citizens to secure their legal rights.

The Programme shall have the following general objectives:

1. Excerpt from the handbook: *Civil Justice in matrimonial matters and the matters of parental responsibility*. This publication is an output of the project N JLS/CJ/2007-1/29-30-CE/02233870023-EUROPEAN COMMISSION-DIRECTORATE GENERAL JUSTICE, FREEDOM AND SECURITY — Directorate C, Civil Justice, Rights and citizenship by M. BELLINGRERI, edited by L. Barbera, p. 1.

2. *Idem*, pp. 9–10. Regulation (EC) 1347/2000 of 29 May 2000, on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, called Regulation Brussels II, came into force on 1<sup>st</sup> March 2001. It was a first step towards the recognition of judgements in family law matters; yet, it only covers: divorce, legal separation, marriage annulment, and judgements concerning paternal responsibility in relation to the dissolution of matrimonial ties and to parental responsibility for the children of both spouses. The repealed regulation applied in particular to judgements regulating which parent the child had to live with and if the other parent had the right to see the children (right of access). It did not cover judgements in jurisdiction on matters related to maintenance obligation, falling under the Regulation of the Council on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Finally, that regulation only covered judgements relating to the children of both spouses. In relation to those proceedings, the regulation provides for rules stating that the grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real tie between the party concerned and the Member State exercising jurisdiction; the recognition and enforcement of judgments given by the other Member States. The recognition and enforcement of judgments given in a Member State are based on the principle of mutual trust, and they have to be accepted by the other Member States. The grounds for non-recognition are kept to the minimum required. Another basic principle of Regulation "Brussels II" and of Brussels I alike, is that the Member State in which enforcement is sought is prohibited to review neither jurisdiction of the court of origin nor the substance of the judgement. Judgements relating paternal responsibility shall be recognised and enforced in other Member States, if they have been declared enforceable by the court of the enforcing Member State ("exequatur"). The decision of granting an exequatur can be reviewed by lodging an appeal. See: [ec.europa.eu/civiljustice/publications/publications\\_en.htm](http://ec.europa.eu/civiljustice/publications/publications_en.htm).

- To contribute to the creation of a genuine European area of justice in civil matters;
- To promote the elimination of obstacles to the good functioning of cross-border civil proceedings in the Member States;
- To improve the daily life of individuals and businesses by fostering access to justice;
- To improve the exchange of information between legal, judicial and administrative authorities and the legal professions by enhancing mutual understanding.

Exactly by fostering judicial cooperation and avoiding conflicts of jurisdiction, it will be possible to guarantee a proper administration of justice. Judicial cooperation will help eliminating obstacles to cross-border litigation created by disparities in different civil law systems and civil procedures and improving access to justice.

The programme is aimed to improve mutual knowledge of Member States' legal and judicial systems by supporting the training of legal practitioners in Union and Community law and promoting and strengthening networking, mutual cooperation, exchange of information and experience.

All those actions are aimed at establishing a common judicial area among all Member States and a synergic cooperation among legal practitioners, psychologists, social workers, mediators, etc.

The Treaty of Lisbon came into force in 2009 and reaffirms the above listed principles. It also clearly states that as for judicial cooperation in civil matters, the European Parliament and Council should adopt measures aimed at the development of alternative methods of dispute settlement (art. 65 of the Treaty on the Functioning of the European Union).

### 3. New Regulation Brussels II

Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility was approved on 27 November 2003. It is also known as 'Regulation Brussels II *bis*'.

It repealed Regulation No 1347 and was conceived to meet two demands. First, on 3 July 2000, France presented an initiative for a Council Regulation on the mutual enforcement of judgments on rights of access to children (OJ C 234, 15.8.2000, p. 7). Second, in 2001 the Commission presented a proposal on parental responsibility.

The Regulation sets out new common rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of



parental responsibility<sup>3</sup>. Measures are established for the protection of the child, independently of any link with matrimonial proceedings. It should therefore apply also to partners living together as a cohabiting couple, to children born out of wedlock and to children born from previous relationships of either of the spouses<sup>4</sup>.

The Regulation combines in a single text the two dispositions, while providing for more details and a wider scope of application. It should apply to all Member States with the exception of Denmark, as stated in Article 2 No 3.

The first disposition covers only marriage proceedings, such as divorce, legal separation or marriage annulment, i.e. all judgements on the dissolution of matrimonial ties. The second covers parental responsibility.

The term 'parental responsibility' shall mean all rights and duties that are given to a natural or legal person by virtue of a judgment, by operation of law or by an agreement having legal effect relating to the person or the property of a child, independently of the status of the children and of any link of the judgement to marriage annulment, divorce or legal separation, in order to ensure equal treatment for all children<sup>5</sup>.

As compared to previous Regulation No 2201/2003, New Brussels II provides an answer to some crucial preliminary issues. It makes clear which Member State has jurisdiction to give judgments in matrimonial matters and the matters of parental responsibility, and lay down procedures for judgments on paternal responsibility to be recognised and implemented in another Member State.<sup>6</sup>

It therefore recognises that jurisdiction in the matters of paternal responsibility should lie in the first place with the Member State of the child's habitual residence. Designated courts, pursuant to current regulations, will have jurisdiction on custody and rights to access. Only in some specific cases, the competent court can refuse giving a judgment, and the list of cases when this is possible has been therefore published, in order to guarantee the transparent implementation of the regulation. (Those cases are related to information on judges and means of contest pursuant article 68 of (EC) Council Regulation No 2201/2003 of 27 November 2003. The court can refuse giving a judgement: if the judgement is manifestly contrary to

3. Summary from *Il regolamento UE n.2201 del 2003 in materia matrimoniale*, by M.A. LUPOI.

4. Excerpt from *Mediatore Del Parlamento Europeo Per I Casi Di Sottrazione Internazionale Di Minori Vademecum*, by R. ANGELILLI.

5. Excerpt from [dirittoditutti.giuffre.it/psixsite/Archivio/Articoli%20gi\\_%20pubblicati/Primo%20piano/default.aspx?id=127](http://dirittoditutti.giuffre.it/psixsite/Archivio/Articoli%20gi_%20pubblicati/Primo%20piano/default.aspx?id=127).

6. Summary from EU legislation on Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (Brussels II). [europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33194\\_it.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33194_it.htm).

public order of the Member State; when, in case of urgency, the judgement has been given without the child having been given an opportunity to be heard; when it was given in default of appearance if the person has not been given an opportunity to be heard; if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence; if it is irreconcilable with a later judgment relating to parental responsibility.

However, the court of the Member State of the habitual residence of the child is in charge of evaluating about its jurisdiction. With the aim of facilitating procedures, the Commission services in consultation with the European Judicial Network in civil and commercial matters have drawn up a 'Practice Guide for the application of the new Brussels II Regulation'<sup>7</sup>, which is not legally binding but is a mere dissemination tool.

For a more comprehensive view of the subject, I refer you to documents on matrimonial matters that have been adopted after the new Regulation Brussels II<sup>8</sup>.

#### **4. Family mediation in Italy as a possible tool of the new Brussels II Regulation**

*An example of good practice of family mediation in the area of Trapani.*

Within Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility there is only a brief reference to mediation as a tool to facilitate agreements between holders of parental responsibility<sup>9</sup>. The Regulation provides for the necessary tools to implement cross-border judicial proceedings and guarantee the satisfaction of rights of custody and access. It does not provide for regulations guidelines, which are the competence of Member States<sup>10</sup>.

In reference to mediation techniques, the European Commission sug-

7. Practice Guide for the application Council Regulation (EC) No 2201/2003. See Annex I.

8. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, GU L 338 del 23.12.2003. Green Paper on applicable law and jurisdiction in divorce matters 14.03.2005 COM (2005). Evelyne Gebhardt (SEP, DE), press release Justice and Internal Affairs, 21 October 2008, Report on the Council Regulation Proposal that amends (EC) Regulation No 2201/2003 in relation to jurisdiction and introduces rules on regulations that are applicable in matrimonial matters.

9. See 2201/2003 (EC), art. 55.

10. For drawbacks of current Brussels II, see Green Paper on applicable law and jurisdiction in divorce matters, Brussels, 14.03.2005 COM (2005).

gests that Member States implement the course of mediation in parallel to the regular proceedings started by national law systems. In any case, Member States are entitled to issue rules about mediation techniques. The European Commission's objective of fostering and implementing the use of mediation techniques to solve cross-border disputes in civil and commercial matters is confirmed by Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters<sup>11</sup>. Here, the Commission has underlined once again that mediation is not a replacement of judicial proceedings of each Member States<sup>12</sup> or of proceedings provided for by Regulation 2001/2003 (EC). As a matter of fact, all issues concerning legal separation and divorce fall within the group of rights and duties on which the parties can make independent decision based on the relevant enforceable law<sup>13</sup>. However, the fact that New Regulation Brussels II is mentioned in the framework of the European document on mediation is to be related to the widely accepted principle that a mediator can be involved before separation proceedings are started or to accompany and support 'co-parenting'. The mediator should foster the reorganisation of family relationships in case of possible separation or divorce or in the aftermath of one of those events. . . Family mediation is to be integrated into this context with the aim of supporting parents and children and of facilitating communication between the parties and relevant judicial authorities<sup>14</sup>.

Before dealing with the issue of family mediation in Italy, and in Marsala in particular, it is worthwhile underlining that since Brussels II Regulation has been adopted we talk about 'parental responsibility' and not about paternal rights anymore. Following that shift, a great emphasis is now placed on the 'new' role parents are asked to fulfil for their children, and this new approach informs all policies aimed at supporting parenthood that Member States have adopted over the last few years.

The concept of support to parenthood has been outlined with more details as compared to previous two-year period in the 'National plan of action and intervention for the protection of rights and development of subjects in developmental age (2002–2004)'. The latter is the second Plan of Action that has been published after Law 451/97 came into force, and the first part of the new Plan provides an update on the implementation of the old one. Also, in paragraph 2.2 it is explained that families must be

11. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, EU Official Journal L 136/3, of 24 May 2008.

12. See Directive 2008/52/EC, Art. 20–21

13. See Directive 2008/52/EC, Art. 10

14. See F. SCAPARRO, *La mediazione integrata*, Milano 1999, [www.associazionegea.it/editoriale1.htm](http://www.associazionegea.it/editoriale1.htm).

supported through actions aimed at disseminating knowledge of the new Law on parental leaves across the Country (L. 53/2000), at evaluating the pilot implementation of the occupational integration minimum income, at organising an awareness-raising campaign targeted on families about children's rights. The tables presented in the Plan show how between 2000 and 2001 in each Italian region offices have been opened to deal with family problems, with some difficulties though, such as long implementation times, obstacles in stabilising the on-going changes or in 'transferring' the new methodologies to different areas.

The Italian Presidential Decree No 616/77 sets rules on the role of local governments. To comply with our Constitution, it has also transferred all administrative powers to regional governments in the field of public assistance and welfare. However, municipalities have been assigned all powers related to the organisation and provision of socio-welfare benefits, including all measures in favour of children subject to Court judgements in administrative and civil matters. The duties of municipalities have been redefined by the following framework Law No 328/00 and related Regional Laws on the implementation of an integrated system of social interventions and services<sup>15</sup>.

In 2002, the City of Marsala has launched a University Master Course in cooperation with the Family Studies and Research University Centre of the UCSC of Milan to train excellence professionals. The course was aimed at people working in social, psychological and educational fields, and at employees of the municipalities of Marsala and Petrosino, Local National Health Unit No 9, Ministry of Justice and Prefecture.

This educational initiative was part of a wider programme on prevention and attention to family relationships that had been launched in the area of Marsala and Petrosino in synergy with other initiatives implemented with funds made available by Law No 285/98 (measures for promotion of rights and opportunities for children and adolescents) for the second three-year period.

This programme is still evolving with new services offered such as 'talk groups' for children of divorced parents and self-mutual-help groups for single parents that will be described later.

In addition to that, given the complex and articulated supply, social services are being reorganized. A specialised team will be set up for children's protection and families, which will be in charge of relationships with clients and of establishing synergic partnerships and connections among available

15. Excerpt from Juvenile Chamber, Rome, JC 10.II.08 — *Centri "polifunzionali" — sovrazionali con servizi differenziati in ambito di relazioni familiari: Il CTRF della Provincia di Roma. In particolare: il sostegno alla genitorialità e la mediazione familiare.*

local services. This team will also coordinate all services dealing with families, dissemination of information about initiatives and on-going services with the aim of making their access easier for citizens.

An Office for Mediation and attention to family ties was started in Marsala on March 23rd, 2004, a field that is also regulated by the recent Law No 54/2006 (on legal separation of parents and shared custody of children). The services provided for by that Office are aimed at helping parents experience a good separation process that can have a positive cascade impact on their children.

Family Mediation is offered to parents who are already separated or undergoing separation and its goal is to help them agreeing on how to reorganise personal and family relationships that have been disrupted due to divorce or end of cohabitation. This tool can be also employed in other highly conflicting events happening in a family, such as disputes between:

- a) Grandparents and children of separated parents in relation to having access to grandchildren;
- b) Siblings for problems linked to inheritance;
- c) Siblings for problems linked to looking after aged parents;
- d) Partners in a family business;
- e) Children of origin and foster families.

The mediation process in family disputes that is offered to the general public provides for some meetings with a neutral third party so that parents and children can make agreements if they experience difficult transitional periods, such as legal separation and divorce or in case of conflicts between people of different generations or bloodlines. Family mediation, as a negotiation taking place in the presence of a neutral third party, can be spontaneously accessed by interested subjects.

'Global' family mediation is a limited type of intervention and is aimed at re-establishing communication between the two parents for them to work out constructive solutions for themselves and their children without delegating their responsibilities to other people. The negotiation can cover issues such as children's education or scheduling their daily life but also maintenance, splitting of the house, etc., as disputes over children often go hand in hand with those on money.

Also couples without children can access such service, if they need to work out the loss of family assets that had been assigned a symbolic value in the presence of a 'neutral third party'.

Professional figures, which have been duly trained with the Master Course promoted by the UCSC of Milan, run the Family Mediation service that is available in the area of the City of Marsala. In 2005, 2006 and 2007,

promotion campaigns, radio shows, public meetings, seminars have been organised with the involvement of psycho-social professionals from social services and third sector, teachers, educators, judges, lawyers, i.e. all the figures who are part of the legal separation process with different roles.

The ambitious and necessary goal is to help developing and disseminating a different culture in dispute settlement, with no winners or losers, so that mutual respect and cooperation are granted having in prospect the 'regeneration' of relationships within community.

In line with the service of Family Mediation and to foster relationships' continuity between different generations in case of major disputes, a service to 'exercise the right of visit and relationship' was established in 2005, after proper training had been provided to staff. This new place is called *Spazio Neutro*, a neutral setting where support is provided to family ties. Its objective is to encourage the encounter between children and non-custodial parents or other parental figures, which live away from children, such as grandparents, brothers or sisters. A specialised intervention is carried out in adequately furnished rooms to support ritualised passages that are critical to family life and to create a community based on solidarity whose members are independent and responsible citizens. Judicial Authorities refer children and their parents to this service.

The Neutral Setting is aimed at preventing children's problems from arising because of unclear family boundaries and impossibility of staying in touch with one's own roots because of family conflicts. In that area, several projects targeted on providing support to the needs of family are currently being implemented. They entail financial support, educational home assistance, placing children in children's homes, daily and/or full time foster care. These measures are adopted after having surveyed the district area and gathered information about the predominant needs. Other forms of intervention are now available to support parenthood, such as talk groups for children of divorced parents and support groups for parents. A coordination team for services to family and attention to family ties has been established to provide an effective guide to all the initiatives that have been started in the national health-care district No 52 of Marsala and Petrosino. That team is also available to promote, facilitate and support similar projects or services to be implemented in the area of Trapani or other areas of Sicily region. Professionals working for public services or the third sector, having experience in the field of services providing support to family ties, can be also part of that team. Such participation is aimed at improving personal skills to the benefit of families that experience difficult or conflicting situations. In addition to that, the coordination team keeps regular contacts and exchanges ideas with a team working on a similar project that is being implemented in the area of Milan and is run in cooperation

with a cooperative called Ghenos.

For more information I refer you to the attached article: Mediation as a tool to intervene in processes arising from difficult situations.

#### 4.1. Family Mediation<sup>16</sup>

As opposed to other services that are available to support a divorcing couple (psychotherapy, social services, counselling), family mediation is based on competence, starting from the assumption that people are capable of making decisions for their own lives. The objective is to keep and stimulate personal resources during critical stages of one's life history (such as marital crisis or events like divorce). There is no room for delegation or social control. The mediator is a facilitator, the guarantor of a space — that has been freely chosen by the parties — that is home to clear rules and where objectives are clearly defined. The effectiveness of this unusual course of actions followed to get support has been increasingly recognised over the past few years. So it is now possible for a divorcing couple to start it also when judicial proceedings have started. As a matter of fact, Art. No 155 sexies of Law No 54/06 states that

The judge may, when deemed appropriate and after having consulted the parties concerned and obtained their consent, defer the adoption of provisions set out in article 155 in order to permit the spouses to attempt mediation with the support of experts in the field in order to reach an agreement, with a particular view to the protection of the moral and material interests of the offspring.<sup>17</sup>

A clear definition of how the service should be organised can be found in the founding act of the Italian Society of Family Mediation (SIMEF), which was established in 1995. The mediators of Marsala have that protocol as a reference point and have adopted that definition of family mediation. Family mediation is a course of actions with scheduled 8 to 12 meetings of one and a half hour each to take place every two weeks. Its objective is to reorganise family relationships — in view of or following legal separation or divorce — in a structured setting. Here, a neutral third party, who is equidistant from all the parties, encourages them to seek fairly acceptable solutions to reorganise family relationships. Such third party is asked to intervene by the conflicting

16. R. ADAMO, excerpt from *La mediazione per intervenire nei processi legati alla criticità in Welfare management, nelle politiche di prevenzione del disagio giovanile* a cura di A. Frosina e N. Tasca, pp. 176–209 edited by CMD project. (Provincia Regionale di Trapani leader partner–ex D.Ass. Famiglia 21, 11, 2005 by Sicilian Region — F.N.p. S. Lex 328/2000 — share of 6% d.a. n. 561 — 9 March 2004.

17. Excerpt from Juvenile Chamber, Rome, JC 10.11.08 — *Centri “polifunzionali” — sovrazionali con servizi differenziati in ambito di relazioni familiari: Il CTRF della Provincia di Roma In particolare: Il sostegno alla genitorialità e la mediazione familiare.*

parents, is bound to confidentiality and is independent from the judicial authorities. Through mediation, which is voluntarily accessed, parties are ready to trust parents and cross-generation ties although marriage has failed since partners have failed in creating a bond as a couple. Sometimes, disputes between people who are not linked by particularly meaningful relationships can be dealt with through a win-or-lose pattern, without major impact on their daily life. In case of discord between parents who have decided to separate though, it is necessary to protect their relational ties as something valuable, so that the family can continue being a resource for growing children and for the identity of the involved adults.

The work that the Marsala team is carrying out, with the supervision of Italian and European mediators, has shown that endless fighting within the family is often increased by the need both parents have for a reasonable period of time for them to work out their diffused pain and anger. They need a place where each party acknowledges the primary need they both have to keep a fairly valid role as a father or mother even when their romance is over.

#### 4.2. *The process of family mediation*

In order to illustrate some characteristics of the course of mediation, we can briefly outline its five stages:

- First Stage: People can be referred to mediation by someone who has already been exposed to such resource (through newspapers or fliers) or they can have direct access to it. People sometimes call the office on advice of professionals who have a role in the dispute, legal separation or divorce, such as lawyers and judges, psychologists, psychotherapists, social workers, teachers, priests. They are often the first to receive people's request for psychological, educational or legal support.  
Word of mouth has recently become the first dissemination channel. Families who have recently benefited of this resource encourage other families to access the service.
- Second Stage: It is called pre-mediation stage. Whether the mediator decides to see the couple right away and in a joint appointment or fixes a later first individual interview, it is always necessary to explain the characteristics of this process. Differences have to be highlighted from other stages of separation or divorce and parents' expectations must be assessed. In other words, what is technically called a '*mediability* assessment' has to be carried out.  
In some situations for instance, parents are still living together and



need help to make one of the most difficult decision in life or they need to agree on how to communicate their decision or the fact that one of them is going to leave the house to other members of the family.

Some preliminary work, before starting actual negotiations, is necessary to set the method and rules of the mediation process. The first three or four meetings will be used to assess whether mediation is the best option to deal with the issues the parties present with. The working group is set up, including parties and mediator/s, roles are explained, rules are set and a schedule is drawn up (themes to be tackled and list of issues to be negotiated).

A special focus has to be placed on cases of domestic violence. A family that has witnessed a violation of rights can use mediation as a good resource and opportunity. Starting from their experience, colleagues in European countries and Quebec encourage pursuing any possible way to support people who have experienced such terrible situations.

At the end of this stage, the parties agree on a work contract. A document will be outlined listing all the themes to be negotiated between the parents in the presence of an equidistant party, i.e. the mediator.

Depending on whether parents are willing to deal with educational, financial and property issues, mediation can be partial or full, and so duration and contents of the final agreement can vary.

- Third Stage: Once the work schedule has been agreed upon, the actual negotiation stage begins. If experience has taught us that agreeing on a convenient time for the meetings and make a shared list of the issues to be discussed is already the outcome of a negotiation process, mediators talk of negotiation only at this stage. Still, we attach great importance to that preliminary work, which is crucial to build trust between the parties. And trust is essential to deal with the core issues of each separation, namely relationships with children and financial matters.

The outcomes of this negotiation effort, which takes place under the alert but flexible lead of the mediator, become integral to the final contract. We are proud to say that those who undergo a mediation process succeed in finding an agreement for shared custody, as a result of their true will to share their parental responsibility.

Parents carry out a careful preparatory work to have an overall view of all expenses that are necessary for their maintenance and life with the children. Then the current situation is examined to imagine the best possible solution.

Negotiation concerning financial and property matters takes on a strong symbolic value, since behind the decisions they make about children's education and its expenses, parents play a crucial relational match.

We have learned that conflicts starting from financial issues stir very deep themes and bring new partners and other relatives, who are not present in person but are emotionally involved, to the negotiation scene.

That is why the most effective mediation models pay great deal of attention to the negotiation about 'material' aspects of the dispute. If this tangible dimension of family reorganisation is not faced and solved, that can have a long-term impact. We can mention, for instance, some severe problems in the relationships between parents and children or grandparents and grandchildren, or the 'parental alienation syndrome' with children refusing to meet the other parent.

- Fourth Stage: At the end of the negotiation process, the work group manages to identify good enough and feasible ways to manage the daily life of all the member of the family. What is agreed upon and verified in the time in between the meetings becomes part of a text parents hold as a reference point, which they can submit to other involved institutions.

At the end of this stage, there is usually a mediation leading the parents to realise the importance of their tie beyond the marital rift. Closing rites are helpful to terminate the process and become aware of how effective the effort they have put in building this 'third space' has been. Within such space parents have been the protagonists of a difficult transition.

- Fifth Stage: Married couples undergo a fifth stage at the Court House. With the support of lawyers, a 'separation plea' is submit. This provides further evidence of how the different professional skills of mediators and lawyer can be integrated rather than being juxtaposed. If parents are not married, their agreement — listing all the conclusions that have been achieved during mediation — is still legally binding even if it has not been formalised by relevant authorities. Drafting a shared project to manage children's education and daily life allows those who are referred to mediation by a Juvenile Judge, in case their conflict has already become a Court case, to leave the course of judicial proceedings and enter the sphere of free-will agreements.

## 5. Conclusions

After that overview of the nature and judicial development of family mediation, it is time for some conclusive remarks.

In spite of continuous transformations, family mediation has consolidated over years to the point that it is now a helpful tool to foster shared negotiation in relation to parental responsibility. It has proved especially useful also to set shared rules among recently immigrated families, which carry cultures and traditions that are different from ours. Therefore, mediation is a proper tool also to avoid that a culture might become abusively predominant over another, so that equality can be guaranteed.

Moreover, family mediation is a crucial resource to protect the interest of children when parents sever their marital ties. Thanks to family mediation children are not deprived of their right to grow up in an atmosphere of family harmony. As a matter of fact, mediation neutralises some feelings and mechanisms that are characteristic of similar circumstances, such as a sense of personal failure and the usual, mutual blaming the other party for the disruption of the marital relationship, and the ensuing frustration.

Another aspect all regulations in the field have in common is the consolidation of the principle of co-parenting as an unbreakable tie even if marriage or non-marital relationships come to an end.

Given this background, the role of the mediator becomes central, although couples themselves are the main source of solutions to their difficulties. Since the mediator is not the actual subject who has to settle the dispute, his activity could be a failure. Going beyond the concrete outcomes, however, the whole process will be an opportunity for parents to find a shared objective and take on responsibility once again.

This approach is reinforced by the analysis of data relating to the questionnaires on family mediation. 100% of the mediators interviewed stated that, in their opinion, the sustainability of agreements is not to be found in the family law, but in capabilities, inherent in the mediation process, to make couples aware of the choices made. The ad hoc legislation, in general, can facilitate networking among stakeholders, what is essential for a national system of the processes of family mediation. To the question “Which of the following measures, in your opinion, are needed in order to improve family mediation services?” 100% of mediators interviewed answered: “improving communication between mediators and other professionals” (eg, judges, lawyers, social services, and so on).

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# Family Mediation

A Comparative Survey

MARTA INFANTINO

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## 1. Introduction

This comparative overview collects and debates data on family mediation in eight European jurisdictions (Cyprus, England and Wales, France, Germany, Greece, Italy, the Netherlands, and Spain), highlighting the factors that have influenced the development of family mediation, with special regard to mediation involving transcultural and international families.

The comparative report is divided into three sections. The first section aims to set the stage for the study by briefly clarifying the meaning of family mediation and its potential for out-of-court resolution of family conflicts. The second section is the core of the report, and scrutinizes data about the laws and practices of family mediation in the eight jurisdictions mentioned above. The third section presents the insights and conclusions that can be drawn from the survey.

## 2. Setting the Context

### 2.1. *What Is Family Mediation?*

Family mediation may be defined as a dispute resolution process in which a neutral third party (the mediator) assists the people involved in a family conflict in analysing the situation and reaching their own agreement with

regard to the matters in dispute<sup>1</sup>.

In theory, mediation in family contexts may apply to any type of conflict arising between family members, such as those regarding maintenance among relatives, relationships between parents and children, contact rights of grandparents with regard to grandchildren, issues about adoption and surrogate motherhood, and so on (Parkinson 2011, 5; Martín Casals 2005, chapter 1).

Most of the time, however, family mediation is applied in time of a family crisis, when there is a conflict in a couple, whether married or not. In these cases, mediation is always about helping the parties settle issues stemming from the breakup: from workable arrangements with respect to children, to the management of the family house, to other financial matters such as maintenance. In other words, mediation, when used in divorce cases, is not aimed at ‘saving’ the relationship. Rather, it is primarily concerned with the consequences of the breakup, with the aim of supporting the parties in terminating their relationship in an amicable way, and in facilitating the negotiation of future arrangements (Parkinson 2011, 5).

## 2.2. *Mediation and Other Alternative Dispute Resolution Techniques*

Since the 1980s, especially in North–America, there has been an increasing dissatisfaction with traditional methods of dispute settlement in family contexts. Awareness of the fact that traditional adjudicative systems of settling disputes before courts often does not meet the needs of families in conflict prompted the development — in North America as in Europe — of other, more consensual and cooperative ways of approaching family disputes. The emergence of alternative dispute resolution models for family disputes has then become “the main family law story” of the recent decades in the Western world (McLean 2010, 300).

Alternative dispute resolution models do not rely, as traditional adjudicative dispute resolution methods do, on a third party to make a binding decision for the concerned parties. Instead, in consensual dispute resolution models it is the parties themselves who shape and decide both the resolution process and its final outcome. When parties are able to find a solution to their problems, that solution may be embedded in an agreement which can subsequently be enforced as a contract before courts. Since parties themselves craft their own solution to the dispute, it is usually held — and

1. Literature on family mediation, especially from common law countries, is countless. Among many others, see, in the United States, Folberg and Milne 1988; in Canada, Noble 1999; in Australia, Batagol and Brown 2011; Spencer and Brogan 2006; in England, Parkinson 2011; Walker, McCarthy, Timms 1994. As to the growing continental European literature on the subject, the most prominent work were written by French and Dutch jurists: see the authors quoted below, no. 3.3 and 3.7.



empirical research confirms (see the authors and the studies quoted below, no. 2.3) — that decisions stemming from non-adjudicative methods of dispute settlement are more long-lasting, and more easily complied with, than settlements imposed by a third-party. Needless to say, all consensual dispute resolution models are based on the willingness of the parties to cooperate in the settlement process. Parties may anytime stop the process and resort to an adjudicative system of dispute settlement.

Consensual models of dispute resolution are usually categorized into four broad categories: negotiation, facilitation, conciliation, and mediation.

Negotiation is an informal process in which the parties to the dispute attempt to reach a joint decision on matters that they have a disagreement on, with or without the participation of a neutral third party. If the disputants decide to involve a third party, a first step might be through facilitation and conciliation.

Facilitation is a process by which a third party tries to coordinate the litigants' activities and meeting, and prevent the escalation of the tension between them, in an effort to move the parties productively toward decisions. In conciliation, the conciliator does not only assist the parties by driving their negotiations and directing them towards an agreement; she also plays a direct role in the actual resolution of the dispute, by advising the parties and making concrete proposals for settlement.

In contrast, mediation can be defined as a structured process in which a neutral third party, the mediator, facilitates dialogue and negotiation between the parties. Mediation is private and confidential. Although flexible, the mediation process is structured in procedural stages and follows precise protocols for dispute settlement. The mediator does not impose a settlement on the parties, who retain exclusive power to make their own decisions (on all the above, Pali and Voet 2012, 24–25; Parkinson 2011, 11–14).

The distinction between these processes is largely artificial, insofar as all consensual methods of dispute resolution involve a great deal of flexibility, and may incorporate elements of one method into the structure of another one. Moreover, the actual characteristics of each model may vary greatly, depending on the circumstances of each case, and on the shape that the mediator, the parties, and eventually any third parties involved in the process, give to it. For instance, mediation may start before any judicial proceedings has been instituted, or may be court-based, that is, run by or through the court itself. It may involve, alongside meetings with both the parties, private and separate meetings between the mediator and each party. A mediator may encourage the participation of the parties' lawyers, or minimize the latter's participation in the process. Some mediators do not hesitate to evaluate the legal strengths of each party's positions, while others avoid any kind of evaluation, and try to make the parties reach their own

agreement irrespective of the chances of success that their requests would have before a court (Pali and Voet 2012, 27; Parkinson 2011, 39–57; Martín Casals 2005, chapter 1).

### 2.3. *Benefits of Mediation in Family Disputes*

Empirical research carried out in several countries has repeatedly demonstrated that, in the context of family disputes, consensual forms of settlement, and mediation in particular, offer a number of advantages over adjudicative approaches to dispute resolution (in Italy, Mazzoni and di Benedetto 2012, 599–638; Lucardi, Allegri, Tamanza 2012, 661–697; Lucardi 2012, 699–722; in Spain, Merino Ortiz 2010, 188–189; in the Netherlands, Pel and Combrink 2011, 35–52; Vogels and van der Zeijden 2010, 22, and, for some refinements, 46–47; de Roo and Jagtenberg 2002, chapter 8.1.4; in England and Wales, Davis G. *et al.* 2000).

First, the mediation process facilitates direct communication between the parties and ensures its confidentiality. Mediation helps the parties accommodate not only their legal relation, but also any emotional and practical aspect of their dispute that would not be considered in an adjudicative setting. Through dialogue and confrontation, parties learn how to negotiate together — an ability that is likely to reduce conflict and nurture long-lasting cooperation. Thus, mediation not only helps the parties to reach a reasonable and sustainable agreement that serves their best interests in the immediate future, but also teaches them to manage their possible differences or misunderstandings, and make new arrangements in accordance with changing circumstances. Moreover, since the final decision stems from the parties themselves, mediation tends to promote compliance with the obligations that each party voluntarily took on (see the seminal study of Eckhoff 1969). This makes the mediation process particularly appropriate to work in family disputes involving children, where future child care and nurturing arrangements have to be determined over several years and through constant coordination between the parents (Pali and Voet 2012, 29).

On a different note, it is often emphasized that a further advantage of mediation over adversarial methods of dispute settlements is that mediation is cheaper and faster than ordinary judicial proceedings (Pali and Voet 2012, 30). In this regard, however, much depends on the way in which legal systems finance and organize in court and out of court proceedings: in countries — such as Germany, Greece, and Cyprus (CEPEJ 2014, 109; CEPEJ 2012, 141) — where legal aid is available for court-based processes only, the cost of mediation proceedings may turn out to be higher than that of ordinary dispute resolution methods.

Finally, mediation is said to be particularly helpful in disputes involving

cross-cultural families and families whose members belong to different nationalities and regions, that is, families based upon relationships between individuals of different nationalities, cultural and/or religious backgrounds, and families whose members do not necessarily come from different backgrounds, but are nevertheless connected with different states.

When cross-cultural families break up, cultural clashes between different beliefs and expectations about gender, parenting, contact with extended families, professional choices, etc., are likely to become more pronounced, and may result in increased conflict (Pali and Voet 2012, 8; Carl and Walker 2011; Parkinson 2011, 57–69; Díaz López 2010; d’Ursel 2010, 73–113; Ganancia 2007, 32–39, 127–140). Members of families belonging to different nationalities may or may not be confronted with these issues, but are anyway exposed to the additional problems stemming from migration, settlement in foreign environment, and cross-border mobility (for all, see Carl and Walker 2011; Ganancia 2007, esp. 32–39). As two experienced mediators in cross-border family disputes put it, cross-border

litigious custody and access cases often display special conflict dynamics. Fear and mistrust grow even more when parents have different nationalities and live in different countries, especially if these countries are far apart from each other geographically. This increases the risk of misunderstanding. Differing cultural and social backgrounds lead the couple to interpret the conflict in different ways — which in turn causes increased misunderstanding and escalation of the conflict. Whereas the other culture was experienced as interesting and exciting in the context of an intact relationship, it generally becomes threatening when the couple separates. Faced with uncertainty and conflict, parties unconsciously tend to fall back on what is familiar to them, what seems normal and plausible, what makes sense. To this, one should add: language problems and a lack of knowledge or false perceptions of the cultural, social, and legal principles of the other country. The foreign parent is often not familiar with the legal system in that country or mistrusts it on account of negative experience and is afraid that the other parent will be at an advantage in her own country. Understandably, the foreign parent often has the impression that in the course of the legal procedures her interests are not adequately represented or taken into consideration. This parent often ends up feeling misunderstood, helpless and disadvantaged.<sup>2</sup>

In family disputes where members are from different cultures or nationalities, national courts are often not or little equipped to adequately deal with the cross-cultural and cross-border issues raised by these conflicts. Mediation, by contrast, can be especially tailored to help the parties confront problems arising from trans-cultural and cross-border disputes (Pali and Voet 2012, 47; Mouttet 2011; Kucinski 2009).

2. Carl and Walker 2011, 77.

#### 2.4. *The (Global and Regional) International Legal Framework of Family Mediation*

The benefits that alternative dispute resolution methods promise to offer in cases involving cross-cultural and cross-border families have prompted many international associations and organizations to promote recourse to alternative dispute resolution models, especially mediation, in family settings. This has been done through different means and by different actors, both at the global (i) and at the regional (ii) international level.

(i) Many global not-for-profit international organizations have deployed their soft power to this purpose.

International Social Services (ISS), for instance, is an international not-for-profit organization, active in more than 140 countries through a network of national branches, whose aim is to help individuals, children and families confronted with cross-border social problems (for more information, see the International Social Service's website at [iss-ssi.org](http://iss-ssi.org)). Each year, ISS handles cases of child abduction and parental responsibility with a mediation based approach, organizes seminars and meetings involving professional mediators, takes active part in international debates on the issue, and collects data on dispute resolutions in cross-border cases (see [iss-ssi.org](http://iss-ssi.org), and Streeter 2010).

On a different level, the Hague Conference on Private International Law (HCCH) has welcomed recourse to mediation in many of the texts on family matters it prepared. Resort to mediation is encouraged, for instance, by the Hague Child Protection Convention of 1996<sup>3</sup>, the Hague Adult Protection Convention of 2000<sup>4</sup>, and the Hague Maintenance Convention of 2007<sup>5</sup>. Moreover, it is worth mentioning that the Third Malta Judicial Conference on Cross-Frontier Family Law Issues, hosted in 2009 by the Government of Malta in collaboration with the HCCH, invited both States parties to the HCCH Conventions and non-State parties, to establish "a Working Party to draw up a plan of action for the development of mediation services to assist where appropriate in the resolution of cross-frontier disputes con-

3. Art. 31, Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. The Convention entered into force in 2002; as of now, 41 States have ratified the text (see [hcch.net/index\\_en.php?act=conventions.status&cid=70](http://hcch.net/index_en.php?act=conventions.status&cid=70)).

4. Art. 31, Hague Convention of 13 January 2000 on the International Protection of Adults. The Convention entered into force in 2009. So far, 8 States ratified the Convention. See [hcch.net/index\\_en.php?act=conventions.status&cid=71](http://hcch.net/index_en.php?act=conventions.status&cid=71).

5. Art. 6(2) and 34(2), Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. The Convention entered into force in 2013, and has actually been ratified by 5 States: see [hcch.net/index\\_en.php?act=conventions.status&cid=131](http://hcch.net/index_en.php?act=conventions.status&cid=131).

cerning custody of and contact with children”<sup>6</sup>. The Working Party was set up in 2009 and published in 2010 “Principles for the establishment of mediation structures in the context of the Malta Process”, with the aim of creating effective mediation structures for cross-border family disputes over children involving States that are not party to the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention<sup>7</sup>. For States which are parties to the 1980 Hague Child Abduction Convention the HCCH published, in 2012, a guide outlining principles and good practices for mediation and similar processes in cross-border family issues (HCCH 2012)<sup>8</sup>.

(ii) A similar flavor for mediation in family disputes can be detected at the regional international level.

In Europe, many non-profit organizations have encouraged the development of measures and structures for international family mediation. Many of them are national organizations which focus their activities both on domestic and cross-border family conflicts; as such, they will be reviewed under the chapters devoted to national experiences. Other initiatives are specifically international in scope. This is for instance the case of the *European Forum Training and Research in Family Mediation*, which was created in 1992 by family mediation trainers from European countries to develop, promote, and coordinate training and research in the field of family mediation (see *forumeuropeen.eu*; for a review of the forum’s activities, see Pali and Voet 2012, 103–104). The Forum also gives accreditation to training programs all over Europe. In 1992 the Forum drafted the so-called *Charte européenne de la formation des médiateurs familiaux exerçant dans les situations de divorce et de séparation*<sup>9</sup>, an instrument of self-regulation establishing the standards and the theoretical and practical training requirements for family mediators. The Charter emphasizes that mediation is a professional activity, and lays down a very comprehensive training programme. Many training programmes across European countries have adopted the standards laid down in the Charter in order to receive accreditation from the *European Forum* (Martín Casals 2005, chapter 2.4.2.1).

6. Third Malta Judicial Conference on Cross-Frontier Family Law Issues, available at [hch.net/upload/maltadeclo9\\_e.pdf](http://hch.net/upload/maltadeclo9_e.pdf), 2009, 3. The previous two Conferences on Cross-Frontier Family Law Issues took place in Malta in 2004 and in 2006.

7. See [hch.net/upload/wop/mediationprinc\\_e.pdf](http://hch.net/upload/wop/mediationprinc_e.pdf).

8. For some criticism against the Hague Convention of 1980, see Ganancia 2007, 18 (“*cette convention [...] laisse hors de son champ d’application [...] les pays de droit musulman, dont aucun, à ce jour, ne l’a ratifiée. Même lorsqu’elle s’applique, des décisions totalement contradictoires sont souvent rendues dans les deux États en raison de la divergence des droits nationaux et du ‘nationalisme’ des décisions*”), 68–73, 76–80.

9. More information at [apmf.fr/lhistoire\T1\textendashde\T1\textendashlapmf](http://apmf.fr/lhistoire/T1\textendashde\T1\textendashlapmf).

Another illustration comes from the *Association Internationale Francophone des Intervenants auprès des Familles séparées* (AIFI), which is a network of organizations working since 2003 in the area of divorce and separated families in Belgium, Canada, France, Italy, Lebanon, Luxembourg, Poland, and Switzerland. The AIFI promotes constructive modes of resolution of family conflicts, and offers an international forum where judges, notaries, lawyers, mediators, psychologists, and researchers may exchange their views and experiences in dealing with separated families<sup>10</sup>. In 2008 the AFI developed a good practice guide for international family mediation and mediation at distance, which was then presented at the Permanent Bureau of The Hague Conference<sup>11</sup>.

A more recent initiative was carried out between 2010 and 2012 by some Belgian, Dutch, and German research institutions and not-for-profit organizations under the name of ‘*EU Training in International Family Mediation*’ (TIM) project (which was co-financed by the European Commission). The idea was to create a training program for international family mediation, to ensure its dissemination across Europe, and to establish a network of truly international and cross-border family mediators<sup>12</sup>. As the last example makes clear, European institutions have been active in fostering the culture of family mediation.

The Council of Europe has long promoted the recourse to mediation in family settings both by hard law and soft law initiatives.

On the hard law side, both the Council of Europe’s European Convention on the Exercise of Children’s Rights, 1996<sup>13</sup>, and the European Convention on Contact Concerning Children, 2003<sup>14</sup>, encourage States to develop family mediation as a process to resolving disputes concerning children<sup>15</sup>.

As to soft law initiatives, on January 1998 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (98)1 on family

10. See the organisation’s website at [aifi.info/mission](http://aifi.info/mission).

11. The text of the Guide is available at [aifi.info/articles/index/13](http://aifi.info/articles/index/13).

12. See the project’s website, at [crossbordermediator.eu/who-we-are](http://crossbordermediator.eu/who-we-are). The not-for-profit organizations were the Belgian Child Focus, the German NGO *Mediation in internationalen Kindschaftskonflikten* (MiKK), and the Dutch Centre for International Child Abduction, which worked with the support of the Belgian Katholieke Universiteit Leuven.

13. European Convention of 25 January 2006 on the Exercise of Children’s Rights, entered into force in 2002 and currently ratified by 18 States. See [conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=1&DF=&CL=ENG](http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=1&DF=&CL=ENG).

14. European Convention of 15 May 2003 on Contact Concerning Children, entered into force in 2005 and currently ratified by 8 States: see [conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=192&CM=8&DF=21/03/2013&CL=ENG](http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=192&CM=8&DF=21/03/2013&CL=ENG).

15. See, respectively, Art. 13 of the European Convention on the Exercise of Children’s Rights and Art. 7 of the European Convention on Contact Concerning Children.

mediation<sup>16</sup>. The Recommendation asked governments to introduce and promote family mediation or, where necessary, strengthen existing family mediation, and set forth a list of principles concerning family mediation covering a range of critical issues: from the mediators' qualifications to the legal value of mediation agreements, from the relationship between mediation and judicial proceedings to cross-border family mediation<sup>17</sup>. The same year, in October, the Council of Europe organized the 4th European Conference on Family Law as a follow-up to the adoption of the Recommendation on family mediation<sup>18</sup>. In 2007 the European Commission for the Efficiency of Justice, acting under the framework of the Council of Europe, published some guidelines to foster the implementation of Recommendation No. R(98)1 (CEPEJ 2007). The 7th European Conference on Family Law, in 2009, was again devoted to the issue of 'International Family Mediation', and tried to identify emerging practices and standards on international family mediation, and to discuss initiatives that could support the development of family mediation in an increasingly internationalized world<sup>19</sup>.

EU institutions also actively participated in the development of family mediation initiatives.

It was 1987 when the post of the European Parliament Mediator for International Parental Child Abduction was created in order to help children of bi-national couples who have been abducted by one parent<sup>20</sup>. The office aims to ensure the protection of the rights of children in any dispute involving their parents by helping the parents to achieve a negotiated solution in the exclusive interest of their children.

