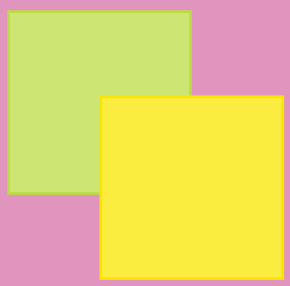
Contemporary Tendencies in **Mediation**

Editors
Humberto Dalla Bernardina de Pinho
Juliana Loss de Andrade



EDITORIAL DYKINSON

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PRESENTATION

Humberto Dalla Bernardina de Pinho
Juliana Loss de Andrade

Mediation is not a trend in non-common law countries anymore: it is a reality. Almost seven years have already passed from the Directive 52/2008/CE, which established a communitarian framework for mediation in civil and commercial matters in the European Union and required the member States to adapt their legal systems to contemplate this sort of Alternative Dispute Resolution (ADR). Many important economies followed the same path in different countries in Asia, Russia and Latin America. Mediation became an important tool in different fields and notably in conflicts concerning family, civil and commercial law as well as restorative justice.

In countries like United States, England and Canada, where mediation flowered before, the past decade represented also an important growth with new rules and maturity in the literature and practice. In those systems, complex conflict have reached mediation as the Canadian case of ADR and Aboriginal-Crown Conciliation articulated in this book in the contribution of Roshan Danesh and Jessica Dickinson. Applying mediation to sophisticated conflicts and improving techniques help the field to become more solid and known in the hard mission to promote conflict resolution and peace based on interest-based models. On the other hand, in the international scenario, mediation progresses call the attention because of its new impact and interfaces in traditional dispute resolution means as arbitration and new technologies prospering also in online dispute resolution.

Accordingly, the context was never so fruitful for exchanging experiences and theoretical points of view. The globalization accelerates reciprocal influences in different legal systems and facilitates the understanding between scholars and practioners from all over the world. Therefore, the purpose of this book was to create a channel to assemble some of these exchanges.

From the conflict view, a Brazilian scholar José Paulo Marinho faces in his text the limitations of ADR methods. His approach can be elucidating in the legal moment for mediation in Brazil, since it has its first signs of mediation regulation approved in the New Procedural Code and runs to a specific new framework for civil and commercial mediation in a Bill of Law still pending of

legislative approval. Humberto Dalla Bernadina de Pinho traverses these new perspectives in his article and demonstrates many legal concerns with these future changes.

Escaping from the legal field and connecting the theoretical and practical aspects, Andrea Maia and Elton Simões propose different and interesting lenses to assess the interaction between conflict and the approach chosen to deal with it by the mediator. Actually, observing the behavior of the facilitator may illustrate how this kind of professional faces some decisions. This discussion is equally important in the practical and the legal scenario, inspiring concerns related to deontology, as well expressed in the text architected by Nuria Belloso Martin.

Besides the experience of developing mediation is still ongoing for some countries as many continental european and latin examples, it is very well developed in others. An interesting scene in between the latin influences and the pillars of North American legal culture, the court-connected mediation experience in Puerto Rico is spotlighted by Jacqueline Font-Gusmán, who concentrate her analysis in the referrals of cases, an important step on the achievement of any mediation program.

Comparatively, the European mediation "boom" – emerged within the new legal system of the European Union anchored in the mentioned directive and impacted by the recommendations of the Council of Europe – also illustrates different and positive perspectives. In this book, some European perceptions are related in different articles by Neil Andrews, Isabelle Hering and Giovanni Mateucci in England, Switzerland and Italy respectively. The difficulties of institutionalization of mediation in different cultures still imply some already known but still very relevant questioning and Giuseppe de Palo propose some adjustments in the mediation implementation in the legal systems, notably in the European landscape. Finally, the same continent shows interesting recent practices concerning restorative justice, as described by Helena Soleto Muñoz, who detects signs of development and resistance in south Europe.

Still, amplifying from the communitarian to the international legal context, Juliana Loss de Andrade examines the legal environment for international commercial mediation settlement agreement and consequent arguments for the task of harmonization of normative framework.

Finally, Lela P. Love and Joseph B. Stulberg didactically touch relevant practical aspects of the use of mediation and Paul Mason brings the focus to

the multi-dimensional mediation, considering the method beyond the limited two parties' scenario.

In this book, it is clear that, differently from the usual legal discussions, mediation is conflict resolution language understandable in different legal cultures. The multifaceted character of mediation emphasized in the texts is an invitation of interconnected contributions between different perspectives in a global and well-connected community.

MEDIATION IN ENGLAND[1]

Neil Andrews[2]

1. The landscape of commercial mediation in England

Most commercial mediators aim to act as facilitators. As such, their role is to act as an independent and disinterested third party and encourage the parties to talk and to move towards a possible agreed settlement. Within mediation the parties have ultimate control over whether the case ends. Parties have the opportunity to determine their outcome, rather than have it imposed by a judge or arbitrator. The mediator is not a decision-maker. Nor is it the aim of mediation to compel people to reach a compromise. The predominant style of mediation in the United Kingdom, at least concerning mainstream civil disputes, involves the mediator assisting the parties to gain an outcome. Such influence as the mediator does acquire is the result of gaining the parties' confidence.

It is best, indeed almost essential, that parties attending the mediation should have authority to settle.

It is estimated[3] that circa 65 to 70 *per* cent of London commercial or civil mediations settle on the day of the session. A further 15 *per* cent settle within a week or a month.

There is no need for the mediator to have a legal training or qualification. However, in England many commercial mediators are 'lawyers': former barristers, solicitors, or judges, or current lawyers.

Many UK mediators are 'accredited', having received professional training from various private organisations.[4] Mediation is not yet a feature of most law degrees. Nor is it an aspect of professional training as a lawyer. In 2008 the

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1 Leading up-to-date works are: *Andrews on Civil Processes* (vol 2, *Arbitration and Mediation*) (Intersentia, Cambridge, 2013); Tony Allen, *Mediation Law and Civil Practice* (Bllomsbury, London, 2013); S Blake, J Browne, S Smie, *The Jackson ADR Handbook* Oxford University Press, 2013).

2 University of Cambridge.

3 Tony Allen, Cambridge seminar, February 2012.

4 K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (2000) 15.3 (not in 2007 edn).

European Commission issued a directive on the topic[5] and a Code of Conduct for mediators.[6] There is (as yet) no formal system of centralised regulation of mediators.

The rise of mediation, not just in England, is largely attributable to six factors: (1) the perception (and nearly always the reality) that court litigation is unpredictable; (2) the court-based adjudicative process (and extensive preparation for the final hearing) is a source of expense, delay, and anxiety; (3) court litigation offers little scope for direct participation by the parties, as distinct from legal representatives; (4) final judgment normally awards victory to only one winner; (5) trial is open-air justice, visible to mankind in general; (6) litigation is private war—even if judges pretend that it is governed by elaborate rules and conciliatory conventions designed to take the sting out of the contest.

The pre-action protocols (applicable to all prospective claims, even where there is no specific protocol tailored to the specific type of prospective litigation) state:[7]

'*Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR*.'[8]

Mediation is now better understood by businesses and organisations. In England resort to mediation has increased, including within the heartland of commercial disputes.[9] The Ministry of Justice for England and Wales (2010)

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5 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.

6 http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0718en01.pdf; for the European Code of Conduct for Mediators: http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_code_conduct_en.htm

7 For an empirical study, T Goriely, R Moorhead and P Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (Law Society and Civil Justice Council, 2001).

8 Practice Direction-Pre-action Conduct, para 8.1.

9 K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, 2007), especially ch's 5, 6, 7; Neil Andrews, *The Modern Civil Process* (Tübingen, Germany, 2008), ch 11; Neil Andrews, *Contracts and English Dispute Resolution* (Tokyo, 2010), ch 22.

reported on this:[10] '*There is evidence…that the market for mediation in the UK continues to grow. A recent mediation audit carried out by the Centre for Effective Dispute Resolution (CEDR) showed that there had been nearly 6,000 civil and commercial mediations carried out in 2009.*[11] *Based on the outcome of the 2007 Mediation Audit, the 2009 figure showed there was a doubling of mediation activity since 2007.*' At the same time, in his 22 March 2012 speech on 'The Reform of Clinical Negligence Litigation', Sir Rupert Jackson noted the unfortunate resistance to mediation in this field, and on the systemic phenomenon of late settlements.[12] And in his 26 March 2012 lecture on 'Reforming the Civil Justice System—the Role of Information Technology', Sir Rupert Jackson has said that '*ADR, particularly mediation, has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used and its potential benefits are not as widely known as they should be*',[13] citing an example of expensive litigation, in which the Court of Appeal suggested that a dispute between neighbouring leaseholders in a London mansion block, taken on appeal from the county court to the Court of Appeal (legal costs in the litigation totalling c £140,000), might have been compromised.[14] A major driving

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10 Ministry of Justice, 'Implementation…Paper' (2010) (a consultation paper), at [10].

11 http://www.cedr.com/index.php?location=/news/archive/20100513_347.htm

12 http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-twelfth-lecture-implementation-programme-22032012.pdf

13 http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-lecture-13-it-society.pdf

14 ibid at 2.2 citing *Faidi v. Elliot Corporation* [2012] EWCA Civ 287; [2012] HLR 27 (leaseholder complaining about noise from defendant's uncarpeted flat; landlord had given permission for defendant to install expensive wooden flooring; claimant's action against defendant neighbour failing because landlord's consent was held to have waived relevant provision in lease requiring wall-to-wall carpeting and underlay (Jackson LJ said at [35]: '*Of course there are many cases where a strict determination of rights and liabilities is what the parties require. The courts stand ready to deliver such a service to litigants and must do so as expeditiously and economically as practicable. But before embarking upon full blooded adversarial litigation parties should first explore the possibility of settlement. In neighbour disputes of the kind now before the court (and of which I have seen many similar examples) if negotiation fails, mediation is the obvious and constructive way forward.*' And suggesting that use of rugs, providing partial sound insulation, the wooden flooring being partially visible, might have been a satisfactory intermediate solution, avoiding cost of litigation). However, the suggested compromise here---

factor in mediation's expansion is wish of disputants to escape the crippling expense of formal court litigation, or of complex arbitration. Both forms of dispute-resolution, court litigation and arbitration, remain expensive, and often slow, means of resolving many types of civil dispute. Certainly, costs and expense are in the forefront of most people's minds whenever litigation becomes even a remote prospect. Indeed even Bill Gates, and other modern-day descendants of Croesus, would hesitate to run the risk of engaging in protracted and complicated claims heard by the High Court (curiously, Russian oligarchs are not put off and some even seem to relish London High Court litigation). Sir Rupert Jackson has said that '*ADR…is a tool which can be used to reduce costs…It is a sad fact that many cases settle at a late stage, when substantial costs have been run up.*'[15]

Furthermore, Government recognises that ADR permits disputes to be resolved less expensively than civil litigation. The Government (Ministry of Justice, for England and Wales) announced in February 2012,[16] following a consultation exercise (2011),[17] that it would like to introduce automatic referral to mediation for all small claims within the county court system (from 1 April 2013, the upper limit is raised from £5,000 to £10,000, but there is no change to the £1,000 limit for personal injury and housing disrepair claims).[18]. The Senior Judiciary, in its response to the earlier consultation, had emphasised[19] that this should not be a compulsory system of mediation, but merely a system requiring litigants to make contact with ('engage with')

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which the court was powerless to impose--is debatable: some noise would still be suffered below; and the offending leaseholder would be denied the aesthetic benefit of a complete expanse of wooden-flooring.

15 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' (RICS Expert Witness Conference, 8 March 2012), at 3.1: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf

16 'Solving Disputes in the County Courts…' p 11, recommendation 24 (February 2012) http://www.official-documents.gov.uk/document/cm82/8274/8274.pdf

17 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system' (CP 6/2011: Ministry of Justice: Cm 8045) (29 March 2011).

18 CPR 27.1(2); PD (27).

19 ''Solving disputes in the county courts….Response of the Lord Chief Justice and the Master of the Rolls on Behalf of the Judiciary' (2011), 14-15 (http://www.judiciary.gov.uk/NR/rdonlyres/CCA63782-89BA-49D4-8543-63C16397DB73/0/lcjmrresponsesolvingdisputescountycourt.pdf).

the mediation service in order to consider the possibility of mediation in respect of their dispute. In short, England is going down the path of mandatory exploration of mediation in all small claims litigation. Fortunately, the mediation service within the small claims system is free. Furthermore, communication will not require face-to-face meetings, because telephoning[20] will be the usual form of communication.

In fact the court system already directly encourages litigants to pursue mediation in appropriate cases. Sue Prince has made a study of various schemes.[21] There has been recent expansion of mediation within the appeal system.

2. Mediation agreements[22]

Ramsey J in *Holloway v. Chancery Mead* (2007) identified three elements: (a) absence of further negotiation on the appropriateness of mediation; (b) agreement on how the mediator should be selected; and (c) the main mediation process should be spelt out or an institutional set of mediation rules nominated:[23]

The Court of Appeal in *Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA* (2012) made clear that the mere fact that the parties' contract refers to mediation as a desirable mechanism is not the same as a clear and

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20 'Solving Disputes in the County Courts...' para 164 (February 2012) http://www.official-documents.gov.uk/document/cm82/8274/8274.pdf

21 S Prince, 'ADR after the CPR...', in D Dwyer (ed), *The Civil Procedure Rules*: *Ten Years On* (Oxford University Press, 2010), ch 17; M Ahmed, 'Implied Compulsory Mediation' (2012) 31 CJQ 151.

22 H Brown and A Marriott, *ADR Principles and Practice* (3rd edn, 2011), 26-033 ff; D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, 2010); K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, 2007), ch 9; *Redfern and Hunter's International Arbitration* (N Blackaby and C Partasides, eds) (5th edn, Oxford University Press, 2009), 2.83 ff; Centre for Effective Dispute Resolution at: *www.cedr.co.uk/library/documents/contract_clauses.pdf*; D Spencer and M Brogan, *Mediation*: *Law and Practice* (Cambridge University Press, 2006), ch 12 for Australian material.

23 [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653, at [83] (for similar analysis in Australia, *Aiton Australia Pty Ltd v. Transfield Pty Ltd* (1999) 153 FLR 236, at [69]; and *Elizabeth Bay Developments Pty v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, 715, Giles J: on which *Lewison on the Interpretation of Contracts* (5th edn, 2011) 826-9).

binding contractual commitment to engage in mediation.[24] If the agreement is void for uncertainty that is the end of the matter. Uncertainty is fatal: it is not enough that the parties intended to create such a binding commitment.[25]

The core portions of clause 11 (mediation) were:

'*the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation*';

'*If the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, of if either party serves written notice terminating the mediation under this clause, then either party may refer to the Dispute to arbitration.*'

Furthermore, Moore-Bick LJ referred to the (implicit) need for the clause to nominate an established mediation provider (whose institutional rules would supply all necessary details) or to fashion expressly a mediation process.[26] This statement echoes Ramsey J's analysis in *Holloway v. Chancery Mead* (2007) (also cited above), who referred to the need that: *the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain*.

No problem of certainty should arise if the mediation clause refers to a well-established institutional 'model' set of mediation rules. This was in fact the position in *Cable & Wireless v. IBM United Kingdom Ltd* (2002) where the mediation clause incorporated an institutional set of mediation rules,[27]

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24 ibid.

25 ibid, at [35], *per* Moore-Bick LJ: '*I have little doubt that the parties intended condition 11 to be enforceable and thought they had achieved that objective. In those circumstances the court should be slow to hold they have failed to do so. However, in order for any agreement to be effective in law it must define the parties' rights and obligations with sufficient certainty to enable it to be enforced.*'

26 ibid, at [36]: '*...The most that might be said is that [condition 11] imposes on any party who is contemplating referring a dispute to arbitration an obligation to invite the other to join in an ad hoc mediation, but the content of even such a limited obligation is so uncertain as to render it impossible of enforcement in the absence of some defined mediation process.*'

27 [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041; [2002] CLC 1319; [2003] BLR 89, at [21] *per* Colman J: '*the parties have not simply agreed to attempt in good faith to negotiate a settlement. In this case they have gone further than that by identifying a particular procedure, namely an ADR procedure as recommended to the parties by the Centre for Dispute Resolution to which I refer as 'CEDR'. That is one of the*

containing a detailed process,[28] and enabling the court to monitor contractual compliance.[29]

Multi-Tier Dispute Resolution Clauses: Many corporations now prefer to use international arbitration in combination with other ADR mechanisms. Such a combination of techniques will be specified in a 'multi-tiered' or 'escalation' dispute resolution clause.[30] These are now common-place in commercial agreements. They specify a 'step-by-step' approach, negotiation and mediation, which must be exhausted before the parties can commence court or arbitral proceedings.

Judicial Remedies to Uphold Mediation Clauses: The leading English decision on this aspect of mediation clauses[31] is *Cable & Wireless v. IBM United*

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best known and most experienced dispute resolution service providers in this country.... [A]t the time when the [agreement] CEDR had [already] published the 6th edition of its Model Mediation Procedure and Agreement.'

28 ibid: *'This document sets out a model procedure which specifies the terms upon which the parties may proceed with a reference to mediation. This identifies (i) the functions of the mediator, including his power to chair, and determine the procedure for, the mediation, his attendance at meetings, his assistance in drawing up any settlement agreement; (ii) the duties of the participants, in particular that of providing to CEDR at least two weeks before the mediation a case summary and all documents referred to in it and others to be referred to; (iii) the entitlement of each party to send in confidence to the mediator documents or information which it wishes the mediator to have but not to disclose to the other party. There are also express provisions about the confidentiality of the proceedings and about how the fees, expenses and costs are to be borne.'*

29 ibid, at [24]: *'Thus, if one party simply fails to co-operate in the appointment of a mediator in accordance with CEDR's model procedure or to send documents to such mediator as is appointed or to attend upon the mediator when he has called for a first meeting, there will clearly be an ascertainable breach of the agreement in cl 41.2.'* Adding at [29]: *'Accordingly, in the present case I conclude that cl 41.2 includes a sufficiently defined mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediator with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements.'*

30 The School of International Arbitration, Queen Mary, University of London, report (2005), available on-line at: *http://www.pwc.com/Extweb/pwcpublications.nsf/docid/0B3FD76A8551573E85257168005122C8*

The author is grateful to Stephen York for this reference.

31 D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, 2010); K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, 2007), ch 9; Centre for Effective Dispute Resolution at: *www.cedr.co.uk/library/documents/*

Kingdom Ltd (2002).[32] In this case, Colman J insisted that mediation should be tried (on those facts as a mandatory stage before litigation), in accordance with the resolution clause, although in fact mediation did not work in this case.

The 'multi-tier' clause in *Cable & Wireless v. IBM United Kingdom Ltd* (2002)[33] initially required the parties to endeavour to negotiate a resolution by considering the relevant dispute within their own organisations. The clause stated that mediation would be obligatory if these negotiations collapsed.[34] Thereafter, the parties to this clause contemplated that, if the dispute were still unresolved, proceedings before a court could take place. After negotiation had failed, one party, by-passing the stipulated stage of mediation, prematurely brought a claim before the English High Court. The other party challenged this. Colman J found that there had been a breach of the dispute resolution agreement, because a party had 'jumped' the mediation stage and proceeded straight to litigation. To remedy this, the judge placed a 'stay' upon those formal court proceedings. The stay would be lifted if a party returned to court and demonstrated that the mediation attempt had been unsuccessful.

3. Judicial encouragement of mediation and costs sanctions

English judges do not themselves conduct mediation during the course of pending court litigation. For the most part, English judges wait for a party to suggest that the dispute should be referred to an external mediator. The

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contract_clauses.pdf; D Spencer and M Brogan, *Mediation*: *Law and Practice* (Cambridge University Press, 2006), ch 12 for Australian material.

32 [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041; [2002] CLC 1319; [2003] BLR 89, Colman J.

33 [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041; [2002] CLC 1319; [2003] BLR 89, Colman J.

34 Clause 41 stated: '41.1 *The parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this agreement or any local services agreement promptly through negotiations between the respective senior executives of the parties who have authority to settle the same pursuant to clause 40*. 41.2 *If the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim through an alternative dispute resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any party or local party from issuing proceedings*.'

court might then endorse this as appropriate for this particular case. If so, the court can place a case in suspense (a 'stay') while that alternative process is pursued. The court can also issue a recommendation that mediation be considered. Each party will then have a duty to consider mediation. Occasionally, however, a judge might spontaneously recommend to both parties that mediation should be attempted.

The English position involves selective judicial recommendation of mediation.[35] The starting point is that the English courts' overall responsibility to administer civil justice includes 'helping the parties to settle the whole or part of the case'[36] and 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate.'[37] In addition to the 'tick box' mechanism contained in the Allocation Questionnaire, resort to mediation is a question of direct communication between a judge? (notably during the pre-trial stages, but occasionally after judgment during the process of giving permission to appeal).

Sir Rupert Jackson, drawing on his experience when he was a first instance judge in the Technology and Construction Court has noted (i) the court's capacity (and responsibility) during a first case management conference to review '*what steps the parties have taken and propose to take to seek to resolve the dispute by ADR*'; and (ii) the court can '*require an explanation from the party who declines to mediate, such explanation not to be revealed to the court until the conclusion of the case';* and the court can (as he puts it, perhaps too robustly) *'penalise in costs parties which have unreasonably refused to mediate'*.[38] The better view is that such costs sanctions are not punitive, but merely disciplinary. Thus a party whose costs are augmented to reflect unreasonable failure to mediate is not being required to pay more than the op-

35 For sceptical discussion of any form of mandating or coercing resort to mediation, Matthew Brunsdon-Tully 'There is an A in ADR but Does Anyone Know What it Means Anymore?' (2009) CJQ 218-36; for a survey and analysis of English courts encouragement of extra-curial mediation, M Ahmed, 'Implied Compulsory Mediation' (2012) 31 CJQ 151.

36 CPR 1.4(2)(f).

37 CPR 1.4(2)(e); *The Chancery Guide* (2005), ch 17; *The Admiralty and Commercial Courts Guide* (9th edn, 2011), section G and appendix 7 (available on the CPR webpage under 'Guides').

38 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' (RICS Expert Witness Conference, 8 March 2012), at 3.2: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf

ponent's actual legal costs, and so there is no element of non-compensatory 'punishment'. Conversely, when (as will seldom occur) the victorious party is 'denied' his ordinary entitlement to costs, this species of costs forfeiture is not punitive. Denial of usual costs because of failure to respond adequately and reasonably to mediation opportunities is a procedural 'sanction' consistent with the general aims of the CPR system, reflecting the flexible approach to costs allocation. It does not appear analytically convincing to treat this form of procedural sanction as a 'penal' judicial response.

Even in the absence of a mediation agreement, an English court can direct that the proceedings be stayed for a month at a time[39] while the parties pursue ADR or other settlement negotiations.[40] A stay merely places the proceedings in a state of suspense. Proceedings can be resumed when this becomes appropriate. The matter is subject to the court's discretion. There is no automatic right to a stay.

In *Cable & Wireless plc v. IBM United Kingdom Ltd* (2002) Colman J explained:[41]

> *'The [mediation agreement] is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy. It is further a procedural tool provided for under CPR, r. 26.4 to encourage and enable the parties to use ADR… However, the availability of the remedy whether of a stay or an adjournment or other case management order must be a matter for the discretion of the court.'*

So-called mediation orders, issued by the court, are merely robust recommendations to mediate.

English courts are prepared, where appropriate, to register censure of a party's unreasonable refusal to engage in mediation. That refusal might be failure to accede to the opponent's call for mediation, or the court's own suggestion that mediation be contemplated.

PGF II SA v OMFS Co (2013)[42] the Court of Appeal held that silence in the face of an invitation to participate in ADR was itself unreasonable, irre-

39 CPR 26.4(3).

40 CPR 3.1(2)(f); CPR 26.4(1)(2).

41 [2002] EWHC 2059 (Comm); [2002] CLC 1319, 1327.

42 [2013] EWCA Civ 1288.

spective of the merits of refusing to engage in ADR (although there might be rare cases where ADR was so obviously inappropriate that to treat silence as unreasonable would be 'pure formalism', or where the silence resulted from an error). Silence was inimical to open negotiation with a view to settlement. Accordingly the court said that any difficulties or reasonable objection to a particular ADR proposal should be discussed, so that the parties could narrow their differences.

Apart from the special case of total silence, in determining the unreasonableness of a party's refusal to pursue mediation, the Court of Appeal in *Halsey v. Milton Keynes General NHS Trust* (2004) listed the following criteria[43] *'... the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of the ADR would be disproportionately high; whether any delay in setting up and attending the ADR would be prejudicial; whether the ADR had a reasonable prospect of success.*'

Sir Rupert Jackson, in a speech, has noted criticism of these criteria:[44]

nature of the dispute: sceptical response, that 'there are no categories of case which are not capable of mediation, although there are some cases where it is reasonable not to settle in mediation';

the merits of the case: sceptical response, that 'there are many cases where a party may reasonably believe that it has a watertight case but they are settled at mediation';

other settlement methods have been attempted: sceptical response, 'in principle this should allow the parties to refer to "without prejudice" negotiations to take account of settlement offers made and rejected;

the costs of mediation would be disproportionately high: sceptical response, the costs of mediation are significantly less than litigation, although it must be accepted that those costs may be wasted if mediation fails';

delay: sceptical response, 'whilst late mediation is to be avoided, it should not delay any trial';

whether mediation has a reasonable prospect: sceptical response, 'experience shows that many mediations have a reasonable prospect of settling, regardless of the initial attitude

43 [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [16] ff; for a strong application of this costs regime, in which the *Halsey* criteria were fully considered, *P4 Ltd v. Unite Integrated Solutions plc* [2006] EWHC 2924 (TCC), Ramsey J.

44 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' (RICS Expert Witness Conference, 8 March 2012), at 3.8: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf

of the parties, but whether they will settle is a matte for agreement between the parties.'

But he then notes that the *Halsey* case had a salutary effect, contending that it stimulated a new pattern of behaviour. Under the post-*Halsey* practice, litigators were aware of the new costs risk, if they were seen to have inflexibly spurned mediation overtures by the opponent, even if the 'spurner' ultimately defeated the 'spurnee'. To reduce this risk, 'mediation offerees' carefully present written reasons in so-called *Halsey* letters sent to the opponent, in which they purport to justify a refusal to accept the opponent's offer to mediate, and the mediation offeror responds by listing reasons for picking holes in the mediation offeree's *Halsey* letter.[45]

A defendant's pre-action unwillingness to mediate can be entirely reasonable if the opponent has failed to particularise and clarify his claim, despite the defendant's 'requests, as Ward LJ noted in *S v. Chapman* (2008).[46] Furthermore, HH Judge Coulson QC held in *Nigel Witham Ltd v. Smith* (2008)[47] that a party's very late acceptance of the opponent's offer to mediate might be equivalent to an absolute refusal to mediate. And (as noted by Sir Rupert Jackson, in a speech)[48] in *PGF II SA v. OMFS Company* (2012),[49] a defendant suffered a costs sanction when it unreasonably refused to accept the claimant's offer to mediate; and the sanction was applied even though the defendant had made a Part 36 offer which the claimant later failed to beat; dis-applying the default rule[50] applicable in

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45 ibid, at 3.9.

46 [2008] EWCA Civ 800, at [49]; noted J Sorabji (2008) 27 CJQ 427.

47 [2008] EWHC 12 (TCC), at [36]; noted on this point by J Sorabji (2008) 27 CJQ 427.

48 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' (RICS Expert Witness Conference, 8 March 2012), at 3.9: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf

49 [2012] EWHC 83 (TCC); [2012] 3 Costs LO 404, at [42] (decision of Deputy High Court judge, First QC): '*it was unreasonable of the Defendant not to respond to the suggested mediation and therefore not to agree to mediate this dispute. I agree with the Claimant that the factors considered in Halsey making it unreasonable to refuse to take part in a mediation are present here, including the consideration that there was a reasonable prospect that the mediation would be successful. Whilst the burden of establishing this latter factor rests on the Claimant in this case, it is not an unduly onerous burden given that it does not need to show that the mediation would have been successful, merely that it had a reasonable prospect of success.*'

50 CPR 36.10(5)(b) provides, that, normally (unless the court considers this would be unjust on the facts of the case), the Part 36 settlement offeree (here the claimant) '*will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.*' CPR 36.10(4) applies that default rule where: *a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or b) a Part 36 offer is accepted after expiry of the relevant period, if the parties do not agree the liability for costs, the court will make an order as to costs.*

this context, the defendant (the mediation offeree) was not entitled to costs in respect of the period after the expiry of that offer.

As for costs sanctions against a party who has clearly won the relevant court proceedings, the 'mediation offeror' (who has lost the case) will bear the burden of showing on the balance of probabilities that the mediation would have had a reasonable prospect of success, assuming the mediation offeree (who eventually won the case) would have participated in the mediation in a co-operative manner.[51] Satisfying this burden of proof will be an uphill task. For example, in *Swain Mason v Mills & Reeve* (2012) the Court of Appeal held that if a party reasonably believed that he had a watertight case, that might well be a sufficient justification for a refusal to mediate, and this was so even if on some issues the defence did not succeed.[52]

Adverse costs decisions ('sanctions') can be issued if, in particular, a party fails to satisfy the duty to consider a judicial recommendation or 'order' that mediation be considered.. Such a costs sanction is justified only if a party has failed, for objectively unsatisfactory reasons, to consider properly the opportunity for mediation.

An example of such a mediation 'order' is the recommendation made by Commercial Court judges (a branch of the High Court) under Appendix 7 to Admiralty and Commercial Courts Guide (for details), which was drafted by Colman J and which Dyson LJ in the Court of Appeal in the *Halsey* case said[53] were acceptable.

In the *Halsey* case (2004), Dyson LJ explained:[54]

'An ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Guide is the strongest form of encouragement. It requires the parties to exchange lists of neutral individuals who are available to conduct ADR procedures", to endeavour in good faith to agree a neutral individual or panel and to take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen". The order also provides that if the case is not settled, the parties shall inform the court ... what steps towards ADR have been taken

51 *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002.

52 [2012] EWCA Civ 498; [2012] S.T.C. 1760; [2012] 4 Costs L.O. 511.

53 *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [30]; Lord Justice Dyson, 'A Word on *Halsey v. Milton Keynes*' (2011) 77 Arbitration 337.

54 ibid.

and (without prejudice to matters of privilege) why such steps have failed". It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR.'

And so the question of a costs sanction against a victorious party is more likely to arise when the party to be sanctioned has rejected a judicial recommendation for mediation (as distinct from a suggestion made by the other side).

Robust costs sanctions are likely to be applied if the court (notably the Court of Appeal), when granting permission to appeal, has simultaneously indicated that the parties should consider mediation. If one party fails to respond positively to such a judicial recommendation, the appeal court, when considering the question of costs at the conclusion of the appeal, might deny that party the costs of the appeal even if he has been successful on the merits of the appeal.

Indeed in the Court of Appeal in the *McMillan* case (2004) said that if both parties to an appeal spurn the judicial recommendation that mediation be considered, and instead they proceed straight to appeal without attempting mediation, each party will bear its own costs for that stage of the proceeding, with no opportunity for cost-shifting in favour of the victorious party to the appeal.[55]

Dyson LJ in the *Halsey* case (2004) also noted the special status of a judicial recommendation:[56]

'*Where a successful party refuses to agree to ADR despite the court's encouragement, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The court's encouragement may take different forms. The stronger*

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55 *McMillan Williams v. Range* [2004] EWCA Civ 294; [2004] 1 WLR 1858, *per* Ward LJ: '*[29] Tuckey LJ gave this [direction] to the parties when he granted permission to appeal*: *"The costs of further litigating this dispute will be disproportionate to the amount at stake. ADR is strongly recommended." ...The parties should have written to each other along the lines that, "Lord Justice Tuckey has very sensibly suggested ADR. My client thinks that is a splendid idea. Please can we get on with it as soon and as cheaply as possible?"...[30]... In my judgment this is a case where we should condemn the posturing and jockeying for position taken by each side of this dispute and thus direct that each side pay its own costs of their frolic in the Court of Appeal. I would allow the appeal with no order for costs.*'

56 *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [29].

the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable.'

In both *Dunnett v. Railtrack plc* (2002)[57] (discussed in text below) and *McMillan Williams v. Range* (2004)[58] a member of the Court of Appeal (Schiemann LJ in the *Dunnett* case, and Tuckey LJ in the *McMillan* case) issued an unsolicited recommendation that, instead of proceeding straight to appeal, both parties should pursue mediation.

But the party who lost the appeal in *Dunnett v. Railtrack plc* (2002)[59] did succeed in persuading the court to disallow the victorious party its costs in the appeal. Or, rather, the Court of Appeal in that case spontaneously imposed a robust costs sanction based on its own impression of the perceived 'tactical merits' of the contest. The court held that the twice victorious rail track company (which had successfully defended the claim, both at trial and on appeal) should be denied its costs from Mrs Dunnett. It appears that this denial was confined to the costs of the appeal; and the costs decision stopped short of requiring the defendant company to pay the claimant's costs—in fact she was not legally represented, and was a 'litigant-in-person'.

One senses that this expression of disapproval was driven by the Lords Justices' vague sense that mediation should expand whenever there is a remote chance of its success. But such a discretionary and unconvincing use of judicial sanctions runs contrary to the voluntary basis of mediation. That technique is a settlement tool. There was no agreement to mediate obliging Mrs Dunnett and Railtrack to use that technique. The judicial recommendation to mediate, made when granting permission to appeal, was not an order to enter into mediation sessions. As discussed, 'orders to mediate' can only be rationalised as orders requiring disputants to consider carefully the merits of mediation as a possible means of enabling them to achieve a consensual resolution of their dispute. But Railtrack seems to have discharged that limited duty to consider was a duty which. If so, there was no legitimate scope for a sanction.

It is submitted that costs sanctions are unjustified if the relevant party to the appeal convinces the court that he has considered properly the opportunity to mediate but he has then chosen to bring or respond to the appeal for objectively satisfactory reasons. Once the court is satisfied that the party did

57 [2002] 1 WLR 2434, CA, at [13] ff.

58 [2004] EWCA Civ 294; [2004] 1 WLR 1858, at [29], [30].

59 [2002] 1 WLR 2434, CA, at [13] ff.

properly consider the mediation option, there should be no scope for sanctions. The party who succeeds in the appeal (the appellant if the appeal is successful, or the respondent if the appeal fails) should receive the costs of that appeal from the defeated opponent, in accordance with the costs-shifting principle: to 'sanction' him for failure to attend or participate in a mediation is both heavy-handed and unprincipled. Similarly, the defeated opponent should be ordered to pay costs on the standard basis, and not (by way of 'sanction') on the higher indemnity basis.

Shirley Shipman has considered the difficult issue whether the threat of an 'adverse costs award' for 'unreasonable refusal' to accede to an opponent's mediation suggestions might be contrary to the right of access to court implicit within Article 6(1) of the European Convention on Human Rights. Her tentative suggestion is that this is no more than a possibility.[60]

4. Concluding reflections

1. The process of mediation has become popular in England, and this is likely to increase for two reasons.

2. First, many disputants now recognise that mediation is often more attractive than the formal processes of court adjudication or arbitration. These are the private vectors which drive demand for mediation. Because these are spontaneous responses by disputants, based on their private assessment of the merits of this style of dispute resolution, these factors have been called 'organic' in this paper.

3. Civil proceedings before the courts are becoming a system of last resort to be pursued only when more civilised and 'proportionate' techniques have failed or could never be made to work.

4. Many corporations now prefer to use international arbitration in combination with other ADR mechanisms, as specified in a 'multi-tiered' or 'escalation' dispute resolution clause. These prescribe a 'step-by-step' approach, negotiation and mediation, which must be exhausted before the parties can commence court or arbitral proceedings.

5. Government, which has a strong interest in promoting ADR because it

60 S Shipman, 'Alternative Dispute Resolution, the Threat of Adverse Costs, and the Right of Access to Court', in D Dwyer (ed), *The Civil Procedure Rules*: *Ten Years On* (Oxford University Press, 2010), ch 18, especially at 353-4.

is less expensive than civil litigation, is now actively promoting mediation.

6. However, mediation should not be imposed on parties if it is evident that there is insufficient shared willingness to engage in constructive discussion.

7. There is a fundamental difference between a duty to consider mediation (in the sense of a responsible and measured assessment by each party of the chances of its success) and a duty to enter upon and then participate in mediation before a neutral. The parties should be free —until a binding settlement is made— to withdraw from the mediation process even if they have passed through the door (subject only to the possibility of specific contractual terms, consistent with the doctrine of contractual certainty, such as agreed duties to exchange specific items of information).

UN RETO PARA LA MEDIACIÓN: EL DISEÑO DE SU CÓDIGO DEONTOLÓGICO[1]

Nuria Belloso Martín[2]

Introducción

A pesar de que la cultura de la transacción está cada vez más presente en la sociedad española, no se ha visto reflejada en la formación de los estudiantes universitarios españoles. Asignaturas relacionadas con los mecanismos extrajudiciales de conflictos apenas han encontrado hueco en los planes de estudio de las Facultades de Derecho[3]. Nuestro propósito es poner de manifiesto que se ha abierto una vertiente más para las profesiones jurídicas, principalmente para quien ejerce la abogacía[4]. Su formación en mediación le permitirá incluir nuevas formas de gestionar el conflicto[5] que no sean exclu-

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1 Una versión preliminar de este trabajo ha sido publicada en BELLOSO MARTÍN, N., "La deontología profesional de ¿una nueva profesión jurídica?: la mediación", en Josefa Dolores Ruiz (Coord.), *Política, Economía y Método en la investigación y aprendizaje del Derecho,* Madrid, Dykinson, 2014, pp. 261-304.

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3 En otras titulaciones, como en Grado en Criminología de la Universidad de Salamanca, han incorporado esta asignatura, con una carga de 6 créditos. En los países latinoamericanos (México, Salvador, Argentina) es común que estas asignaturas formen parte de los planes de estudio. Esto puede obedecer a una influencia más cercana de la cultura anglosajona, como Estados Unidos, donde se lleva trabajando desde hace años en estos sistemas alternativos de resolución de conflictos.

4 Sin embargo, no hay que llamar a engaño prometiendo que la mediación va a ser una nueva cantera de trabajo para los egresados de las Facultades de Derecho. Es una vertiente más que se deberá de simultanear con otras porque, actualmente, la mediación sigue estando poco difundida y son muy pocos quienes pueden vivir exclusivamente del ejercicio profesional de la mediación. Por otro lado, aquí estamos haciendo referencia exclusivamente a quienes han cursado estudios jurídicos. Sin embargo, no sólo quienes tienen formación jurídica pueden ser profesionales de la mediación.

5 Otros operadores jurídicos (jueces, secretarios judiciales, notarios), a partir de la

sivamente las del proceso. Los Cursos de formación en mediación (Máster y Cursos de Experto) a lo largo de estos años, han venido cubriendo esta carencia de formación, a la vez que la legislación reguladora de la mediación cada vez era más abundante[6].

La tipología del rol de mediador es variada: *facilitator mediator*, *interven-cionist* (negociador, formulador) o *expert* (experto en conflictos). Esta tipología es consecuencia de que, en el contexto anglosajón, quienes se forman en mediación, optan después por especializarse en las técnicas propias de un modelo concreto (modelo Harvard, modelo circular-narrativo, modelo transformativo u otros). Sin embargo, en España hemos observado que no hay una especialización en un determinado modelo sino más bien en un área temática concreta (civil, mercantil, concursal, penal, laboral, familiar, etc.). Principalmente, para quienes se hayan formado en Derecho[7], a partir de la promulga-

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Ley 5/2012, han visto ampliadas sus funciones con la mediación intrajudicial. De ahí que hayan proliferado los cursos de formación en mediación para notarios y operadores jurídicos, y que los jueces y magistrados sean llamados a participar en Cursos y Congresos que versen sobre la mediación.

6 En 1997, el *Libro Blanco sobre la Justicia*, preparado por el Consejo General del Poder Judicial en España, ya reconoció la importancia de la mediación familiar. Las formas alternativas de resolución de conflictos –negociación y mediación- han ido cobrando protagonismo desde el año 2001, a partir de la promulgación de primera Ley de Mediación en una Comunidad Autónoma, la Ley 1/2001, de 15 de marzo, de Mediación Familiar de Cataluña (posteriormente derogada por la Ley catalana 15/2009), seguida después por las de otras Comunidades Autónomas. El mayor impulso ha venido dado por la Directiva *2008/52/CE del Parlamento Europeo y del Consejo, de 21 de mayo de 2008, sobre ciertos aspectos de la mediación en asuntos civiles y mercantiles* La transposición de esta Directiva a España se ha llevado a cabo mediante la promulgación de la *Ley 5/2012*, de 6 de julio, *de Mediación en asuntos civiles y mercantiles*, que ha supuesto un espaldarazo decisivo para la mediación. Un ejemplo de este protagonismo de la mediación en el ámbito de las profesiones jurídicas ha sido el III SIMPOSIO "MEDIACIÓN Y TRIBUNALES. *Balance de un año de vigencia de la Ley 15/2012"*, organizado por el Grupo Europeo de Magistrados por la Mediación en España –GEMME- celebrado en Madrid, entre los días 26 y 27 de septiembre 2013, en el que una mesa plenaria se centró en "Las aportaciones a la mediación desde el ámbito de las profesiones jurídicas". http://mediacionesjusticia.com/jornadas-y-congresos/ (Acceso el 10-02-2014).

7 Hasta la promulgación de la Ley 5/2012, de mediación en asuntos civiles y mercantiles, las Leyes de las diversas Comunidades Autónomas que regulaban la mediación familiar, abrían la mediación a diversas titulaciones (prácticamente, todas del campo humanístico-social). Sin embargo, a partir de la Ley 5/2012, quienes con mayor competencia van a poder ejercer como mediadores civiles y mercantiles van a ser los Licenciados/Grad-

ción de La *Ley 5/2012, de Mediación en asuntos civiles y mercantiles*, se ha abierto una nueva vertiente en su trabajo profesional, la mediación. Independientemente del perfil concreto de mediador de que se trate y del ámbito al que se aplique la mediación, como en toda profesión, el mediador, además de las normas legales establecidas en el estatuto del mediador, que establecen sus deberes jurídicos, también precisa de una ética profesional y un código deontológico, donde se plasmen sus deberes morales. En el ejercicio de las profesiones jurídicas, hay necesidad de instaurar en la praxis, junto a los comportamientos jurídicos, también comportamientos éticos, que pueden encontrar su expresión en los Códigos deontológicos. A esta vertiente es a la que vamos a referirnos en las páginas que siguen en relación a la profesión de mediador.

1. La deontología profesional

El término deontología procede del griego "*deon*" que significa debido y "*logos*" que equivale a ciencia o tratado. Así, desde una perspectiva terminológica, "deontología" sería la ciencia o tratado de los deberes[8]. Este término "deontología"[9] tiene una serie de connotaciones de carácter muy difuso e impreciso tanto en el aspecto práctico como en el teórico. "Deontología" que etimológicamente y, en oposición a la "ontología", significa tratado del deber ser, ayuda poco a disipar ambigüedades. De ahí que el término "deontología profesional" sea aún más impreciso. La deontología se desarrolla más bien en el campo filosófico (de lo debido) y en contraste con el carácter descriptivo y explicativo (óptico) de la ciencia, y hay un cierto consenso en entender que se hace referencia al "deber" derivado de unos principios éticos, morales, de honra, de dignidad, etc.[10].

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uados en Derecho. En relación a la mediación concursal, tanto abogados como economistas podrán desarrollarla adecuadamente.

8 MARTÍNEZ MORÁN, N., Ética aplicada y Deontología: los Códigos deontológicos" en R. Junquera de Estéfani (Coordinador), Ética y Deontología públicas, Madrid, Editorial Universitas, 2011, p.193.

9 J. Bentham es quien populariza este término en 1834 (BENTHAM, J., *Deontology or the Science of Morality*. London, Editorial Elibron Clasics, 1834; *Vid.* APARISI MIRALLES, A., y LÓPEZ GUZMÁN, J., "Concepto y fundamento de la Deontología", en Ética de las profesiones jurídicas. Estudios sobre Deontología. T.I. Murcia, Universidad Católica San Antonio, pp.73-107).

10 Como acertadamente subraya M. Otero, sería deseable que no fuera preciso esta-

La deontología profesional se relaciona simultáneamente con la técnica y con la ética. En cuanto el operador de la mediación es un profesional que aplica sus conocimientos a una praxis, su deontología se relaciona con la técnica, ya que su primera obligación profesional es trabajar con perfección, dentro de lo humanamente exigible. Sin embargo, la deontología no pretende conseguir sin más la perfección técnica –para lo que bastaría la observancia formal de las leyes- sino la licitud moral del trabajo realizado[11]. El reto es el de diseñar estructuras organizativas que favorezcan o sean propicias al comportamiento ético.

Casi todos los profesionales que tienen una mayor relevancia social, cuentan con códigos deontológicos que regulan el ejercicio de sus profesiones[12]. Principalmente aquellas que están relacionadas con la consecución de determinados valores y con la jerarquización de los mismos, y no tanto con aquellas otras de carácter más técnico y, por consiguiente, más neutro. La profesión de la medicina, de la farmacia, de la abogacía y del notariado han sido, sin duda, las más relevantes en este campo, y por ello, todo lo relacionado con la vida, con la salud y la enfermedad, con la búsqueda y la administración de justicia, con la fe pública, etc. son campos en los que la deontología profesional ha tenido una mayor presencia[13].

Las normas deontológicas explícitas o implícitas en profesiones tradicionales y liberales son muy antiguas[14]. La deontología profesional está directa-

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blecer normas de conducta, fiándose únicamente de la moral y el buen hacer de cada uno, pero lo cierto es que la realidad no sigue esta línea y, por ello, hay que postular la necesidad de unos códigos de deontología profesional y dotarlos de fuerza jurídica y moral (OTERO PARGA, M., "La Ética del mediador", cit., *Ibidem)*.

11 VÁZQUEZ GUERRERO, F.F., Ética, deontología y abogados. Cuestiones generales y situaciones concretas, 2ª ed., Navarra, Eiunsa, 1997.

12 *Vid*. BELLOSO MARTÍN, N., "Algunas proyecciones de la autorregulación: códigos de conducta y códigos éticos en el comercio electrónico como instrumentos dinamizadores de la resolución electrónica de controversias (REC)", en Vázquez de Castro, E., y Fernández Canales, C., (Coordinadores), *Estudios sobre Justicia online*, Granada, Comares, Colección Derecho de la información, Vol. 22, 2013, pp. 83-138.

13 MARTÍNEZ ROLDÁN, L., "Deontología notarial: corporativismo o regulación jurídica", en *Anuario de Filosofía del Derecho*, Madrid, Nueva Época, Ministerio de Justicia-BOE, T. XXV, 2008-2009, p.37.

14 En Estados Unidos la medicina fue pionera en los años 60 en establecer unas normas éticas de referencia para el ejercicio de la profesión. El primer texto de ética médica en dicho país es de 1966. Después del asunto *Watergate* de 1974, los profesionales del derecho elaboraron su propio código deontológico; posteriormente son los ingenieros el colectivo que opta por la autorregulación, y es en los años 80 cuando la Ética, expresada

mente relacionada con la ética de las profesiones jurídicas de manera que no se puede tratar de deontología sin ética. Deontología es la ciencia o tratado de los seres humanos pero considerados en su conjunto, en otras palabras, es la ciencia que se ocupa de determinar las formas de comportamiento que debe seguir un ser humano en el ejercicio de su actividad profesional dentro del grupo que se integra[15].

Los códigos deontológicos representan el apoyo grupal tan necesario ante los conflictos morales, y suponen también una defensa de la autonomía profesional por cuanto que como señalábamos, cada sujeto ha de tomar en consideración cada una de las opciones de actuación que se le muestran, decantándose por aquella que considere más oportuna. El código no podrá aportarle una solución concreta, que queda a la responsabilidad de cada uno, pero sirve de guía.

No han faltado voces contrarias a los códigos deontológicos. Sin desconocer la posible influencia del factor ético, se prescinde de él por el subjetivismo de los valores, por la generalización de la doble moral y porque la ética se ha refugiado en la privacidad, en una cuestión íntima, en una elección individual que no debe trascender a la sociedad. Ello lleva a cuestionar el carácter jurídico de las normas deontológicas o la ayuda que éstas puedan prestar al cumplimiento de la legalidad vigente. Incluso, se puede tener la tentación de pensar si, por el contrario, no serán esas normas deontológicas auténticos obstáculos para el cumplimiento de las normas jurídicas, interesadamente orientadas a no renunciar e incluso a reforzar ese corporativismo profesional.

1.1. Códigos de la profesión del origen del mediador: especial referencia a la Abogacía

La formación y las profesiones de origen del mediador pueden ser muy variadas: abogado, psicólogo, trabajador social, graduado social, educador social, economista y tantas otras, generalmente del campo humanístico. I*nicialmente hay que partir de los principios de que se haya dotado cada una de estas profesiones. Cualquier mediador parte, de entrada, de cuantas pre-*

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y formulada en códigos de conducta, llega al mundo de la empresa. En Estados Unidos actualmente se imparten más de 500 cursos de Ética de empresa (LABRADA RUBIO, V., Ética en los negocios, Madrid, ESIC, 2010, p.108).

15 Cfr. OTERO PARGA, M., "La Ética del mediador", en H. Soleto Muñoz (Directora), *Mediación y resolución de conflictos: técnicas y ámbitos*, en Madrid, Tecnos, 2011, p.88.

cisiones éticas y morales hayan quedado establecidas en la profesión de origen. No obstante, principios y normas previos no son suficientes por cuanto que la mediación presenta sus propios matices. Pero sí que pueden suponer una base desde la que iniciar el acercamiento a la mediación.

Quien interviene desde cualquier profesión, no puede en ningún caso violentar la esencia ética que trae de partida cuando llega a la mediación. Se actúa como mediador y no como miembro de ésta o aquella profesión de base pero no deja de ser trabajador social, abogado u otra profesión porque esté ejerciendo la mediación en un determinado momento[16].

Aquí vamos a limitarnos a los estudios jurídicos como formación de origen (es decir, no nos ocuparemos de otras Titulaciones como Psicología, Educación Social, Trabajo social y tantas otras que pueden constituir el sustrato formativo del mediador). El jurista –bien sea un abogado, un juez, un fiscal o un notario- suele tener la creencia de que el ejercicio de su profesión es esencialmente honesto, algo vinculado a las reglas de la moral dominante en su comunidad. Como en todas las profesiones, se podrán encontrar algunos profesionales disolutos y tramposos, capaces de mentir y engañar a sus clientes, principalmente si hay una razón económica por medio. Pero estos casos son la excepción y no la regla.

También abundan los escépticos o, simplemente, los realistas que, como buenos conocedores de las exigencias del Derecho, se plantean incluso si el Derecho no será una profesión inmoral.

"Muchas de las recomendaciones de la deontología jurídica conducentes a elaborar, en términos bien abstractos, algún perfil del buen jurista son básicamente ingenuas, pero sobre todo inútiles. Ellas suelen partir de un doble prejuicio, muy arraigado en la actualidad: a) por un lado, de que es posible enseñar moral a cualquier profesional –en este caso, al jurista ya formado- para lo cual se suelen implementar simplemente unos códigos de ética e impartir unos cursos deontológicos (¡de fin de semana!) al respecto; y, b)

16 *Si dirigiéramos nuestra mirada hacia el Código Deontológico de la Abogacía en España (2001), por ejemplo, veríamos que en sus principios se habla de igualdad de las partes, justicia, confidencialidad. Si tomáramos como referencia la profesión de psicología, encontraríamos la afirmación de que su ejercicio se ordena a una finalidad humana y social, rigiéndose por principios comunes a toda deontología profesional: respeto a la persona y protección de los derechos humanos. Con las demás profesiones con capacidad mediadora obtendríamos igual resultado. Los principios en los que se inspiran son similares en ambas profesiones; las normas, en cambio, pueden conllevar unas singularidades concretas para cada una de esas profesiones.*

por otro lado, de que la profesión legal se puede ejercer de conformidad con parámetros estrictamente morales"[17].

Abundando en esta opinión, M. Salas es de la opinión de que el Derecho es una profesión esencialmente inmoral:

"Por 'esencialmente inmoral' quiero decir, tratando de ser lo menos ambiguo, que su ejercicio cotidiano en los foros judiciales, administrativos y privados conlleva, a pesar de la buena voluntad de quienes laboran allí, conductas que atentan contra algunos preceptos de la moral pública dominante. De no aceptarse –a veces de manera colectiva- esas pequeñas (o grandes) inmoralidades, entonces la práctica de la profesión se haría muy difícil y acaso hasta imposible. De allí que para ingresar al juego denominado Derecho es ineludible respetar las reglas y códigos implícitos que se imponen en esa profesión"[18].

Por ello, Salas se muestra crítico con los códigos éticos, cursos de deontología y manuales para el jurista ideal[19], a la vez que también advierte de que un exceso de moral puede acabar desencadenando una ausencia de moral y que la moral profesional, al igual que la moral general, no puede simplemente "enseñarse" (al menos, una vez que el adulto ha desarrollado sus hábitos y conductas personales).

"Un curso de ética, a lo más que puede aspirar es a esclarecer algunos problemas, a hacernos ver mejor dónde están las dificultades y, así, llegado el momento, a aplicar de mejor forma aquellas reglas morales que ya cultivamos en nosotros. Es decir, de lo que se trata es de estar alerta contra los peligros que acechan en este campo" [20].

La asignatura de "Deontología profesional para la abogacía"[21] se ocupa de

17 SALAS, M., "¿Es el Derecho una profesión inmoral? Un entremés para los cultores de la ética y la deontología jurídica". En *DOXA. Cuadernos de Filosofía del Derecho*, 30, 2007, p. 581.

18 SALAS, M., "¿Es el Derecho una profesión inmoral?, cit., p.583.

19 Sostiene Salas que sólo sirven para engañarse a sí mismo o para engañar a los demás. Mediante esos códigos y cursos nos repetimos a nosotros mismos lo que queremos escuchar y le decimos también a la gente lo que quiere oír Confundimos los deseos con las razones y motivaciones verdaderas. Afirmamos que procedemos de una cierta manera para lograr unos determinados fines, cuando en realidad lo hacemos por razones personales o por comodidad (SALAS, M., "¿Es el Derecho una profesión inmoral?, cit., p.598).

20 SALAS, M., "¿Es el Derecho una profesión inmoral?, cit., p.599.

21 En España, a partir de la Ley 34/2006, de 30 de octubre, sobre el Acceso a las Profesiones de Abogado y procurador, que entró en vigor cinco años después, así como del Real Decreto 775/2011, de 3 de junio, que desarrolló esta denominada "Ley de acceso",

temas tales como los principios básicos de la ética profesional del abogado (obrar según ciencia y conciencia)[22], la deontología profesional del abogado, los Colegios profesionales y la potestad disciplinaria, los códigos deontológicos de la profesión y las relaciones profesionales del abogado[23]. Algunos autores sostienen que el obrar de los juristas podría estar condenado al anatema de la inmoralidad.

