The Mediation Service of the Milan Chamber of Arbitration

Introduction

The acronym ADR has long symbolized in Italy the gap between the Anglo-Saxon and continental view on dispute resolution.

There was no alternative to court action in Italy until the early 90's. Although arbitration was growing, there was no out-of-court means that could be a viable option other than court litigation. In-court means such as the conciliation attempted by the court in the cases provided for in the code of civil procedure did not give parties the opportunity to reach an agreement that was not more or less openly "imposed" by the court. The parties' sole alternative was to reach an agreement through spontaneous, direct negotiation, either before or during court proceedings, frequently motivated by the justified fear that the delays and costs of court proceedings would make the economic reason for the dispute disappear.

What does "mediation" actually mean? Obviously, all economic relations may give rise to a dispute and, where a dispute arises, it must be settled. The parties try to reach an agreement; if they fail, they refer their dispute to a court or, where possible, to an arbitral tribunal, which decides which party is right and how much that party should be awarded.

Mediation has a place in between the (failed) negotiation and the court action. It aims at finding an amicable solution by asking for the assistance of a mediator, who can help the parties defuse their dispute.

Mediation is the means by which the parties freely try to reach an amicable settlement of their dispute with the assistance of a neutral and impartial outsider. Two aspects thus characterize mediation: the parties are free to take part in the mediation meeting and there is a neutral and impartial mediator. Mediation's success depends on the interaction of both aspects. The mediator can act, and a settlement can be reached, only if the parties so wish. However, the parties' intention, though a primary requirement, is not the only one. The neutral mediator, who helps the parties communicate, also plays a key role. By helping the parties understand the issues on the table, the mediator ferries them over their contrasts towards a mutually satisfactory solution.

In Italy[1], alternative dispute resolution experiments such as Telecom Italia's project with several Italian consumers associations are also called "mediation" (specifically, "Telecom Mediation") although no neutral mediator is involved, only the parties – the company and a representative of a consumers association[2]. The Telecom model has been closely followed by other major entities such as the Italian Mail Service (Poste Italiane).

According to some alternative dispute resolution experts, there is a "traditional" Italian model of mediation – where the task of the mediator overseeing the dispute settlement is not specified – and an American model of "mediation" where the behaviour of the mediator vis-à-vis the parties is specified. The two models are called *evaluative mediation* and *facilitative mediation.* In evaluative mediation, the mediator help the parties find a solution by suggesting practical solutions. In facilitative mediation, the mediator helps the parties without suggesting solutions to them and without examining the merits of the case. Clearly, these are two different ways of understanding mediation.[3]

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[1] This terminology problem concerning mediation is known even in the cradle of commercial mediation, the Anglo-Saxon world.

[2] "Parity" or "equivalence" mediation.

[3] This difference exists mostly on a theoretical level. In practice, the difference between the two models is much less defined. Undoubtedly, the mediator's "personal style" plays a crucial part.

The Chambers of Commerce system

The Mediation Service of the Milan Chamber of Arbitration, which is examined below, is very close to the so-called facilitative mediation; its specific characteristics, however, make the Milanese experience particularly interesting.

In the Mediation Service (which was called Mediation Desk until 31 December 2002), a neutral mediator assists the parties in negotiating a mutually satisfactory settlement of their dispute. The mediator has ample freedom in carrying out his task and can manage the mediation meeting in the manner he deems best suited to the specific case.

The Mediation Service was created in response to a requirement set by the legislator (Art. 2(IV)(a) of Law no. 580 of 1993, "Restructuring of the Chambers of Commerce"). Law no. 580, when listing the market regulation tasks of Chambers of Commerce, indicates mediation as the most apt means for settling disputes between enterprises and between enterprises and consumers.

Each Chamber of Commerce initially drew up its own mediation rules, in the absence of a specific law provision.

Today, after a few years of isolated activities by several Services, the time was ripe for harmonization[4].