In 2002 the European Commission launched a Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters which dealt also with family mediation<sup>21</sup>. In 2003, Regulation 2201/2003 on jurisdiction and

16. Council of Europe, Recommendation No. R (98)1 of the Committee of Ministers to Member States on Family Mediation, adopted by the Committee of Ministers on 21 January 1998, at [wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2](http://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2).

17. See Council of Europe, Recommendation No. R (98)1, Principles of family mediation, art. II (Organisation of mediation), IV (The status of mediated agreement), V (Relationship between mediation and proceedings before the judicial or other competent authority), VIII (International matters).

18. The proceedings of the conference are available on the Council of Europe's website: [coe.int/t/dghl/standardsetting/family/7th%20conference\\_en\\_files/actes%20médiation%20familiale%20en%20anglais.pdf](http://coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/actes%20médiation%20familiale%20en%20anglais.pdf).

19. The proceedings of the conference are available at [coe.int/t/dghl/standardsetting/family/7th\\_conference\\_en\\_files/mediation\\_documents\\_EN.asp](http://coe.int/t/dghl/standardsetting/family/7th_conference_en_files/mediation_documents_EN.asp).

20. See [europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html](http://europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html).

21. See European Commission, Green Paper on alternative dispute resolution in civil and commercial law, COM/2002/0196final, available at [eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0196:EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0196:EN:HTML).

enforcement of judgments in matters of marriage and parental responsibility explicitly mentioned mediation in article 55 (e). It provided that Member States shall take all appropriate measures to “facilitate agreements between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end”<sup>22</sup>. In 2004 the European Commission, with the assistance of a large number of organizations and experts in the field of mediation, issued the ‘European Code of Conduct for Mediators’<sup>23</sup>, applying to all forms of mediation. The Code set out a number of principles (on mediators’ qualifications, independence and impartiality, and on the mediation process) that individual mediators or mediator associations can voluntarily respect. Finally, Directive 2008/52/EC on mediation in civil and commercial matter was adopted in 2008<sup>24</sup>. In order to further promote the use of mediation, the Directive introduced rules for mediation processes in cross-border disputes regarding civil and commercial matters, except where the dispute concerned “rights and obligations which are not at the parties’ disposal under the relevant applicable law” (art. 1(2) of the Directive). States were free to apply the Directive to internal mediation process as well<sup>25</sup>. As such, the Directive may be applied to cross-border family disputes insofar as they do not involve rights and obligations on which the parties are not free to decide themselves (though, as the preamble of the Directive notes, “such rights and obligations are particularly frequent in family law”<sup>26</sup>). Our comparative survey will now show how member States have interpreted such clauses.

22. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (the so-called Brussels II Regulation). It has however been noted that Brussels II rules do not ease recourse to mediation in cross-border disputes, but rather, by conferring jurisdiction to any state where the parties have their domiciles or habitual residences, create an incentive for the parties to quickly seize a court in the forum with which they have the closest connection (and the other party has not): Hodson 2008, 209.

23. European Code of Conduct for Mediators of 2 July 2004, available at [ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf).

24. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

25. Directive 2008/52/EC, whereas n. 8.

26. Directive 2008/52/EC, whereas n. 10.



### 3. A Comparative Overview

#### 3.1. *The European Scenario: A Fragmented Picture*

So far, the patterns of development of family mediation in Europe have greatly differed.

In the majority of Southern European countries, with the exception of Spain, family mediation seems to be at its infancy, or still at an experimental stage (Pali and Voet 2012, 65). In North–Western European countries, by contrast, the implementation of family mediation is more structured. In England (and Wales), France, and Belgium, the practice of mediation in family disputes was discovered with enthusiasm by professionals working in the context of family conflicts, and achieved a considerable success even before the endorsement of the practice by official authorities (Martín Casals 2005, chapter 2). In other countries (i.e., Germany and the Netherlands), an official endorsement of family mediation has taken place only recently. Although in these countries family mediation has established itself institutionally and professionally, the actual rate of recourse to family mediation remains rather modest as compared to its potential (Pali and Voet 2012, 66–67).

Identifying factors underlying the different rates of development of family mediation in Europe is beyond the scope of this paper. Yet, in the following pages we will try to shed light on the possible variables which are likely to play a role in such development, such as: the length of exposure to problems of multiculturalism in family law; the extent to which regulation of family law is inspired by principles of flexibility and parties' autonomy (with regard, for instance, to child custody, adoptions, divorce, civil unions, and same–sex marriages); the intensity of the regulatory approaches on the matter; the diffusion generally enjoyed by mediation and other alternative dispute resolution methods for general private law conflicts; the technicalities surrounding the recourse to mediation, including those on costs of the mediation process and on the availability of legal aid; the professional composition of mediators; the role played by professional associations and other organizations promoting mediation; the inclusion of mediation in the curricula of law schools, and so on.

In light of all the above, countries will be grouped according to a tripartite theoretical matrix in the following pages. The matrix will hopefully permit us to examine how each country stands in relation to each other, and where they derive their operational rules from. It will possibly pave the way for an appreciation of a common core of agreement on this subject, if any, at the European level. Thus, we will start with a review of three categories of countries. The first group will comprise countries where family mediation

is well-established both in theory and in practice, from the ones where it first emerged to those where it emerged later: England (and Wales), France, Belgium, and Spain. The second group is made up of two countries where mediation, though well-known, is still not widely practiced: Germany and the Netherlands. Finally, we will examine three Southern European countries (Italy, Cyprus, and Greece), where mediation, to a greater or a lesser extent, has yet to grow.

## A. Success Stories

### 3.2. *England (and Wales)*

England and Wales were probably the first European jurisdictions to successfully transplant the North-American model of family mediation. The success of family mediation was initially due to the enthusiasm of some prominent professionals. These professionals gathered into associations, which set forth rules and standards for the mediation process. The matter was then brought to the attention of official institutions, who intervened by enacting some hard rules promoting recourse to mediation in family settings (in general, on the English and Welsh framework, see Colvin and Wilson 2014; Scherpe and Marten 2013; Genn, Riahi, Fleming 2013; Aubrey-Johnson 2012; Hildebrand 2012; Parkinson 2011; Martín Casals 2005, chapter 2.4.3; Eekelarr and Dingwall 1988, 3–22).

More in particular, in England and Wales, family mediation developed under the name of ‘conciliation’ since the early 1970s. In 1971 the President of the Family Division of the High Court issued a practice direction providing for courts to refer contested cases to probation officers for “conciliation” where it “might assist the parties to resolve the issues or any part of them by agreement” (Scherpe and Marten 2013, 409; Eekelarr and Dingwall 1988, 12). The provision did not have any significant effect on divorce practice (Eekelarr and Dingwall 1988, 12), but in 1974 the *Finer Report* recommended conciliation as the primary means of disputes settlement for separation and divorce<sup>27</sup>. In 1977, Registrars at the Bristol County Court introduced a conciliation procedure in defended contested divorce proceedings and in 1978 the Bristol Courts Family Conciliation Service (BCFCS) opened as an out of court voluntary pilot scheme for separated or divorcing parents (Scherpe and Marten 2013, 410; Aubrey-Johnson 2012; Parkinson 2011, 6–7; Martín Casals 2005, chapter 2.4.3). Over the following years, similar in court

27. Report of the Committee on One-Parent Families (*The Finer Report*), Cmnd 5629, HMSO, London, 1974, para. 4.288.

and out of court family conciliation services were created across the country, and many national associations were established with the aim of supporting and facilitating the diffusion and quality of such services<sup>28</sup>. In 1996, the most representative associations merged into the UK College of Family Mediators, to provide national standards for the selection, training and accreditation of family mediators and to compile a national register of family mediators<sup>29</sup>. In 2007, the Family Mediation Council, an association whose members are national family mediation organizations in England and Wales, was set up with the aim of overseeing minimum standards of professional conduct for family mediation (which is still self-regulated)<sup>30</sup>.

These developments took place with very little official support and funding for family mediation. On the recommendation of the Law Commission, the Children Act of 1989 abolished the language of custody, guardianship, and access, and instead provided that each parent has 'parental responsibility' and retains that responsibility after the breakdown of marriage<sup>31</sup>. In 1990 the Law Commission Report 'Family Law: The Ground for Divorce' marked a turning point, advocating mediation as the best solution to resolve the consequences of marital breakdown<sup>32</sup>. Family mediation was allotted a central role in divorce reforms introduced by the Family Act, 1996<sup>33</sup>.

The Act aimed to remove fault as a ground for divorce (Part II of the Act) and to contribute to the rapid and effective management of family litigation (Part III). Part II of the Act, which never came into force, would have required all those seeking a divorce to go through a series of steps prior to the issuing of a divorce order. In one of these steps, the spouses would have had to attend an information meeting at least three months before a statement of marital breakdown was made<sup>34</sup>. Part III of the Act, which has entered into force, provides that those seeking public funding for court proceedings must first be referred by their lawyer to a State-registered family mediator to receive information about mediation and to regard it as an alternative to contested court proceedings. At this preliminary meeting, which the applicant could attend alone or with the other party, as preferred,

28. For instance, the National Family Conciliation Council (NFCC, now National Family Mediation, NFM: [nfm.org.uk](http://nfm.org.uk)) was created in 1981, the Solicitors Family Law Association (SFLA, now Resolution: see [resolution.org.uk](http://resolution.org.uk)) in 1982, and the Family Mediators Association (FMA: see [thefma.co.uk](http://thefma.co.uk)) in 1988.

29. See [collegeofmediators.co.uk](http://collegeofmediators.co.uk).

30. More information at [familymediationcouncil.org.uk](http://familymediationcouncil.org.uk).

31. Children Act 1989, available at [legislation.gov.uk/ukpga/1989/41/contents](http://legislation.gov.uk/ukpga/1989/41/contents). For more information about the reform, see Parkinson 2011a, 50–51.

32. Family Law: The Ground for Divorce (Law Com. No. 192, 1990); on similar lines, five years later, Looking to the future: Mediation and the Ground for Divorce (Cm. 2799 (1995)).

33. For the text of the act, see [legislation.gov.uk/ukpga/1996/27/contents](http://legislation.gov.uk/ukpga/1996/27/contents).

34. Family Law Act, Part II, section 8.

the mediator had to explain the advantages of mediation and make an assessment, with the client, of the suitability of the dispute for mediation (Section 29). The subsequent tests carried out across the country as to the efficiency of such a model were positive<sup>35</sup>. Section 29 of the Family Law Act 1996 was abrogated by, and re-enacted in the Access to Justice Act 1999.

While in 2004 the Parliament passed the Civil Partnership Act, which allowed same-sex couples in England and Wales to formalize their relationship thereby obtaining virtually all of the same rights and responsibilities as married couples<sup>36</sup>, it was the 2010s that brought new changes for family mediation.

In 2010 the Family Procedure Rules introduced a protocol similar to Part II of the Family Act 1996. The Rules, adopted also to comply with Directive 2008/52/EC, established (something similar to what Part II of the Family Act 1996 had initially planned, that is to say) a pre-application protocol for mediation information and assessment (Scherpe and Marten 2013, 368–9). Accordingly, before making their application, all potential applicants for a court order in relevant family proceedings were expected to attend an information and assessment meeting (MIAM) about family mediation and other forms of alternative dispute resolution with a mediator<sup>37</sup>. The rule is confirmed by Section 10(1) of the Children and Families Act of 2014, the drafting of which was done under the guidance of the Family Justice Review<sup>38</sup>. According to Sec. 10(1), “[b]efore making a relevant family application, a person must attend a family mediation information and assessment meeting” (on this provision — more precisely, on the identical contents of the Families and Children bill before its approval — see Aubrey-Johnson 2012, 3).

35. Davis *et al.* 2000. Further reports and studies include Green Paper, Parental Separation: Children’s Needs and Parents’ Responsibilities, Cm 6273, July 2004, at [dfes.gov.uk/childrensneeds/docs/DfesChildrensNeeds.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162302/parental-separation-green-paper.pdf); Report of the responses to consultation and agenda for action, Parental Separation: Children’s Needs and Parent’s Responsibilities — Next Steps, Cm 6452, January 2005, at [dfes.gov.uk/childrensneeds/docs/ParentalSeparation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162302/parental-separation-next-steps.pdf); Review of Civil Litigation Costs: Final Report (also known as Lord Jackson’s Report), December 2009, at [judiciary.gov.uk/JCO\\_Documents\\_Reports\\_fjackson-final-report-140110.pdf](https://www.judiciary.gov.uk/JCO_Documents_Reports_fjackson-final-report-140110.pdf); Family Justice Review. Final Report, November 2011, at [gov.uk/government/uploads/system/uploads/attachment\\_data/file/162302/family-justice-review-final-report.pdf.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162302/family-justice-review-final-report.pdf.pdf).

36. Civil Partnership Act 2004, available at [legislation.gov.uk/ukpga/2004/33/contents](https://www.legislation.gov.uk/ukpga/2004/33/contents).

37. Practice Direction 3A, Family Procedure Rules 2010, SI, No 2955, at [justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_03a](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a); see also Aubrey-Johnson 2012, 3, 26.

38. Family Justice Review, Final Report. The Review held that “it should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service. [...] Where intervention is necessary, separating parents should be expected to attend a session with a mediator, trained and accredited to a high professional standard who should: assess the most appropriate intervention, including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and provide information on local Dispute Resolution Services and how they could support parties to resolve disputes” (Id., 23).

Reliance on mediation in family settings was further strengthened by the 2012 reform of civil litigation funding and costs in England and Wales, a reform prompted by the publication, in 2009, of the Jackson Report on the costs of civil litigation<sup>39</sup>. Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act), which entered into force on April 2013, now limits public funding in private family law cases to mediation only (with very few exceptions)<sup>40</sup>. In other words, mediation is now the only publicly funded remedy for most separating couples in private family law cases (Aubrey–Johnson 2012, 24; it is worth noting that, as elsewhere, financial information disclosed during the mediation process in family cases may be used in any subsequent court proceedings: *Ibid.*, 7).

A final note. In 2011, Directive 2008/52/EC was implemented by the UK government through the enactment of the Civil Procedure (Amendment) Rules 2011<sup>41</sup> and the Cross–Border Mediation (EU Directive) Regulations 2011<sup>42</sup>. Both pieces of legislation refer to cross–border disputes only. Though neither of them explicitly deal with family law, legal commentators do not doubt that they may apply to cross–border family law disputes as well (Aubrey–Johnson 2012, 28; Hodson 2011; see, however, Hildebrand 2012, 379, who emphasizes that the implemented rules should apply to civil and commercial cross–border cases only), insofar as they do not involve “rights and obligations which are not at the parties’ disposal under the relevant applicable law”<sup>43</sup>. A few projects on mediation in cross border cases of child abduction were already been carried out by private associations from the mid–2000s onwards (Pali and Voet 2012, 96; Hodson 2008, 209).

As all the above show, in England and Wales both, professional associations and official institutions are committed to promote and strengthen recourse to mediation in family settings. However, the picture of family mediation is not all rosy. Critics of mediation and settlement point out that, in spite of the massive training of mediators and the legal aid imperative,

39. Review of Civil Litigation Costs: Final Report, esp. chapter 36, n. 1.2, p. 355 ff.: « for cases which do not settle early through bilateral negotiation, the most important form of ADR [...] is mediation. The reason for the emphasis upon mediation is twofold. First, properly conducted mediation enables many (but certainly not all) civil disputes to be resolved at less cost and greater satisfaction to the parties than litigation. Secondly, many disputing parties are not aware of the full benefits to be gained from mediation and may, therefore, dismiss this option too “readily” » (speaking of mediation in civil conflicts).

40. See Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012 Sch 1, Part 1, para 14, at [legislation.gov.uk/ukpga/2012/10/schedule/1/enacted](http://legislation.gov.uk/ukpga/2012/10/schedule/1/enacted). For some critical observation on this proposal (before its adoption), see Parkinson 2011, 72. The same provision is now included in the Children and Families Bill, Part II, sec. 10(1), on which see below in the text.

41. See their text at [legislation.gov.uk/uksi/2011/88/contents/made](http://legislation.gov.uk/uksi/2011/88/contents/made).

42. SI, 2011, No 1133, at [legislation.gov.uk/uksi/2011/1133/contents/made](http://legislation.gov.uk/uksi/2011/1133/contents/made).

43. Cp. Sec. 8, Cross–Border Mediation (EU Directive) Regulations 2012, and Art. 1(2) of the Directive 2008/52/EC.

the numbers going into mediation are not as high as expected (Hodson 2008, 209). According to many, mediation organizations have historically shown themselves better at fighting each other and offering services of mediation training than actually fighting for mediation, with the result that many lawyers who trained as mediators at some cost now have simply no work (Ibid.).

### 3.3. France

The history of family mediation in France presents itself as a paradigmatic history of a successful transplant (Boigeol 2003, 194; Martín Casals 2005, chapter 2.4.2; on the history of family mediation in France, Cecchi Dimeglio 2014; Ferrand 2013; Deckert 2013; Rousseau 2010; Ganancia 2007, 40–47; Sassier 2001; see also Piovesan 2011; Grand 2011; Jacob 2011; Savourey 2011).

Family mediation was introduced in France from Québec in the late 1980s, and then rapidly diffused. Mediators organized themselves in associations and created standard rules and codes of practices. These rules and codes inspired laws favoring recourse to mediation services. All the above occurred in the context of a general framework of legislative reforms both for mediation and family relationship. Suffice it to mention that in 1973 the office of the ‘Mediator of the Republic’ was established<sup>44</sup>, soon followed by the first experiments in neighbourhood and victim–offender mediation in 1985 (on these experiments, see Bonafé–Schmitt 1999). In 1993 the French legislator amended the Civil Code to remove the language of custody and replace it with that of ‘parental authority’, to be exercised together by parents, before and after their separation<sup>45</sup>. Civil unions were allowed in 1999<sup>46</sup>, and same–sex marriages were legalized in 2013<sup>47</sup>.

Going back to family mediation, it was in 1988 when the *Association pour la Médiation Familiale* (APMF)<sup>48</sup> was created. The Association formulated in 1990 its Code of Conduct (reformed in 1998, 2004, and 2010), regulating the relationship of family mediators with other professionals and with the mediating parties<sup>49</sup>. In 1991 a second association followed suit: the *Comité Nationale des Associations et Services de Médiation Familiale* (CNASMF — Na-

44. Law no. 73–6, of 3 January 1973. All French laws and regulations are available on [legifrance.gouv.fr](http://legifrance.gouv.fr).

45. See Law no. 93–22, of 8 January 1993.

46. Law no. 99–944 of 15 November 1999.

47. Law no. 2013–404, of 17 May 2013.

48. See the APMF’s website at [apmf.fr](http://apmf.fr). In 1992 it was the APMF which promoted the creation of the European Forum Training and Research in Family Mediation, on which see below, no. 2.4.

49. Code de Déontologie APMF du Médiateur Familial, at [apmf.fr/sites/default/files/pdf/Code\\_de\\_deontologie\\_2010.pdf](http://apmf.fr/sites/default/files/pdf/Code_de_deontologie_2010.pdf).

tional Committee of Associations and Services of Family Mediation), which later become the *Fédération Nationale de la Médiation et des Espaces Familiaux* (FENAMEF — National Federation of Family Mediation)<sup>50</sup>. FENAMEF brought together many associations administering family mediation services, established its own code of conduct, and kept promoting the diffusion of the practice of family mediation<sup>51</sup>. Moreover, mediation associations have been particularly active, often with the support of official institutions, in participating in international mediation projects in family disputes involving children (for more details on French mediation associations' initiatives, see Pali and Voet 2012, 95; Ganancia 2007, 20–26).

Until the 1990s, the rules posited by these associations were the only written rules governing mediation proceedings. Since 1995, however, the legislator came in, dealing with the so-called '*médiation judiciaire*' (mediation connected to ongoing judicial proceedings), and with the so-called '*mediation conventionnelle*' (which, by contrast, is any mediation occurring out of court, and independently from any judicial proceeding).

In family settings, a judge's intervention is often needed, and that is why most of the time parties resort to the '*médiation judiciaire*' (Lasser 2010, 51–52). Such a form of mediation was regulated by the legislator in 1995–1996, first with Law no. 95–125 on the organization of the jurisdiction and the procedure in civil, criminal, administrative matters<sup>52</sup>, and then with Decree no. 96–652, which incorporated some of the provisions of the 1995 Decree into the Code of Civil Procedure (CPC)<sup>53</sup>. The provisions of Decree 95–125 were substantially rewritten in 2011, by the Ordinance no. 2011–1540<sup>54</sup>, a transposition of Directive 2008/52/EC.

As a result, the actual framework provides that mediation is voluntary and may take place only with the parties' consent; yet the judge may, at any stage of the proceedings, appoint a mediator who will try to enable the parties to find a solution to their conflict by themselves (Art. 22 Law no.

50. See FENAMEF's website at [mediation-familiale.org](http://mediation-familiale.org).

51. *Les principes déontologiques*, at [mediation-familiale.org/metier/index.aspx](http://mediation-familiale.org/metier/index.aspx).

52. Law no. 95–125, 8 February 1995, on the organization of the jurisdiction and the procedure in civil, criminal, and administrative matters (*Loi n° 95–125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative*).

53. Decree no 96–652, of 22 July 1996, on conciliation and mediation (*Décret n°96–652 du 22 juillet 1996 relatif à la conciliation et la médiation judiciaires*), quoted hereafter according to the provisions of the *Code de Procédure Civile* as CPC.

54. See the Ordinance no. 2011–1540 of 16 November 2011, pursuant to the law of 7 May 2011 on the simplification and improvement of the quality of law (*Ordonnance n° 2011–1540 du 16 novembre 2011 portant transposition de la directive 2008/52/CE du Parlement européen et du Conseil du 21 mai 2008 sur certains aspects de la médiation en matière civile et commerciale*). See also the Report to the President of the Republic on the Ordonnance no. 2011–1540 of 16 November 2011, implementing the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of civil and commercial mediation.

95–125, and Art. 131–1 CPC). Referral by the parties to a mediator, however, does not remove the matter from the jurisdiction of the judge who may always adopt the measures that she deems necessary (Art. 131–2(2) CPC). Moreover, the above mentioned provisions set forth the basic requirements and duties that mediators should comply with (see Arts. 21–2 and 21–3 of the Law no. 95–125, on the duty of mediators, and Arts. 131–4 and 131–5 CPC, on the requirements of mediators), and provide detailed rules about the mediation process (see articles 131–6 to 131–9 CPC), including about its duration (which may not exceed three months, and may be extended only once by the judge for no more than three months: Art. 131–3 CPC). Legal aid is available to parties who resort to judicial mediation (Art. 22–2 Law no. 95–125).

The above provisions are general, and are deemed as applicable to any dispute over any civil matters, including family law ones. Although their applicability to family conflicts is not expressly stated, it is made clear by both Art. 21–3 of Law no. 95–125, which establishes an exception to the confidentiality of mediation proceedings when “the superior interest of the child is involved”, and by Art. 22–1 of the same law, which prevents the judge from delegating to the mediator the task of attempting the conciliation between the parties in case of divorce and separation proceedings. Yet the general provisions should be coordinated with special ones. Art. 21–1 of Law no. 95–125 sets forth that the provisions of the law are “without prejudice to the special rules set forth for specific types of mediations or mediators”<sup>55</sup>. Special rules on family mediation exist, and are to be found both in the Civil Procedure Code and in the Civil Code.

According to Art. 1071 of the CPC, as amended in 2004<sup>56</sup>, the judge’s mission in family proceedings is to reconcile the parties. In light of this, the judge may always propose mediation to the parties, and even appoint a mediator if the parties agree to mediate in other conflicts over family matters at their disposal (Art. 1071(2) CPC). Moreover, the article allows the judge, in the specific types of mediation mentioned by articles 255 and 373–2–10 of the Civil Code, to enjoin the parties to attend an information session about mediation services (art. 1071(3) CPC). Articles 255 and 373–2–10 Civil Code provide that a judge may propose that the parties enter mediation and, in case of their acceptance, may appoint a mediator when asked to adopt provisional measures within divorce proceedings (Art. 255 C.civ., amended

55. See also the *Rapport au Président de la République relatif à l’ordonnance n° 2011–1540 du 16 novembre 2011*: « L’article 21–1 nouvel de la loi n. 95–125 du 8 février 1995 a pour objet de rappeler que les dispositions qui régissent la médiation dans le cadre de la présente section s’appliquent sans préjudice des règles complémentaires applicables à certains types de médiation établies, comme par exemple la médiation familiale, laquelle est notamment régie par les articles 255 et 373–2–10 du code civil ».

56. The provision was introduced by the decree n° 2004–1158 of 29 October 2004.



in 2004<sup>57</sup>) or to adjudicate disputes over the exercise of parental authority (Art. 373–2–10 C.civ., amended in 2002<sup>58</sup>).

French legislative activism with regard to family mediation has gone further. A decree of 8 October 2001 established the *Conseil national consultatif de la médiation familiale* (National Consultative Council on Family Mediation), which has been entrusted with the task of supervising mediators' training activities, of certifying training centers, and generally of coordinating public and private activities for the promotion of family mediation<sup>59</sup>. A Ministerial decree of 2003 created a State diploma in family mediation<sup>60</sup>, which was later regulated in detail by a circular of 30 July 2004<sup>61</sup>. Entry requirements include a university degree or professional experience from the social, health, or legal domain<sup>62</sup>. Although the offer of mediation services is not formally conditioned upon such qualification, the State certificate sets a standard for mediators' training, and institutionalized professionalism in family mediators (Bonafé-Schmitt 2009, 48; for more concrete information on such a diploma, see Jacob and Piovesan 2011; Bonafé-Schmitt 2009).

Moreover, in 2012, Decree no. 2012–66<sup>63</sup> — which was adopted following Ordinance no. 2011–1540, as a means of transposition of Directive 2008/52/EC — regulated the '*médiation conventionnelle*', which until that moment was governed by rules self-established by professional associations only (Martín Casals 2005, chapter 2.4.2.2). The decree modified the Code of Civil Procedure, inserting a new Title V in the CPC on the 'Amicable Resolution of Disputes' ('*La résolution amiable des différends*'). Art. 1528 CPC now states that "parties to a dispute, on their initiative and subject to the conditions set forth in the present title, may try to resolve amicably their disputes through the assistance of a mediator or a conciliator, or with the aid, in a non-adjudicative procedure, of their lawyers". Rules dedicated to the '*médiation conventionnelle*' (Arts. 1532–1535, and 1565–1568 CPC) are indeed few, and only set some basic requirements for a mediator (arts. 1532–1533

57. The article was amended by the Law 2004–439 of 26 May 2004, on divorce.

58. Art. 373–2–10 Code civil was amended by the Law 2002–3005, of 4 March 2002, on parental authority. For divorce proceedings and disputes over parental authority, Art. 15 of Law 2011–1862 of 13 December 2011 provided to test, between May 2013 and December 2014, a system of mandatory mediation in the tribunals of Bordeaux and Arras: Directorate-General for Internal Policies 2014, 29.

59. Decree of 8 October 2001 on the creation of a National Council for family mediation (*Arrêté du 8 octobre 2001 portant création du Conseil national consultatif de la médiation familiale*).

60. See the Decree no. 1166–2003 of 2 December 2003, on the State diploma of family mediator (*Décret n° 2003–1166 du 2 décembre 2003 portant création du diplôme d'Etat de médiateur familial*).

61. Ministry of Employment, Labor, and Social Cohesion, Circular N° DGAS/4A/2004/376, 30 July 2004, on the requirements for obtaining the State Diploma of Family Mediator and on the organization of the exams, at [mediation-familiale.info/download/circulaire\\_formation\\_mediation\\_2004.pdf](http://mediation-familiale.info/download/circulaire_formation_mediation_2004.pdf).

62. Art. 2 of the Decree no. 1166–2003.

63. See the Decree no. 2012–66 of 20 January 2012 on the amicable resolution of disputes.

CPC) and for the homologation of domestic and foreign agreements that the parties enter into if mediation is successful (arts. 1534–1535 and 1565–1568 CPC). The new rules do not deal with mediation proceedings, which are therefore still governed by the guidelines set forth by professional practice.

No legal aid is provided to those who access voluntary mediation services. There is no doubt that the new rules apply to family disputes as well, though, as said, recourse to out of court mediation in family settings is not very common. It may nevertheless be chosen by parties who, for instance, want to overcome problems that have sprung from the execution of a separation or divorce order (Martín Casals 2005, chapter 2.4.2.2).

In sum, family mediation in France has established itself institutionally and professionally. It should however be noted that the success of family mediation has not been as great as its advocates expected, and that the number of family conflicts submitted to family mediation is still quite low (Parkinson 2011, 347–348; Martín Casals 2005, chapter 2.4.2.2; Sassier 2001, 67) — a failure for which many blame the French judicial culture, and its deep attachment to traditional adjudicative methods of dispute settlement (see the authors quoted by Martín Casals 2005, chapter 2.4.2.2).

### 3.4. Belgium

The Belgian experience of family mediation is another success story (see, among many others, Demeyere 2014; Verougstraete 2013; Verougstraete 2012, 20–32; Debuyck 2010; van den Steen (nd); Martín Casals 2005, chapter 2.4.4.2).

Since 1987 many associations of parents and experts in family matters have offered mediation services, alongside or in conjunction with public family-oriented services (van den Steen (nd), 5–6; Renson 2008, 113, 123). At the beginning of the 1990s the first organizations promoting family mediation were constituted<sup>64</sup>. Slowly, mediation became a subject for graduate and post-graduate studies<sup>65</sup>. At least in the French-speaking part of the country, family mediation became a trend-setter for the development of other types of mediation (Aertsen 2000, 162–163). The Belgian legislator has been very active in favoring recourse to mediation in family settings. In 2001<sup>66</sup>, in the middle of a period of intensive reforms on family matters (suf-

64. The most important of them, nowadays, is the *Association pour la médiation familiale*, created in 1999: see [amf.be](http://amf.be).

65. See for instance the ‘*Certificat interuniversitaire en médiation*’ offered since 2011 by the four university institutions of *Facultés Universitaires catholiques de Mons* (FUCaM), *Facultés Universitaires Notre-Dame de la Paix à Namur* (FUNDP), *Facultés universitaires Saint Louis à Bruxelles* (FUSL) and *Université catholique de Louvain à Louvain-la-Neuve et Bruxelles* (UCL): [uclouvain.be/202377.html](http://uclouvain.be/202377.html).

66. Through the law of 19 February 2001 on family mediation in the context of family proceedings

face it to say that the Belgian legislator imposed the rule on joint custody in case of parents' separation/divorce in 1995<sup>67</sup>, legalized same-sex marriages in 2002<sup>68</sup>, and allowed same-sex couple to apply for adoption in 2006<sup>69</sup>, a special section on family mediation (articles 734-*bis* — 734-*sexies*) was inserted in the Judicial Code (*Code judiciaire*)<sup>70</sup>. The new articles allow judges adjudicating disputes concerning the consequences of marriage, divorce, parental responsibility and cohabitation to appoint a mediator, on her/his own initiative or at the request of the parties, provided that the parties agree with such a decision.

In 2005, these provisions were repealed by an Act that created a new partition in the Judicial Code (Part VII, articles 1724–1737) on civil mediation in general, thus incorporating family mediation in the more general discipline devoted to mediation in civil law matters<sup>71</sup>. The Act set up a Federal Commission of Mediation consisting of one general commission and three specific commissions devoted, respectively, to family matters, civil and commercial matters and social matters<sup>72</sup>. The general commission is entrusted with the approval of organisations providing training for mediators and their training programmes; establishing standards for the certification of mediators according to the type of mediation; certifying mediators (practicing judicial mediation); imposing disciplinary sanctions on mediators, including removal; and developing a code of practice of mediators<sup>73</sup>.

According to these rules, which apply both to domestic and transnational conflicts, there are two types of mediation: voluntary mediation, i.e., mediation unrelated to judicial proceedings (articles 1730–1733 of the Judicial Code), and judicial mediation, i.e., mediation occurring under the control of a judge (articles 1734–1737 of the Judicial Code). For both types of mediation, the Code provides rules on the voluntariness of the mediation process (Art. 1729), on mediators' requirements and duties (Art. 1726), and on the confidentiality of the information gathered during the mediation process (Art. 1728). With regard to both voluntary and judicial mediation, special rules are dedicated to the mediation process and to the homologation of

(*Loi relative à la médiation en matière familiale dans le cadre d'une procédure judiciaire*). Belgian legislative texts are available at [ejustice.just.fgov.be](http://ejustice.just.fgov.be).

67. Law of 13 April 1995.

68. Law of 13 February 2003.

69. Law of 21 April 2006.

70. The text of the Code is available at [droitbelge.be](http://droitbelge.be).

71. Through the law of 21 February 2005, modifying the Judicial code as far as mediation is concerned (*Loi modifiant le Code judiciaire en ce qui concerne la médiation*).

72. See article 1727 of the Judicial Code. Each commission has six members: two civil law notaries, two lawyers and two representatives from the mediators who are neither civil law notaries nor lawyers. All the members should be experts in mediation.

73. See art. 1727(6) of the Judicial Code.

the agreement reached by the parties<sup>74</sup>. The main difference between the two types of mediation is that, in the case of voluntary mediation, there is no requirement for the mediator to be certified by the Federal Commission of Mediation. Yet the fact that a mediation agreement may be enforced by a court only when the mediator who helped reaching it was certified (see Art. 1733 of the Judicial Code), limits the market for uncertified mediators.

In light of the comprehensiveness of the 2005 reform, the Belgian legislator has introduced no new provision to implement Directive 2008/52/EC. The only modifications that were carried out in 2011<sup>75</sup> concerned divorce proceedings, where judges were charged with the duty to inform the parties on the possibility of mediation, and to stay the proceedings on their initiative to give parties time to consider mediation<sup>76</sup>.

### 3.5. Spain

Amidst Southern European countries, Spain is the only legal system where family mediation has been widely practised since the beginning of the 1980s, mostly by psychosocial teams attached to family courts (on the Spanish framework of family mediation, cp. Tarrazón and Gili Saldaña 2014; Villamarín Lopez 2013; Perez Martell 2012; Bravo Bosch 2012; Ortiz and Jiménez 2011; Fernández Canales *et al.* 2010; Martín Casals 2005, chapter 2.2; García Villaluenga 2007).

The practice was then favored by a legislative reform which, in 1981, made it possible to get a divorce by mutual agreement<sup>77</sup>. By the end of the 80s, family mediation services — often with the support of judicial institutions — were provided by specialized centers in the main cities of Spain (Ortiz and Jiménez 2011, 167). Resort to mediation in family matters was later boosted by the activism shown by the central and regional legislators — being Spain a plurilegislative State where procedural rules are uniform, but different regions have different civil law systems regulating certain areas of private law. Such laws coexist with central rules establishing the default civil law system for the whole country (Bradley 2012, 322–3).

Let us start with the regional level. During the 1990s, family mediation

74. See, for voluntary mediation, articles 1731 and 1733 of the Judicial Code; for judicial mediation, see articles 1734–1735 and 1736 of the Judicial Code. It is worth noting that both articles 1733 and 1736 of the Judicial Code provide that the judge may refuse ratification if the agreement is contrary to public policy or, in the case of family mediation, if the agreement is detrimental to the interests of underage children.

75. By law of 5 April 2011 on divorce proceedings (*Loi modifiant le Code judiciaire en ce qui concerne la comparution personnelle et la tentative de conciliation en cas de divorce, et instaurant une information sur l'existence et l'utilité de la médiation en matière de divorce*).

76. See new articles 1254(4/1), 1255(6), and 1280 of the Judicial Code.

77. Law 30/1981, of 7 July 1981, modifying articles 82–87 of the Civil Code.

was offered and promoted by various associations, and in 2001 Catalonia enacted the first law concerning family mediation<sup>78</sup>. The Catalonia experiment was immediately followed by the adoption of analogous acts by other Autonomous Communities (for a list of such acts, see Ortiz and Jiménez 2011, 180–185; García Villaluenga 2007, 11–12; Martín Casals 2005, chapter 2.2; an in–depth analysis of some of these acts can be found in Bravo Bosch 2012, 15–24; López San Luis 2010, 149–168, and Fernández Canales 2010, 415–431). Though different from one another, these Acts all charge public centers with the tasks of organizing mediation, regulating the practice of professional mediators, and setting requirements for becoming a mediator (Bravo Bosch 2012, 13; Martín Casals 2005, chapter 2.2). Laws on mediation by Autonomous Communities generally provide for family mediation services which may be accessed by any family member (parents, grandparents, brothers and sisters, family carers, alimony recipients, and so on) and for any type of familial conflicts (Bravo Bosch 2012, 10; García Villaluenga 2007, 13).

These changes did not occur in a vacuum. At the central level, the divorce law in 1981 started a move towards privatization of family law, which was then confirmed and intensified by subsequent reforms, reaffirming the system's preference for consensual separation/divorce, and the importance of protecting the autonomy of the parties in the governance of family relationships. Articles 771(3), 773(1), and 774(1) of the Law of Civil Procedure no. 1/2000, of 7 January 2000, urged parties to choose consensual separation/divorce rather than separation/divorce by adjudication. Subsequently, Law no. 15/2005 of 8 July 2005, modifying the Civil Code and the Law of Civil Procedure with regard to separation and divorce<sup>79</sup>, introduced in the Civil Code a new article 90 on children's joint custody, and inserted in the Law of Civil Procedure articles 777(2) and 777(5), which affirm the right of the parties to a separation/divorce proceeding to request the judge to suspend the proceedings and resort to mediation in order to settle the dispute.

It is worth mentioning that, in the same period, a number of other reforms on family law issues, all promoting parties' autonomy in family relationship, were adopted. Suffice it to recall: Law no. 42/2003, of 21 November 2003, which modified the Civil Code and the Law of Civil Procedure as far as relationships between grandparents and children are concerned; Law no. 1/2004, of 28 December 2004, establishing measures of protection against gender violence; Law no. 13/2005, of 1 July 2005, which modified the

78. Law no. 1/2001, of 15 March 2001, on family mediation in Catalonia.

79. *Ley 15/2005, de 8 de julio, por la que se modifican el Código Civil y la Ley de Enjuiciamiento Civil en materia de separación y divorcio*. Spanish legislative texts can be found at the website *boe.es*.

Civil Code rules on the requirements for marriage, and allowing same-sex marriages; Law no. 39/2006, of 14 December 2006, on the protection of dependents; Law no. 3/2007, of 22 March 2007, promoting effective equality between men and women.

The culmination of this process was reached in 2012, when the Spanish Parliament adopted the new Law on mediation no. 5/2012, of 6 July 2012, incorporating Directive 2008/52/EC<sup>80</sup> (for a comment on its provisions, though with regard to the bill, see Perez Martell 2012; Ortiz and Jiménez 2012, 176). The law deals with both cross-border and domestic mediation, and is applicable to all forms of mediation in civil and commercial matters, provided that they do not affect any rights and obligations that are not available to the parties under the applicable law Art. 2(1)<sup>81</sup>. According to legal commentators, the law shall apply to family mediations involving disputes over disposable rights, such as the common residence of spouses, family property, alimony, pension rights and survivors' benefits, and certain issues about succession (Bravo Bosch 2012, 11; Ortiz and Jiménez, 2011, 176; García Villaluenga 2007, 14).

The Law no. 5/2012 officially empowers mediation centers, acting under the control of the Ministry of Justice, to provide mediation services (Art. 5), and designate rules concerning the common qualifications for mediators (Art. 11, according to which mediators need not necessarily be lawyers, but should have received a specialized training on mediation). A few rules are devoted to the mediation process itself (see Arts. 16–23), which is always voluntary (Art. 6). There is no provision concerning legal aid for accessing mediation services.

These rules now provide a general framework for regional Acts on family mediation. It remains to be seen, however, how regional Acts will interact with the central one, especially in cases where the regional and central sets of rules are conflicting — as, for instance, in the case of training of mediators, where the national standard does not require mediators to have a background in law, while the requirements imposed upon family mediators by regional Acts include an adequate legal training (Bravo Bosch 2012, 13).

80. *Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles.*

81. Art. 2(2) excludes from the scope of the law any form of mediation dealing with: criminal law; relationship with the public administration; labor law disputes; consumer law.

## B. Works in Progress

### 3.6. Germany

The state of the art of family mediation in Germany is not easy to assess.

On the one hand, as we will see, since the mid-1980s professional associations have vigorously promoted the development of family mediation services. On the other hand, associations' activism has been accompanied neither by a massive recourse to the practice, nor, at least up until the 2011, by a corresponding increase of normative attention to mediation in family settings (on these phenomena, see Dendorfer-Ditges and Glässer 2014; Tochtermann 2013; Hess and Pelzer 2013; Morek 2012; Koenig 2012, 131–147; Alexander, Gottwald, Trenczek 2003; Martín Casals 2005, chapter 2.4).

Family mediation appeared in the mid-1980s in the south of Germany and spread to the north only at the beginning of the 1990s (Martín Casals 2005, chapter 2.4). In 1992 a group of family mediators educated in the United States created the *Bundesarbeitsgemeinschaft für Familienmediation* (BAFM), to train specialists from different professional backgrounds (mostly lawyers and psychologists) in family mediation<sup>82</sup>. The BAFM rapidly became the standard-setter for mediators' practice, and the main source of specialised training for mediators. For instance, the BAFM adopted in 1995 its *Richtlinien für die Mediation in Familienkonflikten*<sup>83</sup>, which were subsequently endorsed by the Bundesverband für Mediation (BM), the main German association with regard to mediation services in general (Alexander, Gottwald, Trenczek 2003, 193, who state that “the BAFM guidelines have become the *de facto* national family mediation standards in Germany”; see also Martín Casals 2005, chapter 2.4).

Further, German mediators' associations have also been very proactive in the field of cross-border mediation. In 2002 the BAFM began a pioneer project in the field of cross-border family mediation, and in 2008 founded, together with the *Bundesverband für Mediation* (BM — Federal Association of Mediation), the *Mediation bei Internationalen Kindschaftskonflikten* (MiKK e.V.

82. It is worth mentioning that the German bar strongly opposed BAFM's training policy, on the assumption that mediation, as a legal counseling activity, should be reserved to lawyers under § 1 *Rechtsberatungsgesetz* (RBerG), which provides lawyers with a monopoly in matters involving legal advice giving. For more details about this opposition, see Alexander, Gottwald, Trenczek 2003, 203. Since 1997 mediation has been expressly mentioned in the Professional Code for Lawyers (§ 18 *Berufsordnung für Rechtsanwälte*, BORA) as a legitimate part of a lawyer's role, specifying that, even when acting as a mediator, a lawyer remains subject to BORA. German legislative text can be found at [gesetze-im-internet.de](http://gesetze-im-internet.de).

83. The most recent version of the text, approved on November 16, 2008, is available at [bafm-mediation.de/organisation/richtlinien-der-bafm](http://bafm-mediation.de/organisation/richtlinien-der-bafm).

— Mediation in International Conflicts involving Parents and Children). The Mikk e.V. is a non-profit organization active in the field of mediation, providing support, advice and referrals in cases of cross-border child abduction, as well as visitation and custody conflicts<sup>84</sup>. Since its foundation, the organization has sponsored projects with officials, associations, and experts from other countries for facilitating family mediation in child abduction cases (in particular with France, Poland, Spain, the United Kingdom, and the United States. For more information about these projects, see Mikk e.V.'s website, at [mikk-ev.de/deutsch/binationale-mediationsprojekte](http://mikk-ev.de/deutsch/binationale-mediationsprojekte), plus Wright 2013, 15–6; Pali and Voet 2012, 93–103; Parkinson 2011, 362–364; Carl and Walker 2011, 86–92). Moreover, in 2007, the Mikk e.V. adopted the Wroclaw Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues, designing a model for cases of bi-national mediation. The model relies on two mediators: one man, and one woman; one from the legal realm and the other from the psycho-social sphere; one from the country (and speaking the same language) of a parent, and the other from the country (and fluent in the language) of the other parent<sup>85</sup>.