Otros autores elevan a decálogo máximas como las siguientes:

-"Ningún abogado aceptará la defensa de casos injustos porque son perniciosos a la conciencia y al decoro";

-"Tu deber es luchar por el Derecho; pero el día que encuentres en conflicto el Derecho con la Justicia, lucha por la justicia";

- "Mantén siempre, desde la normativa y las tradiciones de tu profesión, y conforme a la ley, el sagrado derecho/deber del secreto profesional, y conforme a la ley, el sagrado derecho/deber del secreto profesional, con sólo las excepciones, muy limitadas, que se justifiquen moral o legalmente";

-"No tergiverses los hechos o hagas argumentaciones inexactas, tendentes a confundir al juez alejándolo de la verdad, aunque con ello creas mejorar la posición jurídica de tu defendido";

-"No pases por encima de un estado de tu conciencia";

-"No hagas uso de la inmoralidad o injusticia de la ley, sino cuando te lo exijan ineludiblemente la fuerza de las cosas o las necesidades imperiosas de la defensa".

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la deontología profesional ocupa un lugar importante en la materia de evaluación. Ello pone de manifiesto que, junto al interés por la formación técnica de los futuros abogados, la formación deontológica resulta también imprescindible para su actividad profesional. La asignatura de la "Deontología profesional para el abogado" forma parte de los diversos *Master de acceso a la abogacía* que han comenzado a implantarse en las Facultades de Derecho. (*vid.* APARISI MIRALLES, A., *Deontología profesional del Abogado*, Valencia, tirant lo blanch, 2013).

22 El *Estatuto General de la Abogacía*, en su artículo 1, establece: "es una profesión libre e independiente que presta un servicio a la sociedad en interés público y que se ejerce en régimen de libre y leal competencia, por medio del consejo y la defensa de derechos e intereses públicos o privados, mediante la aplicación de la ciencia y la técnica jurídica, en orden a la concordia, a la efectividad de los derechos y libertades fundamentales y a la Justicia" (artículo 1).

23 Relaciones abogado-cliente (deber de conocimiento; deber de fidelidad; deber de igualdad de trato; deber de información; deber de buscar la mejor solución; deber de diligencia en la tramitación de la causa), Relaciones del abogado con los tribunales de Justicia y Relación del abogado con la parte contraria.

Estas máximas no son más que tópicos controvertidos susceptibles de numerosas interpretaciones, según el significado que obtengamos de los mismos para un caso concreto. Como acertadamente sostiene G. Lariguet, la ética -la ética jurídica en especial-, no debe ser una ética de dogmas o ingenuidades o reductible a la simple formulación de códigos o decálogos. Se trata de poner de manifiesto cuáles son los problemas o los obstáculos que existen en el camino de la moralidad[24].

En el ámbito de la abogacía, junto a códigos deontológicos de ámbito internacional[25] hay que prestar especial atención a los nacionales, como el *Código Deontológico* de la Abogacía Española[26]; junto a estos hay que tomar en consideración los códigos de ética que suelen tener cada uno de los Colegios de Abogados del Estado español.

Todos estos códigos deontológicos de la abogacía se basan en principios básicos tales como independencia, secreto profesional y lealtad al cliente o evitación de conflictos de interés:

a. Independencia: significa no estar sometido. Los jueces han de ser independientes e imparciales. Los abogados han de ser independientes pero parciales porque se deben a la defensa de los intereses de sus clientes. En algu-

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24 Cfr. LARIGUET, G., *Virtudes, Ética profesional y Derecho. Una introducción filosófica*. Montevideo-Buenos Aires, Editorial IB de F, 2012, p.19; también, *vid.* AA.VV., Ética de las profesiones jurídicas, (dos Vol.), Murcia, Universidad Católica de Murcia- AEDOS, 2003.

25 Pueden diferenciarse tres grandes códigos internacionales para la abogacía: 1) el Código de Conducta del Consejo de los Colegios de Abogados de Europa; 2) las *Model Rules de Professional Responsibility* publicadas por la *American Bar Association*, que son leyes modelo y que no rigen directamente, pero que los Estados copian o adaptan a cada uno de los Estados; y, finalmente, 3) el Internacional *Code of Ethics de la internacional Bar Association* (IBA). Estos códigos tienen como principal finalidad establecer unas normas básicas de actuación, para fijar las garantías mínimas exigibles en la práctica de la Abogacía, teniendo principalmente en cuenta –como en el Código de Deontología de la Abogacía Europea- el ejercicio profesional transfronterizo.

26 En 1982, se aprobó, mediante el RD 2090/1982, de 24 de julio, el Estatuto General de la Abogacía (EGA). Posteriormente, en 1987, se promulgaron la denominadas Normas Deontológicas de la Abogacía Española, aprobándose en 1995, el primer Código Deontológico de la Abogacía Española, en el año 2000, un segundo Código Deontológico de la Abogacía española y, en 2002, el actual *Código Deontológico* de la Abogacía Española (CDAE) (adaptado al Estatuto General de la Abogacía Española, aprobado por Real Decreto 658/2001, de 22 de junio. Disponible en: < http://www.abogacia.es/wp-content/uploads/2012/06/codigo_deontologico1.pdf>).

nas situaciones resulta más complejo analizar el grado de independencia. Un abogado de empresa, ¿se debe a las instrucciones de su empresa ciegamente?

b. Secreto profesional, en virtud del cual un abogado no puede revelar lo que le ha dicho el cliente. Los abogados tienen más obligaciones éticas que los profesionales de otras profesiones liberales, porque participan de una función pública como es la administración de justicia. Y esa administración de justicia implica una serie de privilegios, como el secreto profesional (ningún juez puede obligar a un abogado a declarar lo que le ha confesado el cliente). A cambio de esos privilegios tienen unos deberes que no acompañan a otros profesionales.

c. Conflicto de interés, que se producen entre los intereses del despacho, de clientes y otros actores implicados.

1.2. La deontología de la profesión del mediador

La mediación es una forma de gestión positiva de los conflictos, que se rige por principios propios, y se hace efectiva a través de un procedimiento no formal, combinando técnicas multidisciplinares, por un profesional con formación específica en este campo, con la finalidad de alcanzar acuerdos duraderos[27]. El mediador no decide, no impone la solución. Es un facilitador que ayuda a las partes enfrentadas a comunicarse y a gestionar positivamente su conflicto.

Junto al estatuto legal aplicable al ejercicio de la profesión también se hace necesario un código deontológico (de conducta, de buenas prácticas, etc.), que establezca los compromisos éticos y morales para el correcto y adecuado desempeño de la praxis de la profesión[28]. Hace casi tres décadas, la Recomen-

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27 En Brasil, *vid*. las publicaciones y trabajos sobre mediación de Humberto Dalla Bernardina Pinho, entre los que cabe destacar: "Mediação: a redescoberta de um velho aliado na solução de conflitos" en *Acesso à Justiça: efetividade do processo*, organizado por Geraldo Prado, Rio de Janeiro, Lumen Juris, 2005, pp. 105-124. (Disponible en <http://www.humbertodalla.pro.br/arquivos/mediacao_161005.pdf>; también, "Mediação no Brasil: uma forma de negociar baseada na abordagem de ganhos mútuos" en co-autoria com Yann Duzert, *Barreiras para Resolução de Conflitos*, ARROW J. Kenneth et alt. [orgs.], São Paulo, Saraiva, 2001, pp. 327-349.

28 Entre la escasísima bibliografía sobre la ética del mediador, destacamos: MERINO ORTIZ, C., "La calidad de la mediación", en *Practicum. Mediación 2014*. Edición de E. Vázquez de Castro. Coordinada por C. Fernández Canales Madrid, Thomson Reuters Aranzadi, pp.366-368.

dación (86) 12 del Consejo de Ministros a los Estados miembros del Consejo de Europa respecto a medidas para prevenir y reducir la carga de trabajo excesiva en los Tribunales, recomendaba promover la solución amistosa de los conflictos[29]. La utilización de las técnicas de resolución de conflictos alternativas al Poder Judicial –conocidas como ADR, terminología que deriva de su denominación en inglés, *Alternative Dispute Resolution*- se ha ido extendiendo cada vez más[30].

Los mediadores deben poseer cualidades que les capaciten para administrar un proceso de mediación. La formación de origen del mediador es diversa pues puede provenir de diferentes áreas aunque en general suelen ser las relacionadas con las ciencias humanas. Además, es necesario que el mediador domine nociones básicas de esos diferentes campos de conocimiento para que pueda comprender las diversas situaciones que se presentan en el conflicto, es decir, todo lo que está en juego, tanto desde el punto de vista jurídico, económico, psicológico y social como desde el punto de vista religioso, emocional, cultural y otros. Teniendo estas nociones, el mediador deberá saber reconocer sus propios límites, buscando profesionales especializados para hacer un trabajo interdisciplinar si fuera el caso –en co-mediación- o derivando a las partes a otros profesionales –psicoterapuetas-, e incluso, interrumpir el proceso de mediación si se considerara necesario, siempre por causas justificadas. El mediador debe ser esa tercera persona que coordina el proceso de mediación, quien dicta las reglas del juego a la hora de realizar la mediación. Junto a esa formación de origen se debe sumar una formación específica de los mediadores, mediante los correspondientes cursos[31].

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29 Recomendación (86) 12 del Consejo de Ministros a los Estados miembros del Consejo de Europa respecto a medidas para prevenir y reducir la carga de trabajo excesiva en los Tribunales (Adoptada por el Consejo de Ministros de 16 de septiembre de 1986, durante la 39ª reunión de los Delegados de los Ministros).

30 La evolución de las ADR ha dado lugar a un desarrollo progresivo de su propia concepción y, de formas "alternativas" de resolución de conflictos hemos optado por utilizar la de formas "complementarias" hasta llegar en la actualidad a preferir la terminología de "gestión positiva del conflicto", que representa mejor el espíritu de estas ADR.

31 A esa específica formación de los mediadores ya hacía referencia el primer Código de conducta europeo para los mediadores, de 2004. En su art-1.1. establece que los mediadores serán competentes y tendrán que conocer el proceso de la mediación, para lo cual será necesario que tengan la formación apropiada y actualicen constantemente sus competencias teóricas y prácticas, teniendo en cuenta las normas o sistemas vigentes de acreditación; Esta misma exigencia se contempla en la Directiva 2008/52 CE. En su fun-

Los mediadores suelen ejercer otras profesiones[32], por lo que también quedan sometidos a sus respectivos códigos éticos, procurando que en su interpretación no se entre en competencia con la deontología de la profesión de mediador. Por ello, se podrá alegar que los mediadores también tienen obligaciones con respecto a otros códigos éticos relacionados con su formación universitaria de origen. Pero la interdisciplinariedad que caracteriza al profesional mediador no debe ser obstáculo para configurar un código ético del mediador[33].

2. Un marco ético para la mediación

El estatuto del mediador podría definirse como el conjunto de derechos y obligaciones de carácter ético y jurídico que configuran de modo particular una profesión. El estatuto del mediador, además de definir jurídicamente su posición (no como privilegio injustificado, sino como forma de protección del profesional y de la profesión) determina la que podemos llamar "lex artis", un modelo o parámetro con el cual han de ser contrastadas las actuaciones profesionales para poder determinar si son o no adecuadas y fijar, por tanto, si de ellas se genera o no responsabilidad (ética o jurídica-).

Muchas de las obligaciones pueden tener a la vez una naturaleza ética y jurídica, es decir, que su contenido es idéntico en ambos casos y se recoge

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damento jurídico 16 establece que los Estados miembros tienen que promover, por los medios que consideren adecuados, la formación de mediadores y el establecimiento de mecanismos eficaces de control de calidad relativos a la prestación de servicios de mediación.

32 La *Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles*, en su artículo 11.2, dice:"El mediador deberá estar en posesión de título oficial universitario o de formación profesional superior y contar con formación específica para ejercer la mediación, que se adquirirá mediante la realización de uno o varios cursos específicos impartidos por instituciones debidamente acreditadas, que tendrán validez para el ejercicio de la actividad mediadora en cualquier parte del territorio nacional."

33 Existen algunas obras que se ocupan de la ética de las profesiones jurídicas pero ninguna de ellas menciona la ética del profesional mediador (*Vid*. GRANDE YAÑEZ, M.; ALMOGUERA PÉREZ, J., y JIMÉNEZ GARCÍA, J., Ética de las profesiones jurídicas, Bilbao: Desclée de Brouwer, 2006; también, FERNÁNDEZ FERNÁNDEZ, J.L. y HORTAL ALONSO, A. (compiladores), Ética de las profesiones jurídicas, Madrid, Universidad Pontificia de Comillas, 2002; por último, THOMPSON, D. F., *La ética política y el ejercicio de cargos públicos,* Barcelona, Gedisa, 1998).

tanto en los códigos éticos como en las disposiciones legales. Por tanto, el incumplimiento de esas obligaciones llevará, en su caso, una responsabilidad que juega en ese doble plano: ético (exigible por el colegio profesional correspondiente o institución que cumpla sus funciones) y jurídico (eventualmente ante los tribunales).

Los artículos 11 a 15 de la *Ley 5/2012, de 6 de julio, de Mediación en asuntos civiles y mercantiles* en España regulan el estatuto del mediador[34]. Esta regulación se refiere únicamente a las condiciones para ejercer como mediador (art. 11), a la calidad y autorregulación de la mediación (art. 12), a la actuación del mediador (art. 13), y a la responsabilidad de los mediadores (art. 15). Estas especificaciones son importantes. Sin embargo, se esperaba una mayor concreción por parte del Reglamento de desarrollo de la Ley[35]. Sin embargo, no ha sido así[36]. Transcurridos unos meses desde que se promulgó el texto del Reglamento, *Real Decreto 980, de 13 de diciembre, por el que se desarrollan determinados aspectos de la Ley 5/2012, de 6 de julio, de Mediación en asuntos civiles y mercantiles,* las sombras y dudas que deja el texto son cada vez mayores. El Real Decreto 980 se ha limitado a regular cuatro aspectos: la formación del mediador[37], su publicidad a través de un Registro de-

34 Los deberes a los que alude la *Ley 5/2012 de mediación* son derechos y deberes que se refieren al mediador-persona física, sin perjuicio de que, si se ejerce como equipo o institución, se deban cumplir, además, otros que la Ley imponga.

35 Pascual Ortuño subraya que la Ley 5/2012 es una norma de mínimos en cuanto se ha optado por dejar sin definir cuestiones como la formación, la habilitación, el control de la práctica profesional y los recursos públicos. Ello lo atribuye a la flexibilidad que caracteriza a la mediación. Sin embargo, al mismo tiempo, ha ido más lejos de lo que estrictamente requería la Directiva (CE) 52/2008, puesto que ésta circunscribía su obligatoriedad a la regulación de la mediación en conflictos transfronterizos (ORTUÑO, P., "Apuntes críticos sobre la ley 5/2012, de 6 de julio, de mediación civil y mercantil" en L. García Villaluenga y E. Vázquez de Castro (Directores), *Anuario de Mediación y Solución de Conflictos*, Madrid, Instituto Complutense de Mediación y Solución de conflictos, Reus, 2013, p.48).

36 El día 13 de Diciembre de 2013 el Consejo de Ministros aprobó el *Real Decreto 980, de 13 de diciembre, por el que se desarrollan determinados aspectos de la Ley 5/2012, de 6 de julio, de Mediación en asuntos civiles y mercantiles*. Se centra en cuatro aspectos con los que se pretende configurar un modelo en el que figura el mediador, como responsable de dirigir un procedimiento cuyo propósito es facilitar el consenso en situaciones en conflicto es una pieza esencial de ese instrumento complementario de la Administración de Justicia, como lo ha calificado el propio Ministerio de Justicia.

37 En cuanto a la formación del mediador, se limita a establecer la duración mínima

pendiente del Ministerio de Justicia, el aseguramiento de su responsabilidad y la promoción de un procedimiento simplificado de mediación por medios electrónicos para la reclamación de cantidades inferiores a seiscientos euros.

Desde el punto de vista ético, para enumerar los aspectos que integran el "deber ser" del mediador, a falta de un código ético común[38], se puede recurrir a los principios recogidos en la Recomendación R (98) 1 del Comité de Ministros del Consejo de Europa, adoptada el 21 de enero de 1998 que, a pesar de que se refieran a un tipo concreto de mediación, como es la familiar, sin embargo han servido de base e inspiración para la elaboración de muchos otros códigos:

I.- El mediador es imparcial en sus relaciones con las partes;

II.- El mediador es neutral respecto al resultado del proceso de mediación;

III- El mediador respeta los puntos de vista de las partes y preserva su legalidad en la negociación;

IV.- El mediador no tiene poder para imponer una solución a las partes;

V.- Las condiciones en las cuales se desarrolla la mediación familiar deben garantizar el respeto a la vida privada;

VI.- Las discusiones que tienen lugar durante la mediación son confidenciales y no pueden ser posteriormente utilizadas, salvo acuerdo de las partes o en el caso de estar permitido por el derecho nacional;

VII.- El mediador debe, en los casos adecuados, informar a las partes de la posibilidad que tienen de recurrir al consejo conyugal o a otras formas de consejo como modos de regular los problemas conyugales o familiares;

VIII.- El mediador debe tener especialmente en cuenta el bienestar y el interés superior del niño debiendo alentar a los padres a concentrarse sobre las necesidades del menor y debiendo apelar a la responsabilidad básica de los padres en el bienestar de sus hijos y la necesidad que tienen de informarles y consultarles;

IX.- El mediador debe poner una atención particular a la cuestión de saber si ha tenido lugar entre las partes o es susceptible de producirse en el futuro, a los efectos que de puede tener sobre la situación de las partes en la negociación, y a examinar si, en estas circunstancias, el proceso de mediación es adecuado;

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de los cursos de formación, que será de cien horas, con una parte teórica y otra práctica, que supondrá la menos un 35% del total. También incluirá los requisitos mínimos para asegurar la actualización del conocimiento.

38 Hace tiempo que se viene reivindicando la conveniencia de un código ético o de conducta, acorde a la actividad profesional del mediador (*Vid.* BELLOSO MARTÍN, N., "Una propuesta de código de ética de los mediadores", en *Cuadernos Electrónicos de Filosofía del Derecho,* nº15, 2007, pp. 1-10 <http://www.uv.es/CEFD>.

X.- El mediador puede facilitar informaciones jurídicas, pero no debe dar consejo jurídico. Debe, en los casos apropiados, informar a las partes de la posibilidad que tienen de consultar a un abogado u otro profesional competente.

La mayor parte de los códigos y estándares de ética establecen que los mediadores tienen obligaciones éticas hacia las partes, hacia la profesión y hacia sí mismos. Deben ser honestos y sin prejuicios, actuar en buena fe, ser diligentes, y no buscar el avance de sus propios intereses al costo de los intereses de las partes.

2.1. Las principales responsabilidades de los mediadores

Cabe destacar las siguientes obligaciones de los mediadores:

1. Obligación de permanecer imparcial e independencia de favoritismo o preferencia hacía alguna de las partes, un compromiso de servir a todas por igual.
2. Obtener el consentimiento informado de las partes, para garantizar que ellas entiendan la naturaleza del proceso, los procedimientos, la persona del mediador y la relación de las partes con el mismo.
3. Deber de confidencialidad y un compromiso de mantener secreto de lo oído.
4. Evitar conflictos de interés, o la mera apariencia de ellos.
5. Implementar el procedimiento en el tiempo debido.
6. Asistir a las partes en un procedimiento que puedan percibir como propio y un acuerdo que van a sostener como propio.
7. En casos especiales, se espera que el mediador sepa considerar y poner a consideración de las partes los intereses de partes que no están representadas en la mesa de mediación, pero que deben ser incluidas.
8. También es importante que el mediador acepte solamente aquellos casos para los cuales esté preparado, en términos de conocer tanto el procedimiento como la sustancia del caso; que se preocupe por aumentar su capacidad profesional, mediante cursos periódicos de formación.
9. Se requiere de los mediadores que planteen, al principio del procedimiento, cuál es la base para su compensación u honorarios. No se debe recibir compensaciones monetarias por la derivación de clientes a la mediación. Cuando hay varios mediadores involucrados, deben mantenerse al tanto con la información necesaria y tratarse con cordialidad. Se puede hacer alguna

publicidad de los servicios de mediación ofrecidos, pero no se puede prometer ningún resultado a ninguna de las partes.

10. El mediador debe tener la suficiente fuerza de voluntad como para contener la necesidad de atribuirse el mérito del acuerdo logrado por las partes. Una buena resolución del conflicto nunca es el trabajo de una sola persona.

Los grupos de trabajo de los denominados Puntos Neutros Promoción de la Mediación –PNPM-[39] han realizado un estudio cuidadoso sobre la mediación en España, al hilo del primer año de vigencia de la Ley 5/2012. El resultado se presentó en tres documentos finales[40]: 1) Protocolos de derivación a la mediación; 2) Calidad y buenas prácticas en la mediación, y 3) Acciones de promoción y fomento de la mediación. Seguidamente, vamos a destacar algunas de las recomendaciones que llevaron a cabo. El primer grupo de trabajo se centra en la materia de "Protocolos de derivación a la mediación" y pretende ofrecer pautas para la indicación de esta metodología en los diversos estadios en que la controversia se manifiesta antes de acudir a Tribunales o una vez que se ha judicializado. Asimismo, pone de manifiesto la profunda interrelación entre la profesión de abogado y/o operador jurídico y la de mediador[41]:

[...] 2. Se recomienda que las partes sean asesoradas por los abogados de parte durante el proceso de mediación, en el momento de su redacción y también con carácter previo a la firma de los acuerdos.

[...] 4. Sería deseable que se promoviera la visibilidad de los abogados que recomienden mediación como valor añadido y de calidad en el ejercicio de su actividad profesional.

[...] 6. Se recomienda que cuando el deudor se vea incapaz de cumplir con sus obligaciones acuda a los servicios de mediación, de igual manera que los abogados consideren

39 Las Instituciones que, desde su creación en marzo de 2012, participan e impulsan la iniciativa de los Puntos Neutros para la Promoción de la Mediación en toda España son, principalmente: GEMME – España; Consejo General del Poder Judicial; Consejo General de la Abogacía Española; Consejo General del Notariado; Consejo General de Procuradores; Consejo Superior de Cámaras de Comercio; Ilustres Colegios de Abogados, Procuradores y Notarios de Madrid.

40 Estos Protocolos se presentaron en el III Simposio "Mediación y Tribunales. *Balance de un año de vigencia de la Ley 15/2012*", ya citado. Los documentos finales íntegros, así como los trabajos complementarios realizados por los diferentes grupos que han trabajado a nivel de cada una de las Comunidades Autónomas están disponibles en*: <www. mediacionesjusticia.com>*

41 La coordinación estatal de los grupos del PNPM sobre esta materia ha sido realizada por Montse Purtí. Sin embargo, han trabajado en los documentos más de cien profesionales de los diversos ámbitos.

como mejor oportunidad acudir a un servicio mediación y, si se ha iniciado el proceso judicial, que sea el Juez quien derive a mediación o a un servicio de información de la mediación.

[...] 8. La práctica totalidad de las demandas judiciales relativas a propiedad industrial van acompañadas de un requerimiento previo, debería recomendarse a los abogados en este ámbito, sustituir dicho requerimiento con la derivación a mediación.

[...] 10. Se debería introducir un formulario específico para la derivación a mediación en prácticamente todas las resoluciones judiciales para que las partes sepan que en cualquier momento del proceso pueden acudir a esta alternativa y que la derivación no supondría un retraso en el procedimiento.

El segundo grupo de trabajo, cuya finalidad era ofrecer un código de buenas prácticas para la mediación, "Calidad y buenas prácticas de la mediación"[42], en relación a los principios y valores fundamentales para la práctica del mediador, destaca los siguientes:

1. Voluntariedad y Libertad. La mediación es un proceso voluntario y colaborativo de resolución de conflictos.

2. Carácter personalísimo. Como criterio general, las partes y el mediador asistirán personalmente a las diferentes sesiones que se lleven a cabo durante el proceso de mediación.

3. Imparcialidad y Equidad. El mediador será imparcial. Ello implica que prestará la ayuda a ambas partes en la resolución del conflicto y al proceso de toma de decisiones, dirigiendo las sesiones de mediación sin tomar partido por ninguna de las partes.

4. *Neutralidad.* Durante el proceso de mediación, el mediador respetará

42 La coordinación estatal de los grupos del PNPM sobre esta materia ha sido realizada por Thelma Butts. Este documento está destinado a ser una herramienta útil para la práctica de la mediación que se derive de iniciativas intrajudiciales de resolución de conflictos. Se trata de un código de conducta y, a través de la adhesión al mismo, a sus principios y valores, el mediador obtendrá la credibilidad, autoridad, confianza y prestigio en una mediación de calidad. Este Código abarca dos Secciones: La I Sección comprende las buenas prácticas del mediador, tanto en relación propiamente con el mediador (voluntariedad y libertad, carácter personalísimo, imparcialidad y equidad, neutralidad, confidencialidad, flexibilidad, inmediatez y celeridad, buena fe, independencia, conflicto de interés, transparencia, equilibrio e igualdad entre las partes), como a la Formación y la Acreditación. La Sección II se refiere a la práctica en relación con las partes y el proceso (Principios Fundamentales para la práctica de la mediación, Responsabilidades y obligaciones del mediador respecto a las partes, al proceso, de las instituciones de mediación) (<*www.mediacionesjusticia.com*>). <http://mediacionesjusticia.us7.list-manage.com/unsubscribe?u=ef4ed58e60f365855104fb09a&id=097e8ac559&e=0b9fc77dbd&c=4b9795a0bc>

las posiciones de las partes, así como las soluciones que ellas planteen sin imponer criterios propios en la toma de decisiones. El mediador no tendrá relación con las partes, el asunto en mediación, o el resultado, que comprometa o ponga en duda los principios de la mediación.

5. Confidencialidad. El mediador tiene el derecho y el deber de guardar confidencialidad de todos los hechos y noticias que conozca por razón de su actuación profesional en el proceso de mediación[43].

6. Flexibilidad. El mediador dirigirá las sesiones de mediación de forma flexible, atendiendo a las necesidades particulares del caso a resolver.

7. Inmediatez y Celeridad. El mediador programará de manera rápida la mediación, o informará a las partes de la imposibilidad de atenderles de manera inmediata. El mediador desarrollará el proceso en aras que las partes resuelvan el conflicto planteado en el menor tiempo posible.

8. Buena Fe. Tanto el mediador como las partes que se someten a este

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43 La confidencialidad alcanza a toda la información obtenida en el proceso y a la información relativa al proceso mismo. El deber de confidencialidad exige del mediador:

• La no revelación de hechos, datos, contenido de las sesiones, que haya obtenido por razón del ejercicio de la mediación, así como los posibles acuerdos que se alcancen durante el proceso. Dicha obligación subsistirá incluso tras el cese de sus servicios.

• Exigir el deber de confidencialidad a cualquier persona que participe o colabore con él profesionalmente.

• El deber de informar a las partes que no podrán proponerlo como testigo o perito en procedimiento judicial. En el caso en el que la mediación se haya recomendado u ordenado por un magistrado o autoridad competente, la responsabilidad de informar si se ha alcanzado un acuerdo, y el contenido del mismo, reside en las partes o sus letrados, no en el mediador.

• La necesidad de obtención del consentimiento previo y explícito de las partes en el supuesto de grabación de las sesiones de mediación.

• La necesidad de obtener la autorización previa y explícita de las partes para la presencia de terceras personas durante el desarrollo del proceso. En caso de intervención de terceros a éstos les será de aplicación el presente código deontológico.

- El mediador queda exento de la obligación de confidencialidad por la presencia de un interés superior como en los siguientes casos:

• Cuando conlleve una amenaza para la vida o la integridad física o psíquica de una persona.

• En aquellos casos contemplados por la ley, como es el caso de la obligación de denunciar determinadas situaciones que constituyan a su entender posible delito.

Información de mediación se puede utilizar con fines estadísticos, de formación y de investigación, si las partes así lo autorizan, y sin revelación de datos personales.

procedimiento, deben actuar conforme a las exigencias de buena fe, principio general que impone el deber de obrar correctamente, con honradez y la diligencia debida tendente a conseguir el objetivo de alcanzar una solución al conflicto planteado.

9. Independencia. El mediador mantendrá la independencia durante el desarrollo del procedimiento y no permitirá influencia o presión de ninguna de las partes o de terceros.

10. Conflicto de interés. El mediador se abstendrá de intervenir cuando concurra conflicto de interés con cualquiera de las partes, o en relación con el asunto de la mediación. Se presupone conflicto de interés si se puede generar duda de la actuación del mediador en relación con el asunto, o si se da la existencia de relación personal o profesional con alguna de las partes que pudiera afectar al proceso de mediación, así como la existencia de lucro o provecho económico o de otro tipo para el mediador, de forma directa o indirecta, más allá de los honorarios derivados únicamente de su actuación como mediador.

11. Transparencia. El mediador debe informar a las partes sobre los términos del proceso de mediación así como su desarrollo y consecuencias de los acuerdos alcanzados

12. Equilibrio e Igualdad entre las partes. El mediador promoverá el equilibrio y el principio de igualdad de oportunidades en la participación de las partes en la mediación.

En la sección II de ese protocolo, "Contenido relativo a las partes y al proceso" contempla cuatro apartados. El I apartado es el de los "Principios fundamentales para la práctica de la mediación":

1. La mediación es una actividad con responsabilidades y deberes éticos. Quienes emprenden la práctica de la mediación como actividad profesional deben tener en cuenta el derecho a la autodeterminación de las partes que se encuentran en conflicto.

2. Tanto el mediador como las partes deben actuar conforme a la buena fe.

3. La misión del mediador será ayudar y facilitar a las partes en conflicto a la obtención por sí mismas de un acuerdo satisfactorio para ambas. El mediador, en su actuación, debe estar sujeto a unas directrices encaminadas a garantizar su integridad, profesionalidad, neutralidad e imparcialidad respecto a las partes.

El II apartado es el de las "Responsabilidades y obligaciones del mediador respecto a las partes":

1. La elección del mediador presupone una relación de confianza personalísima, solamente transferible por un motivo justo y con el consentimiento expreso de los mediados. El compromiso adquirido, desde el encargo de mediación, hacia las partes, implica que los mediadores tengan una importante responsabilidad con respecto a ellas, siempre entendido desde la libre voluntad del mediador de aceptar la mediación.

2. La aceptación de la mediación obliga a los mediadores a cumplir fielmente el encargo, incurriendo, si no lo hicieren, en responsabilidad profesional.

3. Los mediadores informarán debidamente a las partes de los gastos de la mediación antes de empezar. En ningún caso los honorarios quedarán condicionados al resultado del proceso.

4. En las entrevistas preliminares, el mediador debe explicar el desarrollo del proceso y de sus diversas fases, y el alcance y las consecuencias del procedimiento a fin de obtener el consentimiento informado de las mismas.

5. El mediador utilizará la prudencia y la veracidad, absteniéndose de promesas y garantías con respecto a los resultados.

6. Es responsabilidad del mediador asistir a las partes para que alcancen un acuerdo siendo el conductor del diálogo.

7. El mediador podrá entrevistarse separadamente con cada parte cuando este lo valore oportuno.

8. En ningún momento el mediador debe ejercer coacción sobre las partes para que se llegue a algún acuerdo y no tomará decisiones en su nombre. En ningún caso el mediador debe forzar a las partes a aceptar un acuerdo o a tomar decisiones.

9. El mediador velará para que los acuerdos alcanzados en la mediación se realicen de forma voluntaria por las partes en conflicto.

El III apartado establece las "Responsabilidades y obligaciones del mediador respecto al proceso de mediación":

1. El mediador es el garante del desarrollo del proceso y ello conlleva responsabilidades específicas derivadas de las obligaciones que le vinculan en su actuación.

2. El mediador velará para que las partes en el proceso no utilicen la coacción, el insulto, la presión o se encuentren incapacitados para la toma de decisiones.

3. Siendo la mediación un proceso participativo, el mediador debe procurar que las partes en conflicto se integren en igualdad al proceso.

4. La información que recibe un mediador durante las sesiones conjuntas o privadas es confidencial. La información que una parte revele al mediador en una sesión privada (*caucus*) no podrá ser compartida con la otra parte si no existe expreso consentimiento de la primera. El mediador velará por la confidencialidad de los procedimientos, incluso en lo concerniente al cuidado tomado por el equipo técnico en el manejo y archivo de los datos.

5. El mediador está obligado a guardar secreto profesional sobre los temas en los que intervenga. De igual forma el mediador no podrá utilizar en beneficio propio o en el de terceros, la información que pudiera obtener en el procedimiento de mediación en el que intervenga.

6. El mediador se abstendrá de mediar cuando pudiera tener un interés directo o indirecto en el proceso o cuando existiere vínculo de amistad o parentesco con alguna de las partes.

7. El mediador velará por la calidad del acuerdo. Ello implica que este sea consensuado e informado y que las partes estén lo suficientemente asesoradas.

8. Cuando las diferencias entre las partes se manifiesten como insalvables, el mediador deberá considerar la posibilidad de finalizar el proceso de mediación e informar a las partes.

9. El procedimiento de mediación derivada de juzgado concluye con el acta final. En el caso de acuerdo, el documento puede reflejar los acuerdos, o puede simplemente decir que se ha llegado a acuerdo y que este va anexo al acta final, dependiendo de la voluntad de las partes. El acta final debe respetar el principio de confidencialidad y no divulgar nada sin el expreso consentimiento de las partes.

10. Los acuerdos han de ser los deseados por las partes, sin ser ilegales.

El IV apartado establece las "Responsabilidades y obligaciones de las instituciones de mediación", sobre el que no vamos a extendernos[44]. En el *Real Decreto 980*, de desarrollo de la Ley 5/2012 de Mediación, entre otras cuestiones, se contempla que se autorice al Ministro de Justicia a diseñar las medidas oportunas para que se establezca, bien normativamente o bien en los Códigos de Conducta de los Colegios profesionales de Abogados, la obligación de informar a los clientes de la posibilidad de acudir a una mediación, sus características y coste aproximado.

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44 Puede consultarse en: <*www.mediacionesjusticia.com*>. <http://mediacionesjusticia.us7.list-manage.com/unsubscribe?u=ef4ed58e60f365855104fb09a&id=097e8ac559&e=0b9fc77dbd&c=4b9795a0bc>.

Es imposible tener reglas para todos los casos y hay veces en que inevitablemente surge alguna tensión. Hay dos criterios que se oponen de manera que, si uno es respetado, el otro debe ceder. Si un mediador se atiene a la confidencialidad más estricta, entonces no podría proteger a partes no representadas de algunos riesgos. Estas dudas tienen que ser resueltas privadamente aplicando el buen juicio. Seguidamente, vamos a examinar, más detenidamente, algunos deberes éticos principales.

2.2.1. Equilibrio de poderes

Todas las partes en la disputa deben tener un mínimo de poder, necesario como para no ser ignoradas o eliminadas por la parte o partes más poderosas. La resolución de disputas a través de una mediación de buena fe solo puede llevarse a cabo si existe un grado proporcional de poder. Una disputa que sea adecuada para mediación tiene que tener las siguientes características[45]:

1. Que sea esencialmente una disputa privada entre partes de poder relativamente parejo;
2. Que haya un marco legal apropiado que sea explicado a las partes;
3. Que todas las partes necesarias estén presentes, con voluntad de entenderse con las otras de buena fe y capaces de participar efectivamente en el proceso.

2.2.2. La neutralidad[46]

La Recomendación Nº R (98) 1 dedica el punto III a los procesos de mediación, adoptando como eje cardinal de los mismos la figura del mediador y destacando, a través de nueve puntos, los principios rectores de su actuación[47]. Libertad de las partes en conflicto y del mediador para participar

45 FEMENIA, N., "Un marco ético para la mediación", <http://www.mediate.com/articles/un_marco_etico.cfm.>.

46 *Vid*. BELLOSO MARTÍN, N., "La Formación en mediación: algunas perplejidades e inquietudes de los alumnos que se forman en los Cursos de Mediación". En L. García Villaluenga, J. Tomillo Urbina, E. Vázquez de Castro (CoDirectores), *Mediación, Arbitraje y resolución extrajudicial de conflictos en el siglo XXI*), Madrid, Universidad Complutense-CRV-Cátedra Euroamericana-GC-, 2010, T.I, pp. 121-147.

47 Así, la R (98) vincula la imparcialidad del mediador a su relación con las partes y a la obligación de preservar la igualdad de éstas en la negociación, y circunscribe la neutralidad a la "resolución del proceso de mediación", manifestando que "el mediador no tiene poder para imponer una solución a las partes". Llama la atención que en otros instrumentos internacionales, como es el *Código de Conducta Europeo para los Mediadores*, de 2004, no se contemple expresamente el principio de neutralidad. Es más, parece quedar

en los procedimientos de mediación, igualdad de las partes, imparcialidad, neutralidad, principio de legalidad, deber de no imposición, confidencialidad, protección del bienestar e interés del menor y personas con discapacidad, competencia y ética del mediador, buena fe de las partes en conflicto y del mediador, sencillez y rapidez del procedimiento y otros que, junto con los deberes del mediador familiar en el ejercicio de su profesión, perfilan una actuación reglada de la mediación.

La neutralidad se perfila como un deber del mediador. La *Ley 5/2012 de Mediación en asuntos civiles y mercantiles*, en el artículo 8, establece el principio de neutralidad:

"*Las actuaciones de mediación se desarrollarán de forma que permitan a las partes en conflicto alcanzar por sí mismas un acuerdo de mediación, actuando el mediador de acuerdo con lo dispuesto en el artículo 13*".

El acuerdo obtenido a través del proceso de mediación, mal llamado "acuerdo de mediación" en el citado artículo 8, lo han de "alcanzar las partes por sí mismas", teniendo que desarrollar el mediador, por mandato legal, "una conducta activa tendente a lograr el acercamiento de las partes, con respeto a los principios recogidos en esta ley" (ex. Art.13.2). Sin embargo, como subraya García Villaluenga, esto no debe llevar a suponer que la Ley atribuya al mediador funciones de "promotor" de acuerdos entre las partes, en una línea más próxima a los modelos anglosajones que no tienen antecedentes en nuestro país[48].

La imparcialidad ayuda a complementar la neutralidad. Es decir, la neutralidad se presenta directamente relacionada con la actitud del mediador frente al posible resultado del procedimiento de mediación. Por su parte, la imparcialidad se refiere a la actitud del mediador con respecto a las partes que participan en el procedimiento de mediación. Un mediador debe permanecer imparcial con respecto a todas las partes. Esto significa no tener favoritismo o tendencia, ya sea por palabras o hechos, hacia un lado y un compromiso de

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cuestionado al recoger, en su apartado 3.2 relativo a "la imparcialidad del procedimiento", la obligación del mediador de poner fin a la mediación "cuando considere que es improbable que la continuación de la mediación dé lugar a un acuerdo" (GARCÍA VILLALUENGA, L., "Artículo 8. Neutralidad", en L. García Villaluenga y C. Rogel Vide (Directores), *Mediación en asuntos civiles y mercantiles. Comentarios a la Ley 5/2012*. Madrid, Reus, 2012, p. 121).

48 GARCÍA VILLALUENGA, L., "Artículo 8. Neutralidad", cit.

servir a todas las partes y al proceso, en vez de servir los intereses de una sola de las partes.

Uno de los requisitos que más preocupan a los alumnos que están formándose en mediación es el de cómo conciliar imparcialidad[49] y neutralidad[50] con la posibilidad de hacer sugerencias a las partes mediadas, de ofrecerles un abanico de posibles actuaciones a llevar a cabo, principalmente cunado las partes se bloquean o no tienen iniciativa. Es decir, cómo hacer para que el mediador no se limite a ser una figura rígida, pasiva, por ese temor a perder la imparcialidad y neutralidad pero sin que esto constituya un obstáculo para llevar a cabo su papel de facilitador. Son las partes las que deciden en última instancia la solución, si bien es posible distinguir distintos grados de intervención del tercero o mediador, llegando a alcanzar en ciertos ámbitos un grado muy próximo a la función de decisión, pero sin que pueda llegar a serlo[51].

2.2.3. El derecho individual a la autodeterminación

Se expresa diariamente a través de sostener la posibilidad de elegir entre varias opciones, aquella que mejor represente los intereses y deseos del individuo. Para lograr esto, se asume que la persona hará una búsqueda inteligente y concienzuda de los costos y beneficios de cada opción. Constituye una proyección del derecho de las personas a escoger sus propias opciones. Para que una decisión sea informada deben recibir previamente toda la infor-

49 El apartado III-I de la citada Recomendación establece que "el mediador debe ser *imparcial* en su relaciones con las partes". Por ejemplo, no podrá intervenir como persona mediadora familiar aquel que haya ejercicio profesionalmente contra alguna de las partes y se considera como hecho constitutivo de infracción el incumplimiento del deber de imparcialidad.

50 En el apartado III-II de la Recomendación se exige que el mediador sea *neutral*. Es decir, debe ayudar a conseguir acuerdos sin imponer ni tomar parte por una solución o medida concreta, sin imponer su propia jerarquía de valores o su ideología.

El apartado III-IV de la Recomendación impone al mediador el deber de abstenerse de imponer una decisión a las partes. No debe confundirse este deber con el de neutralidad. El *deber de no-imposición* trata de salvaguardar la libertad de las partes de manera que, a la hora de adoptar un determinado acuerdo, lo hagan haciendo uso de su autonomía de la voluntad.

51 Habría también que diferenciar la mediación de la conciliación (judicial o extrajudicial), evitar la confusión entre mediación y arbitraje informal, y con figuras de otros terceros (el mediador no es un corredor, no es un juez, no es un árbitro, no es un amigable componedor).

mación necesaria. De aquí surge el derecho a la información pertinente para que las partes que se han sometido a un procedimiento de mediación puedan hacer las propias elecciones.

Siendo el mismo individuo quien pagará los costos de una decisión equivocada, tiene derecho desarrollar un proceso personal de decisión independiente hasta las últimas consecuencias. Se asume que el individuo, recibiendo la información adecuada, está en condiciones de hacer sus propias elecciones sin necesidad de tutelaje. La mediación respeta escrupulosamente la autodeterminación y es congruente con los valores sociales. Se supone que, así como la disputa es de las partes, también la solución pertenece a las partes. La decisión de mantener parte de la información reservada, o la más extrema de abandonar el proceso se incardina en el marco de las libertades del individuo.

Lo que acabamos de afirmar no significa sin embargo que "cualquier acuerdo al que lleguen los ciudadanos es perfectamente válido". Porque no todo es posible[52]. Primero, porque los acuerdos que adopten las partes no pueden vulnerar, en ningún caso, la legalidad. Y segundo, porque además, el mediador debería de incentivar a que las partes adopten acuerdos que sean justos y no sólo legales. El logro de soluciones justas se debe sustentar en una concepción prudencial de la justicia. Ello permite diferenciar la justicia valor como algo distinto de la justicia administración, de la justicia derecho subjetivo, de la justicia principio y de la justicia virtud del operador jurídico. El mediador tiene que saber que su función radica en que las partes lleguen a un acuerdo que sea justo, además de que debe de tomar en consideración una estimación consensuada de los afectados y de las leyes en que convive el grupo social en que se insertan. No se debe echar en saco roto esta afirmación pues lo cierto es que las leyes y la normativa reguladoras de la mediación en general, no hacen referencia al valor justicia como criterio elemental del acuerdo final, contentándose sólo con mencionar que los acuerdos deben respetar la legalidad vigente. Si se pretende que la mediación resulte de verdad efectiva, ese fallo debe ser corregido[53].

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52 PRIETO, F., «¿Una mediación diferente para nuestro sistema jurídico?», en LAWYERPRESS, 02/10/2014 http://www.lawyerpress.com/news/2014_10/0210_14_009.html). El trabajo de Prieto constituye una réplica al publicado por F. Conforti. (Franco Conforti «La Tutela Judicial Efectiva como artesana del modelo de Mediación en España» en LAWYERPRESS, 05/09/2014 http://www.lawyerpress.com/news/2014_09/0509_14_010.html)

53 BELLOSO MARTÍN, N., "Epílogo" a Ponce Alburquerque, j., "*El valor justicia. Eje de la mediación escolar"* (en prensa).

2.2.4. La confidencialidad

Asegura que toda la información procesada quedará en secreto. El mediador no puede revelar las particularidades del proceso de mediación a nadie[54]. La excepción puede ser la obligación de declarar a las autoridades información acerca de casos de violencia o abuso contra menores[55]. En estos casos, la obligación del mediador es advertir a las partes que su confidencialidad no podrá ser mantenida.

3. Códigos éticos

Los códigos éticos ofrecen un *plus* con respecto al Derecho, que cubren áreas, conductas y situaciones a las que el Derecho no ha dado respuesta. En los múltiples dilemas éticos que se presentan en el desempeño de nuestras actividades profesionales, en los diversos órdenes de la vida social llega un momento en que el ciudadano, o bien se queda sin norma en la que buscar la solución, o bien, pretende precisamente burlar la norma, interpretar la norma en otro sentido que se ajuste a sus intereses.

Hasta ahora, en Europa apenas se han redactado Códigos éticos de la mediación. El *Código de Conducta europeo para mediadores*, de 2004, fue promovido por la Comisión de la Unión Europea en una conferencia organizada en Bruselas en ese mismo año, con motivo de su puesta a disposición para las organizaciones profesionales que se dedican a la mediación[56]. En el ámbito

54 *Vid.* MORETÓN TOQUERO, Mª. A., "El secreto profesional y el deber de confidencialidad del mediador", en Belloso Martín, N. (Coordinadora), *Estudios sobre mediación*: *La Ley de Mediación Familiar de Castilla y León, Consejería de Familia e igualdad de oportunidades*, Junta de Castilla y León, 2006, pp.209-236.

55 Como ejemplo cabe citar la *Ley 1/2006, de 6 de abril, de Mediación Familiar de Castilla y León* que, en el artículo 10, donde se regulan los deberes del mediador familiar, en el punto 14, dice: "En cualquier caso, la persona mediadora está obligada a informar a las autoridades competentes de los datos que puedan revelar la existencia de una amenaza para la vida o la integridad física o psíquica de una persona".

56 Los aspectos que se regulan en el *Código de Conducta Europeo para mediadores* son los siguientes: 1) Competencia, designación y honorarios de los mediadores y promoción de sus servicios; 2) Independencia e imparcialidad; 3) Acuerdo de mediación, procedimiento y resolución del conflicto; 4) Confidencialidad. (Puede consultarse en la página web <http://eurpa.eu.int/comm/justice_home/ejn/adr_ec_code_conduct_en.htm.>); *Vid.* también, MARTIN DIZ, F., *La mediación: sistema complementario de Administración de Justicia*. Madrid, CGPJ, 2009, pp.186-190.

internacional tampoco abundan estas normas éticas en relación a la mediación[57].

En lo que se refiere a España, el Reglamento de desarrollo de la derogada Ley catalana de Mediación Familiar –Decreto 139/2002, de 14 de mayo-, contiene una serie de normas deontológicas[58]. El resto de la normativa au-

57 En Derecho comparado se puede tomar como referencia el Código de conducta profesional para la mediación, elaborado por R. Calvo Soler y J. Malem Seña, para México D.F. En este último texto se destacan como principios generales la independencia, la neutralidad, la imparcialidad, la autodeterminación, las incompatibilidades, la capacidad, la confidencialidad y, por último, la publicidad. Valoramos muy positivamente la inclusión del tema de la publicidad pues precisamente, los alumnos de los Cursos de formación en mediación suelen interesarte por la posibilidad de publicitar los servicios profesionales de mediación. En general, no es bien vista, al igual que tampoco lo es la publicidad de los servicios que ofrecen abogados o psicólogos, que suelen limitarse a colocar una placa en el portal donde se ubica su despacho o, como mucho, insertan un anuncio en las "páginas amarillas". No está prohibido ni es competencia desleal, pero no se considera "decoroso". Tampoco resulta ético el hecho de ofrecer precios competitivos para "arreglar conflictos", anunciarse como mejor profesional de la mediación que la competencia, revelar asuntos anteriores o dar pistas sobre clientes que han solicitado sus servicios –queda prohibido el dar los nombres de los clientes que han acudido a mediación, amparado por el deber de confidencialidad y secreto profesional-, prometer resultados satisfactorios que no dependan exclusivamente de la actividad del mediador , realizar una promesa profesional que garantice la obtención de un resultado –son las partes las protagonistas de la gestión del conflicto- u otros.

58 El Decreto 139/2002, de 14 de mayo, que aprobaba el Reglamento de la derogada Ley 1/2001, de 15 de marzo, de Mediación Familiar en Cataluña, contenía en su Capítulo VI, artículo 22, las normas deontológicas por las que debía regirse la conducta de las personas mediadoras. Entre estas normas deontológicas se hace referencia a que la persona mediadora ha de velar para no influenciar a las partes, cuidar de que no se produzca desequilibrio entre las partes y priorizar el interés de los menores o personas con discapacidad, mantener la imparcialidad y, si no se pudiera –por razones de parentesco, amistad o enemistad manifiesta- informar a las partes de este hecho y dejar la mediación. La persona mediadora no puede aceptar una mediación en que su intervención sea incompatible con sus intereses. Ha de respetar el carácter de confidencialidad, a excepción de algunos casos –finalidades estadísticas o cuando conlleve una amenaza para la vida o la integridad física o psíquica de una persona-. Asimismo, las personas mediadoras no pueden percibir ni ofrecer ninguna remuneración relacionada con la derivación de clientes, y en ningún caso pueden requerir ninguna cantidad a las partes que tengan reconocido el derecho de asistencia gratuita. Entendemos continúan vigentes en la medida en que la nueva regulación (*Ley de la Generalidad de Cataluña, 15/2009, de 22 de julio, de Mediación en ámbito de D. Privado*) en su disposición final primera, remite a un desarrollo reglamentario por realizar, sin que aún se haya procedido expresamente a derogar el anterior.

tonómica española sobre mediación, no regula tal código deontológico de la profesión del mediador.

La Ley *5/2012, de mediación en asuntos civiles y mercantiles*, en el Título III, que regula el Estatuto del mediador, en su artículo 12 se ocupa de la calidad y autorregulación de la mediación. Concretamente establece:

"El Ministerio de Justicia y las Administraciones públicas competentes, en colaboración con las instituciones de mediación, fomentarán la adecuada formación inicial y continua de los mediadores, la elaboración de códigos de conducta voluntarios, así como la adhesión de aquéllos y de las instituciones de mediación a tales códigos".

Las esperanzas que se habían depositado en la promulgación del *Reglamento 980* de desarrollo de la Ley de mediación, en orden a una profundización en los aspectos éticos de la profesión de mediador, no se han visto cumplidas. Se confiaba en una regulación amplia del estatuto del mediador, donde se regularía el código ético de los mediadores. Sin embargo, sólo se refleja una lacónica referencia a "ética de la mediación", en el artículo 4.1, al regular el contenido de la formación del mediador:

> "La formación específica de la mediación deberá proporcionar a los mediadores conocimientos y habilidades suficientes para el ejercicio profesional de mediación, comprendiendo, como mínimo, en relación con el ámbito de especialización en el que presten sus servicios, los aspectos psicológicos, de ética de la mediación, de procesos y de técnicas de comunicación, negociación y de resolución de conflictos" [59].

Al diseño de este marco ético sin duda le resultará de gran ayuda las propuestas realizadas por especialistas en la materia, principalmente a través de los Códigos de Buenas Prácticas que se vienen desarrollando. Recordemos el ya citado *Código de Buenas Prácticas para la mediación*, diseñado por lo

59 También hay que destacar el impulso que desde las Universidades se ha dado a la mediación, impulsando cursos de formación y erigiéndose la calidad de esos cursos como uno de los principales objetivos. En esta línea, el junio de 2012, en la sede de la Universidad Complutense de Madrid, se constituyó la Conferencia de Universidades para el Estudio de la Mediación y los Conflictos (CUEMYC). Esta plataforma, integrada por la mayoría de los responsables de formación de Posgrados y Másters en Mediación, así como los Directores de Institutos de Investigación de las Universidades españolas, ha nacido con el objetivo de ser un referente nacional e internacional en la consecución de calidad en la mediación (http://cuemyc.org/.). En el mes de junio de 2014 CUEMYC celebrará su IV Asamblea (organizada en la Universidad de León).

PNPM-[60]. También conviene reseñar el *Código Deontológico de la persona del Mediador*[61], elaborado por la Federación Española de Mediadores. Otra aportación a la materia ha sido *El Código de Buenas Prácticas en Mediación del Club Español del Arbitraje* que, elaborado por la Comisión de mediación, establece las buenas prácticas tanto del mediador, como de las instituciones de mediación, como del abogado en una mediación[62]. Asimismo, merece destacar el *Código de Conducta de los mediadores del Centro de Mediación del Ilustre Colegio de Abogados de Valencia*[63], en cuya Introducción se indica que:

"La experiencia demuestra que la sociedad necesita y exige que los profesionales sometan su actuación no sólo a la Ley sino también a unos principios éticos y morales, cuyo no cumplimiento puede dar lugar a sanciones de tipo disciplinario".

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60 Documento accesible en <*www.mediacionesjusticia.com*>. <http://mediacionesjusticia.us7.list-manage.com/unsubscribe?u=ef4ed58e60f365855104fb09a&id=097e8ac559&e=0b9fc77dbd&c=4b9795a0bc>.

61 El 25 de noviembre del 2010, a iniciativa del Centro de Mediación de la Región de Murcia y de la Universidad de Murcia, se reunieron los profesionales de la mediación de diversas Comunidades Autónomas y constituyeron la Federación Nacional de Asociaciones y Profesionales de la Mediación. < http://www.centrodemediacionmurcia.es/fed_es_de_mediadores_12.html>.

62 En cuanto a las prácticas del mediador como tal, enumera las siguientes: independencia e imparcialidad, neutralidad, competencia, información a las partes sobre la mediación, diligencia, honorarios, obligación de confidencialidad y renuncia del mediador. Como buenas prácticas del abogado en una mediación, establece las siguientes: buena fe y respeto mutuo, colaboración en la mediación, confidencialidad, información sobre el procedimiento de mediación, asistencia al cliente en la mediación, redacción del contrato que incorpore el acuerdo de mediación y deber de información al mediador (www.clubarbitraje.com).

63 Este Código de Conducta destaca las obligaciones generales del mediador, la responsabilidad del mediador con respecto a las partes, la responsabilidad del mediador con respecto al proceso de mediación, la responsabilidad del mediador respecto a los otros mediadores y a la mediación en general, la responsabilidad del centro de mediación del Colegio de Abogados hacia las Administraciones Públicas y las partes no representadas en el proceso, y el régimen disciplinario <*www.mediacion*.icav.es/archivos/contenido/361.pdf> (Acceso el 15.12.2013).

4. Consideraciones finales

La mediación y su relación con las profesiones jurídicas, principalmente con la de abogado, ha sido objeto de largas discusiones. Hasta hace pocos años, una buena parte de los abogados veían con cierta suspicacia la mediación. Las diversas Leyes autonómicas han impulsado la formación de mediadores familiares que han acabado captando clientes que, en otro caso, habrían tenido que recurrir al abogado. Ello ha derivado en la acusación a los mediadores de intrusismo profesional. Por otra parte, los abogados hacen gala de venir desarrollando la mediación desde hace muchos años. No cabe duda de que un abogado habrá utilizado la negociación entre las partes en numerosas ocasiones, culminado el litigio con un acuerdo. Pero eso no puede llevar a confundir lo que es una actividad de mediación o negociación, inherente a la forma de actuar de un profesional de la abogacía, con el procedimiento de mediación en el que, en su desarrollo, el abogado también puede asistir a su cliente –aunque no sea directamente en las sesiones de mediación-. Incluso el mediador puede aconsejar y llegar a requerir la colaboración del abogado, en orden a dar forma jurídica al acuerdo final o para resolver dudas jurídicas de la parte/es mediada/s.