At the beginning of 2003, several Italian Chambers of Commerce[5] adopted Common Rules, a common schedule of fees, a code of conduct and common criteria for certifying mediators according to an outline by Unioncamere (Unione Italiana delle Camere di Commercio), thereby creating a Mediation Services Network.

Among other innovations, the Common Rules introduce a new role, the assistant to the mediator appointed by the Chamber of Arbitration. An assistant is appointed, with the prior agreement of the parties, in cases that the Secretariat deems particularly complex.

In other words, if it is thought that the mediator may need assistance on the case and the subject matter of the dispute, an expert in the field is appointed to act as the mediator's "interpreter" and assistant. This new formula has been immediately successful: since the entry into force of the new Common Rules, the appointment of an assistant was deemed advisable in some cases and has led to positive results.

The Common Rules describe mediation and the mediation proceedings. The interested party files a request[6] for mediation stating the grounds for its claim and requesting mediation. The request can also be filed by mail or fax.

The party to which the request is addressed is informed in writing of the request and then contacted by phone. Mediation is entered into voluntarily; there is no obligation to participate. However, this manner of contact has proved crucial in persuading the second party to take part in the meeting, by illustrating the advantages of mediation, such as rapidity, confidentiality, cost efficiency and a high involvement in the reaching of an agreement.

[4] Although harmonization of the services is undoubtedly a goal, healthy "competition" among the different models ("panel", "sole mediator", "evaluative" and "facilitative" mediation) in the first years of activity generated a culturally stimulating debate and made it possible to try out different models on a practical level, with interesting results.

[5] According to a Unioncamere survey of March 2003, 64 Chambers of Commerce (out of a total of 103) have adopted the Common Rules.

[6] Forms can be obtained from the Milan Chamber of Arbitration or downloaded from www.conciliazione.com.

If the second party does not accept the invitation, the Secretariat of the Service informs the requesting party of the refusal. The requesting party shall then be free to choose which further steps to take, as its right to protect its rights in court or otherwise is unaffected.

If the second party accepts the invitation, by filling out and sending to the Secretariat a form (the same as the request form), the Secretariat schedules the date of the first meeting according to the availability of the parties and the mediator.

The parties can also refer to mediation by common agreement, either by filing a joint request where a dispute has already arisen or by providing for mediation in a clause in the underlying contract.

Mediation clauses have only recently started playing a significant role and are now bearing their first fruits, as an increasing number of lawyers advise their clients to insert a mediation clause in their contracts[7].

One of the advantages of mediation as a dispute resolution means is cost efficiency.

The schedule of fees, which applies to all Chambers in the Network, provides for steps according to the amount in dispute. Here are some examples. The lowest step, which applies to disputes not exceeding €1.000, requires that each party pay €40 to participate in the mediation meeting. The next step, which applies to disputes between €1.001 and €5.000, provides for mediation costs of €100 for each party. See further the attached schedule of fees.

The meeting between the parties and the mediator is the core of the proceeding.

It can last several hours and, where the parties and the mediator deem it advisable, a new meeting can be scheduled to resume the negotiation.

The mediator sets the pace of the discussion and manages the meeting as he deems best suited to the specific case. All mediations are unique, their uniqueness ensuing from the mediator's personal touch and the spontaneous development of the parties' interaction.

The mediator should in any case take some time, before getting to the subject matter of the dispute, to introduce the participants, set some basic rules for the meeting and illustrate the characteristics of mediation, i.e., that it is informal, voluntary and confidential.

This latter aspect is essential. A successful mediation meeting calls for a serene atmosphere where the parties feel free to negotiate without prejudice. It is thus essential that all that is said at the meeting does not leave the meeting room. Only then can the negotiation be frank and constructive and thus helpful in reaching an agreement.

The parties, knowing that all that is said at the meeting shall be kept confidential, may submit to all participants (or only to the mediator) all elements that they deem useful with respect to the dispute. Because of the nature of mediation – the mediator is not a judge who must form a personal opinion of the merits of the case – these elements are not evidence, but rather the facts that each party wishes to put on the mediation table.

