

6-1-2009

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Recommended Citation

De Palo, Giuseppe and Alvisi, Veronica (2009) "Mediation in Italy: toward a professional practice," *ADR Bulletin*: Vol. 11: No. 2, Article 4.

Available at: <http://epublications.bond.edu.au/adr/vol11/iss2/4>

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New developments in ADR

Mediation in Italy: toward a professional practice

Giuseppe De Palo and Veronica Alvisi

In Italy mediation is a young discipline. The first legislative intervention dates back to 1993, when a law allowed the Chambers of Commerce to establish a mediation service for the amicable resolution of disputes. Since then many conciliation offices have been established throughout Italy and significant financing and human resources have been invested in the attempt to make mediation a widespread practice. Despite this fact, on the one hand the Chambers of Commerce have been unable to promote mediation very successfully, and on the other hand the cultural attitude of Italians in general — and in particular of Italian lawyers who consider it a sign of weakness to come to an agreement in the event of a dispute — rendered this first attempt to diffuse mediation almost totally ineffective. In 1998 two laws again assigned the task of providing mediation services for certain types of disputes to the Chambers of Commerce. However, these legislative reforms have also largely failed to produce the expected number of mediations.

In the meantime, the situation of the Italian Courts, which have never been famed for their efficiency in managing (full) dockets, was becoming even more troubling. This induced a small group of influential scholars and politicians to become involved in the ADR debate. In their attempt to find a solution to this serious national situation this group was a catalyst for some advancement and, in 2003, there was a turning point: decree no 5 of 2003 (effective from 1 January 2004) came into force setting forth a regulation for an evaluative mediation process in company disputes. When provided for in a contract or in the Articles of Incorporation, this type of mediation is mandatory: companies and

shareholders are barred from initiating a proceeding in Court if they have not yet attempted to resolve the dispute with the aid of a mediator. Pursuant to the decree, a national register of *mediation organisations* both public and private has been compiled and is kept by the Ministry of Justice. Mediated settlements reached with the assistance of registered mediation organisations present a number of advantages if compared with other settlements. The most important of them are that these settlements are judicially enforceable and are exempt from any kind of stamp duty.

Legislative decree no 5 of 2003 has been succeeded by several decrees which aim to implement particular aspects of the reform:

- ministerial decree no 222 of 2004, regarding the requirements for mediation organisations and the national register kept by the Ministry of Justice;
- ministerial decree no 223 of 2004, governing the fees that mediation organisations collect from the mediation parties;
- decree by the Ministry of Justice dated 24 July 2006, regarding the organisations that can be listed by the Ministry as those enabled to offer courses for the accreditation of professional mediators and the minimum requirements for these courses.

While the Italian legislators continue, from time to time, to propose and discuss bills proposing recourse to mediation that never become law, the new rules for mediation in company disputes have resulted in a renewed attention to the mediation process by lawyers and enterprises alike. In addition, the aforementioned decrees have contributed to shaping the figure of a professional Italian mediator.

Subjective and objective requirements — courses to become mediators

According to Article 4.4 of the decree no 222 of 2004, anyone desiring to be included in the lists of mediators kept by the mediation organisations registered with the Ministry of Justice must adhere to particular requirements of professionalism and a code of honour (one of its requisites is never having been convicted of or subjected to professional disciplinary sanction).

Additionally, a mediator must be either:

- (a) a university professor of Law or Economics,
- (b) a member of the national professional associations in the same disciplines for at least 15 years,
- (c) a former judge, or
- (d) someone who attended a course on company mediation.

We will focus our attention on element (d) because, as it is intuitive, it is the most interesting, as well as the most frequently occurring of all the qualifying criteria. The issue of vocational training of mediators calls for an analysis of the courses required to gain access to the official lists.

Here we must take a step back. Before decree no 222 of 2004 entered into force, being enrolled in the list of mediators kept by the Chambers of Commerce required completion of a basic course of at least 32 hours, 16 of which consisted of practical training, plus four hours of evaluation. Total participants for each course could not exceed 30. Decree no 222 of 2004 established that, during a transitional phase, the standards adopted by the Chambers of Commerce had to be considered minimum acceptable standards by the keeper of the national register of mediation organisations; subsequently,



the same trustee would establish the requirements for organisations qualified to give courses for aspiring mediators.

On 24 July 2006, the trustee of the national register issued a decree establishing the rules for the courses to be organised. The main requirement imposed on these entities is the ability to organise, for a maximum of 30 people at one time and for a minimum of 90 hours per year:

- basic courses of at least 32 hours each — of which at least 16 hours must be practical training — regarding ADR in general and the way it relates to court procedure, mediation, mediators, and national, international and supranational rules;
- advanced courses of at least eight hours regarding mediation in company disputes.

It seems evident that the above adumbrate the minimum educational experience that a mediator will need in the coming years to be included in the mediators' lists of the mediation organisations registered by the Ministry of Justice.

