

# ONE YEAR OF ENVIRONMENTAL MEDIATION AT MILAN CHAMBER OF ARBITRATION

## Milan Chamber of Arbitration



All human activity, despite its objective that can range from social to profit, will have an impact on our system and will inevitably leave a footprint on our ecosystem. Nowadays, it is fundamental to consider in the equation of an activity all its possible outcomes and repercussions on our life, society and planet. Economic profit, social improvement and environmental protection are fundamental interests and it is crucial to balance properly those diverse objectives as each of them is necessary and fundamental to the functioning of our society. Finding the right

### OUR MISSION:

Broadening the application of commercial mediation to environmental conflicts

balance is easier said than done.

No one hopes that a waste disposal centre, an airport, or any other facilities that could endanger his/her lifestyle will be built on the neighbouring ground. Yet all of these activities are fundamental to our society and also largely regulated in order to allow their coexistence with the smooth running of daily life. How to strike a proper balance between private interest and public needs, between environmental boundaries and economic growth, between citizens' wellbeing and the growth of big industries? It is so complex that environmental conflicts arisen from failed balance of interests are now a daily subject. Environmental issues are becoming more frequent, more complex, and they affect us; often their magnitude and their degree of reversibility generate a sense of helplessness.



This notwithstanding, there are several ways that can help resolve such conflicts, so urgent and pervasive. In the collective imaginary, environmental conflicts are associated with catastrophic situations that are widely covered by the media, as, for example, the nuclear disaster in Fukushima or the Deepwater Horizon story in the Gulf of Mexico. Though, “environmental conflict” includes a wider range of situations that may involve public works, social impact or may revolve around seemingly minor ecological problems, such as land reclamation. Therefore, environmental conflicts encompass different dimensions, characteristics, consequences and involved parties: this variety improve the difficulty of identifying instruments that can handle those conflicts appropriately.

In recent decades various tools have been thought and used to better manage environmental conflicts; among them, environmental mediation. To overcome the lack of this instrument in Italy, the Arbitration Chamber of Milan, already widely recognized and operative in the field of alternative dispute resolution (ADR), was the first institution to offer environmental mediation services with a project that started in November 2015. The objective is to expand the scope of civil and commercial mediation to the environmental sphere in order to meet the growing needs of companies and citizens as well as public bodies.

Environmental mediation is already practiced abroad: in addition to being embedded in many international agreements (such as the CETA eventuality), it is used in many states. In Germany there are real specialized agencies for environmental mediation while in Canada it's

institutionalized and in the United States it has been practically practiced for almost every environmental controversy since the 1970s. The first transnational environmental dispute resolved through mediation dates back to 1973 and concerned the placement of a containment dam on the Snoqualmie River near Seattle, Washington. Since then, companies negotiate with their counterparts, and in most cases it ended with mutual benefit: environmentalists had gained policy improvement; companies had obtained an image return and often an increase in efficiency. Therefore, environmental mediation set up a discussion table where all involved parties sit to find an effective and rapid solution that avoids long processes, money waste, and allow both economic activities and the environment to resume their course.

In the event of a conflict of any kind, the classical recourse to the legal order is generally



limited to the determination of the tort or the reason without providing concrete and practical solutions to the problems. In the environmental field, the need for rapid action to limit or restore any damage makes the purely legal procedures unsuitable to meet the need for a prompt response. For example, if a land has been polluted, it is very likely that the court will slow down, if not impede it, the reclamation process.

Through mediation, a third and impartial party, the mediator, facilitates communication between the parties so that they can reach a shared solution, a meeting point that realizes the

interests and needs of each party involved. This has great benefits: it keeps relationships, key issues can be identified and discussed, and proposals that can lead to imaginative solutions can be made. Symmetrically, solving these disputes in a non-consensual way may destroy any intention to maintain good relationships, fundamental feature for good businesses. The parties may even agree only on some elements, but not on others or they may agree to disagree on all the points.

The environmental connotation is given by a series of very peculiar characteristics. First, these conflicts arise from the possession and use of scarce resources (such as economic, environmental, time, space, etc....); that is, if time, money or the environment were infinite, there would be no need to protect any of these goods. While time and money are limited resources that people can protect or derive depending on the chosen way of life, the environment must be protected so that it does not lose its wealth that allows us and future generations to live and prosper.

Another peculiar aspect of environmental conflicts is that they are strongly localized: they strike the territory that is part of our daily experience. For example, any public work or policy will ultimately become part of an individual's environment for the time he lives in that place.

Last but not least, this kind of controversy is manifested in very different areas:

- Transport infrastructures (roads, highways, airports, railways, ports...)
- Waste management facilities (landfills, waste-to-energy plants, special and hazardous waste management)
- Remediation processes of contaminated land portions
- Production of energy from traditional sources
- Energy production from renewable sources and smart grid
- High risk chemical plants
- Management of protected areas
- Large and small urban transformation and urbanization projects
- Great events and great public constructions.