In principle, the mediator holds private sessions with the parties, that is, talks separately to each party to better understand the issues of the dispute. The mediator endeavours to maintain a positive atmosphere and should thus abstain from stressing the elements of conflict between the parties; rather, he should highlight the common elements.

[7] Some large enterprises operating in Italy (such as FIAT and General Electric) have adopted a mediation policy according to which a mediation clause is almost always included in their contracts.

Thanks to its separate sessions with the mediator, each party can decide precisely what to tell the mediator and what to tell the other party.

It is further essential that the parties to the dispute, whose presence at the meeting is essential (by way of an exception they may be substituted by a validly empowered representative), be aware that they are free to "*be assisted by people they trust, lawyers, representatives of consumer associations or professional*" (Art. 5 of the Rules).

This provision is particularly significant in light of the doubts that some lawyers, in Italy and outside Italy, have raised as to the efficacy of mediation.

We shall not deal with this sensitive issue here, but we should mention why mediation is useful to lawyers and why they can contribute to its success.

On the one hand, mediation allows lawyers to offer their clients a feasible and efficient alternative to (often unsuccessful) negotiations that inevitably lead to court. Helping clients find a positive solution to their dispute is an added value to lawyers. On the other hand, lawyers may contribute towards the positive outcome of the mediation meeting by helping the party manage the negotiation adequately and evaluating, among other things, the risks of possible court proceedings as well as the alternatives that may become apparent during the meeting. Last, lawyers can help their clients draw up the agreement in legally correct terms.

Parties, though free to participate in the meeting unassisted, must be informed of the opportunity and sometimes the necessity of relying on qualified assistance at the meeting.

Other professionals than lawyers can play a similar role. A trusted accountant, for instance, may assist in cases where there are fiscally relevant issues. In some types of disputes, representatives of professional unions or consumer associations may also help; the latter assist consumers in B2C (Business-to-Consumer) disputes.

Once the meeting has ended and an agreement has been reached, the parties and the mediator sign mediation minutes that record the positive outcome of the meeting. They record their mutual concessions and all aspects that they deem useful, also in light of their future relations, in a separate document.

This latter document is the mediation agreement proper. Only the parties to the dispute sign the mediation agreement, as new mutual rights and obligations arise only between them. This agreement is a fully binding contract between the parties.

If no agreement has been reached, the minutes state that a meeting has taken place and that the parties failed to reach a mutually satisfactory agreement.

The mediation meeting is crucial. Hence, particular attention is given to the training of mediators. On the occasion of the harmonization of the Mediation Services in the Network, Unioncamere indicated the minimum standards for training courses for mediators. These courses, which are organized in Italy by private bodies and individual Chambers of Commerce, can give a final positive evaluation of participants. However, a positive evaluation does not imply an automatic inclusion in the lists of mediators of the individual Chambers of Commerce.

The experience of the Milan Chamber of Arbitration

On 31 December 2002, the "Mediation Desk" of the Milan Chamber of Arbitration was renamed "Mediation Service" within the above-mentioned national Network and adopted the Common Rules in substitution of the earlier "Guidelines".

The Guidelines distinguished between "Disputes between Enterprises" and "Disputes between Consumers and Enterprises". This distinction has disappeared in the

Common Rules, which regulate all mediation proceedings managed by the Service in the same manner.

A distinction based on the parties to the mediation proceedings is only useful today for statistical purposes.

Some data may illustrate the work of the Mediation Service of the Milan Chamber of Arbitration.

In 1998-2002, the Milan Chamber of Arbitration managed 665 mediation requests.

In 2002, 70% of the cases concerned disputes between consumers and enterprises, the remaining 30% disputes between one or more enterprises. The same data in the first semester of 2003, though partial, are worth mentioning: in 45% of the cases, the requests concerned B2B (Business-to-Business) disputes. This proves that enterprises are increasingly considering a dispute resolution means that is fast and cost efficient and does not jeopardize their further relations.