Además de que los profesionales de la abogacía y de la mediación se puedan complementar, también la propia profesión de abogado puede complementarse con la de mediador. Ejercer como abogado y, además, estar formado en mediación, conlleva una clara ventaja para el cliente. El abogado, según el tipo de conflicto o litigio que le presente el cliente, podrá aconsejarle si le conviene más recurrir a la mediación o le conviene seguir otras vías. Incluso al abogado se le puede abrir una nueva línea de negocio, principalmente en aquellos casos en que con pruebas débiles o con escaso amparo legal, resultaría inviable o poco recomendable la vía judicial. Como mediador, el abogado podrá velar mejor por los intereses de su cliente, conociendo en profundidad los procedimientos para utilizar la mediación intrajudicial.

Las ventajas que puede conllevar la formación en mediación para el profesional de la abogacía están lejos del móvil meramente económico y mercantilista que está provocando la formación en masa de numerosos profesionales en el ámbito de la mediación[64]. Y ello por dos razones principales. La primera, porque hay entidades que se han sumado a impartir cursos de formación en

64 CEBALLOS PEÑA, D., "La insoportable levedad de la mediación" <http://www.diariojuridico.com/la-insoportable-levedad-de-la-mediacion/> (Acceso el 26.04.2014).

mediación, "piratas formadores"[65] que se están lucrando a base de vender cursos no presenciales. En segundo lugar, porque no se prestan al reclamo de definir y ensalzar la actividad del mediador como "una nueva oportunidad de incorporación al mundo laboral", "una actividad en auge" –como han hecho muchos a raíz de la promulgación de la *Ley 5/2012 de Mediación en asuntos civiles y mercantiles*-.

Todos estos son aspectos que ponen de manifiesto que la ética de la mediación va más allá de la conducta que se pueda exigir al profesional mediador. La ética es exigible a todos los agentes implicados en la mediación (formadores, operadores jurídicos, mediadores y partes que acuden a mediación[66]). El diseño de un marco ético para la mediación no está exento de dificultades. Los dilemas éticos[67] a los que se deben de enfrentar los profesionales de la mediación en el desarrollo de su trabajo son numerosos. Muchos mediadores experimentan una tensión entre mantener la actitud de imparcialidad que permite a las partes adoptar sus propias decisiones y el deseo de intervenir directamente y de manera sustancial en el proceso. ¿Debería el mediador ser más directivo en algunos casos? Dentro de una cultura autoritaria, que no tenga establecido el valor de la autodeterminación, ¿se aceptaría que el mediador pueda o deba arrogarse la posibilidad de decidir por las partes, o permitirse ofrecer consejo profesional? Las mismas partes ¿considerarían natural pedir esta intervención? Un estudio detallado de todas las implicaciones éticas del proceso de mediación revela el intrincado proceso de adoptar decisiones en

65 Así los califica A. Criado Inchauspé, "Los mediadores no existimos", Madrid, 21 de enero de 2013, en *Lawyerpress* <www.lawyerpress.com/news/2013_01/2101_13_001.html>.

66 La responsabilidad ética también debe exigirse a las partes que acuden a mediación. Los acuerdos derivan de la práctica dialógica. Lo que en cierta manera obliga a los participantes a que reflexionen sobre los valores que sustentan las normas que formulan, la legitimidad de las mismas y el alcance que puedan tener. La mediación entra en la cuestión de la justificación de las normas resultantes de los acuerdos alcanzados. El intercambio dialógico con el otro desemboca en la responsabilidad, como si se tratara de una respuesta. Es decir, situarse ante el otro implica responder y esto, a la vez, conlleva rendir cuentas de nuestras acciones (Cfr. NADAL SÁNCHEZ, H., "El lugar de la mediación en el Estado democrático de Derecho", en GORCZEVSKI, C. y OLIVEIRA, F. (Orgs.), *Opinio Iuris*. Curitiba, Multideia, 2012. Vol. I, pp. 113-135. (Documento disponible en <2012-08-27-el_lugar_de_la_mediación_en_el_estado_democrático_de_derecho>.

67 BUSH, B., *The Dilemmas of Mediation Practice*.DC, National Institute for Dispute Resolution, 1992, p.16.

libertad. Navegar en estas sutilezas es el único modo de garantizar la mayor precisión ética posible, dentro de las normas de transparencia del proceso.

El gran reto es el de configurar la mediación como una profesión independiente, con su propio colegio profesional. El *Real Decreto 980* ha perdido la oportunidad de establecer un *corpus* legislativo y un marco deontológico propios, que habría facilitado que la mediación pudiera ser considerada como una profesión en sí misma, distinguiéndose de la de otras profesiones tanto jurídicas –como la de abogado- como otras -economista, psicólogo y profesiones afines-.

La ética es la gran olvidada o marginada en la sociedad postmoderna. Se ha sustituido la ética por la estética. Como diagnosticara G. Lipovetsky, parece que nuestra conducta se ha liberado de los últimos vestigios de los opresivos "deberes infinitos", "mandamientos" y "obligaciones absolutas" [68]. La mediación, precisamente por estar dirigida al otro, por volcarse en la alteridad, precisa de una ética y de unos códigos éticos que permitan al mediador ir más allá de la "estricta legalidad" y de lo "estéticamente agradable" en el ejercicio de su profesión. Este es uno de los grandes retos que tiene ante sí la mediación. Posiblemente, una vez la mediación supere la fase de despegue, entre en una etapa de madurez que la permita acoger los deberes éticos y apuntalar su orientación a hacer realidad la justicia.

BIBLIOGRAFÍA

AA.VV., Ética de las profesiones jurídicas, (dos Vol.), Murcia, Universidad Católica de Murcia- AEDOS, 2003.

APARISI MIRALLES, A., y LÓPEZ GUZMÁN, J., "Concepto y fundamento de la Deontología", en Ética de las profesiones jurídicas. Estudios sobre Deontología. T.I. Murcia, Universidad Católica San Antonio, pp.73-107.

APARISI MIRALLES, A., *Deontología profesional del Abogado*, Valencia, tirant lo blanch, 2013.

ATIENZA, M., *Curso de argumentación jurídica*. Madrid, Trotta, 2013.

BAUMAN, Z., Ética posmoderna. Trad. B. Ruíz de la Concha. Madrid, Siglo XXI, 2009.

68 *Vid.* LIPOVETSKY, G., *El crepúsculo del deber*. Barcelona, Anagrama, 1998; *vid.*, también, BAUMAN, Z., Ética posmoderna. Trad. B. Ruíz de la Concha. Madrid, Siglo XXI, 2009, "Introducción", p.IX.

BELLOSO MARTÍN, N., "Una propuesta de código de ética de los mediadores", en *Cuadernos electrónicos de Filosofía del Derecho,* nº15, 2007, pp. 1-10 (<http://www.uv.es/CEFD>).

BELLOSO MARTÍN, N., "La Formación en mediación: algunas perplejidades e inquietudes de los alumnos que se forman en los Cursos de Mediación". En *Mediación, Arbitraje y resolución extrajudicial de conflictos en el siglo XXI* (CoDirectores: L. García Villaluenga, J. Tomillo Urbina, E. Vázquez de Castro), Madrid, Universidad Complutense-CRV-Cátedra Euroamericana-GC-, 2010, T.I, pp. 121-147.

BELLOSO MARTÍN, N., "Algunas proyecciones de la autorregulación: códigos de conducta y códigos éticos en el comercio electrónico como instrumentos dinamizadores de la resolución electrónica de controversias (REC)", en Vázquez de Castro, E., y Fernández Canales, C., (Coordinadores), *Estudios sobre Justicia online*, Granada, Comares, Colección Derecho de la información, Vol. 22, 2013, pp. 83-138.

BELLOSO MARTÍN, N., "Epílogo" a Ponce Alburquerque, j., "El valor justicia. Eje de la mediación escolar". Tesis Doctoral defendida el 01.10.2014 para la obtención del Grado de Doctor en la Universidad de Santiago de Compostela. (en prensa).

BLANCO CARRASCO, Marta, *Mediación y sistemas alternativos de resolución de conflictos. Una visión jurídica*. Madrid, Universidad Complutense de Madrid, 2009.

http://www.mediate.com/articles/un_marco_etico.cfm - _ftnref5#_ftnref5BUSH, B., *The Dilemmas of Mediation Practice*. DC: National Institute for Dispute Resolution, 1992.

DALLA BERNARDINA DE PINHO, H., "Mediação no Brasil: uma forma de negociar baseada na abordagem de ganhos mútuos" en co-autoria com Yann Duzert, *Barreiras para Resolução de Conflitos*, ARROW J. Kenneth et alt. [orgs.], São Paulo, Saraiva, 2001, pp. 327-349.

DE CARRERAS, F., "A cada uno lo suyo: las culpas propias y las culpas de Bolonia", en *El Cronista del Estado Social y Democrático de Derecho*, nº4, abril, Madrid, Iustel, 2009, pp.4-13.

DÍAZ Y GARCÍA CONLLEDO, M., y GARCÍA AMADO, J.A., "La Universidad española y sus Facultades de Derecho: diagnóstico y propuestas de tratamiento", en *Teoría y Derecho. Revista de Pensamiento Jurídico*, nº11, 2012, pp.276-295.

FERNÁNDEZ FERNÁNDEZ, J.L. y HORTAL ALONSO, A. (compila-

dores), Ética de las profesiones jurídicas, Madrid, Universidad Pontificia de Comillas, 2002.

GARCÍA AMADO, J.A., "Bolonia y la enseñanza del Derecho", en *El Cronista del Estado Social y Democrático de Derecho*, nº5, 2009, pp.42-53.

http://www.mediate.com/articles/un_marco_etico.cfm - _ftnref3#_ftnref3 GARCÍA VILLALUENGA, L., "Artículo 8. Neutralidad", en L. García Villaluenga y C. Rogel Vide (Directores), *Mediación en asuntos civiles y mercantiles. Comentarios a la Ley 5/2012*. Madrid, Reus, 2012, pp.120-135.

GRANDE YAÑEZ, M.; ALMOGUERA PÉREZ, J., y JIMÉNEZ GARCÍA, J., Ética de las profesiones jurídicas, Bilbao, Desclée de Brouwer, 2006.

LABRADA RUBIO, V., Ética en los negocios. Madrid, ESIC, 2010.

GUILLÉN PARRA, M., Ética en las organizaciones. Construyendo confianza. Madrid, Pearson Educación, 2006.

http://www.mediate.com/articles/un_marco_etico.cfm - _ftnref1#_ftnref1 http://www.mediate.com/articles/un_marco_etico.cfm - _ftnref4#_ftnref4LAHUE, J.H.,"Ethical Considerations in Choosing Intervention Roles," *Peace and Change: A Journal of Peace Research*, 1982, 8, 29-42.

LARIGUET, G., *Virtudes, Ética profesional y Derecho. Una introducción filosófica*. Montevideo-Buenos Aires, Editorial IB de F, 2012.

LIPOVETSKY, G., *El crepúsculo del deber*. Barcelona, Anagrama, 1998.

MARTIN DIZ, F., *La mediación: sistema complementario de Administración de Justicia*. Madrid, CGPJ, 2009, pp.186-190.

MARTÍNEZ MORÁN, N., Ética aplicada y Deontología: los Códigos deontológicos" en R. Junquera de Estéfani (Coordinador), Ética y Deontología públicas, Madrid, Editorial Universitas, 2011, pp.191-218.

MARTÍNEZ ROLDÁN, L., "Deontología notarial: corporativismo o regulación jurídica", en *Anuario de Filosofía del Derecho*, Madrid, Nueva Época, Ministerio de Justicia-BOE, T. XXV, 2008-2009, pp.35-56.

MERINO ORTIZ, C., "La calidad de la mediación", en *Practicum. Mediación 2014*. Edición de E. Vázquez de Castro. Coordinada por C. Fernández Canales Madrid, Thomson Reuters Aranzadi, pp.366-368.

MORETÓN TOQUERO, Mª. A., "El secreto profesional y el deber de confidencialidad del mediador", en Belloso Martín, N. (Coordinadora), *Estudios sobre mediación*: *La Ley de Mediación Familiar de Castilla y León, Consejería de Familia e igualdad de oportunidades*, Junta de Castilla y León, 2006, pp.209-236.

NADAL SÁNCHEZ, H., "El lugar de la mediación en el Estado democráti-

co de Derecho", en GORCZEVSKI, C. y OLIVEIRA, F. (Orgs.), *Opinio Iuris*. Curitiba, Multideia, 2012. Vol. I, pp. 113-135.

OTERO PARGA, M., "La Ética del mediador", en H. Soleto Muñoz (Directora), *Mediación y resolución de conflictos: técnicas y ámbitos*, en Madrid, Tecnos, 2011.

ORTUÑO, P., "Apuntes críticos sobre la ley 5/2012, de 6 de julio, de mediación civil y mercantil" en L. García Villaluenga y E. Vázquez de Castro (Directores), *Anuario de Mediación y Solución de Conflictos*, Madrid, Instituto Complutense de Mediación y Solución de conflictos, Reus, 2013, pp. 45-69.

SALAS, M., "¿Es el Derecho una profesión inmoral? Un entremés para los cultores de la ética y la deontología jurídica", en *DOXA. Cuadernos de Filosofía del Derecho*, 30, 2007.

THOMPSON, D. F., *La ética política y el ejercicio de cargos públicos*. Barcelona, Gedisa, 1998.

VATTIMO, G. y ROVATTI, P.A., *El pensamiento débil*. Madrid, 1983.

VÁZQUEZ GUERRERO, F.F., Ética, deontología y abogados. Cuestiones generales y situaciones concretas. 2ª ed., Navarra, Eiunsa, 1997.

PÁGINAS ELECTRÓNICAS

FEMENIA, N., "Un marco ético para la mediación" <http://www.mediate.com/articles/un_marco_etico.cfm.> (Acceso el 22.07.2013).

El Código de Buenas Prácticas en Mediación del Club Español del Arbitraje <www.clubarbitraje.com>

Código de Conducta Europeo para mediadores <http://eurpa.eu.int/comm/justice_home/ejn/adr_ec_code_conduct_en.htm>

Código Deontológico de la persona del Mediador, <http://www.centrodemediacionmurcia.es/fed_es_de_mediadores_12.html> (Acceso el 07.06.2013) Grupo Europeo de Magistrados por la Mediación –GEMME- (*www.mediacionesjusticia.com*) <http://mediacionesjusticia.us7.list-manage.com/unsubscribe?u=ef4ed58e60f365855104fb09a&id=097e8ac559&e=0b9fc77dbd&c=4b9795a0bc> (acceso el 16.10.2013)

Código de Conducta de los mediadores del Centro de Mediación del Ilustre Colegio de Abogados de Valencia (www.mediacion.icav.es/archivos/contenido/361.pdf) (Acceso el 15.12.2013).

DALLA BERNARDINA DE PINHO, H., "Mediação: a redescoberta de um

velho aliado na solução de conflitos" en *Acesso à Justiça: efetividade do processo*, organizado por Geraldo Prado, Rio de Janeiro, Lumen Juris, 2005, pp. 105-124. (Disponible en <http://www.humbertodalla.pro.br/arquivos/mediacao_161005.pdf>.http://www.humbertodalla.pro.br/arquivos/mediacao_161005.pdf (Acceso el 20.10.2014).

NADAL SÁNCHEZ, H., <2012-08-27-el_lugar_de_la_mediación_en_el_estado_democrático_de_derecho> (Acceso el 10.04.2014).

CEBALLOS PEÑA, D., "La insoportable levedad de la mediación" <http://www.diariojuridico.com/la-insoportable-levedad-de-la-mediacion/> (Acceso el 26.04.2014).

CONFORTI, F., «La Tutela Judicial Efectiva como artesana del modelo de Mediación en España» en LAWYERPRESS,, 05/09/2014 <http://www.lawyerpress.com/news/2014_09/0509_14_010.html> (Acceso el 13.10.2014)

Código Deontológico de la Abogacía Española (CDAE) (adaptado al Estatuto General de la Abogacía Española, aprobado por Real Decreto 658/2001, de 22 de junio. Disponible en: <http://www.abogacia.es/wp-content/uploads/2012/06/codigo_deontologico1.pdf>). (Acceso el 24-20.2014).

CRIADO INCHAUSPÉ, A., "Los mediadores no existimos", Madrid, 21 de enero de 2013, en *Lawyerpress* <www.lawyerpress.com/news/2013_01/2101_13_001.html> *(Acceso el 23.10.2014).*

PRIETO, F., «¿Una mediación diferente para nuestro sistema jurídico?», Madrid, 02 de octubre de 2014, en LAWYERPRESS, <http://www.lawyerpress.com/news/2014_10/0210_14_009.html)> (Acceso el 13.10.2014)

ALTERNATIVE DISPUTE RESOLUTION AND ABORIGINAL-CROWN RECONCILIATION IN CANADA

Roshan Danesh and Jessica Dickson

The achievement of reconciliation between the Aboriginal peoples[1] of Canada and the Crown, and more broadly between the Aboriginal and non-Aboriginal populations, is one of Canada's central legal, social, political and economic challenges. When the *Constitution Act* of 1982 was passed it included in section 35(1) an affirmation of the collective rights of Aboriginal peoples: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." This recognition of Aboriginal rights has been followed by a legal revolution, in which the meaning and content of Aboriginal rights has become a central focus of the legal system. At the heart of this element of the Canadian constitutional order is the project of "reconciliation" between the sovereignty of Aboriginal peoples who were here before the arrival of Europeans with the assertion of sovereignty by the British Crown. (*Haida*, para 20)

The legal focus on the project of reconciliation, and the implications of collective Aboriginal rights as enshrined in the *Constitution*, are broad and extensive. The number of legal cases that touch on this topic have grown extensively over the last few decades, and there are few signs of this growth abating. These cases are relatively complex, and routinely take years to work their way through the legal system. The prospects for the future are for continued judicial focus on the project of reconciliation. Recently the Chief Justice of Canada, the Honorable Beverly McLachlin, commented that despite thirty years of case law on Aboriginal rights "we're in the very early days of that saga" and predicted a deepening of involvement of the courts on the project of reconciliation. (Brean) In another recent speech she commented on how the affirmation of reconciliation is one of the defining moments of the Canadian legal and constitutional history:

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1 Three distinct groups of Aboriginal peoples are recognized in Canada. The term Aboriginal is used to refer to First Nations, Inuit and Métis peoples recognized as Aboriginal people under section 35 of the *Constitution Act, 1982*. First Nation is the term used by the Government of Canada in reference to communities of people designated as both Status and non-Status "Indians" according to the *Indian Act*.

> Reconciliation recognizes the reality that Canada is made up of people of First Nations descent but also people who are descended, not just from European forbears, but from people from all parts of the globe. Whatever our views about that, it is a reality and we must accept it. As Chief Justice Lamer put it, "Let us face it, we are all here to stay."
>
> Reconciliation takes a hard look at what Canada is, divisions and all, and says, for the good of us all, we need to make peace and build a better future.
>
> The project of reconciliation, while our best way forward, is not an easy way. It is not a finite task but a process. Reconciliation requires openness of spirit, endurance and great patience. But I believe that it is worth the effort. (McLachlin)

The placement of the project of reconciliation at the heart of the public ordering and constitutional jurisprudence of the Canadian legal system would seem to be fertile ground for the deep development and use of methods of alternative dispute resolution (ADR). Indeed, at the heart of the jurisprudence has been a plea from the Courts for First Nations and the federal and provincial governments to recognize the institutional limits of the legal system – that Courts are fundamentally unsuited to the project of reconciliation. Rather, they have actively encouraged negotiations, and developed the requirement for honourable processes aimed at advancing reconciliation.

Despite this, the Courts have remained a central pathway for resolution of disputes over Aboriginal rights. And surprisingly, despite many useful and sometimes quite productive efforts, the use of ADR has relatively speaking remained somewhat constrained. While negotiations are relatively commonplace at various levels, the use of mediation, arbitration and other forms of ADR, particularly on land and resource matters, is rare. Indeed, currently one might say that in Canada an experiment is taking place in trying to achieve reconciliation through adversarial litigation. Not surprisingly, that experiment is being met with quite limited success.

This paper explores the question of why ADR, and mediation in particular, is not being used more in the quest for reconciliation in Canada. We particularly focus on issues related to reconciliation regarding lands and resources – as distinct from the many other social, cultural, and economic dimensions of reconciliation. Our analysis reveals two types of answers. First, there are particular factors regarding the challenge of reconciliation itself – including its nature and meaning in cross-cultural contexts – that complicate and challenge the use of ADR. Second, are the limits of how ADR, and mediation in particular, is often conceived and constructed. This case study illustrates a need to re-examine the fundamentals of what ADR does and might mean for major societal projects, such as advancing reconciliation.

Part 1 – The Legal Challenge of Reconciliation – A Brief Overview

It is important to identify the lineage and potential meanings of the term reconciliation as it is used in reference to the history, present, and future of Aboriginal peoples in Canada.

Viewed from the perspective of the history of European settlement of Canada, and the relationship between the original inhabitants of these lands with the settlers from Europe, reconciliation is a very new and contemporary expression. While there are complex and multi-faceted layers of relations between these populations, a central thrust of the story, which aligns with the founding of Canada in the later 1800's, is the foundational cornerstone of the twin, overtly racist, legal and policy frameworks of *assimilation* and *denial*.

Assimilation targeted the culture, social structure, way of life, and spirituality of Aboriginal peoples, and explicitly sought to eradicate those. As has been described:

> For years after the arrival of Europeans, in both British Columbia and elsewhere in the country, it was assumed by many non-Aboriginal people that First Nations people would eventually be absorbed into the European-based Canadian society. A concerted effort was made to ensure that this process took place, including policies and legislation which banned traditional ceremonies, forbid celebrations, prohibited the wearing of traditional costumes, and silenced spiritual leaders. This effort to impose unfamiliar traditions intensified into a sustained effort toward the assimilation of First Nations people into non-Aboriginal society. (First Nations Summit, 9)

A central vehicle for this assimilation was the residential school system, which systematically removed children from their families, sought to break cultural patterns and the transmission of knowledge, and "to kill the Indian in the child". The residential school system endured for more than one hundred years, and only in recent years have the gross wrongs of the system been acknowledged and begun to be redressed through legal settlements and the establishment of a Truth and Reconciliation Commission. It was not until 2008 that the Canadian government apologized for this particularly egregious aspect of the assimilation policy:

> Two primary objectives of the residential school system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it

was infamously said, "to kill the Indian in the child." Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country. (Harper)

The assimilation policy was an effort to advance the social, cultural, and spiritual oppression of Aboriginal peoples by non-Aboriginal peoples. Its companion policy – which has yet to meet with the same fate as the assimilation policy – is that of denial, and specifically denial that organized Aboriginal societies owned and occupied lands and resources before the arrival of European settlers. Stated another way, the denial policy holds the view that when settlers arrived in the lands that were to make up Canada they found a *terra nullius,* an empty land belonging to no one.[2]

Informing and legitimizing this denial policy is the doctrine of discovery, which had impacts in many parts of the globe. As has been described:

> As with the discredited notion of "terra nullius", the doctrine of "discovery" was used to legitimize the colonization of Indigenous peoples in different regions of the world. It was used to dehumanize, exploit and subjugate Indigenous peoples and dispossess them of their most basic rights.
>
> Central to the survival of Indigenous peoples everywhere is the issue of land and resources. Based on such fictitious and racist doctrines as "discovery" and "terra nullius", European nations were relentless in their determination to seize and control indigenous lands. Papal bulls, such as Dum Diversas (1452) and Romanus Pontifex (1455) called for non-Christian peoples to be invaded, captured, vanquished, subdued, reduced to perpetual slavery, and to have their possessions and property seized by Christian monarchs. Such ideology led to practices that continue unabated in the form of modern day laws and policies of successor States (Atleo,1).

While obviously intertwined with the assimilation policy, the policy of denial served as a foundation for the economic domination of these lands. It reflected itself in the establishment of the Indian reserve system by which Aboriginal peoples were placed on small tracts of land held in trust by the federal government, the promulgation of the *Indian Act,* the systematic violations of the historic Treaties that had been entered into between the Crown and Aboriginal peoples over most of Canada, and the relatively unfettered taking up of land by governments and settlers. Parallel with this was the further

2 In the seminal *Tsilhqot'in* decision from the Supreme Court of Canada on June 26, 2014, the Court importantly re-iterated that as a matter of law *terra nullius* never had a place in Canada: "The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada…." (para 45).

interference with and eroding of Aboriginal systems of law and governance. Today, the reserve system, with all of its destructive legacies and racist implications, remains alive and well.

It is the denial policy that more specifically engages the question of Aboriginal peoples' relationship to lands and resources, and the contemporary challenge of reconciliation in that context. Until the 1950's, it was prohibited in Canada for an Aboriginal person to retain legal counsel to raise the issue of Aboriginal rights over lands and resources. In 1961, the first modern case in the evolution of jurisprudence regarding Aboriginal rights – *R. v. White and Bob* - was brought in Nanaimo regarding a hunting charge. In defence to the charges, a pre-confederation treaty protecting the right to hunt was cited, and a parallel defence was advanced that there were unextinguished Aboriginal rights that had never been ceded or surrendered by the Aboriginal people in question. Ultimately, in 1963, the Supreme Court of Canada affirmed that a treaty existed and must be respected. Thus was born the modern era of Aboriginal rights jurisprudence in Canada.

In 1982, the adoption of section 35 of the *Constitution* led to a major acceleration in the use of the Courts to try to address matters of Aboriginal rights, particularly in the Province of British Columbia. British Columbia is in a somewhat distinct position from the rest of Canada, in that historically very few Treaties were entered into. As such, there was, and is, a fundamentally unresolved conflict about the authority and ownership of lands and resources over the vast majority of the Province. Regrettably, but perhaps unsurprisingly, a centrepiece of Crown positions in these court cases has been to maintain the denial policy. So, while section 35 granted protection of "existing" Aboriginal and treaty rights, the Crown maintained that no Aboriginal rights, other than treaty rights, were existing – they all had been either extinguished by Crown action, or surrendered by First Nations. This position was soundly rejected by the Courts. The Courts affirmed that these rights had not been extinguished, and that the purpose of section 35 of the *Constitution* was to effect a reconciliation between the prior sovereignty of Aboriginal peoples and the assumed sovereignty of the Crown.(*Haida,* para 20) Stated another way, section 35 of the *Constitution* was a promise, grounded in the history of the founding of Canada, that a fair and just resolution to the rightful claims of Aboriginal peoples to the lands and resources of their Territories would be advanced and ultimately achieved. In the seminal *Delgamuukw* decision in which the Supreme Court of Canada fully rejects the idea of extinguishment

or surrender, the Court concluded with words meant to evoke the spirit of reconciliation that must infuse that area of work "Let us face it, we are all here to stay." (*Delgamuukw,* para 186)

One would think that the affirmation of the continued existence of Aboriginal rights, and the identification of reconciliation as the very purpose of the law, might have been the impetus for transformative shifts from a context of denial to one of recognition in which negotiated resolutions could rapidly advance. However, this has largely not been the case. While the Court's requirement for reconciliation was always accompanied by pleas for negotiation, the reality is that litigation has expanded exponentially while negotiations – though common – have proven quite slow and have not been delivered in a manner that would see the courts slowly decrease as a venue for the critical work of reconciliation. Indeed, the *Delgamuukw* decision did not result in any fundamental shifts in Crown policy or activity, as the Crown emphasized that while Aboriginal rights may exist, they had not been proven in respect to any particular resource or place, and that they would not shift their conduct until they were proven. It was business as usual.

In 2004 another seminal case - the *Haida* decision - took issue with this Crown inaction, by stating that even prior to proof of Aboriginal rights, the Crown owed constitutional obligations to consult and accommodate First Nations about any decisions or actions that might infringe asserted Aboriginal rights. Stated another way, reconciliation is dynamic and iterative, and it requires that real steps be taken to protect the interests and values that at are at the heart of advancing reconciliation. Reflecting the principle of the honour of the Crown, which is an overarching constitutional principle with duties owed by the Crown to First Nations, the Court stated that:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. (*Haida,* para 27)

While the *Haida* decision arguably led to some shifts in Crown conduct,

particularly in British Columbia, as well as some diversification of forums and avenues for negotiation, the primary response to the decision was again in the Courts. Massive amounts of litigation now take place challenging the Crown's failure to consult and accommodate First Nations. In all of these court cases, the fundamental underlying question is whether the Crown did what was necessary – procedurally and substantively – to advance reconciliation with respect to that particular action or decision.

On June 26, 2014 in the *Tsilhqot'in* decision, the Supreme Court of Canada, for the first time in history, issued a legal declaration that Aboriginal title existed over part of Canada. After a 25 year battle over a portion of central British Columbia, the Tsilhqot'in People are now recognized as having a *sui generis* property interest over an area that is approximately 1700 square kilometres in size. In this seminal decision, the Supreme Court appears to be significantly raising the stakes for achieving a meaningful reconciliation, as the economic consequences of Aboriginal title on the investment climate and the prospects for the governments' resources development plans could be significant.

What does reconciliation mean in this evolution of the law? The Courts have not provided much substantive guidance on this question. It is clear that reconciliation "is not a final legal remedy in the usual sense" (*Haida,* para 32); rather it is a process that must engender a "mutually respectful long-term relationship" between Aboriginal and non-Aboriginal Canadians. (*Little Salmon,* para 10) We know as well that it requires the Crown to do certain things – like consult and accommodate, negotiate resolution, and diligently implement treaties – but the Courts have not provided a detailed or substantive vision of what a reconciled Canada might look like. Rather, one might think of their jurisprudence as a blueprint that shows structures and elements that will be needed to move towards reconciliation. But bringing reconciliation into being – giving it life – is not something the courts can do. It is this challenge, of bringing reconciliation to life, that brings into focus the role that ADR might, and could, play.

Part 2 –The Challenge of Contemporary ADR Processes in Advancing the Goal of Reconciliation

Alternative Dispute Resolution is well established in Canada. The Canadian legal system, as with other common law systems, has been the focus of a

number of criticisms over the past three decades that have helped bring ADR to the mainstream. These criticisms include that the legal system is too confrontational, too complex, too time consuming and too expensive to provide satisfactory results to Canada's culturally and ethnically diverse population.

The repatriation of the *Constitution of Canada* in 1982 and the entrenchment of the *Charter of Rights and Freedoms* brought with it a heightened responsibility for the courts to prioritize the rights of the accused to a trial without reasonable delay. (Dickson) The streamlining of criminal matters ultimately led to delays in cases in other areas of the law. In response, the courts began in earnest to consider alternative forums for certain cases in which the setting would be better suited for dealing with the issues at stake. (Dickson) The result was the institution of court-annexed ADR processes utilizing techniques of mediation, neutral evaluation and arbitration. The first court annexed ADR program was instituted in 1994 on a trial basis in Ontario as an alternative for settling civil disputes. This program continues to operate in Ontario, and was followed by other similar ADR processes now operating in jurisdictions across the country.

In some areas, such as labour relations, the law requires binding arbitration on the disputing parties. Arbitration has also become widely reflected within contracts by the business community. Through enabling legislation, the provincial and federal governments have created a number of special tribunals and commissions to address matters of public interest. These forums are designed to be less expensive, often informal systems, that run parallel to the courts. There are currently dozens of active tribunals across Canada ranging from administrative tribunals that deal with claims of discrimination and harassment to those that deal with grievances related to government policies and programs.

The use of arbitration to resolve issues of Aboriginal rights has been limited, as governments tend to avoid committing themselves to binding decisions in this often complex and evolving area of law. One area where the Crown has shown deference to arbitration is with respect to monetary damage claims made by First Nations against the federal government regarding breaches of treaties, fraud, illegal dispositions, or inadequate compensation related to Indian reserve lands. ("Frequently Asked Questions") In 2008, following a mounting backlog of cases within the government agency previously responsible for administering claims, and criticisms of acting in a conflict of interest (with Canada in the role of party, adjudicator and process administrator), the

government passed the Specific Claims Tribunal Act which gave life to a new arbitration process for addressing claims.

Criticism of the Tribunal by First Nations has largely centered on the adversarial nature of the process. In its five-year review of the Tribunal, the Assembly of First Nations found that "Canada no longer seems to be evaluating claims in an impartial manner as a fiduciary, but instead is taking an adversarial approach to claims resolution." (Assembly of First Nations, 4) The report further states:

> [Canada], in a manner that has never been announced or acknowledged, turned the federal processing stage into an arena where Canada appears to be no longer acting in good faith as a fiduciary, but instead is taking every opportunity to merely minimize its liabilities. This approach is inconsistent with the principle of reconciliation that was explicitly embedded into the Specific Claims Tribunal Act. (5–6)

The characterization of the Tribunal as adversarial is further highlighted in the testimony of the Tribunal Chair, Justice Harry Slade, to the Commons Committee on Aboriginal Affairs in 2011:

> A well-founded concern in response to our first draft, was that the rules were too court-like and contemplate an adversarial process rather than a reconciliatory negotiated process. […]. In the specific claims branch process, of course, the crown is obliged to disclose nothing, whereas the claimant has to disclose virtually his whole case. (*Standing Committee on Aboriginal Affaris and Northern Development*)

Recently, the Federal Court was asked what "negotiations" mean in the context of the Tribunal process. The Court highlighted that elements of Canada's approach to negotiations "is, frankly, paternalistic, self-serving, arbitrary and disrespectful of First Nations. It falls short of upholding the honour of the Crown, and its implied principle of "good faith" required in all negotiations Canada undertakes with First Nations." (*Aundeck Omni Kaning*, para. 89)

Beyond the court annexed and quasi-judicial systems described above, non-judicial ADR systems are gaining traction in community justice settings around the country. Often geared towards conflict prevention and restorative justice, these systems involve a broad spectrum of ADR processes.

Amidst a plethora of ADR models and techniques developing in the field, interest-based negotiation and mediation, often referred to as the "Harvard" or "problem solving" model, has been the most widely instituted, practiced and taught in Canada and other countries of the global "West". The model

was born in the 1920's and 1930's through the writings of American organizational theorist Mary Parker Follett. Follet's ideas about organizational conflict centered on the premise that organizations, as social institutions, could achieve progress by rejecting compromise and concession as the primary technique for resolving disputes. For Follet, "the only way to resolve a conflict is not victory, nor compromise [....] it is integration of interests. (Druker, 4) She thought, "a better way is to find the integrative solution, the approach that solves a conflict by accommodating the real demands of the parties involved." (Graham, 21) Decades later, the model was modified by Fisher and Ury in their celebrated 1981 book "Getting to Yes" and subsequently gained significant traction in legal and business circles throughout Canada. The model is based on the premise that disputing parties will tend to take extreme and rigid positions in order to counteract their competitors and achieve the settlement they desire. The goal of the interest-based model is to move disputants away from adversarial positions and the emotions that fuel the dispute, towards an understanding of the issue as being shared, and something to be addressed through collaborative problem solving. In the mediation context, to move the parties in this direction, a neutral third supports the disputants to identify their underlying interests in the dispute - their hopes, needs, values, beliefs, and expectations – as the basis for developing mutually satisfactory or "win-win" agreements.

The influence of the model in Canada was not lost on governments who, following the consistent directives of the courts to find alternatives for addressing issues of Aboriginal rights and title, turned to the growing field of ADR for guidance. A well-known example is the establishment of the interest-based inspired British Columbia treaty process. The process, discussed in the case study below, is the single process for negotiating modern treaties with approximately 200 First Nations of British Columbia.

Part 3 - Case Study: The British Columbia Treaty Process

Following the conclusion of the *Calder* litigation in 1973, in which the Supreme Court of Canada confirmed the existence of Aboriginal title as a concept, the government of Canada introduced a policy for negotiating modern treaties throughout the country. The earliest version of the policy was intended to exchange claims of undefined Aboriginal rights for a clearly defined

package of rights and benefits set out in agreements protected by section 35 of the Constitution. The policy was amended in 1986 to allow for the negotiation of resource revenue sharing and Aboriginal self-government.

Facing a potential floodgate of claims and uncertainty of ownership and access to the resource rich lands throughout the province, and a failed lawsuit launched by British Columbia to have the Nisga'a Treaty – the first modern treaty in British Columbia - declared unconstitutional, the government of British Columbia joined the federal government negotiations with Nisga'a in 1990. The following year, the government of British Columbia, the federal government and the First Nations - represented by the First Nations Summit - established a taskforce to develop a treaty negotiation framework to be applied province-wide. On June 28, 1991, the Task Force delivered its final report to the governments and First Nations that called for the establishment of a made in British Columbia process.

In its introductory statement, the Task Force described the conflict about the rights of Aboriginal people in British Columbia as one that "speaks to the difficulties in reconciling fundamentally different philosophical and cultural systems. Historically, the conflict has focused on rights to land, sea, and resources. However, the ultimate solution lies in a much wider political and legal reconciliation between aboriginal and non-aboriginal societies". (British Columbia Claims Task Force 1991, 4) In sketching a political process for negotiating treaties, the Task Force provided implicit support for treaties as a suitable pathway for achieving broad reconciliation.

The report from the Task Force, consisting of 19 recommendations, set out the general framework for the negotiations including a six-stage process and a Commission to facilitate and oversee the process.

> Recommendations #3: A British Columbia Treaty Commission be established by agreement among the First Nations, Canada, and British Columbia to facilitate the process of negotiations.
>
> Recommendation #5: A six-stage process for negotiating treaties, as follows:
>
> Stage 1: Submission of Statement of intent to negotiate a treaty;
>
> Stage 2: Preparations for negotiations
>
> Stage 3: Negotiations of a Framework Agreement
>
> Stage 4: Negotiations of Agreement in Principle
>
> Stage 5: Negotiations to finalize a treaty
>
> Stage 6: Implementation of the treaty

Following the acceptance of the recommendations of the Taskforce by

Canada, British Columbia and the First Nations a new Treaty Commission opened its doors in May of 1993. More than two decades have passed since negotiations began. There are currently 60 First Nations in the process. To date, only a few First Nations are implementing their treaties. Among those First Nations still in active negotiations, the majority have been in Stage 5 of the process for more than a decade. Overall, the process to date has cost hundreds of millions dollars.

In reflecting on the progress of negotiation in a review of the process, the Treaty Commission reported "Treaty negotiations use an interest-based negotiation model where negotiators spend time exploring individual First Nations' interests in economic and social development, implicitly supporting the assumption that treaty offers will reflect those interests." (British Columbia Treaty Commission 2001, 17) However, the review of the process identified a number of challenges to the negotiations that have substantially gone unaddressed, and bring to light questions about the appropriateness of the process and its interest-based underpinnings to the project of reconciliation.

Pursuant to the goal of achieving outright certainty from treaties and consistent with its 1973 Land Claims Policy, the Government of Canada previously required BC First Nations to "cede, release and surrender" their Aboriginal rights in exchange for treaty rights. Generally referred to as the "extinguishment model" First Nations in BC rejected this approach because they did not want to be required to give up rights as part of a treaty. Seeking to satisfy First Nations concerns, Canada shifted its language to one where Aboriginal rights are "converted, modified, or transformed" into treaty rights. From the perspective of the Union of BC Indian Chiefs, the new certainty provision does little to ensure that Aboriginal title and rights not enshrined in the written agreement will survive post treaty. As such:

> The Crown gets complete recognition of its sovereignty, its underlying title to our lands and the supremacy of its laws over our governments and People. Indigenous groups get limited recognition of title to reduced pieces of land, the right to co-manage resources (along with government and third parties interests) and self-government which is subject to Canadian and provincial laws. ("Certainty: Canada's Struggle to Extinguish Aboriginal Title")

From a broader perspective, the focus on certainty through the containment of Aboriginal rights within a written agreement speaks to the important question about the capacity of the BC treaty process to result in stable, healthy and long-term government-to-government relationships post treaty.

In its 2001/2002 review, the Treaty Commission found that "offers made to date points to a population-based format as the primary basis for the calculations by the governments of Canada and BC." (British Columbia Treaty Commission 2001, 17) This finding speaks to a recurring failure of governments to recognize the unique circumstances of individual First Nations in the process, choosing instead to promote a one-size fits all approach regardless of a First Nations culture, history, geography and size and prospect for attaining full self-sufficiency once the treaty is concluded. This one-size fits all approach is typically a narrow conception of treaties as simply another program or service the government is required to deliver under the *Indian Act*, section 35 and to fulfill its fiduciary obligations.

Throughout the history of negotiations, BC and Canada have struggled to arrive at the table with a mandate to negotiate on subject matters of importance to the First Nations. For example, "It has been six years since there was a fish mandate. This long delay for a s.35 rights issue of critical importance to First Nations in BC needs to be addressed." (British Columbia Treaty Commission 2013, 29) From the perspective of First Nations, government's unwillingness to negotiate rights-based issues translates into a lack of commitment to reconsider the structure of the relationship.

Further, the Treaty Commission reviews claims on a first-come-first-serve basis. This has resulted in a number of disputes among First Nations who may have historically shared areas of a territory or whose territorial boundaries were reconstituted through the process of colonization and the establishment of reserves. Failing to consider these relationships and the potential impacts on governance landscape after the treaty is concluded has been highlighted as a major drawback to the treaty process.

Debates about the place of compensation within the negotiation framework has also been a challenge within the process. First Nations argue that financial compensation for the history of unjustified infringements of their Aboriginal rights is an issue significant to reconciliation that should be addressed at the treaty table. Canada and BC argue, however, that compensation is a legal concept and therefore has no place in a political negotiation process about a future relationship between First Nations, the Crown and Canadian society.

At the end of Stage 4 (ratification of an Agreement in Principle) and 5 (ratification of a Final Agreement) First Nations members are called upon to decide whether to accept the terms of the agreement, and provide a mandate

to the First Nations' negotiators to move forward into the next stage of the process. Low voter turnout, limited information about the specifics of the negotiation has resulted in handful of failed votes of an Agreement in Principle or final treaty. Much like conventional interest-based processes, treaty negotiations in BC have largely taken place behind closed doors and only recently is emphasis being placed on information sharing with members as negotiations proceed to ensure "yes" or "no" votes are based on informed consent.

The challenges above have created significant delays, limited progress in negotiations and a significant amount of loans to First Nations. According to the BCTC, "Since opening its doors in May 1993, the Treaty Commission has allocated approximately $471 million in loans to First Nations." (British Columbia Treaty Commission 2013, 25) In consideration of these and other challenges, a number of First Nations have disengaged from the process, choosing instead to pursue more tangible opportunities to assert their rights and increase capacity and economic development within their communities.

The question of whether the treaty process provides a suitable framework for addressing Aboriginal lands and resource issues was recently considered by the Inter-American Commission on Human Rights. On May 10, 2007, the Hul'quimi'num Treaty Group (HTG) filed a petition with the Commission claiming that the government of Canada had violated the human rights of the Hul'quimi'num people by granting a significant portion of its traditional territories to private land owners without compensation or offer of restitution.

In ruling HTG's petition as admissible, the Commission waived the normal requirements under international law and its own rules and regulations that a petitioner must exhaust all available domestic remedies before a case can be admissible to the Commission.

Canada subsequently argued that a treaty negotiated through the British Columbia treaty process, in which the HTG was a participant, could provide HTG with a remedy. In considering the argument, the Commission found:

> The BCTC process has not allowed negotiations on the subject of restitution or compensation for HTG ancestral lands in private hands, which make up 85% of their traditional territory. Since 15 years have passed…the IAHCR notes that by failing to resolve the HTG claims with regard to their ancestral lands, the BCTC process has demonstrated that it is not an effective mechanism to protect the right alleged by the alleged victims. (Hul'quimi'num Treaty Group v. Canada, para 37)

Looking back, the choice of building the BC treaty process in the spirit of interest-based negotiation and mediation may have seemed like an obvious fit for establishing treaties. At the time of its construction, no other model was as widely promoted and used in Canada. One point of confusion that has plagued this process, however, is one between rights and interests. Aboriginal rights are not merely interests. Unlike interests - hopes, needs, values, beliefs, and expectations – Aboriginal rights are *sui generis* and include a continuation of the laws and social norms of the Indigenous people of Canada. Given their unique place within the Canadian legal framework, it is perhaps an unusual expectation that a process that seeks to align interests could achieve the goal of reconciling issues of Aboriginal rights.

Part 4 – Re-introducing ADR and Reconciliation

Why has the project of reconciliation not made more use of ADR processes? Why have efforts that have been made, such as the British Columbia treaty process, not proven widely successful? What possible directions might be explored in the future? And what does this limited use of ADR tell us about the potential and limits of ADR?

One set of answers to these questions, which has been relatively well examined in scholarly literature and research on ADR, is the relationship between culture and conflict.

In considering whether interest-based ADR processes are appropriate for disputes regarding Aboriginal rights, there is a general concern that western models, specifically the interest-based model, are not designed to take into account differences in worldviews that are major drivers of conflict. For Baruch Bush and Folger, western ADR models are too firmly rooted in the ideology of individualism, which characterizes human nature as primarily competitive and self-interested. They argue that the model does not go far enough to consider alternative worldviews and modes of relating, rather, it promotes conflicting parties to seek to satisfy their individual needs and desires. (Baruch Bush and Joseph Folger) In considering the application of mainstream ADR models to disputes involving Indigenous Peoples:

> The worldviews that underlie Western and Indigenous cultures are starkly different from one another. For example, Indigenous approaches to addressing conflict are more accurately described as conflict transformation in that they seek to address the conflict in

ways that heal relationships and restore harmony to the group. In contrast, Western conflict resolution methods prioritize reaching an agreement between individual parties over mending relationships that have been damaged by the conflict (Walker, 528)

Western ADR models have what Lederach calls a "prescriptive modality" where conflict intervention is reduced to a single set of techniques and skills, which become key aspects of the training and subsequent application of the model. (Lederach 1995) For Lederach, these skills often lack the capacity to respond to cultural differences and worldviews that bring these differences to life. The interest-based model's focus on problems, not relationships; outcomes, not process; and, objective criteria of success versus value-based decision-making makes it problematic for implementing in cross-cultural settings. (Osi; Walker)

The goal of "separating people from the problem", which essentially dismisses the emotional aspects of the conflict, may be antithetical to the goal of resolution in cross-cultural settings as it is this very aspect of the conflict in which "sustained progress in conflict can be made". (Lebaron and Pillay, 21) The goal of separation may result in overlooking the key to unlocking change in a cross cultural conflict. Individual and group identity is often tied to culture, and may be the underlying key to disputes over land, resources and many other types of conflicts. Although the assumptions and skills associated with the interest-based approach may help to reduce tensions and form agreements that address the surface issues of a dispute, the approach does not guarantee sustained peace or continuing relationships between conflicting parties.

Strongly rooted in western notions of neutrality and justice, western ADR processes also come under fire from critics who see the model simply as new packaging for age-old-processes by which the Crown seeks to assert its sovereignty over Aboriginal peoples and their lands. This view is steadfastly reflected by Kahane:

The dominant western political vocabulary has a readily available story about how to resolve disputes between groups over perceived conflicts of interests, aspirations, or access to resources: let each side make its case before a neutral third party, who will decide objectively on a just settlement. This common-sense story of adjudication has deep roots in western cultural, legal, and philosophical traditions, and is closely tied to accounts of political legitimacy. In its common-sense version, this story about neutrality and justice has tremendous currency in North America: it is seen as describing not only the aspirations of our legal and political systems, but even their typical operation. Seen from the standpoint of Aboriginal struggles for survival, equality, and self-determination, however, the dominant western account of justice looks deeply corrupt. (6)

As a central driving force of conflict, worldview should be a major consideration in both the design and application of an ADR process in which questions of rights, justice and reconciliation are the focus. The imposition of any ADR model in cross-cultural contexts, regardless of its theoretical and philosophical underpinnings, is unlikely to make a profound contribution to the project of reconciliation in Canada until Aboriginal peoples are directly involved in the early stages of its development.

In addition to the relationship between culture and conflict, we think there are additional issues and challenges that have perhaps stemmed the turn towards ADR in resolving land and resource disputes in the Aboriginal context, and more broadly achieving reconciliation. We briefly highlight two of these in particular: the understanding and meaning of reconciliation; and the relationship between worldviews and dispute resolution. Taken together these examples illustrate some of the limits of ADR, and potential directions for future development.

a. *Understandings and Meanings of Reconciliation*

Understandings of the meaning, vision and goals of reconciliation in the context of the relationship between Aboriginal peoples, governments and non-Aboriginal people vary widely. In the broadest sense, the term is used to suggest what processes and changes must occur to improve the structure of the relationship between Aboriginal peoples and the Crown, and the relationship between Aboriginal peoples and non-Aboriginal Canadians.

As we have seen, the Courts have provided the dominant frame within which the governments' and First Nations' meanings and goals of reconciliation have evolved. They have talked about it in two ways. First, the Court has used the term reconciliation to give guidance to the government with respect to what constitutes a justified infringement of Aboriginal title and rights. Second, the Court has used reconciliation to define the very purpose and goal of the recognition and protection of Aboriginal title and rights in the *Constitution*. In highlighting reconciliation as a fundamental constitutional purpose, they are trying to lay the groundwork for negotiated and consensual agreements, including contemporary treaties, and implementation of historic treaties.

In its interpretation of the guidance given by the Courts, the Government of Canada has tended to view reconciliation as a process taking place along

two separate streams with two separate goals. 1) reconciliation between the Crown and Aboriginal peoples and; 2) reconciliation by the Crown of Aboriginal and other societal interests, particularly with respect to land. The first goal has been taken up by the work of the Truth Reconciliation Commission which supports truth telling and information sharing about past injustices and collateral harm inflicted on Aboriginal peoples by residential schools.

The second goal of reconciliation is pursued through the fulfillment of its common law duty to consult and possibly accommodate First Nations whose s.35 rights may be adversely impacted by conduct the Crown is contemplating, such as the issuing of permits to resource developers. Echoing the *Haida* decision, the government's 2011 guidelines to federal officials to fulfill the duty to consult states:

> The duty to consult and, where appropriate, accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty by the Crown and continues beyond formal claims resolution through to the application and implementation of Treaties. The Crown's efforts to consult and, where appropriate accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation. (6)

These goals are far from consistent with First Nations' visions of reconciliation. In their 2013 report "Advancing an Indigenous Framework for Consultation and Accommodation", the Leadership Council – a collective comprised of the BC Assembly of First Nations, the Union of BC Indian Chiefs and the First Nations Summit - focused their definition of reconciliation as a process rooted in the recognition of a more meaningful role for Aboriginal governments in decision-making about their traditional territories:

> Reconciliation in the context of the relationship between Aboriginal Peoples and the Crown is about sovereignty. It involves reconciling the reality "of prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory" (*Van der Peet*). This reconciliation is of sovereignties, with its ultimate expression being in developing shared and collaborative patterns of how sovereigns will interact with each other with respect to governing and making decisions. Reconciliation of this nature and scope is not a mere adjustment to processes of Crown decision-making, or a mechanistic and forumulaic exchange of information. It is much broader, extensive, and complex than this. (The First Nations Leadership Council, 11)

With government and First Nations' visions of reconciliation seemingly at

odds, it makes sense that ADR processes designed to advance reconciliation between them have not been more successful. In thinking about the role of ADR in creating shifts in the relationship between distinct societies who have experienced protracted and deep-rooted conflict over land, Herbert Kelman's conception of peacemaking processes provides a useful frame for analysis of the situation in Canada.

Kelman categorizes peacemaking processes into three distinct yet interconnected groups : conflict settlement, conflict resolution, and conflict reconciliation.

Conflict settlement refers to the negotiation of a political agreement where the relationship between the parties is narrowly defined by their respective roles as set out in an agreement and compliance is carefully monitored by both sides. (Kelman) While negotiated settlements may be constructed around the political interests in both societies, they are often imposed by third parties and not designed to change the quality of the relationship between them. The resulting relationship is likely to be short-term, and potentially unstable with little or no change in attitude or perceptions each society holds toward the other.

In contrast to conflict settlement, conflict resolution refers to the achievement of agreements that engender long-term cooperative relationships and address the fundamental needs, fears and sense of justice of both sides.

> Conflict resolution goes beyond the realist view of national interests. It explores the cause of conflict, particularly causes in the form of unmet or threatened needs for identity, security, recognition, autonomy, and justice. It seeks solutions responsive to the needs of both sides through active engagement in joint problem solving. Hence, agreements achieved through a process of genuine conflict resolution – unlike compromises achieved through a bargaining process brokered or imposed by third parties – are likely to engender the two parties' long-term commitment to the outcome and to transform their relationship. (Kelman, 1)

Unlike conflict settlement, agreements arising from conflict resolution are not imposed by third parties as would be the case in the use of arbitration. Rather they are arrived at "interactively", moving beyond an interest-based settlement and expressed in the shared belief that cooperation and peace are in the best interest of both societies. Thus, successful conflict resolution represents a shift in the relationship based on trust in the other's interest in sustaining a partnership (Kelman, 10). While the quality of the relationship is

stronger than what might be expected from a process of conflict settlement, this relationship may also have its limits and be vulnerable to changes in interest, circumstance and leadership. For in this new relationship, "new attitudes develop alongside old ones, but are not necessarily integrated with one's pre-existing value structure and belief system – with ones' worldview. This means that old attitudes – including attitudes of fundamental distrust and negation of the other – remain intact even as new attitudes, associated with the new relationship, take shape." (Kelman, 11)

The above conception of conflict resolution can be likened in many ways to the British Columbia treaty process. With its design rooted in the interest-based model, the process involves a level of "interactivity" between Aboriginal leadership and the Crown to explore their interests with the objective of arriving at agreements that outline both individual and joint responsibilities under a new government-to-government partnership. Through a formal process of ratification by the Aboriginal group and royal assent by government, the agreements are brought permanently under the umbrella of section 35(1), making the new partnership long-lasting. Constitutional protection of the agreement further supports a shift from a historically power-over relationship to one where the decision-making authorities of each government, whether separate or shared, must be respected.

Within Kelman's three categories of peace-building, reconciliation represents a distinct process, qualitatively different from conflict resolution. He says,

> Reconciliation is obviously continuous with and linked to conflict resolution and it certainly is not an alternative to it. But whereas conflict resolution refers to the process of achieving a mutually satisfactory and hence durable agreement between two societies, reconciliation refers to the process whereby societies learn to live together in the post-conflict environment. (Kelman, 3)

Kelman goes further to suggest the result of a conflict reconciliation is the expression of a shared value system that distinct individuals and groups internalize and becomes fully integrated into the political cultures and belief systems of once conflicting societies.