The trustee of the register decided to confirm the validity of the educational criteria set out by the Chambers of Commerce, lending them a sort of public endorsement. This had the unquestioned advantage of fixing imperative rules for the whole country.

Duties and responsibility of the mediator

Decree no 222 of 2004 also prescribes some guidelines regarding the duties of the mediator, albeit in piecemeal fashion. They can be summarised as follows:

1. A mediator can be enlisted in a maximum of three mediation organisations simultaneously. If he or she declares a willingness to work for more organisations and is part of a national professional association, he or she opens himself or herself up to disciplinary sanctions.
2. The mediator must personally conduct the mediation process.
3. Everything that is done or said during the mediation process is cloaked in confidentiality (at least with regard to the mediator).

4. The mediator cannot have an interest in the dispute and cannot assume rights or obligations related to it, apart from those required by his or her duties.

5. The mediator cannot be paid

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directly by the parties, but only by the mediation organisation.

6. The mediator must, for each dispute he or she is called to resolve, make a declaration of neutrality based on the mediation code adopted by the mediation organisation. He or she also has to subscribe to every other obligation required by the mediation code itself.

7. The mediator must immediately inform the mediation organisation and, if it seems advisable and the mediation process has already started, the parties, of any potential conflict of interest that could have consequences on the outcome of the dispute.

8. The mediator must answer promptly any question or request posed to him or her by the keeper of the register.

With regard to the responsibility of mediators, we can observe that:

- The breach of any of the rules from points 4 to 8 of the list above results in the derogation of the code of honour whose adherence is indispensable to the official certification of a mediator;
- The mediator is responsible for any damages caused to the parties during the process, and there is also an ancillary responsibility of the mediation organisation for which he or she works.

Conclusion

The attention paid by Italian legislators to the mediation process marks a very interesting shift in the general attitude concerning ADR. In Italy, mediation has been seen for many years, and is often seen today, as a branch of civil procedure, rather than a

per se discipline. The cultural habits of the Italian people, compounded by the myth of the fairness of Italian Court proceedings and a strongly reactionary attitude to new things has made the acceptance of ADR slower in Italy than

in other jurisdictions. Yet the mediation process has been used in Italy, especially in the resolution of minimal consumer disputes. In this kind of mediation, the role of mediator requires only a basic knowledge of the law, and it is almost impossible to find solutions that create real value for both parties, considering the significant disparity in bargaining power between them.

At first, this perception led to the fallacy that in order to effectively mediate a dispute, it is not so important to receive specialised training. The recognition of the importance of mediation in company disputes and the consequential necessity to train mediators using targeted courses is a first step on the path of higher specialisation and reliability of mediation in Italy. This could create a snowball effect of continued positive changes in the field. If mediators prove effective at solving companies' disputes, legislators will probably provide for mediation in matters of a different nature. This would give a thrust to the professionalisation of mediators and lead to the solidification of a strong and qualified class of ADR experts in Italy. ●

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ADR DEVELOPMENTS

Australian Mediation Association launches professional scheme

The Australian Mediation Association (AMA) is a professional organisation dedicated to:

- fostering excellence in the field of mediation;
- promoting mediation by accredited mediators as the preferred method of conflict resolution;
- providing mediation education to the public, the government and the professions;
- accrediting professional mediators;
- protecting the public through Standards of Conduct;
- meeting members' professional needs.

The AMA aims to be instrumental in the evolution of ADR within Australia. Through a combination of the expertise of associates and distinguished ADR practitioners and effective business practices, the AMA has set a standard for ADR providers nationwide.

The AMA was established for ADR practitioners with a shared purpose of keeping neutrality and quality of service paramount. This commitment in partnership provided for unprecedented growth, and gave the freedom to set standards of excellence in the ADR field.

The AMA has a distinguished panel of primary dispute resolution practitioners, mediators and ADR professionals who are capable of resolving the most complex disputes where the parties appear to be unyielding.

A strong sense of collegiality and collaboration is evident at all levels within the organisation. All ADR techniques combined with cutting

edge technology are employed to enhance results and service. The AMA believes in benefiting communities through the provision of information services about conflict resolution and its prevention. The breadth and depth of the AMA is exemplified by the high satisfaction marks received from clients, mediators, ADR practitioners and associates measured on a regular basis.

The AMA presents outstanding professional programs, has an ever-growing membership that participates in programs and activities by members, and is a representative voice of mediation in Australia.

'The primary focus of the Australian Mediation Association is the future of mediation and how we can best grow the mediation industry. Important policy discussions, including regarding certification, mediation news flashes and mediation opportunities are featured in our regular Enews updates,' says Callum Campbell CEO.

'It is correct that we want quality mediation in our courts and governmental agencies. We also want more. It simply does not make sense that people should need to file a lawsuit to gain access to quality mediation services. This is why we are bound to grow the private and community based mediation industries.

