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Commercial Mediation in Italy

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Give the Italians an opportunity to introduce new rules and they will make a meal of it and a messy one at that! And yet, however ineffective Italian rule-making might be, it none the less contains some craftiness. This may owe something to the fact that laws are generally made by (frequently) incompetent MPs, and the rule-making process constantly operates within an uncertain political situation where commitments to principles and technical knowledge of the subject matter are replaced by bargaining.

Sadly this is the story of recent attempts to regulate commercial mediation in this country.

If we consider that mediation is a tool for social control when it is used in an authoritative/administrative environment (as described by Ch. Moore in his book The Mediation Process, Jossey-Boss, 1996, 2nd ed., p. 47[1]).

First of all, let's take the court process. For a long time now mediation was something written about in books but seldom employed in court as an effective way of resolving disputes. Judges and court-appointed experts in civil and commercial cases have had many opportunities to direct parties to conciliate. However, they have tended to avoid this, with some notable exceptions and when they did direct parties the leverage was the usual one: threats disguised in exhortations which are seldom effective, as we all know.

There have been some recent changes too. New procedure rules have been introduced materially transforming the process at least in some sectors. Disputes amongst shareholders or commercial partners as well as disputes relating to financial and banking services are now governed by special procedural rules (legislative decree no. 5 of 2003), which introduced a brand new American-

[1] The second broad category of mediator is a person who has an *authoritative* relationship to the parties in that he or she is in a superior or more powerful position and has potential or actual capacity to influence the outcome of a dispute.

style pre-trial exchange of briefs between the parties. When the matter is 'ripe' enough, a hearing before a three-justice court is convened. The president of the court is required to suggest an amicable solution "if circumstances so allow" (sec. 16 of decree No 5, 2003), and inevitably any president's word is carefully considered by counsel because it may indicate a view on the final outcome of the dispute should the parties insist on having a judgement. Nothing really innovative, granted. However the result is that conciliation rates have rocketed.

The interesting thing is that this option was always in the court's gift but it is the first time that the positions of the parties are more clearly defined in advance so that the court may suggest a solution with appropriate knowledge of the case. The fact that knowledge gives impetus to the conciliation process is echoed by similar results in employment cases. Here the parties are forced to appear before a sole judge only after having filed all their defences and fact-finding requests (law no. 533 of 1973).

State or public agencies offer a second interesting scenario. Traditionally, there was a plethora of mediation-like processes and mediation 'bodies'. One of the most significant was and still is the mediation mandated in employment disputes before a local trilateral commission, composed in an authentic Marxian tradition by a representative from the trade unions, one of an entrepreneurial association and, as a president, an official from the Ministry of Labour. A typical mediation takes an average of *10 minutes* per case and settlements are, not surprisingly, very low.

It might be surprising to learn that some years ago mediation became a compulsory part of almost all legislative reforms and consequently the reformers in Italy were motivated to enlarge the number and the scope of activity of State and public agencies. Thanks to intense lobbying, the chambers of commerce have been the knights in shining armour and have stemmed the flow away from independent providers.

This is undoubtedly an interesting example of a social experiment in introducing mediation. At a first glance, chambers of commerce were in a privileged position. In Italy the chamber of commerce is a quasi-public body which supports and promotes activities were public and private interests interrelate. A heavily-funded program

was put in place in mid 90' (following law no. 580 of 1993) in order to create a mediation centre in every chamber. Since then many disputes have been referred to the conciliation services of the chambers, mainly on a voluntary basis by the parties in dispute (consumer v professionals under decree 206 of 2005; consumer v travel agents under law no. 135 of 2001; franchisees v franchisors under law no. 129 of 2004; etc) but in some cases it has been a mandatory step before going to court (as in the case of disputes by subcontractors v principals under law 192 of 1998).

Inevitably, there have been some very positive outcomes resulting in the facilitative approach gaining a foothold. However, it takes a very long time to win out over red tape in this environment and the experiment has led to burocracy were formality frequently stifles common sense.

Mediators, for instance, are selected by rotation (that's transparency!), and the training required in order to be on the list is minimal. The idea prevails that lawyers and professor of law will automatically be great mediators because they know the law!

The initiative has had some success in commercial disputes. Unioncamere, the co-ordinating body of the Italian chambers of commerce (www.retecamere.it/area_clienti/Conciliazione/Newsletter/sapere06.htm) claims that over 3,500 cases settled in the period 2003-05 with an average quantum of €20,000. This is a disappointing result because it needs to be considered in the light of a corresponding number of 12,800 consumers cases dealt with during the same period. This, together with the average claim value (€20,000), definitely confines mediation conducted under the banner of the chambers of commerce to the small claims' arena and there is no sign of this trend changing. In the first quarter of 2006 consumers disputes counted for 80% of the total number of cases.

Of course this statistic appears somewhat encouraging. However, the disturbing thing is that this public-funded system is (unfairly) competing with private ADR providers which are developing much too slowly due to the absence of a supporting legal framework. In fact, Italy still lacks any decent mediation law that could include independent services (i.e. provided by professional neutrals independent of, or at least not associated to any public scheme).

Something, indeed, has been done: above cited decree no. 5/03 introduced a special mediation called “conciliazione stragiudiziale” (i.e. extra-judicial mediation) for disputes falling within its scope. When the act was adopted the time seemed ripe for enthusiastic support of mediation. And that was possibly the intention of those who wrote the bill. However, they are actually more familiar with traditional civil procedure rules than independent mediation best practices, and so the outcome has been largely disappointing.

A heavily State-controlled system has been introduced, mediations under decree no. 5 (the only practical advantage here is to generate an enforceable title should a settlement agreement be reached) must be conducted by accredited mediators enrolled in an accredited mediation centre. Accreditation, sadly, relies far more on formal qualification than on the mediator’s personal or the centre’s process management skills. For instance, each centre must list - God knows why – at least seven mediators acting for that centre only; a mediator must not be enrolled in more than 3 centres; any lawyer practising for more than 15 year may enrol without any training; the absence of any party at the mediation may be taken into account in court for assessing the legal costs and fees, as is the behaviour of a party during a mediation.

So, the best opportunity for preparing the ground for ‘good’ mediation practice in Italy has gone. Indeed, a counter-productive precedent has been established.

Fortunately, independent mediation has not been banned but its development may have been severely hampered and its attraction to potential customers much reduced due to the unhelpful practices laid down by the law. A valuable example of how public intervention undermines private initiative when good intentions are implemented without any actual knowledge of the matter in hand.

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