We noted above that the Government of Canada predominantly views reconciliation over lands as achievable through the establishment of treaty agreements and other agreements that result from its consultation efforts. Yet Kelman suggests that reconciliation should be a driving force in shaping

the relationship of the negotiating societies, and begin at much earlier stages of the negotiation process. He says "reconciliation is, after all, a process as well as an outcome; as such, it should ideally be set into motion from the beginning of a peace process and as an integral part of it." (Kelman, 2)

From this perspective, ADR has a potentially important place in the broader project of reconciliation in Canada. Legal adversarialism is inconsistent with this vision of reconciliation. ADR contains the potential to contribute to the design and implementation of processes that are capable of making progress in this dynamic and diverse context. However, the limited focus of conventional ADR on achieving political and economic certainty gives rise to a context where the Crown and Aboriginal people value the process differently and have competing expectations of the outcomes. From this perspective, the process of reconciliation and the work of aligning ADR with the goal of creating large-scale shifts in the relationship between Aboriginal peoples and the rest of Canada has only just begun.

b. *The Role of Worldviews*

The relationship between worldviews and dispute resolution has been explored in various ways, including, as discussed earlier, in relation to culture and conflict. Generally speaking worldviews might be understood as the 'lens' or 'frame' through which an individual understands and interprets the world. As Clarke-Habibi describes:

> Worldviews reflect the way an individual or group perceives reality, human nature, the purpose of human life and the laws governing human relationships (Danesh, 2004). For the most part, we are only partially conscious of the worldviews we hold. Nevertheless, worldview determines where we see ourselves going, what we understand to be the processes taking place around us, and what we believe our role in these processes can and should be.
>
> Worldviews develop in the contexts of family, religion, culture, and school; and are additionally shaped by the political environment, the media and our life experiences. Discussed in their various aspects as "social representations" (Moscovici, 1993), "dispositions" (Brabeck, 2001) "cultural fabric" (Hägglund, 1999) and "collective narratives and beliefs" (Salomon, 2003), worldviews "are constructed, transmitted, confirmed, and reconstructed in social interactions, and they mediate social action". In other words, worldviews influence everything we think, feel and do. (41)

As noted earlier, in one set of application, the concept of worldview can be

used to understand the relationship between culture and conflict. As Lebaron writes:

> Our cultures exist within larger structures called 'worldviews'. In her new book *In Search of Human Nature*, Mary Clark defines worldviews as "beliefs and assumptions by which an individual makes sense of experiences that are hidden deep within the language and traditions of the surrounding society." These worldviews are the shared values and assumptions on which rest the customs, norms, and institutions of any particular society. Clark tells us that these worldviews are tacitly communicated by "origin myths, narrative stories, linguistic metaphors, and cautionary tales", and that they "set the ground rules for shared cultural meaning." (LeBaron)

This understanding of the relationship between culture and worldviews has significance for conflict and conflict resolution in a range of ways, including for communication styles and how meanings are conveyed, assessing how individuals and groups may impose their worldviews on others, the need to understand cultures in order to work effectively across cultures, as sources for analyzing and understanding conflicts, and as a frame for understanding how shared meanings may be built. (LeBaron)

In addition to the important and clear connection to culture, the concept of worldview has also been used to identify an individual's orientation towards conflict, behaviours in situations of conflict, and to the meaning and purpose of resolution. From this perspective, one finds discussions of how certain worldviews might be more prone to conflict – or conflict-oriented – while other worldviews might be more, for example, unity or peace-oriented. For example, writing in the context of peace education, Clarke-Habibi observes:

> Most of the peoples of the world live with conflict-oriented worldviews (Van Slyck, Stern and Elbedour, 1999). Indeed, conflict-oriented worldviews are so firmly positioned as the norm in our societies that they pass undetected even when interwoven into peace education lessons, let alone other issues, discussions and activities that occupy us on a daily basis. The result is a perpetuation of cultures of conflict in which people feel themselves to be conflicted, engage in conflicts at home and at work, prepare themselves and their children for future conflicts, and recount their past conflicts in cultural and historical narratives. (41)

Relatedly, worldviews have been used to describe certain conflict resolution models as well as individual orientations towards situations of conflict. Perhaps most famously, Baruch Bush and Folger, in the development of their model of transformative mediation, drew a distinction between a relation-

al worldview and a problem-solving worldview. Processes and practices informed by a relational worldview are fundamental to overcoming the limits of the problem-solving approach, which typically have an end result that "is not more satisfaction and justice but less." (74) In another application, Danesh and Danesh draw a direct correlation between worldviews and the approaches to conflict and conflict resolution that individuals may take. Certain worldviews may align with authoritarian and force-based coercion, others with competitive power-struggle approaches, while others may tend towards being more relational and unity-centered. Danesh and Danesh make three main arguments:

> (1) that conflict resolution practices reflect particular worldviews; (2) that worldviews exist in a gradual, evolutionary process; and (3) that some worldviews are more prone to conflict and violence, while others to unity and peace. (Danesh and Danesh)

All of these approaches to the relationship between worldview, conflict, and conflict resolution zero in on the reality that approaches to conflict resolution must be understood and analyzed from much more than a process lens, and indeed an over pre-occupation on process itself reflects a particular cultural and worldview lens. From this perspective, to achieving reconciliation, for example, requires not only a particular process that is conducive to that objective, but the process itself and those involved in the process must also be informed by a particular worldview. To use the language of Baruch Bush and Folger, it might be said that problem-solving processes that reflect a problem-solving worldview implemented by parties with problem-solving worldviews, are not conducive to advancing reconciliation between Aboriginal and non-Aboriginal peoples. Such reconciliation requires engaging across cultures and building new relationships that speak to the past, present and the future. Similarly, to employ the model of Danesh and Danesh, a conflict-oriented worldview and processes that reflect such a worldview and may be authoritarian and competitive in nature, are fundamentally ill-suited to the project of reconciliation. Rather, the project of reconciliation by necessity requires an orientation towards relationships and unity, and a process design that reinforces that orientation.

While the need for processes, and individuals engaged in efforts at reconciliation, to reflect particular worldviews may appear quite obvious and straightforward, it does have potentially far-reaching implications. For example, Danesh and Danesh suggest that challenging worldviews requires

critically examining our most basic assumptions about conflict – including assumptions that underlie the major models of ADR that are employed. For example, they discuss the potential implications of the assumption that conflict is an inevitable and innate dimension of human existence – something that is assumed in most predominant models of mediation and negotiation – and challenge scholars and practitioners to examine more deeply the constructed nature of conflict at both the psychological and social levels.

This is all to suggest that the relative lack of success in the use of ADR in the Aboriginal context in Canada, such as in the British Columbia treaty process, is because it attempts to achieve reconciliation through processes and individual orientations that are not consciously reflective of the goal it is setting out to achieve. At the same time, the relative lack of use of ADR to advance reconciliation reinforces the observation that a worldview conducive to reconciliation is not predominant in this context, and hence the decision-makers involved have been hesitant to move in the direction of ADR processes that might be more suitable than the courts for achieving that goal. Stated another way, we don't use ADR very much in this context because a conflict-oriented worldview continues to predominate, and when we do use ADR we use it badly for the same reason.

Part 5 - Conclusion

In an age of intensifying social integration, when human beings are experiencing and interacting with each other in an increasingly regular and varied manner, for ADR to remain continually responsive and relevant we need to be open to dynamically explore the fundamental purposes of ADR and what it may represent, and be ready to look beyond process, and towards underlying worldviews and orientations, to be successful in ADR's use. On the surface, the issue of Aboriginal reconciliation in Canada seems an ideal context for the use of ADR. But the reality is that predominant constructions of ADR do not fit the challenge of reconciliation. When one peels away the layer of process, one finds that ADR processes are imbued with cultural norms and worldviews that don't match with the purpose of reconciliation. Reconciliation is not just a problem to be solved. Efforts to align "interests" do not easily succeed in a context where the purpose of the process deals with matters of the past, present, and future, engages issues of trust, respect, and understanding, demands

multiples forms of redress, compensation, and recognition, and demands that parties, through healing, build a different future together.

Importantly, this mis-fit between many predominant forms of ADR and the project of reconciliation, highlights two discourses within the field of ADR itself. The first discourse might be labeled as one about the move towards proactive processes. The majority of ADR processes are designed and developed as methods to resolve conflicts once they have arisen – to provide an alternative to how they are resolved. The proactive shift is to highlight how we may focus work in this field to create dynamics and conditions where the intensity and incidences of conflict are lessened. There are many different approaches to this proactive theme, whether it is in terms of taking a systems approach, building in an "educative" dimension into conflict resolution processes, or turning an inward focus on the orientation an individual has to situations of conflict. (Danesh and Danesh) It might be said that if we are to get serious about ADR being an agent of reconciliation, such as in the Aboriginal context, then it demands we take a more proactive approach that is at once focused on creating conditions that lessen future conflict, while actively working to redress past and present challenges.

The second discourse relates to how we teach ADR. By far the predominant pedagogical model has been a highly prescriptive one – where individuals are trained in steps, stages, and skills, often in a mechanistic or formulaic manner. While such an approach has its merits – including that of transferability of skill and technique – it is increasingly unsuited to contexts and environments where forces of social integration have created layers of diversity and complexity that do not align easily with a predetermined model of resolving conflict. Similarly, where the underlying purpose is a comprehensive and overarching one, such as reconciliation, prescriptive formulas are often far too narrow to address the tangible and intangible dimensions that must be addressed. One counter to the prescriptive model is an iterative one, or what Lederach refers to as an "elicitive approach" to teaching peace-building skills. (Lederach 1995)

Lederach's approach to teaching ADR is rooted in his particular approach to peacebuilding – which is widely referred to as conflict transformation. Lederach describes conflict transformation "as a set of lenses that combine to create a way to look at social conflict and develop responses". (Lederach 2003) In his early writings, he summarizes the concept of transformation in conflict as follows:

> Transformation as a concept is both descriptive of the conflict dynamics and prescriptive of the overall purpose that building peace pursues, both in terms of changing destructive relationship patterns and in seeking systemic change. Transformation provides a language that more adequately approximates the nature of conflict and how it works and underscores the goals and purpose of the field. It encompasses a view that legitimizes conflict as an agent in relationships. It describes more accurately the impact of conflict on the patterns of communication, expression and perception. Transformation suggests a dynamic understanding that conflict can move in destructive and constructive directions, but proposes an effort to maximize the achievement of constructive, mutually beneficial processes and outcomes. (Lederach 1995, 18–19)

For Lederach - methods for teaching ADR should be thought of as transformational or opportunities for discovery, creation, and solidification of models that emerge from the resources present in a particular conflict setting and in response to the specific needs of that context. Conflict intervention, and the teaching of conflict intervention models, does not happen in a straight line, rigid methodology or step-by-step guide. Rather, the teaching of conflict intervention, like the act of conflict intervention itself, takes place within its proper context and builds the skills of individuals to articulate a positive sense of identity and relationship to one another .

This is all to suggest that practitioners, researchers, and scholars of ADR need to continue to foster, and deepen, the development of ever-more responsive processes that are capable of meeting the complexity of the contemporary world. The Aboriginal-Crown context in Canada illustrates the types of challenges to ADR in a world of social integration where conflicts at once engage historical wrongs, complex legal processes, diverse populations, and contemporary economic and social realities. ADR has a potentially significant contribution to make in such contexts, but currently that potential is relatively untapped. In order to rise to meet this challenge, there is a responsibility to think in new, creative, and expansive ways about the underlying foundations of ADR and how to develop processes, and practitioners, that navigate and reflect this contemporary complexity.

Bibliography

Assembly of First Nations. 2012. Justice Delayed: Assembly of First Nfations Submission to Canada for the Five Year Review of the Specific Claims Action Plan: “Justice at Last.” http://www.afn.ca/uploads/files/land_claims/justice_delayedspecificclaims.pdf.

Atleo, Shawn A-in-chut. 2012. “Joint Statement of the Chiefs of Ontario, Grand Council fo the Crees (Eeyou Istchee), Amnesty International, Canadian Friends Service Committee (Quakers), KAIROS: Canadian Ecumenical Justice Initiatives”, prensented at the United Nations Permanent Forum on Indigenous Issues,New York, 7-8 May http://www.afn.ca/uploads/files/pfii_2012_doctrine_of_discovery_joint_statement_fe.pdf.

Brean, Joseph. 2014. “Reconciliation’ with First Nations, Not the Charter of Rights & Freedoms, Will Define the Supreme Court in Coming Years, Chief Justice Says.” National Post, March 13. http://news.nationalpost.com/2014/03/13/reconciliation-with-first-nations-not-the-charter-of-rights-freedoms-will-define-the-supreme-court-in-coming-years-chief-justice-says/.

British Columbia Claims Task Force. 1991. The Report of the British Columbia Claims Task Force. http://www.fns.bc.ca/pdf/BC_Claims_Task_Force_Report_1991.pdf.

British Columbia Treaty Commission. 2001. Looking Back Looking Forward: A Review of the BC Treaty Process. http://www.bctreaty.net/files/pdf_documents/review_bc_treaty_process.pdf.

—. 2013. BC Treaty Commission Annual Report. http://www.bctreaty.net/files/pdf_documents/BCTC-Annual-Report-2013.pdf.

Baruch Bush, Robert, and Joseph Folger. “New Directions in Mediation: Communication Research and Perspectives.” In Ideology, Orientations to Conflict and Mediation Discourse. San Francisco: Sage Publications.

“Certainty: Canada’s Struggle to Extinguish Aboriginal Title.” Union of BC Indian Chiefs. http://www.ubcic.bc.ca/Resources/certainty.htm#axzz34kkrpSn.

Clarke-Habibi, Sara. 2011. “Transforming Worldviews: The Case of Education for Peace in Boznia-Herzegovina.” In Education for Peace Reader, edited by H.B. Danesh, 4:37–52. Victoria: EFP Press. http://efpinternational.org/wp-content/uploads/2011/11/efp_reader.pdf.

Danesh, Hossain B., and Roshan Danesh. 2001. “Consultative Conflict-Resolution Model Beyond Alternative Dispute-Resolution.” The International Journal of Peace Studies 6 (2). http://www.gmu.edu/programs/icar/ijps/vol7_2/Danesh.html.

Dickson, Brian. 1991. “ADR, the Courts and the Judicial System: The Canadian Contest.” http://www.biblio.uottawa.ca/static/ftx/docs/dickson/DICKSON.pdf.

Druker, Peter. 1995. “Introduction.” In Mary Parker Follett - Prophet of Management. Boston: Harvard Business School Press.

First Nations Summit. 1991. Assimilationist Policies. http://www.fns.bc.ca/pdf/uttp-pages9-18.pdf.

“Frequently Asked Questions.” 2013. Specific Claims Tribunal Canada. http://www.sct-trp.ca/freq/index_e.htm.

Government of Canada. 2011. Aboriginal Consultation and Accomodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf.

Graham, Pauline, ed. 1995. Mary Parker Follett - Prophet of Management. Boston: Harvard Business School Press.

Kahane, David. 2003. “Dispute Resolution and the Politics of Cultural Generalization.” Negotiation Journal, January, 27.

Kelman, Herbert. 2010. “Conflict Resolution and Reconciliation: A Social-Psychological Perspective” (paper presented at the Conferencia a cargo de Herbert C. Kelman, Madrid, Novermeber 11, 2009).

LeBaron, Michelle. 2003. “Culture and Worldview Frames.” Beyond Intractability. http://www.beyondintractability.org/essay/cultural-frames.

LeBaron, Michelle, and Venashri Pillay. 2006. “Conflict, Culture and Images of Change.” In Conflict Resolution Across Cultures: A Unique Experience of Bridging Differences. Boston: Intercultural Press.

Lederach, John Paul. 1995. Preparing for Peace: Conflict Transformation Accross Cultures. Syracuse, NY: Syracuse University Press.

—. 2003. “Conflict Transformation.” Beyond Intractability. http://www.beyondintractability.org/essay/transformation.

McLachlin, Beverley. 2013. “Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada”. presented at the Canadian Club of Ottawa, Ottawa, February 5. http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-02-05-eng.aspx.

Osi, Carlo. 2008. “Understanding Indigenous Dispute Resolution Processes And Western Alternative Dispute Resolution: Cultivating Appropriate Models in Lieu of Litigation.” Journal of Conflict Resolution 10 (1): 164–231.

Robert Baruch Bush, and Joseph Folger. 2004. The Promise of Mediation: The Transformative Approach to Conflict. John Wiley & Sons.

Standing Committee on Aboriginal Affairs and Northern Development. 2011. Ottawa: Parliament of Canada. http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5006955&Language=E&Mode=1.

The First Nations Leadership Council. 2013. Advancing an Indigenous Framework for Consultation and Acommodation in BC: Report on Key Findings of the BC First Nations Consultation and Accommodation Working Group. http://www.fns.bc.ca/pdf/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf.

Walker, Polly. 2004. "Decolonizing Conflict Resolution: Addressing the Ontological Violence of Westernization." American Indian Quarterly 28 (3/4): 527–49.

Case Law and Legislation

Audeck Omni Kaning Kaning v Her Majesty the Queen in Right of Canada, 2014 SCTC 1 [Audeck Omni Kaning]

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 [Delgamuukw]

Hul'quimi'num Treaty Group v. Canada, IACHR (2009) Report No 105/9, Petition 592-07, Rights.http://www.cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm

Indian Act, RSC 1985, c I-5

Beckman *v.* Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 [Haida Nation]

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Constitution Act, 1982]

Tsilhqot'in Nation *v.* British Columbia, 2014 SCC 44 [Tsilhqot'in]

A FALSE 'PRINCE CHARMING' KEEPS 'SLEEPING BEAUTY' IN A COMA: ON VOLUNTARY MEDIATION BEING THE TRUE OXYMORON OF DISPUTE RESOLUTION POLICY

Giuseppe de Palo

The recent publication of a study conducted for the European Parliament on Mediation [1] has contributed to the ongoing international debate about effective mediation policy. [2] I am the coordinator of that 230+ page study, whose results were based on 816 questionnaires completed by respondents coming from the 28 member states of the EU and the majority views reflected in those responses.

The Rebooting study determined, in essence, that mediation in the EU is still the "Sleeping Beauty" I first heard about when I decided to enter into this field exactly 20 years ago, after shadowing a mediation at JAMS in San Francisco. Indeed, in light of many decades of stagnation, and despite the generous injection of enthusiasm and repeated efforts to revive her, the consensus seems to be that our princess is, unfortunately, more than just asleep. The Rebooting study ultimately concluded that unless "elements of mandatory mediation" are introduced by law, Sleeping Beauty will not wake up, ever, at least on the EU side of the Atlantic Ocean.

In a thought-provoking article authored for Mediate.com, "What Went Wrong With Mediation", my long-time friend and esteemed colleague Adi Gavrila discussed, amongst other things, the methodology, findings, and recommendations of the European study. In this little article, I would like to correct Adi's errors on some material aspects of the study and, using his comments about the study, address other arguments he makes. My discussion, I hope, will explain the title for my article, which I devote to all those who – in my view – are placing their hopes on a false Prince Charming.

Adi is correct in pointing out that the number of cases being mediated

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1 *Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Use of Mediations in the EU* – hereafter, the 'Rebooting study' or 'study'.

2 The study can be downloaded at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf; its official presentation before the Legal Affairs Committee of the European Parliament can be watched at: http://www.youtube.com/watch?v=qvxShkxqwbY&feature=youtu.be.

remains disappointing, both in the US and the EU. The very low number of mediations taking place was the very reason the European Parliament commissioned the Rebooting study in the first place. However, in my view Adi is not correct in identifying the four major areas that cause the "EU Mediation Paradox" [3] he refers to. Let's take these four areas into consideration one by one. While I will refer specifically to the EU, I presume that these considerations are in good part applicable to other jurisdictions.

1. Policies. What Went Wrong is correct that promoting mediation solely by endorsing it as an alternative to overcrowded courts and expensive lawsuits is the wrong approach. Certainly though, mediation has been proven, over and over again, to save time and money (the Rebooting study, for example, showed that close to 20 billion euro per year could be saved in the EU if mediation were used all the time, even with only a 50% success rate.) What, then, should legislators do, especially at a time of economic downturn? However, the article's contention that "introducing mediation as a way to ease the load of courts has backfired" seems unproven, especially if one considers the following: systems where lots of mediations take place (normally because of "mandatory elements" in the regulatory framework) see no increase in problems, or are even seeing improvement, while in systems where mediations are not happening people continually debate whether, and if so how, stronger incentives, or mandatory elements, should be introduced.

In addition to that, while easing the strain on overcrowded and overburdened courts is clearly one of many valid reasons to promote mediation, it is not, and has never been, the only reason provided or recognized. The readers of Mediate.com need not be told, by me or anyone else, about the many individual and societal benefits an increased use of mediations would bring. Still, if the issue here is one of "marketing", as the articles points out, one should promote the message that is the most likely to prompt politicians to act, given the lack of spontaneous embrace of mediation by its users.

But the argument I find most unconvincing is that "simply increasing the number of judges to deal with the extra load" would be the best policy to address the litigants' concerns. My colleague here seems to overlook that, as an economist would put it, "justice is a superior good", ie, something that

3 This expression was coined by my colleague Leonardo D'Urso and, to my knowledge, is now common in EU circles since a presentation I did at the 2012 Fundamental Rights Conference (http://fra.europa.eu/en/event/2012/fundamental-rights-conference-2012-0#workinggroup5).

the richer a society gets, the more it demands. From this point of view, an increase in the number of disputes signals that a given society is richer. More disputes are thus a good sign – I repeat – from that point of view. And even if one were to add more judges (assuming, that is, that the economy was the opposite of what it is nowadays), very likely there would continue to be even more disputes. An analogy I find useful to explain this concept comes from traffic. Increased traffic is a drag, but it normally means increasing business. The issue, then, is not to hope that there would be fewer cars on the street (or, fewer people litigating), but to govern traffic, incentivizing certain avenues and de-incentivizing others, at least on an experimental basis. If one just adds more streets or parking spaces, more cars will hit the road.

Adi Gavrila goes on to note "that satisfaction with mediation is not consistently greater when compared to satisfaction with courts." Although this might hold true with parties at the beginning of the court process, most people ultimately come to regret, at times profoundly, their day in court. Indeed, I do not think it was a self-interested mediator, or a lawyer, who first said "a bad settlement is better than a good trial" or, going way back to Latin, "summum ius, summa iniuria". I am positive that saying this first or more often are the litigants themselves, and often both winner and loser in court.

I also disagree with Adi where, in reference to the Rebooting study, he states that supporters of mandatory mediation are self-interested mediators themselves. First of all, a large number of study respondents were not mediators. Second, several respondents were against mandatory mediation. Third, those who favored it pointed out the potential push-back mandatory mediation could confront. Fourth, and most importantly, the EU study does not support mandatory mediation. Rather, the study maintains that "mandatory elements" are necessary for the success of mediation in the EU and, notably, that the best system (both in terms of actual performance and support expressed by the respondents) is one of mandatory mediation with the possibility of an unrestrained (and cheap) opt-out at the first meeting with the mediator. In short, the study suggested a "smarter" form of the increasingly common mandatory mediation information meetings. Such information meetings, based on an "opt-in" model to participate in mediation, are simply proving to be of little effectiveness. Strikingly, this model, not promoted by the study, is used in Adi's own country (don't forget, we are not just good friends, but mediators, too; hence, I of course reached out to him before pub-

lishing this article, to learn more about "What Went Wrong ... With Him and His Country's Mediation Law"!)

Adi goes on to say that "mandatory mediation is a sort of oxymoron – nobody can force people to negotiate." Here my disagreement with him is greater, as a matter of both law and practice. First, laws requiring litigants to exhaust pre-litigation processes have existed in the US for over 100 hundred years, and passed Supreme Court scrutiny (if I remember correctly, the US leading case is *Capital Traction*, of 1899). The European Court of Justice, too, held in its "Alassini" case [4] that mandatory mediation is consistent with EU law so long as it serves a general purpose and does not make access to the judicial system too burdensome. Second, as a matter of practice, what is a heavier and more legally intolerable obligation to negotiate: being "forced" by law to sit down and talk with a mediator (with the possibility of opting out at little or no cost), or being "de facto" obliged to settle right way to avoid spending a fortune in legal fees, and waiting for years, as happens in countries where fewer than 5% of the civil disputes get to trial? Third, and most fundamentally, requiring people to think about the possible benefits of negotiating is different from requiring them to negotiate.

I would add a note here about an epiphenomenon of mandatory mediation demonstrated in my home country of Italy. As some people know, mediation has quite a history here. After decades of negligible annual numbers of mediations, the switch turned ON in 2011, when mandatory mediation came into force for certain civil actions. From virtually one day to the next, mediations increased to over two hundred thousand annually. At the end of 2012, though, the switch turned OFF, overnight, when the Italian Constitutional Court ruled that the legislative process that had introduced mandatory mediation was faulty. (In other words, the Court did not address the issue of the constitutionality 'per se' of mandatory mediation – it only ruled that mandatory mediation should have been introduced with a parliamentary act, not the governmental regulation that was used.) The switch went back ON when the mandatory requirement was re-installed, this time with parliamentary approval, in September 2013. The most interesting bit is this: 20% of the 200,000+ mediations initiated before the Italian Court quashed the mandatory mediation requirement were voluntary. Right after that decision, ALL kinds of mediations stopped. And now, with the return of mandatory mediation, BOTH voluntary and mandatory mediations are being started again at a

4 Http://curia.europa.eu/juris/liste.jsf?num=C-317/08&language=en.

very high rate. In short, at least in Italy, requiring mediation for some cases tends to promote voluntary use of mediation for others.

Going back to What Went Wrong, , my colleague argues there that policymakers and mediators are conspiring: they "have made an unholy alliance to force people into using a service they haven't particularly liked or found useful." I have no evidence of this plot, but certainly that is not the mediation model the Rebooting study recommends: if parties do not find mediation useful, or they do not like it for whatever reason, they are free to opt-out and seek recourse through the court system. But at least they have to give the process serious consideration by just showing up. Is that too much to ask of citizens who do not want to pay extra taxes and, at the same time, want access to a better dispute resolution system?

About lawyers being reluctant to use mediation on a grand scale, I only partially agree with Adi. That is, there is resistance by lawyers to elements of mandatory mediation, especially in the beginning; however, given time, many lawyers have become the greatest supporters even of "very mandatory" (ie, without easy opt-out) forms of mediation. Argentina, is one example. Italy, another. Let me be clear on this, at least about my own country. There are still opponents to the current model of mandatory mediation with easy opt-out, but the majority of lawyers are now in favor, and they actually began creating the busiest mediation centers when "very mandatory mediation" was the law. Lawyers are still almost exclusively trained in the adversarial model, and there is certainly an "adversarial self-selection" factor in those choosing law school in the first place. So resistance, even strong resistance, by the legal profession should be neither a surprise, nor a reason to be fearful of advocating for a better model.

Having spoken with Adi at various international conferences about this very aspect, I am a bit puzzled when his article seems to suggest that I would be satisfied by the large number of mediations, as if settlement rate and, even more, user satisfaction would not count. But I guess we mediators experience every day, perhaps more than anyone else, the difference beween written and oral communication. Anyway, even aside from the discussion as to what really is a "failed mediation", amongst others I would like to remind us all of the Australian experience. There, mandatory and voluntary models co-exist and the success and user satisfaction rates are comparable. What is not comparable (guess what) is the sheer number of mediations in the two models, within the same country.

I have been using the seat belt or helmet law example for quite some time now, to explain why it is naïve – in my view – to keep on blaming the "lack of culture" for the limited use of mediation. Based on the definition of justice as a superior good, which I alluded to above, and on the well-known "fight or flight" animal response to an attack, I argue that the human being's initial, natural response to a legal conflict (or the threat of it) is not mediation, but litigation--despite the fact that, overall, the better approach, at least in the vast majority of the cases, is an amicable process. My point is the following: people know that wearing a seat belt or a helmet is good for them (and society); still, we have laws compelling that behavior. A "culture of safe driving" alone won't do it.

Similarly, human beings suffer from well documented biases ("optimistic overconfidence" comes quickly to mind) that would lead the majority of them not to insure their vehicles, even if that is an economically irrational choice, both for the individual and the society. Well, Adi says that my analogy compares things that are not comparable, because people have the choice to litigate or not, but not that of buying insurance (or wearing a helmet on motorbike) or not. I think it is plain that people do have a clear choice in both cases, and it is actually very similar: taking the risk of losing in court, or that of being caught and fined by the police.

In my view, What Went Wrong takes at times the wrong perspective. Just as the article focuses on the problem of mandatory mediation encountering initial opposition, and not on what happens later, it also considers the individual case when it states that there are no advantages to mediation over litigation, and not at the big (policy) picture. Of course, if a person faces litigation once in a lifetime, is obliged to mediate first, and the mediation "fails" (once again, depending on what that really means), that person might be unhappy with mandatory mediation. But policy is not about one individual, but the majority of people. To explain this, to the author of 'What Went Wrong' and those still sitting tiredly on the old adage "you can lead a horse to the river, but you cannot make it drink" (ie, you can force people to enter the mediation room, but not to settle), please allow me to resort to the example I used presenting the Rebooting study before the European Parliament: "lead millions of horses (ie, all your civil disputes, or categories of them) to the river, calculate the benefits resulting from those that drink and the losses from those that did not, and then decide what's best for the majority". And don't forget, at least in the Rebooting study recommendation, all horses are free to turn away ('opt out') once they are at the river!

I would add another piece on the Rebooting study, which is the recommendation on experimenting with "mitigated mandatory mediation" (the study's phrase for "mandatory mediation with an easy opt-out system") by not introducing it full scale right way. This approach is already being used in diverse locations. The Italian law I have mentioned foresees only a 4 year trial (with a pit stop after two years). Most interestingly, I understand that a similar trial, though of 18 months only, is taking place at this time in the Manhattan Commercial Court of New York State.

2. Marketing mediation. Adi's second argument is that mediation is not being used enough because mediators have failed to market it correctly. He states that "as taxpayers in a democratic society, [it] is [the parties'] right to unrestrained access to justice." I disagree on two counts. First, access to justice is not unrestrained, nor is it fully sustained by the litigants' own money as is claimed. In Adi's country Romania, for instance, according to the 2014 CEPEJ report [5], the state only receives 13% of court costs from litigants. The remaining 87% of the costs are born by those who do not litigate. When the EU is looked at as a whole, the average amount received from litigants does increase, but to cover only 30% of the costs. Would Romanian citizens prefer an increase of about 800% of the court fees, so as to pay in full for the service they get, or would they rather try a (smart) form of mitigated mandatory mediation? In addition to that, would Romanian lawyers be more opposed to this particular form of mediation, or to almost tripling the current court fees, so as to reach the EU average?

My colleague goes on to state that "promoting mediation as cost-effective is also risky," and that the mediation approach relegates disputes to an inferior quality process and fails to understand the importance of a dispute for parties. But for those parties concerned that mediation is of an inferior quality, the opt-out approach preserves their concerns and allows them to "opt-out" of mediation and seek resolution via the court system.

Adi next states "that, if people really want something, they are ready to pay the price for that." The very high premium, over actual production costs, that consumers pay for certain consumer products is his example. This statement seems to assume, with "neoclassical economics', that human beings are perfectly rational resource "optimizers". Behavioral economics first, and neuroscience more recently, have shown us that this isn't the case at all. Translated into the field of mediation, if people don't really want mediation and they

5 Http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp.

were in fact perfectly rational, as Adi assumes, why would people "forced" to mediate settle one out of 2 cases (as it is the case in Italy today)? Or why in the US would otherwise similar foreclosure mediations programs register 25% take-up, when the system is "opt-in", and over 70% when it is opt-out? And please, let's stop with phrases such as forcing "mediation down the throats of users." Limited or free opt-out always exists, where mediation is mandatory at some level; moreover, although mediation or mediation consideration might be mandatory, the outcome is always voluntary.

3. and 4. Mediators' behavior and practice, and mediation regulation. According to What Went Wrong, there is no universal definition of mediation, and this is why the process is not embraced widely, because promoting a trade lacking a very definition is nonsensical. I am not convinced by this statement for three reasons. First, many fields and professions lack a universally accepted definition or standard, but that does not seem to affect their credibility. Second, does a universal definition even matter as long as mediators are solving problems and resolving disputes? Third, at least the Rebooting study seem to indicate the contrary; indeed, the view of the majority of the study respondents, asked about the usefulness (on a scale of five, from very negative to very positive) of a number of measures to promote mediation in the EU, listed a standard certification of mediators as the very last one.

Mediation has fallen short of expectations in the EU and the US, and in that much Adi and I agree. I know this is a strong criticism of his article, but I have tried to explain here the reasons why, and I have conveyed them to him first. Consequently, also strong is my answer to the question of "What Went Wrong". I believe that is the mediators who (rightly) claim that the "mediation romance" is over, but, jaded by the failure of their romantic vision, wish to keep the princess in the coma, or even entomb her, rather than wake her. They are (wrongly) unwilling, or incapable, to accept reality that efforts such as the EU Rebooting study, and others before, have been presenting for a number of decades now: *the voluntary approach is a false Prince Charming*, as far as dispute resolution policy is concerned. People are not enchanted by the vision of mediation, and the princess must be awoken by other, real-world means. Smart forms of mandatory mediation—a more flexible approach than most recognize—increase the number of mediations. Rejecting that reality, and wishing that a more idealistic approach would work, is the fairy-tale, idealistic vision that has kept us in the situation we confront today for too long.

In the end, Adi himself admits that "it would be really insulting to suppose

users can't understand the obvious advantages [that] mediation brings." If the users are not the ignorant ones, the only ones left to blame are the mediators. But I do not think that mediators are ignorant, either. I am simply convinced that instead of hoping that a marketing guru will enlighten them (and perhaps the users, too) at the 'Global Pound Conference[6], the mediators should speak directly to policy makers and legislators, presenting numbers, admitting mistakes, making and asking commitments. Besides, in the true spirit of mediation's efficiency, if marketing and mediators taking notes is all there is to make mediation happen, why not pulling together all the money needed to organize such a conference to retain--right now--the world's foremost marketing expert for our industry?

Adi and I discussed this at length by now, and we do fully agree on something. Sleeping Beauty needs eventually her magic kiss, and the mediation world needs a tournament of all its best knights, that is, discussing new ideas, no matter how diverse. Let's make the new Pound Conference the place where all those knights work together to wake the princess up … there will be plenty of mediators there to settle the issue of who should then marry her.

6 The idea of a new 'Pound Conference' is brilliantly presented in a recent article written by Michael Leathes and Debbie Masucci. See Http://www.imimediation.org/global-pound-conference.

PROGRAMA DE DERIVACIÓN JUDICIAL EN PUERTO RICO DESDE LA PERSPECTIVA DE LA MEDIACIÓN

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I. INTRODUCCIÓN

El propósito de este escrito es discutir las experiencias de Puerto Rico con la mediación intrajudicial y compartir algunas de mis vivencias como abogada, profesora, y conflictóloga con programas de mediación. En las últimas décadas la práctica de la mediación intrajudicial se ha incrementado en el mundo. El uso de la mediación intrajudicial ha sido muy popular y a la misma vez sumamente controversial. Muchos jueces, abogados, y participantes en estos procesos de mediación le dan la bienvenida a métodos alternos que le permitan resolver las disputas de manera rápida y eficiente a un costo razonable. Otros argumentan que la mediación intrajudicial priva a las partes de su derecho constitucional a tener su día en corte y podría fomentar acuerdos injustos o contrarios a derecho. A pesar de estas preocupaciones, la mediación intrajudicial parece haber llegado para quedarse.

En Latinoamérica y el Caribe se han importado los modelos de mediación estadounidenses. Esta situación como discutiré más adelante, puede ser un arma de doble filo. En Puerto Rico se ha logrado establecer un programa de mediación intrajudicial en el cual se integran varias técnicas y principios anglosajones, atemperándolas a las idiosincrasias caribeñas. Para explicar cómo se ha logrado este proceso, ofrezco un breve trasfondo del programa de mediación intrajudicial en Puerto Rico, la adaptación cultural de modelos estadounidenses, y lecciones aprendidas de estas experiencias.

Antes de proceder con esta discusión me es imperativo compartir algunas premisas de la cuales parte mi análisis y discusión. Como muy bien di-

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1 Catedrática Asociada, The Werner Institute for Negotiation and Dispute Resolution, Creighton University. Este capítulo es una versión editada de un capítulo publicado en *Mediación y Resolución de Conflictos: Técnicas y Ámbitos*, Helena Soleto Muñoz, Emiliano Carretero Morales y Cristina Ruiz López (Eds.), Madrid, España: Editorial Tecnos, 2011. Agradezco al Negociado de Métodos Alternos para la Solución de Conflictos del Tribunal Supremo del Estado Libre Asociado de Puerto Rico, en particular a su Directora la Sra. Ana E. Romero Velilla, por suministrarme la data estadística de los centros de mediación adscritos al Negociado discutidos en este capítulo.

jera Ricouer, "uno siempre filosofa desde algún sitio."[2] Primeramente, como abogada soy de la creencia que el desvío de casos a métodos alternos debe siempre tener como fin impartir justicia. Los métodos alternos de resolución de conflicto en muchas ocasiones descongestionan los tribunales y aceleran la tramitación de los casos. Sin embargo, desde mi punto de vista la rápida tramitación de casos no es un fin en si mismo, sino más bien una consecuencia positiva de la eficiente tramitación de la justicia lograda por medio de los métodos alternos. Comparto la opinión del Profesor Muñiz Arguelles, "La justicia lenta no es justicia, pero la adjudicación acelerada y forzada puede no serlo tampoco."[3]

Segundo, mis experiencias a través de los años me han convencido de la necesidad de adoptar modelos interdisciplinarios en el desarrollo y la implementación de programas de métodos alternos de resolución de conflictos. La interdisciplinaridad "integra conocimiento y maneras de pensar de dos o más disciplinas [...] para generar avances cognitivos y prácticos (e.g., explicar un fenómeno, crear un producto, desarrollar un método, encontrar una solución, crear una interrogante) que no sería posible si utilizamos una sola disciplina."[4] Los conflictos con los que se lidia en el ámbito judicial son demasiado complejos para pretender que por medio del narcisismo disciplinario se puede llegar a soluciones justas y holísticas. A tales efectos, me parece imprescindible que en el proceso de desarrollar programas de métodos alternos se solicite de manera proactiva el insumo de profesionales, no tan sólo en el área del derecho, sino también de profesionales en disciplinas como conflictología, psicología, antropología, y sociología, entre otros.

Tercero, mis pasadas experiencias también me han convencido que en el mundo globalizado en que vivimos es de suma importancia nutrirnos y aprender de las experiencias de cómo otros países han establecido programas de métodos alternos conectados con el tribunal. Aunque hay varios elementos culturales que nos separan, también hay varios que nos unen como seres humanos. Un padre luchando por la custodia de su hijo, una madre batal-

2 RICOEUR, Paul. Reply to David Steward, En Lewis Edwin Hahn (ed.) *The Philosophy of Paul Ricoeur*. USA: The Library of Living Philosophers, 1995, p. 443.

3 MUÑIZ ARGUELLES, Luis. *La Negociación & La Mediación*. San Juan, Puerto Rico: Ediciones Situm, 2006, p. 5.

4 STROBER, Myra H. *Interdisciplinary Conversations: Challenging Habits of Thought*. Stanford, California, Stanford University Press, 2011, p. 15-16, citando a MANSILLA, Veronica Boix. Assessing Expert Interdisciplinary Work at the Frontier: An Empirical Exploration. *Research Evaluation*, 2006, 15(1), p. 17-29.

lando en los tribunales por la pensión alimenticia de sus hijos, un empleado tratando de reivindicar su derecho al trabajo, y un prisionero tratando de reclamar sus derechos civiles no son experiencias foráneas para la gran mayoría de los tribunales en el mundo. Todos estos individuos reclaman justicia. Por supuesto, hay variaciones en cómo cada cual define estos conceptos, pero todos terminan inmersos en la cultura judicial. Por lo tanto, soy de la opinión que se puede, y se debe, ampliar nuestros conocimientos compartiendo las distintas experiencias y métodos alternos establecidos en distintos tribunales alrededor del mundo. Estados Unidos es uno de los países que usualmente es catalogado como uno de avanzada en métodos alternos y muchas veces sus programas son objeto de estudios para ver cómo implementar sus modelos en otros países. Sin embargo, recomiendo ejercer gran cautela y evitar copiar modelos importados a ciegas. Debemos recordar que los conflictos surgen en contextos socio-culturales y los mecanismos para resolver los mismos deben ser culturalmente sensitivos a estos contextos.

II. PROGRAMA DE MEDIACIÓN EN PUERTO RICO: MIRANDO AL NORTE SIN OLVIDARNOS DEL SUR

1. Breve trasfondo histórico del desarrollo del poder judicial en Puerto Rico

El poder judicial en Puerto Rico está íntimamente ligado al poder judicial de Estados Unidos a pesar de que Puerto Rico no es un estado de dicha nación. En 1898 a raíz de la Guerra Hispanoamericana y la firma del Tratado de París entre España y Estados Unidos, España cede a Estados Unidos a Puerto Rico. El Tribunal Supremo de los Estados Unidos ha descrito esta nueva relación con Estados Unidos de la siguiente manera, "Puerto Rico pertenece a, pero no es parte de" los Estados Unidos.[5]

Para el 1952, Puerto Rico desarrolló su propia Constitución bajo lo que se conoce como el Estado Libre Asociado de Puerto Rico. Este cambio no incorporó a Puerto Rico a los Estados Unidos, pero tampoco convirtió a Puerto Rico en una nación soberana. Por ejemplo, bajo el sistema de gobierno actual los puertorriqueños no pueden votar por el Presidente de los Estados Unidos

5 *Downes v. Bidwell* 182 U.S. 244, 287 (1901). En el mismo sentido, *Balzac v. People of Porto Rico* 258 U.S. 298 (1922). Ambos casos citados anteriormente continúan vigentes.

y no tienen representación en el Congreso de los Estados Unidos, a pesar que muchas leyes federales de dicho país aplican en Puerto Rico.[6]

Sin embargo, la Constitución del Estado Libre Asociado de Puerto Rico creó un Tribunal General de Justicia con jurisdicción sobre toda la isla. Conforme a la Ley de la Judicatura de Puerto Rico, el sistema judicial de Puerto Rico está compuesto de un Tribunal Supremo, el Tribunal de Apelaciones, y el Tribunal de Primera Instancia.[7] El Tribunal Supremo es el foro de última instancia en todo asunto judicial y sus decisiones no son revisables, excepto cuando la decisión afecta un derecho bajo la Constitución de los Estados Unidos o una ley federal en cuyo caso se puede acudir en alzada a la jurisdicción federal. El Tribunal Supremo de Puerto Rico es un tribunal colegiado y está compuesto del Juez Presidente y seis Jueces Asociados. El Tribunal de Apelaciones es un foro intermedio entre el Tribunal Supremo y el Tribunal de Primera Instancia. El Tribunal de Apelaciones también es un tribunal colegiado que funciona en paneles de no menos de tres y no más de siete jueces. Finalmente, el Tribunal de Primera Instancia es de jurisdicción original y para fines administrativos está dividido en trece regiones judiciales.

Según discutido anteriormente, debido a la relación político-legal entre Estados Unidos y Puerto Rico ciertas decisiones del Tribunal Supremo de Puerto Rico, pueden ser revisadas por los tribunales federales de los Estados Unidos. La Constitución de EEUU y las leyes federales estadounidenses tienen primacía sobre la Constitución y las leyes del Estado Libre Asociado. Es precisamente debido a esta relación, que podría ser beneficioso explorar la manera en que la judicatura de Puerto Rico desarrolla un modelo de mediación intrajudicial adaptando los modelos estadounidenses a las realidades culturales de los puertorriqueños.

2. Desarrollo de los centros de mediación de conflictos adscritos al poder judicial de Puerto Rico y su base jurídica

En el 1980 el Secretariado de la Conferencia Judicial del Tribunal Supre-

6 El Congreso de los Estados Unidos también controla en Puerto Rico el servicio militar, las leyes de cabotaje, la moneda, el espacio aéreo, el comercio externo e interno, e inmigración, entre otros. Para una discusión más a fondo véase, FONT-GUZMÁN, Jacqueline N. y ALEMAN, Yanira. Human rights violations in Puerto Rico: agency from the margins. *Journal of Law & Social Challenges*, 12, 2010, p. 107-149. Disponible en http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2121735.

7 Ley de la Judicatura de Puerto Rico Núm. 201 del 22 de agosto de 2003.

mo de Puerto Rico propuso la implantación de métodos alternos no adversativos para resolver conflictos.[8] La intención era agilizar los procedimientos judiciales ya que el informe del Secretariado concluyó que la litigación iba en aumento y había atrasos en el manejo de los casos ante el tribunal.[9] A raíz de dicha Conferencia y las recomendaciones que surgieron de la misma, la legislatura de Puerto Rico aprobó fondos para establecer el primer centro de mediación intrajudicial en el centro judicial de San Juan.[10] El objetivo principal de este primer centro fue evitar que los casos llegaran a los tribunales; el servicio era alternativo y no un mecanismo de desvío.[11] Las personas acudían directamente al centro sin necesidad de tener que presentar una demanda ante el tribunal. Este primer centro de mediación fue evaluado en los años 1983, 1987, y 1988; las evaluaciones arrojaron resultados tan positivos que comenzaron a establecerse centros a través de todas las regiones judiciales en Puerto Rico.[12] Actualmente de las trece regiones judiciales, nueve tienen centros de mediación.

El éxito con la mediación llevó al Tribunal Supremo de Puerto Rico a añadir el arbitraje y la evaluación neutral como métodos alternos adicionales al de la mediación.[13] Además, el 25 de junio de 1998 fue aprobado el *Reglamento de Métodos Alternos para la Solución de Conflictos por el Tribunal Supremo de Puerto Rico* (en adelante, *Reglamento de Métodos Alternos*).[14] Este Reglamento tiene como propósito principal establecer las reglas que aplicarían a todos los casos que el tribunal refiera a los métodos alternos y estableció el Negociado de Métodos Alternos para la Solución de Conflictos

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8 GATELL GONZÁLEZ, Manuel y NEGRÓN MARTÍNEZ, Mildred. La mediación de conflictos: su desarrollo y su aplicación en Puerto Rico. *Forum*, Vol. 7, nº . 2, 1991, p. 20-26, 23.

9 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y SANTIAGO TORRES, Lester Caleb. *Un Modelo Puertorriqueño de Mediación*. San Juan, Puerto Rico, Lexis-Nexis de Puerto Rico, Inc., 2001, p. 17.

10 Ley Número 19, de 22 de septiembre de 1983, 4 L.P.R.A. §532 y ss. (en adelante, Ley de Mediación)

11 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y ROMERO VELILLA, Ana Elena. Justicia Alterna desde un Escenario Judicial. *Revista Interamericana de Psicología*, Vol. 36, nº .1 & 2, 2002, p. 299-310, 309.

12 Ibidem., p. 303.

13 Ibidem., p. 305.

14 El *Reglamento de Métodos Alternos* fue enmendado el 4 de marzo de 2005

(en adelante, Negociado). Con la aprobación del *Reglamento de Métodos Alternos*, los métodos alternos no tan sólo son procedimientos alternos, sino también complementarios al proceso judicial ya que los casos pueden ser desviados a los centros de mediación.[15] En mi opinión la creación del Negociado evidencia el compromiso del Tribunal Supremo de Puerto Rico con los métodos alternos. El Negociado es dirigido por un Director nombrado por el Juez Presidente.[16] Entre las funciones más importantes del Negociado están fomentar la utilización de los métodos alternos, servir como recurso y supervisar todos los centros del tribunal, proveer adiestramiento, y certificar y supervisar a todos los interventores neutrales (estos incluyen, mediadores, árbitros, y evaluadores neutrales).[17]

Como dijera anteriormente, el presente escrito se circunscribe a la mediación. A tales efectos, dirijo la discusión específicamente a los centros de mediación conectados con el Tribunal Supremo de Puerto Rico. Los objetivos principales de estos centros son:

> (1) Fomentar la participación de las personas en la búsqueda de alternativas para el manejo de sus controversias; (2) Ayudar a las personas en controversia a llegar a acuerdos que consideren justos y razonables; (3) Atender controversias en forma sencilla, rápida, y económica; (4) Facilitar el desvío del proceso adversativo de ciertas controversias de tipo civil o criminal menos grave; y (5) Servir como fuente de información, orientación y referidos.[18]

Procedo a discutir como el Tribunal Supremo de Puerto Rico, logró desarrollar e implementar un modelo efectivo de mediación conectado con el tribunal nutriéndose y adaptando modelos de otros países incluyendo a Estados Unidos.

3. Desvío a métodos alternos para la solución de conflictos

Contrario a la tendencia de muchos centros de mediación homólogos en Estados Unidos que limitan sus servicios a una o dos especialidades, en Puer-

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15 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y ROMERO VELILLA, Ana Elena. Justicia Alterna... cit. p. 310.

16 *Reglamento de Métodos Alternos*, según enmendado..., cit., Regla 2.01.

17 Ibidem., Regla 2.01.

18 GATELL GONZÁLEZ, Manuel y NEGRÓN MARTÍNEZ, Mildred. La mediación de conflictos... cit. p. 24.

to Rico se optó por ofrecer servicios en varias áreas, incluyendo controversias de familia, comunales, comerciales, escolares, casos criminales menos grave, y casos de menores.[19] Como puede notarse, tanto casos civiles como criminales son elegibles para mediación. Algunos ejemplos de casos civiles que se ven en los centros de mediación son los siguientes: cobros de dinero, relaciones maternas y/o paternas filiales, quejas por animales, conflictos entre arrendador y arrendatario; conflictos referentes a pensiones alimenticias (incluyendo casos donde ha habido violencia doméstica), conflicto entre vecinos, e incumplimiento de contratos, entre otros. Los casos criminales son mediables cuando el delito incurrido es menos grave y sean casos que puedan transigirse conforme a las reglas de procedimiento civil.[20] Algunos ejemplos de casos criminales que se atienden en los centros son la agresión simple, alteración a la paz, y daños a la propiedad. Los casos que impliquen la reclamación de derechos civiles o asuntos de alto interés público sólo podrán mediarse cuando las partes y sus representantes legales den su consentimiento explícito y el tribunal dé su anuencia.[21]

En el proceso de seleccionar qué casos son referidos a mediación el tribunal tiene la obligación de considerar los siguientes factores: (1) la naturale-

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19 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y SANTIAGO TORRES, Lester Caleb. *Un Modelo Puertorriqueño de Mediación…*, cit., p. 20. En una decisión reciente del Tribunal Supremo de Puerto Rico (Pueblo de Puerto Rico v. En interés del menor C.L.R.) emitida el 17 de febrero de 2010, el tribunal resolvió que la mediación no está disponible para casos iniciados al amparo de la Ley de Menores. La opinión mayoritaria interpretó el *Reglamento de Métodos Alternos* de manera restrictiva e indicó que los métodos alternos sólo están disponibles para casos civiles y criminales y que no se hace mención expresa de su aplicación a la Ley de Menores. Además, arguye que el Negociado no tiene un adiestramiento especializado para atender casos de menores. La opinión disidente, suscrita por 3 de los 7 jueces del Tribunal Supremo de Puerto Rico, argumentó que la lista de casos mediables en los centros de mediación conforme a las discusiones que se llevaron a cabo en el Secretariado de la Conferencia Judicial dejó establecido que la enumeración de casos en el *Reglamento de Métodos Alternos* era ilustrativa y no taxativa. Más aún, los Centros han estado mediando este tipo de casos desde su establecimiento. Este caso es de particular importancia por ser la primera vez que el *Reglamento de Métodos Alternos* es interpretado. Los centros continúan mediando casos de menores referidos directamente por el Procurador de Menores, escuelas, y entidades comunitarias. Sin embargo, a raíz de la decisión en cuestión, los jueces no pueden desviar a los centros casos al amparo de la Ley de Menores.

20 *Reglamento de Métodos Alternos*, según enmendado, Regla 7.02

21 Ibidem., Regla 7.03.

za del caso; (2) la relación entre las partes; (3) la disposición de las partes para negociar; (4) la posibilidad de que la mediación afecte adversamente la relación; (5) los riesgos a la integridad física de los participantes o de los interventores neutrales; (6) la posibilidad de proveer remedios de emergencia antes del referido; y (7) los costos y riesgos de la litigación.[22]

Si el juez así lo ordena, las partes están obligadas a acudir a una sesión inicial de orientación ante un mediador del centro, pero no están obligados a someterse al proceso de mediación; en Puerto Rico la mediación intrajudicial es voluntaria. Si las partes no cumplen con la orden del juez de acudir a la sesión inicial, podrían ser encontradas incursos en desacato.[23] Cuando el juez emite una orden para que las partes acudan a la sesión de orientación, las partes deberán haber completado este proceso dentro de 60 días a partir de la fecha de notificación; el tribunal tiene discreción para ampliar o acortar este término.[24]

Requerir la asistencia a la sesión inicial de orientación so pena de desacato, pero dejar a la voluntad de las partes si se someten al proceso de mediación es, a mi juicio, una manera excelente de intentar institucionalizar la mediación intrajudicial, pero a la misma vez respetar el ejercicio de autodeterminación de las partes y no privarlas de su derecho a tener su día en corte, si así lo desean. Históricamente, los programas de mediación voluntarios tienden a no tener mucha demanda.[25] Algunas de las teorías esbozadas para que las partes no asistan a programas voluntarios de mediación incluyen las siguientes: que las partes no entienden los posibles beneficios de la mediación; las partes y sus abogados prefieren seleccionar un proceso más conocido como litigación; cuando las personas están molestas entre sí prefieren un proceso adversativo a uno colaborativo; ciertas culturas promueven una sociedad litigiosa; percepción que los mediadores pueden no ser competentes o neutrales porque están asociados con el tribunal; y las partes y sus abogados no quieren dar la impresión que tienen un caso débil.[26] La sesión de entrevista inicial obligatoria le permite al mediador orientar a las partes y sus abogados sobre

22 Ibidem., Regla 3.01

23 Ibidem., Regla 3.05.

24 Ibidem., Regla 3.06.

25 VARMA, Arupa y STALLWORTH, Lamont. Barriers to Mediation: A Look at the Impediments and Barriers of Voluntary Mediation Programs that Exist Within the EEO. *Dispute Resolution Journal*, Vol. 55, 2000, 32-43.

26 SENFT, Louise Phipps y SAVAGE, Cynthia A. ADR in the Courts: Progress, Problems, and Possibilities. *Penn State Law Review*, vol. 108, Nº 1, 2004, p. 327-348, 329.

qué es la mediación, posibles ventajas de la misma, y aclarar cualquier duda que tengan.

El tribunal tiene discreción para referir el caso a mediación en cualquier etapa del procedimiento judicial, pero el tribunal podrá denegar una petición de referido si determina que no beneficiará a las partes o dilatará los procedimientos.[27] Esta discreción asignada al juez permite que se fomente la utilización de métodos alternos al sistema adjudicativo y simultáneamente evita que las partes utilicen la mediación como una táctica dilatoria. Además, el mediador tiene la facultad de evaluar el referido y determinar si el caso es mediable. El mediador es quien tiene la última palabra en cuanto a si el caso es mediable y los jueces tradicionalmente han tenido gran deferencia al criterio profesional de los mediadores de los centros de mediación del Negociado.