As all the above shows, in Germany it is the private sector which takes the lead in the training and education of mediators. Although interdisciplinary mediation certification programs are now being offered at postgraduate level by some German university, German law schools have traditionally been reluctant to include mediation theory and/or skills in their curricula (Alexander, Gottwald, Trenczek 2003, 194)<sup>86</sup>.

For a long time no measure on family mediation was adopted at the official level. While non-adjudicative proceedings were provided by the Act on voluntary jurisdiction (*Freiwillige Gerichtsbarkeit* — FGG<sup>87</sup>), status proceedings (paternity and divorce), and maintenance actions for minor children were regulated by the Code of Civil Procedure and left in the hands of judges (§ 606 ZPO). Things started to change only in 1998, when the Children's Law Reform Act introduced the rule of joint custody for children

84. See, for more information, Mikk e.V.'s website: [mikk-ev.de](http://mikk-ev.de). BAFM participates in Mikk e.V.

85. The text of the declaration can be accessed here: [mikk-ev.de/wp-content/uploads/wroclaw-declaration.pdf](http://mikk-ev.de/wp-content/uploads/wroclaw-declaration.pdf).

86. Yet the Law for the promotion of mediation and other procedures of extrajudicial conflict settlement (*Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung* — *MediationsG*), implementing Directive 2008/52/EC, of 25 July 2012 (on which see below in the text), now provides that the Department of Justice has the authority to enact a regulation establishing the requirements for certification, and specifying the required basic training and practical experience, amount of continued education, minimum hours for basic and advanced training and education, qualifications for trainers and coverage for final exams in mediation training. A proposal for Regulation was drafted in early 2014: Walsh 2014.

87. Act on Voluntary Jurisdiction (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*), of 20 May 1898.



of divorced couples, and modified the FGG law with the aim of promoting cooperative decisions in disputes involving children<sup>88</sup>. It is on the basis of such a reform that Germany has developed a specific type of court-based mediation where the mediation is conducted by a judge who does not have jurisdiction over the case during a pending court procedure.

In 2009, on the occasion of the adoption of the new procedural code for all family-related matters, the *Familienverfahrensgesetz* (FamFG<sup>89</sup>), the above mentioned provisions were incorporated into the FamFG. The FamFG also introduced new rules favoring resort to mediation, such as § 135 FamFG, which grants judges in family proceedings the power to invite the spouses to attend a free information session on mediation.

Finally, on 25 July 2012, the Law for the promotion of mediation and other procedures of extrajudicial conflict settlement (*Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung* — *MediationsG*), implementing Directive 2008/52/EC, was adopted. The Act applies to both domestic and international mediation, including family mediation. It establishes requirements (essentially, adequate and constant specialized training) for becoming a mediator and a national certificate for mediators (§§ 5–6) — both choices have been welcomed by the BAFM<sup>90</sup>. Moreover, the Act reformed the FamFG as far as mediation was concerned. While there is no obligation on the parties to participate in the mediation (Koenig 2012, 141), the new rules in place for in-court and out of court mediation, expressly state that a court may order the parties in a family dispute to attempt an amicable agreement before a judge other than the one who will pronounce the decision (§ 36(5) FamFG), or it may simply propose recourse to mediation or other methods of alternative dispute

88. Children's Law Reform Act (*Kindschaftsrechtsreformgesetz* — KindRG), of 16 December 1997. The new version of § 52 FGG encouraged the search for consensual solutions in family settings, providing that courts stay proceedings when mediation is in place, while § 52a FGG precised that, when one of the parents objects to mediation, the court may mediate between the parties. In the same year, the Children and Young Persons Assistance Act (*Gesetz zur Neuordnung des Kinder — und Jugendhilferechts* — KJHG, of 8 December 1998, as amended), which now forms the title VIII of the Social Code (*Sozialgesetzbuch* — SGB), conferred to the State Youth Welfare Office (*Jugendamt*) a central role in offering family mediation and helping parents pass through family crisis when the welfare of children is in danger (see § 17 SGB VIII). Three years later, in 2001, although not recognizing same-sex marriages, Germany began to allow registered partnerships for same-sex couples that give them the same sets of responsibilities as marriage: see *Lebenspartnerschaftengesetz*, 26 February 2001, BGBl.2001 I 226.

89. Law on the Procedure in Family Matters and in Matters of Voluntary Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*), of 17 December 2008.

90. *Bundes-Arbeitsgemeinschaft für Familien-Mediation (BAFM) zu dem Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung sowie anderer Verfahrensvorschriften aus FamFG und ZPO*, 25 July 2012, at [bafm-mediation.de/wp-content/uploads/image/images/BAFM\\_Presseerkl%C3%A4rung\\_MedG.pdf](http://bafm-mediation.de/wp-content/uploads/image/images/BAFM_Presseerkl%C3%A4rung_MedG.pdf).

resolution (§ 36a(1) FamFG).

In light of recent reforms, it may seem that the future of mediation in Germany is shining. In considering the impact of these Acts, however, one should keep in mind that under Germany's federal structure jurisdiction and its funding are mainly in the hands of the German *Länder*, which may concretely support and apply the Acts in different ways (Koenig 2012, 131). Moreover, even after the 2012 reform, legal aid is not yet available for those who resort to mediation (but the reform gives the States the option to introduce some incentives, and to reduce or even abolish certain legal fees if a claim is withdrawn after the parties come to a settlement agreement as a result of mediation)<sup>91</sup>.

It therefore remains to be seen whether the situation of the German market for family mediation, which for the time being seems not to be flourishing, will improve in the years to come. For the time being, very few mediators in Germany are able to make a living by mediation only. Most of them, alongside mediation services, engage in training activities for other mediators, or consider mediation as a mere supplement to their regular profession (Koenig 2012, 145).

### 3.7. *The Netherlands*

The practice of family mediation in the Netherlands is young, but relatively well-developed. From this perspective, the Dutch experience is fully in line with that of other North-Western European countries (see, e.g., Schonewille and Schonewille 2014; Schmiedel 2013; Pel 2013; Pel 2012; Pel 2012a; Pel 2008; Albers 2012; Jagtenberg and de Roo 2011; Pel and Combrink 2011; Vogels and van der Zeijden 2010; Neimeijer and Pel 2005; de Roo and Jagtenberg 2002; Martín Casals 2005, chapter 2.4.4). Yet, like in Germany, the enthusiasm with which Dutch professionals embraced mediation in family settings has been somewhat tempered by the passive resistance of the legal system towards its development in practice. The attitude taken by the Netherlands to the EU's embracing of the mediation idea is illustrative of this view. Dutch institutions strongly opposed the adoption of Directive 2008/52/EC, and, after its adoption, simply refused to implement it. In this light, the potential for mediation in the Netherlands still appears to be large.

As in Germany, family mediation established itself in the Netherlands at the end of the 1980s, mostly thanks to private associations, which were very active in promoting common standards for training and mediation activities (Martín Casals 2005, chapter 2.4.4). The socio-cultural framework against

91. See Mediation in Member States — Germany, at [e-justice.europa.eu/content\\_mediation\\_in\\_member\\_states-64-de-en.do?member=1](http://e-justice.europa.eu/content_mediation_in_member_states-64-de-en.do?member=1); Directorate-General for Internal Policies (2014), 32.

which these associations were created was characterized by the openness of Dutch family law. As is well known, in 1998 Dutch law introduced joint custody after divorce as the general rule for separating couples<sup>92</sup>; in the same year cohabitating couples and single persons were allowed to adopt children<sup>93</sup>; in 2001 the Netherlands was the first country in the world that recognized same-sex marriage and allowed same-sex couples to adopt children<sup>94</sup>. A similar openness may be found as far as divorce is concerned. Dutch law essentially affords the parties substantial autonomy in working out the legal consequences of a divorce — from parental authority and visitation rights, to the amount of alimony and maintenance in favor of the financially dependent ex-spouse and children. For instance, since 2008, the Act on Post-Divorce Continued Parenthood<sup>95</sup> requires divorcing parents to submit their parenting plan to the divorce court, that is, an agreement that indicates how their parental responsibilities will be exercised after separation (on these plans, Nikolina 2012). Insofar as the Act fosters collaborative solution, it creates a framework for negotiated outcomes and recourse to mediator services (de Roo and Jagtenberg 2002, chapter 8.1.1).

The typically Dutch favor for agreements between parties in family conflicts explains why Dutch divorce lawyers started to engage in family mediation, and rapidly felt the need to organize in a common association. In 1989 the *Vereniging van Advocaat-Scheidingsbemiddelaars* (VAS) (Association of Divorce Lawyers-Mediators) was founded<sup>96</sup>, and soon issued its own Rules of Professional Conduct and a standard Agreement to mediate (de Roo and Jagtenberg 2002, chapter 8.1.2).

The establishment of the VAS was rapidly followed, in 1993, by the creation of the *Nederlands Mediation Instituut* (Netherlands Mediation Institute), the first (and publicly funded) Dutch association for mediation in general. The NMI works as an umbrella organization, and aims to promote recourse to mediation services, coordinate programs for the training of mediators, maintain a register of accredited NMI-mediators, and establish rules and code of conduct for mediators (de Roo and Jagtenberg 2002, chapter 2; the NMI adopted its own Mediation Rules in 1995). In the (persisting) absence of a statutory framework regarding (family) mediation, and in light of the little consideration given to mediation by the graduate and post-graduate curricula in universities, it is the NMI and its rules that have set the standard for mediators, disputants, and judges (Pel and Combrink 2012, 31–32; de Roo

92. Law of 30 October 1997.

93. Act Amending the Law of Parentage and Adoption, of 24 December 1997.

94. See Act Opening Marriage to Same-Sex Couples, of 21 December 2000.

95. Act on Post Divorce Continued Parenthood (*Wet bevordering voortgezet ouderschap en zorgvuldige scheiding*), of 25 November 2008.

96. For more information, see the association's website at [verenigingfas.nl](http://verenigingfas.nl).

and Jagtenberg 2002, chapters 6–7). In 2010, approximately 4,500 mediators were affiliated with the NMI (800 of these mediators were certified ones: Vogels and van der Zeijden 2010, 5; Albers 2012, 368).

Far from being the unintended result of an inattentive legislator, the situation was exactly the one envisaged by Dutch official institutions. For a long time, the Dutch policy on mediation has been that of favoring the development of mediation by issuing the least number of rules possible on the issue, and by leaving to professional associations and groups the task of determining the quality standards for the service (Pel 2012a). From 1999 onwards, the Dutch government did so by financing pilot projects of court-referral to mediation (Pel 2012; Albers 2011, 360–361; Jagtenberg and de Roo 2011, 13–16). In 2004, the Minister of Justice officially announced the nationwide implementation of the referral services, and, since April 2005, courts have been able to refer parties to family conflicts to mediation during court proceedings (Pel and Combrink 2011, 26).

As a result, the route to mediation in the Netherlands now consists of two paths: (i) a mediation regime developed completely outside the sphere of courts, and (ii) a court-annexed mediation regime. This second path can be followed in two ways: either the court suggests mediation in writing to the litigants (written referral), or the court suggests mediation during a court hearing (oral referral) (Albers 2012, 361; Pel and Combrink 2011, 30). Once there is a referral to mediation, further processing of the case by the court is suspended for a period of three months, i.e., the maximum processing time for mediation (although this period of three months may be extended if the mediation takes more time) (Pel and Combrink 2011, 30). From April 2005 onwards, litigants entitled to legal aid within the framework of regular court proceedings are also entitled to legal aid for court-referred mediations (moreover, until 2011, in order not to create financial obstacles for litigants not eligible for legal aid, the Ministry of Justice subsidized for everybody the first 2.5 hours of the mediation: Pel and Combrink 2011, 33).

The Dutch legislator's minimalist approach towards regulation of family mediation led the Dutch government to attempt to block the EC Commission's initial effort to come up with a European mediation directive. After the adoption of Directive 2008/52/EC, the Netherlands chose, in implementing the Directive, not to enact a law dedicated specifically to mediation, but to make changes to the Civil Procedural Code such as those concerning the enforceability of the mediation agreement, the protection of confidentiality of medication, and the statute of limitations, in cross-border and domestic disputes alike (some details about these changes in Albers 2012, 359, 361–364). On September 2012, however, the Netherlands were referred by the Commission to the EU Court of Justice for failing to transpose EU

rules<sup>97</sup>. Under the pressure of the EU institutions, the Dutch parliament is now examining a bill to implement the directive into the Dutch legal system (de Puy Kamp 2013; Pel 2012a).

As all the above makes clear, the (short) history of mediation in the Netherlands largely runs parallel — as in Germany — with the history of private associationism in this field. In the Netherlands, as in Germany, many argue that mediation has been a booming business more for the providers of mediation courses rather than for mediators themselves. According to statistics, for the vast majority of mediators, mediation is not the only source of income. 93% of mediators have other working activities, or use mediation as a sideline only (Vogels and van der Zeijden 2010, 10).

## C. From Scratch

### 3.8. Italy

In Italy the practice of family mediation is spreading very slowly (cp. de Palo and Massidda 2014; de Palo and Keller 2013; de Palo and Oleson 2013; Marinari 2012; Cagnazzo 2012; Chiaravalloti and Spadaro 2012; Martín Casals 2005, chapter 2.2). The limited success enjoyed by family mediation procedures in Italy seems to be related both (i) to the general reluctance of judges, lawyers, and litigants, to respectively encourage and resort to ADRs, and (ii) to the absence of a clear regulatory framework, specifically tailored to a regime for mediating family disputes.

(i) On the one hand, statistics show that the Italian legal culture is deeply attached to traditional adjudication mechanisms. Although a legal framework for mediation in civil and commercial matters has existed since 1993, recourse to mediation is still negligible (Marinari 2012, 188). The Italian legislator tried to invert this trend through the Legislative Decree no. 28 of 4 March 2010, which implemented the Directive 2008/52<sup>98</sup>. The decree made mediation in some civil (not including family) and commercial law disputes compulsory before litigation (Art. 5(1)). Moreover, it encouraged resort to mediation by: allowing judges to invite the parties to mediate when they find it appropriate (Art. 5(2)); obliging lawyers to inform their clients about the mediation opportunity (Art. 4(3)); making legal aid (Art. 15) and financial

97. See [news-europa.eu/portal/index.php/justice-fundamental-rights-home-affaires/item/9941-cross-border-legal-disputes-commission-takes-cyprus-and-the-netherlands-to-court-for-failing-to-transpose-eu-rules](http://news-europa.eu/portal/index.php/justice-fundamental-rights-home-affaires/item/9941-cross-border-legal-disputes-commission-takes-cyprus-and-the-netherlands-to-court-for-failing-to-transpose-eu-rules).

98. Legislative Decree no. 28 of 4 March 2010, on mediation in civil and commercial matters (*Decreto legislativo 4 marzo 2010, n. 28, Attuazione dell'art. 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali*).

incentives (Arts. 17 and 20) available to parties who choose mediation (Art. 15). However, the legislator's plan partly failed, since the provision regarding compulsory mediation was declared invalid by the Constitutional Court in 2012<sup>99</sup>. Compulsory mediation has now been reintroduced by art. 84 of the law decree no. 69 of 21 June 2013, as amended by law no. 98 of 9 August 2013.

(ii) On the other hand, the legislator has thus far refrained from setting up a clear and comprehensive regime for family mediation. The only express reference to mediation in family settings is contained in the Civil Code, in a few articles which were introduced in the 2000s. More in particular, articles 342–*bis* and 342–*ter* of the Italian Civil Code, created by a 2001 law against family violence<sup>100</sup>, provide that a judge may require the intervention of family mediation centers in connection with restraining orders in cases of family abuses within families. According to Article 155–*sexies* of the Civil Code, which was inserted in the Code in the framework of a 2006 family law reform introducing the rule of joint custody in separation proceedings<sup>101</sup>, the judge may (or must, if the circumstances so require) refer the parents to a family mediator so that they can try to reach more adequate and stable arrangements.

This scanty legal framework has not been substantially enriched by the adoption of the above mentioned legislative Decree no. 28/2010, since the extent to which the latter may apply to family mediation is unclear. Art. 2(I) of legislative Decree no. 28/2010 states that everyone shall have access to mediation provided that the parties may freely dispose of the rights in dispute. The majority of legal commentators agree that the article shall be read as excluding family mediation from the scope of the Act (Directorate–General 2014, 42; Cerrai 2012, 292; Chiaravalloti and Spadaro 2012, 137–138).

Against such a legislative scenario, family mediation keeps developing informally, mostly through the good practices and policies crafted by professional groups and associations of mediators, such as the *Società Italiana di Mediazione Familiare* (SIMEF, founded in 1995)<sup>102</sup> and the *Associazione Italiana Mediatori Familiari* (AIMEF, established in 1999)<sup>103</sup>. Up to now, it is

99. Constitutional Court, 26 December 2012, n. 272, in O.J. 12 December 2012.

100. Law of 5 April 2001, n. 154, implementing measures against family violence (*Legge 5 aprile 2001, n. 154, Misure contro la violenza nelle relazioni familiari*). The text of the Civil Code is available at [altalex.com](http://altalex.com).

101. Law of 8 February 2006, n. 54, implementing measures on separation and shared parenting (*Legge 8 febbraio 2006, n. 54, Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli*).

102. More information at the website [simef.net](http://simef.net).

103. See the website [aimef.it](http://aimef.it).

these groups and associations that offered training services and established the rules of conduct for family mediators (Varano and De Luca 2007, 16). In 2010 these associations lobbied for the adoption of a law regulating the access to the profession of family mediators, but so far their efforts have not succeeded<sup>104</sup>.

### 3.9. Cyprus

As a legal system heavily influenced by common law<sup>105</sup>, Cyprus has a strong culture of judicial non-adjudicative settlement of (family) disputes (McLean 2006, 301), yet alternative dispute resolutions are still in their early stages. This holds true for mediation as well (Georgiades 2014; Georgiades 2012, 48; Georgiades 2012a).

Although there exists a Cyprus Mediation Association, which offers its services to all private sector disputes, including family disputes<sup>106</sup>, the recourse to mediation is still limited (Georgiades 2012, 48).

Moreover, for the great majority of Cyprus citizens, family matters are subjected to religious arrangements: for instance, Art. III of the Constitution preserves on these issues the powers of the Greek Orthodox Church of Cyprus and of its religious courts, and civil marriage was only introduced in 1989, with Law no. 95/89 on the First Amendment of the Constitution (Nicolau 1998, 131–2).

It is thus not surprising that judges in Cyprus are neither required nor have the power to encourage mediation, and that there is no legal aid program covering mediation (CEPEJ 2014, 109; CEPEJ 2012, 141). In 2011, a draft Bill on the implementing measures of Directive 2008/52/EC had been prepared by the Ministry of Justice in 2011, but to date it has not been approved (Georgiades 2012, 48). As a consequence, in September 2012, the EU Commission referred Cyprus to the Court of Justice of the EU for failure to transpose the mediation directive<sup>107</sup>.

In any case, even if the Bill becomes law, its enactment is not likely to change the current state of family mediation in Cyprus. According to Art. 1(2) of the Bill, family disputes fall outside its scope of application, which

104. For more information concerning this bill, see SIMEF's website, at [simef.net/blog/blog-articolo-di-prova.html](http://simef.net/blog/blog-articolo-di-prova.html).

105. As a former British colony, the Cyprus' legal system is heavily influenced by English law. According to many scholars, Cyprus should be considered as a mixed jurisdiction: see Palmer 2012, 379.

106. More information are available at [cymedas.com/english/family\\_mediation.php](http://cymedas.com/english/family_mediation.php).

107. See [news-europa.eu/portal/index.php/justice-fundamental-rights-home-affaires/item/9941-cross-border-legal-disputes-commission-takes-cyprus-and-the-netherlands-to-court-for-failing-to-transpose-eu-rules](http://news-europa.eu/portal/index.php/justice-fundamental-rights-home-affaires/item/9941-cross-border-legal-disputes-commission-takes-cyprus-and-the-netherlands-to-court-for-failing-to-transpose-eu-rules).

covers only mediation in cross-border civil and commercial disputes (see Arts. 2 and 3(2) of the Bill).

### 3.10. Greece

For a long time family mediation has not been used in Greece (cp. Triantafyllou and Bakatselou 2014; Klamaris and Chronopoulou 2013; Anthimos 2012; Anthimos 2012a; Triantafyllou 2012, 59–63; Panagiotis 2011; Anastassopoulou and Cotsaki 2010; Martín Casals 2005, chapter 2.2)<sup>108</sup>. This reluctance to resort to mediation seems to be unrelated to the absence of a regulatory framework favorable to alternative dispute resolutions mechanisms. On the contrary, such framework was well-established, at least on paper<sup>109</sup>.

The Greek legal system indeed offers a vast array of conciliation options in family conflicts. Article 681B of the Greek Civil Procedure Code<sup>110</sup>, concerning disputes on alimony and child custody, for instance, provided (and provides) that the court before which such disputes are brought is obliged to make an attempt to conciliating the parties at the hearing (there is however no sanction for the omission of such an attempt). Article 681C, para 2(b), of the same Code, sets forth a similar obligation for disputes regarding parental obligations and communication between parents and minor children, stating that omitting to attempt conciliation may lead to the invalidity of the subsequent proceedings. Finally, one should also mention Article 602 of the Code of Civil Procedure, which also provides for an attempt for conciliation by the court during the hearings of a divorce action.

To these provisions regarding conciliation, one should now add the rules on mediation contained in Law no. 3898/2010, which implemented Directive 2008/52/EC<sup>111</sup>, and the new Art. 214B of the Civil Procedure Code, introduced by Law no. 4055/2012<sup>112</sup>. Yet, as we will immediately see, the point remains that the options offered by the legislator have been very little used by judges, lawyers, and litigants, and so far very few cases have been

108. Insights and comments from Prof. Penelope Agalopoulou have been invaluable in the drafting of this paragraph.

109. See, for instance, the many articles of the Greek Code of Civil Procedure (in particular articles 208, 209–212, 233, 667 of the Greek Civil Procedure Code) allowing the parties to resolve a civil or commercial dispute by means of a conciliation agreement. In 2011, Art. 233(2) of the Greek Civil Procedure Code was amended by law n. 3994/2011, and now provides that, if the case involves a private law dispute for which the parties are allowed to reach a settlement, and the parties are present, the court may attempt to resolve the dispute by means of a settlement.

110. Κώδικας Πολιτικής Δικονομίας, at [ministryofjustice.gr/site/kodikos](http://ministryofjustice.gr/site/kodikos).

111. Law 3898/2010, of 16 December 2010, on mediation in civil and commercial matters (Διαμεσολάβηση σε αστικές και εμπορικές υποθέσεις). Legislative texts are available at [ministryofjustice.gr](http://ministryofjustice.gr).

112. Law 4055/2012, of 12 March 2012, on fair and equitable trial (Δίκαιη δίκη και εύλογη διάρκειά της).



settled through mediation (Anthimos 2012, 149, 157; Anastassopoulou and Cotsaki 2010, 2).

The phenomenon is hardly surprising when one looks at the provisions on mediation against the legal, economic, and cultural context surrounding family mediation in Greece. Despite the vast array of ADRs options that the Greek legal system offers to the parties, the success of mediation is limited by many facts. There is no public legal aid funding for those who resort to mediation (CEPEJ 2012, 141). In the country's territory, there are only three main mediation providers: the Athenian Centre for the training of mediators, in Athens, the Institute for training mediators in Thessaloniki, and the Piraeus Mediation Center, in Piraeus. Judges and lawyers do not receive any education regarding mediation and other ADRs, either at the university or in their post-graduate/professional training (Anthimos 2012, 157–158, noting however, at 157, that “a number of very welcoming short monographs and essays on mediation have been published over the last few years in Greek law reviews and periodicals”; Anthimos 2012a; Anastassopoulou and Cotsaki 2010, 6–7). Moreover, although joint custody of children after divorce is theoretically possible, it is not widely used. According to the Greek Civil Code, custody of minor children in case of divorce is to be assigned by the courts (see Art. 1513 of the Civil Code), which usually give it to one parent only (Boele-Woelki, Braat, Curry-Sumner 2005, 285–286).

It is unclear whether the state-of-the-art on the matter is going to change after the adoption, in December 2010, of Law no. 3898/2010 on ‘Mediation in Civil and Commercial Matter’. The law applies to domestic as well as cross-border disputes, insofar as the parties are entitled to freely dispose of their object (Art. 2). Family law conflicts are included within the scope of the Law, as is demonstrated by Art. 10(2), which provides for an exception to the confidentiality of mediation proceedings when it is necessary to ensure the protection of the best interest of children.

According to the Mediation law, mediation may begin on the parties' initiative before or after notice of a lawsuit is given (Art. 3(1)), or on the court's initiative, if the court asks the parties to seek recourse to mediation (Art. 3(2)). Recourse to mediation is never mandatory: the law does not contain any provision mandating disputants to try mediation prior to filing their cases, or sanctioning them for not using mediation before or after the judicial proceedings, even in cases where they omit to comply with the Court's invitation to mediate (Anthimos 2012, 153).

According to the same law, mediation in domestic disputes can only be conducted by lawyers who have been adequately trained, and have been accredited as mediators by the Greek Ministry of Justice (Art. 7). Mediators in cross-border disputes should be accredited mediators, who are not required to be lawyers (Art. 4(c)). Participation of lawyers is mandatory throughout

the whole procedure (Art. 8(1)), but there is no provision granting legal aid for covering the mediator's fees (Anthimos 2012, 153).

Finally, in 2012, the normative framework of rules on mediation was further enriched by Law no. 4055/2012 on 'Fair trial and its reasonable duration', which added a new article 214B on Judicial Mediation to the Greek Code of Civil Procedure. According to article 214B, judicial mediation is optional and confidential, and is offered in cases of private disputes. The parties along with their lawyers may resort to separate and joint hearings and discussions with the judge–mediator who may suggest non–binding proposals to resolve their dispute.

## 4. The Way Ahead

### 4.1. *Concluding Remarks*

The comparative survey of the eight European jurisdictions herein studied confirms that family mediation did not develop homogeneously across European countries.

Although the absence of comparable statistical data about mediation in European countries makes it difficult to assess the factors determining the rate of success of family mediation services, some tentative conclusions may be drawn from the above overview.

There is no doubt that many factors impact on the parties decision to resort to mediation rather than pursuing more aggressive methods of dispute resolution. Yet some characteristics appear to be of little relevance in paving the way for a widespread recourse to mediation in family settings. Among these, one could include (a) the general legal attributes of legal systems — e.g., their being based on civil law or common law (or both). Family mediation is well–established in England but virtually unknown in Cyprus, which is largely a common law country. The lack of any correlation between a legal system's adherence to the civil law tradition and its approach towards mediation (see above the differences emerging, for instance, between France, Germany, and Italy) is even more evident.

Similarly irrelevant seems to be (b) the length of a jurisdiction's exposure to multiculturalism in family law. This factor shows no significant relation with the approach jurisdictions reserve to family mediation. In 2008, for instance, the share of foreign–born population as a share of the total population was high in Spain (around 14%), Germany (around 12%), Greece, France, the Netherlands, and the United Kingdom (around 11%), and a bit lower in Italy

(7%) — data are not available for Belgium and Cyprus<sup>113</sup>. If we compare these numbers with the results of our survey, we immediately see that the rate of success of family mediation in a country has not necessarily corresponded with that percentage of that country's foreign-born population.

The effect that other factors may have on family mediation is more ambivalent. For instance, consider (c) the diffusion enjoyed by mediation and other ADRs in private law conflicts. In some instances, such as in the case of Cyprus and Greece, the low rate of recourse to ADRs for private law disputes seems to be a proxy for the reduced success of mediation in family settings. But in other jurisdictions, the success of family mediation services displays no evident connection with the success enjoyed by ADRs in other contexts. Let us, for instance, take the case of England (and Wales), Spain, and the Netherlands. In England (and Wales) family mediation has a larger share of the market than civil mediation, but both forms of mediation have overall been successful. In Spain, family mediation essentially covers the whole market for mediation, which is virtually non-existent outside family disputes. In the Netherlands, family mediators handle six times more cases than civil mediators (CEPEJ 2014, 205). Yet the first two jurisdictions are much more mediation-oriented in private settings than the third one.

In other cases, there seems to be a correlation, but its direction is unclear. This is, for instance, in the case of (d) the intensity of regulatory approaches on family mediation. Here too, there are cases where the number of legal rules on mediation seems to have a correlation with the (non)success of family mediation. In France, Belgium, and Spain, for instance, the legislator actively supported the rise of family mediation in practice; in the other extreme, the absolute lack of normative provisions on mediation in Cyprus tells us something about the very low rates of recourse to family mediation. Yet, on the one hand, the absence of a normative framework on family mediation has not prevented the development of family mediation services in the Netherlands. On the other hand, the presence of legislative options for family mediation has had a very little impact on the practice in Greece.

Similar remarks may apply to (e) the technicalities surrounding mediation services, especially those regarding the costs of the mediation process and the availability of legal aid. We were not able to gather data about the costs of mediation services, either in public or in private settings, although it can be stated that in many countries there is a sense that mediation has lower costs than other forms of dispute settlements, including adjudication by courts (see the authors quoted above, no. 2.3). As to the availability of

113. See Eurostat, *Migrants in Europe. A statistical portrait of the first and second generation*, 24, at [epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-31-10-539/EN/KS-31-10-539-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-31-10-539/EN/KS-31-10-539-EN.PDF) (data about Belgium and Cyprus are not available).

legal aid, what can be said is that the majority of the jurisdictions surveyed make legal aid available for accessing mediation services; the only three that do not — Germany, Cyprus, and Greece (see below, respective at nos. 3.6, 3.9 and 3.10) — are countries where family mediation is not enjoying high rates of success.

Equally, as to (f) the inclusion of mediation in the curricula of law schools, in countries where family mediation is well-established, literature on mediation is quite rich, and specialized graduate and postgraduate courses in mediation are offered by many universities. In contrast, in countries such as Italy, Cyprus, and Greece, family mediation seems not to have attracted the attention of scholars and academics. Yet both for legal aid and the establishment of mediation as a scientific and scholarly discipline, it is difficult to understand whether these factors prompted, or were prompted by, the development of family mediation.

On the contrary, the history of mediation in the jurisdictions surveyed tend to show that no development of family mediation is possible without (g) the support of enthusiastic individual practitioners and strong professional associations promoting the recourse to mediation. In all the countries where mediation is (more or less) recognized as an important method of solving family disputes, mediation and other alternative dispute resolution approaches have been developed by gifted and charismatic individuals, who achieved local success (McLean 2006, 300). In all these countries now there are strong national or regional associations of family mediation around which the profession is organized. The history of these movements cannot be separated from the emergence and diffusion of mediation services, insofar as these associations are primarily responsible for the increasing professionalism of mediators and the increasing public awareness of the availability of mediation as an option for settling family disputes.

Further, the data collected displays, what in certain respects may seem a remarkable correlation between the success of family mediation and (h) a country's religiosity. According to the Eurobarometer Poll 2010, the three jurisdictions — Cyprus, Greece, and Italy — where family mediation is less developed have some of the highest rate of religiosity in Europe (Cyprus 88%, Greece 79%, Italy 74%). By contrast, jurisdictions where family mediation rapidly diffused are characterised by the lowest religiosity scores: France, 27%; Belgium and United Kingdom, 37%. More difficult to assess is the position of Spain, the Netherlands, and Germany. In Spain, family mediation has enjoyed great success, but the population's rate of religiosity is relatively high (59%). As to the Netherlands and Germany, it remains to be explained why, though the two countries have low religiosity rates (respectively, 28% and 44%), family mediation has

not enjoyed the expected success<sup>114</sup>.

These data can be better understood when one adds to the picture the invariable positive correlation between the development of family mediation and (i) the flexibility of family law rules. The sooner the regulation of family law becomes inspired by principles of flexibility and parties' autonomy (with regard, for instance, to child custody, adoptions, divorces, civil unions, and same-sex marriages), the sooner family mediation develop. Some of these rules have a direct effect on the suitability of mediation as a method of dispute settlement. For instance, where joint custody of the children in case of separation/divorce is the rule, the need for reaching a sustainable agreement between the parents may easily boost the recourse to mediation rather than another type of proceedings (Vogels and van der Zeijden 2010, 27). Other rules, by contrast, have no direct impact on the offer and demand of mediation services. However, all the jurisdictions where family mediation first evolved were enacting, or were going to enact major reforms to family law, emphasizing the parties' freedom to govern their own relationship as they wished. The best illustration of such a link is probably the case of Spain, whose uniqueness among Southern European countries can be explained by considering that Spain engaged much more than its Southern neighbors in experimenting with liberal family law. This seems to confirm what the most advanced sociolegal scholarship on the impact of law reform has long stressed: legal reforms have radiating consequences, insofar as their workings diffuse into other issues and arenas, change judicial and public awareness of rights, and alter the ideological orientation of the professionals' and laymen's responses to claims (Galanter 1983; see also Bussani 2010).

It goes without saying that the conclusions sketched above are open to discussion and refinement. The hope is that the above survey can contribute to the debate around better ways to diffuse and deepen the culture of mediation in family settings.

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# Research on family and civil mediation in Greece

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CONTENTS: 1. Introduction, 231 – 2. Presentation of the research for mediation in Greece, 232 – 2.1. *Mediators*, 232 – 2.2. *Non-mediators — Lawyers and Judges*, 235 – 2.3. *Public*, 237 – 3. Epilogue, 238.

## 1. Introduction

Alternative dispute resolution (ADR) is of increasing importance today because of the various developments that require alternative ways to resolve problems. Various definitions of the concept of ADR have been presented in the existing literature and legislation (Lieberman and Henry, 1986, O’Leary et al, 1999, and Pazarzis M. and Nina–E. PAZARZI, 2009)<sup>1</sup>. The basic elements for all types of ADR systems are: the parties’ agreement to participate, the neutral third party helping to reach an agreement and the parties’ decision on the outcome (Pazarzis M. and Nina–E. PAZARZI, 2009, and O’Leary et al, 1999).

Mediation as a type of ADR started thirty years ago in USA, Great Britain, Canada and Australia. The experience of the implementation of ADR mechanisms in these countries is a good example for countries similar to Greece which have not developed to an adequate level ADR techniques and mediation. European Union, by issuing the directive 2008/52/EC further promotes the use of mediation and Dir. IP/2008/628 obliges member states to encourage the training of mediators. Since last decade various researches have been conducted by organizations concerning the implementation of ADR in the European Union.<sup>2</sup>

The objective of this paper is the presentation of data collected from our

1. Alternative Dispute Resolution, as Lieberman and Henry state, is alternative for two reasons: the first is that the parties have chosen to avoid litigation and the second because there are legal rules that send the dispute the formal procedures of adjudication.

2. See Nina–Pazarzi E. and M. PAZARZIS (2005). Our research was part of a larger research project conducted by the European Institute of Management in all the member states of the European Union. The objective of our research was the application of alternative dispute resolution types in small–medium–sized enterprises in Greece and was relied on the analysis of secondary data that were collected and evaluated by the researchers (book, reports, papers, pamphlets, legal texts and interviews). The same questionnaire was used by all the researchers from the different countries, members of the European Union.

survey on mediation in Greece, both family and civil, which was part of the research for the e-Medi@te project. The questionnaires were constructed by the research group of the e-mediate program following a procedure of exchange of views and corrections and they were differentiated for Civil and Family Mediation. Three groups of respondents were selected [mediators, non-mediators (lawyers and judges) and non-mediators (public)].

The research on mediation in Greece was conducted during the period of fall 2013 and the questionnaires were addressed to mediators, lawyers and judges and public. The method used for collecting data was both emailed and distributed questionnaires. The disseminated questionnaires were 240, in total, mailed in six different groups: 20 to mediators, 40 to lawyers and judges and 60 to the public for each type of mediation (family and civil mediation). The questionnaires were differentiated according to the type of mediation and the category of respondents.

## 2. Presentation of the research for mediation in Greece

### 2.1. Mediators

We had disseminated 40 questionnaires to mediators (20 for family and 20 for civil mediation) and we received five and six replies respectively. The questionnaires were disseminated to individual mediators and to their Associations. Taking into account that the number of certified mediators by the Hellenic Ministry of Justice, Transparency and Human Rights was 99 at the time of our research, we could argue that the number of collected questionnaires was sufficient. Most individual mediators answered the questionnaires but the gap is due to the fact that the associations probably didn't give positive feedback, despite the fact that we resent the questionnaires and communicated by phone.

From the answers of the collected questionnaires we present the following points of interest.

- 1) All mediators in family mediation and 80% in civil mediation are lawyers, since, according to the law, this was the only professional category that could be certified by the ministry, with the exception of cross-border mediation. According to the recent law 4254/2014 mediation can be conducted by any third person who needs the qualifications required by the existing legislation.
- 2) Mediators are not highly experienced in the mediation process in Greece through handling a large number of cases, since the majority of them have less than five years' experience in mediation



- (60% in family mediation and 80% in civil mediation) and 40% less than two years.
- 3) Mediators do not work solely as mediators. A small percentage of them spend more than half their working time in mediation services. Additionally most of them have handled no more than 10 cases.
  - 4) The task of mediation requires the cooperation of other professions as revealed by the majority of mediators, who acknowledge the importance of doing so. We should mention here that mediators in family mediation cases have interacted with other professionals while in civil mediation there is no cooperation up to now.
  - 5) The most common way to obtain professional credentials is rather through an institution that is dedicated to mediation (61% of the answers for family mediation and 71, 4% for civil mediation) than through a university.
  - 6) Most of the mediators are members of Associations of mediators and most of them are involved in the training of potential mediators and they consider that the qualifications for becoming a mediator are fair. There is a high level of professionalism since they continuously update their training skills and participate in their professional and scientific meetings of their Associations.
  - 7) Mediators do not work solely in one type of mediation (family or civil) but they accept cases on both types. Civil mediators do not practice solely a particular area but many kinds of civil disputes.
  - 8) The fee for mediation services is calculated per hour according to a public tariff which is paid by the parties. The pricing policy reveals the protectionism of the sector and the cost of mediation is kept at minimal level when compared to the other means of solving the disputes (such as the courts).
  - 9) Concerning the methods of mediation, family mediators practice mainly four methods of mediation that is facilitating 40%, settlement driven mediation 20%, indirect mediation 20% and co-mediation 20% as shown in Figure 1. Civil mediators practice mainly facilitating mediation and settlement driven mediation and we observe a great spread of the answers (as shown in Figure 2).



**Figure 1.** Methods of mediation practiced by family mediators



**Figure 2.** Methods of mediation practiced by civil mediators

- 10) Mediation presents high percentage of the settlement of disputes and the mediators perform the monitoring of the case.

- 11) Most mediators (75% in civil mediation and 50% in family mediation) declared that there is neither an increase nor a decrease in the number of mediation requests.
- 12) Most mediators in family mediation do not involve children in the mediation process. In civil mediation, when the mediator estimates that experts from other fields should be involved, they seek for technical assistance, mostly in the presence of the parties.
- 13) Most mediators declare that in order to improve mediation services, it is necessary to include mediation in the university curricula, and to develop cooperation between mediators and judges. In USA and other countries, there are university programs on Negotiation and Alternative Dispute Resolution techniques, i.e. Harvard Law School, Program on Negotiation, Stanford Centre on Conflict and Negotiation, etc.

## 2.2. Non-mediators — Lawyers and Judges

We have disseminated 80 questionnaires (40 for family mediation and 40 for civil mediation) to individual lawyers, to the Bar Associations of Athens, Piraeus and Thessaloniki and to the Associations of judges and we have collected eight and six replies respectively. Even if the number of the collected questionnaires is low, some conclusions can be extracted. Most individual lawyers answered to the questionnaires but the gap is due to the fact that the Associations probably didn't give positive feedback, despite the fact that we resent the questionnaires. We should also point out that the majority of the respondents are rather young and hence familiar with new technology and more open to accept the idea of innovative institutions.

We didn't have any feedback from the judges despite the fact that we sent questionnaires to their Associations and to some individual judges. Judges but also lawyers of older generation are reluctant to answer the questionnaires for several reasons. One is probably skepticism and opposition to the implementation of mediation; also they are not accustomed to answer questionnaires. Additionally, especially judges are more reluctant because they are not sure for the anonymity and they are not willing to freely express their opinions. We should also point out that questionnaires sent to the Associations probably were not properly disseminated to their members.

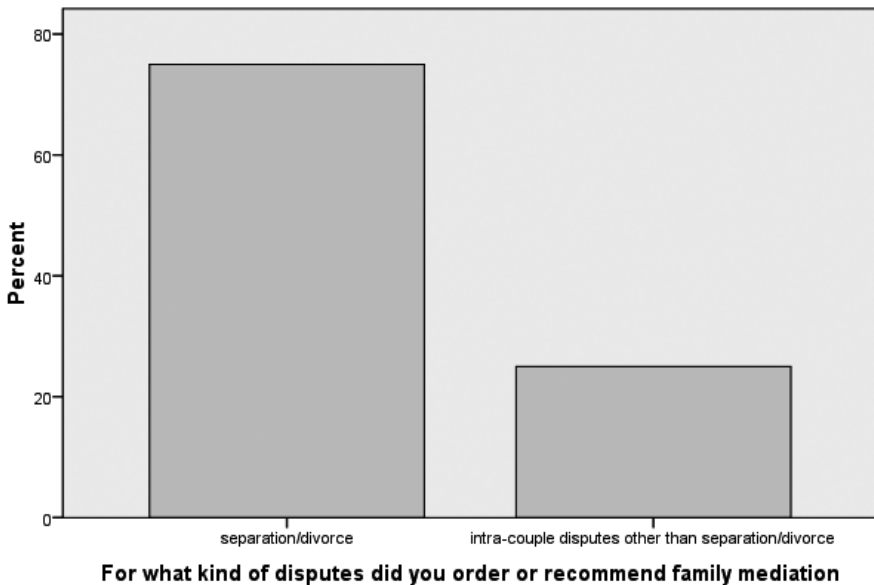
From the answers of the collected questionnaires we present the following points of interest.

- a) Most of them consider mediation as a useful mechanism for the settlement of disputes. Concerning family mediation they think that

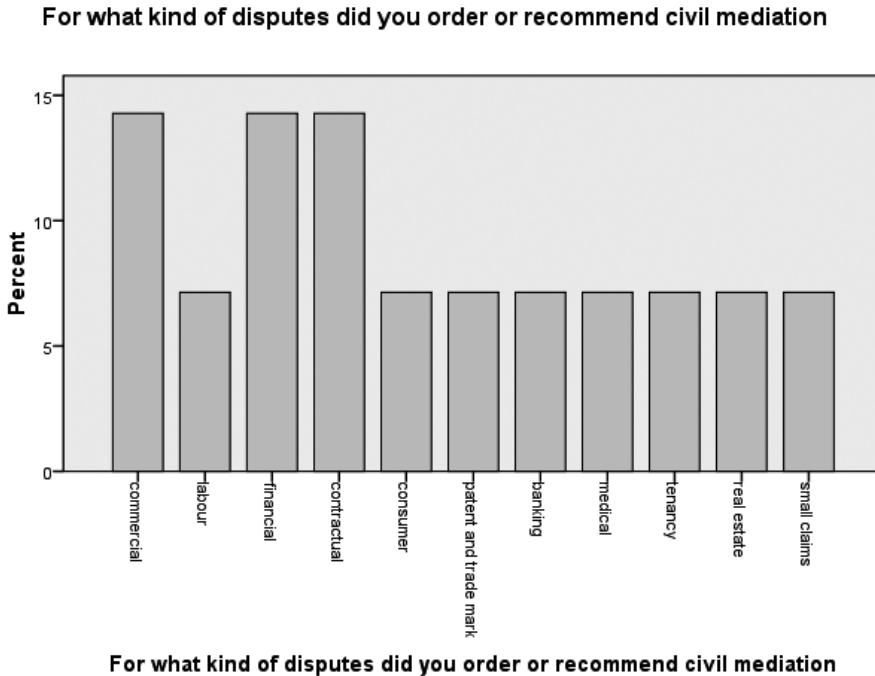
for disputes arising out of separation or divorce is better to be resolved through mediation.