As to disputes between consumers and enterprises, mediation was most frequently requested, in the fields of building renovation, tourism, commerce, telecommunications and insurance. Subject matters are more varied in disputes between enterprises: supply contracts, sub-contracting (*ex* Law no. 192 of 1998), public works contracts, carriage contracts, telecommunications and intellectual property are frequent issues.

The outcome of mediation proceedings is also significant: in 2002, an agreement was reached in 40% of the cases. This percentage is the sum of the cases in which the dispute was settled by direct negotiation of the parties (15%) – presumably favoured by the Mediation Service, which helps parties start talking to each other again – and the cases in which the parties participated in a mediation meeting (25%). Also significantly, 90% of the meetings held in 2002 led to an agreement[8].

Mediation is cost efficient. It is also a faster means of dispute resolution than court proceedings.

Mediation is informal; there are no set time limits to guarantee that the pace of the proceedings does not slow down. Rather, the voluntary nature of mediation and a lack of bureaucracy guarantee a rapid settlement of disputes

In 2002, disputes were settled on an average in 35 days.

The Milan Chamber of Arbitration pays particular attention to mediators.

Needless to say, the mediation meeting is crucial and helping the parties reach an agreement is a complex process. For this reason, the Milan Chamber of Arbitration relied since the launch of the Mediation Service on experts in the field of dispute resolution.

Subsequently, a training programme was established on the techniques of mediation and conciliation. The programme, which is managed by the Documentation and Training Centre of the Milan Chamber of Arbitration, is open to participants outside the Chamber and has proven very successful. It guarantees increasing professional skills in the Service mediators and has helped spreading the "culture" of mediation.

As far as the Milan Chamber of Arbitration is concerned, Art. 3 of the Mediation Service Rules provides that mediators are selected ad hoc by the Secretariat "*from a list; this list complies with national minimum standards*". This implies that those who wish to become mediators with the Milan Chamber of Commerce must necessarily have participated in both the basic and advanced training course.

The list of mediators presently consists of 36 names. The mediators are appointed to the cases by turns, taking into account their personal characteristics and the specific dispute.

[8] The partial data of the first semester of 2003 show no noticeable differences with respect to 2002.

The mediators of the Milan Chamber of Arbitration – and all Network Chambers – must act in accordance with a code of conduct.

The code of conduct lists the principles that must inspire the mediator. First, a mediator must be independent, impartial and neutral with respect to the parties. He does not exercise any pressure on the parties and keeps all information obtained at the meeting confidential. The mediator must be adequately trained and keep his training updated. He must decline an appointment if he deems that he is not qualified. Further, at the start of the meeting he must make sure that the parties are aware of the aim, nature and characteristics of mediation. These requirements exist independent of the sum in dispute and the type of controversy.

Conclusion

Mediation is a dispute resolution means that complements the (few) dispute resolution means presently available. Mediation is complementary because it can be adapted to almost all commercial disputes. This does not mean that all disputes can be easily settled through mediation. However, in many cases mediation does help parties get out of a hostile situation, which can cause economic losses as well as a break in their business relations.

Until recently, there was no dispute resolution means that followed a negotiation approach and aimed at creating consent, mostly because there were no providers of mediation services.

At present, the situation is evolving significantly, as evidenced by the work of the Milan Chamber of Arbitration and the harmonization project of the Mediation Services within a national Network of Chambers of Commerce.

Further, there are areas in which the legislator feels the need for mediation as a precondition to court action.

For example, the recent reform of company law (Decree no. 5 of 2003) provides for fiscal incentives for and the confidentiality of mediation. Since this reform shall enter into force in January 2004, it cannot be foreseen how it shall affect mediation in Italy. However, this is undoubtedly a positive sign for this means of dispute resolution.

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