En los centros de mediación del Negociado el proceso de mediación es confidencial y privilegiado.[28] La protección de la confidencialidad y el privilegio es un principio fundamental de la mediación. Las partes están más dispuestas a dialogar entre sí cuando las conversaciones se mantienen en confidencia y la comunicación es privilegiada. Además, en las *Reglas de Evidencia de Puerto Rico,* según enmendadas, se añadió la Regla 516 la cual establece que, "Se considera privilegiada y confidencial cualquier información ofrecida y los documentos y expedientes de trabajo referentes a un proceso de método alterno para la solución de conflictos…".[29]

Recientemente, el Negociado añadió a la lista de sus servicios la mediación en casos de ejecución de hipotecas. *La Ley para Mediación Compulsoria y Preservación de tu hogar en los Procesos de Ejecuciones de Hipotecas de una Vivienda Principal* (en adelante, *Ley de Mediación de Ejecución de Hipotecas*) aprobada por la legislatura de Puerto Rico el 17 de agosto de 2012, estableció el deber del tribunal de referir a mediación lo casos de ejecución de hipoteca de una propiedad residencial que constituya la vivienda principal del deudor hipotecario.[30] El propósito de estas mediaciones es que el acreedor y el deudor hipotecario puedan llegar a un acuerdo, se puedan modificar las condiciones de pago, o considerar otras alternativas que permitan al deudor

27 *Reglamento de Métodos Alternos*, según enmendado…, cit., Regla 3.03

28 *Reglamento de Métodos Alternos*, según enmendado…, cit., Regla 6.01.

29 *Reglas de Evidencia de Puerto Rico* del 9 de febrero de 2009, Regla 516.

30 Ley Núm. 184-2012, Artículo 2 (b).

no perder su vivienda principal.[31]Aunque la sesión inicial de mediación es compulsoria, las partes no están obligadas a lograr un acuerdo.[32]

El proceso de mediación en casos de ejecución de hipoteca se rige por la *Ley de Mediación* y sus Reglamentos. A tales efectos, el Tribunal Supremo por medio del Negociado requiere que para mediar casos de ejecución de hipoteca referidos por el tribunal los mediadores tendrán que tener su certificación de mediador vigente y tomar un curso de educación continua aprobado por el Negociado que incluyan una discusión de la *Ley de Mediación de Ejecución de Hipotecas*, fundamentos legales de la hipoteca y el proceso de ejecución, terminología relevante en el contexto del derecho hipotecario, alternativas a la ejecución de hipoteca, documentos necesarios para la ejecución de hipoteca, y aspectos éticos.[33]

4. Obligaciones y responsabilidades del mediador

Bajo el modelo de mediación del Negociado, el mediador es considerado un experto y profesional en su área. Tradicionalmente ha habido una gran deferencia por parte de los jueces hacía su peritaje en el área de la conflictología. El mediador tiene la obligación de citar a las partes a la mediación, orientar a las partes sobre el proceso de mediación, y conducir la sesión. En los casos referidos por el tribunal, el mediador tiene la obligación de informar por escrito al juez si se logró un acuerdo, si alguna de las partes no compareció, y si a su juicio el proceso no es idóneo para mediación.[34]

Si las partes llegan a un acuerdo, los términos específicos del mismo deberán ser notificados por escrito al juez. Las partes pueden pactar lo contrario y no informar al juez sobre el contenido del acuerdo. Sin embargo, si el asunto en controversia es de alto interés público las partes estarán obligadas a divulgar al juez el contenido del acuerdo.[35] El mediador, tanto los emplea-

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31 Ibidem.,

32 Circular Núm. 30, Año Fiscal 2012-2013, 11 de junio de 2013, Estado Libre Asociado de Puerto Rico, Tribunal General de Justicia, Oficina de Administración de Tribunales.

33 Aviso General para Proveedores de Servicios de Adiestramiento Certificados Sobre las Condiciones para presentar Propuestas Relacionadas a los Cursos de Educación Continua en Casos de Ejecución de Hipotecas del 17 de junio de 2013, Negociado de Métodos Alternos para la Solución de Conflictos, Estado Libre Asociado de Puerto Rico, Tribunal General de Justicia, Oficina de Administración de Tribunales.

34 *Reglamento de Métodos Alternos*, según enmendado..., cit., Regla 7.11.

35 Ibidem., Regla 5.01.

dos de los centros de mediación en los tribunales como los mediadores activos en el registro del Negociado, deberán cumplir con el código de ética en el *Reglamento de Certificación y Educación Continua Relacionado con los Métodos Alternos para la Solución de Conflictos* (en adelante *Reglamento de Certificación y Educación Continua*) aprobado el 15 de junio de 1999 por el Tribunal Supremo de Puerto Rico.[36] Entre otros, se requiere mantener su certificación vigente para lo cual es necesario cursar 21 créditos de educación continua cada 3 años.

5. Participación de abogados y terceros en la mediación

En las mediaciones intrajudiciales en Puerto Rico las partes pueden estar acompañadas por sus respectivos abogados durante la entrevista inicial y la sesión de orientación individual que se lleva a cabo por el mediador. Sin embargo, en las sesiones conjuntas sólo se permitirá la participación de abogados si ambas partes tienen abogados, ambas partes desean que sus abogados estén presentes, los abogados estén en una actitud de aportar a la solución del conflicto de manera colaborativa, los abogados deben limitarse a asesorar, y el mediador consiente a la presencia de los abogados.[37]

Una de las razones para no fomentar la presencia de abogados en las sesiones conjuntas de mediación es que de esta manera las partes pueden conversar entre sí y resolver sus propios problemas sin que haya un tercero hablando por ellos. En la gran mayoría de los casos ante el Negociado, los abogados no comparecen. *Prima facie*, excluir a los abogados aparenta ser consistente con los valores adoptados por los mediadores del Negociado. Algunos de estos valores son la autodeterminación (que las personas tienen la capacidad para tomar sus propias decisiones), responsabilidad (las personas pueden asumir responsabilidad sobre sus actos y decisiones, participación activa, racionalidad, y reciprocidad).[38] Por otro lado, privilegiar la participación de las partes en el proceso de la mediación y limitar la de los abogados promueve que las partes puedan narrar su perspectiva y que su voz sea escuchada. Conforme a

36 *Reglamento de Certificación y Educación Continua Relacionado con los Métodos Alternos para la Solución de Conflictos* del Tribunal Supremo de Puerto Rico del 15 de junio de 1999.

37 Ibidem., Regla 7.12

38 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y SANTIAGO TORRES, Lester Caleb. *Un Modelo Puertorriqueño de Mediación*..., cit., p. 30.

varios estudios empíricos, esta participación favorece que la parte sienta que ha habido justicia procesal durante la mediación.[39]

En mi opinión, aunque ciertamente excluir a los abogados logra una participación más activa y directa de las partes, también podría coartar el ejercicio de su autodeterminación en la medida en que el mediador tenga la última palabra en cuanto a si los abogados comparecen o no. Habiendo dicho esto, tengo el privilegio de conocer a muchos de los mediadores en los centros de mediación, y éstos tienen un gran compromiso con el proceso de mediación y empoderar a los participantes en el proceso de toma de decisiones. Además, los abogados pueden participa en la entrevista inicial, los clientes pueden consultar con sus abogados antes de suscribir un acuerdo, o si desean pueden hacerle una consulta durante la sesión conjunta de mediación. Otra preocupación con la exclusión de los abogados del proceso es que podría hacer más cuesta arriba la institucionalización del proceso de mediación intrajudicial. Eso podría ser una de varias razones por lo cual para el año fiscal 2005-2006, del total de casos atendidos en los centros de mediación, el 81.7% (11,123) fueron referidos de la comunidad (e.g., agencias públicas, organizaciones privadas, personas por cuenta propia) y tan sólo el 18.3% (2,488) fueron referidos del tribunal de primera instancia.[40] Por otro lado, es necesario recordar que los centros de mediación fueron creados en sus orígenes como una alternativa real al litigio y no para desviar casos del tribunal.

Las partes también pueden estar acompañadas por peritos, intérpretes, familiares u otras personas si así lo desean durante la entrevista inicial. Para la participación de éstos terceros en la mediación aplican los mismos principios que para la participación de abogados, excepto que no todas las partes tienen que también tener un perito, interprete, o familiar.[41] Esta adaptación es importante porque en la cultura puertorriqueña el concepto de familia extendida es más prevalente que en Estados Unidos y a veces las partes solicitan la presencia de un familiar o amigo durante la sesión de mediación. Mi experiencia conduciendo mediaciones en Puerto Rico ha sido que la petición de

39 WELSH, Making Deals in Court-Connected Mediation: What's Justice Got To Do With It? *Washington University Law Quarterly*, vol. 79, 2001, p. 787-861.

40 *Datos Agregados de los Centros de Mediación de Conflictos Para el Año fiscal 2005-2006*. San Juan, Puerto Rico: Negociado De Métodos Alternos Para la Solución de Conflictos, Tribunal Supremo de Puerto Rico.

41 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y SANTIAGO TORRES, Lester Caleb. *Un Modelo Puertorriqueño de Mediación*..., cit..., p. 68.

que un familiar u otra persona de apoyo estén presentes no es inusual. El Negociado también permite la participación de observadores o investigadores en el proceso de mediación siempre y cuando todas las partes consientan a su presencia y completen un formulario aceptando las normas del Negociado y protegiendo la confidencialidad de las partes.[42] Esta disposición no tan sólo permite la participación de investigadores, sino que también permite que mediadores en proceso de adiestramiento puedan observar las mediaciones como parte de su proceso de aprendizaje.

6. Modelo de mediación

En Estados Unidos existe un gran debate que gira en torno a los distintos modelos de mediación y cuál es el que deben adoptar los tribunales. La gran mayoría de los tribunales han optado por el modelo evaluativo o el modelo facilitativo de mediación los cuales están centrados en la toma de decisiones a base de intereses. Debido a que el modelo a base de intereses es el que usualmente se importa a Latinoamérica y el Caribe, es esencial definirlo e indicar, por qué a mi juicio, es un error el adaptarlo sin hacer las debidas modificaciones culturales.

El modelo de mediación a base de intereses surge del modelo de negociación desarrollado por Fisher y Ury (1991) en el Proyecto de Negociación de Harvard y tiene como objetivo integrar las técnicas de negociación colaborativas con las posicionales/agresivas.[43] Este modelo se guía por los siguientes principios: a) separar a las personas del problema; b) enfocarse en intereses, no posiciones (qué es lo más importante para el negociador); c) buscar opciones de ganancias mutuas; e, d) insistir en utilizar criterios objetivos.[44] Este modelo es integrativo y se fundamenta en un sistema de valores que enfatiza la cooperación y acuerdos que son convenientes para todas las partes.[45] Este modelo ciertamente es una mejoría a los modelos de

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42 *Manual de Normas y Procedimientos de los Centros de Mediación de Conflictos,* Estado Libre Asociado de Puerto Rico, Tribunal General de Justicia, Oficina de Administración de los Tribunales, Negociado de Métodos Alternos para la Solución de Conflictos de mayo de 2004, Norma 2.05.

43 FISHER, R., URY, W. y PATTON, B. *Getting to Yes*. New York, New York, Penguin Books, 1999.

44 Ibidem.

45 LEWICKI, R. J., SAUNDERS, D.M., y MINTON, J.W. *Negotiation Reading Exercises, and Cases*. New York, NY, McGraw-Hill/Irwin, 1992, p. 226.

negociación basados en el uso del poder, pero no es un modelo universal aplicable a todas las culturas.

El modelo de negociación a base de intereses está basado en el positivismo cuyas premisas son las siguientes: a) la experiencia humana es universal; b) el conocimiento se adquiere observando las experiencias que ocurren en el mundo real; c) es posible lograr la objetividad plena o la separación de los objetos y las personas que nos rodean; y d) la ciencia debe ser neutral/objetiva; e) las teorías son instrumentales, las teorías son los instrumentos que nos ayudan a entender el mundo; f) el tecnicismo (i.e., las técnicas usadas) tiene primacía sobre el desarrollo del conocimiento.[46] Este modelo a base de intereses presupone una racionalidad y realidad objetiva que desde una perspectiva de constructivismo social deben ser producto de nuestras interacciones sociales y dista mucho de ser universal. Por ejemplo, el énfasis en satisfacer intereses individuales y aferrarse a una ilusión de objetividad no es efectivo en ciertas comunidades caribeñas en las cuales el énfasis es en tradiciones culturales que valoran una visión comunitaria. De igual manera, el énfasis en el presente y el futuro del modelo a bases de intereses, choca con culturas como la puertorriqueña en la cual el pasado siempre está presente por medio de tradiciones orales. Los intereses de las partes no surgen en el vacío; son parte de procesos sociales, culturales e históricos.

En Puerto Rico, se optó por desarrollar un modelo híbrido el cual toma en cuenta prácticas en otros contextos culturales (e.g. Estados Unidos, Canadá, y Europa) pero las adaptó al contexto cultural puertorriqueño.[47] Además, el modelo se aleja de una visión positivista al utilizar como base las siguientes premisas: 1) los conflictos son productos sociales que son dinámicos y se transforman dentro de un contexto social e histórico; 2) la mediación es una intervención social y por lo tanto las intervenciones del mediador son parte de un sistema social de relaciones existentes que trascienden al individuo o intereses individuales; y 3) la mediación es una actividad social influenciada por los valores de los mediadores y los participantes.[48] El modelo desarrollado por el Negociado está basado en el modelo facilitativo y por ende incorpo-

46 DELANTY, G. y STRYDOM, P. (Eds.). *Philosophies of Social Science: The Classic and Contemporary Readings*. Maidenhead, England, Open University Press, 2003, p. 14.

47 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y SANTIAGO TORRES, Lester Caleb. *Un Modelo Puertorriqueño de Mediación…*, cit., p. vii-viii.

48 Ibidem., p. 29-30

ra unas etapas secuenciales específicas (identificación de asunto, negociación asistida, y cierre) a seguir las cuales progresan de forma cualitativa.[49] Además, durante la mediación el mediador se enfoca en identificar los intereses de las partes y ayuda a las partes a buscar opciones para resolver la controversia. Tomando en cuenta nuestras tradiciones orales, para identificar los intereses, los mediadores del Negociado incorporan refranes populares o utilizan como parte de sus técnicas de restructuración relatos de historias.[50]

El modelo del Negociado incorpora además técnicas de la mediación evaluativa. Consistente con el modelo de mediación evaluativa, el mediador puede ofrecer posibles soluciones a las partes. La experiencia de los mediadores en los centros de mediación del Negociado es que como regla general las partes ven al mediador como un "experto" y muchas veces solicitan de manera vehemente la opinión del mediador.[51] Los mediadores sólo recurren a sugerencias como último recurso para poder permitir a las partes ejercer su autodeterminación.

El modelo del Negociado también incorpora las técnicas de apoderamiento y reconocimiento, provenientes de la mediación transformativa. Apoderamiento es cuando las partes en el conflicto retoman su fortaleza y su capacidad para tomar sus propias decisiones.[52] Reconocimiento es el proceso mediante el cual las partes en conflicto toman conciencia, entendimiento, o empatía con respecto al conflicto que están viviendo y la percepción de la otra parte.[53] El elemento primordial para que ocurra apoderamiento y reconocimiento, es que el mediador pueda identificar los momentos en que estos cambios se dan durante el proceso de la mediación.[54] Los mediadores del Negociado como parte de su adiestramiento aprenden a identificar oportunidades durante el proceso de mediación en el cual las personas en controversia puedan conocer y entender la percepción que cada uno tiene con el objetivo de desarrollar 'fortaleza' y 'compasión' hacia la otra parte.[55] Consistente con

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49 Ibidem., p. 32.

50 Ibidem., p. 99-100.

51 Ibidem., p. 60-61.

52 BUSH, Baruch R.A. y FOLGER, Joseph P. *The Promise of Mediation*. San Francisco, California, John Wiley & Sons Inc., 2005, p.22

53 Ibidem., p.22

54 Ibidem., p. 22

55 NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y SANTIAGO TORRES, Lester Caleb. *Un Modelo Puertorriqueño de Mediación*..., cit., p. 23

el modelo transformativo, el Negociado ha adoptado como uno de sus valores en la mediación la autodeterminación: si se dan las condiciones propicias, las partes en conflicto tienen la capacidad de tomar sus propias decisiones y manejar sus conflictos de forma efectiva y satisfactoria.[56]

7. Proceso de certificación y código de ética

Una de las principales funciones del Negociado es la de supervisar la certificación de individuos como interventores neutrales y certificar entidades que puedan proveer adiestramiento de excelencia en métodos alternos. Estas entidades (conocidas como 'proveedores') ofrecen cursos de educación continua y los programas de adiestramiento necesarios para capacitar y certificar a interventores neutrales.

Los mediadores de los centros de mediación son seleccionados por el Negociado y son empleados a tiempo completo de la rama judicial. Por su parte, las personas que quieran pertenecer al registro de interventores del Negociado tienen que pasar por un proceso riguroso y comprensivo de adiestramiento. Ser mediador certificado por el Tribunal Supremo de Puerto Rico se considera un privilegio. Las personas interesadas en certificarse deben ser mayores de edad, no tener antecedentes penales, poseer un bachillerato (licenciatura) de un colegio o universidad acreditada (en ausencia del grado universitario puede ofrecer evidencia de experiencia profesional y cualificaciones), no estar descalificado por una autoridad licenciadora para ejercer su profesión o tener sanciones disciplinarias pendiente, y completar satisfactoriamente 60 unidades de adiestramiento en destrezas básicas de mediación, 16 unidades de adiestramiento en la práctica de la mediación, 8 unidades de adiestramiento sobre manejo en casos de violencia doméstica (si desean mediar casos de familia) y 6 unidades de adiestramiento sobre el sistema judicial de Puerto Rico para un total de 90 unidades de adiestramiento.[57] Este último adiestramiento no es requerido si la persona está autorizada a ejercer la profesión de la abogacía en Puerto Rico, es un ex-juez, o un ex-mediador del Negociado. En mi opinión, el Negociado tiene uno de los programas de certificación más riguroso y comprensivo al compararse con otros programas de mediación intrajudicial en los Estados Unidos. Por ejemplo, la gran mayoría de los programas de certificación en Estados Unidos usualmente requieren entre 24 y 30 unidades de adiestramiento.

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56 Ibidem., p. 30

57 *Reglamento de Certificación y Educación Continua*..., cit., Reglas 3.02 y 3.05.

Este programa de certificación es ofrecido por proveedores de servicios que a su vez han sido certificados por el Negociado. Estos programas de certificación exigen como mínimo ejercicios escritos, discusión de casos, juego de roles, y demostraciones. El contenido del currículo de estos programas debe ser sometido al Negociado para su aprobación. El Negociado tiene unos requisitos mínimos en cuanto a temas que deben cubrirse que van más a allá de lo normalmente exigido en muchos de los programas en Estados Unidos. Por ejemplo, además de los temas tradicionales como identificar casos negociables de los no negociables y técnicas a utilizar en el proceso de la mediación, también se incluyen otros como las formas efectivas de referir un caso a servicios gubernamentales o de consejería; aspectos sociales, psicológicos, y económicos que inciden en la dinámica de las familias con una estructura tradicional y no tradicional; asuntos de diversidad cultural; y asuntos de género.[58]

La certificación como mediador tiene una vigencia de tres años. A los tres años si el mediador desea recertificarse deberá presentar una solicitud de recertificación y evidencia de haber completado 21 horas de educación continua. De esta manera se trata de garantizar que los mediadores se mantengan al día sobre lo que está ocurriendo en el área de la conflictología.

Además, mantener las destrezas al día y participar de actividades educativas que promueven los métodos alternos es uno de los estándares éticos establecidos por el Negociado.[59] Otros estándares éticos con los cuales tiene que cumplir el mediador bajo el código de ética del Negociado son: evitar dilaciones en la tramitación del caso; mantener una conducta profesional y de respeto hacia los participantes; mantener imparcialidad; revelar cualquier posible conflicto de interés; preservar la confidencialidad; orientar a los participantes a buscar consejo legal si entiende que el acuerdo puede afectar adversamente a una de las partes y ésta no está representada por abogado; redactar el contrato de servicios profesionales de manera clara; no cobrar tarifa contingente ni condicionarla al resultado de la intervención; y respetar y colaborar con otras disciplinas como derecho, contabilidad, salud mental y servicios sociales.[60]

58 Ibidem., Regla 4.09.

59 Ibidem., Regla 6.01.

60 Ibidem., Capítulo VI.

8. Resultados en Puerto Rico

A base de las estadísticas del Negociado, los programas de mediación conectados con el tribunal han sido exitosos en implantar su política pública de fomentar el uso de los métodos alternos con la finalidad de impartir justicia de manera rápida y económica. Las partes consistentemente expresan una gran satisfacción con el proceso de la mediación y los acuerdos a los que se llegan.[61] A manera de ejemplo, en el centro de mediación de la región de Bayamón, se realizó una encuesta entre personas que participaron en procesos de mediación y el hallazgo fue el siguiente: 92% estuvieron satisfechos con el proceso, 78% entendían que el acuerdo fue justo, y 94% indicaron que regresarían al centro.

Entre los años fiscales 2000-2013 el Negociado ha atendido un total de 163,468 casos para un promedio por año de 12,574.[62] Del total de 163,468 casos atendidos, 68,106 fueron aceptados para mediación y 95,362 fueron aceptados para orientación. Entre 2000-2013 hubo un promedio anual de 5,238 casos aceptados para mediación y un promedio anual de 7,335 casos en el cual se proveyó el servicio de orientación. El servicio de orientación consiste en reunirse privadamente con las partes y con sus abogados (cuando estos estén presente) con el fin de sugerirles posibles alternativas a su conflicto. Al finalizar la orientación, el caso es referido a mediación o a algún otro servicio. De los 68,106 casos aceptados para mediación, 39,051 (57%) fueron mediados (96% con acuerdo y 4% sin acuerdo) y 29,055 (43%) fueron archivados. En los centros de mediación, un caso es archivado cuando la mediación no se completa porque una de las partes no comparece, una de las partes no acepta la mediación, o cualquier otro motivo que impida que la mediación pueda realizarse.

Los servicios de mediación para casos de ejecución de hipoteca comenzaron a prestarse el 1 de julio del 2013. Para el periodo del 1 de julio de 2013 al 31 de marzo de 2014, los centros de mediación atendieron 1,459 casos correspondientes a la subcategoría de ejecución de hipoteca.[63] Del total de 1,459

61 GATELL GONZÁLEZ, Manuel y NEGRÓN MARTÍNEZ, Mildred. La mediación de conflictos... cit. p. 25.

62 *Resumen de Datos Estadísticos de los Centros de Mediación de Conflictos 2000-2013*. San Juan, Puerto Rico: Negociado De Métodos Alternos Para la Solución de Conflictos, Tribunal Supremo del Estado Libre Asociado de Puerto Rico. Las estadísticas discutidas en este párrafo provienen de la fuente aquí citada.

63 *Casos de Ejecución de Hipoteca,* Negociado De Métodos Alternos Para la Solución

casos atendidos, 936 (64%) fueron aceptados para mediación y 523 (36%) fueron aceptados para orientación. En estos ocho meses hubo un promedio mensual de 117 casos aceptados para mediación y un promedio mensual de 65 casos en el cual se proveyó el servicio de orientación. De los 936 casos aceptados para mediación, 213 (23%) fueron mediados con acuerdo, 113 (12%) sin acuerdo, 254 (27%) fueron archivados, y los restantes 356 (38%) son casos que están pendientes de mediarse.

III. ¿QUÉ PODEMOS APRENDER DE LAS EXPERIENCIAS DE PUERTO RICO?

1. Control judicial y política pública

Primeramente, es recomendable que el tribunal establezca una política pública clara y los valores que van a regir la mediación intrajudicial. Articular las razones para establecer un programa de mediación intrajudicial sirve como punto de referencia futuro contra el cual se evalúan los programas durante su desarrollo y una vez ya estén establecidos. El proceso de institucionalización de la mediación intrajudicial y el nivel de confianza que los potenciales participantes van a depositar en estos procesos, es más eficiente cuando los posibles usuarios participan de las discusiones que conducen a crear estos programas. Jueces, abogados, estudiantes de derecho, personal de los tribunales, y miembros de la comunidad pueden hacer grandes aportaciones en el proceso de desarrollar objetivos y valores.

Los objetivos y los valores son la base sobre los cuales se desarrollan los modelos de mediación que eventualmente se adoptan. Por ejemplo, un estudio realizado en los servicios de mediación ofrecidos en el estado de Florida de los Estados Unidos demostró que algunos centros de mediación se "asimilan" al tribunal y adoptan las normas y valores de los tribunales.[64] Los mediadores de estos centros tienden a utilizar lenguaje más formal, muchas veces están ubicados en el tribunal, se enfocan en número de casos resueltos, y tienden

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de Conflictos, Tribunal Supremo del Estado Libre Asociado de Puerto Rico. Las estadísticas discutidas en este párrafo fueron suministradas el 13 de mayo de 2014 y provienen de la fuente aquí citada

64 NOCE DELLA, Dorothy, J., FOLGER, Joseph P., y ANTES, James R. Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection. *Pepperdine Conflict Resolution Law Journal*, vol. 3, 2002, p. 11-38, 22.

a ser más evaluativos. Otros centros son "autónomos" y establecen su propia identidad separada del tribunal, crean sus propios folletos de mercadeo, y los mediadores hacen referencia a los conflictos de las personas y no a casos legales.[65] Otros centros de mediación intrajudicial adoptaban una visión de "sinergismo" y tratan de balancear las normativas y visión del tribunal con la de la conflictología.[66] Es recomendable además que la terminología esté claramente definida. Por ejemplo, ¿Qué es mediación? ¿Cuál es la diferencia entre un modelo facilitativo, transformativo, y evaluativo? Clarificar estos conceptos ayuda a los participantes y jueces a entender que se espera de ellos en estos procesos.

El tribunal debe exigir que los programas o centros de mediación intrajudicial recopilen data estadística que permita evaluar si se está cumpliendo con los objetivos establecidos. De una lectura de los estudios realizados, puede observarse que una queja y preocupación que surge reiteradamente es la falta de fondos para recopilar data para evaluar los programas de mediación. En mi experiencia, la inclusión de académicos e investigadores para diseñar la metodología e instrumentos a utilizarse para identificar qué data y cómo se va a recopilar debe ocurrir muy temprano en el proceso. Además, algo que me parece sumamente necesario es incorporar métodos cualitativos en el proceso de evaluación de programas de mediación. La gran mayoría de la data recopilada en los centros de mediación tiende a ser cuantitativa. Incorporar métodos cualitativos puede ofrecer información en cuanto a las experiencias de los participantes (abogados, jueces, partes) y cómo le asignan significado a sus experiencias. Esto último no es posible lograrlo con data cuantitativa.

Conforme a las experiencias en Puerto Rico, es recomendable que el tribunal designe a una persona para supervisar y administrar los centros de mediación conectados con el tribunal. En Puerto Rico la Directora del Negociado es la encargada de supervisar el los centros de mediación, el personal, y los mediadores en los registros del Negociado. Además, es la persona encargada de investigar cualquier querella que surja en una mediación.

El tribunal debe velar porque los servicios de mediación estén disponibles para todo el mundo por igual y que sean accesibles. En el caso de Puerto Rico, los centros están abiertos durante el mismo horario que el tribunal. Sin embargo, si es necesario realizar una mediación fuera de horas laborables, la misma puede ser coordinada. Además, es recomendable que aquellos que no

65 Ibidem., p. 24.

66 Ibidem., p. 25.

puedan pagar el servicio puedan obtenerlo sin costo alguno. El tribunal debe tener control sobre qué tipo de caso se refiere a mediación y en qué momento se refiere el mismo. Las guías en cuanto a qué casos son mediables deben ser claras y específicas.

Como parte de su política pública el tribunal debe educar a la población, a los jueces, a los abogados, y estudiantes de derecho sobre los métodos alternos de resolución de conflictos. Esto puede lograrse mediante charlas, talleres de adiestramientos, coloquios, programas radiales, redactando artículos cortos o editoriales en periódicos o revistas, y publicando artículos académicos. A manera de ejemplo, el Negociado apoya y fomenta que sus mediadores (tanto los que son empleados, como los mediadores activos en el registro) participen activamente en las actividades antes descritas. Además, estás actividades están incluidas en el Reglamento de Certificación y Educación Continua como parte de los estándares éticos con los que debe cumplir un mediador certificado.[67]

Usualmente los mediadores que prestan servicios a programas conectados con el tribunal proveen mecanismos para proteger a los mediadores de impericia profesional cuando están prestando servicios de mediación en casos que han sido referidos por el tribunal. Por ejemplo, en el caso de Puerto Rico a los mediadores se les concede la misma inmunidad contra reclamaciones civiles que se le reconoce a un juez por acciones u omisiones en el desempeño de sus funciones, siempre y cuando el mediador no incurra en dolo o fraude.[68]

2. Confidencialidad y privilegio

Es recomendable que los tribunales tengan normas escritas relacionadas a las comunicaciones orales, verbales, y documentos compartidos durante la mediación. Entre los aspectos a considerar es si las comunicaciones están protegidas por normas de confidencialidad y privilegio, quien puede reclamar la confidencialidad, a quien pertenece el privilegio, y excepciones a la confidencialidad y al privilegio. En la gran mayoría de los estados en los Estados Unidos, las mediaciones son confidenciales pero siempre hay excepciones. Por ejemplo, usualmente en casos de alto interés públicos, la confidencialidad del acuerdo cede ante el interés público y el juez tiene la obligación de revisar el mismo. Un ejemplo de lo anterior, son los casos de pensión alimenticia

67 *Reglamento de Certificación y Educación Continua*..., cit., Capítulo VI

68 *Reglamento de Certificación y Educación Continua*..., cit., Regla 4.06

de un menor ya que el tribunal tiene la obligación de velar por el interés del menor y por ende revisar el acuerdo final. Sin embargo, el proceso de cómo se llega al acuerdo y las comunicaciones entre las partes como regla general se mantienen confidenciales. De esta manera se preserva la integridad del proceso de mediación.

3. El proceso de mediación y de desvío

La experiencia en Estados Unidos parece indicar que el proceso de institucionalizar la mediación es más cuesta arriba cuando la mediación es voluntaria. Sin embargo, esto no necesariamente se traduce en más acuerdos. En mi opinión, es un contrasentido 'obligar' a las partes a participar en una sesión de mediación. A largo plazo me parece más efectivo educar a la comunidad, abogados, y jueces sobre las posibles ventajas de los métodos alternos.

4. Credenciales del mediador y adiestramiento

Las credenciales de los mediadores varían significativamente en los centros de mediación conectados con el tribunal alrededor del mundo. Un factor a decidir es si los mediadores tienen que ser abogados. A base de mi experiencia, los programas de mediación son más robustos cuando se abre la puerta a que diversos profesionales puedan servir como mediadores. Los conflictos no son unidimensionales. Los conflictos que llegan a los tribunales ciertamente tienen un elemento legal, pero, a manera de ejemplo, también pueden tener un elemento social, psicológico, o económico. A tales efectos, limitar los registros de mediación únicamente a abogados me parece que limita innecesariamente las opciones a la comunidad. De igual manera, es importante tener diversidad en género, edad, raza, y cultura en los registros de mediadores.

Usualmente los mediadores de los tribunales intrajudiciales tienen que pasar por algún tipo de adiestramiento o proceso de certificación. Este proceso garantiza que los mediadores tengan un adiestramiento mínimo en mediación. Para garantizar ciertos estándares mínimos, las entidades que ofrecen estos adiestramientos deben estar también certificadas por el tribunal. Los currículos y la capacidad de los adiestradores deben ser revisados por la persona encargada (o quien ésta designe) de administrar los centros intrajudiciales. Además, se debe exigir un proceso de re-certificación cada cierto tiempo para que los mediadores se vean en la obligación de mantenerse al día por

medio de educación continua. El Negociado de Métodos Alternos ha tenido un gran éxito permitiendo a mediadores que vienen de distintas profesiones y disciplinas mediando en sus centros.

Como parte del adiestramiento de candidatos a certificarse como mediador, se debe requerir que éstos observen mediaciones y tengan la oportunidad de mediar bajo la supervisión de un mediador con experiencia. Varios estudios indican que hay una correlación positiva entre la experiencia de un mediador y la cantidad de acuerdos logrados en mediación; a mayor experiencia, mayor número de acuerdos logrados.[69]

5. Código de ética

Es altamente recomendable que se redacte un código de ética para mediadores y establecer un proceso de cómo manejar violaciones a dicho código. Entre los asuntos a considerar se sugieren los siguientes: neutralidad/imparcialidad, conflicto de interés, publicidad, contrato de servicios profesionales, conducta de los mediadores durante la sesión de mediación, educación continua, y honorarios.

IV. CONCLUSIÓN

Los programas de métodos alternos para la solución de conflictos conectados con el tribunal comenzaron a institucionalizarse bajo la premisa que era posible resolver casos de una manera más eficiente y menos costosa que el proceso litigioso en el tribunal. La premisa no articulada parecía ser que justicia tardía no era justicia. De los métodos alternos conectados con el tribunal, en Puerto Rico la mediación es la más popular

De la data estadística compartida en este capítulo puede inferirse que como regla general los centros de mediación del Negociado en Puerto Rico son exitosos. La mayoría de las personas que acuden a una sesión de mediación quedan sumamente satisfechas con el proceso y el trato que reciben. Aquellos que logran llegar a un acuerdo como resultado de una mediación, suelen estar satisfechos con el acuerdo y piensan que el mismo es justo.

El Negociado ha logrado aprender de los modelos extranjeros e integrar/

69 WISSLER, Rosselle L. The Effectiveness of Court-Connected Dispute Resolution in Civil Cases. *Conflict Resolution Quarterly*, vol. 22, Nº 1, 2004, p. 55-88, p. 68.

adaptar técnicas de resolución de conflictos foráneas al contexto socio-cultural puertorriqueño. En ese sentido ha creado un modelo híbrido de mediación en el cual se preserva las idiosincrasias puertorriqueñas sin ser víctima del insularismo. Sin embargo, quedan muchos retos por delante y mucha información que recopilar. Algunas de estas interrogantes son: ¿Cuándo es el mejor momento para desviar un caso a mediación? ¿Cuál debe ser el rol de los jueces y cuánto deben intervenir en el proceso de mediación? ¿Son los métodos alternos un foro en el cual se ofrece justicia de inferior calidad comparada con los tribunales? ¿Cómo podemos garantizar mediadores de excelencia? Todas estas interrogantes deben tomarse en consideración al desarrollar e implementar un programa de mediación conectado con el tribunal.

En el caso de Puerto Rico, los Centros de Mediación vinculados al Tribunal han logrado articular de manera clara sus objetivos y desarrollar un sistema efectivo para el contexto socio-cultural en que se encuentran. Por lo tanto, a pesar del camino que falta por recorrer creo que es posible lograr justicia rápida, económica, y eficiente a través de centros de mediación conectados con el tribunal. Reconozco que suena utópico, pero como dijera Eduardo Galeano: "La utopía: ella está en el horizonte. Me acerco a ella dos pasos; ella se aleja dos pasos. Camino diez pasos y el horizonte se corre diez pasos más allá. Por mucho que yo camine, nunca la alcanzaré. ¿Para qué sirve la utopía? Para eso sirve: para caminar…"

V. BIBLIOGRAFÍA

Aviso General para Proveedores de Servicios de Adiestramiento Certificados Sobre las Condiciones para presentar Propuestas Relacionadas a los Cursos de Educación Continua en Casos de Ejecución de Hipotecas del 17 de junio de 2013, Negociado de Métodos Alternos para la Solución de Conflictos, Estado Libre Asociado de Puerto Rico, Tribunal General de Justicia, Oficina de Administración de Tribunales.

Balzac v. People of Porto Rico 258 U.S. 298 (1922).

BUSH, Baruch R.A. y FOLGER, Joseph P. *The Promise of Mediation*. San Francisco, California, John Wiley & Sons Inc., 2005.

Casos de Ejecución de Hipoteca, Negociado De Métodos Alternos Para la Solución de Conflictos, Tribunal Supremo del Estado Libre Asociado de Puerto Rico, Data suministrada el 13 de mayo de 2014.

Circular Núm. 30, Año Fiscal 2012-2013, 11 de junio de 2013, Estado Libre Asociado de Puerto Rico, Tribunal General de Justicia, Oficina de Administración de Tribunales

Downes v. Bidwell 182 U.S. 244, 287 (1901).

Datos Agregados de los Centros de Mediación de Conflictos Para el Año fiscal 2005-2006. San Juan, Puerto Rico: Negociado De Métodos Alternos Para la Solución de Conflictos, Tribunal Supremo de Puerto Rico.

DELANTY, G. y STRYDOM, P. Eds. *Philosophies of Social Science: The Classic and Contemporary Readings*. Maidenhead, England: Open University Press, 2003

FISHER, R. y PATTON, B. *Getting to Yes*. 2nd ed. New York: NY, Penguin Books, 1991.

FONT-GUZMÁN, Jacqueline N. y ALEMAN, Yanira. Human rights violations in Puerto Rico: agency from the margins. *Journal of Law & Social Challenges*, 12, p. 107-149. Disponible en http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2121735.

GATELL GONZÁLEZ, MANUEL y NEGRÓN MARTÍNEZ, MILDRED. La mediación de conflictos: su desarrollo y su aplicación en Puerto Rico. *Forum*, Vol. 7, Nº 2, 1991, p. 20-26.

LEWICKI, Roy J., SAUNDERS, David M. y MINTON John W. *Negotiation Reading Exercises, and Cases* 3rd Ed. New York, NY: McGraw-Hill/Irwin, 1993

Ley de la Judicatura de Puerto Rico Núm. 201 del 22 de agosto de 2003.

Ley Número 19, de 22 de septiembre de 1983, 4 L.P.R.A. §532 y ss

Ley Número 184-2012 del 17 de agosto de 2012 (*Ley para Mediación Compulsoria y Preservación de tu hogar en los Procesos de Ejecuciones de Hipotecas de una Vivienda Principal.*

MANSILLA, Veronica Boix. Assessing Expert Interdisciplinary Work at the Frontier: An Empirical Exploration. *Research Evaluation,* 15(1), 2006, p. 17-29.

Manual de Normas y Procedimientos de los Centros de Mediación de Conflictos, Estado Libre Asociado de Puerto Rico, Tribunal General de Justicia, Oficina de Administración de los Tribunales, Negociado de Métodos Alternos para la Solución de Conflictos de mayo de 2004.

MUÑIZ ARGUELLES, Luis. *La Negociación La Mediación*. San Juan, Puerto Rico: Ediciones Situm, 2006.

NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL

GONZÁLEZ, Manuel, y ROMERO VELILLA, Ana Elena. Justicia Alterna desde un Escenario Judicial. *Revista Interamericana de Psicología*, vol. 36, nº.1 & 2, 2002, p. 299-310.

NEGRÓN MARTÍNEZ, Mildred, VÉLEZ FERNANDES, Lilyana, GATELL GONZÁLEZ, Manuel, y SANTIAGO TORRES, Lester Caleb. *Un Modelo Puertorriqueño de Mediación*. San Juan, Puerto Rico, Lexis-Nexis de Puerto Rico, Inc., 2001.

NOCE DELLA, Dorothy, J., FOLGER, Joseph P., y ANTES, James R. Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection. *Pepperdine Conflict Resolution Law Journal*, vol. 3, nº .11, 2002, p. 11-38.

Pueblo de Puerto Rico v. En interés del menor C.L.R., opinión del Tribunal Supremo de Puerto Rico emitida el 17 de febrero de 2010.

Reglas de Evidencia de Puerto Rico del 9 de febrero de 2009.

Reglamento de Métodos Alternos para la Solución de Conflictos del Tribunal Supremo de Puerto Rico del 25 de junio de 1998 según enmendado el 4 de marzo de 2005.

Reglamento de Certificación y Educación Continua Relacionado con los Métodos Alternos para la Solución de Conflictos del Tribunal Supremo de Puerto Rico del 15 de junio de 1999.

Resumen de Datos Estadísticos de los Centros de Mediación de Conflictos 2000-2013. San Juan, Puerto Rico: Negociado De Métodos Alternos Para la Solución de Conflictos, Tribunal Supremo del Estado Libre Asociado de Puerto Rico.

RICOEUR, Paul. Reply to David Steward, En Lewis Edwin Hahn (ed.) *The Philosophy of Paul Ricoeur*. USA: The Library of Living Philosophers, 1995.

SENFT, Louise Phipps y SAVAGE, Cynthia A. ADR in the Courts: Progress, Problems, and Possibilities. *Penn State Law Review*, vol. 108, Nº .1, p. 327-348, 329.

STROBER, Myra H. *Interdisciplinary Conversations: Challenging Habits of Thought*. Stanford, California, Stanford University Press, 2011.

VARMA, Arupa y STALLWORTH, Lamont. Barriers to Mediation: A Look at the Impediments and Barriers of Voluntary Mediation Programs that Exist Within the EEO. *Dispute Resolution Journal*, vol. 55, 2000, p. 32-43.

WELSH, Nancy A. Making Deals in Court-Connected Mediation: What's Justice Got To Do With It? *Washington University Law Quarterly*, vol. 79, 2001, p. 787-861.

WISSLER, Rosselle L. The Effectiveness of Court-Connected Dispute Resolution in Civil Cases. *Conflict Resolution Quarterly*, vol. 22, Nº 1, 2004, p. 55-88.

MEDIATION IN SWITZERLAND

By Isabelle Hering[1]

"It takes a very long time to become young"...
(Pablo Picasso)

I. Introduction

We seem to have the perfect place, - Switzerland is well known for its implication in international mediation between states, for its neutrality and its confidentiality rules, – we have very good professionals, we offer several alternative dispute resolution (ADR) trainings, and we have some legal tools...

In this environment, how is mediation contemplated and used in Switzerland? Is the legal system in favour of such a process? Is mediation practice encouraged?

Mediation has been mentioned in the Federal Constitution (FC) since 1979, at the time when Jura was admitted as a canton in Switzerland[2]. Article 44 al. 3 FC stipulates that "*disputes between Cantons or between Cantons and the Confederation shall wherever possible be resolved by negotiation or mediation".* Article 28 FC concerning the right to form professional associations provides that "Disputes *must wherever possible be resolved through negotiation or mediation*."

Mediation is also promoted in cantonal constitutions such as in the Constitution of the Canton of Geneva[3], the Constitutions of the Canton of Vaud[4],

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2 Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, Survol de la pratique suisse, Jean Mirimanoff (éd.), Helbing Lichtenhahn, 2011, p. 32.

3 Art. 120 Constitution Genevoise: *L'Etat encourage la médiation et les autres modes de résolution extrajudiciaire des litiges.*

4 Art. 43 Constitution Vaudoise:

1 L'Etat institue un service de médiation administrative indépendant. La médiatrice ou le médiateur responsable est élu par le Grand Conseil.

2 L'Etat peut encourager la médiation privée.

the Canton of Neuchatel[5] or the Canton of Fribourg[6].

Mediation is definitively an institution that is known and offered in Switzerland. It is used during judicial processes and also out of courts, for family matters, for labor and schooling disputes and for commercial and criminal matters[7].

With mediation incorporated in 2011 in the new Swiss Civil Procedure Code (CPC), what may have been considered as a psycho-therapeutic alternative[8] has now entered the judicial system at the federal level.

However, although tools are provided to judges and lawyers to promote mediation, and numerous trainings and workshops are offered throughout Switzerland, it seems this process has difficulty to find its place not only among the legal practitioners, but also in the business world[9].

Some judges still hesitate to suggest mediation[10], as they lack time or trust in the process or sometimes do not completely understand the mechanisms. Lawyers are not inclined either as some might lack knowledge and fear to lose their clientele or possibly control of their file[11].

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5 Art. 27 Constitution Neuchâteloise:

1 Les travailleuses et les travailleurs, les employeuses et les employeurs, ainsi que leurs organisations, ont le droit de se syndiquer pour défendre leurs intérêts, de créer des associations et d'y adhérer. Ils ne peuvent pas y être co*ntraints.*

2 Les conflits collectifs de travail sont, autant que possible, réglés par la négociation ou la médiation.

6 Art. 27 Constitution Fribourgeoise:

1 Les travailleurs, les employeurs et leurs organisations ont le droit de se syndiquer pour la défense de leurs intérêts, de créer des associations et d'y adhérer ou non.

2 Les conflits sont, autant que possible, réglés par la négociation ou la médiation.

7 Jean A.Mirimanoff, in La Médiation dans l'ordre juridique suisse, Survol de la pratique suisse, Jean Mirimanoff (éd.), Helbing Lichtenhahn, 2011, p.39

8 Florence Pastore/Birgit Sambeth Glasner, La médiation civile dans le code de procédure civile unifié, in Revue de l'Avocat, n° 8/2010, p. 327, quoting Diana Murnier, Gerichtsnahe Zivilmediation unter besonderer Berücksichtigung des Vorentwurfs für eine Schweizerische ZPO.

9 Cinthia Levy, La médiation commerciale en Suisse, 10 ans de Gemme, 2014, forthcoming article, p. 1

10 Cinthia Levy, La médiation commerciale en Suisse, 10 ans de Gemme, 2014, forthcoming article, p. 6

11 Isabelle Bieri, Compte rendu du colloque de 29 mai 2013 de Gemme, in www.gemme.ch/gem_contributions; Cinthia Levy, La médiation commerciale en Suisse, 10 ans de Gemme, 2014, forthcoming article, p. 6

Such statement is surprising as it is in clear contradiction with the fact that, when mediation takes place, it has a lot to offer. It lasts on average 3 to 5 meetings and the success rate is very high - parties settle in 70.6%[12] of the cases.

This article aims at giving a brief overview of the current role of mediation in Switzerland.

It focuses on federal laws, particularly the new unified civil procedure code (CPC) and criminal procedure code (CrimPC). It may however refer to cantonal laws (from western Switzerland) when appropriate and for illustration purposes.

The use of the masculine gender throughout this document and in relation to any physical person shall be understood as including the feminine gender. An English translation of the federal and cantonal laws is provided when available.

II. Conciliation and Mediation

Both conciliation and mediation are offered in Switzerland.

It is interesting to recall the differences between both processes as these are often mixed up. Some pretend that the process of conciliation is not different from that of mediation, as both terms tend to be used interchangeably[13]. The difference may indeed be minimal if the distinction is made on the directive/non-evaluative/evaluative/facilitative criteria. For instance, the differences fade away when the mediator becomes evaluative and directive.

However, both processes are dissimilar from their settings. It is confirmed by the fact that the law differentiates both and allows conciliation to be replaced by mediation in certain circumstances. Mediation has a subsidiary role with regard to conciliation[14], at least in the judicial civil process.

A. Conciliation

Conciliation is neither defined by the CPC, nor by any other laws.

12 First Survey by the Swiss Federation of mediation associations, 2009 http://www.infomediation.ch/cms/index.php?id=229&L=1

13 Daniel Girsberger/Nathalie Voser, International Arbitration in Switzerland, §50, Schulthess, 2008; Gabrielle Kaufmann-Kohler, Antonio Rigozzi, Arbitrage International: droit et pratique à la lumière de la LDIP, § 28, Ed. Schulthess § and Weblaw, 2006

14 Christine Guy –Ecabert, Conciliation ou Médiation? Guider le juge et le justiciable par une analyse des différences entre les processus, RJN, 2011, p. 22

It is an informal model of dispute resolution, either mandatory or optional, conducted by a designated conciliator, usually an impartial, neutral and independent judge.

During such process the conciliator has the ability to suggest a solution to the parties if they are not able to reach a solution themselves[15]. He assists the parties in the negotiation of their positions, rather than their interests[16]. The conciliator tends to have a directive/evaluative role.

B. Mediation

The new CPC does not include a definition of mediation either. The Swiss legislator took the view that the mediation process as well as the technical and personal skills of the mediators cannot be defined in a civil procedure law[17].

According to the doctrine[18], "*mediation within the meaning of the CPC can be defined as non-judicial means of resolving conflicts that involves an independent and impartial neutral third party, the mediator, helping parties, causing them to resume dialogue so that they find, under their own responsibility, a solution to their dispute*".

Several associations have defined mediation.

According to Gemme Switzerland[19] "*mediation is a process of management of communication, freely chosen by the parties, supported by a mediator, a person who is impartial, independent, neutral, and designated by the parties. It is a confidential process, during which the parties aim at making their own decision*".

The Swiss Bar Association[20] defines mediation as "*a dispute resolution process, during which one or several independent and impartial third persons (mediators) help the parties in their dispute to resolve such dispute themselves and in an amicable way, through the negotiation process*".

According to the Swiss federation of mediation associations (FSM), me-

15 Christine Guy –Ecabert, Conciliation ou Médiation? Guider le juge et le justiciable par une analyse des différences entre les processus, RJN, 2011, p. 24

16 Cinthia Levy, La médiation commerciale en Suisse, 10 ans de Gemme, 2014, forthcoming article p. 7, footnote 30

17 FF 2006 6943

18 Bohnet François, in Code de Procédure Civile commenté, ad article 213 n° 4, p. 797, Basel, Helbing Lichtenhahn, 2011.

19 Gemme Switzerland, Groupement Européen des Magistrats pour la Médiation, www.gemme.ch

20 Fédération Suisse des Avocats (FSA), www.sav-fsa.ch

diation is "*a dispute resolution process through negotiation under a third party conduct. The aim of the process is to find solutions that are acceptable by each party (win-win solution)*".

Lastly, the Swiss rules of the Swiss Chambers' arbitration institution define mediation as

[...] an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the participants. Unlike an expert the mediator does not offer his or her own views nor does he make proposals like a conciliator, and unlike an arbitrator he or she does not render an award. The mediation can be terminated at any time, if the parties do not reach a mutually satisfactory settlement, or if one of the parties wants to discontinue the process"[21].

These definitions have all in common the responsibility of the parties to resolve their dispute and to find a solution by themselves[22]. Unlike the conciliator, the mediator does not suggest a solution to the dispute; he is not directive, nor should he be.

The parties participate in mediation because they are willing to, the process is confidential, autonomous and independent, the mediator is impartial and neutral and has the qualifications to act as mediator[23].

III. The object of mediation

The judicial path should remain the last resort ("*ultima ratio*"); therefore focus on prevention, management and efficient conflict resolution is essential, mediation being one of the means of amicable resolution[24].

But can all disputes be settled by mediation? Can the parties decide on all issues?

In civil and commercial matters, one can easily answer by the affirmative.

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21 The Swiss Rules of Commercial Mediation, April 2007, Introduction, p.77

22 Jean A. Mirimanoff, in La Médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p.71, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

23 Florence Pastore/Birgit Sambeth Glasner, La médiation civile dans le code de procédure civile unifié, in Revue de l'Avocat, n° 8/2010, p.330

24 Florence Pastore/Birgit Sambeth Glasner, Réflexions sur la médiabilité, in Revue de l'Avocat, n° 10/2010, p.412

Indeed, parties' autonomy to contract prevails. The CPC does not provide for any limitation in what can be mediated or not.

However, several limits, subjective, objective, moral or legal, have to be taken into consideration. The judge, when ratifying a settlement agreement (art. 217 CPC), has to apply general principles of contract law, and ensure that the suggested settlement is not impossible, illegal or against the *mores*, and that it does not infringe any mandatory laws[25].

Whose role is it to assist the parties in order to ensure that the mediation settlement is valid and can be ratified? The mediator? The lawyers?

As the mediator is to be neutral and impartial, and as his role is only to assist the parties to find a settlement, the mediator is not supposed to check the viability of the settlement with respect to imperative law.

This should be the lawyers' role, if lawyers are involved in the process. If there are no lawyers, then the mediator, if he has some doubts, should suggest the parties to seek special advice from a specialist on specific issues at stake so as to ensure the settlement can be ratified.

In federal administrative mediation (see chapter VIII. A below), the authority transforms the settlement reached between the parties in the form of a decision. In doing so, it has to ensure that the content of its ruling is not defective in terms of article 49 Federal Act on Administrative Procedure (FAAP)[26], that the decision does not infringe federal laws, i.e. there is no violation of federal law including the exceeding or abuse of discretionary powers, the determination of the legally relevant facts of the case is correct and complete, and the ruling is adequate.

IV. Mediators in Switzerland

The profession of mediator is not regulated in Switzerland[27], which means

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25 Bohnet François, in Code de Procédure Civile commenté, ad article 217 n° 3, p. 810, Basel, Helbing Lichtenhahn, 2011 ; Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p. 72, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

26 Art. 49 FAAP *In the appeal, the appellant may contend that:*

a. there has been a violation of federal law including the exceeding or abuse of discretionary powers; b. there has been an incorrect or incomplete determination of the legally relevant facts of the case; c. the ruling is inadequate; a plea of inadequacy is inadmissible if a cantonal authority has ruled as the appellate authority.

27 Bohnet François, in Code de Procédure Civile commenté, ad article 213 n° 8, p.

that anybody can use the title of mediator and practice mediation. Several professions are represented among practising mediators, such as lawyers, retired judges, psychologists, social workers, or architects, etc.

When mediation takes place during court proceedings (see chapter VI. A below), the mediator shall be independent. Contrary to some other jurisdictions, the mediator is not part of the judicial system, i.e. a professional judge or a conciliator. In other words, the Swiss judicial system has externalised mediation[28].

The CPC or other federal laws do not provide for the mediators to have specific qualifications or to be listed as qualified/sworn mediators, though they stipulate that the mediation shall be confidential and independent[29] .

In theory, the parties are therefore free to choose whoever they want.

However, several cantons such as Canton of Geneva have published a list of sworn civil and criminal mediators, who had to fulfil required conditions to be recognised as such[30]. They must be at least 30 years old, hold university diploma, have some professional experience, have knowledge and experience in mediation, hold a diploma or certificate accredited by one of the Swiss as-

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798, Basel, Helbing Lichtenhahn, 2011; Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, Mediation-s, esquisse générale, p. 36, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

28 Christine Guy –Ecabert, Conciliation ou Médiation ? Guider le juge et le justiciable par une analyse des différences entre les processus, RJN, 2011, p. 23

29 Art. 216 CPC Relationship with court proceedings:

1 Mediation proceedings are confidential and kept separate from the conciliation authority and the court.

2 The statements of the parties may not be used in court proceedings.

30 Art. 66 and 67 Loi sur l'Organisation Judiciaire Genève.

Art. 66 Autorisation *L'exercice de la fonction de médiateur assermenté est subordonné à une autorisation du Conseil d'Etat.*

Art. 67 Conditions d'exercice *L'exercice de la fonction de médiateur est réservée aux personnes qui :*

a) sont âgées de 30 ans au moins;

b) sont au bénéfice d'un diplôme universitaire ou d'une formation jugée équivalente;

c) disposent d'une bonne expérience professionnelle;

d) disposent d'une expérience ou de connaissances suffisantes dans le domaine d'exercice de la médiation;

e) disposent de qualifications et d'aptitudes particulières en matière de médiation;

f) ne font l'objet d'aucune condamnation pour un crime ou un délit relatif à des faits portant atteinte à la probité et à l'honneur.

sociations, such as the Swiss Bar Association[31], the Swiss federation of mediation associations or the Swiss chamber of commercial mediation and have a clean criminal record.

The Canton of Vaud[32] has also established a list of accredited mediators for civil matters. However, the parties are usually free to choose mediators not mentioned on the list.