- b) Most of the lawyers who ordered or recommended family mediation referred to disputes arising out of separation or divorce (75%). Lawyers ordered family or civil mediation because they considered it as the best solution and the mediator was chosen by the lawyer or by the disputers.
- c) We must point out that 100% of the recommended or ordered mediation by the lawyers was settled and they declare that they would suggest again mediation for similar matters. That means that mediation presents high level of efficiency in solving disputes.
- d) Mediation seems to be applicable to all kinds of disputes. Concerning family mediation mostly to cases of separation/divorce and intra-couple disputes, while concerning civil mediation there is a spread of answers as shown in Figures 3 and 4.

**For what kind of disputes did you order or recommend family mediation**



**Figure 3.** Kinds of family disputes recommended by the lawyers



**Figure 4.** Kinds of civil disputes recommended by the lawyers

### 2.3. Public

We have disseminated 120 questionnaires (60 for family mediation and 60 for civil mediation) to the public and we have collected 7 and 7 replies respectively. There is a limited number of questionnaires that were replied, however we can reach some conclusions.

From the answers of the collected questionnaires we present the following points of interest.

- Most of the public is not familiar with mediation and none of them has been involved in mediation. For this reason we don't have answers to most questions of the questionnaires.
- Concerning the choice of a mediator, they appreciate the experience of the mediator along with a reference by someone known to the parties.
- All family disputes could be addressed to mediation by them while concerning civil mediation they would choose disputes among banks and clients, insurance companies and clients etc.

We observe that the number of answered questions varies for each category of respondents. The following Table 1 shows the number of answered questions per group compared to the total number of questions.

**Table 1.** The N° of answered questions per group.

GROUP	N° OF ANSWERED QUESTIONS
Civil Lawyers	9 (out of 10)
Civil Mediators	56 (all)
Civil Public Non-Mediators	6 (out of 22)
Family Mediators	42(out of 44)
Family Non-Mediators Lawyers	9 (all)
Family Non-Mediators Public	6 (out of 21)

### 3. Epilogue

Being aware of the limitations encountered in our research, we can clearly reach the assumption that the current research was of importance in assessing the value of the institution of mediation.

We should point out that the judicial system does not seem to be in favor of institution of mediation and mediators think that positive law plays a role for the selection and the result of the mediation process<sup>3</sup>. It is very important, especially in Greece where the judicial system is very slow (Greece is fourth among the 45 members of the council of Europe and for this reason was contempt for unjustified delays in trials for almost 400 cases by the European Court of Human Rights), that the duration of mediation is very short, usually not more than three months and no more than 1, 5 year.

Mediation as a form of ADR has certain advantages and is a challenge for the legal system since it is designed to facilitate and accelerate the granting of justice. Scholars and Practitioners refer to many advantages deriving from the implementation of mediation<sup>4</sup>.

Main of those advantages are:

— Reduces time and cost which means:

3. Assumed from the answers to the relevant questions of the questionnaires.

4. There are also barriers in some situations. Some scholars at the Stanford Centre on Conflict and Negotiation have developed this concept of barriers. For instance Robert H. Mnooking, Lee Ross, Roger Fisher, Ury Lax, Sebenius, Lawrence Susskind, Jeffrey Cruikshank and Constance Stillinger have dealt with the analysis of barriers in their writings. These barriers are either general barriers or social or psychological ones.

- a) Short-term procedure and direct result which is controlled by the parties who have an active role.
  - b) Low cost and no social cost.
- Control of the procedure based on the will of the parties (voluntarily).
  - The mediator is a neutral third person.
  - Secrecy and confidentiality.
  - No limitations of space and time<sup>5</sup>.

Hayford (2000) in his paper refers to three forms of alternative dispute resolution: Ombuds, mediation and arbitration (the three main alternative dispute resolution devices) and he considers them as the only techniques that are worth to choose for corporate executives to resolve disputes.

Ending up our paper we would like to point out that the experience of the implementation of mediation, as well as of other systems in some countries is a good example for countries similar to Greece and is a challenge to facilitate the resolution of disputes in the spheres of life. As Abel (1982) states, referring to the Politics of Informal Justice (1982), « Informal institutions allow state control to escape the walls of those highly visible centers of coercion — court, prison, mental hospital, school — and permeate society ».

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# Family Mediation in Greece

Development and Problems

PENELOPE AGALLOPOULOU

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## 1. Introduction

Mediation is a voluntary process whereby a third party, the “mediator”, facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict<sup>1</sup>. The main characteristics of mediation are the confidentiality of the procedure and the neutrality of the mediator<sup>2</sup>.

Mediation should be differentiated from other types of alternative dispute resolution methods<sup>3</sup> which are available in Greece, such as, counseling, conciliation, arbitration and ombudsman procedures.

Specifically:

- Counseling is a process that can be used to assist couples or families in dealing with relationship problems<sup>4</sup>.
- Conciliation is a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties find an agreed solution to their dispute<sup>5</sup>.

1. See Hague Conference on Private International Law (2012), *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation*, p. 7, [www.hcch.net/upload/guide28mediation\\_en.pdf](http://www.hcch.net/upload/guide28mediation_en.pdf)

2. See E. KOLTSAKI (2014), pp. 79 ff.

3. See M. PAZARZIS and E. NINA-PAZARZI (2009), pp. 411 ff.; D. TRIANTAFYLLOU (2013); S. ANTONELOS and E. PLESSA (2014), pp. 59 ff.

4. See above, note 1.

5. See above, note 1. See articles 208, 209–212, 214A (as was amended by art. 19 of law 3994/2011), 233 (as was amended by art.22§3 of law 3994/2011), and 667 of the Greek Code of Civil Procedure, which provide for conciliation in civil or commercial disputes.

- Arbitration is a process in which an impartial third party (arbitrator) solves the dispute by making a decision<sup>6</sup>.
- The Greek Ombudsman<sup>7</sup> is a constitutionally sanctioned Independent Authority<sup>8</sup>. The principal mission of the Greek Ombudsman is to mediate between the public administration and citizens, in order to help citizens exercise their rights effectively. In exceptional circumstances, the Greek Ombudsman may examine the behavior of private citizens, as for example in cases where a child's rights are violated. For this purpose a special Children's Rights Department<sup>9</sup> has been established. The children's Ombudsman initiates mediation proceedings after citizen's reports in cases of violation of the rights of the child, seeking to protect and restore them. If necessary, in cases of serious violations, the Children's Ombudsman acts *ex officio*.

Today, mediation is used in all fields and in a large variety of constellations. Historically, mediation was often first used in the fields of family and labor disputes<sup>10</sup>. Today however, because of its flexible, cost and time efficient nature is suited to a wide array of conflicts<sup>11</sup>.

## 2. Definition and characteristics of family mediation

Family mediation, as a form of alternative dispute resolution, is a method to resolve disputes between family members through a process that helps to reach an agreement, on the settlement of their dispute, after negotiations over the issues that divide them, with the assistance of a third party, the mediator<sup>12</sup>.

At European level, the following information is of relevance:

- Article 13 of the European Convention on the Exercise of Children's

6. See above, note 1.

7. See [www.synigoros.gr/langs?i=stp.en&l=en](http://www.synigoros.gr/langs?i=stp.en&l=en).

8. The Greek Ombudsman was founded in October 1998 and operates under the provisions of law 3094/2003.

9. See [www.o-18.gr](http://www.o-18.gr).

10. Concerning labor disputes I would like to mention that the Greek Organisation of Mediation and Arbitration ([www.omed.gr/en](http://www.omed.gr/en)) aim to facilitate free collective bargaining between the parties in order to resolve possible collective disputes, and to support the parties in reaching collective labour agreements. The above mentioned organisation help the social partners under negotiations to conclude to a solution through mediation when the negotiations cannot lead to an acceptable solution by both parties. Its purpose is to assist the signing of a Collective Labor Agreement or to reach some other agreement between the parties.

11. See F. STEFFEK (2012).

12. C. POULIOS (2014), pp. 129 ff.; S. LIVADOPOULOS (2014), pp. 49 ff.

Rights of 25 January 1996<sup>13</sup> provides that “in order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties”. According to this Convention mediation should be possible independently of any intervention of judicial authorities, before, during or even after the end of the relevant proceedings, if a conflict arises at the stage of the enforcement of a judgment. In any case, any agreement resulting from mediation or other processes to resolve disputes should not be against the best interests of children<sup>14</sup>.

- The Council of Europe’s Recommendation No R (98) 1 on family mediation, adopted by the Committee of Ministers to Member States on 21 January 1998, has been of significant importance. This Recommendation is the first text which states the main directions and basic principles concerning family mediation. Recommendation Rec (2002)10 of the Committee of Ministers to Member States on 18 September 2002 on mediation in civil matters is also of relevance. Finally, the Parliamentary Assembly of the Council of Europe has also adopted on 25 November 2003 the Recommendation 1639 (2003) 1 on family mediation and gender equality.

Family mediation is common after separation of married or unmarried couples or after a divorce judgment in order to reach an agreement on issues such as child support, visitations arrangements, property division, family home, and alimony. Family mediation is also used for inter couple disputes other than those resulting from separation or divorce, as for example the contribution of each spouse/partner to the needs of the family, the relations between one spouse/partner and the parents of the other spouse/partner or between one spouse/partner and the child or children of the other spouse/partner. Another category of disputes that could be resolved by mediation are the extra couple disputes, regarding for example the relations between children and grandparents, brothers and sisters, as well as between biological, adoptive or foster parents. The abovementioned cases and especially the conflicts arising after the separation or divorce are best suited for mediation, which is not only confidential, but also flexible in

13. The European Convention on the Exercise of Children’s Rights, has been signed by Greece on 25 January 1996, ratified on 11 September 1997 (law 2502/1997) and has been entered into force on 1 July 2000, [conventions.coe.int/Treaty/en/Treaties/Html/160.htm](http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm).

14. See Explanatory Report on the European Convention on the Exercise of Children’s Rights, under art.13, [conventions.coe.int/Treaty/EN/Reports/HTML/160.htm](http://conventions.coe.int/Treaty/EN/Reports/HTML/160.htm).

terms of timing and procedure<sup>15</sup>.

After the agreement of the parties for resolving their dispute by mediation<sup>16</sup>, a specially trained mediator<sup>17</sup> can help the parties to understand their positions, taking into account all special circumstances they face. The mediation process must have four stages: a joint meeting, where all parties are present, in which both the purpose of the meeting is explained and the parties can talk to each other. The mediator help the parties understand their problem. The second stage concerns separate interviews, in which each party has the opportunity to express his/her views, and suggest possible solutions. The third stage consists of another joint meeting in which the mediator summarizes the issues and feelings of the parties to both of them. The fourth stage regards, hopefully, the final agreement. Before the parties sign an agreement it is of utmost importance that they have been well informed by their attorneys<sup>18</sup>.

Family mediation offers advantages in comparison to judicial decisions as to the resolution of family disputes, especially in cases involving minor children. Mediation can lead to the best arrangements of the family problems, taking into account the best interest of the child or children, after hearing him/her/them as well. Mediation presents thus a considerable advantage as compared to a court decision, in which the judge seeks the best solution on the basis of the court file, oral hearings and expert statements. Family mediation also offers the chance to find a reasonable and relatively quick and low-cost solution<sup>19</sup> that will bring peace to the family instead of a court procedure that might continue for years.

Before referring to the types of family mediation I would like to note that the article 602 of the Greek Code of Civil Procedure provides for an attempt for conciliation by the court during the hearings of a divorce action. It is specifically provided that if the court, during the hearings of a divorce action, is convinced that there is a possibility for the spouses to reconcile, it has the possibility, after petition of one of the parties or *ex officio* to try to conciliate them or to adjourn the hearings but only once and not more than

15. See M. ROBERTS (2005), pp. 4 ff.; C. POULIOS (2014); S. LIVADOPOULOS (2014).

16. See S. AGOURA (2014), pp. 23 ff.

17. See Presidential decree 123/2011 which regulates the conditions and requirements for approval and operation of mediation training centers ([www.et.gr/index.php?option=com\\_wrapper&view=wrapper&Itemid=106&lang=el](http://www.et.gr/index.php?option=com_wrapper&view=wrapper&Itemid=106&lang=el)). See also A. ANTHIMOS (2012); Z. GIANOPOULOU (2014), pp. 87 ff.; S. ANTONILOS and E. PLESSA, pp. 52 ff.; S. LIVADOPOULOS pp. 57 ff.

18. See V. SKORDAKI (2012); S. ANTONILOS and E. PLESSA (2014), pp. 115 ff.

19. Art. 12 of law 3898/2010 provides that a mediator, unless the parties and the mediator agree differently, cannot charge an hourly fee for more than 24 hours of work. The 24-hours fee also includes time spent for preparation. It is also provided that, unless the parties agree otherwise, each party is obliged to pay half of the mediator's fee, and each party pays his/her own attorney's fee. See A. ANTHIMOS (2014), pp. 45 ff.

three months. Moreover articles 681B and 681C of the Greek Code of Civil Procedure on disputes regarding the exercise or the cessation of parental care as well as the communication between parents and children provide that the court shall make an effort, during the hearings, to conciliate the parties, having as guideline the interest of the child.

### 3. Types of family mediation

In Greece there does not exist a special law for family mediation. For this reason the general provisions about mediation are applicable<sup>20</sup>.

Greek legislation provides two types of mediation: The non-judicial and the judicial one.

#### 3.1. Non-judicial mediation

Non-judicial mediation is regulated by law 3898/2010 on ‘Mediation in Civil and Commercial Matters’<sup>21</sup>. This law transposed the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on “certain aspects of mediation in civil and commercial matters” into Greek legislation<sup>22</sup>.

Law 3898/2010 applies both to domestic and cross-border disputes. According to this law,<sup>23</sup> private law disputes may be submitted to mediation if both parties agree and if the dispute concerns rights and obligations which the parties have the right to dispose (e.g. child protection measures, maintenance of children or ex-spouses or partners, child abduction). Consequently, law 3898/2010 cannot be applied to rights and obligations on which the parties are not free to decide themselves. Thus e.g. a court decision is always needed for the dissolution of marriage by divorce or for the adoption of a minor<sup>24</sup>.

20. A civil law, non-profit, partnership, under the name “Family Mediation Center” has been created in Greece whose main objective is to promote family mediation, as a form of alternative family dispute resolution ([www.familymediationcenter.gr](http://www.familymediationcenter.gr)).

21. Law 3898/2010 is published in the Official Gazette of the Hellenic Republic, Volume A, No. 211 on 16th of December 2010. ([www.ministryofjustice.gr/site/LinkClick.aspx?fileticket=W16E-iMSUYw%3D&tabid=132](http://www.ministryofjustice.gr/site/LinkClick.aspx?fileticket=W16E-iMSUYw%3D&tabid=132)) See also the preamble of the law 3898/2010 in [www.ministryofjustice.gr/site/LinkClick.aspx?fileticket=UDXtv4wqfe0%3D&tabid=132](http://www.ministryofjustice.gr/site/LinkClick.aspx?fileticket=UDXtv4wqfe0%3D&tabid=132).

22. See K. CHRISTODOULOU (2010) pp. 287 ff; K. CHRISTODOULOU (2011), pp. 1567 ff; E. AVLOGIARI (2010), pp. 1944 ff; V. PANTELIDOU-KOURKOUVATI (2012), pp. 1509 ff; V. SKORDAKI (2012); N. KLAMARIS and C. CHRONOPOULOU (2013), pp. 586 ff; A. KAISIS (2014); S. ANTONELOS and E. PLESSA (2014); S. LIVADOPOULOS (2014). See also Pamb, Im and GEMME (European Association of Judges in Mediation), (2013).

23. See art. 2 of law 3898/2010.

24. F. EVANGELIDOU-TSIKRIKA (2014), pp. 59 ff

In case where the parties reach an agreement, the mediator has to draw up a concluding record. It is very important to note that law 3898/2010 foresees<sup>25</sup> that the final mediation record concerning the settlement of the dispute serves as a title of execution in the sense of article 904 para. 2 c of the Greek Code of Civil Procedure, provided that it has been filed in the secretariat of the court of first instance that has jurisdiction over the place where the mediation was conducted and has been duly certified<sup>26</sup>.

Mediation proceedings must be confidential unless the parties agree otherwise<sup>27</sup>. In most cases seeking an agreement means, in general, that the parties must be able to talk to the mediator in confidence about possible proposals for settlement, without it being possible for this information to be divulged.

Family disputes may be domestic or cross-border.

- Domestic (or national) is the dispute in which all parties are domiciled or are habitually resident in Greece. According to law 3898/2010 the mediator in a domestic dispute must be a third person<sup>28</sup> accredited as mediator by a competent Accreditation Body<sup>29</sup>.
- Cross-border (or international) is the dispute<sup>30</sup> in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:
  - a) the parties agree to proceed to mediation after the dispute has arisen;
  - b) mediation is ordered by a court of a Member state;
  - c) an obligation to use mediation arises under national law; or
  - d) for the purposes of article 3 para. 2 of the abovementioned law an invitation is made to the parties<sup>31</sup>.

Concerning cross-border disputes it is to note that parties are free to choose an accredited mediator who must be a third person accredited as

25. See art. 9 para. 2 and 3 of law 3898/2010.

26. See V. SKORDAKI (2012), p. 215; K. GRATSIU (2014), pp. 49 ff.; S. ANTONELOS and E. PLESSA, pp. 147 ff.; S. LIVADOPOULOS, p. 51.

27. See art. 10 para.1 of law 3898/2010.

28. According art. 4 (c) of law 3898/2010, the mediator in a domestic dispute should be a lawyer. After the amendment of the above disposition by art. 1, para. 1E, subpara. 1E.2 of law 4254/2014 it is no longer necessary for the mediator in a domestic dispute to be a lawyer.

29. See art. 7 of law 3898/2010. See above note 17.

30. See art.4 a of law 3898/2010. See also L. PARKINSON (2009); M. OLIVEIRA (2009). See also I. ANASTASSOPOULOU, (2011); S. LIVADOPOULOS (2014), pp. 54 ff.; C. POULIOS (2014), pp. 134 ff.

31. The court before which the case is pending may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. If the parties agree with this invitation the court adjourns the hearing of the case for at least three but not more than six months (art. 3 para. 2 of law 3898/2010).



mediator by a competent Accreditation Body.<sup>32</sup>

Families consisting of parents of different nationalities are getting increasingly common<sup>33</sup>. Couples of different nationalities that marry or live together create multicultural families.

Mediation in international family disputes is much more complex than the domestic one and requires mediators to have relevant additional training. The interplay of two different legal systems, different cultural and religious backgrounds as well as the different languages makes mediation much more difficult in such cases.

When it comes to rights of contact between parents and children for example, habitual residence is widely used as a 'connecting factor' in private international law. Hence the change of the child's habitual residence from one country to another following the implementation of a parental agreement may affect jurisdiction and applicable law regarding custody and contact, and may thus affect the legal evaluation of the parties' rights and duties<sup>34</sup>.

In cross-border disputes the most usual family disputes regard especially the child's/children's place of habitual residence, the exercise of parental responsibility, child custody, alimony, and property issues between the spouses. Particularly complex are the issues arising out of the wrongful removal/retention of a child/children.

Mediation in international child abduction cases should be conducted by experienced family mediators who preferably should have a specific training for mediation in international child abduction cases.

International parental child abduction involves:

- a child being wrongfully removed from his/her place of habitual residence and taken abroad by a parent who does not have sole responsibility;
- a child not being returned to his/her State of habitual residence by a parent who does not have sole responsibility, in breach of the rights of custody and access<sup>35</sup>.

32. See art. 4 c of law 3898/2010.

33. According to the latest Eurostat data, some 2 million marriages are contracted each year in the European Union, 300.000 of which involve binational couples. In addition, there are approximately one million divorces each year, 140.000 of them involving binational couples (The European Parliament mediator for International Parental child abduction — Handbook 9.12.II, p. 7). See also M. KLEIM (2009).

34. See Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *op. cit.*, note 1.

35. See H. FULCHIRON (2004); P. AGALLOPOULOU (2005), pp. 263 ff.; S. KIESEWETTER and C. PAUL, (2011), pp. 39 ff.; P. AGALLOPOULOU (2012), pp. 181 ff.

In these cases, apart from law 3898/2010, applicable are also:

- a) The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction<sup>3637</sup> and
- b) The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility<sup>38</sup>.

Where a child is abducted from one Member State (“the Member State of origin”) to another Member State (“the requested Member State”), the Regulation (EC) No 2201/2003 ensures that the courts of the Member State of origin retain jurisdiction to decide on the question of custody notwithstanding the abduction. Once a request for the return of the child is lodged before a court in the requested Member State, this court applies the 1980 Hague Convention as complemented by the Council Regulation (CE) No 2201/2003<sup>39</sup>.

Due to the fact that the court proceedings for the implementation of the abovementioned legal rules are of long duration, and thus harmful to the children’s interests, mediation is not only considered as a faster and, most often, cheaper solution compared to ordinary court proceedings, but it also prevents the confrontation between the parties which is inherent in judicial proceedings and therefore allows them to maintain their professional or personal relationship beyond the dispute. Mediation also enables the parties to find creative solutions to their dispute which they could not obtain in court.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction foresees<sup>40</sup> the possibility of mediation in family proceedings and encourages central authorities<sup>41</sup> to work towards

36. See [www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing).

37. The Hague Convention of 25 October 1980 (1980) on the Civil Aspects of International Child Abduction has been ratified in Greece by law 2102/1992 — Official Gazette A’ 193/1992.

38. See [ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_ec\\_vdm\\_en.pdf](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_en.pdf).

39. See the Practice Guide for the application of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, p. 28. ([ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_ec\\_vdm\\_en.pdf](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_en.pdf)).

40. According to art. 7 (2) c of the Hague Convention of 25 October 1980 “Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures [...] c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues”.

41. The Greek Central authority is the Ministry of Justice, Transparency and Human Rights.

an amicable settlement<sup>42</sup>.

Moreover the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility foresees<sup>43</sup> that another task of the central authorities<sup>44</sup> is to facilitate agreements between holders of parental responsibility, for example through mediation. Especially in child abduction cases, it is generally considered that mediation can play an important role, to ensure that the child can continue to see the non-abducting parent after the abduction as well as to see the abducting parent after the child has returned to the Member State of origin. However, it is important that the mediation process is not (mis)used to unduly delay the return of the child.

Mediation proved to be a successful and effective method of settlement of family conflicts resulting in the abduction of the child, mainly because it can facilitate the voluntary and peaceful return of the child as well as reaching a long-term agreement on the residence of the child and on access rights after the return of the child<sup>45</sup>.

### 3.2. *Judicial mediation*

Before the adoption of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, the Consultative Council of European Judges of the Council of Europe in its Opinion 6 (2004) to the attention of the Committee of Ministers “on fair trial within a reasonable time and judge’s role in trials taking into account alternative means of dispute settlement”, considered it possible for judges to act as mediators themselves. This, according the abovementioned opinion, allows judicial know-how to be placed at the disposal of the public. It is nevertheless essential to preserve judge’s impartiality in particular by providing that they will perform this task in disputes other than those they are required to hear and decide<sup>46</sup>.

According the Directive 2008/52/EC, “mediation can also be conducted by a judge who is not responsible for any judicial proceedings concerning

42. W. DUNCA (2009).

43. According to art. 55 (2)(e) of the Council Regulation (EC) No 2201/2003 “The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: [...] (e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end”.

44. See above, note 39.

45. B. PALI and S. VOET (2013).

46. See I. STRATSIANI, (2014), pp. 15 ff.

the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question”<sup>47</sup>.

Law 3898/2010 does not provide the judicial mediation, but in its article 3 para. 2 foresees that in case a dispute is pending before a court it is possible for the court in every stage of the trial to invite the parties to use mediation for the settlement of their dispute.

Law 4055/2012 on “Fair trial and its reasonable duration”, by its article 7 added article 214B to the Greek Code of Civil Procedure<sup>48</sup>, according to which judicial mediation is optional and confidential<sup>49</sup>, and is offered by judges presiding at a Court of First Instance or at the Court of Appeal or senior judges at a Court of First Instance or at the Court of Appeal<sup>50</sup>, in cases of private disputes both before the Court of First Instance and the Court of Appeal. Judicial mediation can take place before the filing of the action or while the trial is pending. The parties, together with their lawyers, have separate and joint hearings and discussions with the judge–mediator who may suggest non–binding proposals to resolve their dispute.

If the parties reach a settlement of their dispute, the record of mediation is signed by the mediator, the parties and their authorized lawyers. The original of the record must be filed in the secretariat of the Court having jurisdiction where the mediation was conducted. After this final mediation report has been filed in the court and is duly certified, it serves as a title of execution according article 904 para. 2 c of the Code of Civil Procedure<sup>51</sup>.

#### 4. The differences between non–judicial and judicial mediation

The differences between non–judicial and judicial mediation are the following:

- During judicial mediation the judge proposes solutions, i.e. the judge address to the parties not binding proposals for the settlement of the dispute<sup>52</sup>, while during non judicial mediation the mediator facilitates the negotiations between the parties and leaves the parties to reach

47. See art 3 (a) of Directive 2008/52/EC. of the European Parliament and of the Council of 21 May 2008.

48. Art. 214 B of the Code of Civil Procedure has been modified by art. 102 para. 2 of law 4139/2013.

49. See I. ILIAKOPOULOS (2012), pp. 21 ff.

50. No training, certification or accreditation requirements are needed for the exercise of their new duties. Their seniority has been considered sufficient.

51. See art. 214B, para. 5 of the Code of Civil Procedure.

52. See art. 214B, para. 3 of the Code of Civil Procedure.

to a settlement of their dispute.

- For the initiation of non-judicial mediation both parties have to agree to the selection of the mediator while in judicial mediation one party may initiate the mediation proceeding unilaterally, by addressing the competent judge-mediator and depositing a written application. The judge then calls the other party to take part to the mediation proceedings<sup>53</sup>.

## 5. Case-law

Because of the confidential character of mediation it is forbidden to the courts to publish the content of any final mediation records concerning the settlement of the dispute. Only statistical data may be provided concerning the number of private disputes that have been settled by non-judicial or judicial mediation.

*Non-judicial mediation:* As far as it has been possible to find out, there has been only two domestic (national) cases of mediation, which concerned visitation arrangements between parents and children after divorce of their parents. The original copy of the record is filed in the secretariat of the Court of First Instance of Piraeus.

*Judicial mediation:* The application of judicial mediation started on May 2012. Since then, and until September 2013, 93 cases of private disputes have been introduced to the Court of First Instance of Athens. 10% of the above cases concern family disputes<sup>54</sup> and especially visitation arrangements between parents and children, property division between ex-spouses and alimony to child/ children or/ and ex spouse. The same period 7 cases of private disputes have been introduced to the Court of First Instance of Thessaloniki. 2 of the above cases concern family disputes and especially property division between ex-spouses and alimony to child/ children.<sup>55</sup> Judicial mediation seems thus to be a successful institution, as it is brief, inexpensive and the judge enjoys the trust of the parties.

*Children's Rights Department of the Ombudsman:* The results of the Children's Rights Department of the Ombudsman have been successful. In 2011, the Children's Rights Department of the Ombudsman received 540 complaints regarding children's rights violations. 34% of them concerned issues related to education, 24% to health and welfare, 11% to guardianship and parental responsibility, 8% to the social integration of immigrants and

53. See I. STRATSIANI, pp. 41 ff.

54. See I. STRATSIANI, *op. cit.*, p. 40.

55. See K. FRANKOU, *op. cit.*, pp. 20 ff.

refugees and 7% directly to child abuse and neglect cases<sup>56</sup>. The Greek Ombudsman submitted to the United Nations Committee on the Rights of the Child a Parallel Report on the implementation of the United Nations Convention on the Rights of the Child in Greece from 2003 to 2011, summarizing his findings and recommendations. Since 2003, i.e. in the first 8.5 years of its operation, the Greek Ombudsman received a total of 3, 248 reports concerning violations of the rights of minors.

## 6. Conclusion

The Greek state must encourage family mediation proceeding as it is the best way to resolve family disputes, and especially issues arising after the divorce of the parties, since in this way the parties can regulate their affairs more effectively. Mediation allows the parties on the one hand to avoid emotional distress and on the other hand to ensure that their best interest (and also the best interests of their child/ children) will be satisfied as much as possible<sup>57</sup>.

In view of the particular nature of family mediation the mediators must receive specific training, especially for international family mediations.

It is also necessary for the state to promote mediation and make it known to the public, as a method for resolving family disputes in a quick, confidential and low-cost way<sup>58</sup>.

According to reliable information, the strategic planning of the Greek Ministry of Justice, Transparency and Human Rights includes the establishment of special Family Court as well as the establishment of mandatory family mediation proceedings.

More concretely, according to the abovementioned plan, the Family Court of First Instance will be composed by judges well qualified in resolving family matters and will also be supported by qualified scientific staff (e.g. psychologists, child psychologists, custodians of minors, family consultants). The Family Court of First Instance, composed by a single judge, will try to reach an agreement through mandatory judicial mediation and in case of unsuccessful mediation the case will be tried by the Family Court. This system will concern, of course, family disputes regarding rights

56. See the Greek Ombudsman Annual Report 2011, p. 35 ([www.synigoros.gr/resources/ee2011-english-translation-final.pdf](http://www.synigoros.gr/resources/ee2011-english-translation-final.pdf)).

57. See A. TSAOUSSIS and E. ZERVOGIANNI (2008), pp. 229 ff.

58. According to art. 9 of the directive 2008/52/EC "Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services".

and obligations which the parties have the right to dispose.

The decision of the Family Court of First Instance will be appealable. After lodging an appeal the case will be tried by the Family Court of Second Instance, i.e. by the Family Court of Appeal, which will be composed by a single judge of the Court of Appeal, qualified in family matters. The abovementioned court will first of all try to reach an agreement through judicial mediation and in case of unsuccessful mediation the case will be then tried by the Family Court of Appeal, which will pronounce the final decision<sup>59</sup>.

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59. See N. KANELLOPOULOS, pp. 27 ff.

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PART III

MEDIATION AS A PROCESS



# Mediation process

Increasing language awareness and developing communication skills

GIULIA ADRIANA PENNISI

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## 1. Introduction

Over the last decades, the increasing interest of the courts to become involved in settlement processes and the arrival of new professionals in dispute resolution combined to encourage lawyers to reconsider their own practices. This process of re-examination has led lawyers and experts in the field of law to move beyond advisory and representative roles towards neutral, non-aligned interventions and to develop new professional techniques in aid of these new settlement strategies.

The diverse nature of these practice developments has not prevented them to be associated with the shared label of 'Alternative Dispute Resolution' (ADR)<sup>1</sup>. According to the scholars working in this field, this term was coined by professor Frank Sander in a paper presented at the Pound Conference in 1976 before an audience of lawyers and judges, explicitly concerned with renovating court processes. For these reasons ADR cannot be seen as « a label only associated with the movement of escape and resistance from lawyers and the courts. ADR in a narrow sense originated as something lawyers decide to do and judges to participate in and encourage » (Roberts and Palmer 2009, 5).

These transformations in the practice of public dispute management mostly coincided with a moment when legal scholarship and law practitioners became more interested in social sciences and took on a broader comparative view. Central to this growing concern was a return of attention to the negotiation and mediation processes. Interestingly enough, this development was signalled in the language used by some academic lawyers and

1. The meaning of ADR will be considered in the following sections.

legal practitioners when talking about conflict: the terms of conversation shifted from « cases » to « dispute », from « litigation » to « dispute processes », from « judges » to « interveners » (ibidem, 5).

In the jurisdictions belonging to civil law tradition, this important development has largely taken place as a result of inspiration from the ADR movement in the Anglo–American law systems. The re–emergence of institutionalized mediation, the procedural reform of public justice system and the consequential adjustment within the legal professions have been all present in civil law countries<sup>2</sup>. Yet, the emergent picture has its own peculiarities because of the more bureaucratic and hierarchical judicial apparatus typical of civil law systems and the more active role usually assigned (and played) by judges in litigation<sup>3</sup>.

## 2. ADR all over the world

Many European countries have known mediation for a long time. However, different approaches for the regulation of mediation were taken in different EU Member States and some Member States still do not have regulated mediation at all (Espluques *et al.* 2012). European Institutions have taken into consideration the problem of different approaches for the regulation of mediation in Europe with the aim to consider mediation as a flexible and affordable tool for the parties to solve their disputes in civil and commercial matters. For this reason, the Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters (henceforth Directive 2008/52/EC) has been enacted in order to become a basic device in order to achieve this goal<sup>4</sup>. The use of 'Alternative Dispute Resolution' (ADR) in Europe is seen as a way to ensure both, a better access to justice for citizens in the EU and to facilitate the creation of a real and genuine European area of Justice.

At this point, it would be interesting to consider what the Directive

2. In this respect, Roberts and Palmer observe that any delegation of procedural steps to non–lawyers is considered wrong and inappropriate. In fact, « in preparatory proceedings judges of lower standing are charged with collecting factual material and preparing it as a written evidence for their superiors. The evidence thus gathered and presented forms the basis for the written case file that is developed through a series of stages that culminates in the final public proceeding, the trial. The central position of the judge — or, better, the hierarchy of judges — dealing with a civil case gives civil litigation a different processual shape [...], one which has not generated the same pressure for reform experienced in common law jurisdictions » (ibidem 2008, 6).

3. Cfr. Damaska 1986, Markesinis 1990, Alexander 2006.

4. This process, which has been officially launched in October 1999 in Tampere — Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, n.30 — has been referred to in Article 81 TFEU as to civil and commercial disputes and can also be seen in the Stockholm Programme of 2010 — 2010/C 11/01.

2008/52/EC states about mediation and which kind of definition(s) and standard(s) it does provide for 'out-of-court' and 'court-annexed' domestic and cross-border mediation. According to Recital 6, mediation is a « cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters », flexible and very much tailored to the needs and expectations of the parties as regards domestic and cross-border disputes (Article 1(2) and 2, Directive 2008/52/EC).

Recital 6.

Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

Art. 1(2).

This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

With this proviso, the Directive aims to provide a minimum legal standard in the Member States for mediation in domestic and cross-border civil and commercial disputes: First it explains the notion of 'mediation' in Art.3, Directive 2008/52/EC

Art. 3 Definitions.

For the purposes of this Directive the following definitions shall apply:

(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Then, the Directive 2008/52/EC provides the definition and meaning of the basic principles of mediation, such as:

— confidentiality of mediation (Art.7, Directive 2008/52/EC)

Art. 7 Confidentiality of mediation.

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

— effects of the mediation on litigation and prescription periods (Art.8, Directive 2008/52/EC)

Art. 8 Effects of mediation on limitation and prescription periods.

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

— ‘voluntariness’ (Art. 5(2), Directive 2008/52/EC)

Art. 5(2) Recourse to mediation or ‘voluntariness’.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

— or ‘enforceability of the mediation agreement’ (Art.6, Directive 2008/52/EC)

Art. 6 Enforceability of agreements resulting from mediation.

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of



the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Then, the Directive provides several measures concerning the promotion of mediation among citizens, judges and practitioners (as stated in Articles 5 (1), 9 and 10, Directive 2008/52/EC).

Art. 5(1) Recourse to mediation or 'voluntariness'.

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

Art. 9 Information for the general public.

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Art. 10 Information on competent courts and authorities.

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

The quality of mediation (Art.4, Directive 2008/52/EC) is also included in the Directive as one of the most important reasons for broadening its use within the European countries

Art. 4 Ensuring the quality of mediation.

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

The current situation of mediation in Europe is the object of the analysis in the next Subsection 2.1 which, then, will be followed by the analysis of

the meaning(s) and different nuances of the words making up the ADR acronym.

### 2.1. *Mediation and the European countries*

Before starting the analysis of the specificities of the term 'Alternative Dispute Resolution', it would be better to briefly consider the current situation of mediation in the European Countries. This will allow us to have a general idea of the framework within which the Directive 2008/52/EC has been produced and the audience/addressees that have been meant for.

The European countries have been grouped together according to their long/recent history of mediation and the corresponding concept of mediation/mediator that each country presently has<sup>5</sup>:

- i) The concept of mediation in France, Spain, Portugal, United Kingdom, Austria, Scandinavian Countries, and the Netherlands has been well-known, even though in some of them there are differences in certain aspects of mediation.

More specifically, the Austrian legal concept of mediation is based on the facilitative and transformative models of mediation. It focuses on the voluntariness of the parties to settle their disputes on their own. Apart from mediation there are also regulations concerning conciliation and arbitral proceedings.

Before the the EU Directive 2008/52, French mediation strictly speaking is a sub-category of conciliation. Conciliation is defined as the process by which two or more parties attempt to reach an agreement for the amicable resolution of their disputes with or without the help of the third party. Following the implementation of Directive 2008/52 (Ordonnance n. 2011-1540), French legal system provides this definition of mediation: any structured process, whatever its name, by which two or more parties attempt to reach an agreement for the amicable resolution of their disputes with the help of a third party, the mediator, chosen by them or appointed, with their consent, by the judge hearing the case.

Mediation is a known legal figure under Portuguese and Spanish law. In Portugal, mediation is not only legally defined but also is the object of profuse doctrinal studies. Mediation is an alternative dispute resolution device that exists as a private means for solving

5. The information that follow have been collected and subsequently adapted from the study conducted by Espluques Mota Carlos, Iglesias Buhigues José Luis and Moreno Guillermo Palao in their book *Civil and Commercial Mediation in Europe*, 2012.

disputes and it is also integrated within the public jurisdictional system.

There are several Mediation Acts in Spain as a consequence of the legislative competence of the *Comunidades Autónomas* (Autonomous Regions) in this matter. Nowadays, mediation is a tool for resolution of disputes, regardless of the term used, by which two or more parties attempt to reach voluntarily an agreement with the intervention of a mediator.

In the Netherlands mediation in civil and commercial matters is well developed because, towards the end of the last century, a broad coalition of private parties and government officials came to an informal understanding that mediation was worth developing. The legal framework of contract law proved to be a useful framework for the development of mediation, which was in time accompanied by self-regulation and some financial support by the government. Likewise, the existence of different types of boards for solving disputes, especially between consumers and entrepreneurs, is typical of Scandinavian countries. In addition to arbitration, which is used in wider and more difficult issues of civil litigation — like business matters — the boards provide a method of ADR in more minor cases, especially in consumer cases. The significance of mediation has increased in the Nordic countries during the last few decades.

- ii) Legal systems that have developed hybrid forms of mediation are those in Belgium, Germany, Italy, and Cyprus. More specifically, Belgian legislation distinguishes between voluntary (*vrjwillige*–*volontaire*) and judicial (*gerechtelijke*–*judiciaire*) mediation. The first form of mediation is applied outside the framework of legal proceedings and can also be called out-of-court mediation. The second form of mediation — which can be qualified as court-annexed — is ordered by a court and is applied within the framework of civil procedure. Mediation has been considered as a sort of remedy in order to prevent people from having recourse to litigation in civil courts.

Until recently, mediation — both in the form of out-of-court and court-annexed mediation — was at the periphery of German legal discourse<sup>6</sup>. German law distinguishes between mediation not con-

6. Discourse analysis is a general term for a number of approaches to analyzing written, vocal, or sign language use or any significant semiotic event. The objects of discourse analysis—discourse, writing, conversation, communicative event—are variously defined in terms of coherent sequences of sentences, propositions, speech. The important difference between text linguistics and discourse analysis is that this latter aims at revealing socio-psychological characteristics of language/ words rather than text structure. For more details on this issue, see VAN DIJK, 1997, FAIRCLOUGH, 2003, BHATIA

nected with judicial proceedings and mediation that relates to an impending or ongoing court proceeding. Mediation not connected with court proceedings (i.e. mediation that results only from the parties' mutual consent) was not subject to any specific rules until recently. In practice, parties often choose to mediate under the roof of an established mediation organization. In such cases, the mediation rules of the chosen organization apply.

Before the Directive 2008/52, in Italy the term conciliation referred to a non-adjudicatory dispute resolution procedure in civil and commercial matters. A different notion of mediation has spread, now being understood as the activity handed over to a neutral and impartial party, who lacks adjudicating powers, aimed to the settlement of the dispute. More specifically, mediation encompasses conciliation, understood as the agreement reached by the parties thanks to the activity of the mediator, whereas conciliation refers to the agreement of the parties, which is written by the mediator under his personal liability, at the end of the meetings.

In Cyprus, the definition of mediation as a structured process whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator is generally accepted; yet, no such structured system currently exists, nor has ever existed. Negotiations frequently take place between the parties and/or their advocates, but not before a mediator.

- iii) The concept of mediation has a little legal tradition in Hungary, Baltic Countries, Bulgaria, Czech Republic, Slovakia, Poland, Romania and Greece.

More specifically, in Greece mediation has gained a new content after the adaptation of Greek legislation to Directive 2000/52/EC. Mediation is a relatively new concept in all three Baltic Countries, Hungary, and Bulgaria where the situation changed after the implementation of the EU Directive 2008/52/EC.

Until recently in the Czech Republic, mediation was known more as a concept of international law where it represents a type of peaceful settlement disputes. Family mediation has prevailed so far, with the activity provided almost exclusively by mediators who are non-lawyers.

In Poland and Romania, mediation as a tool for alternative dispute resolution has been first introduced in 1990s in certain areas of law (family disputes and juvenile crimes). Then, Malta and Slovenia

joined the European countries with the introduction of mediation as a tool for alternative dispute resolution in 2000s.

As the analysis reveals, the schematic structure of the Directive on the one hand, and the different national legislations on mediation that show that some variations on certain major aspects of mediation still exist in Europe on the other hand, may prevent mediation from fully becoming an easy, quick, flexible and affordable instrument for citizens to solve their civil and commercial disputes in Europe (Espluques *et al.* 2012).

At this point, the paper aims to explore first the meaning of ADR acronym (Section 3) and then concentrate on the skills and strategies for practitioners (Section 4) who are involved in the mediation process.

### 3. The meaning of ADR

Despite significant cultural diversity and variations over time, the different contexts within which informal principles of justice have often been found reveal a prevalent and constant trend to create alternatives to adjudication for handling disputes. The contemporary resurgence of alternative forms is distinctive for various reasons,

- a) ADR has increasingly become an umbrella term under which some lawyers have developed alternative areas of legal practice;
- b) the speed with which the new groups offering institutionalized support for party negotiations have become professionalized;
- c) the extent to which courts in some jurisdictions have adopted ADR for sponsoring settlement;
- d) the support provided by professionals working in the legal field and the state.

In the last decades, Alternative Dispute Resolution (ADR) has increasingly developed. Not only courts and government agencies in many countries have supported its use, but also mediation and conflict resolution organization have been firmly established. Mediation, which is one of the major ADR processes, has become the most significantly used non-adjudicatory one, with established procedures and expectations. Nevertheless, as Brown and Marriot (2011) argue, ADR has not been universally adopted, and litigation still plays a huge part in people's attitude towards dispute resolution.

The analysis of the three elements of ADR acronym helps understand what the process actually involves, bearing in mind that: (i) there is no universally accepted definition of ADR; (ii) ADR is a general concept that

covers a broad range of activities and embraces a huge difference in terms of practice and approach in the area of disputes (Brown and Marriot 2011). The analysis can start with the term alternative

- according to OED, alternative means « adj., 1. that can be used instead of something else; 2. different from the usual or traditional way in which something is done »;
- alternative is the most efficient word to use in the acronym simply because it is so widely understood internationally; it is expected to refer to ways of avoiding having one's dispute resolved by the court (Brown and Marriot 2011, 3);
- the term alternative received some criticism; the reservations come from the fact that it seems to suggest that mediation and other ADR processes (if reflected as alternatives) are viewed as subservient to litigation;
- the alternative aspect of ADR is an alternative to the formal court system;
- ADR is alternative to the ordinary negotiation process when it requires something more than conventional bilateral negotiation
- it is now accepted that arbitration, contractual adjudication and other forms of dispute determination by a third party are also forms of ADR (the idea that ADR is alternative to all forms of third party determination and should embrace only non-adjudicatory processes is no longer proposed).