'We are determined to make mediation become the dispute resolution process of choice for those who are informed. People are ever more attracted to going directly to quality solutions. And the Internet will be playing a bigger and bigger role in providing expanding access to quality mediation opportunities.'

See further on the AMA <www.ama.asn.au>. ●

ADR practitioner insurance

ADR Practitioner Insurance is now compulsory under the NMAS and for registered Family Dispute Resolution Practitioners.

Vero Insurance and the Australian Mediation Association (AMA) have been working together to form a comprehensive insurance program for members. The program is a Master Policy for professional indemnity insurance and public and products liability insurance. 'Our vision to lead the ADR industry as "The Resolution Experts", setting the standard of excellence by which all dispute resolution services will be measured, remains resolute,' said CEO Callum Campbell.

This ADR-tailored insurance program provides the most cost effective and comprehensive coverage available. ADR practitioners could save up to thousands of dollars each year, depending on the nature of their current insurance. Other current ADR insurance packages available combine a membership fee component — the AMA has no membership fees to add on.

The AMA considers the term *mediator* to be inclusive of a broad range of conflict management and resolution endeavours. Activities such as the entire mediation process, conciliation, consulting, facilitation, consensus building, conducting public dialogues, adjudication, arbitration, dispute system design, training, conflict coaching, restorative justice initiatives, education and capacity building to mitigate or prevent disputes and conflict are all encompassed within a sweeping definition of *mediator in the context of Alternative Dispute Resolution*.

See further on the AMA <www.ama.asn.au>. ●



ADR Diary • ADR Diary

- The **ADRA** AGM will be held on Wednesday 21 October at 5.30 with dinner commencing at 6.30. It will be held at the NSW Law Society, 170 Phillip St, Sydney. Rex Butler will be the guest speaker. ADRA has a number of seminars coming up this year in Sydney: **International Peace-keeping Initiatives** on 13 July; **Juvenile Conferencing** on 10 August; **Holistic Practice is an Interdisciplinary and Reflexive way of Practising a Profession** on 14 September; **Restorative Justice** on 9 November. For bookings and further information please contact <contact@adra.net.au> or 0418965875 during business hours. All seminars and workshops provide opportunities for you to fulfil professional development requirements for ongoing accreditation.
- The **VII International Conference, World Mediation Forum (WMF)** 'Mediation, Justice and Governance: An Opportunity for Peace' is being held in Margarita, Venezuela, 27–29 November 2009. For further information go to <www.worldmediationforum.org/newsletter_visualizacion.php?newsID=9>.
- **LEADR** has a number of upcoming courses including: **Refresher Day: Conflict Coaching Skills** on 16 July; **Working with Emotions in Mediation** on 17 July. They are also holding **Mediation Workshops** in Sydney on 3–7 August and 9–13 November; Alice Springs on 11–15 August; Adelaide on 25–29 August; Melbourne from 12–16 October; Perth from 13–17 October. For further information go to <www.leadr.com.au/training.htm>.
- **ACDC** is offering **Mediation Training** in Sydney on 10–14 August and 19–23 October; **Mediation Accreditation** in Sydney on 14 August and 28 October; **Advanced Mediation Training** on 18, 19 and 20 November. For further information, visit <www.acdcltd.com.au>.
- The 5th Asia-Pacific Mediation Forum Conference will be held in India from 21–27 November 2010. For further information go to <www.apmec.unisa.edu.au/apmf>.
- **National Mediation Conference** will be held in Adelaide on 7–9 September 2010. For further information go to <www.mediationconference.com.au/>.
- The **Bond University Dispute Resolution Centre** has upcoming courses including **Basic Mediation** 30 July–2 August 2009 and 26–29 November on the Gold Coast; and 15–18 October in Melbourne with Leo Cussen Institute; **Advanced Commercial Negotiation** 31 August 4 September in Sydney; **Assessment Course** 6–7 November in Melbourne with Leo Cussen Institute; **Family Mediation Specialisation** 30 November on the Gold Coast. For more information email <drc@bond.edu.au> or visit <www.bond.edu.au/law/centres>.
- **Resolve** is holding a course on **Confronting Conversations — Dealing with Conflict** at Bond University on 28–29 July.

PUBLISHER: Bond University **PUBLISHING EDITOR:** Carolyn Schmidt **PRODUCTION:** Alexandra Berthold **SUBSCRIPTIONS:** \$330.00 per year including GST, handling and postage within Australia **FREQUENCY:** 8 issues per annum **OFFICE:** Dispute Resolution Centre Bond University Qld 4229 Australia **TELEPHONE:** (07) 5595 2039 **FAX:** (07) 5595 2036 adrbulletin@bond.edu.au

ISSN 1440-4540 Print Cite as (2009) 11(2) ADR

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