For mediations taking place during civil, criminal or criminal for minors proceedings in Canton of Fribourg, the mediator must be authorised by the mediation commission. The conditions are similar to these applicable in Canton of Geneva[33].

Authorities are of different opinions; some believe that the existence of such lists should not prevent the parties from choosing whoever they want[34] while others consider that a mediator should have an authorisation[35]. The debate is certainly valid in civil procedure as the CPC does not provide for minimum professional requirements.

In any event, it is advisable that the parties choose a mediator accredited by one of the recognized associations as mentioned above, as it ensures that the mediator has had a minimum of training and understands the principles applicable to the mediation process.

In federal administrative mediation, the mediators do not need to be sworn mediators, but they are designated by the authority. In Canton of Vaud, administrative mediators are chosen by the authorities, as well as in Geneva for specific matters[36].

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31 Pierre Kobel, Le nouveau Règlement Médiateur FSA/Médiatrice FSA in Revue de l'Avocat, 3/2008

32 Vaud: Règlement sur les médiateurs civils agrées (RMCA), 22 of June 2010

33 Fribourg: art. 6 Ordonnance sur la médiation en matière civile, pénale et pénale pour les mineurs (OMed) du 6 décembre 2010

34 Bohnet François, in Code de Procédure Civile commenté, ad article 213 n° 9, p.798, Basel, Helbing Lichtenhahn, 2011.

35 Contra : Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 189, with the editor's note, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

Contra : Pierre Kobel, in Ursula Leemann , Roman Manser, Pierre Kobel, in Mediation, La Pratique de l'Avocat, page 1225, Stämpfli Editions, Berne, 2009 tiré à part

36 Vaud: Loi vaudoise sur la médiation administrative du 19 mai 2009, articles 5 and ff

Geneva: Loi sur l'information du public, l'accès aux documents et la protection des données personnelles (LIPAD) article 30 ; mediation at school service

In criminal mediation, the matter is not regulated by federal laws. At the cantonal level, mediators are usually required to have an authorisation to practise as mediator when dealing with minors [37] or with adults or minors[38].

V. Lawyers and judges involvement in the process of mediation

A. Lawyers

According to article 9 of the Swiss lawyers' federation code of conduct[39], "*the lawyer tries to amicably settle all disputes, insofar as it is in the interest of the client. The lawyer, as representative of a party or legal advisor, takes into account a mediation that is currently taking place or the desire of one of the parties to initiate mediation*".

With regard to mediation, lawyers have different roles[40]:

Prevention/promotion: a lawyer shall prevent disputes and help his clients to maintain their relationship with their business partners or family members, for instance by integrating alternative dispute resolution clauses in the agreements rather than the usual court clauses.

Choice: when analysing a file and the issues at stake, the lawyer shall first identify the interests of his clients and then suggest the best alternative to

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37 Vaud: art. 60 Loi sur la juridiction pénale des mineurs, Principe

1 A tout stade de la procédure, le président peut la suspendre et charger une organisation ou une personne reconnues en la matière d'engager une procédure de médiation lorsque les conditions de l'article 8 DPMin A sont remplies.

2 Le médiateur est soumis à une autorisation de pratiquer délivrée par le Tribunal cantonal.

3 Le règlement B fixe les conditions et la procédure d'autorisation, le statut, le fonctionnement et la rémunération du médiateur.

38 Fribourg: art. 6 Ordonnance sur la médiation en matière civile, pénale et pénale pour les mineurs (OMed) du 6 décembre 2010, article 6

39 Fédération Suisse des Avocats, Règlement amiable des litiges Art. 9 FSA Code of Conduct

1 L'avocat s'efforce de régler à l'amiable les litiges, dans la mesure où l'intérêt du client ne s'y oppose pas.

2 Il tient compte, comme représentant d'une partie en justice ou conseiller, d'une médiation en cours ou du souhait de l'une des parties d'en instaurer une.

40 Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p. 89, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011 ; Pierre Kobel, in Ursula Leemann , Roman Manser, Pierre Kobel, in Mediation, La Pratique de l'Avocat, page 1230, Stämpfli Editions, Berne, 2009 tiré à part

resolve the dispute: courts? Negotiations? Mediation? Arbitration? For this purpose, the lawyer can for instance refer to recommendations prepared for the attention of lawyers by the mediation chamber of the Vaud lawyers' association (OAV)[41].

Information: a lawyer shall explain the process and the main principles of mediation to his clients so as to prepare them to mediation. The lawyer explains his role during mediation and understands his clients 'expectations. If the mediation process is chosen by the parties, then the lawyer shall be able to guide his clients through the process, taking a role of coach or council during the mediation.

Drafting: once the mediation has led to a settlement agreement, the lawyer shall be able to write the settlement agreement and assess if such settlement is to be ratified (217 CPC) or authenticated in order to become enforceable (art. 347 CPC).

In order to fulfil these roles, lawyers should have sound knowledge of existing alternatives, including mediation, and ensure they are properly trained. Such statement seems evident; nevertheless there are still some lawyers who work daily as negotiators or contract' drafters and who believe that such knowledge and practice give them sufficient tools to fulfil above mentioned roles. However, shifting from being lawyer used to look for positions, give advice or be directive, to being a coach during mediation, where the parties search for their common interests and options, is not easy. This presupposes a change of mind-set, as lawyers are no longer the spokespersons for their clients[42] .

Lawyers are still dubitative about mediation and its effects on their practice; for some of them, thinking about alternative modes of dispute resolution is not natural[43]. They should however understand that mediation can be an effective tool and seen as a complementary activity. Successful mediation maintains a long term relationship between lawyers and their clients and enables them to offer several and diverse services.

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41 Ordre des Avocats Vaudois, check-liste pour les avocats, www.mediation-oav.ch, domaines d'intervention

42 Catherine Jaccottet Tissot, Contrôle de la qualité juridique de l'accord de médiation – le rôle du médiateur, en particulier la relation avec l'avocat, Gemme 29 mai 2013, www.gemme.ch/gem_contributions

43 Cinthia Levy, La médiation commerciale en Suisse, 10 ans de Gemme, 2014, forthcoming article, page 6.

Indeed mediation success rate is high (about 70%)[44], and profitability should not be a deterrent as - at least in commercial mediation - hourly lawyers' fees may be charged.

B. Judges

At the early stages of the process, at least in civil or commercial cases, judges have the opportunity to assess which of the following paths the case should take: either conciliation conducted by the judge, or referral to mediation with an external mediator, or judgment.

With the new CPC, the judges have now the ability to suggest mediation and to encourage parties to use the mediation process (art. 214 CPC) up to the judgment stage[45]. In disputes related to children, they can even urge the parents to try mediation (art. 297 CPC). The judges might also intervene at the stage of ratification (art. 217 CPC).

Once mediation has been chosen by the parties, judges do not intervene in the process anymore, because of their complete independency and autonomy[46].

Judges must admit that, in certain circumstances – when a legal solution is not straightforward –, mediation might be a good solution. They must be ready to accept that the dispute might be resolved in another way than a classical judgment[47].

Their referral to mediation may depend on the level of success of conciliation in the courts. Indeed, if the conciliation process proves to be successful, then judges might not be inclined to suggest mediation and might continue to follow their usual path[48]. Why refer the matter to mediation when concil-

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44 First Survey by la Fédération suisse des associations de médiation, 2009 http://www.infomediation.ch/cms/index.php?id=229&L=1

45 Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p. 95, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

46 Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p. 91, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

47 Violaine Monnerat, L'impulsion à la médiation, l'intervention et l'impact du juge, Gemme, 29 mai 2013, www.gemme.ch/gem_contributions, slide 10

48 Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p. 92, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

iation is free of charge (no additional fees are requested from the parties to conciliate) and works[49]?

Now that judges have been given the legal tools and a new role - initiator of the mediation process - , they have to understand the process of mediation, recognize its advantages and the mission of the mediator.

But above all, judges must have faith in the process of mediation in order to convince the parties[50], who are not knowledgeable and who expect guidance. Such belief will only be possible if they get properly trained and informed[51].

VI. Civil and Commercial Mediation

Mediation is available to the parties not only out of courts as a voluntary process, but also during the court proceedings according to the applicable laws.

A. Mediation during court proceedings

Since January 2011, Switzerland has a new CPC which replaced all cantonal civil procedure laws and applies uniformly on the whole Swiss territory[52]. The Swiss legislator has introduced amicable settlement (mediation) in the CPC because "*transactional solutions are more durable and subsequently more economical, as they can take into account factors that a court could not take into account*"[53].

The new CPC offers mediation during the proceedings as per articles 213 to 218 CPC. These articles do not aim at regulating mediation, but only at setting its interaction with the court proceedings. The process of mediation itself is neither described nor regulated, it is the exclusive choice of the parties (art. 215 CPC[54]) (autonomy principle).

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49 Cinthia Levy, La médiation commerciale en Suisse, 10 ans de Gemme, 2014, forthcoming article, p. 7

50 Violaine Monnerat, L'impulsion à la médiation, l'intervention et l'impact du juge, Gemme, 29 mai 2013, www.gemme.ch/gem_contributions, slide 8 and 9

51 Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p. 91, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

52 Civil Procedure Code, CPC of 19 December 2008, RS 272

53 FF 2006 6860

54 Art. 215 CPC Organisation and conduct of mediation: *The parties are responsible for organising and conducting the mediation.*

Mediation can be used alternatively to conciliation (art. 213 CPC[55], see chapter VI. A. 1 below) or during the proceedings (in first instance or at the appeal stage) (art. 214 CPC[56], see chapter VI. A. 2 below).

The parties can choose their mediator, which means that the conciliation authority or the judge will neither impose nor nominate the mediator (see however the exceptions mentioned above in chapter IV above). Whatever is being said during the mediation will not be taken into account afterwards in the trial. Mediation is confidential and totally independent of the proceedings (art. 216 CPC)[57].

If a settlement has been reached during the mediation, such settlement can be ratified (art. 217 CPC) either by the conciliation authority or by the tribunal competent at the time of mediation [58].

Ratification can only take place if the content of settlement is not impossible, illegal or against the *mores*, and of course only if it does not infringe any mandatory laws (see chapter III above). The conciliation authority or the competent tribunal will however not verify if the settlement reflects the true will of the parties or if parties had authority to enter in such agreement[59]. Once ratified, the settlement becomes executable.

The filing of the mediation request by the parties creates *lis pendens* (art.

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55 Art. 213 CPC Mediation instead of conciliation

1 If all the parties so request, the conciliation proceedings shall be replaced by mediation.

2 The request must be made in the application for conciliation or at the conciliation hearing.

3 The conciliation authority shall grant authorisation to proceed if it is notified by one of the parties that mediation has failed.

56 Art. 214 CPC Mediation during court proceedings

1 The court may recommend mediation to the parties at any time.

2 The parties may at any time make a joint request for mediation.

3 The court proceedings remain suspended until the request is withdrawn by one of the parties or until the court is notified of the end of the mediation.

57 Art. 216 CPC Relationship with court proceedings

1 Mediation proceedings are confidential and kept separate from the conciliation authority and the court.

2 The statements of the parties may not be used in court proceedings.

58 Bohnet François, in Code de Procédure Civile commenté, ad article 217 n° 2, p. 809, Basel, Helbing Lichtenhahn, 2011

59 Bohnet François, in Code de Procédure Civile commenté, ad article 217 n° 2, p. 810, Basel, Helbing Lichtenhahn, 2011

62 CPC) and interrupts the statute of limitation (art. 135 ch. 2 Swiss Code of obligations).

1. Mediation as an alternative to conciliation (art. 213 CPC)

At the conciliation stage, the parties can voluntarily decide to submit their dispute to mediation instead of conciliation (art. 213 CPC).

As a reminder, civil or commercial trials in Switzerland are all submitted to prior mandatory conciliation (art. 197 CPC[60]), with the exception of certain types of disputes, such as divorce proceedings[61] or summary proceedings (art. 198 CPC[62]). Moreover, conciliation is facultative if the dispute at stake has a value of more than CHF 100'000.-- or if the defendant's seat or domicile is abroad[63].

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60 Art. 197 CPC Principle

Litigation shall be preceded by an attempt at conciliation before a conciliation authority.

61 In case of divorce or separation, the conciliation is conducted by the tribunal (le juge du fond) and not by the conciliation authority. During the proceedings, mediation can either be suggested by the tribunal, or initiated by the parties themselves, or requested by the judge in child matters (art. 297 al. 2 CPC)

62 Art. 198 CPC Exceptions

Conciliation proceedings are not held:

a. in summary proceedings;

b. in proceedings on civil status;

c. in divorce proceedings;

d. in proceedings for the dissolution of a registered partnership;

e. for the following actions arising from the DEBA49:

1. action for release from a debt (Art. 83 para. 2 DEBA)

2. action for a declaratory judgment (Art. 85a DEBA),

3. third party action (Art. 106-109 DEBA),

4. action for participation (Art. 111 DEBA),

5. third party actions and actions by the bankrupt estate (Art. 242 DEBA),

6. action to challenge the schedule of claims (Art. 148 and 250 DEBA),

7. action to ascertain new assets (Art. 265a DEBA),

8. action for the recovery of items that are subject to the right of retention (Art. 284 DEBA);

f. in disputes for which a court of sole cantonal instance has jurisdiction pursuant to Articles 5 and 6;

g. for principal intervention, counterclaim and third party actions;

h. if the court has set a deadline for filing the action.

63 Art. 199 CPC Waiver of conciliation

In the event where all the parties at the dispute are willing to proceed with mediation instead of conciliation, they can either inform the conciliator in their conciliation request or at the first hearing. They can choose mediation for as long as the conciliation authority has not granted the authorisation to proceed (art. 213 al. 3 CPC).

If only one party requests mediation instead of conciliation, the conciliation authority should notify such request to the other party asking the latter to accept or refuse mediation[64], as all parties at stake must agree to go to mediation as a principle.

At the stage of the request, the parties do not have yet to agree about who is going to act as mediator and what process will be used. They do not have to provide the conciliator with the reasons of their choice to mediate.

The conciliation authority cannot refuse the replacement of the conciliation by mediation unless the request does not provide for mediation, but negotiation (for instance) or the parties manifestly try to evade the conciliation proceedings[65].

The parties are free to choose their mediator, who does not need to be listed on the lists of sworn mediators (see however exceptions in chapter IV above).

They can also decide at any stage of the proceedings to stop mediation and resume the proceedings.

If mediation does not result in a settlement, the parties can continue the proceedings before the judge after the authorisation to proceed has been delivered (art. 209 CPC).

2. Mediation during the proceedings (art. 214 CPC)

During court proceedings (after the conciliation phase), mediation can either be suggested by the tribunal (art. 214 al. 1) or initiated by the parties themselves (art. 214 al. 2).

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1 In financial disputes with a value in dispute of at least 100,000 francs, the parties may mutually agree to waive any attempt at conciliation.

2 The plaintiff may unilaterally waive conciliation:

a. if the defendant's registered office or domicile is abroad;

b. if the defendant's residence is unknown;

c. in disputes under the Gender Equality Act of 24 March 1995.

64 Florence Pastore/Birgit Sambeth Glasner, La médiation civile dans le code de procédure civile unifié, in Revue de l'Avocat, n° 8/2010, p. 330

65 Bohnet François, in Code de Procédure Civile commenté, ad article 213 n° 6, p. 797, Basel, Helbing Lichtenhahn, 2011

The judge is given the ability to be proactive in advising –not enjoining – the parties to go to mediation or to take some outside advice concerning mediation[66]. The judge can do so during the whole proceedings until a judgement is rendered.[67] Only in cases of proceedings related to children in case of divorce, may the judge urge the parents to attempt mediation (art. 297 CPC[68]).

The parties can request mediation either in writing or orally at any hearing. The judge may not refuse such request.

In both cases, the proceedings are suspended (al. 3).

The parties can request that the proceedings resume if the mediation was not successful or if one of the parties decides to stop the mediation process. If the parties were able to reach an agreement only partially, the proceedings will resume for the points that were not settled[69].

B. Mediation out of courts

The process of mediation before or outside any proceedings is of course available to the parties. It is the same process than the one used during the proceedings.

However, the question remains about what happens with an out of courts settlement agreement? Can it be ratified by a judge? Can the parties use the ratification procedure?

Two possible solutions are offered to the parties: they can either request the judge to ratify their settlement in accordance with article 217 CPC or ensure that such settlement is authenticated by a notary so as to ensure it becomes executable (art. 347 CPC).

1. Ratification by the judge (art. 217 CPC[70])

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66 Jean A. Mirimanoff, in La médiation dans l'ordre juridique suisse, La médiation en matière civile et commerciale, p. 81, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

67 Bohnet François, in Code de Procédure Civile commenté, ad article 215 n° 7, p. 801, Basel, Helbing Lichtenhahn, 2011.

68 Art. 297 CPC Hearing of the parents and mediation

1 *The court hears the parents in person when ruling on matters relating to a child.*

2 The court may ask the parents to attempt mediation.

69 Bohnet François, in Code de Procédure Civile commenté, ad article 214 n° 24, p. 803, Basel, Helbing Lichtenhahn, 2011.

70 Art. 217 CPC Approval of an agreement *The parties may jointly request that the agreement reached through mediation be approved. An approved agreement has the same effect as a legally binding decision.*

Article 217 CPC is part of the civil procedure code and originally enables the parties to request ratification of their settlement by the judge if mediation has taken place in replacement of conciliation or during the court proceedings.

The question is therefore whether a settlement reached through mediation can be ratified by the judge if the dispute has not been submitted to such judge (or conciliator) before mediation has taken place.

Authorities have different views. Some believe that such settlement can only be ratified if the matter is pending before the conciliation authority or the tribunal[71], as the CPC does not formally provide for the contrary.

Others consider that the parties should be able to get their settlement ratified through a written request to either the conciliation authority or the competent tribunal. Enabling ratification outside any proceedings would ensure pragmatism and procedural economy[72]. It seems indeed unreasonable to request the parties to introduce a conciliation request including the settlement just for the purpose of ratification, although this might be formally the only way to ensure ratification.

Note that in divorce proceedings, the parties can settle on the effects of their divorce and request the judge to approve such settlement (art. 279 CPC[73]), which will be valid only once ratified by the judge (article 279 al. 2 CPC).

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71 Bohnet François, in Code de Procédure Civile commenté, ad article 217 n° 7, p. 810, Basel, Helbing Lichtenhahn, 2011 (and references) ; Christine Guy –Ecabert, Conciliation ou Médiation ? Guider le juge et le justiciable par une analyse des différences entre les processus, RJN, 2011, p. 22

72 Florence Pastore/Birgit Sambeth Glasner, La médiation civile dans le code de procédure civile unifié, in Revue de l'Avocat, n° 8/2010, p. 332, Bohnet François, in Code de Procédure Civile commenté, ad article 217 n° 7, p. 810, Basel, Helbing Lichtenhahn, 2011 (and references in contra) ; Cinthia Levy , Les avantages de la médiation pour l'avocat, in Revue de l'avocat, 11/12 2013, p. 476 ; Ursula Leemann , Roman Manser, Pierre Kobel, in Mediation, La Pratique de l'Avocat, page 1207, Stämpfli Editions, Berne, 2009 tiré à part

73 Art. 279 CPC Approval of the agreement

1 The court shall approve the agreement on the effects of the divorce if it is persuaded that the spouses have concluded the agreement of their own volition and after careful reflection, and that the agreement is clear, complete and not manifestly inequitable; the provisions on occupational pensions are reserved.

2 The agreement is valid only when it has been approved by the court. It must be included in the conclusions to the decision.

2. Authentication by a notary (art. 347 CPC)

The parties can take the necessary steps in order for their settlement to become enforceable as an authentic title in accordance with article 347 CPC[74].

The settlement shall fulfil the following conditions:

-the parties, or at least the obligee, shall declare in their settlement agreement that they accept direct enforcement,

-the settlement shall mention the legal grounds for the performance due (execution clause),

-the performance shall be sufficiently specified in the settlement agreement, accepted by the parties and due, and

-the settlement shall be "official", that is it must have been authenticated by a public officer, usually a notary.

Once authenticated, the settlement is enforceable in accordance with the Lugano convention, within the scope of the convention and in the member states signatories to such convention[75].

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74 Art. 347 CPC Enforceability. *Official records relating to any type of performance may be enforced in the same way as judicial decisions if:*

a. the obligee expressly declares in the record that he or she accepts direct enforcement;

b. the legal ground for the performance due is mentioned in the record; and

c. the performance due is:

1. sufficiently specified in the record,

2. accepted in the record by the obligee, and

3. due.

75 Art. 57 Lugano Convention, Authentic instruments

1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one State bound by this Convention shall, in another State bound by this Convention, be declared enforceable there, on application made in accordance with the procedures provided for in Article 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the State addressed.

2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.

3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.

4. Section 3 of Title III shall apply as appropriate. The competent authority of a State bound by this Convention where an authentic instrument was drawn up or registered

VII. Criminal mediation (victim–offender mediation)

Mediation in criminal law aims, on one hand, at placing responsibility to the offenders and ensuring that they understand the consequences of their acts and, on the other hand, at trying to repair and alleviate the suffering and damages incurred by the victims (restorative justice)[76]. As in civil matters, criminal mediation looks at the matter in a global way and gives some space for the parties to express their feelings, needs and interests, and find an adequate solution.

The ability to use mediation in criminal matters as a dispute resolution process is not the same for minors or for adults.

A. Mediation in criminal law for minors

Since January 2011, criminal procedure law for minors has been unified and is now applicable throughout Switzerland. It welcomes mediation.

Indeed, the criminal procedure code for minors (art. 17 PPMin[77]) provides that mediation can be initiated by investigating authorities and tribunals, and criminal proceedings may be suspended:

-if no safeguarding measures are needed or if such measures have already been taken, and

-if conditions of exemption of punishment in the meaning of article 21 DPMin (criminal law for minors) are not fulfilled.

Mediation is therefore subsidiary to measures and exemptions.

Mediation cannot be initiated, if safeguarding measures (for instance placement of the minor in a detention centre) have to be taken. Likewise,

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shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Convention.

76 Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 151, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

77 Art. 17 PPMin

[1] L'autorité d'instruction et les tribunaux peuvent en tout temps suspendre la procédure et charger une organisation ou une personne compétente dans le domaine de la médiation d›e*ngager une procédure de médiation dans les cas suivants:*

a. il n'y a pas lieu de prendre de mesures de protection ou l'autorité civile a déjà ordonné les mesures appropriées;

b. les conditions fixées à l'art. 21, al. 1, DPMin[1] ne sont pas remplies. [in cases of exemptions of punishment]

[2] Si la médiation aboutit à un accord, la procédure est classée.

if the minor will be exempted from punishment (e.g. the minor has already been sufficiently punished for his acts), mediation is not necessary.

Mediation can be initiated at any stage of the criminal proceedings, i.e. also in the appeal phase or during the execution of the sentence or measures. The authorities or tribunals transmit the file to an association or person competent in the field of mediation without having to get the agreement of the victim and the offender. The mediator then ensures that the parties agree to submit their case to mediation[78] .

The proceedings are suspended when the mediation takes place, and if the parties come to a settlement, the proceedings are dropped (17 PPMin al. 3).

Cantonal laws have provided for the implementation of mediation for minors[79].

B. Mediation in criminal law for adults

Despite significant support aiming at introducing a clause promoting criminal mediation in the Swiss criminal procedure code (CrimPC), its final version does not include any direct mention of mediation, probably due to fear of high costs at the level of cantonal implementation[80]. However, the Federal office of Justice incontestably supports the use of mediation in the criminal proceedings[81].

Although mediation is not directly provided for in the CrimPC, the use of mediation can be found indirectly in article 316 CrimPC[82].

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78 Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 173, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

79 Geneva: Directive relative à la médiation dans les juridictions pénales des mineurs à Genève du 17 octobre 2011 ; Fribourg: Ordonnance du 6 décembre 2010 sur la médiation en matière civile, pénale et pénale pour les mineurs; Vaud: Règlement du 2 février 2010 sur la médiation dans le cadre de la procédure pénale applicable aux mineurs.

80 Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 181, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

81 BO 2007 N 1389 and letter of 21 September 2007

82 Art. 316 CrimPC Private Settlements

1 *Where the proceedings relate to an offence that is prosecuted only on complaint, the public prosecutor may summon the complainant and the accused to a hearing with the aim of achieving a settlement. If the complainant fails to attend, the complaint is deemed to have been withdrawn.*

2 If consideration is being given to an exemption from punishment due to reparation being made in accordance with Article 53 SCC, the public prosecutor shall invite the person suffering harm and the accused to a hearing with the aim of agreeing on reparation.

This disposition allows the public prosecutor to summon the parties to a hearing with the aim of achieving settlement. Such possibility is limited only to offences prosecuted on complaint. The claim is deemed to have been withdrawn (al. 1), if the complainant does not show up at the hearing.

In such hearing, authorities are of the opinion that the prosecutor can suggest mediation to the parties[83] and suspend the proceedings (art. 314 al. 1 lit. c CrimPC)[84]. If the complainant does not appear at the mediation session, given the voluntary process of mediation, the claim will not be deemed to have been withdrawn[85].

For offences prosecuted *ex officio* or on complaint, when consideration is being given to an exemption from punishment due to reparation being made in accordance with article 53 Swiss Criminal Code[86], the public prosecutor has the obligation to invite the victim and the offender to a hearing with the aim of agreeing on reparation (art. 316 al. 2 CrimPC). Authorities are of the opinion that during this hearing the prosecutor can also suggest mediation[87].

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3 If an agreement is reached, this shall be placed on record and signed by those involved. The public prosecutor shall then abandon the proceedings.

4 If the accused fails to attend a hearing in accordance with paragraphs 1 or 2 or if no agreement is reached, the public prosecutor shall immediately proceed with the investigation. In cases where it is justified, it may require the complainant to provide security for costs and damages within ten days.

83 Florence Pastore/Birgit Sambeth Glasner, Réflexions sur la médiabilité, in Revue de l'Avocat, n° 10/2010, p. 414, Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 183, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

84 Art. 314 CrimPC Suspension

1 *The public prosecutor may suspend an investigation, in particular if:*

c. private settlement proceedings are ongoing and it seems appropriate to await their outcome;

85 Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 183, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

86 Art. 53 Code Pénal Suisse: Reparation. *If the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him*

to court or punishing him if:

a. the requirements for a suspended sentence (Art. 42) are fulfilled; and

b. the interests of the general public and of the persons harmed in prosecution are negligible.

87 Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 184, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

For offences prosecuted on complaint, the public prosecutor shall abandon the proceedings when the parties reach a settlement (art. 316 al. 3).

For offences prosecuted *ex officio*, the prosecutor may either issue an order stating that no proceedings are being taken (in the event where the mediation took place before the instruction is opened) or that the on-going proceedings have been abandoned (in the event where the mediation took place after the opening of the instruction) [88].

If mediation took place at the stage of judgment, then an order stating that the on-going proceedings have been abandoned can be issued (art. 329 al. 4 CrimPC).

Cantonal laws on the application of the CrimPC have taken the opportunity to expressly provide for mediation in the criminal procedure for adults. For instance, in Geneva, the public prosecutor can invite the offender and the victim to engage in a mediation process instead of conciliation[89]. Canton of

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88 Art. 8 CrimPC Waiving prosecution

1 The public prosecutor and courts shall waive prosecution if the federal law so permits, in particular subject to the requirements of Articles 52, 53 and 54 of the Swiss Criminal Code (SCC).

2 Unless it is contrary to the private claimant's overriding interests, they shall also waive prosecution if:

a. the offence is of negligible importance in comparison with the other offences with which the accused is charged as regards the expected sentence or measure;

b. any additional penalty imposed in combination with the sentence in the final judgment would be negligible;

c. an equivalent sentence imposed abroad would have to be taken into account when imposing a sentence for the offence prosecuted.

3 Unless it is contrary to the private claimant's overriding interests, the public prosecutor and courts may waive the prosecution if the offence is already being prosecuted by a foreign authority or the prosecution has been assigned to such an authority.

4 In such cases, they shall issue an order stating that no proceedings are being taking or that the ongoing proceedings have been abandoned.

89 Geneva : Art. 34A Loi d'application du Code Pénal Suisse et d'autres lois fédérales en matière pénale: Médiation

[1] En lieu et place d'une conciliation (art. 316, al. 1, *phr. 1, et al. 2, CPP), le Ministère public peut inviter le prévenu et le plaignant ou le lésé à engager une médiation au sens des articles 66 et suivants de la loi sur l'organisation judiciaire, du 26 septembre 2010.*

[2] L'article 316, alinéa 3, CPP s'applique par analogie.

[3] Le Ministère public peut également procéder selon l'alinéa 1 lorsqu'une exemption de peine au titre de l'absence d'intérêt à punir selon l'article 52 CP entre en ligne de compte.

Fribourg also provides for mediation instead of conciliation[90].

Despite the fact that mediation is available and welcomed for criminal matters, one has to note that it might not help the primary goal of criminal law that is general prevention. Indeed mediation being confidential, the public will not be informed if the matter is resolved by settlement. It might be satisfactory for the involved parties but it does not serve the public interests, particularly in the context of certain criminal acts, such as sexual offenses or offences against life[91].

VIII. Administrative mediation

Administrative mediation has the particularity that it will attract private parties on one side (users of the public goods) and public authorities on the other, the latter having a stronger position because of its status and the obligation to apply the law. The parties are therefore in unequal positions from the outset[92].

The settlement or positive outcome of administrative mediation does not aim at replacing administrative decisions taken by public authorities, but aims at reaching a decision acceptable by all parties.

During the mediation, parties will be able to get better information of the situation, ensure some kind of collaboration in order to find a solution and enable a long term acceptation of the decisions[93]. There will indeed be a decision taken by the authorities, but such will be based on the outcome of the mediation.

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90 Fribourg: Art. 41 Ordonnance sur la médiation en matière civile, pénale et pénale pour les mineurs (OMed)

Médiation en procédure pénale des adultes, Procédure

1 Pour les infractions pénales poursuivies sur plainte, la médiation pénale peut intervenir dans le cadre de la procédure de conciliation de l'article 316 du code de procédure pénale suisse.

2 Dans les affaires pénales poursuivies d'office, les parties peuvent recourir à la médiation en ce qui concerne les aspects civils ou la réparation de l'article 53 du code pénal suisse, à la condition que l'autorité judiciaire saisie accepte la médiation.

91 Florence Pastore/Birgit Sambeth Glasner, Réflexions sur la médiabilité, in Revue de l'Avocat, n° 10/2010, p. 415

92 Florence Pastore/Birgit Sambeth Glasner, Réflexions sur la médiabilité, in Revue de l'Avocat, n° 10/2010, p. 413

93 Alexis Overney, in La médiation dans l'ordre juridique suisse, La médiation en matière administrative, p. 192, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

Such mediation can take place at any time in the process of decision, either before the decision is taken, during the decision phase, after the decision has been made, or in the appeal phase against such decision.

Not all administrative cases can be submitted to mediation. In order to consider mediation in administrative cases the following conditions must be fulfilled[94]:

- There is a conflict between a public authority and users,
- Mandatory laws do not exclude a negotiated solution. If mandatory laws impose a solution, no mediation can take place (legality principle) (see chapter III above),
- The public authority has discretionary powers,
- All parties have an interest to reach a negotiated settlement and have the will to engage in a mediation,
- Powers between the parties are not too excessively imbalanced.

It seems that administrative mediation is more successful in non-contentious matters ("*procédures gracieuses*"), when positions are not crystallised and the disputes are not yet legally formalised[95].

A. Mediation in the federal administrative law

The Federal Act on Administrative Procedure (FAAP) applies to the procedures in administrative matters that are to be dealt with by rulings of Swiss federal administrative authorities of first instance or on appeal.

Article 33b FAAP[96] enables the authorities to suspend the proceedings if

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94 Alexis Overney, in La médiation dans l'ordre juridique suisse, La médiation en matière administrative, p. 197-201, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

95 Guy Ecabert Christine, Examen de la question à partir de quelques arrêts du tribunal administratif fédéral, in Juria, Mediationstagung Verwaltungsrecht – Ueberblick in « Justice-Justiz-Giustizia » 2010/4, p. 3

96 Art. 33b FAAP Amicable agreement and mediation

1 The authority may suspend the proceedings with the consent of the parties in order that the parties may agree on the content of the ruling. The agreement should state that the parties waive their right of appeal and how the parties intend to allocate the costs.

2 In order to encourage an agreement, the authority may appoint a neutral and suitably qualified natural person to be a mediator.

3 The mediator shall be bound only by the law and his mandate from the authority. He may take evidence; for inspections, reports from experts and the examination of witnesses, he shall require prior authorisation from the authority.

the parties agree to, in order for them to come to an agreement regarding the content of the decision to be taken by the authorities. It covers all decisions to be taken in first instance or appeal by the federal authorities and is open to proceedings opposing at least two parties (not counting the authority)[97].

The authority may nominate a mediator. As the appointment of a mediator is discretionary to the authority – parties have no right to mediation[98] -, the parties cannot request that mediation takes place. The mediator will be chosen on a case by case basis, as there are no federal mediators. In order to encourage an agreement, the authority may appoint a neutral and suitably qualified natural person to be a mediator. The FAAP does not mention that the person must be a sworn mediator.

The mediator shall be bound only by the law and his mandate from the authority (al. 2). The process is confidential (art. 16 al. 1 bis FAAP) as the mediator can refuse to testify in future proceedings[99]. The mediator may take evidence; however, for inspections, reports from experts and the examination of witnesses, he shall require prior authorisation from the authority (al.3), which means that the mediator is under close control by the authority[100].

The authority shall make the agreement reached with the help of the mediator the content of its ruling, unless the agreement is defective in terms of article 49 FAAP[101] (see chapter III above).

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4 The authority shall make the agreement the content of its ruling, unless the agreement is defective in terms of Article 49.

5 If an agreement is reached, the authority shall not charge any procedural fees. If no agreement is reached, the authority may dispense with imposing the costs of mediation on the parties, provided the interests involved justify this.

6 A party may at any time request that the suspension of the proceedings be revoked.

97 TAF arrêt A- 6085/2009, du 22 janvier 2010, c.3.2

98 TAF arrêt A- 6085/2009, du 22 janvier 2010, c.3.2 and A-710/2007 c. 3.1

99 Art. 16 FAAP *1bis The mediator is entitled to refuse to testify on matters that have come to his attention in the course of his activities in terms of Article 33b.*

100 Florence Pastore/Birgit Sambeth Glasner, Réflexions sur la médiabilité, in Revue de l'Avocat, n° 10/2010, p. 413

101 Art. 49 FAAP: *In the appeal, the appellant may contend that:*

a. there has been a violation of federal law including the exceeding or abuse of discretionary powers;

b. there has been an incorrect or incomplete determination of the legally relevant facts of the case;

c. the ruling is inadequate; a plea of inadequacy is inadmissible if a cantonal authority has ruled as the appellate authority.

Unfortunately, despite the welcomed integration of mediation at the federal level, such process does not seem to attract the authorities, as art 33 b is rarely applied[102]. One of the reasons might be again that mediation has not been promoted or that the authorities lack information or proper training.

B. Mediation in the cantonal administrative laws

At the cantonal level, mediation is offered for administrative matters, although it is sometimes mixed with other types of alternative dispute resolution.

Some cantons provide for services of an "ombudsman" (who fulfils the role of an administrative supervisor)[103], some other offer administrative mediation[104], some other conciliation[105].

IX. The process of mediation

Not differently from other jurisdictions and applicable to civil, criminal or administrative[106] matters, mediation follows a process in different phases:

A. The opening phase

The mediator receives the parties and seats them. He may have met them separately, or spoken to them before. It is very much a personal decision and of course it depends on the type of dispute at stake.

After the usual introductions, the mediator begins with his opening, during which he explains the mediation principles, his role, and may discuss other

102 Alexis Overney, in La médiation dans l'ordre juridique suisse, La médiation en matière administrative, p. 205, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

103 Bâle-Ville: Loi sur le traitement des doléances face à l'Etat par un ombudsman ; Zurich: Verwaltungsrechtsplflegegesetz, Zoug: Gesetz uber die Ombudstelle

104 Vaud: Loi sur la médiation administrative ; Règlement sur la promotion de la santé et la pr**é**vention en milieu scolaire, article 30 and art. 41 and ff

Genève: Loi sur l'information du public, l'accès aux documents et à la protection des données,

Fribourg: Art. 119 Constitution *Le Conseil d'Etat institue, en matière administrative, un organe de médiation indépendant.*

105 Genève : Loi sur la procédure administrative, articles 65 A and ff

106 Alexis Overney, in La médiation dans l'ordre juridique suisse, La médiation en matière administrative, p. 194, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

considerations such as pointing to the fact that being in mediation is a unique chance to dialogue, to bring an end to the dispute, and for the parties to express their views/feelings about the case the way they wish. At this stage, the parties also confirm their authority to settle and sign the mediation contract, if it has not been done before (which would be advisable).

B. Exploration phase

During this phase, the parties present their opening statements, their cases, topics that they wish to discuss or issues that might be clarified. It is usually done in a joint meeting; it can also be done in private meetings (caucuses). Once again, it is very much dependent on the issues at stake, the behaviors of the parties and the style of the mediator.

The mediator will ask clarification questions, in order to understand the issues at stake. He will try to identify the underlying interests, distinguish the real issues from the apparent ones, and find out parties' perception of the case.

C. Bargaining/negotiation phase

This phase aims at first brainstorming options, without evaluation, then analyzing and evaluating them. Then parties select the options that can bring them to a settlement. The parties, with the help of the mediator, discuss differences, identify items of different values, prioritizing parties' concerns and aspirations. The mediator may use reality testing questions, when necessary and appropriate, checking their BATNA and their WATNA[107], taking into account the costs of continued litigation or arbitration, and closing the gap.

D. Concluding phase

If parties have settled their dispute, then a settlement agreement will preferably be written down, either by the parties themselves, or by their lawyers if they have hired any. In any event the mediator neither drafts the agreement nor does he verify its enforceability. He may only check that all settled points and issues are covered in sufficient details.

E. Ratification phase

Once signed, the parties can request that the settlement agreement be rat-

107 BATNA : Best alternative to a negotiated agreement. WATNA: Worse alternative to a negotiated agreement

ified by the judge (art.217 CPC) or authenticated (art. 347 CPC). In administrative mediation, the settlement is ratified by the authority in its decision.

X. Costs of Mediation

A. Civil and commercial mediation

In civil or commercial mediation, the CPC stipulates that costs of mediation are borne by the parties, with the exception of cases concerning non-financial matters of child law. In such cases and under some conditions, the parties are entitled to cost-free mediation[108]. However, cantons have the ability to legislate and provide for exemptions (art. 218 al. 3 CPC). This unfortunately results in different situations, some cantons allowing cost free mediation and therefore encouraging mediation and some other denying any financial help in this regard.

In the Canton of Geneva, costs of mediation taking place out of courts or during a judicial process can be borne by the state if legal assistance has been granted and if the mediator is a sworn mediator[109]. In the Canton of Vaud, civil mediation is chargeable[110]. In Canton of Fribourg, it depends on the applicable procedural law[111]. In civil mediation, the costs are usually borne by

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108 Art. 218 CPC Costs of mediation

1 The parties shall bear the costs of mediation.

2 In non-financial matters of child law, the parties are entitled to cost-free mediation if:

a. they do not have the necessary financial resources; and

b. the court recommends mediation.

3 *Cantonal law may provide for further exemptions from costs.*

109 Geneva : Règlement sur l'assistance juridique et l'indemnisation des conseils juridiques et défenseurs d'office en matière civile, administrative et pénale

Art. 2 Objet *L'assistance juridique est réservée aux procédures relevant des juridictions étatiques du canton. Elle peut inclure le recours à un médiateur assermenté au sens des articles 66 et suivants de la loi sur l'organisation judiciaire, du 26 septembre 2010*

Art. 63 Loi sur l'Organisation Judiciaire, Conditions d'octroi de l'assistance juridique extrajudiciaire [1] Toute personne physique, domiciliée dans le canton de Genève et susceptible d'intervenir comme partie dans une procédure, dont la fortune ou les revenus ne sont pas suffisants pour lui assurer l'aide ou les conseils d'un avocat, d'un avocat stagiaire, ou d'un médiateur asser*menté en dehors d'une procédure administrative ou judiciaire, peut requérir l'assistance juridique.*

110 Vaud : Règlement sur les médiateurs civils agréés : article 7 al. 2

111 Fribourg, Art. 127 Loi sur la justice, Frais

the parties, unless one of the parties has obtained legal assistance and the mediation has been requested by the judicial authority[112].

B. Administrative mediation

With regard to federal administrative mediation, it is free of charge if the parties have come to an agreement. If they have not, the authority can renounce to charge them if the interests involved justify such renunciation (art. 33 al. 5 FAAP[113]). On a cantonal level, administrative mediation is free of charge in Canton of Vaud[114] as well as in Canton of Geneva for matters related to data protection[115] or if legal assistance has been granted[116].

C. Criminal Mediation

In criminal mediation there is no regulation at the federal level concerning costs of mediation. Only costs of conciliation (conducted by the public prosecutor) are borne by the state[117] unless the offender has been convicted[118].

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1 Les frais de la médiation sont répartis selon le droit de procédure applicable. Lorsque la médiation a abouti à un accord, cela peut être pris en considération dans la fixation des frais de procédure.

2 Dans les affaires non pécuniaires relevant du droit de l'enfant et de la famille, la médiation est gratuite si les parties ne disposent pas des moyens nécessaires et que le tribunal recommande le recours à la médiation.

112 Fribourg, Ordonnance sur la médiation en matière civile, pénale ou pénale pour les mineurs, article 40

113 See footnote 95 (art. 33b FAAP)

114 Vaud : Loi sur la Médiation administrative, article 22

115 Geneva : Loi sur l'information du public, l'accès aux documents et la protection des données personnelles, article 30 al. 6

116 See footnote 108

117 Art. 423 CrimPC Principles

1 The procedural costs shall be borne by the Confederation or the canton that conducts the proceedings, unless otherwise provided in this Code.

Art. 427 al. 3 CrimPC Liability to pay costs of the private claimant and the complainant

If the complainant withdraws the criminal complaint as part of a settlement arranged by the public prosecutor, the Confederation or the canton shall normally bear the procedural costs.

118 Article 426 al. 1 CrimPC Liability to pay costs of the accused and parties to separate measures proceedings

1 The accused shall bear the procedural costs if he or she is convicted. Exempted therefrom are the costs of the duty defence lawyer; Article 135 paragraph 4 is reserved.

Different regulations can however be found in the cantonal laws. In Canton of Vaud, the costs of mediation in cases implying minors will be handled the same way as the costs of the procedure, i.e. either taken in charge by the minors, or their parents, or the victim, or by the state[119]. For mediation in cases implying adults, there is no specific regulation.

In the Canton of Geneva, the situation is the same as in civil mediation, i.e. the costs of a sworn mediator will be borne by the state if legal assistance has been granted[120]. In the Canton of Fribourg, mediation in criminal procedure for minors is free of charge[121]. For adults, the cantonal law[122] expressly refers to articles 422 and following of the CrimPC concerning the costs of conciliation[123], which shall apply by analogy to the costs of mediation.

As one can see, costs of mediation are handled in different ways depending on the canton and the subject matter. This certainly does not help the promotion of mediation.

In order to increase the use of mediation, it would be appropriate to ensure that mediation is cost free, at least when the parties have obtained legal assistance.

XI. Conclusion

Despite of its welcomed and recent introduction in several federal laws and its presence in cantonal laws, there is still a lot to do in Switzerland to promote mediation[124] and increase its use out of courts and within the judicial process.

Great efforts are made to sensitize the population about mediation through

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119 Vaud : Loi sur la juridiction pénale des mineurs, articles 34 et 65

120 Geneva : Loi d'application du code pénal suisse et d'autres lois fédérales en matière pénale, article 34A, Loi sur l'Organisation Judiciaire, Conditions d'octroi de l'assistance juridique extrajudiciaire, article 63 ;

Florence Pastore, in La médiation dans l'ordre juridique suisse, La médiation en matière pénale, p. 187, Jean A. Mirimanoff (éd.), Helbing Lichtenhahn, 2011

121 Fribourg : Ordonnance sur la médiation en matière civile, pénale ou pénale pour les mineurs, article 38

122 Fribourg : Ordonnance sur la médiation en matière civile, pénale ou pénale pour les mineurs, article 42

123 See footnotes 116 and 117

124 Cinthia Levy, La médiation commerciale en Suisse, 10 ans de Gemme, 2014, forthcoming article, p. 1

the existence of multiple associations, the organisation of numerous conferences and workshops, as well as the integration of mediation seminars in the university programs, but the results unfortunately do not yet fulfil the expectations.

We still need to raise awareness of this form of dispute resolution in order to increase the number of mediations. Changing minds and reflexes will not be induced without the active direct support, encouragement and participation of the business community and the promotion of mediation by the judges and the lawyers. Legal professions, business world, top management need to be convinced and mediation clauses inserted in contracts.

We have the tools, to some extent the law; we have the professionals and the perfect place.

We must continue to promote and believe in mediation so as to "*become young*".

RECONOCIMIENTO Y EFICACIA DE LOS ACUERDOS DE MEDIACIÓN MERCANTIL INTERNACIONAL

Juliana Loss de Andrade

1. Introducción

En la última década se observa un aumento del número de mediaciones realizadas en el campo mercantil internacional. Aunque, en dicha esfera, el modelo consensual esté lejos de alcanzar la aceptabilidad ya consolidada del modelo arbitral, el progreso camina a pasos largos y exige respuestas prácticas y normativas que contribuyan a su evolución.

Precisamente en una reciente propuesta norteamericana en la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI) para la construcción de una convención sobre eficacia ejecutiva de los acuerdos de mediación, se ha destacado la vinculación de los acuerdos obtenidos en la mediación *(Mediation Settlement Agreement - MSA)*.

Dicha propuesta se basa en la supuesta necesidad de crear un sistema normativo específico con un mínimo de uniformidad en el ámbito internacional, ya que los ordenamientos internos de los países tienen abordajes legislativos distintos y muchos no han tampoco legislado[1] sobre el tema. Por lo tanto, el intento busca dar una respuesta jurídica del MSA, aunque esa respuesta pueda ser incluso no conferir ningún status jurídico especial por tratarse de medio esencialmente consensual, *soft*, como argumentan algunos que no ven como positiva la eficacia ejecutiva al MSA. En otra óptica, argumentos sugieren que el no cumplimiento del acuerdo obtenido en mediación resultaría un retorno de las partes al punto de partida, es decir, una mera vinculación contractual *inter partes,* y una consecuente pérdida de tiempo.

De igual manera se cuestiona la eficacia de los acuerdos para mediar *(Agreement to Mediate - AM)*, pues adquiere fibra el movimiento que afirma la necesidad de conferir más seguridad jurídica a las clausulas para mediar (AM).

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1 Como ilustración, Brasil, un país económicamente relevante en el escenario internacional no ha legislado todavía sobre la mediación, ni a nivel interno ni internacional. De hecho, el primero abordaje sobre la mediación se infiere en el nuevo Código Procesal Civil recientemente aprobado. No obstante, una reglamentación más específica está en vías de preparación con un proyecto de ley que trata de la mediación judicial, privada y pública.

Para tanto, aquí se buscará una visión internacional, sin perder de vista lo que ocurre en el sistema europeo y en algunos ordenamientos jurídicos internos.

2. Procesos de resolución de disputas

Son casi infinitos los métodos disponibles para resolución de disputas[2]. Aquí nos interesan la negociación, la mediación, el arbitraje y el proceso judicial.

La negociación supone un diálogo directo entre las partes con el fin de solucionar la divergencia enfrentada por ellas. No obstante todos negociemos en nuestra vidas cotidianamente, eso no quiere decir que todas las negociaciones se desarrollen de una manera estructurada ni tampoco de una forma colaborativa. Al contrario, las estrategias comunes de negociación no siempre generan satisfacción. En ese contexto, el proceso de negociación, al menos en el campo de la literatura mercantil internacional se orienta hacia un proceso cuya base esta en principios e intereses.

Si bien las negociaciones ancladas en posiciones y conductas duras de regateo representen todavía el perfil mayoritariamente adoptado, la tendencia es de progreso de los perfiles colaborativos en que las partes abandonan posturas adversariales y atacan el problema en conjunto[3]. Cada disputa es diferente, pero los elementos esenciales de la negociación son constantes, lo que permite el uso de la negociación basada en principios en diversos casos (FISHER, et al., 2011).

La mediación, a su vez, contempla en sí misma un genuino proceso de negociación. No obstante, en la mediación hay la intervención de un tercero neutral e imparcial que facilita la comunicación entre las partes por medio de técnicas y conduce el proceso de creación de consenso. El papel del mediador implica sobre todo el impulso de una postura de buena-fe y de colaboración en la búsqueda de soluciones creativas substanciales y procesuales[4]. Por con-

2 Algunos autores hacen distinción entre disputa y conflicto. Disputas serian divergencias que son pasibles de resolución con base en intereses, mientras conflictos serian divergencias más profundas, de largo termino sobre materias no negociables. Sin embargo, para efectos didácticos, los dos términos son tratados como sinónimos en este trabajo.

3 La evolución de la colaboración y la visión de *win-win*, en detrimento de posiciones de regateo o *win-lose*, es evidente con la observación de ese tipo de enseñanza en las carreras de derecho y también carreras de naturaleza mercantil.

4 En la mediación son debatidas cuestiones substanciales (directamente relacionadas

siguiente, la distinción entre los últimos métodos comentados es justamente la actuación de ese profesional, que será detallada en un tópico más adelante.

Aún entre los medios privados, el arbitraje tiene una perspectiva diferente: implica una solución impuesta por medio de una heterocomposición. En ese caso, el tercero imparcial, pasa a tener, además del controle del proceso, también el control del resultado. Este método tiene por fin una decisión alcanzada en un proceso más flexible que el judicial y más rígido que la mediación y puede basarse no solamente en derecho, pero también en equidad[5].

Algunos de los beneficios de la mediación también están presentes en el arbitraje, como la voluntariedad y la confidencialidad, que impiden que las informaciones y el procedimiento sea posteriormente utilizados como materia de prueba en un proceso judicial (COLE, et al., 2005 p. 319). Esas distinciones funcionan como atractivo para asuntos que exigen una mayor reserva y envuelvan secretos mercantiles.

Por fin, el proceso judicial es la vía de resolución de disputas estatal por excelencia, que representa el Estado-juez como tercero imparcial que tiene el poder- deber de decir el Derecho por medio de una decisión impositiva. Como un proceso heterocompositivo, rígido y de grande formalidad, el proceso judicial, diferentemente del arbitraje, posee además del papel decisorio, también la fuerza estatal para la ejecución de sus deliberaciones (CINTRA, et al., 2003 pp. 30-31) .

Los distintos niveles de formalidad y rigidez se incrementan en la medida que se reduce el control del proceso, como podemos ver en el cuadro siguiente inspirado en el espectro de resolución de Dwight Golann e Jay Folberg (2011 p. 11).

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a la disputa) y también procedimentales (relacionadas con elecciones de procedimientos para la resolución de cuestiones negociables incidentes). En aquellos casos que no sea posible la creación de valor o el acuerdo en la substancia, es común que las partes concuerden en utilizar medios o procedimientos considerados "justos" y/o imparciales para llegar a una decisión, a ejemplo de la evaluación de un experto o de la técnica de la división de la tarta *"I cut you choose"*.

5 La posibilidad del arbitraje por equidad no se aplica a todos los tipo de arbitraje. En varias legislaciones, arbitrajes que traten de derechos sobre los cuales las partes no pueden disponer, solo pueden basarse en el derecho. En Brasil, donde el arbitraje involucrando la Administración Pública no está previsto en la ley, el Proyecto de Ley (PL 7.108/14) conducido por el Ministro Luis Felipe Salomão, propone la inserción del arbitraje en ese ámbito, pero con la exigencia de que sea basada en derecho y no en equidad.

Resultados no vinculantes		Resultados vinculantes	
Máximo control del proceso		Mínimo control del proceso	
←			→
Negociación	Mediación	Arbitraje	Proceso Judicial

Bastante utilizado en el medio mercantil internacional, el arbitraje posee como atractivo la garantía de un proceso rápido, imparcial y que garantiza un alto nivel de seguridad jurídica en la mayoría de los Estados, o por lo menos en todos de grande relevancia económica.

Imagínese dos contratantes en diferentes países que no hablan el mismo idioma, son culturalmente diferentes y desconocen la realidad jurídica nacional de su coparticipe comercial. Estar sujeto a esas diferencias causa una enorme inseguridad en las partes en el caso de eventual incumplimiento por alguna de ellas, y en no raras ocasiones llega a impedir la propia concreción de contratos o lazos comerciales. Por ello, el arbitraje sirve como forma de asegurar que existirá un medio de lograr una respuesta idónea, conocida por todas las partes y flexible para que las mismas elijan idioma, local, derecho aplicable, entre otros factores.

Normalmente cuando no son cumplidas espontáneamente, el reconocimiento y cumplimiento de los laudos arbitrales descansan sobre la Convención de Nueva York de 1958 o Convención sobre el reconocimiento y ejecución de sentencias arbitrales extranjeras[6] (CNY). Por lo tanto, independientemente de la localidad donde fue realizado el arbitraje, la CNY crea un sistema internacional uniforme en el momento de conferir eficacia a las decisiones arbitrales. Lo mismo no ocurre con la mediación, cuyos MSA no poseen un status jurídico de reconocimiento internacional uniforme y son tratados por ópticas jurídicas completamente distintas por diferentes países como se ponderará en un tópico adelante. Asimismo, la obligación creada por una clausula arbitral es completamente sistematizada en los ordenamientos, pero lo mismo no ocurre con el MA.

Es importante, entonces, comprender con un poco más de precisión la estructura de los métodos comentados y las respectivas distinciones que pueden justificar la diferencia de tratamiento jurídico.

6 El texto de la Convención de Nueva York está disponible en: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

2.1 Como la mediación se distingue de una simples negociación y de un arbitraje?

Para tratar de la problemática referente a la eficacia ejecutiva del MSA y su comparación con el acuerdo obtenido en una simple negociación y con el laudo arbitral, veamos cuáles serían las razones para crear un sistema específico de cumplimiento del MSA.

Las principales diferencias, como se ha anticipado, resultarían de las garantías ofrecidas por la actuación del mediador. La inserción de un mediador en una negociación que no progresa o que encuentra obstáculos cognitivos tiene el efecto de promover la optimización del resultado del proceso consensual por medio de un aumento de la sensación de justicia, estímulo a una aproximación cooperativa entre las partes identificación de intereses y necesidades, además de facilitar el intercambio de informaciones con las debidas garantías de confidencialidad e imparcialidad. Normalmente, la mediación tiene una estructura, agenda y dinámica diferente de una negociación ordinaria (GIORDANO CIANCIO, 2013 p. 1).

Por otro lado, el carácter específico del laudo arbitral si es comparado frente al MSA es evidente: este último refleja una solución convenida por las partes, mientras que el primero una decisión impuesta por un tercero. Además, el efecto vinculante necesario del laudo arbitral se distingue del valor contractual a priori atribuido al MSA.