The second word of the ADR acronym is dispute and, by definition, ADR deals with disputes. OED defines the term dispute as « an argument or disagreement between two people, groups or countries; discussion about a subject where there is disagreement ». However, it is important to know when a disagreement becomes a dispute. This may be relevant, for example, to decide whether or not a clause in a contract comes into effect, where it provides for disputes to be referred to arbitration or any other disputes resolution process. Furthermore, it is important for ADR practitioners to have a clear understanding of the distinction between dispute and conflict as the way of dealing with each of these may vary.

There seems to be a fundamental paradox in the distinction and, as Brown and Marriot (2011: 7) observes, « if conflict is more generalised as a clash of opposed principles and may include differing viewpoints and attitudes, disputes are much more specific and involve disagreement over

issues capable of resolution, mediation or third party adjudication »<sup>7</sup>.

The last word of the ADR acronym is resolution, viz., the resolution of disputes. OED defines resolution « 1. a formal statement of an opinion agreed on by a committee or a council, especially by means of a vote; 2. the act of solving or settling a problem, disagreement, etc.; [. . .] 4. a firm decision to do or not to do something ». Options for dealing with conflict and disputes may include resolution, settlement, management, transformation, prevention, analysis and intervention. According to scholars working in this field, the primary call for ADR practitioners should be the resolution or settlement, and some believe that the word resolution means or implies that the issues between the parties have been resolved<sup>8</sup>. More specifically,

- if a practitioner is required to help parties reach an agreement to settle a dispute, then resolution and ‘settlement’ would have the same meaning;
- if the practitioner is required to help resolve a state of conflict that exists between them, and the dispute is merely one of the ways that the conflict manifests itself, then settlement of the dispute does not of itself necessarily resolve the wider conflict;
- in the end, the word resolution should not be viewed in a rigid way, since an ADR practitioner may simply enhance the resolution process without engaging with the actual resolution of the dispute.

These results demonstrate that ADR is an umbrella term and the scope of the process needs to be flexible and cannot be constrained by the terminology<sup>9</sup>.

The present analysis has been conducted on the mediation process and the linguistic skills and discourse strategies that practitioners need to know and develop in order to become expert mediators. In this respect, a brief overview of dispute resolution processes including not just ADR processes, but litigation, negotiation and alternative processes, becomes necessary before starting the analysis of mediation discourse<sup>10</sup> (Table 1 below).

ADR refers to the alternatives to litigation, therefore an outline of the key features of litigation process in order to place ADR process in its proper

7. In this case Brown and Marriot (2011) believe that, on the one hand, conflict may be viewed as a generic term, whereas dispute may be considered as a class/kind of conflict which manifests itself in distinct issues. Yet, on the other hand, disputes are likely to involve some elements of conflict within them (for example, a high conflict dispute). So disputes may be found within conflicts, and conflicts may be found within disputes.

8. *Ibidem*.

9. BHATIA *et al.* 2010.

10. For more details on the issue of *discourse and discourse analysis*, see FOWLER *et. al* 1979; FAIRCLOUGH 1989, 1995; VAN DIJK 1985, 1997; WODAK and MEYER 2001; BHATIA 1993.

**Table 1.** Adjudicatory vs. consensual processes.

<i>adjudicatory</i> : third party responsibility	<i>adjudicatory</i> → ← <i>consensual</i>	<i>consensual</i> : party's own responsibility
litigation		
private judging		
administrative or statutory tribunals		
arbitration		
expert determination		
adjudication		
dispute board		
court-annexed arbitration		
	ombudsman	
	arb-med/med-arb	
		evaluation
		natural fact-finding expert
		mini-trial
		negotiation (through representatives)
		collaboration/collaborative practices
		mediation (purely facilitative)
		negotiation (by parties personally)

context becomes crucial. If litigation consists in conducting a case through the courts, litigation is typically started by the claimant against the defendant with each party instructing attorneys. Over the centuries, established formal procedures for litigation have developed in most countries, such as pleadings or statements of case, and pre-trial hearings before judicial officers. Then, there is a trial and a judge — in some cases/jurisdictions, a judge and a jury — who hears the evidence and arguments, decides the issues, and makes the court order.

If litigation is at the one hand of the dispute resolution spectrum/scale, bilateral negotiation is at the other hand. Negotiation forms an inherent part of the ADR processes, because it is fundamental to all consensual ways of resolving disputes. However, on its own it is not generally considered an ADR process. ADR is in a strict relationship with litigation and negotiation, because it depends on both processes for its functioning. In this regard, we can imagine a spectrum of processes<sup>11</sup> as shown in Table 1, where:

- litigation is at one end of this spectrum of processes (i.e., adjudication with strict procedures and less party control)
- negotiation is at the opposite end of this spectrum of processes (i.e., consensual with flexible and less strict procedures and a considerable

11. Brown and Marriott 2011, 18.



party–decision–making control).

Between adjudication and negotiation there are hybrid ADR processes that incorporate elements of adjudication, negotiation, binding and non–binding, which are variously combined among each other. More specifically:

- i) the less the individual party's control, power and authority, the greater the third party decision–maker's power and the more rigid the procedures<sup>12</sup>;
- ii) the greater the party s' control, power and authority, the more flexible the process<sup>13</sup>.

#### 4. Peculiarities of ADR language

The European institutions have taken into consideration the existence of different approaches for the regulation of mediation in Europe, and the Directive 2008/52/EC has been enacted in order to become a basic device to achieve this goal. Furthermore, it provides definitions and standards that apply to all 'out–of–court' and 'court–annexed' domestic and cross–border mediation. The aim is to create an homogeneous area in which legal practitioners in the EU can « promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings » (Art.1 Directive 2008/52/EC).

In the context of globalization and internationalization with the key–role of English as lingua franca, the increase of language awareness and linguistic knowledge among legal practitioners represents an important step towards the creation of a European judicial culture and the realisation of a more efficient European judicial area. This goal can be reached only by means of an appropriate linguistic training of legal practitioners in the following areas: improvement of language skills training on legal terminology and communication.

Undoubtedly mediation is a free and voluntary process that depends on collaboration of the parties who retain control over the outcome of mediation. In fact, there is no stereotyped model and mediation might be extremely flexible. Mediation agencies have developed their own process model that have been designed to suit their particular purposes. Breaking the mediation process down into a number of stages might be a helpful way of gaining a general overview, though it should be kept in mind that these

12. *Ibidem*.

13. *Ibidem*.

stages will not follow the same order, they will not be present in every case and may overlap in practice. In this respect, a general framework might be convenient for a structural overview<sup>14</sup>:

- pre-mediation: informing parties about the mediation process and dealing with queries
- mediation process:
  - mediator's opening statement and parties' opening statements;
  - issue identification and agenda setting;
  - clarification and exploration of issues;
  - negotiations and dealing with impasse;
  - range of mediation outcomes.
- post-mediation: the mediator might have a post mediation function (i.e., stakeholder, continuing mediator, adjudicator, settlement supervisor).

For the purpose of this paper, the investigation will not be conducted on each of this stage but on the overall language skills that might be required throughout the mediation process. Communication skills cannot be so easily compartmentalized or sorted out. Often overlapping and merging, they do not operate in isolation. For this reason, the following analysis does not pretend to provide a comprehensive and exhaustive chronicle of all relevant tools and features of mediation, but just to give a broad overview on the strategies that a mediator might use to facilitate communication and negotiation and help move the parties to resolve the dispute.

#### 4.1. *Setting the scene: mediator's opening statements*

The role of the mediator can be derived from Art.3(b) of the Directive 2008/52/EC, which states that « 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way ». Effectiveness, impartiality and competency are the main rules of the mediation proceedings that a mediator should possess and apply. In this respect, the mediator is expected:

- to act as a facilitator of the communication, negotiation and decision-making between the parties

14. This framework has been adapted from Brown and Marriot 2011, and Charlton and Dewdney 2004.

- to be neutral and impartial, s/he does not give legal advice, s/he does not establish facts, s/he does not infer/suggest solutions to the parties
- to let the parties decide to reach an agreement or not, s/he has nothing to gain from the outcome of the mediation

Having agreed to enter into a mediation process, the parties will have some preliminary communications with the mediator or with the organization arranging the mediation. These early communications introduce the mediator to the parties (or their lawyers), give the mediator an initial picture of the issue under discussion, and set the process up effectively. One of the mediator's initial tasks is to establish the issues that the parties have agreed to resolve in mediation and establish an agenda for the process of mediation. The mediator's opening statement should be brief and concise, and the content of the statement and the style of delivery should be geared towards the prospects of a productive communication. This practically means that monologues should be avoided and the statement should be three to five minutes long, reserving the details at various stages of the mediation. The use of technical terms and Latinisms, such as « without any loss or waiver of rights or privileges », « the disputees », « re ipsa loquitur », must be avoided. In fact, parties who are not lawyers may feel reluctant to ask for explanations and this may impede the natural flow of the conversation. For the same reason, the mediator should not keep asking for the parties' approval of the process in the course of making the opening statement (i.e. « Is that fine for you? », « Is that okay by you? »).

A neutral and impartial mediator should not take sides and decide who is right and who is wrong. S/he might say<sup>15</sup>:

Let me begin by stating that *I am not acquainted with the parties involved in this dispute. I am not here to represent either side, or any particular position. I will not express partiality or take sides during this process. My goal is to assist each of you in reaching an acceptable settlement of this matter.*

*I've nothing to gain from any particular outcome of the mediation. I try to be neutral and impartial. If either of you feels that at any stage I am not, please let me know*<sup>16</sup>.

The mediator should not give the parties the impression s/he is deciding what the most important issues are. To do that, the mediator should remind the parties' ownership of the outcome of mediation. The mediator might say:

15. These excerpts, as those that follow, are adaptations of samples taken from Charlton and Dewdney 2004 and mediation process websites, cfr. [www.adr.af.mil/shared/media/document/AFD-070212-051.pdf](http://www.adr.af.mil/shared/media/document/AFD-070212-051.pdf).

16. My emphasis here and there.

*I have no power to impose a decision on you or to decide how this matter should be settled. This is where mediation differs from other forms of dispute resolution. . . you are still empowered with the ability to design a settlement that meets your needs, and addresses your interests.*

*It's a voluntary process so that you can feel free to leave at any stage of the mediation. Naturally I'm encouraging you to stay and work through it together. I can also terminate the mediation at any time and neither of us needs to give reasons for doing so.*

As these excerpts show, the mediator enables the parties to own the issues, making them clear that s/he has nothing to gain from the outcome of the mediation.

#### 4.2. *Neutrality and impartiality in the language used by mediator*

Mediator should encourage parties to make statements even in the presence of their representatives. Unless, they prefer to delegate that function to their lawyers/legal representatives, the mediator should ask each party to outline what the dispute means to them not just in terms of identifying the issue(s), but also asserting how they have been affected by them. If no one has volunteered, the person who initiated the mediation is invited to begin. The mediator might say:

*Mr. Fillmore, I understand you brought this to mediation, so perhaps you would like the courtesy of giving your outline first.*

Then, the mediator can briefly outline the process s/he plans on using:

*I'm going to ask each of you individually to present your point of view. The other person must listen to what is being said. To ensure this, I'm going to ask the other person to restate what was just said. So, for example: John, you will complete presenting your point of view around a question I have asked; Paula, you will have to restate what John just said. Is that process clear to both of you?*

In this case, restating helps clear up any misunderstandings and avoid problems early in the mediation:

*In addition, as we move along, I will also be asking each of you to present solutions to some of the problems brought up. As part of your solutions, I would like to hear what you believe are the possible consequences of your solutions being implemented. We will also follow the same restating process that I just brought up. All right, let's get started. John I'll start with you.*

This gives the mediator a brief sense of a simple, yet effective mediation opening. Gaining participation through encouraging parties' active partici-

pation and respectful communication will go a long way toward achieving a successful outcome.

To ensure parties' issues and concerns have been dealt with in an impartial and neutral way, mediator should take summary notes of parties' statements, using a couple of direct quotations. The pronoun « you » reinforces mediator's neutrality demonstrating that s/he is simply quoting the party's statement/ version and is not endorsing a particular version of the events:

Yes: « You made the point when you said that/ The other thing you said was/ You said that 'the accident made me anxious' »

No: « The way I see your issues is. . . » « Now I understand that. . . »

This goal can be reached when the mediator is able to listen carefully to what parties are saying. In this regard, an often neglected communication skill is listening. Unless the circumstances require the mediator to interrupt a party for a specific reason, listening skills involve allowing the parties to speak without anticipating, contradicting or interrupting them, and understanding the situation so that mediator's appropriate interventions and responses occur to facilitate progressing the session. It is possible to distinguish active listening from passive listening.

Passive listening occurs when mediator listens in silence to what parties are saying. More specially, s/he responds

- making use of non-committal acknowledgements, such as « I see », « Mm-hmm »;
- through eye contact;
- nodding;
- being relaxed, focused and alert;
- appearing interested.

It is important for mediators to demonstrate not only that they have listened to what the parties have said but also that they have heard accurately. Passive listening can be recognized when the mediator

- encourages parties to continue talking;
- encourages parties to finish a sentence (when they are hesitating while talking);
- is not looking uninterested;
- observes the effects parties have on each other.

On the other hand, active listening occurs when the mediator listens to what parties are saying and responds in active way reflecting the significance

of what parties have stated and their emotional content. This implies:

- giving uninterrupted and focused attention to the speaker;
- progressive summarizing: this helps mediator to manage conversation and conveys to the speaker that s/he is not merely listening to the parties but is appreciating the significance that they attach to what they are saying. This can be done summarizing the behavior of the parties in a descriptive way: «*I notice that whenever we talk about . . . , both of your voices rise, but I am not clear about why yet? Can you tell me?*»;
- using the parties' own terminology rather than using legal jargon;
- clarifying: words and phrases may have information missing or be otherwise unclear. For example, one party might say «I am very unhappy with the way Ms. White is behaving». The behavior Ms. White is displaying, which causes the other party's unhappiness, needs to be clarified;
- asking questions: strategic questions.
  - closed questions are used for clarifying and checking purposes, they generally require a one-word response: «Yes» or «No». This type is useful when the mediator needs to regain control of the session, i.e., the mediator politely interrupts a response with a closed question; once it is answered, it is the mediator's turn to talk;
  - open questions have the potential to open up the communication and encourage the parties to think more about what their response should be: «What», «How», «Why», «Where», «When», «What would happen if . . .?», «How certain are you of . . .?», «How certain do you think is the other party of . . .?», «Why did you say that?».
- asking questions: skilled questioning can be used for a number of purposes.
  - to encourage parties to provide each other with additional relevant information: «John, you say that Mary is always ignoring your advice. What do you mean by always?»
  - to probe for further ideas: «John, you indicated that you disapprove of Mary's lifestyle. Why?»
  - to encourage parties to shift their position themselves and focus to the future, to facilitate parties' identification of feelings and emotions, to perform a reality testing role: «What if . . .?», «What about . . .?», «How do you think your needs and concerns will differ in two years' time from what is a

persistent consideration for you today?»

### 4.3. Reframing

Words have to be used with extreme care when carrying messages, ideas and proposals between parties in the course of mediation. Whereas framing might refer to the way a conflict is described or a proposal is worded, «reframing is the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution efforts» (Myer 2000, 132)<sup>17</sup>.

According to Nadja Alexander, the importance of framing and reframing can be illustrated by the Kahneman effect<sup>18</sup> or the «endowment effect», which states that people decide which outcomes they consider equivalent, set a reference point and then consider lesser outcomes as losses and greater ones as gains<sup>19</sup>. Mediators can therefore select appropriate framing and reframing to induce the other party to see the judgment placed on that event in a different meaning or perspective.

Reframing<sup>20</sup> occurs when the mediator changes either the words or the context of a party's statement by means of

- paraphrases, i.e. restating what each party has said using different words<sup>21</sup>;
- placing a series of statements into a more logical sequence;
- restating an issue in a more general terms;
- neutralizing negative statements;
- mutualizing parties' statements, emphasising commonality of interests.

Language needs to be neutral and mediators should avoid expressions directing parties («I think you should. . .», «It seems to me that you'd better doing. . .»). Instead of distorting the meaning of a party's actions, mediators

17. Cfr. MOORE 1996, ROTMAN 1997 and HALE 1998.

18. Cfr. KAHNEMAN and TVERSKY 1979 and KAHNEMAN 2011.

19. It also aims to resolve isolation effects stemming from individuals' propensity to isolate consecutive probabilities instead of treating them together. In the subsequent evaluation phase, people behave as if they would compute a value, i.e. utility, based on the potential outcomes and their respective probabilities, and then choose the alternative having a higher utility (ibidem 2011, 317).

20. Whereas framing might refer to the way a conflict is described or a proposal is worded, «reframing is the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution efforts» (2000, 132). Cfr. MOORE 1996, ROTMAN 1997, HALE 1998.

21. OED.

should allow those actions to be seen in a positive rather negative way. Examples of reframing might be these following<sup>22</sup>:

*Example 1*

Party A's statement: « You have to do something. Nobody in your family likes you! »

Mediator's reframe: « *There appears to be some conflict between your family and you.* How do you think the conflict could be resolved? What can you do to resolve the conflict? What do you need your family members to do to resolve the conflict? »

Comments: in this case the mediator's reframe is too long and goes directly to a process for resolution with no exploration. The first sentence indicates that there is a possibility that the conflict might not be true.

*Example 2*

Party A's statement: « You have to do something. Nobody in your family likes you! »

Mediator's reframe: « *I've been hearing that there might be some conflict among family members.* How do you think the conflict could be resolved? What can you do to resolve the conflict? What do you need your family members to do to resolve the conflict? *Can we talk about that sometime?* »

Comments: in this case we have changed the first sentence in the mediator's reframe. The rest of it has been retained, followed by an invitation to talk about that.

*Example 3*

Party A's statement: « You have to do something. Nobody in your family likes you! »

a) Mediator's reframe: « *Can you tell me how things are going with your family right now?* » or

b) Mediator's reframe: « *How're family members doing?* »

Comments: in option (a) of Example 3, there is no implicit assumption; it addresses the right issue and it is an appropriate question for a mediator

22. These examples are adaptations of those provided in Charlton and Dewdney 2004, and mediation websites [www.mediate.com/index.cfm?classicsite=1](http://www.mediate.com/index.cfm?classicsite=1).



to ask. The subjective pronoun « you » and the objective pronoun « me » are still there, but their importance/power is reduced by comparison with Examples 1 and 2.

In option (b), the question has been geared to maintain the focus of the concern and does not contain the subjective pronoun « you » and the objective pronoun « me ». This is an open question and the answer might be consistent with what party A wants to explore. Being an open-ended question, it might also raise unexpected issues as well.

#### Example 4

Party A's statement: « You have to do something. Nobody on your family likes you! »

Mediator's reframe (a): « *I've been getting feedback that there may be some disagreement with your family right now. I want to be sure I have your feedback, so let's set aside a few minutes in the next day or two to talk about what might be happening* ».

Mediator's reframe (b): « *It's come to my attention that there may be some disagreement with your family right now. I want to be sure I have your feedback, so let's set aside a few minutes in the next day or two to talk about what might be happening* ».

Mediator's reframe (c): « *Lately I've noticed that there may be some disagreement with your family right now. I want to be sure I have your feedback, so let's set aside a few minutes in the next day or two to talk about what might be happening* ».

Comments: in examples 1, 2, 3 we have neutral, unbiased information, with the use of the singular first person pronoun « I ». In Example 4, option (a), the mediator makes a neutral observation using a first person pronoun « I ». Then s/he gives a chance for exploration expressing the need for party A's feedback (« *I've been getting feedback that . . .* »). In particular, the modal auxiliary « may » is used to suggest that the mediator assumes that the feedback has not been automatically accepted (« *there may be* »), whereas « might » indicates a discretionary act (« *what might be happening* »). The need expressed by the mediator to have party A's input indicates a collaborative approach, further emphasized by the exhortative « *let's set aside* ». Asking to suggest a time to talk indicates that party A is not being expected to defend herself/himself against an unstated accusation, but that a mutually agreeable time for conversation is being determined jointly. The use of the possessive form of the singular personal pronoun « you » (« *your feedback* ») in the main clause of the mediator's second sentence, has the effect to produce a statement that does not feel like an accusation, but refers to the family members.

Reframing is harder than it first appears, and none of these reframes are perfect. For this reason, experts working in mediation provide some useful suggestions to improve the reframing technique<sup>23</sup>. We can take a look at some of them:

- to start with a neutral observation or a very general question;
- to reduce the occurrences of second pronoun « you » in all its forms so the statements are less personal and does not become an accusation:

Party's statement: « I cannot rely on her any more. It's not going to work »;

Mediator's reframe: « Let's see if there are other ways *it* might work best »;

- to use the plural « you/yours » and « we/our » whenever possible to build a sense of collaboration and emphasize a sense of commonality of interests:

Party A: « Mr Fillmore is always too busy! He never replies to my emails and phone calls »;

Party B: « Ms Ronan, you've never told me about client concerns! »;

Mediator's reframe: « It seems as if *you are both* focusing on important aspects of the work. So what if *we* have a discussion on past communication as your concerns seem linked to that? »;

- neutralising and removing toxicity<sup>24</sup> while keeping the truth of the statement:

Party's statement: « Ms White is not reliable. She breached the contract »;

Mediator's reframe: « Your concern is the way the contract was carried out »;

- examples of redirecting parties towards a positive future focus:

Party's statement: « He has never been at home before the 8:00 p.m. and I'm always back home at 6:30 p.m. I have to do everything alone »;

Mediator's reframe: « So you are saying that for the future you would like to work on some plan that ensures you are both around at the same time, or which allows for a fair housework and dinner arrangement, for example, for you to alternate the late evening arrival ».

23. Cfr. MOORE 1996, 2013; GOLDBERG *et. al* 2012., Charlton and Dewdney 2004.

24. This term is used in mediation process by Charlton and Dewdney 2004, 200.

In this case, the mediator tones down on a blaming or critical statement and states it in a positive frame «for the future you would like to work on some plan that ensures you are both around at the same time». Furthermore, the term «future» and the plural «you», together with the volition verb «would like», help emphasizing common concerns or common ground;

— examples of softening demands:

Party's statement: «John just won't admit that what he did was wrong and affected the whole team. I don't want to play with him anymore. History will only repeat itself»;

Mediator's reframe: «You are saying *how much this affected you in the past and that things need to change in the future if you decide to play with him again*».

In this case the mediator identifies the issue that needs to be resolved. This can be the start of building an agenda. Even though acknowledging emotions, they are not used as a central focus «you are saying how much this affected you in the past and that things need to change in the future». In this case the mediator does not suggest or imply a solution in the reframe («if you decide to... »).

As the extracts reported above show, mediator works to identify the needs and concerns behind a stated position which helps the clients to analyze their own perspectives and clarify their thoughts.

## 5. Concluding remarks

The analysis developed in this paper shows that the mediator needs to be a proficient director and supervisor of the mediation process. This includes organizing the meetings, maintaining control over all procedural aspects, deciding how to conduct each element of the process, ensuring procedural fairness through a gentle, firm, effective and impartial management. Different roles and functions are performed at different times, sometimes consecutively, sometimes simultaneously. The mediator not only leads the process but also acts as: (i) information gatherer of the relevant information from the parties; (ii) facilitator exploring the alternatives to negotiated resolution and their implication; reality tester checking whether a party is realistic about the viability of proposals for the resolution of the dispute; a scribe maintaining essential notes of matters that need to be further investigated.

Generally speaking, words are slippery and they need to be used with

extreme care when carrying messages, ideas and proposals between parties. This is all the more evident in mediation process as language has to be neutral and mediators should avoid expressions directing parties. To perform these roles, mediators need important communication strategies which are based on the « effectiveness, impartiality and competency » (Art.3(b) of the Directive 2008/52/EC) as the main rules of the mediation process.

In this regard, recent theoretical developments in postmodern social theory and social constructionist movement in the social sciences and humanities<sup>25</sup> have provided the field of alternative dispute resolution with a new approach to managing and mediating conflicts. These developments are organized around the « narrative approach »<sup>26</sup>, which attempts to re-examine traditional theories of conflict mediation by examining how the stories (or discourses) tell us about our conflicts, our interests, our positions. It is based on the notion that language plays a significant role in constructing who we are or how we behave with others. This discursive process focuses on how complex social contexts effect and shape the multiple aspects of social conflict. As they are played out and mediated in practice, the narrative approach helps to see how the words and language we use to describe and understand our conflicts are operative in constructing an image in our minds of the conflict itself. Interestingly enough, the narrative mediation approach questions the commonly held assumption that our interests are natural or are present before entering the conflict, and offers instead an approach that locates these values, interests and needs/desires in a social and cultural context that arranges certain values and goals over those with which they compete. By examining and reframing the discourses surrounding the conflict situation, both mediators and disputants might have a better understanding of the biases and assumptions they hold in regards to the conflict itself.

Narrative mediation differs from traditional mediation in that the regulation of the process is not necessarily independent of the content. In addition, the agreement is not considered an outcome but rather a step in the right direction. Interestingly enough, this approach could be used in conjunction with more traditional practices to discover the ways in which our interests, ideas, opinions and view of the conflict are shaped by social forces and discourses.

The theoretical principles behind the narrative mediation are perfectly in line with the analysis developed in this paper. As we have demonstrated, mediation is best performed through skillful communication strategies

25. Cfr. Cobb 1994; Gergen and Thatchenkery 2013; Winslade and Monk 2000, 2008; Camargo-Borges C. and Rasera E.F. 2013.

26. Cfr. Winslade and Monk 2000, 2008, Monk and Winslade 2012, White 2011.

that have generally three dimensions: the first step consists in « setting the scene: mediator's opening statements » (Subsection 4.1), followed by the deconstruction of conflict patterns by means of « neutrality and impartiality in the language used by mediator » (Subsection 4.2), and ending with the construction of an alternative story or « reframing » (Subsection 4.3).

During engagement, the mediator will carefully listen to each conflict story. These early communications introduce the mediator to the parties (or their lawyers), give the mediator an initial picture of the issue under discussion, and set the process up effectively. As the analysis shows, one of the mediator's initial tasks is to establish the issues that the parties have agreed to resolve in mediation and establish an agenda for the process of mediation. During deconstruction the mediator will challenge assumptions the parties make about each other, about themselves and about the conflict. Then, mediator will clarify that the persons are not the problem, the dispute is the problem, and they must jointly reconsider it. Reframing and construction begin with the idea that a story of cooperation already exists and only needs to be uncovered.

Although not thoroughly exhaustive, the analysis conducted in this paper confirms that an increase of language awareness and linguistic knowledge among legal practitioners represents an important step towards the creation of a common European judicial culture and the realization of a more efficient European judicial area. This goal can be reached only by means of an appropriate training in language skills and communication strategies.

For a more complete picture of the linguistic features and discursual strategies at play, the analysis might extent to the methods and strategies that are adopted differently depending on the context(s) and the conflict(s) at issue. The present contribution might be considered a first step in that direction.

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# Preserving identities in multiethnic cities

Differences, integration, mediation

LORENZO FERRANTE

CONTENTS: 1. Introduction, 289 – 2. What do we ask to multiculturalism?, 290 – 3. The assessment of the differences: rights and duties, 291 – 4. Multiculturalism: new identities struggles?, 293 – 5. The failure of Multiculturalism, 294 – 6. The ambivalences of “different”, 296 – 7. The rite of infibulation, 299 – 8. Halalfood, 300 – 9. The scarf affaire, 301 – 10. The research, 305.

## 1. Introduction

The paper aims to analyze the role of cultural mediation in integration processes of immigrants. It's known that mediation is recognized as instrument to settle disputes arising between people coming from different cultures, traditions, religions and juridical systems. If mediation evokes a meeting point, in which the differences that could lead to conflicts with negative effects for the parties, and considerable economic, social and psychological costs. Knowing the differences mean, at least, understand the reasons that explains the behavior. For this purpose, will be presented the main results of a research carried out in Palermo, about expression of differences. The research aims to verify if origin's culture and religion, as decisive factors of identitarian differentiation can facilitate or hinder the integration of immigrants. In current multi-ethnic societies, immigration processes changed the perception of the differences between natives and immigrants. The continued and sustained immigration flows have also disrupted the social order on which orders are ruled legal, political, major European countries. The newcomers have posed new questions on the recognition of rights, not only appealing to Western liberal principles of respect for universal human rights, but also for the protection of the rights of the minorities. In western societies, the hostile climate that exists between natives and immigrants, is a result of multicultural policies, on the one hand, from many sides declared to have failed. On the other hand is the result of cultural prejudices that host societies have used to catalog the cultural differences of immigrants. In societies where has been used the mediation, there were significant reductions of the potential conflict between communities. Or has averted the danger

of urban violence. These experiences, however, are realized mostly at the local level, as Marseille in France, (Duprez, 1999:753–770) or some small cities of South Sicily (Ferrante, 2011). In big cities the role of cultural mediators is mainly linguistic or assistance for the fruition of social services. The difference depends on the freedom with which the local dimension determines the specific governance and the integration of cultural differences. That instead a more global level depends of the national policies. Indeed, the governance it is a declination of it. As we shall see in the course of analysis, new approaches to mediation runs, by setting up of consultative bodies, spokesman of ethnic communities' instances present on the territory. These organs, spokesman of minorities, are created to collect the demands of associates, and eventually lead them in a public evidence, for the reduction of social, legal, religious marginality. The central question is whether the cultural differences, which increase in societies with a strong immigrative component, can increase social conflict. Most of the sociological theory argue that the problem is the fear of losing what is owned by elites in terms of wealth and social status, so the answer is that these strata determine the increase of social distance. But when the "others" become more numerous, or simply more visible, the perception is that their group, their community and the values it expresses, that give identity and recognition to the members, become a minority. To this is added the fear for loss of values which have ensured a guidance in the paths of mobility and social reproduction. Those values that built the sense in relationships and ensures the recognition of expressions of relationships. In short, a certain, predictable, social life. From the perspective of political and social structures pose a problem for the multiethnic democratic societies postmodern–globalized and interrelated, where democracy has settled on monoculturalism. Demographic trends show that in many countries multiethnic, the years will be years in which you will face the problem of the functioning of democracy in a multiethnic society. For example in 2050 the U.S. will be a nation of minorities, whites will be a minority, as well as blacks, Asians and Latinos. Such comparison shall be based the field of the rights and duties of those who now are numerical minorities than those who hold the leadership of cultural, religious, political and economic. There are many problems that need the recognition of the minorities involved.

## **2. What do we ask to multiculturalism?**

Meanwhile, the feeling that with a general obligation of respect for the foreigners, is not the same commitment from their side, both civilian and religious. So a vision of a cultural and religious intermarriage as a process

to guide and not a goal to reach. Why allowing them the freedom to build mosques in my territory when in “their” territory churches cannot be built? Why in the name of respect for religious beliefs of others, you have to remove the crucifix from public places, that represent my faith? These questions reflect the common sense of a more general principle according to which a society is recognized as a right if the right is a right holder who is also holder of a duty. And seems to justify a legitimate demand for reciprocity in the recognition of indigenous rights, even if neither wants to live in any of the countries of the Arab world or live in a society that looks like it. The problem that remains is the social assessment of the differences, while the political–organization is in terms of interests. In summary, what kind of society do they want? Our analysis is directed: 1) to the issue of the transformations and metamorphoses of different cultures that come into contact with one another; 2) the reasons why identity phenomena such as religious rituals are very strong markers of identity; 3) the reasons why despite the attempts that the dominant culture makes to absorb or cancel them, these efforts are vain. In substance, they determine the agenda of issues in the public domain. When it comes to immigration, ordinary people have little direct evidence. Immigration can be considered one of the best examples of the trend mentioned above, as it is perhaps one of the phenomena of which ordinary people have less experience in everyday life. Moments like these tend to break down social relations and community relations, exposing societies to risks of social disintegration, while, on the contrary, increasing the need for standardizing sense of daily life. In the worst of cases (concerning the meanings that cohesion inspires), uncertainty opens the way to simplifying shortcuts toward new unifying symbolic universes, such as some forms of fundamentalist representations, religious extremism, and revisionist perspectives. The increasing complexity that is associated with the fragmentation of social and individual life, the new phenomenon of ethnic and religious pluralism that force social systems to review their parameters of security and fear, contribute to the rise of localism and ethnocentrism as a defensive response to social problems. A society where all groups have the same rights as nationals or a society with some people more privileged than others: this suggests a closure strategy of land to “outsiders” to which, however, ends for practicing the Gated communities strategies of foreigners.

### **3. The assessment of the differences: rights and duties**

The question of recognition of collective identities due to different populations or ethnic groups is central to the debate on the definition of multi-

culturalism. The terms of recognition is split in a public dimension, which refers mainly to the issue of rights and duties, and in a private dimension where prevailing the sphere perceptible and representational of difference. The two dimensions are not strictly separated but, as it allows the concept of pluralism, which are grown in size and private practice free expression of differences, while the public is organized by setting common rules. Recognize means to meet the same level difference. The problem that remains on social level is the social assessment of the differences, while on the organizational political level, the problem is in terms of the level of protection of collective interests. But under what conditions is this meeting? What collective sentiments generates a comparison between different cultures? In the normative dimension, multiculturalism aims to legitimize the demand for public actions that fall within identity policies. Essentially it refers to attempts to establish good relations between different cultures, through rules and criteria of equality and mutual respect, based on the principle that no culture has the legitimacy to play a leading role over the others. This principle of equal dignity, in its original intent, has a high degree of heterogeneity because it counteracts gender discrimination, race, ethnicity, religion, political beliefs, then all forms of structural differentiation, having the aim of protecting the right of individuals and groups to their social identity. On a constructivist basis, there are phenomena of multiculturalism which, leading to exclude or marginalize groups and individuals who belong to hegemonic "circles", with major economic and cultural resources, want to maintain, as well as to include individuals and groups considered to be an enrichment in the social configuration, especially when placed on higher cultural or economic strata. As such, multiculturalism draws attention to the social relationships between different and new languages, so you do not accept the idea of assimilation or not supported by appropriate mutually constructive integration policies, nor the idea of tolerance in the same territory of cultures and different ethnic groups p. BERGER (1966). The concept of tolerance evokes a sense of tolerability of someone with whom you do not feel comfortable, that you agree to avoid to fight with him on the same space. In short, a separate but peaceful coexistence, which is full of worthlessness and inferiority towards the tolerated.

The basic problem that arises in terms of the comparison of cultures is a way to maintain their own identity and the subjective group, also creating the conditions for the recognition of content and meaning of membership. Should such this recognition take place in terms of reciprocity or respect for otherness, depend on the sense with which we collectively internalize the common values of coexistence and the degree to which a community will be able to perceive differences. This solution of multicultural differentiation would lead to differential risks of a multicultural fragmentation of society

because of the coexistence of “homelands” self-identity groups, resulting in de-legitimization of normative codes unit, but also the evaporation of a proposed diverse and inclusive coexistence (P. BERGER, Berger B. and H. Kellner, 1973). It should be recognized that many minorities, especially in the cultural field, may be limited by decisions taken by the majority. Such decisions, that dangerously restrict the existential space of their identity in a circuit autopoietic that reproduce the representation of difference and inequalities. Differentiation on the basis of group rights can offset this disadvantage, because it reduces the vulnerability of minority cultures in relation to majority decisions. These safeguards ensure that external members of the minority have, once members of the majority, the same opportunities to live and work in their own culture. The debate thus seems to move to a theory that justifies on the one hand the protection of individual and collective rights, but both gives shapes of negotiation with the most anthropologically inequalities rooted in the collective imagination collective. To avoid being accused of sociological reductionism, we must assume that every social space has provided a universe of relations of meaning between individuals, groups, classes, strata and social classes, cultural elements that shape the generality of social relations, and specifically to the sociability, the latter term meaning either a) the general provision of humans to establish relations with some kind of social relationship or b) the multiple concrete manifestations of this provision as a group, association, community, mass, based on certain types of needs and interests.

#### **4. Multiculturalism: new identities struggles?**

In the eyes of multiculturalism, the meeting between two or more cultures is seen as a reciprocal enrichment. The concept of pluralism usually refers to a society where the plurality of ideas, religions, opinions, beliefs are allowed and protected by the State. In reality, multiculturalism is the pluralism of cultures within the same political society. It is not therefore a problem concerning pluralism of interests, needs or preferences. But concerning the cultures, i.e. the symbolic universes that give significance to the choices and the existential foundations the people who practice them. The multiculturalism that was developed in response to mass immigration in Europe, wanted to celebrate the diversity of religious and ethnic groups. It wanted to convince the host nations that those groups were part of a new order of society. It was said that these groups would have enriched the social life, from cookery to literature, from language to local customs. Monotony would be transformed into a fascinating variety. This has partially come true. In many countries the food has improved, the finest

Chinese or Korean chefs from the coolest city centres, have offered us new tastes. But many benefits have been seen in other sectors, with the input of workers in the fields construction, agriculture, transport, or in jobs that local residents are reluctant to undertake. In time they will be a middle class that will establish its self and expand more and more. Multiculturalism, however, has inaugurated new identities struggles. More, it's a source of accusations and racist practices. It imposes a heavy price for those who want to preserve diversity and leads to see integration with suspicion. It's not a question of becoming Italian or French or German, English... but of remain Chinese or Moroccan. For example, calling oneself British means to force a concept that is difficult to define, but the same goes for the Americans, or (rather) for the U.S. In either case, these are identities composed of various nations. "British", for example, means composing Scotland, Wales, Ireland and England together. Defining "American" then, means taking into consideration about fifty states. What brought together these identities then if not a religious glue (the Protestant one) and an imperialist ideal, that lead to a declension of identity that by now was rooted in local culture such as feelings of belonging, such as pride in their flag, the sacredness of their territory, their international protagonism in historical events that led to scenarios of a political and economic nature, including both local and world economy. But both in Britain and the U.S. religious and "imperialist" glues are gone. Following the events of September the 11<sup>th</sup> 2001, and the attacks in the London Underground, western societies have been found to be more insecure; the shock came from the Islamic extremism rooted in Muslim residents, not just in Muslim immigrants. In 1991 the percentage of immigrants living in England was 6.7%, after 10 years it had grown to 8.3%. In 2010 the figure arrived at 11, 4%. In 1991 there were 2.4 million Muslims who had access to about 1500 places of worship to pray in. The Cool Britannia of Tony Blair in which different ethnicities and cultures were mixed whilst maintaining there specificity seemed to have vanished. The distrust towards all Muslims has grown just as the common belief that Muslim communities cultivate hatred towards the West has grown.

## 5. The failure of Multiculturalism

With a singular synchronicity, two of the major European leaders, (Cameron and Merkel), at the Conference on the Security of Monaco in 2011, declared the failure of multiculturalism in their countries: England and Germany, countries in which it was thought, if not to have solved, to at least have the social tensions arising from the coexistence of different cultures in the same territory under control. According to Cameron, the doctrine of multicultur-

alism has encouraged different cultures to live separate lives, detached from each other and from the Mainstream culture. A consideration of the idea that it's time to abandon Great Britain's "passive tolerance" of the different cultures existing in the country, and replace it with a muscular and active liberalism, suggesting that life in England revolves around certain key values such as freedom of speech, the equality of rights and the rule of law, reminds us that a passively tolerant society remains neutral between different values, a liberal country does much more: it believes in certain values and actively promotes them. In Merkel's speech, the term multiculturalism was passed for a synonym of an ideology that justifies violent practices such as forced marriage, genital mutilation, the amputation of thieves' hands or the stoning of adulterers. The failure was thus justified by the notion that it's impossible to share common values. Two elements however were omitted: Firstly, that the failure is coincided with the growing fear for the Islamic culture, that already from the 11th of September 2001 has changed the coordinates of global order and security; secondly, the growth of the economic gap between the rich and the poor countries of the world. Another thing that has been underestimated is the possibility that poor people, being aware of the historical exploitation of a colonial past or due to global markets, could generate compensatory feelings; just as the role of religion as a marking factor of identity has been underestimated.

The response of migration policies has been to exploit fear of the foreigner by adopting more stringent measures towards immigrants and their forms of religious expression. The protection of the French language in Val D'Aosta in Italy, as that of various linguistic minorities and majorities in Canada is multiculturalism. The protection of rights of the Amish, Mormons, Orthodox Jews, or Native Indians guaranteed by the U.S. Supreme Court, and the multicultural multiethnic rights to ensure that minorities can express their cultural particularity, and without discrimination always respecting individual rights, is also multiculturalism. The local policies in opposition of globalization, as key to understanding a different self in a territorial space which is experienced as unique in itself and excluding others, is another example. It is an element of social composition, which, however, emphasizes the illusion of social regulation at which modern societies have projected themselves: i.e. coexistence of the same rights with citizens of different racial origin, political beliefs and religious orientation. In Western contexts, the concept of "multiculturalism" and its many declensions arise in the form of policies of assimilation. At the moment when the paradox intrinsic to the illuminist type of the universalistic model explodes, which tended to discard the cultural, religious and ethnic differences, stifling all particular features, it ends up imposing, under a pretence of neutrality, forms of cultural domination that lead to a forced homologation. Just like

an alternative to the American *melting pot*, which collapse of the illusion of its realization seems to have crossed the Atlantic quickly, giving us the conviction that ethnicity is not a condition of coexistence, but of social stratification, in societies where the division is however already accentuated, for categories as homogeneous as possible in economic and cultural terms. This condition affects the perception of collective identities, so much so that some groups feel they can claim more privileges than others, compared to the *status quo* as a citizen, and more specifically in the areas of professional life, the system of social welfare, public services, education, etc.

The differences between ethnic groups and cultures that seek points of comparison are the starting point to overcome the historical relations of domination and economic exploitation: relations in which the *inferiorization* of some corresponded to the supremacy of others, and whose relational drifts have been expressed in various forms of racism. This phenomenon has often changed shape but is always attributable to a “story” that determines its different characteristics, and social relations that have their own logic and specificity. From this point of view, racism is always the consequence and not the cause of social behaviours or conduct: it is a feedback effect that triggers a mode of interaction between people, inspired by the cultural patterns that justify the exclusion. Taking a look back at the time of the colonization of territories and the time of “uncivilized” populations, operated by countries like France, Holland and Great Britain, very few would have imagined what effects, in terms of social coexistence, would have been determined in the colonizing countries after many centuries. Among these effects, for example, the ceasing of immigration for work and permanent settlement of migrant populations in the ‘70, led to the emergence and then growth of statements and claims of identity, which continue to explode, often violently, as in the case of protests by French *casseurs* in 2005 and in the years following. These claims are also present in other European countries, and fit into the context of the end of national societies, of the exhaustion of national patterns of mobilization and modernization. Having to deal with one’s own past imposes a protection of an interpretation of the world, one’s own world, which cannot be abdicated even in the name of the reminder of the rules of equal dignity. This explains how each country looks for a particular model of multiracial integration, by assimilation or integration.

## 6. The ambivalences of “different”

When racial differences are present in daily practices, political, religious and educational institutions, in people and bodies that have different characteristics, they become inseparable from social relations in which identities are



built. For this reason, racial attitudes and behaviours are strongly resistant to any moralizing appeal, or to the rules of a universal equality. Choosing a model implies a decision on how to comprehend differences, belongings, the sense and direction to give to a society to which it is addressed, from now on. Somehow it forces the choice of material and symbolic boundaries in which to place perceptions and representations of people's lives, in accepting or denying the various instances of identity. Let's take a look at, in this regard, the case of the models of integration of two nations that in the past Europe has looked into with interest, but more recently with concern. The defence of U.S. citizenship with the hyphen of Italian–American, Hispanic–Americans, African–Americans is multicultural: a hyphen with which “hyphenated” Americans are registered at the census. Different definitions overlap to the extremist interpretations of multiculturalism, such as the “Multicomunitarianism” of Baumann (1991), and Sean (1992), that when referring to English multicultural policy, retains it as a policy that has made “collections of “monoculturalism”. An appropriate conception of multiculturalism expects that immigrant groups that come in at a later stage of the founding countries, for example the mostly Christian Muslims in European countries, have rights as minorities: (freedom of worship and the right to build places of worship). However they also have the “responsibility to integrate themselves into the rules of the Nation” (KimliKa, 1995). We share the idea that the “European nation” has a collective identity that is still immature, and is still looking for common roots between the various European states participating in the European Nation, whose stories tend to maintain their local roots, which have defined the national identity. But these cultural tensions generate short circuits in the adoption of measures aimed towards the compliance with local identities and the respect of the immigrant's rights.