Even though the conflictual character might be seen as an obstacle, if interpreted in a right way, looking at the future possibilities, the conflict itself it can introduce useful elements, as it enable the emergence and enhancement of widespread knowledge, which can greatly improve the quality of projects and imaginative management models. Therefore, it may allow finding a creative, knowledgeable and informed solution which is crucial since these conflicts have a very negative impact on three necessary and complementary realities: the local community, the environment and the economic activity.

Another of the key aspects of environmental mediation is the communication: the circulation of information among all stakeholders. For this reason, involving all parties is a key step in finding an agreement that is actually shared and therefore lasts long.

This can happen because, by putting all the parties at a table, mediation gives the community the opportunity to overcome the power imbalance that comes by addressing large companies and helps all the involved parties to express their interests.

Besides the community's interests, it is essential to protect the environment in which it is located. An environmental controversy generally arises after damage was caused, so in this context, the restoration of the damage to the environment is fundamental. The environment needs protection from our institutions, and for this reason, both at Community level, with Directive 2004/35 / EC, and nationally, with the D .Lgs 152/2006 (the Single Text for the Environment), in case of damage, it is obligatory to carry out an environmental remediation in order to restore the



territory. Even if it is not an environmental damage of the size of a green crime, it is still desirable to find a solution that reshapes the impact of economic activities if needed.

The use of mediation in environmental disputes can therefore be a completely innovative approach to the protection of health and ecosystems, but also of productive activities. It may, in fact, be useful also from the point of view of the person responsible for the contamination, which might be interested in defining the matter quickly, with lower charges and, above all, with less media exposure. Not only a mediation agreement can save the reputation of an activity, but it also follow the new precepts set by international institutions, such as CSR, which push the enterprises to be socially and environmentally responsible and to repair their eventual damages. The latter, in fact, often involves a realignment of interest on the time scale, and this is one of the most interesting results of mediation: having the urgency to create profits right away without consulting the actors in the location where the business is based, taking resources indiscriminately and not having transparent practices will, in the long run, damage the company's profit. Collaborating for a better future together will certainly lead to better functioning and better prestige of long-term economic

activity. Therefore, mediation in the environment field and with specific reference to issues related to the restoration of environmental damage allows to:

- Solve the environmental problem through concrete solutions that are hardly obtainable – and rarely fast - in judicial offices,
- Obtain solutions more adherent to the peculiarities of the dispute, not imposed by a third but identified by the parties, involving all the actors
- Satisfy the real interests and needs of all the stakeholders,
- Intervene in a timely and appropriate manner,
- Use an active tool for prevention,
- Achieve these goals with lower costs (and with specific tax incentives) and greater confidentiality,
- Avoid the risk of interruption or suspension of work for economic operators and local authorities, in the case of construction works and / or infrastructures,
- Improve the image of all the stakeholders and to create consensus,
- Improve relations between the parties and create job opportunities and often new relationships.

When it comes to environment, science is important; the purpose of mediation is not to negotiate science, but to allow all the parties to acquire the science properly. The highly technical and complex nature of the issues dealt with creates the need to make these understandable to all participants in their technical and / or scientific aspects as well. The mediator and the parties will therefore be able to agree on the presence of an expert (or a team of experts) involved in providing technical / scientific data. During the course, the technician is called to answer all the questions that are in the minds of the involved parties. For those reasons, mediation can help ensure that all parties understand and are aware of what the actual situation is. Moreover, the technical consultancy has no decisive purpose and is not binding, but aims at leading the parties to the conclusion of a consensual agreement.

During the year of experimentation at the Milan Chamber of Arbitration, the presence of technicians has proved to be very important. The objective as well as the primary tool of mediation is to circulate correct information between the parties and to reopen the communication channels and this cannot be done without the help of "translators" who explain the matter in a comprehensible way to all present.

During the 15 experimental months, the Arbitration Chamber handled 16 mediation cases related to environmental issues. Of these 16 cases, an agreement has been reached in 3 cases, in 2 cases the matter has ceased, in 4 cases the parties did not sit at the table or refused to

initiate mediation, in 1 case the agreement has not been reached and 6 mediations are still under way. This project has partners and supporters who have submitted environmental disputes to the body. Half of the disputes come from the project's supporters, while the other half comes independently. Of the latter group, in three cases the parties did not have a real awareness of the "environmental" dimension of the dispute, since the subject of the dispute was not an irreparable environmental damage, but a territorial controversy where the peculiarities were many, not only Environmental, but also social and economic.

This first year allowed us to touch some of the characteristics of the environmental conflicts outlined above: the plurality of the parties involved, the complexity of the events and the variety of interests. In fact, in half of the cases dealt with, at least 3 parties were sitting at the mediation table. In the total number of mediations, 5 private individuals / committees of citizens, 3 associations, 12 companies and 17 public bodies were involved. The parties have almost always participated personally to the mediation, always assisted by lawyers and the mediator's approach in environmental cases so far has not been particularly different from the handling of "traditional" civil and commercial mediation cases. This experiment has enabled us to confirm the effectiveness of mediation in improving communication between the parties and helping the parties to negotiate better solutions and was an excellent opportunity to share information and engage all the stakeholders.