No obstante se haga referencia a la mediación como un método muy antiguo de resolución de conflictos, la mediación tal cual conocemos hoy supone un proceso estructurados en fases – aunque sean flexibles – y que requiere unas técnicas y una formación específica del profesional que interviene como facilitador. El perfil básico de esa mediación, ‘’vedette’’ de las más recientes alteraciones normativas en el campo de los métodos alternativos de tratamiento de disputas[7], posee en cierta medida el siguiente soporte (KOVACH, 2005 p. 306)[8]:

7 El término “alternativo”, constantemente criticado por varios autores, da paso en la literatura reciente a otros más precisos como “complementarios”, “adecuados”, “apropiado”, etc. Aquí la elección se debe al hecho de ser la traducción más utilizada para el término inglés *Alternative Dispute Resolution*.

8 Traducción propia del inglés para: “Preliminary arrangements; Mediator’s Introduction; Opening remarks/Statements by parties; Venting (optional); Information Gathering; Issue and Interest (optional); Caucus (optional); Option generation; Reality testing (optional); Bargaining and negotiation; Agreement; Closure”.

Arreglos Preliminares
Introducción del Mediador
Discursos de apertura de las partes
Ventilación (opcional)
Colecta de informaciones
Identificación de temas e intereses
Definición de la agenda (opcional)
Caucus (opcional)
Construcción de opciones
Testes de realidad (opcional)
Regateo y negociación
Acuerdo
Conclusión

Aún sea flexible, el proceso de mediación está relativamente estructurado y tiene un fin determinado, así como las técnicas que son implementadas por el mediador. Además, el proceso de mediación, aunque no resulte en acuerdo, funciona como una base de preparación para cualquier otro método que sea aplicado en la secuencia, pues en el son aclarados intereses, barreras al acuerdo que tal vez antes no estuviesen tan visibles.

En realidad, hoy muchos contractos mercantiles contienen cláusulas que prevén no uno solo, sino una variedad de procesos diferentes y con aplicación secuencial: negociación, mediación y arbitraje (A persisting aberration: the movement to enforce agreements to mediate, 2008). Igualmente, la búsqueda por soluciones negociadas – intermediadas o no por terceros – es cada vez más adoptada. Posteriormente en la mediación las partes están más preparadas para definir en medio adecuado y alcanzar resultados más satisfactorios. Por esa razón, la mediación funciona también como un primer método automático y permite una mejor gestión del conflicto, aunque no se llegue al acuerdo.

3. Cláusula o acuerdo para mediar (*Mediation Agreement* – MA)

El término "acuerdo de mediación" puede adquirir dos significados. El primero correspondería al termino en inglés *Agreement to Mediate* (AM), referente al acuerdo previo a la existencia de la disputa para que, en el caso de divergencias entre las partes, el método utilizado para resolución sea la mediación. El segundo significado sería el propio acuerdo obtenido como re-

sultado de la mediación, en inglés, *Mediation Settlement Agreement* (MSA), como ya se ha señalado anteriormente.

Si bien la discusión sobre la eficacia del AM es un tema importante, este estudio se ha concentrado más en el segundo significado de los acuerdos de mediación, es decir, los MSA. Con todo, los resultados demostrados en una reciente investigación de la Universidad de Missouri, llaman la atención para estudios en ese campo, pues retrata que, en la visión de los profesionales, es más probable que ocurra una mediación mercantil internacional por previsión contractual (cláusulas escalonadas de negociación, mediación y arbitraje o cláusulas de mediación) (STRONG, 2014 p. 18).

Así mismo, como la mediación es un proceso voluntario, la eficacia de la cláusula de mediación – o AM – puede tener un impacto reducido, toda vez que las partes no están obligadas a continuar en el proceso de mediación, y aunque estuviesen, probablemente la buena fe y el ambiente colaborativo estaría afectado por la ausencia de voluntad.

En este caso, la cláusula de mediación no puede ser comparada a una cláusula de arbitraje previa a la disputa, ya que, no obstante la opción de utilizar el procedimiento arbitral sea también objeto de un acuerdo de voluntades previo, una vez iniciado el procedimiento, no se exige participación voluntaria de las partes.

4. Resultado del proceso de mediación

La mediación puede o no resultar en acuerdo. Si se llega al acuerdo, este puede ser parcial o total, dependiendo si se pone fin a una parte o a la totalidad del conflicto. Véase que el contenido del acuerdo puede incluso explicitar previsiones de naturaleza no jurídica (GISBERT POMATA, et al., 2014 pp. 171-173), lo que no puede ser objeto de una ejecución forzada ante un tribunal. Con todo, por lo menos en ámbito mercantil internacional, la mayor parte de las disposiciones de los MSA tienen correspondencia con obligaciones y deberes jurídicos que pueden ser objeto ejecución judicial.

En lo que respecta al cumplimiento de los MSA, se suele decir que hay unas tasas elevadas de cumplimiento. Eso se explicaría por el hecho de que el contenido de los MSA es objeto de decisiones reflexionadas en un proceso en que incluso se testa la viabilidad de los compromisos y, sobre todo, porque son las propias partes que han decidido con base en la satisfacción de sus pro-

pios intereses. También por ello se insiste en la distinción del mediador como simple facilitador, sin un papel más directivo o evaluativo[9] en la búsqueda del consenso.

Así, como son las partes las que controlan el resultado del proceso, naturalmente no tendrían por qué incumplir lo que fue por ellas mismas acordado. Sin embargo, si bien la mayoría de los acuerdos se concreten espontáneamente, siempre habrá una pequeña parte de acuerdos que no serán cumplidos voluntariamente, sea porque las circunstancias han cambiado, sea por propia decisión de la parte incumplidora.

Para evitar arrepentimientos que culminen con un posterior incumplimiento, el proceso de mediación puede permitir incluso que las parten tomen un período de reflexión o para consultar otros profesionales y consolidar lo que se decidió (ORTUÑO MUÑOZ, et al., 2007 p. 43). De ordinario, ese periodo puede ser de tres días, pero naturalmente queda a la elección de las partes ese periodo de reflexión o no y su extensión. Nada impide, sin embargo, que las partes tengan una respuesta definitiva ya al fin de la sesión, principalmente si las partes vienen acompañadas de sus consultores jurídicos.

Una vez acordados los términos de la solución encontrada por las partes, es necesario identificar las formas jurídicas en las cuales ese acuerdo se encajará en el ordenamiento jurídico. Hoy, las posibles respuestas son asentadas en seguida.

4.1. Acuerdo como contrato

La forma jurídica más común de un acuerdo de mediación, es la de un contrato, pues todos los requisitos necesarios son rellenados. De ahí la conclusión de que mismo en las disputas originadas de un contrato, la solución podría surgir de otro contrato, especialmente si las partes tienen entre ellas

9 Aún hay mucho debate sobre el papel de los mediadores y posibles límites a las actividades directivas y de evaluación. Algunos autores incluso incluyen el carácter estrictamente facilitador (no evaluador) en el concepto mismo de la mediación, rechazando cualquier acción de este tercero que proponga salidas, lo que a menudo se le permite al profesional que actúa como conciliador. Sin embargo, no hay límites claros, e incluso los términos propios de conciliación y la mediación se confunden bastante en la literatura internacional, ya que pueden tener significados opuestos en función los sistemas nacionales en que se insertan. Aquí, por mediación entendemos un proceso de facilitación, pero tampoco dejamos de considerar como mediación un proceso solamente por una eventual intervención directiva o evaluativa del profesional.

una relación de confianza. José Roberto de Castro Neves (2013 pp. 326-331) en una interesante interpretación jurídica del contrato en una de las piezas de Shakeaspeare[10] retrata la intolerancia del derecho con la falta de lealtad y la importancia de la buena fe en las relaciones contractuales. De esa manera, si existe esa relación de confianza recíproca o si esa relación puede ser reconstruida durante el proceso de mediación, sería natural que las partes se satisfagan con el vínculo contractual. La protección y el privilegio de esa naturaleza consensual (STULBERG , 1998) es el argumento más utilizado por aquellos que entienden que el derecho contractual ya ofrece un sistema jurídico suficiente para reglamentar los acuerdos de mediación.

La cuestión, sin embargo, se encuentra en el hecho del ordenamiento jurídico atribuir a la negociación *no* asistida el mismo rango de una negociación asistida por un profesional como en la mediación (DIATHESOPOULOU, 2013 p. 5). Y a partir de esa preocupación repercuten otras relacionadas a la protección de cuestiones inherentes a la mediación como la confidencialidad y consiguientes límites de utilización de informaciones en la producción de prueba judicial. En Estados Unidos, país donde la mediación es un método ya consolidado, cuestionamientos de esa misma naturaleza ya son observados en la jurisprudencia que parece no presentar una uniformidad si comparados precedentes de diferentes Estados de la Federación, aunque exista un movimiento normativo federal en la búsqueda de elementos mínimos de uniformización con el *Uniform Mediation Act*.

El contrargumento afirma que la interferencia del mediador puede, incluso, ser ella misma la supuesta fuente del vicio contractual alegado, especialmente si la conducta del tercero neutral ultrapasa los límites de la facilitación. Los remedios jurídicos disponibles para forzar el cumplimiento de un acuerdo de mediación considerado como mero vínculo contractual serán los mismos ofrecidos a cualquier otro contrato y, en varios ordenamientos, eso implica en un proceso judicial largo y complejo que no garantiza la misma certeza que un título ejecutivo, cuyas materias de impugnación tienen un espectro más reducido.

Por otra parte, el gran riesgo de tratar el acuerdo de mediación como una forma equivalente a los contratos en general es el de hacer con que las partes retornen al punto de partida, es decir, al problema inicial de incumplimiento o divergencia a que enfrentaban en el momento en que se inició la mediación (WOLSKI, 2014 p. 94).

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10 El autor se refiere a la pieza *All's well that ends well* (Todo está bien cuando acaba bien).

Del mismo modo, hay diferencias entre la mediación intrajudicial y la mediación realizada sin que haya sido iniciado cualquier procedimiento jurisdiccional, o sea, una mediación extrajudicial sin cualquier conexión con los tribunales. Partiendo de esa distinción, surge una perspectiva más radical que comprende que la mediación extrajudicial no sería propiamente un método de resolución de disputas como el proceso judicial o el arbitraje, pero un mero proceso de facilitación contractual (Enforceability of mediation outcome, 2010 p. 18).

Es difícil determinar hasta qué punto la autonomía de la voluntad implica que el resultado obtenido sea limitado a la esfera contractual o no. Por otro lado, las mediaciones realizadas durante el curso de un proceso judicial, no obstante su resultado sea tratado como simple contracto para algunos sistemas, en varios otros puede ser convertido en título ejecutivo.

La inserción y el fomento del uso de la mediación con algún tipo de conexión con los tribunales y también otros tipos de ADR involucran cuestiones interesantes, porque crean realidades jurídicas nuevas. Evidentemente, la mediación que se lleva a cabo en una estructura estatal adquiere formatos diferenciados: aunque mantenga su carácter flexible, ciertamente tendrá más rasgos de formalidad que la mediación estrictamente privada. Por lo tanto, es interesante observar algunas figuras jurídicas y sus niveles de formalidad atribuidos al resultado de la mediación.

4.2. Acuerdo como contrato elevado a escritura pública por acto notarial

Una versión un poco más formal y que atribuye un cierto nivel de seguridad y facilidad en el momento de la ejecución del acuerdo derivado de mediación es la posibilidad de dotar el documento de eficacia ejecutiva por medio de un acto notarial, es decir, por medio de una escritura pública. Si la mano del Estado es la que confiere un status jurídico más alto a un acuerdo de voluntades, la vía notarial es una opción. No obstante no fuera esa la perspectiva durante la preparación del marco legislativo de la mediación civil y mercantil en España, la Ley 5/2012 de 6 de julio en su artículo 23 deja a la elección de las partes la posibilidad de elevar o no a escritura pública el acuerdo de medicación extrajudicial. También la legislación alemana contiene idéntica permisión. Ambos ordenamientos poseen, además de la opción por elevar a público, otras formas de conversión del acuerdo en título ejecutivo en lo que respecta al acuerdo obtenido en una medición conectada con los tribunales.

El acto notarial supone una vigilancia de legalidad del contenido del acuerdo. Una de las razones para la permisión inserta en la ley española es que ella invita a respetar la autonomía de las partes (que pueden decidir por ellas mismas si convierten o no en escritura pública), al mismo tiempo que retira del aparato judicial la apreciación de cuestiones que no contienen verdaderas lides. Con todo, puede haber una implicación negativa con relación al coste[11] que dicho trámite puede representar para las partes y los límites del acto notarial cuanto al contenido del acuerdo.

Otras formas de convalidación estatal del acuerdo son identificados en la recientes normativas nacionales que confieren eficacia ejecutiva al contrato de mediación por medio de otros actos/registros como es el ejemplo del ordenamiento griego que, al transponer la Directiva 52/2008/CE a través de la ley 3898/2010, determina los requisitos necesarios al acuerdo (nombre de las partes, fecha, etc.) y admite que cualquier de las partes solicite al mediador que presente el MSA en la secretaria del órgano judicial de primera instancia competente, con lo que el acuerdo será dotado de fuerza ejecutiva automáticamente. La legislación griega, va más allá de las direcciones previstas en la normativa comunitaria y dispensa que la solicitud sea realizada por todas las partes y también por prever un trámite sencillo para conversión en título ejecutivo con base en la presentación del mediador.

Como se ha demostrado, las opciones legislativas para la concesión de eficacia ejecutiva al MSA puede realizarse de distintas formas jurídicas como la escritura pública y otros tipos de ''registros públicos'' ha sido adoptada por algunas legislaciones europeas.

4.3. Acuerdo convertido en laudo arbitral

Si bien el arbitraje no es un proceso consensual, su procedimiento comporta – así como en proceso judicial – la posibilidad de que el acuerdo realizado entre las partes sea homologado o convertido en laudo. En el lugar de decidir e imponer sus decisiones, el árbitro en ese contexto sólo confirma la solución encontrada por las propias partes.

Así, la vía arbitral también es una forma de dotación de eficacia ejecutiva al MSA. Ahora bien, esa posibilidad puede enredar diferentes efectos y nive-

11 El factor de cálculo de los importes a pagar por la elevación a escritura pública del acuerdo y la posibilidad de actuar como mediadores notarios son cuestiones sobre las que diverge doctrina.

les de reconocimiento en ciertos ordenamientos, dependiendo de la existencia o no de un proceso de arbitraje pendiente o, por lo menos, de la existencia de clausula arbitral previa.

4.3.1. *Proceso de mediación realizado sin cláusula de arbitraje previa*

Consideremos un escenario en que una mediación iniciada sin que exista una convención o cláusula de arbitraje entre las partes para que la disputa sea llevada a un arbitraje. Y que en dicha mediación se origina un acuerdo que pone fin a la disputa. Si en ese caso, las partes buscan una concesión de mayor certeza y seguridad jurídica del acuerdo, especialmente para que el mismo sea reconocido y ejecutable en diferentes sistemas jurídicos, no parece tan absurdo que las partes intenten que el acuerdo sea convertido en un laudo arbitral, principalmente si la mediación ha sido realizada en un centro que ofrece ambos servicios.

Sin embargo, si por un lado la conversión de un acuerdo realizado durante el curso de un arbitraje es bastante común, por otro, las búsqueda de la vía arbitral solamente como medio de convalidación para la solución encontrada previamente es algo más reciente, lo que crea un discusión jurídica originada especialmente con el incremento del uso de la mediación en disputas mercantiles internacionales.

Ese "supuesto" arbitraje que se instaura sin que, en realidad, exista cualquier pretensión resistida de alguna parte, puede ser considerado por algunos como un arbitraje simulado. En efecto, lo que ocurre es que en ciertas cámaras que promocionan ambos servicios (mediación y arbitraje) es facilitada la indicación del mediador como árbitro con el único y exclusivo fin de convalidar el acuerdo como laudo arbitral. Esa condición es permitida, por ejemplo, en Estocolmo[12], California y en Corea del Sur (WOLSKI, 2014 p. 97). En estos casos, la elección del derecho aplicable es de gran importancia para garantizar que la ejecución del laudo arbitral pueda ser concretada, pues podría ser en muchos ordenamientos impugnada.

El reconocimiento y cumplimiento de un MSA convertido en laudo arbi-

12 El art. 12 del Reglamento del Instituto de Mediación de la Cámara de Comercio de Estocolmo prescribe que, alcanzado el acuerdo, las partes pueden, con el visto bueno del medidador, ponerse de acuerdo para indicarle como árbitro y requerir la confirmación del acuerdo en laudo arbitral. El contenido del reglamento está disponible en inglés en: http://www.sccinstitute.se/filearchive/1/12753/web_A4_Medling_eng.pdf.

tral en estos moldes encuentra, incluso, barreras en lo que respecta la posibilidad de aplicación de la CNY, que es sin duda, hoy, la vía más difundida internacionalmente por su larga aceptación y adopción internacional.

4.3.2. *Proceso de mediación realizado con cláusula de arbitraje previa*

La existencia de una cláusula de arbitraje implica un acuerdo previo entre las partes sobre el objetivo de discutir una eventual disputa por medio de este tipo de procedimiento y no por medio de un proceso judicial. Las ventajas de recurrir al arbitraje son variadas y por eso es uno de los medios preferidos para la resolución de disputas de naturaleza mercantil internacional. Países como Brasil[13], por ejemplo, han progresado bastante en esa esfera, sea porque posee un sistema jurisdiccional poco atractivo si consideradas la incertitud y tardanza de sus resultados, sea porque ha habido avances en el campo de la legislación.

Si hay una manifestación previa al conflicto para entrar en un arbitraje, la conversión del MSA por el árbitro es menos cuestionable que en las situaciones en que las partes en ningún momento han pensado en someterse al arbitraje. Por consiguiente, es más probable que se logre un nivel más alto de eficacia de ese acuerdo convalidado por la vía arbitral si hay cláusula previa que justifique la utilización de esa vía si comparado a casos en que no existe ninguna manifestación previa en este sentido, o sea, que el arbitraje se instaura única y exclusivamente con el fin de dar fuerza a la resolución alcanzada por la mediación.

4.3.3. *Proceso de mediación realizado durante el curso de un arbitraje*

No es ninguna novedad la posibilidad de que la disputa objeto de un arbitraje pueda ser solucionada por medio una solución acordada común entre las partes. Si ya no subsiste divergencia entre las partes, no hay materia sobre la cual deba incidir una decisión del árbitro. Es bastante común que la actividad conciliatoria del árbitro sea estimulada en los reglamentos concernientes a los procedimientos arbitrales.

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13 Además de elevar el número de arbitrajes realizados en el país, Brasil impresiona por ascender al cuarto lugar en el listado de países que más aparecen como parte en arbitrajes conducidos en la Cámara de Comercio Internacional en Paris (CCI) y del mismo modo por el hecho de que en la misma institución el Derecho Brasileño es el sexto más utilizado como régimen jurídico aplicable por elección de las partes involucradas.

En este sentido, la ley modelo de arbitraje de la CNUDMI[14] contiene la siguiente previsión:

> Artículo 30. Transacción
>
> 1) Si, durante las actuaciones arbitrales, las partes llegan a una transacción que resuelva el litigio, el tribunal arbitral dará por terminadas las actuaciones y, si lo piden ambas partes y el tribunal arbitral no se opone, hará constar la transacción en forma de laudo arbitral en los términos convenidos por las partes.
>
> 2) El laudo en los términos convenidos se dictará con arreglo a lo dispuesto en el artículo 31 y se hará constar en él que se trata de un laudo. Este laudo tiene la misma naturaleza y efecto que cualquier otro laudo dictado sobre el fondo del litigio.

Dicha previsión encuentra comandos semejantes en la mayoría de las legislaciones internas sobre arbitraje, de la misma manera que también en el proceso judicial es permitida la transacción en temas de naturaleza pasible de transacción, lo que ya es supuesto en el arbitraje ya que eso sería requisito para la arbitrabilidad de la materia.

El reglamento de arbitraje de la CCI, en su apéndice IV menciona técnicas para la conducción del procedimiento y en la línea "h" menciona la información a las partes sobre la posibilidad de buscar un acuerdo por medio de negociación o mediación, y, si así fuera estipulado por las partes y el tribunal, este podrá adoptar medidas para facilitar la obtención del acuerdo, desde de que todo lo posible sea hecho para asegurar que el laudo arbitral sea posteriormente ejecutable según la ley[15].

Es cada vez más común la utilización de diferentes métodos combinados, y como ya se ha mencionado, la inclusión de cláusulas escalonadas para la resolución de disputas mercantiles internacionales. A ejemplo de la experiencia de China (East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China, 2009 p. 1), algunos países presentan una mayor tendencia a optar por métodos híbridos.

Véase que algunas de esas combinaciones hibridas que facilitarían la convalidación de acuerdos de mediación por medio de laudos arbitrales enfrentan cuestiones inevitables que surgen de la tensión entre a) la confidenciali-

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14 Disponible el 15/12/201 en:
http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf

15 Disponible en 15/12/2014 en:
file:///C:/Users/USER/Downloads/ICC%208650%20ENG_Rules_Arbitration_Mediation%20(1).pdf

dad y el dialogo abierto de la mediación y b) las garantías del debido proceso como la protección del contradictorio que imperan en el arbitraje. En este sentido, Edna Sussman (2011 p. 383) destaca las siguientes combinaciones:

> (1) MED-ARB: si se llega a un impase insuperable, la misma persona sirve como árbitro; (2) ARB-MED o ARB-MED-ARB: el árbitro apuntado intenta mediar (o conciliar) el caso, pero si no tiene éxito, retorna a su papel de árbitro; (3) CO-MED-ARB: el mediador y el árbitro oyen juntos a las presentaciones de las partes, pero el mediador entonces procede al intento de resolver la disputa sin el árbitro, quien solamente es llamado de vuelta para convalidar el acuerdo en laudo o para servir como árbitro si la mediación no es exitosa; (4) MEDALOA (*Mediation and Last Offer Arbitration*): si la mediación falla, al mediador (ahora ya árbitro) son presentadas propuestas de resolución por ambas las partes y tiene que decidir entre las dos como en "baseball arbitraje". (traducción propia)

Si para muchos la mezcla entre métodos puede representar un riesgo[16] para las características esenciales de la mediación y del arbitraje, como sería el caso de la confidencialidad y autodeterminación de las partes en la mediación; para otros, se fortalece la idea de un análisis del campo de ADR como un nuevo mundo a ser explorado abiertamente con el objetivo de atender a los intereses de las partes.

Así, siguiendo esa última línea, si existe la intención de las partes de obtener la eficacia ejecutiva de los acuerdos de mediación, ni siquiera el vacío legislativo internacional es capaz de detener la creatividad de los juristas, lo que más tarde llegará a las discusiones en los tribunales internos.

4.4. Acuerdo de mediación homologado judicialmente

Diversos ordenamientos han preferido ofrecer a las partes la posibilidad de homologación judicial del acuerdo para que, así, obtengan eficacia ejecutiva. En España, para las mediaciones realizadas en el curso del proceso judicial, la Ley de Enjuiciamiento Civil (LEC) en el Artículo 415 permite la homologación del acuerdo logrado en mediación intrajudicial.

Como ha sido mencionado anteriormente, la vía utilizada para dotar el acuerdo de fuerza ejecutiva dependerá entonces si se trata de mediación *intra* o *extra*judicial. En el primer caso el acuerdo puede tener un status contractual o de título ejecutivo, ya en el segundo, el acuerdo podrá ser homologado por el juez.

16 Para un estudio más profundo en las ventajas e inconvenientes de los métodos híbridos entre mediación y arbitraje, véase (SAIZ GARITAONANDIA, 2013 pp. 94-98).

Con la transposición de la Directiva 52/2008/CE en Francia[17], además de la posibilidad de homologar el acuerdo obtenido en mediación intrajudicial, el legislador también ha abierto la posibilidad de homologación para la mediación extraprocesal. El procedimiento requiere una petición conjunta de las partes o de una con el acuerdo de la otra. En suma, en la mayoría de los países europeos existe la posibilidad de conversión del acuerdo en título ejecutivo[18], lo que se les facilita la ejecución.

La homologación judicial de los acuerdos podría, en el ámbito internacional, permitir la ejecución en el otro país como una sentencia extranjera, lo que dependería de acuerdos internacionales. De toda forma, la idea de una convención específica que sea ampliamente ratificada podría, a lo mejor, facilitar en un nivel aún más profundo esa eficacia internacional.

A partir de esa noción es que se discute más allá del plan interno de cada país, un documento internacional que ofrezca respuesta a otras formas normativas que impulsen una uniformidad del tratamiento de la eficacia del acuerdo obtenido en mediación mercantil.

5. Propuesta de Convención sobre eficacia ejecutiva de los acuerdos obtenidos en mediación mercantil internacional

En febrero de 2015 el grupo de trabajo en arbitraje y conciliación de la CNUDMI discutirá la consideración de una convención sobre reconocimiento y ejecución de los acuerdos obtenidos en mediación mercantil internacional. La idea está en cierta manera basada en el mencionado progreso de la mediación y también en el éxito de la CNY, texto también originado en la CNUDMI pero que incide sobre los laudos arbitrales.

El debate se basa en el argumento de que la mediación sería potencializada por el hecho de existir un documento normativo que estimule la uniformización de un sistema facilitado de ejecución de los acuerdos de mediación mer-

17 Antes de la transposición de la directiva, el ordenamiento francés no era igualitario en lo que respecta al acuerdo obtenido en mediación privada (al cual se concedía la naturaleza de contrato de transacción) y el acuerdo obtenido en mediación intrajudicial (al cual la ley autorizaba la homologación por el juez si así solicitasen las partes).Con la norma de transposición de la Directiva, el tratamiento legal de los dos tipos de acuerdo fue uniformizado.

18 Hay países que van más allá, en Bulgaria por ejemplo, la homologación otorga al acuerdo incluso efectos de cosa juzgada.

cantil internacional. Es común el argumento de que la general falta de eficacia ejecutiva de los acuerdos tendría contribuido para el uso menos constante de la mediación para disputas internacionales (Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements, 2014 p. 121).

Si el arbitraje ha llevado bastante tiempo en el camino para consolidarse internacionalmente, la mediación parece dar pasos más largos, lo que es coherente con un contexto pos-moderno en que la comunicación y los cambios ocurren de una forma inmensamente más rápida.

Con base en esa futura discusión, el *International Mediation Institute* (IMI) ha conducido un rápido estudio con el objetivo de obtener una perspectiva de los profesionales sobre el impacto que tendría esa posible convención. A principio, llaman la atención algunos datos. Por ejemplo, más de la mitad de las respuestas apuntan que será mucho más probable la participación de esos profesionales en una mediación con otra parte de otro país si este fuera signatario de una convención sobre reconocimiento y ejecución de los MSA. Asimismo, más de la mitad confirmaron la existencia de esa posible convención que facilitaría el uso de la mediación si ella fuera largamente ratificada por los países (International Mediation Institute, 2014).

Toda esa fuerza de opiniones de los profesionales que participaron de la encuesta, sumada al estímulo de la literatura incita bastante el debate de una Convención por las Naciones Unidas, a priori provocada por Estados Unidos.

Otro estudio realizado por la Universidad de Missouri, también como base para análisis de la convención propuesta, a pesar de sus resultados demostraren una necesidad de impulso en el mismo sentido de garantizar la eficacia ejecutiva del acuerdo, también destaca otro elemento importante que es la existencia de visiones completamente distintas entre aquellos profesionales que trabajan con mediación mercantil internacional en la teoría y aquellos que la vivencian en la práctica (STRONG, 2014 p. 25). Además, en el campo de la mediación aún es bastante común que se trabaje más con el tema en la literatura que en la experiencia.

Aún si existe todo un movimiento positivo para la creación de un sistema para la uniformidad de la eficacia ejecutiva, hay unas preocupaciones cuanto a la propia naturaleza de autodeterminación de las partes y principalmente sobre el principio de consenso en que se basa la mediación. Es justamente en la suavidad y ausencia de coerción e imposición que la mediación encuentra su fuerza. Por otro lado, al lado de la suavidad y del consenso, otro pilar cru-

cial de la mediación es la flexibilidad, entonces permitir que à las partes sea dada la oportunidad de elegir la fuerza y las eventuales formas de ejecución de sus deliberaciones parece una buena salida que resguarda la confianza de las partes en el proceso.

Si el tema merece tratamiento por medio de una pauta internacional, eso sólo se confirmará con el avance de las discusiones, que deben tratar desde su real necesidad, campo de aplicación y la forma de la norma, es decir si por convención u otro medio. No se puede ignorar que la propia CNUDMI en 2002 ya ha avanzado con la ley modelo de conciliación y su respectiva guía de implantación en los ordenamientos internos[19]. Sin duda, no basta que el documento exista, es imperante que los países identifiquen las mismas dificultades, del contrario la no aceptación del documento internacional implicara en una ausencia de efectividad de la deliberación.

Independiente de los resultados de los debates, hay una necesidad clara de medidas educacionales, comprobada incluso por medio de las primeras encuestas realizadas en el tema (STRONG, 2014) y que pueden tener un impacto muy positivo. La medición, aunque sea largamente utilizada en algunos sistemas, es una novedad en tantos otros, lo que requiere un cierto tiempo de madurez jurídica que pueda permitir una aplicabilidad de mejores prácticas y que esas sean más fácilmente adecuadas a cada sistema nacional.

6. Consideraciones finales

La mediación ha protagonizado los mayores avances en el ámbito de ADR con alcance globalizado principalmente en los últimos quince años. Ese "boom" es observado en diferentes campos como la literatura científica (social, jurídica y mercantil), reformas legislativas (nacionales, comunitarias e internacionales), así como en la esfera educacional en distintos niveles.

Ese cambio hacia la perspectiva de resolución de conflictos basada en consenso ha implicado en una mudanza en la manera de arreglar disputas originadas en los negocios internacionales. El consecuente aumento en el uso de la mediación mercantil internacional es evidente y se produce en paralelo ciertos cambios identificado en otro mecanismo ya consolidado que es el arbitraje. La búsqueda por ventajas típicas de ese último, como la seguridad

19 La versión en castellano está disponible en:
http://www.uncitral.org/pdf/spanish/texts/arbitration/ml-conc/03-90956_Ebook.pdf

jurídica y eficacia de la resolución es una realidad y de la más alta creatividad los medios encontrados sea por legisladores, sea por juristas en la práctica. Como ilustración, hemos visto las casi infinitas formas de modelos híbridos encontrados para moldear las resoluciones a los intereses de las partes.

Hoy en el escenario internacional, el territorio es un poco nebuloso y no es posible conferir una harmonía, tampoco un medio completamente idóneo para garantizar la eficacia ejecutiva de manera más amplia internacionalmente. Todo dependerá de cada sistema normativo interno y las diferencias de tratamiento son grandes con el acuerdo representando figuras jurídicas completamente distintas: desde contratos hasta sentencias judiciales con efecto de cosa juzgada material.

La tensión entre principios importantes como la confidencialidad y autodeterminación de las partes de la mediación y sus versiones adoptadas producen ventajas e inconvenientes. El hecho de que sea un mecanismo en diferentes niveles de consolidación en los países contribuye para una dificultad de consonancia, pero los debates en el seno de las Naciones Unidas en su Comisión para el Derecho Mercantil Internacional parecen apuntar para avanzar en intercambios productivos en ese ámbito.

Por fin, la puesta del tema para debate ya tiene por lo menos un efecto bastante positivo que es la provocación del interés de la comunidad jurídica y sus consecuentes investigaciones y promociones educacionales. Si eso ya sería esencial en cualquier materia, la importancia es aún más evidente en lo que respecta a la mediación, un método tan flexible y comprehendido de forma tan distinta en las culturas jurídicas.

7. Referencias

DIATHESOPOULOU, Thaleia. 2013. Traditional Contract Law Principles as Means for Enforcing Mediated Agreements: Can They Safeguard Fair Process in Mediation? *Social Science Research Network (SSRN)*. [Online] Setembro de 2013. [Citado em: 15 de outubro de 2014.]

A persisting aberration: the movement to enforce agreements to mediate. LYE, Kah Cheong. 2008. 2008, Vols. 20-195.

CINTRA, Antonio Carlos de Araújo, GRINOVER, Ada Pellegrini e DIDNAMARCO, Cândido Rangel. 2003. *Teoria Geral do Processo*. Sao Paulo : Malheiros, 2003.

COLE, Sarah Rudolph and BLANKLEY, Kristen M. 2005. Arbitration. [book auth.] Michael L. MOFFIT and C. Robert BORDONE. *The handbook of dispute resolution*. San Francisco : Jossey-Bass, 2005, pp. 318-335.

Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements. LO, Chang-fa. 2014. 29 de Mayo de 2014, Contemporary Asia Arbitration Journal , Vol. 7, pp. 119-138.

East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China. STIPANOWICH, Thomas, et al. 2009. 2, 2009, Pepperdine Dispute Resolution Law Journal, Vol. 9.

Enforceability of mediation outcome. EL SIDDIK, Abbas M. Taha. 2010. 2010, eLaw Journal: Murdoch University Electronic Journal , Vol. 17.

FISHER, Roger, URY, William and PATTON, Bruce. 2011. *Getting to yes*. 3 ed. London : Penguin Books, 2011.

GIORDANO CIANCIO, Anna. 2013. Mediation at the intersection with contract law: The settlement Agreement. *Social Science Research Network (SSRN)*. [Online] Junho de 2013. [Citado em: 3 de 2014 de Novembro.]

GISBERT POMATA, Marta e DIEZ RIAZA, Sara. 2014. *El contrato de mediación y el acuerdo de mediación civil y mercantil*. Pamplona : Aranzadi, 2014.

GOLANN, Dwight and FOLBERG, Jay. 2011. *Mediation. The roles of advocate and neutral*. 2 ed. New York : Wolters Kluwer, 2011.

International Mediation Institute. 2014. *How users view the proposal for a UN Convention on the enforcement of mediateed settlements*. 2014.

KOVACH, Kimberly K. 2005. Mediation. [A. do livro] Michael L. MOFFIT e Robert C. BORDONE. *The handbook of dispute resolution*. San Francisco : Jossey-Bass, 2005, pp. 304-317.

NEVES, José Roberto de Castro. 2013. *Medida por medida. O Direito em Shakespeare*. 2 ed. Rio de Janeiro : GZ, 2013.

ORTUÑO MUÑOZ, Pascual e HERNÁNDEZ GARCÍA, Javier. 2007. *SIstemas alternativos a la resolución de conflictos (ADR): la mediación en las jurisdiciones civil y penal*. Documento de Trabajo 110, Fundación Alternativa. s.l. : Laboratorio Alternativas, 2007.

SAIZ GARITAONANDIA, Alberto. 2013. El medarb como procedimiento mixto de resolución de conflictos: luces y sombras. [A. do livro] Helena SOLETO MUÑOZ. *Mediación y resolución de conflictos: técnicas y ámbitos*. Madrid : Tecnos, 2013.

STRONG, S.I. 2014. *Use and perception of international commercial mediation and conciliation: A preliminary report on issues relating to the proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*. University of Missouri School of Law Legal Studies Ressearch Paper. 2014.

STULBERG, Joseph B. 1998. Fairness and Mediation. *Ohio State Journal on Dispute Resolution*. 13, 1998, Vol. 909.

SUSSMAN, Edna. 2011. Combinations and permutations of arbitration and mediation: issues and solutions. [book auth.] Arnold INGEN-HOUSZ. *ADr in business. Practice and issues across countries and cultures* . London : Wolters Kluwer, 2011.

WOLSKI, Bobette. 2014. Enforcing mediated settlement agreement (MSAs): Critical questions and directions for future research. *Contemporary Asia Arbitration Journal* . 87, 2014.

THE USES OF MEDIATION[1]

Lela P. Love and Joseph B. Stulberg

Imagine a time you negotiated with someone and it ended in an impasse. You walked away from the discussion even though you sensed that a negotiated outcome was in your best interests. Perhaps you were called a name or accused of something you did not do. Maybe an insulting offer was made. You may have been tired or depressed and working on a "short fuse." Perhaps it was simply too hard to establish a time to meet again with your counterpart. For whichever reason, the negotiation did not succeed. In that same scenario, something different might have happened if you had added a mediator.

Why add a mediator to negotiations?

Negotiations are neither self-generating nor self-sustaining. One party might want to talk, but others refuse to do so. Some talks never start—or collapse—because participants lack effective negotiating skills. Other discussions reach impasse due to misunderstandings, hostile comments or perceived rigidity. These familiar dynamics can disserve parties whose interests lie in resolving their dispute. Understandable—all too human—reasons cause negotiation melt down.

Negotiators can be trapped by other pitfalls. Sometimes parties refuse to initiate direct negotiations (or to request mediation) for fear that their counterpart interprets that move as a sign of weakness. Some take extreme public positions to protect themselves and their reputation, but in so doing eliminate workable options. Some make inaccurate assumptions about aspects of the situation or their counterpart's motivation. Some fail to determine their priority interests. And some, because of such psychological phenomena as loss aversion or overconfidence in their own judgment, make sub-optimal decisions. [Russell Korobkin & Chris Guthrie, Heuristics and Biases at the Bargaining Table]

A skilled mediator can defuse or transform these roadblocks into building blocks for movement by promoting constructive participation, minimizing misunderstandings, crystallizing significant interests, framing issues thoughtfully, urging parties to be realistic, and expanding discussion of possible outcomes. How?

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1 "The Uses of Mediation" by Lela P. Love and Joseph B. Stulberg, excerpted from *The Negotiator's Fieldbook*, 2006, edited by Andrea Kupfer Schneider and Christopher Honeyman, published by the American Bar Association Section of Dispute Resolution.

What does a mediator do?

A mediator is a neutral intervenor committed to assist each negotiating party to conduct constructive conversations. She helps structure discussions. She stabilizes dialogue. She injects an attitude of hope and "going the distance." She prods participants to clarify interests, establish priorities and transform rhetoric into proposals. She develops discussion strategies that minimize misunderstandings when tensions run high. She helps parties understand one another when ill chosen words create bitterness between them. She uses reframing and reality testing to encourage parties to examine and evaluate their assumptions and conclusions. She performs these basic tasks in order to help stakeholders enhance their collective understanding, spark creative problem solving, and settle their controversy.

A Posture of Optimism

George Mitchell, when referring to his intervention as a mediator in Northern Ireland and the Middle East, states, "Conflicts are created and sustained by human beings. They can be ended by human beings."[2] In mediating the conflict in Northern Ireland, Mitchell describes 700 days of failure followed by one final day of success. Though he became disheartened at times, he did not give up. The mediator is the very last person to give up. Desmond Tutu, the Nobel Peace Laureate who helped negotiate the transition of South Africa from the horrors of apartheid towards black political leadership and racial dignity, concludes that: "no problem anywhere can ever again be considered to be intractable."[3] A mediator is not naïve, but she is persistently optimistic that negotiations—even difficult and stalled negotiations—can be set on course.

Most of us faced with a negotiation that is not working tend to feel that the other person involved is stubborn, selfish, uncooperative, or unreasonable. The presence of an upbeat, optimistic third person can transform the environment of a negotiation. Once the mood is changed, positive momentum can be created.

A Variety of Applications

From disputes on the Internet to controversies erupting on city streets or in school settings to cases filed in court, mediation is increasingly used to address and resolve problems. Situations in very diverse arenas—divorce, labor and employment, construction, landlord-tenant, commercial matters, public policy, and international disputes—all regularly benefit from mediation.

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2 George Mitchell, *Peace Can Prevail*, Dispute Resolution Magazine, Winter 2002 at 4, 6.

3 Desmond Tutu, *No Future Without Forgiveness*, in *The Impossible Will Take a Little While*, p. 396, Paul Rogat Loeb (ed.)(2004).

Consider the following:

- A single parent with teenagers moves into an apartment above an elderly couple. The teenagers make noise walking around their apartment, playing loud music and entertaining friends, sometimes late at night. When the downstairs neighbors complain to the teenagers, they respond with crude comments. The elderly couple bangs a broom against the ceiling to signal that the sounds should stop, but this results in the volume increasing. When one of the downstairs neighbors goes upstairs to try to talk with the parent, no one answers the door despite the presence of sounds in the apartment. Vigorous knocking on the door results in a door panel breaking. The upstairs neighbor demands money to replace the door. When the neighbors do talk, conversation results in angry accusations. How will the spiral stop?
- Cheryl is an associate in a large law firm. An African American, she is the only lawyer in the group who is not Caucasian. When other office attorneys socialize, gossip and chat in the corridors, she feels excluded and isolated. She notices that she is not given training opportunities that others are offered and she is not called on in meetings as frequently as others. After her supervising attorney tells her that "B+ work is ok," when an assignment is slightly late, Cheryl believes that she is being set up to fail. When she raises any of these issues, she is given an unsatisfactory explanation. Is her only option to file a racial discrimination complaint against her employer?
- In an Eastern European town, members of the Roma (gypsy) community regularly go through the town dump to scavenge for useable material that has been discarded by others. Various ethnic and religious groups in the town are upset because such scavenging results in the garbage being strewn in disarray, thereby making it impossible for recycling efforts to succeed. Feelings of distrust, hostility, and discrimination create a tinderbox environment capable of exploding instantly into violence. Efforts to identify a Roma group to talk with have proven futile. Is this situation simply a "law enforcement" problem?

For each situation noted, using a mediator would be helpful. How? A short list of negotiating dynamics that result from a mediator's intervention includes:

- The presence of an energizing, yet calming, optimistic intervenor.
- A meeting site and environment that is safe, equitable, comfortable and inspiring for all participants.
- An opportunity for voices to be heard in a respectful way.
- A discussion format and agenda that guides participants to "tell their story" and organizes discussion topics in a clear, targeted manner.

- Procedural and communication tools designed to enhance understanding and movement. Examples of such tools include separate meetings (caucuses) and active listening or reframing.

It is easy to envision how a mediator's attentive presence at a comfortable meeting site would enhance communications between the upstairs and downstairs neighbors. In the second scenario, the mediator transforms an adversarial contest over allegations of racial or gender discrimination into a constructive negotiation discussion by simply and accurately identifying the negotiating issues to include social interaction at the worksite, training opportunities, professional meeting protocols, and performance standards – i.e., items about which the parties can, indeed, bargain. And a mediator's affirmative intervention in the final scenario – often by meeting separately with the various stakeholders to identify the necessary parties to a resolution and explore the concerns that must be addressed to secure stability and respect—can be the first step towards addressing differences. Sometimes such separate meetings provide a constructive "safe haven" through which persons with a history of profound conflict can communicate forcefully with one another without violence erupting.

Different Destinations and Many Paths

In one sense, mediation can be boiled down to a simple target shared by all mediators. Mediators help parties to negotiate more effectively. That often means to help parties communicate more constructively and, in many cases, reach agreements. Beyond that simple target, though, mediators have different goals and different means for achieving them.

What goals—or destinations—do different mediators and different schools of mediation have? Among the most often cited mediation goals are:

- Better understanding for each party of her own goals and interests (empowerment)
- Better understanding among parties (recognition of each other)
- Creative problem solving and option generation
- Agreements that are durable and optimal
- Settlements acceptable to all parties[4]

One school of mediation only embraces the first two goals (empowerment and recognition). Other mediators only target settlement—an end to the dispute. And others will include all of these goals. Here is a continuum of mediation approaches (above the line) together with a continuum of goals (below the line). The con-

4 With respect to the effects of these goals on perceptions of mediator neutrality, see Honeyman, Understanding Mediators, in this volume.

tinuum roughly matches mediation approaches or schools with corresponding goals or targets. In real cases, however, it is important to note that any linear depiction is a simplification of a dynamic and complex process.

Let's examine these goals.

Empowerment and recognition means that disputing parties come away from mediation stronger in two important respects. They "experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face" and they "experience an expanded willingness to acknowledge and be responsive to" the other party.[5] These goals are closely linked to the goal of understanding the overall situation better. It is easy to understand how Cheryl, in the employment scenario, imagined she was being excluded. Through mediated discussion about this potentially volatile situation, she can come to realize that others in the office wanted her participation in social life, but her own frequently closed office door deflected attempts to include her. Also, it might be that Cheryl's supervisor's comment about "B+ work" was meant to lessen any pressures Cheryl felt to get things perfect. The supervisor, in turn, might come to understand the adverse impact of his remark. Each party can feel sufficiently safe in mediation to "tell their story"—a more "empowered" state than letting confusion and anger fester. And each can come to understand the other.

The mediator who has problem solving as a goal hopes to engage participants in a forward looking exercise of developing options to address the concerns raised by the parties. Ideally, these options will represent creative—sometimes "out of the box"—solutions to the concerns raised. If the amount of money that a defendant will pay in a personal injury situation is an issue, the mediator might encourage the parties to determine whether there are things the defendant can do for the plaintiff in lieu of money—provide a job, insurance, housing, a vehicle, as a partial or total alternative to an immediate payment or payment over time—that will cost the defendant less and still promote the plaintiff's interests. Or, in the Roma situation described above, perhaps the parties can achieve an arrangement where needy Roma citizens can help the recycling effort while obtaining necessary items for themselves. Any such resolution would build a better relationship and a capacity to engage in future problem solving should other issues arise.

For many mediators, agreement among the parties is a goal of mediation so long as agreement provisions are "reality tested" by the mediator to ensure that commitments are as durable [Wade & Honeyman, Negotiating Beyond Agree-

5 Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition 84, 84-5 (1994).

ment] and optimal as possible. For example, the upstairs and downstairs neighbors might quickly agree to the following terms: "no communication, the upstairs neighbors will wear soft-soled shoes walking around in their apartment, the teenagers will have parties only on Saturday nights, no music after 11 pm, and no banging on the ceiling." Given the parties' proximity as neighbors, some of these proposed arrangements appear implausible (no communication between neighbors?), even if well-meaning, so many mediators would want to test these terms for precision (what does "parties" mean?) and workability (will soft-soled shoes alone solve the problem?) and explore a solution that provides the neighbors with some method of communication and constructive interaction.

Other mediators keep a sharp focus on settlement—coming to a resolution with respect to contested matters, so long as the settlement is acceptable to all parties. Mediators in pursuit of this goal might use a very forceful style to achieve the goal of settlement. One scholar has described that approach as mediator "trashing" and "bashing."[6] "Trashing" means tearing apart each party's case to encourage them to put realistic numbers on the table.[7] "Bashing" means trying to get parties to move from their entry settlement offers to some mid-point.[8] Settlement-oriented mediators consider the mediation successful if the parties can reach a number they will both endorse.

How Goals are Linked to Process Design

Different mediator strategies and techniques follow from different goals.

- Will the mediator encourage active participation by the parties, instead of allowing the lawyer or other professional representatives to dominate the session? If the goal is empowerment and recognition or creative problem solving, the mediator would want to maximize party participation.
- Will the mediator use the caucus (individual meetings with each side)—never, sometimes, or exclusively? If the goal is for the parties to have an enhanced understanding, some schools of mediation encourage no caucus at all.
- What types of settings and time frames should be employed? In a settlement approach, twenty minutes in the hallway of a courtroom might be deemed an adequate attempt at mediation by mediators who are "trashing and bashing" their way toward a settlement.

What mediator should you add?

You must be clear about your goal before choosing a mediator to help you

6 James Alfini, *Trashing, Bashing and Hashing It Out*, 19 Fla. St. U. L. Rev. 47 (1991).

7 *Id.* at 66.

8 *Id.* at 69.

achieve it. Various benefits outlined above may not be available from all mediators. Some mediators stress stakeholder participation to generate understanding and collaboration, even when hostile responses might jeopardize settlement. Some convert controversies to a discussion of money damages only and try to help parties find an acceptable "number" in a forced march to settlement, thereby minimizing opportunities to enhance understanding and improve relationships.

In addition to inquiring into a particular mediator's approach, other questions should be given consideration. For example, should parties and their representatives select a mediator who is an "expert" in the field? Does the mediator's gender, race or age matter? Is cost a consideration? How does the mediator address the questions of process design? For example, does the mediator discourage "face-to-face" conversation (or joint sessions) in favor of "separate" meetings? Some are comfortable with party representatives assuming a primary role in the discussion while others are not. A careful negotiator can find the type of mediator – and mediation – she wants.[9]

Mediation and Justice

Mediation allows parties to find resolutions that are in keeping with their own preferences and values.

Some mediator approaches—transformative or facilitative—systematically support democratic dialogue and decision-making, improving relations and building communities. Imagine:

- upstairs and downstairs neighbors able to communicate respectfully with one another, developing both an added degree of sensitivity and tolerance;
- an office which can set a precedent for displaying inter-racial and inter-gender cooperation, with Cheryl communicating more clearly her desire for inclusion and training, and a supervisor who comes to understand her perspective; and
- a community where different ethnicities find ways to appreciate their differences and resolve issues that are potentially divisive.

Other approaches to mediation, such as when an evaluative mediator presses parties to settle, are designed to secure speedy and cost-saving closure, thereby advancing administrative goals of a justice system.

Conclusion—an experiment worth trying

Perhaps the most important thing that negotiators should know about mediation is that it works. Frequently, it brings disputing parties a better understanding of each other and closure to their dispute. Given the emotional and financial

9 For more on why mediators differ so much, see Honeyman, supra note 3.

costs that conflict can levy, a thoughtful negotiator should not ignore that mediation might provide a promising road out of a dispute.

President Theodore Roosevelt was the first American to be awarded a Nobel Prize for Peace. Like many recipients of the Nobel Peace Prize, he tackled a dispute which seemed intractable and was immensely costly—the war between Russia and Japan at the dawn of the 20th century. Writing to his son in 1905 about his efforts as a mediator, Roosevelt said:

I have finally gotten the Japanese and Russians to agree to meet to discuss the terms of peace. Whether they will be able to come to agreement or not I can't say. But it is worthwhile to have obtained the chance of peace, and the only possible way to get this chance was to secure such an agreement of the two powers that they would meet and discuss the terms direct. Of course, Japan will want to ask more than she ought to ask, and Russia to give less than she ought to give. Perhaps both sides will prove impracticable. Perhaps one will. But there is a chance that they will prove sensible, and make a peace, which will really be for the interest of each as things are now. At any rate[,] the experiment was worth trying.[10]

Thanks to Roosevelt's persistent efforts, enormous tact, and thoughtful prodding, an agreement was reached that ended the war. As testament to the significance of the accomplishment, the mayor of Portsmouth, NH, where the treaty was signed rang the town bells for a full half hour.[11]

While we should not expect town bells to toll when private disputes are resolved, we can nonetheless celebrate the impact on neighbors when a tense and volatile situation—like that of the upstairs and downstairs neighbors—is transformed into a neighborly relationship. We can celebrate the impact on a workplace when employees feel understood, included and supported by their colleagues and supervisors. And, for public disputes, we can celebrate the impact on a community when diverse ethnicities can collaborate with one another to address issues that divide them.

In many scenarios, mediation—a way to generate a possibility for negotiating success—is, as Teddy Roosevelt said, an experiment worth trying.

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10 Letter from Theodore Roosevelt to Kermit Roosevelt (June 11, 1905), *in* XXI The Works of Theodore Roosevelt at 595 (Hermann Hagedorn ed., Mem'l ed. 1923-1926).

11 *See* James E. Fender, *Roosevelt, The Mikado and The Czar: Theodore Roosevelt's Mediation o f the 1905 Treaty of Portsmouth*, N.H. B. J. Summer 2005, at 68, 72. citing Peter E. Randall, *There Are No Victors Here! A Local Perspective on the Treaty of Portsmouth* 53 Portsmouth Maine Society 8 (1985).

MULTI-DIMENSIONAL MEDIATION

Paul E. Mason[1]

Q: What is multi-dimensional mediation?

A: Multi-dimensional mediation goes beyond the usual concept of multi-party mediation, although it can and often does include more than one party. As the term suggests, multi-dimensional mediation involves mediating beyond the normal two-party scenario where many other factors come into play. These can include any of the following: more than one party; several entities participating in the mediation whether formal parties or not; a large number of participants in the mediation; employment of co-mediators, assistant mediators or experts consulting with the mediator; different media utilized to conduct the mediation; participants coming from different countries; cultural and negotiating traditions; use of more than one language for the mediation; and more than one organization involved in administrative aspects of the mediation.

Q: Is it really possible for a mediator to juggle all these balls at the same time?

A: Yes, although the mediator needs to keep his or her eye on all the balls and not drop the most important one, which is getting the parties on the right track to settlement.

Q: Have you been involved as a mediator with any of these scenarios, and how have they turned out?

A: I have mediated at least five of these and acted as counsel in another

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one, all successfully as it turned out. Although the total number of such mediations is not large, the cases were all complex and high value.

The first one was an environmental dispute for about $50 million between a U.S. state Attorney General's office and eight multinational oil companies in a sharp conflict over responsibility for an underground gasoline plume which polluted groundwater in a residential area.

The second was an international commercial dispute over reinsurance coverage for a public bid bond on an Argentine government contract, worth about $5 million which was referred to mediation by the U.S. Federal District Court in Miami.

The third was an international business dispute in the energy sector where a Brazilian executive's bonuses were tied to performance in renegotiating energy project financing for his company, which was owned at the time by a large energy multinational. It was an ICDR administered case.

The fourth was an ICDR international business conflict involving post-M&A environmental and tax liabilities of a Brazilian oil company which was sold by its Brazilian owners to a multinational oil company. This IDCR administered case was valued at about $3 million.

The fifth was an ICC administered international business dispute between companies in Central America over insurance and reinsurance coverage for business interruption flowing from damage to energy producing equipment. This one had claims of about $6 million.

The sixth was an *ad hoc* mediation between Russian and American companies in the shipping and agribusiness sectors with a value of several million dollars.

Q: What were the multi-dimensional aspects of each of these cases?

A: The Attorney General case had nine parties. The Argentine public bid bond case had seven participants on one side and just two on the other, and I mediated it in both English and Spanish. The Brazilian post-M&A case likewise had unbalanced numbers of participants with six on one side and three on the other, and I mediated that one in both Portuguese and English. The Central American case had eleven participants from six countries and six different companies, not all of whom were formally named in the claim.

We conducted that mediation in both English and Spanish. Since the Russian-American case had some Ukrainian elements as well, I invited a Ukrainian colleague fluent in Russian to assist in the mediation.

Q: You have mentioned ten factors which make these experiences interesting or unusual.

Can we briefly touch on each, beginning with the first one: how do a large number of participants alter the mediation dynamics?

A: It is important to note that the number of participants as a dynamic-influencing factor is separate from the number of formal parties involved in the mediation. With numerous participants, the main concern is ensuring meaningful dialogue as opposed to cacophony and confusion. There are various ways to do this, and in this situation the mediator has to be aware from the outset of this challenge and meet it head on.

Another thing to bear in mind is needing to remind all the individuals participating of their duty to keep the mediation confidential – this is easier to accomplish with one or two people on each side.

Q: What about the second factor – different roles of various participants?

A: It is key to immediately note and match their respective levels and areas of responsibility to ensure there can be meaningful dialogue. For instance, if one party sends their Executive VP, Finance Director and General Counsel but the other party sends a purely technical delegation, chances for meaningful exchange and agreement are not very high. The mediator needs to keep a keen eye on identity of the participants and ensure a match even before the formal mediation session begins.

Q: And the third factor – attorneys acting as clients?