One of these short circuits is the law in France, (a country with a strong liberal tradition), which in April 2011 banned the burqa. Migrations have changed the face of Europe, and they are set to impact more in the future. It is hard to accept the idea that States are populated only by the indigenous population. Meanwhile, historical motivations are an obstacle to the changing face of Europe because history helps define the identity of a population. What may the Germans with their “past that does not pass” and the Turks as the most populous immigrant community in Europe, have in common? Or the British with the French, that instead have an embarrassing colonial past in common with immigrants but neither French *grandeur*, nor British imperialism or British aristocratic traditions, or the profoundly Roman Catholic Poland with Muslims?

According to Bauman (1992), assimilation projects are destined to failure because they annihilate the ambivalences of “different”. This work

relies on terms such as multiculturalism and ethnicity, terms that more and more often are used interchangeably in ordinary language, to qualify societies. These terms actually express distinct meanings (Willett, 1998) if the multi-ethnicity indicates the presence of different ethnic groups within the same social space. Normally, multi-ethnicity entails multiculturalism, because the different ethnic groups are the bearers of their own cultural heritage. Multiculturalism however does not necessarily entail multi-ethnicity because cultural differences may come not only from different ethnic groups but also from religions, ideologies and distinct socio-economic stratifications. But migrations from regions near and far, are an integral component of European history (Sassen 1999).

Recent mass migrations to the Western States from countries outside the European Union certainly do not represent anything new, at least from the stand point of geo-politics. By merely the European context alone, towards the second half of the 18, century there were substantial migration flows. Already at that time migration flows took place for the same reasons many in the more recent periods do: religious (the expulsion of 500 thousand Huguenots from France), ethnic-nationalist (the withdrawal of the Polish minority from the territories in Prussia), work related (temporary and seasonal migrations to Paris, Madrid, London and the plains of the Mediterranean: areas with high jobs). The reasons why today's populations of the South or the poorer ones migrate, or the reasons that jeopardize the survival of people that emigrate (towards Western States, ) are essentially the same as previous waves of immigration that involved Europe over the centuries. A thesis to reserve attention to is the one according to which the actually new nature is not to be sought in the current form or in the causes of migration flows, but rather in the way they are considered and socially defined: the common perception of immigrants is in fact as a threat, a domestic enemy (Dal Lago, 1999). This thesis claims that foreigners (legal immigrants, irregular or clandestine, nomads, refugees) are the categories most likely to be treated as "non-persons". And that a stranger will be from time to time an immigrant, a clandestine, an irregular, categories that never refer to some feature of his own being, but what he is not, in relation to our categories.

In social scenarios of present-day society, "risk society", "fluid modernity", whose tension generated by globalization has produced effects both on freedom and security. Membership and identity are not for life, but rather suffer from the uncertainty of negotiation and withdrawal. In sociology, social exclusion is based on the figures of the poor, the enemy, and the foreigner. These figures all have in common the fact that their position in society is determined by what cannot be shared. Simmel argues that individuals engage in social interaction only because they are somewhat

aware that in the society whose existence they promote there is a place where their individuality can adapt more or less harmoniously. He also states, "All individuals are intrinsically oriented by their own qualities to a certain position<sup>1</sup> that ideally belongs to them, (and) is also truly present in the social complex — this is, the condition in which individuals live their social life and that can be defined as the value of universality inherent to individuality" (Simmel 1908). The experiences of slavery and colonialism reveal to us the value of the efforts made [200B?][200B?]by immigrants (forced) not only to preserve their religious dimension through daily rituals or practices, as illustrated below, but also how religion has allowed them to protect and safeguard their identity spaces, recreating in a modified form the social systems with their hierarchies, stratifications, organization of solidarity that they belonged to.

## 7. The rite of infibulation

There are several examples in which Westerners are usually surprised by some rites of passage or some social or religious practices that are considered immoral. Just think of the polygamy among Muslims or the stoning of adulterers, and the reactions in the world to save those condemned to a horrible way of doing justice. A way that is regarded horrible even by many Muslims. The point is that the believers of *shariah*, the religious law of Islam, believe that the law requires precisely this form of punishment. Infibulation is the ritual of female genital mutilation in some African populations. Some years ago an Italian doctor who wanted to fight this invasive practice (which results in little girl's infection because practiced in disastrous sanitary conditions), had proposed a simple prick of a pin that would help preserve both the cultural practice and avoid the danger of infections. Of course, the proposal was rejected, showing that the typical Eurocentric cultural attitude that does not seek a dialogue or exchange nor respects diversity.

This is a typical but not the only example. The Western world believes that the practice of infibulation, as a mutilation of a body part of a human being, is terrible and repulsive, especially because it is performed on a part of the female sexual organs that give women the pleasure of sex. Some die-hard feminists interpret it as a practical demonstration of the culture of power and submission that men exert over the female world. Anthropology offers us a localist cultural dimension in which in the ethnic groups that practice this rite of passage, this rite is steeped with expectations, because it allows young women not only to show their courage, but also to make

1. In reality to be considered, in our opinion, as a profession.

their sexual organs more beautiful, according to the collective imagination that these cultures have of the aesthetics of the body.

For the same reasons, young warriors spend entire days alone hunting and doing incisions on their bodies, applying wooden sticks or other objects on their genitals. These changes in the physical and aesthetic features of the human body are practiced in all societies. Even in the West. Suffice it to think of the tattoos that are put on display on beaches or body piercings whose very sight is disgusting to some or that appear to be terribly painful like those of the tongue, nose, navel and in some cases even the male and female sex organs to give them an image of originality, uniqueness, according to an idea of aesthetics that is unusual for the Western world. And what about male circumcision and cosmetic surgery (examples that affect every single part of the human body) that involve painful post-intervention as well as risks of infection, error, and re-intervention after a certain period of time, etc. Probably one of the differences that reassure the consciences of Westerners is that these interventions are carried out in extremely aseptic places and with medical care in extraordinary cases where there is a risk of death. The reassurance we are talking about here is an idea of what may be “right” or “wrong” in some cultures. However, it is clear that these concepts must be related not only with the rationality of actions (actions on the body are performed in places where the ensuing risk is limited). But they have a meaning when put in relation to cultures, customs, and unique practices, thereby breaking away from the suspicion that moral judgments simply reflect the preference for the culture to which you belong.

## 8. Halalfood

“Eat from the good things with which We have provided you” (Quran, Surah al-A’raf, 7:160). Halal is an Arabic word meaning “permitted”, “permissible”. Halal meat is in appearance like any other<sup>2</sup> meat that Westerners habitually eat. Muslims eat meat that must be slaughtered according to a specific rite described in detail in the Quran in order to be certified as halal<sup>3</sup>

2. Except pork, which is forbidden in Islamic law because it is considered an impure animal

3. The killing of the animal must be done by cutting the throat with sharp knives to be used solely for lawful animals. The animal must be positioned with the head towards the Mecca and slaughter operation must be performed by an adult Muslim of sound mind and aware of all the precepts of Islam and halal. The killing must be done in premises and with tools and staff separate and different from those used for non-halal slaughter. The animals to be killed must be halal animals and should be eaten by a Muslim without committing sin. The animals must be conscious at the time of the killing. The killing must be done by cutting the trachea and esophagus: the main blood vessels will be cut accordingly. The spinal cord should not be severed: the animal’s head must not be detached during the killing. The killing must be done at once: the cutting movement should be

There are not only religious reasons behind this type of food. In Islam or Judaism certain standards of food preparation must be met, such as the prohibition on pork or pork derivatives and the prohibition of alcohol consumption, making sure not only to drinks, but also to solvents and substances that contain alcohol, or the prohibition on the consumption of blood, which is fundamental in Jewish law, which provides for many other restrictions (including the prohibition to eat certain parts of animals and the prohibition to eat dairy products with meat). In order to avoid the intake of blood, there is a whole series of obligations to be observed<sup>4</sup> before eating meat. These rules are welcomed because they make it possible to trace the food chain, something that is not possible with ordinary food. Even non-Jews and non-Muslims are interested in kosher and halal food. Halal and Jewish kosher cuisine are spreading and this goes beyond the observance of religious precepts that are inspired by the principles of the Quran or Torah. Halal and kosher foods are finding greater space in supermarkets and in the food preferences of those who tend to choose products not only to be healthy, but also for environmental reasons. Perhaps this demand for special foods is the result of the indirect request for the safest and healthiest foods that respect the earth. If we think of the recent trends opposing genetically modified foods and junk food, this goes well beyond the principles of these health-conscious traditions<sup>5</sup>. The prescriptive practices of halal food, much more ancient than to the current increasing demand for food security, already assured the objectives of Western healthy-eating trends.

## 9. The scarf affaire

What is the Islamic veil? A scarf worn on the head? Or could it be that the practice of veiling among Muslim women is a much more complex institution that varies greatly in Muslim countries? Meanwhile the terms *chador*, *hijab*, *niqab*, scarves, refer to different items of clothing worn by Muslim women from different Muslim communities. The chador is essentially Iranian and refers to a long dress with a black rectangular headdress

continuous and will cease when the knife is lifted from the animal. It is not allowed to make another cut: a second act of killing makes the animal carcass not fit for halal. Bleeding must be spontaneous and complete. The slaughtering must begin only after verifying the death of the animal.

4. Like *salawatkhams*, which is the observance of the rules for hourly prayers for Muslims.

5. A westerner might rationally explain these practices in the climate/environment balance that requires a proper diet in which alcohol consumption in hot places like those in which Islam has an original historical connotation would have a deleterious effect on people. How many Westerners would drink a *margarita* in the desert? The pork meat is halal because it is a meat with a high content of fat that is difficult to store and that rapidly deteriorates, especially when there are no refrigerators or when agricultural and rural areas are not reached by electricity.

worn around the face. The niqab is a veil covering her eyes and mouth, leaving out the nose. It may or may not be worn together with the chador. Many Muslim women in Turkey enjoy wearing a long dress with a scarf (like a headdress) or a *carsaf* (an ornament that resembles the black chador). These items of clothing have a symbolic function in the same Islamic community. Women who come from different countries indicate their different ethnic and national origin through their clothing. By doing so, they set their distance from or proximity to traditions. The brilliance of the colours of their coats, scarves, and headdresses, bright blue, green, beige, lilac as opposed to brown, blue, and of course black and the closer the style of their model and textiles are to Western standards, the greater the distance is from Muslim orthodoxy for the women wearing them. Seen from outside, this complex semiotics of dress codes reduces them to one or two items of clothing which then take on the crucial function of symbols of a complex negotiation between Muslim religious and cultural identity and Western cultures.

One consequence of the transformations of citizenship is the short and long-term coexistence of individuals or groups belonging to distinct and often conflicting cultures, customs and rules in the same public space (Behnabib2002). Globalization not only means the spreading of multinational corporations around the world, which has created ideological cultural rifts, as summarized by Barber (1995). There is a parallel phenomenon of globalization in the opposite direction, by which groups of people from the poorest regions of the world, like Southeast Asia, Africa, and Middle East, reach global cities like London, Paris, New York, Amsterdam, and Rome.

These groups, many of which arrive in Western countries as immigrant workers, have seen their numbers rise drastically in recent decades through the birth of their children in the country of migration for family reunification as well as the entry of refugees or asylum seekers from other regions of the world. Particularly sensational examples of multicultural conflicts have drawn the attention of public opinion in the last two years of the 1980s, highlighting how the secular nature of European States has struggled to meet the growing Muslim presence. As in the case of the writer Salman Rushdie in Britain or the Islamic veil in many European countries. In France, this case drew great attention for the way that politics went against its deep liberal roots in handling this case. Let us review the *affaire du foulard*, which originated from a long and bitter public debate in 1989 after the expulsion of three Muslim girls who wore the veil at their school in Creil. It seemed an issue regarding the foundations of the French educational system and its secularism as its inspiring philosophical principle. Secularism is not just about separation of the church and State, but above all it must be understood as public and manifest neutrality of the State towards all forms of

religious practice, institutionalized by removing sectarian religious symbols, signs and icons from the public sphere. In reality, the real issue is the balance between respecting the individual right of freedom of conscience and religion and preserving a public sphere free from the display of religious symbolism. This balance has been proven to be delicate, when the debate has shifted to the significance of social and sexual equality, and especially to the polarizations of liberalism versus republicanism versus multiculturalism, in the French lifestyle.

The case, experienced as a national trauma (Gaspard and Khosrokhavar, 1995:11), occurred, almost as a sort of trick of fate, during the celebrations of the bicentennial of the French Revolution. The three girls entered the classroom wearing the veil, despite a compromise reached between the school's headmaster and their parents, who discouraged them from wearing the veil. However, the three girls, advised by the head of a Muslim organization called *Intégrité*, decided to wear the veil, as a conscious political gesture of complete identification and pride as well as the exercise of their freedom of religion. Therefore, by appealing to their freedom of religion as French citizens, the display of their Muslim and North African origins in a context that saw their integration within an egalitarian, secular ideal of republican citizenship. The supporters of the Muslim girls insisted that the French State wanted to see a garment as a private symbol in the public sphere, almost like a challenge to the boundaries between the public and private sphere. Furthermore, they argued that the school could not be a neutral space of French acculturation, where it was not possible to openly show their cultural and religious differences or convey an aspect of their identity. Their opponents claimed instead that the action of the girls was a sign of their oppression, but also a subtle strategy to enter the public sphere through their own symbol and that by renouncing a modest requirement of Islam, namely covering their heads; they could have facilitated their course of public acceptance as players in civil society. The issue was solved by the French Conseil d'Etat, which by calling for the protection of the principles of the State's secular principles and freedom of conscience of students, highlighted how the freedom to express and display one's creed did not allow either individually or collectively to exhibit religious symbols, which by their own very nature and conditions were a form of display or claim that would tantamount to a form of pressure, provocation, propaganda, and *proselytism*, thereby encroaching the dignity or freedom of the students and other members of the school community, jeopardising their welfare and security, and affecting the continuity of activities and the educational role of teachers and, in short, the normal order of public service. This ruling left school authorities the task of interpreting the meaning of clothing, namely to judge whether a piece of garment was a provocation. It is not difficult to

see that this judgment fuelled a conflict of identity sought for by opposing forces, driven by irreconcilable cultural divisions. How is it possible to determine whether wearing a *yarmulke* (for the observant Jews) or a crucifix for Catholics is a provocation or a claim to affirm one's own identity?

The issue of the Islamic veil embodies all the dilemmas of French national identity in the age of globalization and multiculturalism. A second set of issues was the need to protect the traditions of secularism, republican equality and democratic citizenship in view of French integration in the EU by easing the pressure of multiculturalism generated by the second and third generations of immigrants from Islamic countries in France. The situation was almost paradoxical by which the French State stepped in by calling for greater autonomy and equality in the public sphere than the girls wearing the veil actually wanted. But specifically, what was the meaning of girls' action? In this act of religious observance or alleged subversion, the girls' action was a genuine act of adherence to cultural traditions, or an act of adolescent narcissism. And above all, what was the voice of the protagonists? The voice of this "sociological category"? That is, the voice of young women wearing Islamic headscarves in public? In French sociological studies by Gaspard-Khosrofhavar (2004), it is clear that the meaning of wearing the veil was changing from being a religious act to an act of growing cultural transgression and politicization. In addition, the very egalitarian nature of the rules on the French public schooling system brought the national patriarchal structure of these girls into the public sphere and gave them the confidence and ability to give a new meaning to the headscarf. There is enough evidence in sociological literature that in different parts of the world and for Muslim women, the chador hinders emancipation from their traditions (Gole 1996). But assuming that there is an intention of religious transgression means trapping them again among the walls of the patriarchal meanings of their communities that one thinks they are trying to escape from. Furthermore, it is as if women and the Muslim community were asked to give good reasons for what they do in the public sphere, how they will treat beliefs of others who belong to different religions and lastly, how is it possible to institutionalize the separation of religion and the State in the Islamic tradition. The great amnesia or underestimation was the necessity of having to learn, fully understand and accept the idea that these elements and practices of clothing in some Islamic or Jewish communities<sup>6</sup>, like that of covering their head is an aspect of female modesty, but interpreted instead as a sign of female sexual repression. The ban of the veil was subsequently

6. In truth this happens even in Catholic communities. In Sicily, even today, in some inland towns elderly women leave home, covering their heads. Up to the 1960s in Italy *underius corrigendi*, men were granted the right to beat their wife to correct their character defects.



approved by the French Parliament in 2004. But the long wave of the issue led in 2011 to an additional and more stringent ban on wearing the full veil that does not cover only the eyes, namely the *niqab* or *burqa*, which are banned in public places and supported by a few hundred Muslim women.

## 10. The research

In several European countries, the integrations policies intersect with those of migration, characterized by restrictions, strong regulations and segmentations of access. The “zero tolerance” as the introduction of the crime of illegal immigration in Italy, don’t stopped immigration flows. And in a climate of impunity of traffickers, the illegal immigration was abrogated; it had started the huge humanitarian operations: *Mare Nostrum*, in the Strait of Sicily, after several tragedies at sea of immigrants in 2013 and 2014, amplified in their drama by a strong media impact. Paradoxically, the travel market has increased, helped by the guarantee of the recovery of migrants, and their first acceptance, traveling to Sicily, right from patrol operations and international recovery that intercept the boats crammed with children not accompanied, families, pregnant women, no more coming from the countries of the Maghreb, but from Syria, Mali, Eritrea and Nigeria. It’ not only changed the geography of the places to which they fled, but also typologies of subjects. That is typologies physically more fragile to whom the application of human rights is not debatable. And that arouses the most intense feelings of compassion and solidarity. The local host devices and healthcare, doctors, nurses, cultural mediators have been severely tested by this emergency. In June 2014, the number of migrants rescued at sea and landed was about 50 thousand units. Ten times higher than the previous year. And with a trend similar to that of 2011, the year of the Arab Spring and the Libyan civil war. In that year the number of landings in Sicily was of 63 thousand units. The policy oscillates between the European hypocrisy and the Italian pietas. Has often been reaffirmed by leading political figures as « Italy does not leave dying men and children who are fleeing poverty and war »<sup>7</sup>.

In practice Italy has borne the economic and social brunt of a mass exodus from the relevant numbers. The mayors of the landing sites have complained, loud and clear, the intolerability of the situation, and especially the loss of credibility of the European institutions. But European policy, on the one hand has threatened Italy of sanctions for practices of reception of migrants. On the other hand has turned a blind eye to the humanitarian

7. We refer to speeches of Minister of internals, Angelino Alfano.

tragedy. In front of European's egoism and hypocrisy, Italy did not have the political strength to bring the issue into a political dimension global shared. In practice Italy has recovered, received, cared, migrants, refugees, asylum seekers, illegal immigrants, and left them free to go with or without permission, to the countries of real destination: France, Norway, Germany, where await other relatives, friends or compatriots. These scenarios, evidently known in every detail by those who undertook the trip, leads them to adopt strategies to escape right from the moment of landing. The cultural mediators report the shouted advice to newcomers by those who are inside the shelters or in the emergency room. They burn their fingertips or dip them in wax to avoid the taking of fingerprints. They do not reveal neither the place of origin nor their real name. Many flee before being brought into the structures for migrants.

The research was carried out in Palermo, one of the biggest cities of South Italy. Palermo is a multiethnic city for vocation, culture, history. The sociological scientific base has allowed us to understand the multi-dimensionality of the phenomena studied: identity, differentiation integration. The social scenario is formed by a population<sup>8</sup> of about 60.000 inhabitants, 28.000 of which strangers (4, 3% of total resident population). Specifically, foreign residents and registered coming from 38 countries of the European continent; from 5 countries of the Maghreb, 16 countries of West African, 13 countries of East Africa, 7 countries of South-Central Africa, 16 countries of the western and south-central Asia; 11 countries in East Asia, 18 countries of the south American continent; and 2 of the north America. In total, it is a multiethnic puzzle of 126 different ethnicities. Palermo is a city in great transformation, that is set to become a modern city, where changes are driven by of economic and cultural instances, but, we believe also forms of multi-ethnic contamination. That is, a dialectic which intertwines local and global, and that is manifested in Palermo in sociologically interesting forms. A *glocal* as interplay between global and local, that tempers local forces with the ethnic ones. That if managed appropriately can become a logic of economic development, not only, for example through the entrepreneurial vitality of immigrants that increase local wealth and the employment rate. But also through cultural and anthropology change, for all forms of reverse multiculturalism, which take more space. That is, a kind of multiculturalism in which the natives' community is integrated with that of immigrants, leaving infect by forms of social behavior, typical of the "creative" European medium size cities, that progressively transform their past post-modern industrial identity, in art, tourism, financial, and so on. The analyzed data lead to some evidence: for certain categories of immigrants the universe of

8. Statistic Office of Comune di Palermo.

values coincides with the religious sphere. In particular, the more mature cohorts of men from the Maghreb and Southeast Asian Muslims tend to overlap these dimensions. In women of the same ethnicities, moral values related to good and evil keep running parallel to what is permitted or forbidden by their faith, especially in the private sphere. Both men and women of these ethnicities, religious prohibitions become ethnic expression of values; And above all, they are the elements on which there is a radical difference. As in the case of western women's wear, often considered as a factor of sexual objectification of women and the devaluation of his moral integrity.

(Man Bengali, muslim):

In Palermo, women are too free, they dress discoveries, they are more sociable with humans, for example kissing each other to say goodbye. The sons are too free and do not respect their parents. Moreover, in Italy you do not practice circumcision, that is important for me, because it means hygiene and cleanliness. I do not accept that my wife goes to work alone or comes out without me or without his sister, and that behave and dress like Italian women. My daughter will be free to choose who to marry, but the important thing is that it is an honest man and a Muslim.

Behind the critical views on traditional values and their role to individual actions, there are more complex reasons modulated according to the context in which we live and will live on, that society which continue to be considered by the immigrant as fraught with obstacles and risks. In our opinion, the acculturation, is the decisive factor in these changes of direction, in those most exposed to the confusion and disorder of the performance of a life that from the land of origin to the arrival, has lost its linearity, requiring adaptation by means the autonomy of choices. To deny this possibility would mean assume a cultural ethnocentric position. That is a position that tarnish any idea of modernization of the countries in which traditional values encase individuals in uncritical positions towards the religious and social institutions, not allowing the government for the reorganization of new instances of individuals, in an increasingly globalized world, in which human rights and the respect thereof tend to be at the center of social affirmation of the individual. The role of religion, the catalyst of social belonging, is the a starting point of personal identity. Immigration separates individuals from relatives and friends, and sometimes by their own family: It compels to confusion. Puts into disuse their own language, ignores the status of origin, throws with force immigrants to the bottom of the hierarchy of entrance society. In the research, the religion is qualified a) as a means to transmit values and cultural elements that define the cultural heritage; b) as a spiritual resource, material and social, "which occurs at different stages of the migration process (Ambrosini 2007). The religious dimension, in public and private collective expressions, defends the

differences that immigrant communities keep in a foreign land through the practices of ethnic persistence, which act primarily in the process of cultural reproduction towards new generations of immigrants, when they, opening up to various forms of contact with peers of the indigenous community, they experience the difference.

From interviews show a reality of relations between natives and immigrants marked by dynamics in which are irrelevant or absent forms of racism, but of acceptance and positive social relations. In Palermo, the indigenous community it has little to defend in economic terms. In Palermo, the “private” is far from the public. So, many differences in the social scale with immigrants are reduced. This nullifies the danger that the “immigrants” have access to the resources destined for indigenous. The “Before we” trumpeted by the local sub-cultures of the North, in Palermo does not make sense. One of the reasons why immigrants would like to citizenship is for not having bureaucratic problems. But nobody wants it because he wants to be Italian. Irrelevant solidarity with the territory. Irrelevant citizenship when the residence permit allows them to satisfy the reasons for which they emigrated. In Palermo (but probably more generally in Italy) immigrants fully realize their projects in the medium term, that is: to return home with the money earned, and in the short term, transfer money to those who has remained at home. The projections of cultural integration, are instrumental to their needs. It’s guaranteed the access to education for their children; they don’t advance demands for the respect of their precepts or cultural protection, because in public schools attended, many intercultural projects pushing immigrant communities to the expression of differences, are already active. They utilize health services, without any problems, and in the forms that the service provides. In Palermo, services exist innovative healthcare regarding integration policies, as a service of hospital ethnic psychology. Instead do not exist health services that protect the cultural differences. However, Muslim women who need gynecological care, benefit of these services as any Italian woman. So go on their own, in total indifference to the gender of the doctor.

(Tunisian woman, muslim):

I was fine even when I had need a doctor. Even in hospitals. I have been also to the gynecologist, he was a man; for me it was not a problem, God has given to man the intelligence to let us cure.

Palermo is particularly welcoming to Muslims. Meanwhile, the vestiges of Arab domination from century XII, are still present and definitely characterizing the urban structure. In Palermo there are 5 mosques, 4 of which are insecure areas (basements, garages ..) independently managed

and financed by the faithful. The most important mosque is a building dedicated exclusively to worship, with appropriate structural features, such as different and separate areas reserved for men and women. Contrary to what happens in other Italian cities, in Palermo, the intertwining politics–religion–society has been non-existent. In Palermo from 2013, ethnic minorities have a political role, through the establishment of a consultative body, the “Consulta delle Culture” whose members are elected from their own ethnic community. The “Consulta” does not appear, however, with real powers able to influence the political debate concerning instances of minorities. It produced no public visibility of its action. The experience of the consultation are likely to be useless even for the immobility of the same components incapable and perhaps not motivated enough to take action on the many issues of recognition of differences of minorities, from health care, education. It seems that the local problems of popular lack of confidence towards political institutions, and the inertia of the institutions due to lack of resources (and real power) has also infected the immigrants.

*(Bengali man, muslim, representative of minorities in Consulta):*

Palermo has improved my life from the economic point of view, because I gain more than in my country. But from the point of view of culture, not much has changed because in the end I live according to my own culture. From the point of view of religion there are various problems. I pray with my fellow countrymen, with whom I often find myself in the mosque and in the different areas that we are trying to self-manage and finance to be able to pray dignified.

In the Palermo multiethnic, some parishes have already granted spaces for the expression of cultural and religious differences, that assume the meanings of ethnic integration persistence, but also to the host community. It so happens that in the historic center, the space outside of the parish of St. Chiara, who also works with cultural mediators, is been granted every Sunday from immigrants who come together to celebrate their festivals. In this place the Ghanaian community, just as happens in the small villages of the African country have elected symbolically king and queen. The *Ohemaa* (the queen) e the *Ohene* (the king), that are veritable points of reference for the community, as well as the protagonists of the festivals which they organizing in the city. Like many of their countrymen, they do menial and poorly paid, but on important occasions pulls out a lion’s skin on the naked back of the king, and a crown that makes them special.

*(Ghanaian woman, cultural mediator):*

The language is probably the most crucial factor affecting the integration, allows you to be understood, to be able to express themselves and transmit their culture, as well as their own traditions and those of their own country. In the parish where I work we organize courses of Italian. They are taught the basics of the Italian

language, the alphabet, numbers, basic grammar and catchphrases in particular contexts: family, office, shops, ask questions. The city of Palermo is sometimes seen as a meta-term goal of an immigrant, since the work is its first aim, although he will look in the regions of northern Italy, or rather to northern Europe. So, it happens that the immigrants, once arrived in Palermo, learns that little bit of Italian he needs, and then migrates back to the north. Palermo in particular has some special features that facilitate the integration, in fact the city's history and that of the Arab world have much in common.

In Palermo there are no cases of violent demonstrations or protests on ethnic motives, as it happened in other European cities, or occasionally in some Italian cities, but for different reasons from those that led the protagonists of the bloody riots in France or England. In the case of the Palermitan situation, institutional frames are such as to avert such dangers, both for the irrelevance of assimilation pressure that is made on immigrants, both for the low incidence that discrimination on working basis are practiced. Due to high levels of unemployment and general conditions of socio-economic hardship of large sections of the local population, the discrepancies between immigrants and natives are minimal and not likely to generate feelings in the similarity right to immigrants. When their own values are not culturally compatible with local ones, however, does not hinder their integration. However, this condition, which in Palermo, as seen in the analysis of empirical data, is engaged in a climate of greater freedom of expression of differences, proposes some reflections on the dimensions of reciprocity. From the interviews recorded there is a strong emphasis on the right of immigrants to welfare services as a qualifying element of integration. Often the call for respect of human rights appears as a ideological Windbreak through which claim the right to the similarity, but not affected by pressures of assimilation, as happens eg. in France, takes the form of a right that is enjoyed without the commitment to reciprocity. The rhetoric (politically correct) of multiculturalism does not venture to justify populist positions who see foreigners as individuals who exploit without giving anything in return. From the scientific point of view, however, the data show many behavioral ambivalence between respect for differences of identity and protection of the rights. But above all, lack of proactivity in the strategies of integration policies. The thesis that would result is that the predisposition of multicultural policies more oriented to assimilation would lead to a greater commitment to solidarity of immigrants towards the host community.

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# Social Mediation in Contexts of Cultural Pluralism

A Tool of Intercultural Dialogue

LIBORIO FURCO

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## **1. Introduction**

In Sicily the town called Mazara del Vallo could be taken as an empirical and geographical model for the debate about ethnic and cultural pluralism and consequently in relation to integration processes and social and cultural mediation. The town has been at the receiving end of migratory flows departing from the southern shores of the Mediterranean for many decades now. Mazara has become a final destination for Tunisian citizens in particular, since it is only a few hundreds nautical miles from their country of origin. Despite that, Tunisian belong to a completely different social and cultural world if we compare them to Europeans. Therefore, Mazara could become an ideal, 'natural' laboratory where social sciences theories on the topic of multi-ethnic societies, multiculturalism, etc. could be experimented. As a matter of fact, it is a spontaneous set where to put to test crucial variables in this field of study. There are two dominant ethnic groups (that of Tunisian origin and the native one) interrelating, which have to learn how to coexist in harmony. They are also a paradigm of the possibility that an intercultural dialogue between Islam and Western World is possible. Here are some common characteristics: very similar climatic and territorial conditions between the Tunisian and Mazara coastal areas; some common historic roots in terms of foreign dominations (Phoenicians, Elymians, Punics, Romans and Arabs); a similar evolution of basic social and technical characteristics of both traditional rural economy and cross-national trades that were dominant until the advent of modern age; different religion, cultural values and political institutions.

These two social groups, one more numerous than the other, seem to coexist peacefully. However, second-generation are causing more problems than immigrant generation because of a higher criminality rate than in the past, although figures are low in absolute terms. These young people feel rootless and that has a heavy impact on them, more than on their parents, since they feel foreigners both towards their parents' country of origin and the country where they have been born.

A focus group and interviews were conducted in the framework of the E-Mediate project. This research work has brought to surface some relational dynamics that do not have the distinctive features of an effective integration process between the two ethnic/cultural groups. This process results from a reductive approach towards the opportunities integration can offer. They see integration as a mere unilateral adjustment to the rules of the host country's society rather than an encounter of different cultures that go through a positive contamination, get mutually enriched, experience otherness and develop their potentials.

Their coexistence appears to be peaceful as it mainly takes into account: a) the host community's viewpoint; b) the rights it grants; c) the social policies it implements locally; d) the degree of school inclusion of minors immigrant; e) the initiatives of the third sector. However, the current evaluation of coexistence does not take into adequate consideration the immigrants' viewpoint on the type of inclusion and integration they wish to achieve. At the same time, the propensity of immigrants to inclusion cannot be given for granted but it has to be analysed by taking into consideration their wish to improve their living conditions from an economic, social and political viewpoint and not only to protect their cultural identity. Contacts among social groups are not an abstract encounter of cultures. They are an interaction among people who have internalised different cultural models and have individually reworked them (by taking into account one's own social status, economic interests, aspiration to independence, and sense of belonging to one's own community).

Tolerance, as a guarantee that it is possible to express diversity, stems from instrumental motivations or a set of values, but it neither entails necessarily a communication that creates bonds nor it has cultural diversities in very high regard. A truly intercultural approach is not so much aimed at safeguarding cultural diversities but it enhances such diversities, and through communication and exchange of ideas it involves necessarily people's will to understand each other and to work and solve problems together. This approach is an instrument to be used either in workplaces and to outline a shared project of society, to change and innovate life styles and the way people interact.

The process of mediation then seems to be capable of playing a crucial

role in a context of cultural pluralism, where issues linked to identity and otherness bring to the fore the importance of dialogue among different subjects and of learning new forms of interpersonal relationships.

The words mediation and Mediterranean have a common semantic root. They both mean 'being in the middle', in the sense of establishing a communication, uniting people and land respectively, by safeguarding their plurality and diversity though and establishing an identity based on dialogue that rejects unequivocal solutions imposed by dominant cultures.

Intercultural mediation is an important practice and a social institution that meets some of the enormous challenges that our globalised society poses. Exactly for that reason, it is helpful to briefly illustrate the theoretical assumptions mediation is based upon by connecting them with the different integration models and various ways to intend diversity and identity.

## **2. A Comparison among Theoretical Premises**

Starting a public service — such as that of mediation — means to start a bottom-up, institution building process at a local level. There are different theories on institution building processes and each of them essentially moves from two different perspectives. The new-institutionalist or functionalist approach explains that institutions guide (someone says 'shape') human behaviour and new institutions are only the result of an autopoietic process of social systems. The other approach, defined utilitarian, shows that rational choices that are aimed at maximising profits or personal satisfaction make it possible to conclude agreements (contracts) on what are the 'rules of the game'. These then trigger structured cooperation or institutionalisation processes. A middle approach (stemming from the Weber tradition that has been incorporated in particular by French sociology of organisations) focuses on social actor in the system<sup>1</sup>. It explains that if it is true that institutionalisation processes stem also from individual choices and informal interactions, it is also true that they are dependent on operating institutions that have existed for a long time.

We also know very well that the explanation of the origin of modern society has two main versions. The Marxist one identifies in the evolution of production methods, hence in technology and economy, the first driver of social change, which lead society towards industrialization and modernization. Weber's version distinguishes in the evolution of cultural processes (the Protestant reformation in particular) the key to explain the social change that gave origin to modernity. Weber himself however made

1. Crozier M. e E. FRIEDBERG (1978).

a distinction among different types of rational actions: rational actions as opposed to objectives (instrumental) from rational actions as opposed to a set of values (ethics). They are both distinct from traditional actions, the standardised ones (i.e. the usual way of doing things). Actions that comply with rules<sup>2</sup> can be instrumental, ethical, and standard. It depends on the motivations and convictions of each individual, and motivations and convictions can only be ‘revealed’ by means of empirical investigation<sup>3</sup>.

Finally, in order to establish any human or social groupings for any purposes and for them to be long-lasting (‘protecting one’s conservation’), it is necessary to have behavioural rules that organise a system of interactions, roles, self-restrained behaviour and sanctions, decision-making procedures that identify a group as a collective actor. Jurists define such system of rules “a legal system” and are divided between two main theoretical lines. One follows the normative theory (Kelsen and Bobbio)<sup>4</sup> that argues that a legal system is to be considered as a collection of norms, hierarchically organised and resting on a basic norm that provides the system with validity and represents its unification element (the *grundnorm* providing validity to all other norms). The other theory is called institutionalist<sup>5</sup>. It suggests that legal systems are not established by following an organic and consistent design but they develop over time by juxtaposing and accumulating norms systems (microsystems), as if they were “geological layers”, which are coordinated to pursue a single purpose. Each microsystem is to be considered an institution when it has been established for an organised social group to reach some goals (*ubi societas, ubi ius*). The normative theory is Monist since it argues that there is one legal system, which is then divided into many special systems validated by the basic norm. The institutionalist theory is Pluralist because it suggests that each institution (family, company, State, Church, but also Masonry, Mafia, etc.,) has its own set of rules hierarchically organised in relation to other legal systems. Given specific social, economic and political circumstances, informal or specific systems are subject to the State legal system only in theory, while in practical terms they are parallel to or even more effective than it is.

It is logic that by selecting and crossing the crucial variables according to these theories, different institutionalisation processes of mediation procedures can be described (from an explicative viewpoint) and put forward (from a prescriptive viewpoint) at a local level. It depends on the objectives to be reached and the conviction and value systems the community has given itself.

2. March J. G. and Olsen J.P. 1984.

3. M. WEBER (1999).

4. R. TREVES, Ed. (1967).

5. M. HAURIU (2010).

For example, the theory of rational choice can be used to illustrate how it is possible to generate institutions capable of “rationally reconstruct society” (Coleman). It can be helpful to appraise, from this viewpoint, whether native citizens and immigrants together are capable of establishing norms and social structures that can bring to the surface conflicts among different and apparently contrasting cultural stances and make them evolve towards a positive direction. It has to be evaluated then whether mindful subjects are capable of creating the institutional prerequisites for a real intercultural dialogue to be started by relaying on their will to solve common problems and by carrying out collective actions aimed at enhancing the role of mediation. On the contrary, if we adopt the other approach, we end up believing that social institutions impact on individual behaviour and “shape” any possible actions. However, those institutions could also be a consequence of actions that are sometimes voluntary and others unexpected. Consequently, it would seem fool to think of starting a real intercultural dialogue and establish structures aimed at social cohesion to promote social bonds that can be fairly durable over time.

The motivation for individuals to participate in the construction of new institutions obviously cannot be a utilitarian one. It is necessary to share fundamental moral values to pursue objectives that go beyond individual interests and capabilities and protect public welfare. Reaching an agreement based on shared values and the will to set up intercultural mediation procedures alike can provide for the necessary consensus to legitimate individuals to look after their personal interests and to reallocate pre-existing rights in a context that otherwise would appear to be disunited and generator of mistrust. Therefore, the resulting institution would be a resource all individuals can share, one that enhances their capabilities or their power of action. As a consequence and intentionally, a social capital is being created that is a public good and cannot be ascribed only to the individuals who have produced it. It is more likely that social capital is produced by those communities that promote intense social bonds among its members and make them mutually responsible rather than by a society with its formal and impersonal legal system.

Communities and society<sup>6</sup> are part of another traditional dichotomy in social sciences that has apparently regained a central role for the topic we are discussing about. Intercultural mediation can take the shape of community mediation, among others. As a matter of fact, common values and meanings are not an independent variable of the outcomes of an intercultural mediation process. They are rather a dependent variable of a negotiation started by social actors. It seems that still today humans need to

6. F. TONNIES (2005).

be part of a network of meaningful social relationships that helps them to build their own identity. Human beings have not given up on establishing informal face-to-face relationships to enjoy sharing and with the additional goal of producing public goods. Given globalisation, all these issues assume even greater importance. In our time, different cultures meet each other more frequently than in the past, and possible, ensuing conflicts can be managed by promoting relationships based on trust, supporting cultural integration processes, enhancing everybody's sense of social responsibility and active citizenship.

We have to ask ourselves: is it more likely that the generation or regeneration of social bonds in contexts with conflicts or anomia occur within a community that has a rich social capital based on an intricate network of interpersonal relationships (even though such relationships could constitute an hostile environment for minority ethnic groups)? Or could such generation process happen more easily in an impersonal social environment provided with poor relationships based on trust? The answer is very open since the core issue is that spaces must be guaranteed where, in spite of their differences, ethnicities that are willing to establish a dialogue can manifest themselves. In those spaces the value of difference must be enhanced to avoid that they are flattened out because of a standardised approach. On the other hand, the difficult balance between personal liberty and social control seems to be one of the possible explanations for the arising of anomia and conflicting behaviour. An example of that is bullying that is spreading more and more. The instrument everybody asks for to solve problems of this type is the State's legal positivism, as the only way to guarantee welfare of citizens. At the same time though, it is claimed that the weakening of both solidarity bonds and sense of belonging to a community are at the origin of the civil society's failure in finding solutions to social conflicts. It is also the reason for the lack of competent relational capabilities to creatively solve the relational problems its members meet in their daily life.

Next to the idea of community as a symbolic place of an organic and integrated nature, provided with an homogenous culture of reciprocity such as the one Tonnies described, there is another idea of community as a place where meaning and sense of belonging are generated. It is not in its turn generated by ascribing-type of bonds but it results from the free will to be part of it, from a voluntary initiative to look for social bonds (New Communitarianism). This last type of community seems to be more adequate to deal with and solve possible conflicts arising from the encounter of different cultures.

An incentive to implementing mediation services is to be found in the need for a social reorganization that emerges in contexts that are either multicultural or characterised by a strong cultural pluralism. Here, the

increasing complexity inevitably leads to an increase in social unrest that makes it necessary to try and restore imbalance between groups and people. The need for mediation stems from the necessity to intervene in social interaction processes that are characterised by a surplus of asymmetry in relationships between all parties. Mediation then is felt to have a social function as it helps dealing with coexistence problems between immigrants and native Italians. Through communication, mediation facilitates relationships between the parties by allowing individuals and groups to acknowledge their differences. We have already underlined that mediation is effective depending on the prevailing integration model in a given social context. The need for mediation as a matter of fact stems mainly from the need to open up communication channels among social workers and immigrants. These channels should help implementing local reception policies.

It seems helpful to me at this point that I go back to the dichotomy between economy and culture I have mentioned before. To the benefit of our reasoning, it is interesting to underline, following Touraine, that the division between economic and cultural approach is becoming quite sharp in our contemporary society when it comes to tackle social issues. The economic approach focuses on the instrumental dimension, that is related to manufacturing and technology, while the cultural approach places greater emphasis on the symbolic dimension, that is related to identity building processes and social regulation through communication. According to Touraine's view<sup>7</sup>, our post-industrial and globalised society is characterized by an increasing division between technique and values, which restrains the opportunities to carry out social and political mediation. That division then also impacts on the way social policies, in general, and immigration policies, in particular, are devised and implemented.

### 3. A Type of Integration Model

In her book about mediation and integration Mariagrazia Santagati<sup>8</sup> cross-checked the fragmentation existing between instrumental and symbolic dimension with the different concepts of integration. She therefore outlined a type of integration model.

Starting from a Cesareo's concept theorising about the role of culture within a political community<sup>9</sup>, Santagati draws a distinction between *mono-culturalism*, *cultural pluralism*, *multiculturalism* and *interculturalism*. For the

7. A. TOURAINE (1998).

8. M. SANTAGATI (2004).

9. V. CESAREO (2000).

purposes of social cohesion, *Monoculturalism* suggests that it is necessary to preserve a culture that is homogeneous and uniting, that identifies a society at a local level and stops disruptive contaminations that could undermine its identity. This model leaves little space for different cultural identities that can be expelled, ghettoed or integrated. *Cultural Pluralism* can tolerate cultural differences. However, it demands a rigid separation between the sphere of public life, which is governed by general and abstract norms that are valid *erga omnes*, and the sphere of private life, where differences can be expressed. *Multiculturalism* requires that cultural differences are recognised and respected as ethnic/cultural identities claim for equal dignity and value for themselves. The idea of a dominant and unifying culture is rejected. *Interculturalism* recognises differences and places great emphasis on the importance of exchanges, reciprocity and dialogue to create connections among cultures. Given that differences among cultural groups often overlaps with socio-economic gaps, interculturalism aims at taking up the challenges and reconciling the right each different ethnic groups have to be safeguarded and individual rights respected. If we adopt this viewpoint, equal opportunities for individuals must be the main goal to be pursued in the struggle for equality, although it cannot revisit class struggle according to Marxist theories. Collective rights can and must be protected but this cannot be done to the detriment of individual rights.

Different historical and geographical contexts have lead to different practical, social implementations of different theories to manage specific immigration policies. These are rooted on more or less detailed programmes of social changes like all public policies. Then, it becomes interesting to illustrate some of the integration models (or rather, of immigrants inclusion) with the host societies. There are four main models and they approximately stem from the above-mentioned theories.

The *assimilation model* (followed in France) is typical of monoculture theories. Reception here means to turn immigrants into citizens who come to resemble and are incorporated to the dominant culture. Immigrants have to adapt to the political/legal/cultural system that is in force in the host country because « they come to live in our home country » and consequently they have to endorse local customs, habits and comply with laws if they want to become integrated and enjoy citizenship rights. Immigrants become socialised according to the values and behavioural models of the receiving country and therefore they are forced to internalise them. As a consequence, minority ethnic groups are not recognised and languages and cultures are assimilated.

The *model of temporary residence permit* (it has been implemented for a long time in Germany and is now being revised) represents a variation of monoculture theories and suggests that immigrants are mainly workforce



and therefore temporary guests. Immigrants are a way to meet temporary and occasional demands of the labour market. They are foreigners that have been received and can stay until they are helpful to production processes. Then, they are expected to go back to their country of origin.

The *multicultural model* (it is a controversial topic in the United States, the Netherlands and Sweden) claims that the right to being different has to be recognised and therefore some independence to minorities groups have to be granted. From this viewpoint, minority groups tend to pool their efforts to protect mainly their ethnic/linguistic identity. The society then is organised with a central, majority group surrounded by contiguous, minority, social groups that interact with the first one and influence its cultural, social and political evolution. The resulting system can tolerate coexistence among groups with different cultural background but it also requires that the universal values of the host society are recognised as being superior and that specific cultural features are mainly expressed at a private level. As for the main issues concerning interaction with minority groups then, they mostly consist in respecting individual rights within minority ethnic groups, where mechanisms to expel dissidents are sometimes put in place (exactly the opposite of what they demand for themselves collectively from the host society). We could have to face the extreme case of intolerant people demanding for tolerance.

Finally, the *intercultural model* is a variation of multiculturalism. It does not only acknowledge differences but even suggests a positive approach by considering them a resource in society building activities. Through communicative processes this model is aimed at enhancing reciprocal relationships among groups by implementing exchanges of meaningful concept and negotiation. These processes provide the participants with an opportunity to understand each other, start cooperation relationships and also solve problems together.

By intertwining different views of interethnic relationships and by taking into account the fragmentation between instrumental and symbolic dimensions of immigrant integration models, we come up with a description of relational strategies that can be implemented within the host society.

Integration models obviously results also from a combination of different approaches to social studies. So the assimilationist concept stems from a structural–functionalist perspective where integration is focused on protecting the prevailing socio–cultural system. The multicultural model stems from the conflicting view of social interaction typical of the Marxist or liberal/pluralist approach, which tends to mark the separation lines among interests and values of different social groups. The intercultural model results from the constructivist approach and theory of communicative action that suggest that social relationships are interactions aimed at building

**Table 1.** Interethnic Relationships between Instrumental and Symbolic Dimensions. Adapted from M. Santagati, *Mediazione e integrazione*, (ment.) pag. 34.

		Symbolic Dimension	
		No	Yes
Instrumental Dimension	No	Refusal to interact with immigrants	Cultural Recognition Tolerance–Separation
	Yes	Economic Recognition Assimilation	General Recognition Dialogue–Reciprocity

meaning and that conflicts are an opportunity to establish new coexistence and mutual evolution patterns for individuals and groups.

From an analysis of relational dynamics between immigrants and native people, difficulties emerge in trying to implement the model based on intercultural integration. It appears to be more theoretical than practical. Nonetheless, the dissemination of conciliation and mediation services, in the field of civil, commercial, family, social and cultural matters, has created the prerequisites and space for alternative measures to settle disputes, which are based also on the theory of communicative action, to gain ground. Such services are devised to manage conflicting situations and make them evolve into symmetrical forms of negotiation so that all parties' claims can be met.

From different concepts of integration stem different models of mediation too. When integration is experienced as an assimilation process, mediation becomes then functional to a merely temporary adaptation process. The latter will only enable the host society to include immigrants within the local labour market and gather the economic benefits deriving from such inclusion. Mediation then plays here a normalizing function in helping foreigners to comply with local rules, become familiar with institutions and achieve cultural standardization.

When the social context is pluralist and cultural differences are tolerated, mediation becomes a sort of fight for the acknowledgement of the rights of minority groups that does not become then a true interaction with residents. Mediation mainly plays its role of advocacy of individuals' interests rather than being a tool to try and empower a group and its members.

When the context is open to intercultural exchanges, mediation rests upon the reorganization of the different dimensions immigrants' inclusion entails. They are looked at in their dimension of people and not only as workers, of immigrants and not only as emigrants who need to bring into play their individual and collective identities. If this is the case, mediation implies a social transformation process that can take place by building reciprocal interactions between the receiving people and those who are

received. Mediation is intended to establish bonds by working out common meanings and has the purpose of finding new ways of settling conflicts that take into account personal identities and immigrants' need to belong.

The above-described type of social mediation fills a space in the dialectic between social control and freedom, community and society. It can also play a crucial role to help implement a concept of citizenship that is capable of matching individual freedom and institutional bonds, which are essential to develop a sense of social and cultural belonging. This outcome can be achieved if the host society is capable of putting in place social interventions that can trigger mutual relationships among people, establish bonds and new social settings and tackle the issue of relationships of individuals both to themselves and others. By doing so it will be possible to avoid the risk of making moral norms excessively relative and of fragmenting identities due to a surplus of possible scenarios to be chosen and of theoretical other ways of living.

#### 4. Mediation Models

There are multiple mediation models stemming mainly from different general sociological theories and approaches to the study of social interactions, each of them with its own conceptual framework and consequent scientific paradigm of reference. Hence, intervention methodologies are also different.

In order to illustrate similarities and differences among the different types of intervention, we will illustrate here some of the most relevant models to the purpose of carrying out social and cultural (or community) mediation. Our classification will be far from being exhaustive.

Moving from a selection of the models Donatella Bramanti compared in her book *Sociologia della Mediazione*<sup>10</sup>, it is possible to divide all different mediation patterns in three groups based on the objectives they pursue in their attempt to promote social changing. The three groups are: a) the *cooperative models* that conceive mediation as a tool to manage and settle conflicts that is alternative to the more traditional negotiation and arbitration; the *transformative models* that focus on transformation of relationships and bonds; the *communicative models* that have the ambitious goal to build new social rules.

Let's begin by analysing an example of cooperative models. At the beginnings of 80's, the Harvard Negotiation Project<sup>11</sup> suggests that mediation

10. D. BRAMANTI (2005).

11. R. FISHER, W. URY (1981); Tran. (1995).

is a form of integrative negotiation. The classical, mercantile-type of approach to the subject is followed, where mediation is an assisted, but not directed, bargaining between parts. It is a problem-solving tool to be used in conflicts, which are considered as an *integration deficit*, and it covers problems mainly related to legal issues and transactions. It aims at restoring an acceptable level of fairness among the parties in relation to rights and powers, in situations where conflicts stem from what is felt as an unfair distribution or access to resources. The mediator's specific focus is to direct the parties and help them take on a cooperative approach so that the conflict can be looked at from a new perspective based on mutual understanding and both parties can achieve a greater level of satisfaction. By reframing the issue that has originated the conflict, the parties realise that they have the opportunity to achieve more than demanded. The logic behind this mediation model can be summarised in the paradigm of mutual benefit. In addition to that, cooperation games can produce a win-win-type of outcome if the parties succeed in starting a sympathetic relationship that allow each of them to put oneself in the other party's shoes. Hence the conflict can be transformed into a shared effort to find a common solution. The art of integrative negotiation is based on four principles: separate the people from problems; focus on needs and interests not on positions and claims; invent options for mutual gains; achieving an agreement based on shared and objective fairness criteria. The mediator must be capable of keeping the situation under control through a tightly organised process and he must have sufficient knowledge of the legal system of the social context where his intervention will take place. He must seek agreement by taking on a pragmatic and problem-solving demeanour to counterbalance the parties' subjective views linked to their experiences and values. Then, conflict is only a manifestation of issues resulting from difficulties in meeting needs or protecting interests. If we leave aside the intangible sense and meaning the parties attach to the conflict though, the risk is that the agreement they have undersigned appears little reliable, which can cause the agreement itself to rapidly crumble away. From a sociological standpoint, this type of agreement is based on the theories of rational choice and bargaining, while from a psychological viewpoint, it is based on the theory of cognitive dissonance. Thanks to the problem solving technique, this model has enabled bargaining to be carried out and creative solutions to be found. In time, it has become a point of reference for all other mediation models that have been worked out later.

The *Humanistic* model falls in the group of transformative models and is an evolution of the previous one. However, while the latter focuses on problems resolution, the former revolves around the transformation of the quality of human interaction. Mediation is aimed not only at achieving an

agreement but also at boosting the changing potential of the parties who rediscover their capacities and can consequently rely on their enhancement. This approach is strongly ethical and has the objective of allowing an active change in the conscience of individuals and a deep transformation of their relationships. To achieve this goal, two basic techniques can be employed: empowerment and recognition. The humanistic vision places great emphasis on empathic listening. Morineau<sup>12</sup> claims that mediation is intended to give individuals back their dignity and an active role within society by promoting new forms of social bonding. Hence mediation is understood to have a crucial educational role. The conflict is not seen as a problem, but as an opportunity to develop one's capacities to make choices and perform actions (by achieving confidence in oneself and one's own capacities) and to interact with other people (capacity to transform one's own social context). The logic behind this model of mediation is that of changing not only situations but also people by enhancing their confidence. The mediator enables each party to know oneself better, regain independence in making decisions and taking actions, abilities that were previously little developed. By adopting a consulting, not directive style, he facilitates thinking and encourages parties to make decisions. He does not focus on facts but tries to take to surface the underlying sense, the meaning the conflict has for each party by underscoring the relationship between cognitive and affection levels. He works as a mirror and receives emotions in order to mirror them back. He must tolerate silence for allowing the real self of each party to emerge. To this purpose, he must have a crucial quality: humility. The parties must have the opportunity to develop their own mediation process and take responsibility for the outcomes they can reach.

Finally, here is the *communicative action* model that falls in the group of communicative models. Bonafè Schimtt<sup>13</sup> described this approach as a sort of 'soft justice' and it is intended to be a new form of social regulation that is alternative to the judicial system. Mediation processes originate new values upon which social cohesion can rely, and therefore they promote a greater pluralism of social regulation systems. This approach is a response to the increasing differentiation of social groups. Through participation and exchange of ideas, individuals and groups start seeking new values that then establish new bonds and enhance social cohesion. From an ideological viewpoint, when this is the case, mediation promotes collective actions through a maieutic method to create a new judicial and social system based on shared agreements. By doing so, new rules are then produced along with a new form of law system, different from positive law, called

12. J. MORINEAU (2000).

13. Bonafè-J.p. SCHIMTT (2001).

“consensual law”. Judicial procedures, based on conflict resolution, prove less and less suitable to settle disputes among people who have strong informal bonds and must maintain relationships of a continuing type such as those with members of the family or community (neighbours). So, communicative-type of procedures must be established to reach consensus and must be implemented by participants to outline and independently promote one’s own and mutual interests.

As a consequence of this communicative procedure to achieve consensus, new behavioural rules are adopted and the quality of communal relationships consequently changes in environment where social relationships are very deteriorated. This approach is grounded on the theory of communicative act by Habermas<sup>14</sup>, which claims that an effective mediation is the result of communicative rationality based on mutual understanding. A structure of communicative relationships must therefore be created, one that allows discursive processes of will-formation to be started. This structure must serve as a tool to increase “understanding”. It must allow both for communication to be unbiased, free from constraints and unaltered by prejudices, and for false conscience to be exposed. To achieve consensus as an outcome of rational argumentations, one that carries the significance of true consensus, two conditions must exist: it is necessary that the discourse is ethical and that the prerequisites for mutual understanding to be achieved are met. According to Habermas, understanding is a normative concept that everybody knows. We must therefore provide ourselves with those communicative rules that enable *rational decisions about practical problems* to be made. A common understanding of such rules (negotiated rules) is the source of validity for those argumentations that are aimed at achieving a rationally motivated consensus. This is the only way to avoid mutual influences that can be more or less manipulative or violent. The founding rule of argumentations validity is the “universalization principle”, which makes it possible to achieve understanding about moral argumentations. The logic that informs this model of mediation aims then at establishing new structures of communication, that are preparatory to new forms of learning, and the development of a new consensual order (a new way to set rules) which is, in turn, capable of rebuilding social bonds. The first step for mediation to be started is that parties get back their power to manage their own conflicts. The mediator only sets the procedural conditions that allow the communicative space to be protected and mutual understanding be achieved. The rules of communication must enable each party to express their view of the problem, their experience, feelings and expectations about the conflict settlement. The first technique to be employed then is that of

14. J. HABERMAS (1986).

listening, with the aim of building trust among the parties.

## 5. Remarks on the case of Mazara del Vallo

Transformative and communicative models seem to be the most suitable types of mediation to be applied to social contexts that are culturally plural and characterised by cross-cultural encounters. In particular, the *relational or community mediation* model seems to be potentially the most effective in cases such as Mazara del Vallo. It is an Italian version of the humanistic transformative model and it has been outlined at the Research Laboratory for Mediation Processes of the Psychology Department — Catholic University of Sacred Heart in Milan.

This is the situation that clearly emerges from the focus group and individual interviews that have been conducted in Mazara. A coexistence and reception model resulting from a pluralist view of integration affects the relationship between immigrants and natives. The two prevailing ethnic and cultural groups (the most numerous native community and the minority Tunisian group) live together peacefully, they acknowledge and show a good degree of tolerance towards cultural diversity, but at the same time they show a clear separation between their working environment on the one hand, where interactions between the two groups are intense and usually not-conflicting, and the world of private relationships between family members or friends, on the other. Here relationships are extremely limited. The natives of Mazara show a certain degree of indifference both towards Tunisian immigrants' way of living and their expressions of cultural identity. In the way the two groups interact, there is a total separation between the instrumental dimension of work and production and the symbolic one that covers culture and identity, with the former being dominant. The resulting type of integration can therefore be described more as an instrumental-type of *assimilation* in the workplace, where the two groups are more or less forced to coexist (immigrants are demanded to adapt to the dominant culture, to its habits and ways of conducting work); while it can be defined as *tolerance*, from the cultural viewpoint and in social and civic life, where people are free of starting relationships which are often limited to paying respect of good neighbourhood rules. This is the sphere where different values, beliefs and customs are allowed to be expressed but for opportunistic motives. Natives do not want to be involved in real communication processes and they find nothing positive in cultural differences. We are therefore in the presence of social groups who live one next to the other but are as a matter of fact separated. In order to improve both the quality of their relationships and consequently of coexistence, the two groups should

have more opportunities to meet and spend convivial time together, to exchange information and perform recreational and sport activities, games and cultural events, especially in relation to cookery.

As for the settlement of disputes or tensions in their relationships, it is to be underlined that in Mazara there are not specific offices devoted to social or cultural mediation activities; on the other hand, members of the two groups do not manifest any need for them. During the interviews, the immigrants' need to receive help in solving some problems emerged (they often address help desks), but only in terms of practical problems rising in particular from their interaction with local public administration offices or when they have to comply with habits and rules they do not deeply understand. Cultural mediators are usually of Tunisian origin and their intervention is mainly requested for translating from a language into the other or explaining bureaucratic rules. When family problems arise, especially linked to assets or of a practical type, they address their community of origin. When problems concern feelings or their private sphere, they go to the priest or the social workers (in order to avoid judgements and gossiping among members of their community of origin). If problems arise within their working environment, they address representatives of unions or specific organizations protecting their interests in the fields of fishery or agriculture. If they have to look for a job they usually address the members of their community who enjoy the best position within the local context, who are expected to have useful contacts (same approach as local people).

The need for cultural mediation is more strongly felt by young immigrants of second generation, although they do not express it. They are often at risk of anomy because they feel they do not belong to either community and they need to find mediation between two different cultures. These young people are potential, cross-cultural communication tools and are already members of the local community. However, they are not employed as such; on the contrary, they feel left out more than their parents do. They could be natural mediators, the bridges between the two cultures; on the contrary, they experience relational problems with both communities. This is even more so for young Tunisian women, who have to deal with cultural discrimination within the host community and gender discrimination within their community of origin at the same time. Second generation youth could be the most suitable cultural ambassadors, capable of establishing links and cooperative relationships between Sicily and Tunisia, especially in the light of opportunities provided for by the EU neighbourhood policy to be implemented within the Mediterranean area.

Given this background, as we have already said, the relational or community model of mediation seems to be the most suitable to improve the quality of interaction between the two groups, their reciprocity and



dynamics based on trust. Here follows a brief description of this model.

The relational model is aimed at originating a complex form of citizenship that is capable of acknowledging the different cultural belongings and loyalty, by accepting and enhancing differences and focussing on integration at the same time.

Relational sociology is the general theory this model is rooted in. The medium range theories are: relational empowerment theory, risk theory, games theory and network analysis.

The purpose of community mediation is to reduce conflicts between social groups and increase relational wellbeing. In particular, mediation can meet the following challenges:

- a) To settle conflicts by putting in a central position the subject demanding for freedom and regulations at the same time (micro-level);
- b) To provide support in situations of chaos, disorganization and collapse of rules, with the purpose of promoting new ones that can be tailored to enhance individuals and community wellbeing (meso-level);
- c) To enhance solidarity in social interactions (meso-level);
- d) To understand and give value to cultural, ethnic, language differences within local, regional, national and super-national communities (macro-level)<sup>15</sup>.

Relational mediation then pursues the short-term goal of reducing and managing conflict, the medium-term goal of protecting from anomy and violence, and the long-term goal of building a form of citizenship. This should move from acknowledging what is the common good and work towards strengthening social ties, dynamics of trust and quality of life of its members. Ties are intrinsically special as they are a constraint and a resource at the same time; therefore they require an intervention based on a transformative type of project. Once ties have been established, it becomes possible for instance to cooperate with rational social actors who work to pursue individual and communal goals. Conflict is then one of the possible outcomes of interactions between social groups as a result of power dynamics, mistrust, the perception of having a limited amount of resources available, the feeling of experiencing or being at risk of suffering an injustice.

Mediator must be capable of: stimulating an increase in relational competences, tackling situations of conflict, putting in place forms of negotiation by transforming emotional conflicts into cognitive ones and encouraging a transition from a perspective of scarcity to one of abundance in relation to

15. D. BRAMANTI (2005), mentioned.

the resources at stake.

An entity offering social and cultural mediation could trigger economic and social development, if we have in mind the geographical position of Sicily within the Mediterranean area and the role of “cultural diplomats” that native and Tunisian social groups (that have been coexisting for decades) could play between the two shores of the Sea. By adopting a communicative-type of approach, mediation could give origin to new interaction rules between the civil societies of the countries located on the southern shore of the Mediterranean — starting with Tunisia —, and with Sicily as a social system that plays the role of the gateway to the European economic and social systems. This would give origin to a spontaneous law system regulating interactions that is not enforced from a superior authority but is based on shared values and relationships of mutual trust, which could eventually result in outlining an original development model for the Mediterranean “region”. This model could rely on universal values that both cultures — the Christian and the Islamic one — recognise; a model that could serve the purpose of building a new social or civil economy that is free of that type of extreme financial approach that has led to the recent and current downturns.

## **6. Cross-cultural Mediation within Supra-national Interactions. An Operational Proposal: the Med-Med Centre**

The Mediation Centre for the Mediterranean should be inspired to the “ethics of capabilities” stemming from the economic theory and practical philosophy of Amartya Sen and Martha Nussbaum<sup>16</sup>, and for some aspects it should also look at the mentioned theory of communicative action postulated by Jurgen Habermas. In practical terms, it would be a synthesis between the transformative-humanistic mediation model and the communicative one, between the liberal and pluralistic approach and the individual/person-centred and communal one that are based on the concept of participatory democracy. Also the model of financial management could be original and resulting from some shared principles that inform the ethical finance, that is catholic and person-centred, and also the finance inspired by Islamic principles.

Mediation activities can be understood as a sort of public intervention aimed at building social bonds that goes beyond domestic borders, and it could become the new frontier of cross-cultural dialogue and social engagement in the Euro-Mediterranean area.

16. A. SEN (2000); M.C. NUSSBAUM (2011).

This Centre could have the status of Foundation according to the Italian law. It could work to support social enterprises that adopt social responsibility criteria in making business and fulfil the legality requirements (legality rating must be an integral part of social responsibility) necessary to protect the rights of people involved and encourage their relational and professional capacities so that they can take advantage of a greater number of opportunities to increase their well being.

The goal is then to establish a mediation centre provided also with a revolving Fund to support entrepreneurial initiatives of social and civil economy. This Fund should favour small enterprises whose aim is to improve accessibility to fundamental goods and services and, as a consequence, promote social inclusion of the weakest and more marginalised layers of population in the area where they are active.

The objectives of the Fund are in line with the social doctrine of the Church, and in particular with the idea that profits are the means to an end and not a goal. This ethical Fund should adopt a chart of values shared by all contributors. This chart should give a preliminary practical definition of what is meant by “ethical”. It should refer to religion-inspired values (that constitute the shared meaning of “respect of human dignity”) that are the founding pillars of specific action programmes outlined to promote human development within the Mediterranean area. This operational definition is preliminary to the creation of the Trust and should be outlined starting from a shared position about the real possibilities that a new development model is created. This model should not deal only with the financial returns expected from investments and should not use people as tools, but it should highlight the human value of each person as such. Microcredit and social markets could be examples of an economy based on those principles.

Besides having a social impact, the Centre should also guide the Trust towards environmental friendly projects in order to do its share in safeguarding the ecologic balance of the system supporting life on our planet. Accordingly, it should direct investments towards sectors such as that of renewable sources of energy for self-consumption and organic farming.

The Centre would allow for the dialogue between ethics and economy to be resumed by putting back at the centre of the debate a comprehensive approach to man and nature from the viewpoint of happiness. Elements such as solidarity, reciprocity and fairness of relationship based on civil virtues would become central again, the same virtues that the encyclical *Caritas in Veritate*<sup>17</sup> highlighted as fundamental for a fair operation of markets.

The Centre would meet then all the requirements expressed by the current inspiring principles of ethical finance: encouraging fight against

17. Pontificio Consiglio Giustizia e Pace, (2013).

poverty and social exclusion; supporting crucial sectors to guarantee equal opportunities and development of a creative approach to issues and individual capabilities; guaranteeing transparency, lawfulness and fairness of governance and manufacturing processes, so as to respect rights of workers and stakeholders, and safeguard healthiness in the workplace, by defining the principles of social responsibility of enterprises and ethics of business at a local level.

One of the main tenets of this view is that the Trust is funded with contributions coming from both shores of the Mediterranean area. That would support peace in an area where great cultural, religious and also economic tensions are evident. In particular, it would be advisable that financing Islamic institutions in general, and of ethical finance in particular, could be involved because that would start a practical project towards a cross-cultural and cross-religious dialogue that is constructive and can encourage a truly effective intervention against extremisms and social conflicts in the area.

The new EU Commission could decide to share this process towards ethical finance by channelling some resources that are already available in the framework of the programme ENI (European Neighbourhood Instrument) for the Mediterranean. This project could be supported also through a targeted fund-raising activity for social economy under the above-mentioned Fund. By pooling together all these energies, the roadmap towards a new humanism in the Mediterranean area would make major progresses. Catholicism and Islam could work together to implement policies to support people disadvantaged or left out from social integration processes. Consequently, the role of religions in meeting the needs of weaker and more marginalised layers of population could receive a new emphasis.

It would be advisable also to think about the technical issues rising from the establishment of such Fund with mixed capital (Islamic and Catholic) in Italy and about its concrete management (for instance, IMCO could be an idea).

Given the current problems national budgets meet in supporting their traditional welfare policies, the cross-national options we have analysed here would be of great help in fostering, for instance, the implementation of a micro-credit circuit to the advantage of immigrants coming to our country. This type of solution would also provide a small contribution to the countries of the southern shore of the Mediterranean for them to establish institutions that can assist people undergoing great economic difficulties within their own countries so that to improve their quality of life and give them better opportunities for their future. These steps would be of support to the institutionalization processes of democratic regimes that are in force in the southern shore of the Mediterranean, since they are at risk of being

absorbed by an extremist vision exactly because they are unable to provide suitable answers to the needs of the most disadvantaged population.

## **7. Temporary conclusive remarks**

Social and cultural mediation can definitely help establishing bonds in situations of social fragmentation due also to the coexistence of social groups with different ethnic and cultural background. These groups find it difficult to communicate and build shared pathways to live together at a local level. Mediation can also help disseminating cooperation methods among social stakeholders who can intervene at a higher level, the supra-national one. The point is not to help solving international problems with the traditional diplomatic tools States have, but to establish relationships among different components of civil society of different Countries by carrying out a mediation among different values and understandings. These social components can be individuals — immigrants for instance —, third sector organizations, but also businesses that want to access international markets. These businesses could be offered different possible partnerships that are based not only on the capitalist economic and financial model but also on models working according to the principles of civil and social economy or cooperative world. Mediators could perform negotiation but not arbitration, which requires a judge, not a mediator. Migrants could be adequately trained to be a bridge between different societies and take on the role of cross-national cultural mediator. They could therefore convey a concept of entrepreneurship that privileges the ethical dimension in economic transactions. Entrepreneurs must preserve their human dimension besides being professional. They must be aware of the deep links that businesses have with society and the areas where they are active and that the wealth they produce has not only economic implications, but also human, social and cultural ones. To be successful, a training should teach to approach the person as a whole — not only as an instrument for production —, and communities as a set of meaningful relationships also from a moral and affection viewpoint not only from an economic one.

Humanistic mediation can be a suitable and remarkable method to be used for such training for many reasons; in particular: a) it has an educational approach and attention to ethical aspects; b) it can highlight people's inclination to listening, exercising responsibility and need for internal change, c) it can place emphasis on the value of relationships between people that can be turned from a source of conflicts into one of well-being and internal richness; d) it can broaden people's capacities to be active participant and become aware of resources available; e) it can provide motivations to set up

cooperation relationships with a win–win approach and broaden the range of shared understandings; f) it can encourage communal actions to produce common goods.

By listening and involving people, humanistic mediation gives voice to the hidden and subdued humanity. It promotes dialogue, softens interpersonal problems and facilitates mutual understanding.

The model of mediation that follows the principles of communicative action, on the other hand, allows for the prerequisites to be set to start negotiation procedures and communal will–forming processes based on dialogue. If reasoning is not distorted by instrumental manipulation or false conscience, as we have said, it can help the parties to agree upon new interaction models that do not have necessarily to be bound to countries' positive laws. The agreements that will be reached by using this approach will be able to set up a new social order, new rules and regulations of social relationships based on consensus and not coercion. The resulting new socialization fabric could become an original source of law and an opportunity that open societies in times of globalization can make use of to limit the risks rising from an excessive individualism, utilitarianism and cultural relativism. At the same time, in more closed and traditional societies those new forms of socialization could trigger processes of social evolution that are mutual and not one–way (going from more advanced international areas to the less developed ones).

Already during the Seventies, Eisenstadt<sup>18</sup>, in a research on post–traditional societies, reached the conclusion that the model of social evolution is not universal, it is not intrinsic to human nature or human societies' evolution. It is rather connected to the various contingent situations that occur in specific periods of human history. He also said that not only such historical process is temporary or chronological but it is also the result of the evolution of some systematic cultural and social forces, such as social mobilization, structural diversification, demand for political participation or other similar things. It would be wrong to believe that once these forces have shaped society, they tend towards a conclusive, predetermined platform. On the contrary, they cause different responses depending on the internal organization of those societies, nature of the international system and international relationships of that society. These international communication relationships of cultural, economic and political type give origin to differentiated responses by providing new and old kind of resources to tackle the problems. The interweaving of those opportunities does not offer only one opportunity to reshape social order but many and differentiated opportunities, which differ also for the way basic problems of that society are received and dealt with.

18. S.N. EISENSTADT (1974).

Cultural processes and institutional constellations operating within a society have then the same impact on changes. Culture, economy and politics impact on each other. I also deem necessary to add that equally central is the capacity a society has to produce élites that have leadership skills to utilize not only for their own interest but to the benefit of the whole community. If the members of those élites succeed in turning themselves into “policy entrepreneurs” the opportunities for change and social evolution will dramatically increase.

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# Intercultural Mediation and support centres for victims

ABDELKARIM HANNACHI, ANNAMARIA FROSINA, GIOVANNA TRIOLO

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## **1. General Consideration**

Over the last few years, CRESM has been implementing a social mediation project which had been started with the scientific support of Jean Pierre Bonafè Schimtt. It also involved the Cities of Marsala and Castelvetro.

The previous experience had pivoted on social mediation and stirred the need for enhancing the use of mediation in the field of criminal justice too. Our project was at that point enriched by the contributions of other countries' experiences, such as Belgium, Spain and Ireland.

In connection with the Specific Programme "Criminal Justice", the need to identify common practices arose, which could align different national legislations. By doing so the victims could be guaranteed the opportunity of solving their disputes by employing mediation in areas where organised crime is a major threat to both social cohesion and development.

The above-mentioned project has made possible to train fifteen mediators in social and criminal matters. They have followed a two-year training course under the scientific supervision of Professor Ivo Aertsen of the University of Leuven while Giovanni Ghibaudi (Mediation Centre of Turin) has been in charge of mediation activities at support desks. Thanks to the scientific supervision of the activities Giovanni Ghibaudi has carried out, the existing methodological approach to manage the desks has been better defined.

The initial model was essentially based on mediation activities in social

and criminal matters. However, a protection scheme of victims and vulnerable people requires more than simply listening to them or doing mediation activities.

Hence CRESM has decided, while the project was already being carried out, to implement a model that has been experimented in Turin for more than twenty years now. This model focuses on the victims in particular and provides support to deal with their emotional experience and meet their material needs.

The experience implemented in Turin according to the Recommendation R (2006)<sup>8</sup> to the Member States of the Committee of Ministers of the Council of Europe — on the assistance to victims of offences, is perfectly in line with the EU Directive of 25 October 2012 The directive 2012/29/eu of the european parliament and of the council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, throughout the EU. “For victims of crime to receive the proper degree of assistance, support and protection, public services should work in a coordinated manner and should be involved at all administrative levels — at Union level, and at national, regional and local level. Victims should be assisted in finding and addressing the competent authorities in order to avoid repeat referrals. Member States should consider developing ‘sole points of access’ or ‘one-stop shops’, that address victims’ multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation.”

The centres we opened to provide help for victims of crime offer:

- One or two meetings where people are listened to in order to provide support in a difficult moment and guide them to counselling or support services;
- Guidance during the contact stage with social services;
- Legal counselling;
- Psychological support;
- Social and penal mediation.
- Intercultural Mediation

having in mind the systematisation of the existing services in an area.

The Centres have been opened two years ago and are operated in co-operation with the Public Prosecutor’s Office, Law Enforcement Agencies, Juvenile Justice System and educational institutions. Their difficult goal is to address the matter in its complexity and approach it from different angles at the same time by a) preventing phenomena from occurring, b) controlling that given rules are complied with, c) starting processes that include different viewpoints, institutional responsibilities, different interests and needs.

## **2. Introduction**

Immigration has turned into an overwhelming phenomenon over the last few years and according to data released by the Italian National Institute of Statistics (Istat), 4.387.721 immigrants are reported to be resident in Italy at 1<sup>st</sup> January 2013. Percentage of foreign citizens over the total number of Italian and foreign residents keeps growing: it has gone up from 6.8% at 1<sup>st</sup> January 2012 to 7.4% at 1<sup>st</sup> January 2013. The increase in migratory flows has generated many issues in the field of social cohesion, integration, and citizenship. Given those substantial numbers, intercultural mediation seems to play a crucial role in planning on interventions and overcoming the disadvantages immigrants experience. In addition to that, mediation has proved extremely helpful in facilitating relationships between immigrants and native Italians. It is aimed at challenging prejudices and discrimination in its various forms by intervening on conflicting situations or preventing them from arising.

Having the opportunity to promote mediation in the field of intercultural conflicts has encouraged us to carry out a survey about the quality, quantity and numbers of immigration phenomenon in Mazara del Vallo. Given these assumptions “The Focus Group of Mazara del Vallo: Immigration and Care of Family Bonds” On Monday 7<sup>th</sup> April 2014, C.R.E.S.M. (Centre for Social and Economic Research in Southern Italy) organised a focus group about “Immigration and Care of Family Bonds” at the headquarters of Primo Circolo Didattico “D. Aiello” in Mazara del Vallo.

CRESM, CEMSI (Mediterranean Centre for Intercultural Studies) and DEMS (Department of European Studies and International Integration) deemed necessary and advisable to analyse the phenomenon of integration, with a focus on the importance of acknowledging that cultural differences can be a resource in an area with distinctive multi-ethnic characteristics such as Mazara del Vallo.

Immigration has been a well-established reality since many years in Mazara del Vallo and foreign workers are well integrated in the city from a demographic and economic viewpoint. Immigrant workers, mainly coming from Tunisia, are in fact pivotal for fishing industry, the economic sector in which Mazara has gained leadership within the Mediterranean basin. Moreover, Tunisians are almost half of the immigrants who live in Mazara; teen-agers are about one / fourth of them at a provincial level and one / third at a municipal level. Here, foreign population is mostly organised in family groups.

As for the methodology, the analysis has been based on a fact-finding approach. It has also included assessing the quality and quantity of social bonds between family groups of different cultures and between immigrants

and their families of origin.

During the Focus Group the following issues were discussed:

- Interculturality in Mazara del Vallo;
- Establishing a help desk for victims, and implementing intercultural and family mediation;
- Comparing family organisation of immigrants and receiving community;
- Analysing social bonds of families of different cultures;
- Exploring the relationship between urban space and social integration.

During the meeting two focus groups were formed:

- One involving both immigrant and native families;
- One aimed at workers in the field and experts of social, intercultural, family mediation and of anthropology and sociology.

### **3. Questions for the Focus Group aimed at families**

Only immigrant women representing foreign families participated in the group, which was initially aimed also at representatives of native Italian families. The questions asked during the focus group concerned two main themes: integration, and relationship with foreign and Italian families.

The questions were:

Opening Question: « Tell us something about yourself. What are your interests? »

Introductory Question: « What thoughts do pop into your mind if I say the word “coexistence”? »

First Key Question: families are asked to evaluate their own and their children's level of integration in Italy, starting from their arrival to the current situation.

Second Key Question: « Do you have a positive relationship with families of your same ethnic group and Italian ones? »

Third Key Question: « How do you deal with arguments, problems and disagreements concerning the following areas: relationships within your work environment, with neighbours and family members; issues linked to your house lease or to relationship with private people? Who do you address to deal with them? Do you address a different subject according to whether the issue involves a member of your community and/or culture of origin or a member of the native community? »

Transitional Question: « In relation to these positive or negative experiences, have you had support from anyone? »

Final Questions: « Tell us three concepts that you find crucial for this focus group. Should we add anything about the topic we have been dealing with today? »

### *3.1. Analysis of the contents of the focus group with families*

After a brief introduction, participants were asked to think and say something about the words coexistence and level of integration.

In particular, differences emerged between first and second-generation immigrants. Generally speaking, those who were born in Mazara explained that they could rely on a well-organised family network in case of necessity, although they stated that relationships with Italian families were good and they lived a “good life”. First-generation immigrants who were asked their opinion about coexistence showed reticent about the issue of “integration”. They explained between the lines that they were forced to address public services (i.e. social services, churches, Caritas, the Franciscan Nuns, etc.) since they did not have a family network to support them. To the question “Do you have a positive relationship with families of your same ethnic group and with Italian ones” most of participants replied that they had a positive relationship with the first group, although they provided a mere moral support, while they talked of a “peaceful” coexistence with families from Mazara with whom they hardly had any contacts (except for meetings in schools through their children). The situation is made worse by the fact that mixed marriages are very rare, as a non-Muslim man has to convert to Islam if he wants to marry a Muslim woman while a Muslim man is allowed to marry a woman of a different religion.

As for the theme of conflicts they mostly arise with employers and stem from social status differences rather than from the ethnic group of origin. Participants mostly reported of issues linked to black-market work and worker’s exploitation (being underpaid, not having welfare contributions paid, etc.). These problems are unfortunately common to many workers in the fishing and agricultural industries, which employ mainly immigrants resident in Mazara del Vallo. Facilitators are not provided for that type of conflicts and workers address the legal system only in the most severe cases.

The situation is different when interpersonal conflicts are involved. During the conversation with the participants, it emerged that conflicts between friends and/or relatives are contained and dealt with by observing the rules of Quran. The Imam is a figure of reference only for religious and spiritual matters.

The participants expressed their need for multifunctional services to meet their basic needs and tangible and intangible necessities. They therefore unveiled the lack of organised services that can provide them with

support and put them in contact with existing public services. The few effective initiatives are apparently managed by volunteers operating in the third sector, although their activities are not often connected to similar ones or tend to be extremely sectional.

#### 4. Questions for the Focus Group aimed at workers

The questions asked during the focus group were aimed at carrying out an analysis and expressing remarks about the situation of social services, their weak and strong points, problems and relationships between immigrants and with them. Workers in the field of immigration were invited to the focus group. Professor Abdelkarim Hannachi has met the group two times upon his explicit request. The report of the meeting has taken into consideration remarks that emerged during the second meeting.

Opening Question: « What is interculturality for you? Can you say that cultural integration is a reality in your city? »

Introductory Question: « What are the main needs or necessities of immigrant citizens? »

First Key Question: « Do you encounter conflicts and disputes between private citizens in your work? »

Second Key Question: « What type of projects/services that are currently operational, if there are any, are mainly aimed at immigrant population to support mediation as a way to settle conflicts? »

Transitional Question: « In reference to those positive or negative experiences, have you received support from other figures? »

Final Questions: « Tell us three concepts that you find crucial for this focus group. Should we add anything about the topic we have been dealing with today? »

The study group included:

- Abdelkarim Hannachi. Anthropologist and expert in integration policies in support of citizens of third countries;
- Mohamed Zitoun. Adjoined member of Mazara del Vallo City Council;
- Franciscan Nuns of Mazara. Nun Paola;
- Nourehene Chouchane. Cultural Mediator;
- Emilio Vergani. Evaluator;
- Alessandra Pera. D.E.M.S.;
- Casabona Salvatore. D.E.M.S.;
- Alessandro La Grassa. C.R.E.S.M.;

- Annamaria Frosina. C.R.E.S.M.;
- Giovanna Triolo. C.R.E.S.M.;
- Mariella Corte. School head teacher;
- Liborio Furco. C.E.M.S.I.;
- Teachers of bilingualism courses (Arabic–Italian).

#### 4.1. Analysis of the contents of the focus group with workers in the sector

After having introduced the focus group, participants were asked the first question with a stress on the issues of real integration in Mazara del Vallo. Their answers revealed different viewpoints. Participants underlined that “interculturality” does not overlap with coexistence, which is rather related to multiculturalism, but it means *exchange, dialectic between two different cultures*. There is not an ideal city for immigrants but an ideal city for all citizens where they have all the same rights. Interculturality implies an exchange on equal terms where each culture is challenged and promotes the creation of a new identity as a merger of the existing ones. To carry out an exchange on equal terms it is necessary to share principles, ideas and solve and eradicate conflicting elements.

Professor Hannachi stressed how Mazara is a fertile ground for true integration, which he believes has not been achieved yet because of the high unemployment rate among immigrants and not only. Evidence to this phenomenon is to be found in the fact the few cases of integration, mainly resulting from mixed marriages or job placement, happen among people of the same social status.

To reach the goal of cultural integration, in particular, projects and courses to enhance bilingualism have been carried out in schools in the past years.

The focus group revealed how bilingualism is crucial to the integration process. Knowing the language of minority ethnic groups is fundamental to share common spaces.

Tunisian children attended those courses to learn Italian and, vice versa, Italian children studied to learn Arabic. The projects were aimed at promoting integration by introducing the study of Italian in the Tunisian schools and of Arabic in Mazara’s schools.

The most successful experiment of teaching Arabic in a school of Mazara has been promoted by C.R.E.S.M. and successfully transferred to other European areas with a strong presence of immigrants.

According to what the interviewed people declared, the topic of conflicts in schools and coexistence of children of different ethnic groups have not led to major disputes, and in such cases, school authorities have intervened and met the involved families separately. They have tried to carry out

a mediation of the conflict with their own resources, by using personal instruments such as sympathy and sensitivity to some themes.

Professor Abdelkarim Hannachi acknowledged a general atmosphere of acceptance, tolerance and pacific coexistence among immigrants and native Italian. In spite of that, though, the integration process is still in the best intentions of many people who try hard, through individual or small groups' actions in different work environment. They "think" and "work" to promote social inclusion of immigrants and the encounter between cultures that are close but different.

Nowadays, if we exclude conventional social relationships, there is a sort of separation between Tunisians and inhabitants of Mazara due to a series of factors ranging from cultural diversity to the lack of a local integration policy. In addition to that, the majority of immigrants work in the fishing industry and are consequently little present in the social and political life of the city. This phenomenon involves both adults and children and in Hannachi's opinion this would explain the low number of conflicts. It is well known that closeness of relationship and potential conflicts are directly proportional but immigrants and Italians have few opportunities to meet and relate in Mazara. The existing problems are worsened by their language gap, since there is not an organised public service to deal with it.

Hannachi reiterated that there are not many opportunities to share interests. This does not happen because the two ethnic groups do not have ideas in common but because of unfavourable economic conditions. Sharing a space is important but not enough: social equality is needed. People can live in the same neighbourhood and still not have social interaction whatsoever if they belong to different social statuses.

A house or a neighbourhood is chosen in relation to the money people have in their pockets.

To promote integration and exchange, more meeting points (such as bars, newspaper agents, attracting events for youths, exhibitions, etc.) should be created in the historic city centre, exactly the opposite of what is happening. As a matter of fact, an Americanised urban model is becoming dominant, where neighbourhoods are established far from the city centre. Immigrants live in the historic city centre but they are not happy, they would rather live in houses overlooking the sea.

Finally, they were asked to list institutions or organisations the family go to in the event of conflicts (at work, in the family, among generations, etc.). The main ones are Caritas and private organisations, such as *Associazione San Vito*, which are still a fundamental point of reference. The Franciscan Nuns give a strategic contribution on a daily basis by assisting immigrants in their needs, which vary according to the different situations.



The cultural mediator Nourhene Chouchane pointed out that the lack of integration is not only due to the difference in their economic status. For fear of losing their roots and their identity, integration is often considered a negative value.

As for conflicts in particular, she stated that they heavily depend on language barriers when we consider the relationships between local and immigrant families. However, conflicts are never so serious since inhabitants of Mazara and immigrants can be seen as “divorced partners still living in the same house”. As a matter of fact, the two communities mainly meet in educational contexts, as it has already been said.

On the contrary, conflicts between first and second-generation immigrants are more frequent. The majority of these types of conflicts are “settled” within the four domestic walls, which bear witness to the lack of mediators capable of promoting and facilitate the dialogue between immigrants of different generations.

The following paragraph was written after the second meeting with Abdelkarim Hannachi whom we asked to explain the phenomenon starting from structural data, having in mind possible strategies to be implemented.

## 5. Introduction: National and Regional Context

Italy records little less than five million immigrants coming from third countries, so it is now a country of immigration but its population swings from a wish to integrate and the temptation to exclude. This situation highlights the lack of an integration model that is common to all political fronts and built with the participation of the stakeholders. Immigrant communities currently cover 8.1% (according to Istat) of Italian population and they play a crucial role in keeping economy developing and increasing the number of young people in a society that is ageing more and more. At 1<sup>st</sup> January 2011, 141.904 foreigners were residing in Sicily and represented 2.8% of the whole population. Romanians is the most numerous community, with 28.4% of all foreigners living here, followed by Tunisians (11.9%) and Moroccans (9.0%). Sicily is a land of emigration, immigration and transit, a frontier region, the largest island in the Mediterranean Sea with the highest rate of illegal immigration. In spite of all that, it is the only Italian region lacking legislation or even a regulation on immigration.

### 5.1. *The Province of Trapani*

The province of Trapani ranks fifth in Sicily for number of foreign residents (see tab. 1) with 12, 370 individuals at 01/01/2011. They represent 2.8% of the

**Table 1.** Foreign residents in Italian provinces at 01/01/2011 (Source: Istat).

	NUMBER PER PROVINCE
Palermo	28,496
Catania	25,908
Messina	23,550
Ragusa	20,956
Trapani	12,370
Siracusa	11,102
Agrigento	10,755
Caltanissetta	5,893
Enna	2,874
TOTAL	

province inhabitants that were 436, 624 at 2011. From table 2 it emerges that Mazara del Vallo is the only city with more than two thousands immigrants, while Marsala and Trapani have more than one thousand. Alcamo ranks fourth with 1, 297 individuals.

By analysing the figures of the Province of Trapani, it becomes evident the importance of having offices to deal with issues linked to integration. It would help to establish:

- a) A provincial observatory in Trapani or Mazara del Vallo to monitor the migratory phenomenon across the whole province;
- b) An office dedicated to immigrants in the municipalities with at least one thousand foreigner residents, i.e. in Mazara del Vallo, Marsala, Trapani and Alcamo;
- c) A in-house officer responsible for immigration issues at Social Policies Departments of municipalities with more than 300 foreigners;
- d) A service of intercultural mediation to enhance cultural differences through mutual acknowledgment, by allowing a mutual knowledge between family organisation of immigrants and that of receiving communities, and defining relationships and social bonds among families of different cultures.

The Romanian community has been growing bigger over the last few years because of the need for carers of aged people. On the contrary, the Tunisian community is growing smaller because of unemployment that forces families to move to northern Italy where there is more and better paid regular work.

As for the distribution of immigrants among different towns, Mazara del Vallo records almost a third of the total number of immigrants in the

**Table 2.** Foreign population of the province municipalities at 1<sup>st</sup> January 2011 divided per age and sex (Source: Istat Website — *dati.istat.it*).

	MEN	WOMEN	TOTAL
Alcamo	638	659	1, 297
Busetto Palizzolo	14	25	39
Calatafimi	33	57	90
Campobello di Mazara	252	211	463
Castellammare del Golfo	335	397	732
Castelvetrano	301	442	743
Custonaci	61	89	150
Erice	149	261	410
Favignana	18	40	58
Gibellina	37	37	74
Marsala	1, 063	924	1, 987
Mazara del Vallo	1, 334	1, 248	2, 582
Paceco	83	117	200
Pantelleria	253	232	485
Partanna	201	114	315
Petrosino	168	76	244
Poggio Reale	24	21	45
Salaparuta	28	19	47
Saleri	130	89	219
Santa Ninfa	32	51	83
San Vito lo Capo	63	87	150
Trapani	814	907	1, 721
Valderice	95	127	222
Vita	8	6	14

Province (tab.2) and Tunisians are almost half of the immigrants. Minor immigrants area about one/ fourth of the foreign population in the Province and one/ third in Mazara, where settlement are family based.

Given the significant number of Tunisian immigrants and the importance of the Mazara case, a model of intervention will be devised to deal with Tunisians integration in Mazara del Vallo. It will be a tool to help gain awareness about the necessary steps to achieve integration. All stakeholders (immigrant target groups, politicians, economic, school, cultural and healthcare actors) should be responsible for the success of this model by working in good synergy.

The proposed model has been outlined to know and intervene in order to update and improve general knowledge of the living conditions of Tunisian community in Mazara and to promote initiatives for social inclusion and cultural integration of immigrants within the host community. This is why this model provides for concrete proposals to outline an

intervention protocol, that is a set of proposals mainly aimed institutions.<sup>1</sup>

### 5.2. *Brief Outline of Tunisian Immigration in Mazara Del Vallo*

Immigration is already a well-established reality in Mazara del Vallo. Table 4 shows that the community is stable and the work market is saturated in the city.

**Table 3.** Presence of Tunisians and foreigners in Mazara del Vallo from 2004 to 31/12/2010 (Source: Istat data concerning the city of Mazara del Vallo).

Year	Tunisians	Total
2004	2,186	2,481
2005	2,211	2,492
2006	2,087	2,395
2007	2,055	2,452
2008	2,015	2,487
2009	1,989	2,490
2010	2,006	2,582

As for the needs of the Tunisian community, the best technique to understand them is that called “participant observation” since it is possible to study the phenomenon from the inside. The observer participates in the group’s life and manages to collect information directly. This observation has highlighted the following major areas of difficulties affecting the community:

- a) Employment;
- b) Second generation immigrants, school, school integration;
- c) Renewal of residency permit;
- d) Housing;
- e) Family reunion;
- f) Language and school barrier;
- g) Access to health-care and social services;
- h) Political participation;

Some problems are linked to others: housing depends on income, hence on having a job, for example, or the renewal of residence permit depends on Italian rules and regulation.<sup>2</sup>

1. A. HANNACHI (2010), pp. 87–107.

2. A. HANNACHI (2008), pp. 85–125.

### 5.3. *Employment*

Mazara is considered one of the wealthiest cities in Sicily; its port harbours the biggest fishing fleet of the Mediterranean (for number of vessels and catch). Most of the Tunisians are employed in this sector. Being a fisherman is a very hard work: each fishing trip lasts from two to four weeks, sometimes even more. These workers can be seen as true “aliens” and when they go back to mainland it is for a few days, enough for unloading the catch, refuelling, stocking up in food, spending a little time with the family, and it is already time to sail away again. This job does not allow them to enjoy family and social life.

Competition between Italian and Tunisian manpower is almost non-existent since the former are not interested in those jobs. On the contrary, Tunisian workers make a substantial contribution to the economic growth of the area with a positive impact on job opportunities for natives since they ensure continuity and development to different activities linked to the fishing sector and shipyards (processing and selling fish, supplying fishing gears for vessels, etc.).

As for employment opportunities on the mainland, they are mostly casual and not regularised, also because they arise in the building or agricultural sectors. Jobs are therefore occasional or seasonal (harvesting grapes or picking olives).

Tunisians are also largely employed in fields such as services, restaurants, sheep farming and tuff-stone quarries, while women are more and more employed as house servants.

Problems such as job insecurity, exploitation and illegal work were already affecting those sectors before foreign workers entering the market. Tunisians experience in Italy the same uncertainty as in their country of origin but they can rely on higher daily wages here, although they are lower than they should be and the cost of living is higher than in Tunisia.

In Sicily illegal work is quite widespread and residence permits take into account of the type of work and duration of contract. Most of Tunisians working as fishermen have a two-year residence permit. Consequently, immigrants' life is quite unstable and dependent on residence permit, a paper that is “permanently temporary”. Its expiration is a sort of nightmare for them also because of the inconvenience they have to go through to renew it.

In addition to that, immigrants' standard of living depends on the type of work they have and related salary, so that they experience periods when they have enough money and periods of hardship.

The possibility of reuniting families has brought about dramatic changes in immigrants' lives. Men have to work more and women hope to find

a job to help support the household. The members of the family live together, the wife looks after the house, laundry is done more frequently but responsibilities are heavier and expenses grow (rent, bills, education, all problems linked to looking for a job).

#### 5.4. *Second-Generation Immigrants and School*

Since 1981, a Tunisian school has been opened in Mazara del Vallo, because many families live there. Every year almost one-fourth of the Tunisian children enrol to it to start elementary school. Consequently, although they have been born and raised in Italy and are going to become citizens, these children do not study Italian. The gap in knowledge therefore becomes difficult to be filled when they start Italian school. As a consequence, they will not be in the best conditions to receive a good education and participate in society but they will suffer from disadvantage and exclusion. This situation might result in behavioural problems with school dropout for some of them, and rejection of their cultural identity and related ways of being of the community they belong to for others. Some of them might even show transgression reactions against schoolmates and teachers. Although similar cases occur rarely, they trigger a vicious circle so that the stronger their reactions the more they will be marginalised. It is therefore fundamental to fill the language gap to stop similar situations from arising also in high school. It must be also said that teachers of Mazara's schools are left alone, without suitable tools to manage the arrival of foreign students in a classroom, who are then left to their own destiny. The integration process might therefore become a spiral of exclusion.<sup>3</sup>

#### 5.5. *Housing*

Immigrants mostly live in the historic centre of Mazara, in the oldest and most crumbling houses with poor services although they pay a high rent with a negative impact on their economic and social condition. Their choice is the consequence of many factors: casual jobs, low income, very high rent, need to save money for the house in Italy so they can spend more in Tunisia (this is one of the first pillars of the migratory process). In addition to that, the Italian legislation that sets the criteria to evaluate whether a house is fit to accommodate immigrants ends up being discriminating. It aims at improving the living conditions of these new citizens but at the same time it discriminates foreigners against Italian inhabitants.

3. A. HANNACHI (1998), pp. 47–71.

### 5.6. Access to healthcare and social services

According to the law on immigration and healthcare, immigrants who have regular residence in the Italian territory have the right to access healthcare without discrimination between them and natives. The same right has been granted to immigrants living in Italy without a regular residence permit so that they can enjoy urgent treatment and also the basic therapies in terms of prevention and treatment. However, it is difficult to access such right because that legislation is not well known both by immigrants themselves, who often do not know their rights, and healthcare operators. Sometimes immigrants are not even capable of describing their condition also because cultural mediators are not present during the check-up.

Finally, there are not updated guidelines illustrating social services and healthcare assistance in foreign languages to allow immigrants to read about local facilities and services in their own language.

## 6. Intervention Proposals

Criteria for a model of intervention.

Immigrants integration and exclusion depend on factors that facilitate or stop such processes. The most decisive among them is certainly national legislation that defines the legal status of foreigners who have been granted a model or a certain degree of citizenship. However, local governments are asked to intervene by programming local immigration policies, since the game of integration is mainly played at a local level.

A model of intervention to promote social inclusion and cultural integration of immigrants and their families in a local context is a theoretical and simplified representation of a complex reality. Such complexity stems from the many factors that must be taken into consideration to this end, in particular:

- 1) Existing rules and regulations on foreigner stays that set their rights and duties at a national and regional level;
- 2) Provincial and municipal regulations on immigration;
- 3) Local context and its socio-economic conditions;
- 4) Immigrants necessities that have been assessed through a correct reading of their reality;
- 5) Local structures and services immigrants can address to enjoy their rights;
- 6) Modern concept of citizenship that is articulated in three levels:
  - a) social citizenship that guarantees the right to education, public

healthcare, public services and welfare; b) civil citizenship that guarantees fundamental rights to individuals; c) political citizenship that is granted through the right to active and passive vote.

This intervention model will be a fundamental tool for cultural integration, and therefore it will also take into consideration:

- 7) Immigrants' culture/s and religion/s of origin;
- 8) Model of a plural society we would like to establish in Italy.

Article 1, paragraph 2, of the city's Statute states that Mazara del Vallo is an open city that respects different ethnic, cultural, political and religious groups; it respects loyalty of pacts and relationships with other communities. Article 2, paragraph 5, talks about reception and integration of immigrants that are based on the principle of solidarity and acknowledgment of the value of different cultures. Local politics is therefore asked to make decisions that are in line with those principles and make the most of the presence of immigrant communities. Consequently, economic development will be promoted, and conditions will be created for a complete inclusion of new citizens and a better coexistence between them and native Italians.

In addition to that, besides major language and cultural barriers, the numerous problems of immigrants should be dealt with, such as employment, healthcare, housing, public life participation, school inclusion for juveniles, social inclusion, prevention of minor delinquency.

Far-sighted local administrators must establish a permanent Office dedicated to immigrants in each municipality, which should fulfil many functions and work to programme and plan actions in advance rather than intervening to respond to emergency situations.

This Office should aim at providing protection and assistance to immigrant populations, promoting their social inclusion and their cultural integration, making the most of their presence in terms of job placement, economic, social and cultural advancement.

It should operate to monitoring and providing assistance but also to promoting social and cultural integration.

- 1) Monitoring and assistance should be provided to:
  - a) Guarantee that the knowledge of migratory phenomenon is updated on a regular basis both in terms of quality and quantity to pick the real needs and avoid stereotypes and/or prejudices;
  - b) Work in cooperation with experts and immigrants association or organisations looking after them in order to device initiatives



- and targeted actions and to find the necessary financial support to implement that programme;
- c) Boost intercultural mediation services with the purpose of:
    - Informing immigrants through desks, handbooks, leaflets in Italian and their language of origin and provide them with helpful tools to know the local economic, social and cultural context;
    - Providing guidance on how to access social, healthcare, educational services, to enjoy their civil, political, and cultural rights, to keep them informed about immigration laws;
    - Supporting immigrants if conflicts had to arise because of their situation (intergenerational conflicts between first and second-generation immigrants, between local and foreign families);
    - Providing general consultancy, guidance to address the different local public services, mediation between immigrants and public or private bodies;
  - d) Support and promote modernisation of offices and services that are available in order to make them ready to deal with new customers;
  - e) Promote and support social and political participation of immigrants;
  - f) Coordinate interventions of other municipal, public or private bodies that are active in the field of immigration;
- 2) Social inclusion, education and cultural integration should be boosted by:
- a) Starting cooperation projects with schools to receive and enrol foreign students. As children of foreign parents or Italian parents who had emigrated and have come back to their town of origin, they should be offered customised courses to gain basic education or improve and perfect their Italian. They should be supported at schools, and initiatives that aim at stressing the value of their language and culture of origin should be organised;
  - b) Organising meetings, seminars to discuss the topic of immigration and related issues, in particular how to raise awareness among teachers and students about intercultural themes;
  - c) Organising events to illustrate their cultures of origin (folk and theatre shows, movie screening, arts and crafts exhibitions, etc.);
  - d) Revamping the historic city centre in cooperation with all relevant actors, whether private or public, in order to turn it from a ghetto-type of place to an area where citizens can live together

and economic activities can flourish. To do that, new housing policies should be outlined and shops and workshops should be open to sell Sicilian and Tunisian artefacts.

At the receiving end of these actions there will be: a) foreign immigrants who are legally residing in Mazara del Vallo and their families; b) Italian immigrants who have returned after having lived abroad for some time; c) native Italians in case of initiatives, such as cultural ones, that are aimed at integration. Some of the above-mentioned tasks should be better defined in order to guarantee that that Office provides for helpful services.

For this Immigrant Office to work effectively, human resources are necessary. They must be equipped with programming skills and capable to intercept public funding sources at a EU, national or regional level in order to implement the planned activities (item 1b). Before programming, though, it is necessary to gain a thorough knowledge of the phenomenon (item 1a).

Experts, researchers and immigrants themselves, religious and non-religious groups, public and private bodies involved in working with immigrants will all be involved. A bottom-up approach is necessary if we want to gain knowledge of immigrants' living conditions and real needs and to prioritize them (if). This form of participation must be implemented in a transparent and democratic way. The involvement of community leaders does not mean that immigrants participation should be limited or even absent. We must be aware though that if it is true that immigrants participation is crucial to make those initiatives effective it is also true that they are often too busy with their jobs, too worried by the economic support they need to find for their migration project that they have little or hardly any time to participate in associations activities.

While we are waiting for national legislation to rule about the right of active and passive vote for these new citizens, rights that have not been granted to them so far, it is necessary to promote at least two forms of participation (item 1f): a) since the figure of the adjoined city counsellor, which had been introduced in 1992, has been left behind, it is necessary to involve immigrants or their children who have acquired Italian citizenship in local elections; b) a council of immigrants should be conceived as a body that proposes policies and initiatives aimed at integration.

The figure of language and cultural mediator is central (item 1d) and he/she must comply with scientific and professional requirements to be selected so that he/she can guarantee an effective and efficient service. Here follows a good description of his/her professional profile. He/she must work to facilitate inclusion of immigrant citizens in the social context of the host country. He/she will function as a middle-person between their needs

and public services in order for them to enjoy equal opportunities in accessing the labour market and social services (G. Gennai, 2005). His/her fields of work range from education to culture, from healthcare to employment and justice. He/she is usually of foreign origin, has to master languages and cultures of the country of origin and of the host one, so that to promote dialogue and settle conflicts with his/her mediation.

In schools (item 2a), the integration of second-generation immigrants is at the same time a factor and an index to evaluate the overall integration process that takes place in a plural society. Schools are the thermometers of integration and the ideal place to shape a modern concept of citizenship according to which people leave differences behind and put in common values and principles.

The most serious problems most of foreign students are faced with arise from their poor knowledge of Italian language. Consequently, this gap is a major obstacle to cultural and school integration, and social inclusion. This is why when these new students enrol to school must receive a special attention. Reception and inclusion in schools are a crucial stage to the purpose of integration. The national Ministry for Education has passed a good law that regulates enrolment procedures and provides for inclusion guidelines (President of the Republic Law Decree N. 394/1999; Ministerial Circular N. 24/2006; M.C. N. 93/2006). Ministerial Circular N. 93/2006 in particular, concerning enrolment rules for the school year 2007/2008 reiterates that foreign minors have to join a classroom with students of his/her same age; the council of teachers however can decide that the student joins the previous or following classroom according to education curriculum and knowledge of Italian language.

For these students at risk, moreover, it is fundamental to provide language support by devising individual or group programmes to fill their gaps, given that language is a basic tool for learning.

Equally crucial is the presence of an intercultural mediator. This new professional figure law has introduced is aimed at facilitating inclusion and has work to favour integration.

His/her job is to welcome, inform, guide, analyse the needs, facilitate communication between a student and his/her family on the one side and school and public services on the other, be engaged in language support activities, teach language and culture of origin. Since he/she plays also a role in helping immigrants to achieve integration, he/she has to boost exchange and intercultural dialogue, anticipate and manage conflicts by underlining differences and similarities. The final objective is to make socialisation in the classroom less problematic and educational approach more effective by facilitating social inclusion and preventing exclusion.

Considering that immigrants living in Mazara del Vallo are of Arabic origin, it is necessary to provide language support schemes, involve a cultural mediator, and also adopt a mixed language teaching curriculum that includes Italian and Arabic. This will have positive outcomes: it will be possible to change complexity into an opportunity to become multilingual; schools located in the historic city centre will have the chance to improve their educational programmes by giving value to students' languages and cultures of origin, and native Italians will have the opportunity to learn those languages.

Since Italian parents are concerned that the presence of foreign students in the classroom might slow down all teaching activities due to their poor knowledge of Italian, it will be possible to change this "weak point" into a real "point of strength".

As for housing problems (2d), a solution is to promote policies that can adequately respond to the demand for accommodation by:

- Making public houses available at subsidized rent for foreign residents;
- Helping foreigners to buy houses at a controlled price with the support of an ethical bank;
- Enforcing existing laws to control rent and assist immigrant families to look for a house and estimate its rent.

As for healthcare services (item 1e), it is necessary to reorganise services and competences, and to raise awareness and train healthcare workers (doctors and nurses, social workers, psychologists, sociologists, pedagogy experts, etc.). By doing so, more effective tools will be made available to adequately meet the needs of these new citizens. They challenge our system with specific problems arising mainly because of the different social and cultural models they belong to. In addition to that, it will also be necessary to translate handbooks and leaflets into Arabic (item 1c) to make it easier to understand how to access and enjoy public services.

As for cultural integration (item 2), the Italian and immigrant communities are walking along parallel lines, which do not "meet". They overlook an important fact though: they have a common, same destiny on their horizon. Except for a few cases, each community has the minimum relationship possible with the other. Communication between the two communities happens only in case of formal social interactions, such as between employer and employee, shop owner and customer, landlord/tenant. Free time is the time of separation par excellence. Although immigrants and native Italians meet at their work places, when they shop at the market or at the grocer's, when the curtain of their compulsory social life falls each individual seeks

refuge within their own group and attends to his/her personal interests. It is therefore necessary to organise different intercultural activities (items 2b and 2c) to disseminate knowledge, promote exchange of ideas and the dialogue between cultures, and integration.

It is fundamental to reiterate that for a real integration to take place immigrants do not have to renounce their origins and cultural characteristics. On the contrary, these are valuable assets to establish a harmonic cultural syncretism that generates a new culture based on strong common values. Immigrants should rather be aware that the future, common history of the new Italian society we are asked to write is more important than our past histories. The particularisms that feed our individual identities are accidents against the universal scope we can build together.

As for employment, besides drawing relevant authorities' attention on the need to implement actions aimed at reducing black-market work and guaranteeing regular opportunities, equitable salaries and workers' rights, it is necessary to get engaged and transform cultural diversities into job opportunities. For instance, it is possible to promote Sicilian and Tunisian artefacts at the same time and open craftsmen workshops in the historic city centre to turn it into an attractive place for tourists (item 2d).

The model we have illustrated here has highlighted how important and central is the Immigrant Office, in its form of a permanent, municipal desk. Yet, it is not enough. Other initiatives have to be started, in addition to those that Office will organise. It will certainly play a fundamental role in encouraging, supporting, coordinating, completing, monitoring activities while public services, which have a direct contact with immigrant communities, work to become independent and self-sufficient in fulfilling their tasks.

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# MIS (Mediation for Social Inclusion)

MICHELANGELO RUSSO

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## **1. Introduction**

A universally accepted definition of mediation does not exist. There are many features from time to time by the beliefs of the ones who wrote it, from what objectives it is proposed, in which areas of intervention works, as so many other aspects. A formulation that includes the most widely used definition, may be the following: the intervention of a neutral, impartial and independent third party of the relationship between two or more parties to the conflict, in order to facilitate the contenders in the search for a resolution of the dispute in consensual and satisfactory form of all parties. This is an approach that can be fully considered classic between the methods of Alternative Dispute Resolution. The Social Mediation and in particular Mediation for Social Inclusion, is one of the least well-defined areas developed in Italy in more recent times of the advent of mediative methodologies and deviates a bit, in field of application, from the most traditional Mediation.

Here we are trying to represent the context in which the Social Mediation has had the conditions to be born and grow but also to highlight those features that support a common understanding about its meaning and its area of action.

So, in the first part we will try to trace, even if briefly, the evolutionary lines of social mediation in Italy. While in the latter we will try to understand what areas to compete Social Mediation and how much it is appropriate to speak of Mediation for Social Inclusion distinct, as far as possible from other forms of mediation in any action for social inclusion. Finally, we will seek to represent the experience so far made to Social Mediation with particular reference for Social Inclusion in Italy.

## 2. Defining the Social Mediation

The Social Mediation is the most generic that can be defined as part of the Alternative Dispute Resolution and the attempt to trace the boundaries of intervention is far from simple.

Who is working on, in a continuous evolution and transformation of meanings, he has considered the more various aspects.

In its most essential meaning, the Social Mediation should include an extremely broad and deep field whose boundaries, difficult to draw, especially in the era of the Internet and the so-called globalization, would merely be defined by the social group or society it can refer to, not necessarily confined to a geographical area.

To define the social mediation, you need to refer to social conflict. Charles Tilly states that “there is a social conflict when someone or a group claims of negative requests towards other people or groups, if claims had been satisfied t, they would damage others’ interests that is other people’s chances of reaching a desirable situation”<sup>1</sup>.

Assuming the social conflict which counterbalance of the spheres in which the Social Mediation would have legitimacy of existence, it is clear the vagueness of its meaning.

Passing over any attempt to infer from the vast existing literature on the subject of social conflict, produced by extraordinary scholars of any disciplines (R. Dahrendorf, K. Lewin, N. Luhmann, G. Simmel, A. Touraine, L. Cavalli, M. Weber K. Marx, F. Engels, C. Wright Mills, T. Parsons, S. Freud, E. Fromm, N. Machiavelli, Thomas Hobbes, D. HUME, to mention only an infinitesimal part), we just deal with that part of the conflicts between individuals, between groups, between individuals/groups and institutions that compete to the field of action more content, and more currently in use today, of the Social Mediation. For simplicity and for the author credit, we show the definition that Luciano Gallino, in his Dictionary of Sociology, provides the voice Conflict: “Kind of a more or less conscious interaction between two or more people individually or collectively, characterized by a divergence of purposes that, in the presence of too few resources because the subjects can achieve these goals simultaneously, to need objectively to be made, or subjectively appears indispensable, to each of the parties, to neutralize or to divert to other purposes or to prevent the action of others, even if this involves both consciously to inflict damage, and to endure relatively high costs compared to the objective pursued.”<sup>2</sup>.

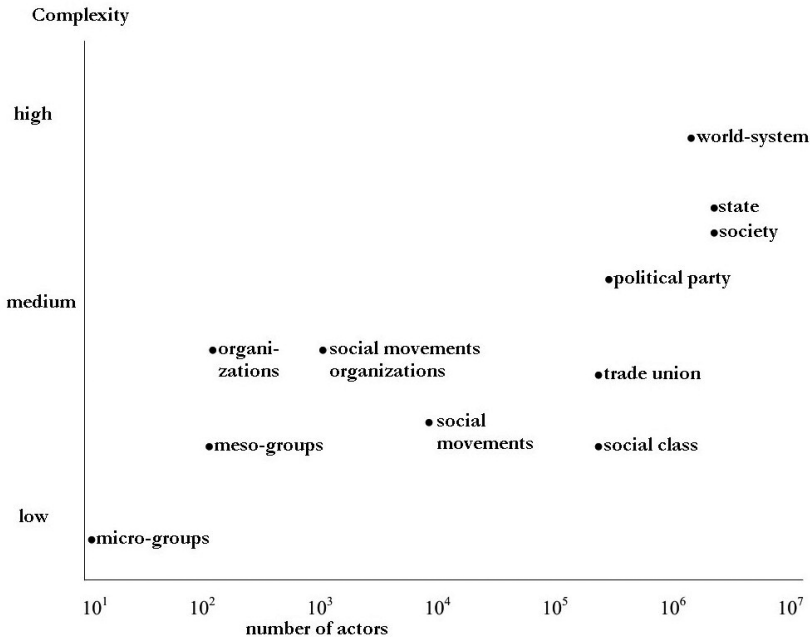
The following graph 1 highlights another important aspect of social con-

1. C. TILLY (1992).

2. L. Gallino (1978).



flict to identify what is the focus of interest here, that is as “The complexity of the conflict is in a close relation with the different organizational and systemic complexity generated by the increase in the number of actors.”<sup>3</sup> It helps to understand that the purpose of the Social Mediation is essentially oriented to the relationships that include individuals and small groups but also to the relationships between them and the institutions. In the graph 1 the expertise area is that in the bottom left corner.<sup>4</sup>



**Figure 1.** Complexity of the conflicts to the number of actors

The other areas are to be excluded here for complexity that the number of actors involved. It can however be clear that within the top right shows the conflict sometimes, of course too often, in the form of war. One consideration is appropriate for the area at the centre to the right, that of political parties and trade unions. These are the organizations that starting from the second half of the nineteenth century have historically monopolized the major social conflicts and reached large; they have, in particular, assumed a representative role in broad categories of entities managing trading well above individuals. They have changed over time as more functional roles, then less confrontational, for the responsible institutions that manage the

3. E. ARIELLI, G. SCOTTO (1998), p. 16.

4. *Ibidem*.

economic, social, financial, productive, organizational, phenomena until it becomes an organic part and become party of the individual citizen.

About Italy, some other assumptions are necessary, given that the Mediation, in its meaning that here is most responsible for the mediation of the conflict, it made his entrance in relatively recent times and, as legislation, certainly very late compared to other Western countries.

Without forgetting that figures with mediating role of the conflict have always been produced or expressed by any type of social group and in any community more or less broad, more or less developed, and in more or less institutionalized, the term Mediation is done borrowed, in use of the Italian language, more for assonance and simile than for its meaning, from the Anglo-Saxon term Mediation.

Although since the eighties/nineties the first mediative techniques and methodologies have developed in the field of Family Mediation and Restorative Justice, the meaning that refers to conditions of conflict was closely confined to the insiders of the new disciplines. In fact the best approaches term, although not exactly coincident with a correct translation of the meaning of “Mediation”, is “Conciliazione”. In fact, for example, until the enactment of the legislation on mediation, the only institute formally appointed to settle cases of conflict, institutionally provided out of the courtroom, was expected to labour disputes and that the “Commissione di Conciliazione” established at the Provincial Labour Departments. It is no coincidence that the term Reconciliation has continued to be used in the first regulation issued by the State in the field alternative resolution to judicial conflict.

You have to wait until the early 2000s because the term mediation, referring to solution actions of conflict conditions, began to spread in its new meaning. In those years, under pressure from the European Union, will start the work of the Legislator that leads to the adoption of decree-law in the field of civil and commercial disputes (Legislative Decree 28/2010), the establishment of an official register of mediation entity (Legislative Decree 80/2010) and the rules for governing registration at the same. Even more recent is the normative, produced as a result of an intense debate with strong intervention of lobbies concerned, that in part of the recent decree “Mille proroghe” of the Italian government, was enacted the regulations governing the compulsory action of Civil Mediation, defines the matters to be submitted to conciliation, as well as specific procedures for accessing to the mediation entity and the skills of the same. The same regulations cited did not support the clarification of the term Mediation, as used up to that moment and the term “Conciliazione”, better pertaining to the handling of the conflict. In contrast it supported the use of the term “Mediazione” in area of the existing or potential conflict. It is worth mentioning, in order to understand the socio-cultural significance of the spread of Mediation in

Italy, that standardization of case law of the Civil and Commercial Mediation comes from a strong directory of the European Community and is linked to the reform of the Civil Process for the reduction and containment of numerous causes that keep the courts on the edge of the collapse. So it comes to strategic decisions that have as their priority spending, the functioning and organization of the institutions rather than the government and the management of critical social issues. It is to date the only top-down action regarding the subject matter.

In fact there is a development bottom-up boost, in parallel, of mediation forms of conflict, although always among the insiders, such as new models of import and such as instruments to face up to growing forms of social conflict. It is the case of the Cultural and/or Intercultural and/or Linguistics Mediation, or School Mediation or more Social Mediation.

Some social phenomena that you are presented with a wide and growing range have facilitated the development and dissemination of various forms of mediation. Considering the phenomenon of immigration, both the legal one that introduced and made [200B?][200B?]up of real communities of other cultures in every part of the country, and illegal immigration that for tragic event and for the condition of immigrants have shaken so many consciences and put into crisis many institutions; thinking of the growing phenomenon of bullying in schools and the increasing number of divorces and separations in the presence of offspring.

Even in the courtroom, more enlightened opening of some judges rather than for precise regulation, it began to peep out before and after spreading, some forms of mediation. It is the case of the Family Mediation that, despite not having official role in the Court, is now long experienced; so many Civil Judges, strong of discretion that priority attention to the interest of the child allows them, they tend to suggest it or to suggest a pathway of resolution or mitigation of conflict between partners in separation / divorce. It is the case of the Restorative Justice, also that with a long experience, that sits next to the courtroom of the Juvenile Court, ready to initiate pathways that can change the life of a teenager. It is also the case of Cultural Mediation, sometimes confused with the Linguistic Mediation, which in addition to find a *raison d'être* because of the many immigrants who go flocking to courts and prisons, is now explicitly and formally requested in institutions such as hospitals, municipalities, security agencies, who have to manage areas with high number of immigrants.

Until this recent period, even among professionals of the Law, the term mediation was limited to the assets of the Commercial Mediation, of Real Estate Mediation, Insurance Mediation and so on; basically it referred to the work of a professional to promote relations, contracts, agreements. The mediator was a comparable figure, and sometimes well defined, to the

broker. The only form of institutionalized mediation of the conflict, that concerning labour disputes, continued to be the “Conciliazione”.

The assimilation of the old meaning to the new term has taken place and it is still taking place in recent years in times much faster. Of course, this could mean a concrete dissemination and entrenchment of a culture of mediation is not to be taken for granted, but it is definitely a great contribution.

Mediation, in the new sense, and to exception of the Civil Mediation, sometimes also referred to as “Mediazione Societaria”, is in fact all the different specific forms of social mediation that devote attention to particular forms of conflict characterized by common factors. So in effect, the Family Mediation, Restorative Justice (Mediazione Penale), Cultural Mediation, just to mention those better configured, are forms of social mediation dedicated to particular forms of conflict that the number of cases and frequency having the character of a social phenomenon and for specificity of factors that characterize them, are differentiated from that.

It is in a so articulate, and often confusing context, that the Social Mediation has begun to be characterized as an area in which you tend to attribute their own specificity.

### 3. Mediation and social conflict

To get better under the Social Mediation you must consider beyond the conflict explicit or manifest, however clear, the social tension, as the set of all those elements that are indicative of frictions and contradiction between individuals, groups with the institutions that characterize a condition that is potentially a conflict.

That the conflict is to be considered a phenomenon belonging to the normal condition in the presence of human relations, it is commonly recognized. The same existence of the conflict, which however represents a form of interpersonal relationship and communication, is an endogenous factor of social change. Ralf Dahrendorf believes the social conflict nothing more than one of the causes of endogenous change just as there are others such as technological innovation, just as there are those of exogenous change such as the contact between different cultures<sup>5</sup>. In addition, « there is social conflict when someone or a group advancing claims of negative sign towards other people or groups, claims that, if met, would damage the interests of others that is other people's chances of reaching a desirable situation »<sup>6</sup>.

5. R. DAHRENDORF (1989).

6. C. TILLY, *ibidem*.

The aspect that makes pathological the conflict is the transition to a violent relationship: the conflict is natural, the use of the violence is a choice. The model of Friedrich Glasl representing the steps of the escalation from the pre-conflict condition to the use of violence and the attempting to annihilate the other contender at the cost of self-destruction<sup>7</sup>.

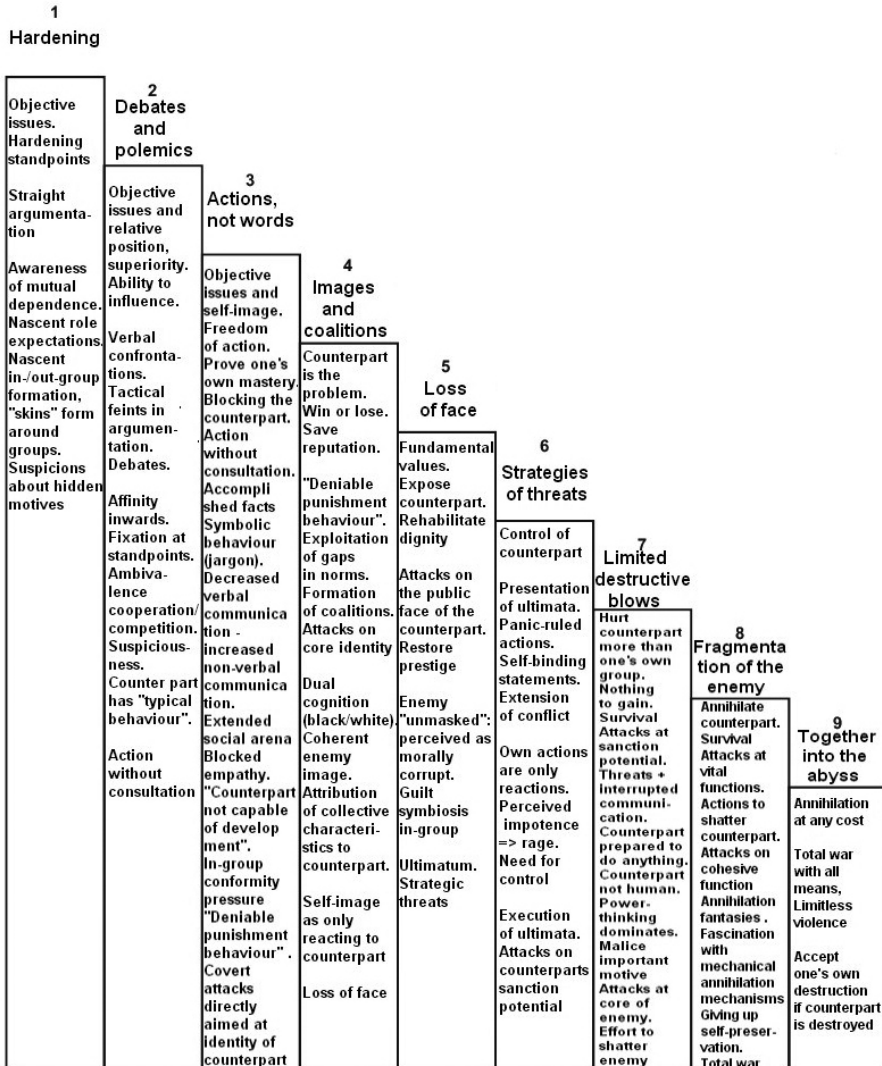


Figure 2.

7. Adapted from F. GLASL (1982), pp. 119–140.

The possibility of conflict exists when people just have different needs, values and interests. This is the stage of pre-conflict. Indeed it is latent and not planned. There can be tense in the relationship between the parties and/or a desire to avoid contacts. The conflict may not become apparent until a trigger does not lead to confrontation. Either party could gather its resources and even seek allies with the prospect of growing disagreement and violence.<sup>8</sup>

In a state of great social change, social tensions tend to worsen if existing or arise from new conditions present. The attention of the Social Mediation then gradually is characterized moving or rather extending towards the pre-conflict

stage. So the mediating intervention has taken on a different meaning, or more extensive than canon, initially cited, in which a third party intervenes to facilitate the resolution of the conflict. The third act to prevent the transformation of social tension, pre-conflict, to conflict, or better work in the presence of latent or manifest conflict for overcoming it and to prevent violent choices.

It is appropriate to return to notice, in order to give the right connotation to the new labels in which it is always prefaced by the term mediation, that meditative activity is in fact a social need that groups and communities put into practice spontaneously without necessary formalization. The extrapolated and defined it, studying it and reinforced it with a methodology and with specific techniques, allows the awareness of the action and the improvement of the effectiveness of it.

#### 4. Subject of Social Mediation for Social Inclusion

The nature of work of Social Mediation is characterized by the methodological approach that makes the conflict a resource for social growth, tending to reinforce the knowledge and self-awareness of individuals, groups and communities. In addition, the dissemination and sharing of good practices trigger a virtuous circle of relationships, knowledge, communicative ways that open up new application areas of social mediation. It is, in fact, a path of strengthening the participation available to everyone subjected to life and the decisions of the social group or the membership community. With a synthetic expression, it is strengthening the empowerment of each subject/citizen.

It is not a coincidence that the Social Mediation has frequently as the

8. Mischnick Ruth PhD (ed) — *Trasformazione nonviolenta dei conflitti. Manuale per la formazione formatori* — translation D. Berruti e M.L. Nigrelli — Commissione Europea — programma Socrates/Grundtvig I.

object of interest subjects in a position of weakness in relation to the social community of reference: the case of children or spouse weak in Family Mediation, the case of the victim of the offense or craftsman Mediation in Penal, is the case of those who are in a state of social marginality as poorly involved in the life of the community or with small or no empowerment. The latter are the principal beneficiaries of Mediation for Social Inclusion. If the Social Mediation can be seen as a support for the participation of citizens in community life in full responsibility for the choices of the community, Mediation for Social Inclusion is the context in which the relationship between who is treated by the life of the community is placed at the edge or at risk of exclusion (children in need, disabled, marginalized adults, individuals with mental disorders, etc.) and the community itself and its participants.

Social inclusion of people excluded or protection of the ones at risk is one of the most difficult in the betting game of the socio-economic condition. A synthetic and rough description of the effects of the crisis of the capitalist-liberal development model, is given by the French economist Serge Latouche:

- 1) a growing inequality with a substantial reduction of the space of continuous citizenship;
- 2) the increase in household debt of the working classes with the global orientation to pay the debts of the rich to the poor of world;
- 3) the global destruction of the global ecosystem in the name of profit;
- 4) the end of the welfare system and all systems of social protection;
- 5) the Omnia-commodification of all aspects of human life (from patents to culture human trafficking and organ);
- 6) the dominance of multinational corporations and transnational able to influence all economic and financial decisions of nation states but also international organizations such as the World Trade Organization, the World Bank, the International Monetary Fund and the European Central Bank;
- 7) a progressive reduction in the rule of law;
- 8) a mass media mis-education to gain better the hegemony<sup>9</sup>.

On closer reflection, the core of social mediation and with it, more specific Mediation for Social Inclusion, returns to the search for sufficient conditions of self-determination of individuals in a context of informed participation in the community.

I believe that even more of the deep reflections and analysis of expert

9. S. LATOUCHE (2009).

scholars, certainly of great merit, it is in the Constitution of the Italian Republic, in Articles 3 and 4, that is clear, concise and explicit model to strive for the same actions social inclusion should not even be considered, if not for the management of the pathological exceptionality:

#### Article 3

All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.

It is the duty of the Republic to remove those obstacles of an economic and social nature which constrain the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and capital of the country.

#### Article 4

The Republic recognizes the right of all citizens to work and promotes those conditions which render this right effective.

Every citizen has the duty to perform according to their ability and their choice, an activity or a function that contributes to the material or spiritual progress of society<sup>10</sup>.

All the elements that are objective and instrument of Mediation for Social Inclusion and Social Mediation in general, are: the dignity of each person, freedom of thinking, solidarity, the right to a healthy growth, participation in the choices of the community, the work and the right to self-maintenance, the opportunity to express their skills, the right to an concretely recognizable identity.

As daunting the conditions can appear, the experiences of Social Mediation and Mediation for Social Inclusion are numerous throughout the country. Many occur under a different title, but those experiences are recognisable. Most of the initiatives are undertaken by private entities frequently with volunteer work. It should also be given about the many municipalities that directly or indirectly engage with the right their responsibility. Lastly, I believe that special attention should be paid to the experiences of social centres, initiated mostly by young people, who were born and born in a totally spontaneous as an expression of a need for sociability and that most of the time so integrate with the territory in which they settle, to become a place of acceptance, social exchange and social inclusion. They are probably also those experiences, mostly outside of institutional control, which represent a significant tool of Social Mediation.

Finally, below we report some institutional experiences about:

10. 1947, *La Costituzione della Repubblica Italiana*, [www.governo.it/Governo/Costituzione/principi.html](http://www.governo.it/Governo/Costituzione/principi.html).



## Municipality of Reggio Emilia

*Centre of social mediation and conflict.* The Centre is managed by the Cooperative mediate with the supervision of a representative of the municipal project. Types of conflicts that the Centre for Social mediation addresses:

- Monthly disputes:
  - quarrels and disputes among citizens, related to the use of the common areas, to noise, to the presence of pets, etc.
  - disputes related to the management of private green;
  - noise problems;
- Air pollution:
  - emissions into the atmosphere when, for example, from the chimneys of small businesses do not exceed the parameters established, but they are still cause for disturbance for residents in the area;
  - presence of informal groups of young people: when it is unease about the use of public spaces;
  - disputes between people of different generations or cultures.

[www.comune.re.it/retecivica/urp/retecivi.nsf/DocumentID/F7AFE674D90E8B9FC12572ABoo2ECB48](http://www.comune.re.it/retecivica/urp/retecivi.nsf/DocumentID/F7AFE674D90E8B9FC12572ABoo2ECB48)

## Municipality of Modena

Live

*Point of agreement — Social Mediation Centre — Office of Conflict Mediation.* Point of agreement is the centre of social mediation of the city of Modena, which is responsible for the peaceful resolution of small conflicts, such as a conflict with a neighbour, between relatives, disagreements among youth and adults, misunderstandings among teachers, parents and pupils. The social mediation service offered by the centre is free. The centre provides information and guidance to citizens who live in situations of conflict, hear the parties and the media between them, designing and managing trading operations. Mediation conducted by a third person, allows the parties to describe their conflict by facilitating the reopening of dialogue.

[www.comune.pisa.it/centro-gandhi](http://www.comune.pisa.it/centro-gandhi)

## City of Padua

Mediation office within

*Inside the homes and neighbourhoods.* The Mediation Service office in the territory is a tool that aims to promote the integration processes, neighbourhoods and within homes, promoting the development of the processes of living in the local community.

[www.padovanet.it/dettaglio.jsp?id=9936#.UtczFfKLUY4](http://www.padovanet.it/dettaglio.jsp?id=9936#.UtczFfKLUY4)

## City of Florence

*Door social mediation.* The door handles of social mediation of conflicts between private citizens, such as, for example, conflicts condominium and neighbourhoods, ethnic, labour, education and family. The mediation in the social sphere has a

purpose mainly preventive aimed to avoid escalation of conflicts. The conflicts that they do criminal law are the responsibility of the Office of mediation at the Justice of the Peace.

[www.comune.fi.it/export/sites/retecivica/comune\\_firenze/sicurezza\\_emergenza/cittasicura/attivita\\_servizi/mediazione\\_sociale.htm](http://www.comune.fi.it/export/sites/retecivica/comune_firenze/sicurezza_emergenza/cittasicura/attivita_servizi/mediazione_sociale.htm)

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