A: This usually depends on the status of the conflict. If it comes from a case already filed in court or even arbitration, you have a greater chance of seeing attorneys come into the mediation to do at least some of the negotiating. This is what happened in the Attorney General case, where all the oil companies were represented by their General Counsel and senior litigation attorneys. With all due respect, since I am an attorney myself, one risk here is that with attorneys only, the mediation can fall into the trap of arguing over legal points only without sufficiently exploring underlying client interests.

Q: Four, speaking of attorneys – have you mediated cases with an attorney on one side only?

A: Yes. The attorney on one side was outside counsel accompanied by the Chairman of the Board and Executive VP of her client. The other side had

executives of insurance and reinsurance companies who understood the basic legal concepts by trade but were not lawyers. One came from London with a European LL.M. although he was not a practicing attorney. In this scenario, there was of course some legal posturing by the parties as there almost always is, but we were able to go beyond this and settle the case.

Q: Five, what about balancing the numbers if one party brings just a few people but the other side wants to bring a delegation?

A: This is primarily a matter for each party to decide. As mediator, I prefer not to exclude participants based on numbers alone because one never knows before a mediation session how they may contribute. Some parties may perceive a difference in numbers as an unbalanced power situation while others see it as a challenge. In many cases there may be several participants on one side, but only one or two with authority to make the final decisions.

Q: Six, how do physical/logistical arrangements change with many participants?

A: The recent Central American mediation provides a good example. There were eleven participants. The mediation facility had only the usual long rectangular tables aligned in the typical "U" pattern, really more suitable for arbitration than mediation. So we rented a smaller round table to fit only the decision-makers on each side and myself as mediator.

We put the round table in the middle of the "U" for the joint sessions, and also used it for the decisive mini-sessions which included only the key executives when it came time to see where the hard decisions had to be made. So the others were in position to observe the mediation sitting around the larger "U" rectangular table which mostly surrounded the round table in the middle. We provided Wi-Fi access so the observers could access the internet and not interrupt the main mediation. This arrangement worked very well.

Another example is comfort vs. discomfort as a stimulus to settle. In the Attorney General case, the morning sessions were held in the Attorney General's personal office with a gorgeous view of the coastline. However he had to use it in the afternoon so we were relegated to the law library which was being remodeled with boxes and books all over the place, dusty, and no windows. A quick settlement followed.

A further dimension of this is when you have more than one organization involved in the administration of the mediation. This can happen when the

case is filed with one ADR group but the space for the mediation is rented from a different ADR organization, for example. Sometimes this is necessary but adds some administrative overhead to coordinate. Best is to have a good assistant available for this purpose.

Q: Seven, what about using co-mediators, assistants or experts?

A: In very complex cases, the mediator may need to use one or more of these.

Co-mediators are normally indicated when different disciplines are brought into the mediation such as family cases with a lawyer and family counselor or psychologist as co-mediators. However it can be suggested in business cases as well, especially those with a large highly technical component of the dispute. The ICC Central American mediation did contain a large technical component on the condition of the energy equipment, so I decided to retain a technical expert rather than assistant mediator as such. He helped frame a very helpful set of technical questions in Spanish which we sent out to each party prior to the mediation session to help understand and frame the precise issues to resolve.

But it is necessary to understand the motive and basis for asking for co-mediators. For example I was invited to co-mediate a $50 million dollar energy/shipping case involving parties from the U.K. and Brazil. Their lawyers insisted that each side pick its "own" mediator, in a procedure not unlike party appointed arbitrators. There, each side was asking the mediator to "protect" its own interests rather than act as an independent neutral.

As mentioned earlier, the Russian-American shipping/agribusiness case had some Ukrainian documents which led me to contract with a Ukrainian colleague to help with these. But beyond that, the Russian side was represented by a Russian businessman coming to Miami alone while the Americans had two business representatives and their lawyer. Therefore another function of my Ukrainian colleague was for her to sit and converse casually with the Russian representative during my caucuses with the American side so that he would not feel isolated. This was several years before the recent outbreak of hostilities in the Ukraine with Russian separatists, so I am not sure how well this scenario would work today.

Q: Eight, you have referred to "different media for the mediation". What do you mean by this?

A: Almost all mediations are conducted in person in real time. However in today's globalized computerized world there are other options available in case in-person meetings are not possible. This can happen because of scheduling conflicts and for international mediations, difficulties in obtaining visas to travel. In the Brazilian energy executive case, we could not get all the executives together at the same time. So I suggested taking a leap of faith and try videoconferencing because the cost of the technology had fallen steeply while video quality had improved significantly. We had sites in New York, another U.S. city, and São Paulo. There were a number of technical and privacy issues to overcome, but we did it and settled the case. I was told that it was the first international commercial mediation where videoconferencing was used successfully.[2]

Q: Nine, you mentioned strategies of the mediator to avoid getting bogged down with so many people participating.

A: There are a number of these which come to mind. One is the small round table approach noted earlier. Another is having something at the session to keep the others busy when they are not needed, such as wireless internet access for email etc. which we provided in the Central American multi-party electrical energy reinsurance dispute. Another involves giving time deadlines to speak, especially after the initial venting stage so as to avoid running overtime and risking losing the settlement when people need to catch flights home. And when people start to repeat their points, it is helpful to remind them that this is not necessary.

Q: Ten, what about the language and locale issue in international mediations?

A: As in many mediations, circumstances may change from the time the initial request is filed until the mediation session actually occurs. In one case, the original request was quite pointed and rigid – the parties specifically asked for mediation to be conducted in their Central American country in Spanish. However on researching the laws of the Central American country involved, I found the relevant law on mediation to have several problems and exclusions so we moved the mediation to Miami.

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2 For anyone interested in further information, I have written a chapter on this in the book *International Commercial Arbitration Practice: 21st Century Perspectives* (Horacio Grigera-Naón and Paul E. Mason, Co-Editors, Lexis-Nexis books, 2010).

Although the parties had originally asked for Spanish only, late in the game one of them brought a key decision-maker from Europe who did not speak Spanish. So we decided to let each person speak in the language they were most comfortable with, holding more of the mediation in English to accommodate the European executive. We asked each one if they could understand English well, but having those preferring Spanish to speak Spanish in order to express their thoughts and feelings more accurately. If language is an issue in your mediation, I would suggest carefully polling each side's list of participants about their respective language abilities and preferences well before the mediation session begins and arrange for high quality translators (for documents) and interpreters (for speaking) if necessary.

Q: Finally, how do you address multiple cultural styles in the mediation?

A: Negotiation is really at the heart of mediation, and negotiating style can be heavily influenced by culture. In the recent Central American mediation, I found one side to be very crisp and decisive but far less flexible, while the other side was slower, indirect, flexible and elliptical. When I saw the first side growing impatient with the indirection of the other side, I counseled patience with them because that is the way things are done in that particular part of the world. Likewise when the indirect side asked me whether I thought the other side would accept a much larger offer than had previously been indicated, I advised caution not to insult them and to consider the lack of flexibility which is characteristic of that region's negotiating style. In short, while not revealing any specific negotiating information to either party without the other party's prior consent, I did compare with each one the general parameters of their and the other side's respective negotiating styles. This seemed to help each side be more realistic about what they could accomplish and drive them towards a settlement.

"*ITALY IS DOING IT – SHOULD WE BE ?*" CIVIL AND COMMERCIAL MEDIATION IN ITALY

Giovanni Matteucci[1]

1 . Italy is doing it – should we be?

Mandatory Mediation in Italy – Reloaded: "*The 'Italian mediation explosion' attracted a lot of attention from the international mediation community. The mediation explosion came to a sudden halt in December 2012, when the Italian Constitutional Court ruled that the provisions had been unconstitutional. Just recently, on September 20, 2013, a new regulation came into effect, again opting for mandatory mediation, but with several important modifications*"; Rafal Morek, Kluwer Mediation Blog, October 9th, 2013 [2]. These words appeared at the beginning of October 2013 on a blog connected with a prestigious name in international publishing.

Some weeks later. Italy is doing it - should we be? : "*When mandatory mediation was first introduced in Italy in 2011, over 220,000 mediations were started. Of these almost 50% settled. Not bad for a country where it is estimated that 5.4 million disputes are currently pending before the Courts! It will be interesting to follow the progress made over the next 12 months and see what lessons we can learn and possibly bring to the UK*"; Gemma Bowen, Linkedin ADR Professionals, October 23rd , 2013 [3].

Reading that English professionals were following the Italian experience on commercial mediation to "*learn and possibly bring it to the UK*" puzzled me. As an Italian, and as a commercial mediator, I was pleased. But the statement

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2 http://kluwermediationblog.com/2013/10/09/mandatory-mediation-in-italy-reloaded/?goback=%2 Egde_163292_member_5795889772836700160#%21

3 http://www.linkedin.com/groupAnswers?viewQuestionAndAnswers=&discussionID=5795889772836700160&gid=163292&commentID=5798906971604135936&trk=view_disc&fromEmail=&ut=3UhVhGKjXlEBY1

"*over 220,000 mediations were started. Of these almost 50% settled*" did not accord with the statistical figures issued by the Italian Ministry of Justice. Between the second quarter of 2011 and the fourth quarter of 2012 (roughly the period in which mediation was compulsory), 215,689 mediation proceedings were started in Italy; of these, 26,822 ended with an agreement. Therefore 12% were settled, not 50%. Moreover, while 15% of mediations were settled at the beginning of the period, the figure dropped to 8% at the end.

Why?

Last but not least, 215.689 mediation precedures is a very small number in terms of the 4.3 million court proceedings started, the 4.5 million ended and the 5.5 million pending (in 2012).

The European Parliament commissioned a study, *Rebooting the mediation directive*, published at the beginning of 2014, contributed to by 816 experts from all over the EU.

Among other results:

Table 1.- *Estimated number of mediation per year*

More than 10 000	Germany, Italy, Netherlands, UK
between 5 000 and 10 000	Hungary, Poland
between 2 000 and 5 000	Belgium, France, Slovenia
between 500 and 2 000	Austria, Denmark, Ireland, Romania Slovakia, Spain
less than 500	Bulgaria, Croatia, Cyprus, Czech Rep., Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal, Sweden

Table 2.- *Top-Ranked, Most Effective Legislative Measures to Increase Mediation Use* (by number of preferences expressed)

Make mediation mandatory in certain categories of cases	132
Require mandatory mediation information sessions before litigation	110
Provide incentives for parties who choose to mediate	97
Require counsel to inform parties of mediation as an alternative to litigation	72
Impose sanctions for parties' refusals to attend mandatory mediation	54
Grant judges the power to order litigations to mediation	51

Moreover :

"*... only a certain degree of compulsion to mediate (currently allowed but not required by the EU law) can generate a significant number of mediations. In fact, all of the other pro-mediation regulatory features mentioned in the study's terms of reference, such as strong confidentiality protection, frequent invitations by judges to mediate and a solid mediator accreditation system, have not generated any major effect on the occurrence of mediations.*

"*... elements of mandatory mediation can have a positive effect on voluntary mediation as well. In Italy, for example, when mediation was not mandatory (until 2011), there were no more than 2 000 mediations per year. At the time mediation became mandatory (March 2011-October 2012), the number of voluntary mediations climbed to almost 45 000, out of over 220 000 proceedings as a whole. When mediation ceased to be mandatory (October 2012 – September 2013), along with that of mandatory mediations also the number of voluntary mediations fell to almost zero. Now that mediation is again a pre-requisite to litigation in certain cases (since September 2013), both mandatory and voluntary mediations are being initiated at a rate of tens of thousands per month.*

" *Italy, actually, features a 'mitigated' mandatory mediation system. Indeed, in certain categories of cases litigants are only required to sit down with a mediator for a preliminary meeting, at no cost, in lieu of having to go through, and pay for, a full-blown mediation. If any of the parties is not persuaded that mediation has good chances to succeed, they can 'opt-out' from the process during the preliminary meeting and go directly to court without negative consequences. Amongst other advantages, this model reduces to the minimum concerns about the litigants' right of access to justice*" [4] .

The Italian experience thus provides a very interesting case for study.

2 . The overall situation

According to Cepej [5] figures for 2010, compared to 47 other European Countries, Italy had:

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4 European Parliament, Directorate General for internal policies, Policy department citizens' rights and constitutional affairs, Legal Affairs, "*Rebooting the mediation directive*" pag. 6 and 8, 2014

http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IP-OL-JURI_ET(2014)493042_EN.pdf

5 Cepej, European Commission for the Efficiency of Justice, set up by the Committee of Ministers of the Council of Europe http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf

- proportion of the public budget allocated to the whole justice system out of the total public expenditure less than the average (value in %) [6]

Table 3

Croatia	1,9
France	1,1
Germany	1,6
Italy	1,5
Poland	2,9
Spain	1,0
Average	1,9

- high number of litigation cases [7]

Table 4 - *Number of 1st instance incoming and resolved ; civil cases per 100,00 inhabitants*

Croatia	3.323	3.384
France	2.758	2.713
Germany	1.935	1.941
Italy	3.958	4.676
Poland	2.146	2.038
Spain	4.219	3.950
Average	2.738	2.663

- long lasting litigation cases[8]

Table 5 - *Disposition time of litigious cases in 1st instance courts, in days*

Croatia	462
France	279
Germany	184

6 Figure 2.4
7 Figure 9.5
8 Figure 9.12

Italy	493
Poland	180
Spain	289
Average	287

- a huge number of lawyers[9]

Table 6 *Number of practising lawyers (without legal advisors)*

	ABSOLUTE NUMBER	PER 100.000 INHABITANTS	PER PROFESSIONAL JUDGE
Croatia	4.133	94	2
France	51.758	80	7
Germany	155.679	190	8
Italy	211.962	350	32
Poland	29.469	77	3
Spain	125.208	272	27
Average	///	128	10

According to the Italian Ministry of Justice, there were a tremendous number of pending civil litigation cases in the overall judicial system: 5.532.216 in 2010.

All these problems did not arise in the last decades. Indeed, they have existed for over a century.

3 . A bit of history

Giovanni Giolitti, one of the most important figures in Italian political history, who was elected prime minister many times in the first decade of the twentieth century, once said: "*In Italy, a country of very low wages...; the overall tax burden has become so high as to sometimes constitute a real confiscation of property;...justice...is slow, very expensive, and does not provide sufficient guarantees* " [10] - 1899.

9 Table 12.1

10 "*In Italia, paese di salari bassissimi ...; il complesso delle imposte è giunto a tale altezza da costituire talora una vera confisca della proprietà;...; la giustizia ..., è lenta,*

Giuseppe Prezzolini, a journalist and author, wrote in his book *Codice della Vita Italiana*: "*It is not true...that there is no justice in Italy. Instead, it is true that one should not ask the judge for justice, but rather the influential deputy, minister, journalist, lawyer, etc. You can find it: the address is wrong"* [11] – 1921.

Piero Calamandrei, one of Italy's leading jurists of the twentieth century, wrote in a book titled *Troppi avvocati (Too many lawyers)*, published by *La Voce*: "*In Italy today the number of legal professionals surpasses by far the existing social needs; this pathological elephantiasis affecting the Bar entails, as its natural consequence, unemployment and economic hardship for the vast majority of professionals, followed by the gradual intellectual and moral degradation of the profession. Public opinion, even without exactly understanding the causes of this degradation, is aware of it and judges it severely*" (page 38).

"I*t is important to keep in mind that the liberalization of the legal profession ... presents a serious danger, i.e. the possibility that the regime of beneficial competition among freelance professionals morphs into a desperate struggle for existence when, as the number of legal counsels becomes increasingly disproportionate to the number of lawsuits, normal professional work starts running short*" (page 35) – 1921 [12].

In the more recent article "*Advocatus, et non latro? Testing the Supplier-Induced-Demand Hypothesis for Italian Courts of Justice*", Fondazione Enrico Mattei, Nota di lavoro 2010, Paolo Buonanno (University of Bergamo)

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costosissima e senza sufficienti garanzie;..."- 1899

11 *"... 18. Non è vero ... che in Italia, non esista giustizia. E' invece vero che non bisogna chiederla al giudice, bensì al deputato, al Ministro, al giornalista, all'avvocato influente ecc. La cosa si può trovare: l'indirizzo è sbagliato*" - 1921

12 "*In Italia, oggi, i professionisti legali sono in numero enormemente superiore ai bisogni sociali; questa elefantiasi patologica degli ordini forensi porta con sé, come naturale conseguenza, la disoccupazione e il disagio economico della gran maggioranza dei professionisti, e quindi il progressivo abbassamento intellettuale e morale della professione, del quale la pubblica opinione, pur senza intenderne esattamente le cause, si rende conto con tanta severità di giudizi*" (pag. 38).

"*Non bisogna dimenticare che il sistema della libera avvocatura ... presenta un grave pericolo, nella possibilità che il regime di benefica concorrenza tra i liberi professionisti si trasformi in una esasperata lotta per l'esistenza quando, aumentando il numero dei patrocinatori in misura sproporzionata al numero delle cause da patrocinare, il normale lavoro professionale venga a scarseggiare per tutti*" (pag. 35) – 1921.

and Matteo Maria Gallizzi (University of Brescia) state the following: "*We explore the relationship between litigation rates and the number of lawyers in a typical supplier-induced demand (SID) frame. Drawing on an original panel dataset for the 169 Italian courts of justice between 2000 and 2007, we first document that the number of lawyers is positively correlated with different measures of litigation rate. Then, using an instrumental variables strategy, we find that a 10 percent increase in lawyers over population is associated with an increase between 1.6 to 6 percent in civil litigation rates. Thus, our empirical analysis supports the SID hypothesis for Italian lawyers: following an increase in their relative number, lawyers may exploit their informational advantage to induce clients to access courts even when litigation is unnecessary or ineffective.*" – 2010 [13].

Each of these analyses reached the same conclusion: too many lawyers, too many unnecessary and ineffective litigations.

Since 2008 / 2010 the situation has worsened in Italy:

- the Italian litigation "market" has shrunk; the number of new civil proceedings has decreased due to the economic crisis, starting in 2008, and the increase in court fees [14]:

Table 7 Civil proceedings per legal year (numbers x 1,000) [15]

	Justice of the peace	Trial courts	Total *
2009			
Registered	1.948	2.835	5.012
Defined	1.706	2.800	4.717
Pending 31.12	1.744	3.540	5.826
2010			
Registered	1.477	2.725	4.437

13 A study by the Bank of Italy found similar results: Carmignani Amanda and Giacomelli Silvia, "*Too many lawyers? Litigation in Italian Civil Courts*", Working Paper (Tema di discussione) n.745, February 2010, http://www.bancaditalia.it/pubblicazioni/econo/temidi/td10/td745_10/td_745_10/Sintesi_745.pdf .

14 According to the Italian Bar Council (Consiglio Nazionale Forense) + 180% from 2005 to 2012; CNF January 24th,2014 http://www.consiglionazionaleforense.it/site/home/naviga-per-temi/in-evidenza/articolo8457.html .

15 Source: "Relazione del Ministero su amministrazione della giustizia" .

Defined	1.748	2.742	4.706
Pending 31.12	1.485	2.742	5.532
2011			
Registered	1.509	2.678	4.409
Defined	1.561	2.703	4.479
Pending 31.12	1.554	3.452	5.566
2012			
Registered	1.379	2.671	4.267
Defined	1.512	2.761	4.500
Pending 31.12	1.367	3.372	5.285
2013			
Registered	738	1.499	2.326
Defined	775	1.547	2.447
Pending 30.06	1.320	3.328	5.159
Variations % 2012 / 2009	29 - 11 - 22	6 - 1 - 5	15 - 5 - 9

* Justice of the peace (Giudice di pace), Trial courts (Tribunale ordinario), Juvenile court (Tribunale minorenni), Court of Appeal (Corte d'Appello), Supreme Court of Cassation (Corte di Cassazione)

- the number of lawyers has still increased (x 100,000 inhabitants)

Table 8

1989	94
2000	207
2010	350
2012/08	406

- lawyer revenues have decreased: average taxable income for social security purposes amounting to EUR 40,333 in 2012; 13% decrease, 2012 / 2008[16].

16 Federica Micardi, "*Dai notai agli ingeneri redditi in forte calo*", Il Sole 24 Ore 11.3.2014, pag. 22 http://www.banchedati.ilsole24ore.com/EstrazioneDoc.do?product=-BIG&doctype=HTML&iddoc=SS20140311022BAA

Therefore, most Italian lawyers read the acronym ADR not as Alternative Dispute Resolution but as "Alarming Drop in Revenues".

4 . 2010: Mandatory mediation approved

According to the Italian Ministry of Justice, in 2010 there were a tremendous number of pending civil litigation cases in the overall judicial system: 5.532.216. Mandatory mediation came into force.

Legislative Decree 28/2010 and Ministerial Decree 180/2010, both enforced since March 21st, 2011, established compulsory mediation in many civil matters; mediation became a mandatory first step before going to court. Mandatory mediation was met with furious opposition by most lawyers. Moreover, the ADR training course proved inadequate: it consisted of only 50 hours of lectures, including the final exams (with a pass rate of 99,99999 ... % !!!).

Training can thus be seen as the Achilles heel of Italian mediation proceedings [17] .

In Italy, certified mediators are required to:

- hold a BA degree in any subject, or membership in a professional association (in this second case, mediators are only allowed to manage proceedings related to their professional competences);
- complete a 50 hour training course on theory and practice, designed for a maximum of 30 trainees, consisting of:
  - Italian, European and international laws on mediation;
  - facilitative and adjudicative mediation procedures, and mediation ordered by a judge;
  - conflict management techniques;
  - communication techniques;
  - mandatory mediation contract clauses;
  - form, content and effects of mediation demand and agreement;
  - mediator's duties and responsibilities;
  - simulated mediation sessions;

17 Matteucci Giovanni, "*Mediazione avanti tutta ma ... la formazione?*", January 30 th, 2012 http://www.altalex.com/index.php?idnot=16703

Riccardi Carlo, "*Formare alla mediazione*", July 21st, 2014 http://blogconciliazione.com/2014/06/formare-alla-mediazione/

- final 4 hour test;

- refresh their training every two years with an 18 hour advanced training course on the above mentioned subjects, including simulated mediations, and attend 20 mediation procedures.

Certified ADR trainers in Italy are required to:

- publish works on ADR theory: 3 articles or books on ADR, issued by a national based publisher, with ISBN code for books and ISSN for serial issues; alternatively, ADR scientific issues published by public bodies; online publications are not admitted;

- practice ADR: management of 3 mediation procedures;

- give lectures on ADR to professional associations, public bodies, Italian or foreign public universities;

- refresh their training every two years with a 16 hour training course run by professional associations, public bodies, Italian or foreign public universities.

Mediation is a multidisciplinary science; a 50 hour course is enough *to inform*, but not *to form* professionals. Moreover, most teachers and participants were lawyers; therefore, lectures mainly focused on civil procedure laws as applied to mediation. And approximately 99,99999 ... % of candidates were successful in the exams !!!

On March 21st, 2011, mandatory mediation took off. The initial results were encouraging: only 26 – 30% of proceedings saw all parties present (understandably so, not only because of the lawyers' hostility, but also due to the novelty of the procedure), but, when all parties were present, the success rate was 59 – 51%. A final agreement was achieved in only 15% of mediations. Not too bad. And, overall, three to four months were required to reach the deal.

Over time, the number of proceedings increased as well as the percentage of proceedings where all parties were present. But the success rate of the latter started to decline, continuously, constantly, and stubbornly, until the end of 2012 (see table 10, column C).

Why?

The mediator's fee doubles when an agreement is reached. This acts as an incentive to the professional, who will try to ensure that the proceeding results in a positive solution; however, in some (if not many) cases, the parties left the mediation just before its final session, where the deal was to be signed.

Moreover, it is my opinion that, at the beginning of 2011, mediators were professionals with expertise in the subject, with many years of training behind them, and able to understand the causes of conflict and how to manage them. Later on (also because of the economic crisis), people who jumped on the bandwagon were arriving on the scene; the consequences were deterioration in the quality of the mediation process management and worse results.

Legislative Decree 28/2010 and Ministry Decree 180/ 2010 regulated mediation.

According to the Italian law, mediation is the procedure, conciliation the result (the agreement). It can only be used for disputes over alienable rights ("*diritti disponibili*").

Mediators (trained according to the law) operate within organizations ("*Organismi di mediazione*", mediation bodies) under the control of the Ministry of Justice; they manage the proceeding, without the power to make binding decisions or judgments for the recipients of the service itself. Nevertheless, the mediator may make a written proposal (even if the parties do not require it and *even in the absence of a party*). Within the following seven days, the parties are free to accept or decline the proposal, but in the subsequent trial, should the judgment be the same as the refused proposal, the claimant must pay all judicial costs, including those paid by the losing party.

Proceedings must remain secret.

The final agreement is enforceable if it does not violate mandatory regulations or it is not contrary to public policy, and when it is approved upon examination by the president of the court.

The parties may participate in mediation alone or assisted by a professional (lawyer, engineer, etc.). These are the regulations for voluntary administered mediation.

Mediation can also be requested by the judge (delegated mediation) in disputes over alienable rights ("*diritti disponibili*"). But the judiciary has shown a "*benign neglect*" of mediation, which is regarded as "*the daughter of a lesser God*".

Legislative Decree 28/2010 also introduced mandatory (by law) administered mediation for a large range of disputes. The plaintiff, before turning to the court, was to undergo mediation proceedings in litigations relating to:

since March 20th, 2011	
"diritti reali"	rights in rem
"divisione"	division of assets
"successioni ereditarie"	inheritance
"patti di famiglia"	family estates
"locazione"	lease
"comodato"	gratuitous loans
"affitto di aziende"	business lease
"risarcimento del danno derivante da responsabilità medica e diffamazione a mezzo stampa o con altro mezzo di pubblicità"	civil liability for medical malpractice and defamation in the press and other media
"contratti assicurativi, bancari e finanziari"	insurance, banking, and financial contracts

since March 20th, 2012	
"condominio"	condominium
"risarcimento del danno derivante da circolazione di veicoli e natanti"	civil liability for damage caused by vehicles or ships

Interim and preventive procedures were exempted from the mandatory attempt at mediation.

Proceedings were to be concluded within four months time. Tax relief was to be provided to the parties involved in the mediation procedure, and doubled when the agreement was reached.

Legal advisers to the parties were to inform their clients about the mediation process.

Legislative Decree 28/2010 also recognized the existence of voluntary negotiations and peer mediation in civil and commercial disputes, complaint procedures for service users (as set out in complaints policies), and two other kinds of ADR in the banking and financial sector: the "*Arbitro Bancario e Finanziario*" and the "*Camera Arbitrale e di Conciliazione*", two independent bodies, the former of the Bank of Italy, the latter of the Italian Securities and Exchange Commission (Consob)[18].

More than 200,000 disputes were expected to be transferred from the courts to mediation (one million in five years). There was a "*mediation ex-*

18 In the Italian banking and financial sector there are at least five different types of ADR.

plosion", or, to be precise, the *expectation* of a *"mediation explosion"*: due to the economic crisis, many professionals, *mainly lawyers*, rushed to attend courses on mediation (for a duration of 50 hours, roughly 4 week-ends). As a consequence, there were about 1,000 "*Organismi di medizione*" (mediation bodies) and -while no one knows the exact number – approximately 40,000 mediators (*mainly lawyers*). There were more mediators (*mainly lawyers*) than mediations.

Table 9 Civil (not family) and commercial mediation in Italy

Proceedings	Pending initial A	Registered B	Settled C	Pending final A+B-C = D
2011				
2nd quarter	n.a.	18.138	n.a	n.a.
3rd "	n.a.	15.670	n.a	n.a.
4th "	n.a.	27.002	n.a	n.a.
21.3 / 31.12	742	60.810	40.162	21.390
2012				
1st quarter	21.390	30.880	19.131	33.139
2nd "	33.139	51.634	39.758	45.015
3nd "	45.015	45.040	n.d	n.d
4th "	n.d.	27.325	n.d	23.638
Year	21.390	154.879	152.631	23.638
2013				
1st quarter	23.638	4.785	9.711	18.712
2nd "	18.712	4.485	1.118	22.078
3rd "	22.078	6.369	3.572	24.875
4th "	24.875	25.965	9.618	41.222
Year	23.638	41.604	24.019	41.222
2014				
1st quarter	49.342	58.389	33.349	74.383

Table 10

	Registered proceedings A	All parties present B	Success rate all parties present C	Agreement all parties present	
				BxC=D	AxD=E
2011					
2nd quarter	18.138	26%	59%	15%	2.811
3rd "	15.670	30%	51%	15%	2.397
4th "	27.002	36%	49%	18%	4.860
21.3 / 31.12	60.810	31%	54%	17%	9.912
2012					
1st quarter	30.880	36%	44%	16%	4.860
2nd "	51.634	26%	43%	11%	5.783
3rd "	45.040	22%	40%	9%	3.963
4th "	27.325	21%	38%	8%	2.213
Year	154.879	26%	42%	11%	16.727
2013					
1st quarter	4.785	31%	43%	13%	646
2nd "	4.485	34%	62%	21%	946
3rd "	6.369	23%	58%	14%	866
4th "	25.965	36%	32%	12%	3.064
Year	41.604	31%	49%	15%	6.365
2014					
1st quarter	58.389	40%	28%	11%	6.598

Table 11[19]

	Proceedings defined A	All parties present B	Success rate all parties present C	Agreement all parties present	
				BxC=D	AxD=E
2011					
21.3/31.12	40.162	31%	53%	16%	6.586
2012.					
1st quarter	19.138	36%	44%	16%	3.004
2nd "	39.758	26%	43%	11%	4.453
3rd "	n.a.	22%	40%	9%	==
4th "	n.a.	21%	3%	8%	==
Year	152.631	26%	41%	11%	16.484
2013					
1st quarter.	9.711	31%	43%	13%	1.311
2nd "	1.118	34%	62%	21%	236
3rd "	3.572	23%	58%	14%	486
4th "	9.618	36%	32%	12%	1.135
Year	24.019	31%	49%	15%	3.675
2014					
1st quarter.	33.349	40%	28%	11%	6.936

Table 12 Types of proceedings

	Mandatory by law A	Voluntary B	Delegated by judge C	Compulsory by contract D
2011				
21.03 / 31.12	77%	20%	2%	1%
2012 Year	86%	11%	3%	0,03%

19 Table 7 and tabel 8 differ in the content of the first column (proceeding registered / defined); contents of colums B and C are identical. It's difficult that the mediations, although very fast, end in the same quarter, in which they are started. Therefore two different tables: the analysis of the same phenomenon, taking account of the time lag.

2013				
1st quar.	53%	43%	4%	1%
2nd "	43%	54%	2%	1%
3rd "	25%	70%	1%	3%
4rd "	64%	39%	2%	1%
Year	55%	42%	1,9%	1,4%
2014				
1st quar.	84%	13%	2%	0,8%

Statistics based on data by Italian Ministry of Justice
https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Home.aspx

5 . Lawyers' strike, Constitutional Court decision, mandatory mediation revoked

Even if most mediators were lawyers, Italy's national lawyers union (*Organismo Unitario dell'Avvocatura Italiana*) called for a national strike [20] . Most lawyers feared "*A*larming *D*rops in *R*evenues"; many of them rightly pointed out the low quality of the service offered by many mediation bodies; some in-

20 " *Italian Lawyers Strike Because of Mandatory Mediation - Believe it or not, the Italian Bar Association is calling on its members to strike in opposition to a mandatory mediation law. According to the website for the Organismo Unitario dell'Avvocatura Italiana (the Italian bar association- www.oua.it), lawyers are being asked to participate in a strike from March 16-22, and a public protest demonstration on March 16th. The strike is aimed at a new law commencing March 21st, requiring mandatory mediation in certain cases. Lawyers are being asked to attend the protest and to cease work on all cases during that period.*

" *Interestingly, the timing of the strike blankets a national holiday (March 17-18) and a weekend (March 19-20), effectively extending what is already a four day weekend.*

" *Now that mediation is an accepted part of the civil litigation process, we forget that in other parts of the world, lawyers are still fighting against measures that may settle cases and reduce legal fees. Even though there is a significant backlog of cases in Italy, lawyers are obviously not taking this new law lying down.*

" *That said, it is interesting that the Government passed the law notwithstanding such strong opposition from the Bar*" - Paul Godin, ADRChambers (Canada), April 19th, 2011

http://www.adrchambers.com/blog/2011/04/19/italian-lawyers-strike-because-of-mandatory-mediation/

voked the constitutional right to defense in a trial (but they were locked in their ivory tower: can a *res judicata*, after 10 – 15 years, still be called "justice"?). Numerous appeals against the legislative decree 28/2010 were made, needless to say, by lawyers themselves. On December 12th, 2012, the Constitutional Court declared the unconstitutionality of compulsory mediation, due to overdelegation (the Government went beyond its powers in creating the delegated legislation) and not because of the breach of a citizen's right to defense.

Table 13 Outcome according to type of proceeding

	Settled proceedings according to type of mediation A	Success rate all parties present B	Agreement rate all parties present AxB = C
21.3.2011 / 31.3.2012			
Mandatory by law	78%	45%	35%
Voluntary	18%	65%	12%
Ordered by judge	3%	33%	1%
Year 2013			
Mandatory by law	56%	30%	17%
Voluntary	42%	64%	27%
Ordered by judge	2%	22%	0,5%
2014 1st quarter			
Mandatory by law	85%	22%	20%
Voluntary	13%	62%	8%
Ordered by judge	2%	14%	0,32%

Statistics based on data by Italian Ministry of Justice
https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Home.aspx

The number of mediation proceedings dropped, even as there were almost 1,000 mediation bodies, almost 40,000 mediators, and still an enormous number of legal disputes. Why? In Italy, where there has never been a liberal or an industrial revolution, but only a *bourgeois* revolution managed by Benito Mussolini, almost everything is expected to come from the State, from the public sector (Italian public debt is one of the highest in Europe). Therefore, no mandatory mediation by law, no mediations!

Nevertheless, voluntary mediation survived, with a much higher success rate than that of compulsory mediation.

6 . 2013 - Mandatory mediation reloaded

Under pressure from the European Union, the so called "To Do" Law decree 69/ 2013, reintroduced mediation as a mandatory first step before going to court, starting September 20th, 2013. The most efficient mediation bodies have always been those run by private entrepreneurs and the Chambers of Commerce; the less efficient, those run by lawyers.

But the heavy pressure exerted by lawyers on the members of Parliament (many of whom are lawyers as well) led to significant changes from the previous law:

- "*risarcimento del danno derivante da circolazione di veicoli e natanti*" - civil liability for damage caused by vehicles or ships was exempted from mandatory mediation; civil liability for medical malpractice was extended to include all forms of health care malpractice;

- accredited mediation bodies must be chosen within the territorial jurisdiction of the court over which the judge presides;

- the settlement agreement reached before an accredited mediation body can be enforced either when undersigned by the lawyers representing the parties or when approved by the court; mediation proceedings are to be concluded within a three months period;

and, more importantly,

- COMPULSORY LAWYERS' ASSISTANCE TO THE PARTIES;

- THE FIRST "INFORMATIVE" MEETING FREE OF CHARGE (except for a 48,00 euro fee – the mediator works for free, the lawyer hired by the party is paid); the invited party, according to lawyers' misinterpretation, can abstain from the proceeding by not attending the mediation meeting (with the plaintiff and the mediator) or, present at the first informative meeting, can "op-out" from the process [21].

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21 "*These elements, which were not part of the June 21st, 2013 decree, were vigorously advocated for by members of the Italian bar during the process of converting the decree into law. Parliament eventually accepted them*" Giuseppe De Palo, "*Mandatory mediation back in Italy with new Parliamentary rules*", Mondoadr, October 22nd, 2013, http://www.mondoadr.it/cms/articoli/mandatory-mediation-italy-parliamentary-rules.html

The behaviour of most lawyers has been (and still is) almost a form of boycott: when invited to take part in a mediation proceeding, they refuse to do so. Oftentimes, lawyers attend the first informative meeting (without the party they represent) only to declare: "*We are not interested in proceeding*". The same behaviour is adopted by many banks and insurance companies.

The practical result consists of 3,064 agreements where all parties were present in the fourth quarter of 2013, and 6,598 in the first quarter of 2014; in percentage terms: 12% and 11% of the registered proceedings (see Table 10, column D). A huge hustle and bustle of paper work and very poor results, especially when compared to the more than 5 million pending civil litigations.

Furthermore, the Law Decree has conferred upon ALL lawyers the qualification of mediators "*ope legis*" and entrusted their representative bodies with decisions about training. The following training requirements were established:

- a 15 hour training course, with a maximum of 30 trainees (5 hours on Italian legislation; 10 hours on conflict management techniques and mediation skills);

- 2 attendances of mediation procedures.

This perfectly exemplifies the coherence of those, who had criticized the inadequacy of the 50 hour courses, and shows a very poor knowledge of mediation and its techniques.

With regards to this issue, Calamandrei's words still ring true a century later: *"... these two hundred lawyers who, for fifty years, have formed the unchangeable basis of our Chamber, whenever some bolder minister confronted them with the issue of judicial reform, allowed themselves to be guided by a parochial or class politics, rather than by a national politics; and so it seems, though it is sad to admit it, that the large number of lawyers sitting in Parliament has been so far the most formidable obstacle against a radical reform of our legal system and our procedural law*" ("*... questi duecento avvocati che da cinquanta anni costituiscono la base immutabile della nostra Camera, tutte le volte che da qualche ministro più audace sono stati messi dinanzi ai problemi della riforma giudiziaria, si sono lascati guidare anziché da una politica nazionale, da una politica campanilistica o addirittura da una politica di classe: sicché sembra, è triste doverlo confessare, che il gran numero di avvocati sedenti in Parlamento sia stato fin'ora il più formidabile ostacolo contro una riforma radicale del nostro ordinamento giudiziario e del nostro diritto processuale*" - Calamandrei Piero, "*Troppi avvocati (Too many lawyers)*", Ed. La Voce, page 86, 1921.

Table 14 Mediation proceedings according to type of mediation bodies

	Meditation bodies A	Settled proceedings B	All parties present C	Agreement all parties present D
21.3.2011 / 31.3.2012				
Chamber of Commerce	82	15.916	38%	50%
Private	569	28.768	35%	51%
Professional not lawyers	59	214	34%	29%
Bar association	103	14 394	30%	34%
	813	59.292	35%	48%
Year 2013				
Chamber of Commerce	87	3.902	30%	40%
Private	699	12.882	32%	49%
Professional not lawyers	85	336	43%	47%
Bar association	115	6.900	35%	30%
	986	24.019	32%	42%
2014 1st quarter				
Chamber of Commerce	86	4.040	40%	26%
Private	643	19.033	40%	33%
Professional not lawyers	86 114	453	27%	9%
Bar association	9.824	33.349	41%	21%
	924		40%	28%

Table 15 - Legal assistence

	Invitating party to mediation		Present invited party	
	legally assisted A	NOT legally assisted B	legally assisted C	NOT legally assisted D
21.3.2011 / 31.12.2012	81%	19%	81%	19%
2011 Year	84%	16%	79%	21%
1.1 / 30.9.2013	72%	28%	65%	34%
in the voluntary mediation *				
2014 1° quarter	35%	65%	26%	74%

* Untill September 19th, 2013 legal assistance in mediation was not compulsory.
Statistics based on data by Italian Ministry of Justice
https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Home.aspx

7 . "*Il diavolo fa le pentole ma non i coperchi*", truth will out – The judiciary.

One of the most interesting phenomena in the context of mediation in Italy, since the end of 2013, is the role of the judiciary.

As already mentioned, according to Legislative Decree 28/2010 mediation could also start at the invitation of the judge. But very few judges made use of this opportunity (see Table 12, column C).

Dr. Massimo Moriconi acted as a pioneer and, in the 2012 – 2013 period, achieved a reduction of at least 10% of the disputes entrusted to him [22] by using this strategy.

Moreover, Law decree 69/2013 established:

- the possibility for judges (since June 2013) to make a solution proposal based on equity (ex art. 185-*bis* civil procedure code) in ALL subjects related to alienable civil rights which the parties may accept or not (not binding arbitration);

- the possibility for judges (since September 2013) to ORDER litigants to undergo mediation in ALL subjects related to alienable civil rights (delegated

22 http://www.mondoadr.it/cms/articoli/resoconto-del-convegno-il-ruolo-del-giudice-nella-mediazione.html

mediation). In many cases, the judges blended these two options: they made a solution proposal; and if the proposal was rejected, they ordered mandatory mediation (arbitration – then – mediation).

From June 2013 to June 2014, only about ten judges have used these opportunities in about fifty cases [23]. Very few. But with very interesting results: in most cases lawyers, though reluctant to do so, joined the mediation procedure and litigants reached an agreement. Last but not least, judges have opposed the practice of those lawyers who do not attend the first informative meeting, or attend it (without the party) only to declare that they are not interested in proceeding with the mediation. Judges are condemning this behavior, remarking that: "*lawyers are mediators 'ope legis', therefore 'ope legis' they know mediation, the necessity of the parties' presence and of a real interaction among them*".

"*Il diavolo fa le pentole ma non i coperchi*", truth will out!

Since September 2013, the above cited Dr. Moriconi has used the tactic of "arbitration-then-mediation" and in almost 50% of cases the parties have reached an agreement [24] .

8 . New rules beeing approved

In August 2014, pending civil litigations in Italy are still more then 5millions. The Prime Minister on June 30, 2014 announced 12 goals to be reached in the reform of Justice. Two days later the Ministry of Justice started on internet a public confrontation on the new rules, to be adopted in Semptember 2014 [25] .

As far as mediation is concerned:

- transfer before the arbitrator the cases pending before the court, upon the parties' agreement ;

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23 For further information see www.adrmaremma.it , Italian section, News.

24 "*Il Tribunale di Roma raggiunge il 58% di accordi a seguito della proposta del giudice e della mediazione demandata*", Massimo Moriconi, 14.9.2014

http://www.mondoadr.it/cms/articoli/il-tribunale-di-roma-raggiunge-il-58-di-accordi-seguito-della-proposta-del-giudice-della-mediazione-demdnata.html .

25 http://www.giustizia.it/giustizia/it/mg_2_7.wp;jsessionid=8E68C407DD8FC1E142FA9EB4A5E6D754.ajpAL03

https://www.giustizia.it/giustizia/prot/it/mg_2_7_1.wp?previsiousPage=mg_2_7

https://www.giustizia.it/giustizia/prot/it/mg_2_7_2.wp?previsiousPage=mg_2_7

- assisted negotiation by lawyers: for an application for payment in any case up to € 50,000; in a lot of disputes on disposable civil rights (in matters not subject to mandatory mediation); for the separation between husband and wife (provided there are no children under age or anyway dependant), the litigants, assisted by their lawyers, will be able to reach an agreement, that is enforceable; as mediation, this procedure will be a pre-condition to assesment in court [26];

- equating judicial proposal to the judgment, for the purpose of assessing the productivity of the judge;

- compulsory judicial proposal in all pending court cases lasting for more than three years.

Also, finally, "*focus on interest, not position*" :

- who loses in court will refund the expenses of the process, limiting the possibility of compensation;

- those who do not voluntarily pay their debts will have to pay more; a high statutory rate of interest for late payment will be provided, to an extent at least equal to the market price; therefore the debtor, who forces the creditor by applying to the court to get the amount back, will not make money out of the lengthy procedures.

What is predictable?

- Explosion of judicial proposals and (to a lower degree) delegated mediation by judges;

- greater caution in taking legal action carelessly;

- lawyers' attempt to extend -surreptitiously- the assisted negotiation also to the subject matter of mandatory mediation.

If this last point doesn't come true, Italy will be the European Country with the largest number of ADR methods (and, as already happens, procedures).

What it will also involve:

- satisfactory knowledge of mediation (and, now, collaborative law, which is not mediation) with proper taining;

- issue by the ministry of certificates of the expenses incurred for mandatory mediation, so as to benefit from the tax reduction provided by law.

26 Decreto legge (Law Decree) 132, September 12nd, 2014 art. 1 and art.2.

P.S. – Needless to say: mandatory mediation in Italy is no "*mediation*" at all ! [27]

27 Matteucci Giovanni, "*E non chiamatela mediazione! – And do not call it mediation*" Chamber of Commerce of Milan, 11.12.2013 http://blogconciliazione.com/2013/12/e-non-chiamatela-mediazione-anche-perche-ha-una-funzione-paragiurisdizionale/

LIMITES DOS MEIOS ALTERNATIVOS DE CONFLITO

José Marinho Paulo Junior

> *"Devemos estar conscientes de nossa responsabilidade: é nosso dever contribuir para fazer que o direito e os remédios legais reflitam as necessidades, problemas e aspirações atuais da sociedade civil: entre essas necessidades estão seguramente as de desenvolver alternativas aos métodos e remédios, tradicionais, sempre que sejam demasiado caros, lentos e inacessíveis ao povo: daí o dever de encontrar alternativas capazes de melhor atender às urgentes demandas de um tempo de transformações sociais em ritmo de velocidade sem precedente".*
>
> *CAPPELLETTI, Mauro. GARTH, Bryant. Access to Justice: The Worldwide Movement to Make Rights Effective—a General Report. Access to Justice: A World Survey. Milan: Dott. A. Giuffrè Editore, 1978.*

O espírito conciliatório a cada novo dia inspira mais e mais o meio judiciário, seus métodos e modos. A resolução alternativa de conflitos, um dos bastiões dos novos tempos, evolui de forma multifacetada, podendo dar-se por inúmeros meios, nenhum deles impassível de falhas, desafios e erros; todos sempre em evolução. Entre os extremos opostos da autotutela e do deslinde judicial, têm os estudiosos do Direito Processual buscado alternativas mais eficazes que, ao tempo em que reduzam o impacto de volumosas demandas desaguarem nas mesas já abarrotadas de nossos Tribunais, consubstanciem verdadeira e abreviada pacificação social.

Aplaude-se efusivamente a difusão de práticas (extrajudiciais ou, ainda quando judiciais) inconvencionais de resolução de conflito, sem se cerrarem os olhos aos limites destas inovadoras alternativas de resolução de conflito. Antes, reconhece-se: não necessariamente conduzem à obtenção de resultados superiores aos daqueles oriundos de meios tradicionais (ainda que em crise[1]). E a facilitação de processos, individuais ou coletivos, no âmbito judicial ou fora dele, não é a cura para todos os males do processo.

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1 Sobre a crise do Processo e do Direito, em um contexto global, mais amplo e complexo, vide JOSÉ MARINHO PAULO JUNIOR (*O Poder Jurisdicional de Administrar*. Rio de Janeiro: Lumen Iuris, 2005).

Ao contrário de ser uma panacéia para todos os males, qualquer destas alternativas, por mais promissora ou messiânica que seja, consagrar-se-á sempre e sempre a enfrentar apenas uma parte desta crônica realidade conflitual, jamais se pretendendo que combata cega e debilmente todo e qualquer problema confrontado[2]. Bem ao revés, assevera-se categoricamente sua impropriedade para uma ampla diversidade de conflitos.

Não se trata, no entanto, de abandonar uma alternativa que tem se mostrado concretamente viável em inúmeros casos. Trata-se sim de se manter à disposição um leque de opções de resolução de conflito, sabendo os limites que cada uma destas enfrenta. Sob tal enfoque, sem em uma linha sequer se perfilhar aos que decretaram, de afogadilho, a morte da neófita técnica, reconhece-se, ao revés, a utilidade de sua adoção (ou antes, de sua difusão), passando-se a criteriosamente refletir sobre os limites que, enfim, qualquer método de pacificação há de aqui ou ali enfrentar.

Uma das primeiras constatações acerca dos limites que reduzem o alcance de meios de facilitação atine ao fato de que estas também estão condicionadas pelo ambiente socioeconômico em que estão inseridas. Direito, Processo e meios alternativos, nenhum está isento ou acima dos efeitos nefastos de uma crise de uma sociedade cujos conflitos pretenda resolver e que nele será necessariamente replicada. Noutros termos, a crise social e a subsequente carência de meios estruturais (tal como um corpo de peritos adequado) afetarão indistintamente meios tradicionais e alternativos de facilitação de conflito.

Não é por outra que ROSHAN DANESH, Professor de Direito Constitucional da *University of British Columbia* e Doutor pela Faculdade de Direito de Harvard, enxerga a mediação e os demais meios de resolução de conflito como de caráter não apenas interdisciplinar, mas sim – e muito além - TRANSDISCIPLINAR, composto e influenciado pela saúde de todas suas partes. Assim escreveu:

"*Clearly, it (the field of conflict resolution) is an* interdisciplinary field*, but it is also more than that (...) Because conflict not only has a unique presence and is distinct in a number of fields of knowledge – such as physics, biology, psychology, sociology, law, political science – but also has common elements in all its formulations, it might be better to think of conflict resolution as a* transdisciplinary field*. It denies the borders that modernity has imposed on knowledge, but not simply by being between (interdisciplin-*

2 Aliás, nas palavras de *Ortega y Gasset,* das meditações de Quixote*: "Do querer ser ao crer que já se é vai a distância do trágico ao cômico. Esse é o passo entre o sublime e o ridículo".*

ary) existing borders. It also transcends those borders, drawing upon and integrating knowledge and practices from across borders, and thus in important ways calls for a redrawing of the knowledge map."[3]

Assim, não é demasiado antecipar que a impropriedade curricular das faculdades de Direito e a carência de especialistas de apoio para juízes e promotores em tutelas complexas não tem por única vitima o processo, mas também imputam danos significativos à eficiência de todos os meios de resolução de conflito. Bem mais, fica tal debilidade aprofundada quando no campo da mediação, por somar-se à crítica intrínseca ao treinamento ambivalente de facilitadores quanto ao uso de manipulação ou coerção:

"*The training is ambivalent about manipulation and coercion (...) the contradiction between letting the disputants provide their solution to their problem and the mediator's responsibility to maneuver the disputants into making an agreement plagues many dispute processing programs and may be hard for trainees to assimilate when it is not confronted directly in training.*"(TOMASIC e FEELEY. 1982, p. 117)

O treinamento prático ofertado pelas principais instituições acadêmicas nesta área oscila entre identificar a facilitação como uma técnica ou uma arte, mas admite sempre que a INTUIÇÃO deve fazer parte do acervo de instrumentos do facilitador. E nisto há outra crítica tecida a partir de pesquisa da Universidade de Yale, conduzida pelo renomado Professor Shane Frederick, havendo sido por este desenvolvido teste em que a intuição se mostra falível de forma consistente[4]. O facilitador é encorajado a confiar em sua intuição, quando inúmeros estudos de economia do comportamento recomendam o

3 Em igual sentido, vide por todos MEDIATION LEVEL I (13 ed. New Westminster, BC: Justice Institute of British Columbia, Centre for Conflict Resolution, 2009): "*Mediation is a multidisciplinary and eclectic practice, combining theoretical bases and approaches from many different disciplines.*" (*op. cit.,* intro).

4 Vide por todos Frederick, S. Cognitive reflection and decision making. Journal of Economic Perspectives, 2005, 19(4), 25-42). Alguns exemplos destes testes: "A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost? / If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? / In a lake, there is a patch of lily pads. Every day, the patch doubles in size.If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?" Se a resposta foi dada intuitivamente, sugere o autor que se refaçam calmamente seus cálculos: a resposta da primeira é $0,05 (e não $0,10!); a segunda, 5 minutos (e não 100!); a última, 47 dias (e não 24!).

inverso – *precisamos, sem cinismos, sempre desconfiar daquilo que nos vem como intuitivo*[5].

Tampouco restam ilesos às críticas dos autores acima nominados os facilitadores e seus limites socioculturais, não se podendo cientificamente atestar que sejam mais apropriados que os juízes que presidem as ações afins.

"Our third conclusion concerns the influence of social organization on mediation (...) mediators are strangers – their values and life experience are unknown. Institutionalized mediation is unfamiliar and its use is exceptional." (pp. 129 e 146-148)

A latere, críticas ácidas se tecem quanto ao PARADOXAL fato de inúmeras iniciativas de desjudicialização de conflitos se darem a partir das Cortes, constituindo, em reflexo, muitas vezes uma singela "roupagem nova" de meios não mais alternativos em sua essência[6]. Bem pior, em países em que alternativas como tais têm sido adotadas, verifica-se uma gradual captação deste movimento por advogados[7]-[8].

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5 Vide por todos DAN ARIELY em *The Upside Of Irrationalionality – The Unexpected benefits of defying Logic*. New York: Harper Perennial, 2012, p. 288). No mesmo sentido, tenha-se o artigo daHarvad Law School: "*We realize that our recommendations run counter to the implicit trust and confidence that many of us have in our intuition. However, the data is clear: with the use of intuition comes the potential for significant psychological biases that lead to irrationality. By accepting this gift, you can learn to overcome bias and think more rationally during your most important negotiations*" (Strategies for Negotiating More Rationally, edited By PON_Staff on April 16th, 2013 / Negotiation Skills, Program on Negotiation, Harvad Law School. Disponível em http://www.pon.harvard.edu/?p=34724/?mqsc=E3503954& utm_source=WhatCountsEmail&utm_medium=PON%20Harvard+Negotiation%20Insider%20Tuesday&utm_campaign=Negotiation_Insider_04152013. Consultado em 29/04/2013).

6 Vide por todos TOMASIC, ROMAN. FEELEY, MALCOLM M. *Neighborhood Justice – Assessment of an Emerging Idea*. New York: Longman Inc., 1982, p. 242-244.

7 Vide por todos ROSHAN DANESH *inHas Conflict Resolution Grown Up*? toward a developmental model of decision making and conflict resolution. 2012. The International Journal of Peace Studies. Volume 7. www.gmu.edu/programs/icar/ijps/vol7_1/Danesh.html, p. 01: "*One vehement strand of criticism has been the perceived cooptation of the movement by a particular subculture – lawyers (Goldberg, 1997). A movement that was once driven by a substantive and communitarian desire to create layers of social justice, equality, and peace, it is argued, has now been overtaken by procedural, liberal, and efficiency concerns*".

8 Aliás, o transplante da mediação para as exigências de celeridade da Justiça provoca, por certo, impactos negativos naquela. Tenha-se por todos *MEDIATING CIVIL AND*

Adrede, em curioso estudo acerca do motivo pelo qual a mediação era preferida à Corte[9], revelou-se que a *impropriedade desta* e *não a propriedade daquela* era o que influenciara os envolvidos. Noutras palavras, não os méritos da facilitação, mas os deméritos do rito judicialiforme afastavam os jurisdicionados dos Tribunais, a trazer a lume os limites da mediação. E tal constatação descortina um notável problema que qualquer cientista do Direito há de enfrentar: entre o vale das imperfeições e o cume das conquistas, não é simplório avaliar qual dos caminhos – clássico ou alternativo – trilhar. Isto porque, ao menos até a presente data, não há dados estatísticos seguros sobre elementos objetivamente aquilatados. Noutros termos, adstringe-se a análise de custos e benefícios a percepções subjetivas despidas de dados confiáveis.

Atentos à lição de ARIELY no sentido de que é um erro capital em qualquer análise de comportamento a teorização anterior à aquisição de dados[10], volvam-se os olhos uma vez mais a TOMASIC e FEELEY, cabendo transcrever o seguinte excerto:

"*The lack of adequate cost data is particularly unfortunate with respect to essentially comparable processes, such as litigation and arbitration. Assuming for the moment that arbitration would produce results as acceptable as litigation – a premise that is even more difficult to verify – would cost considerations justify the transfer (at least in the first instance) of some entire categories of civil litigation to arbitration, as has been done in some jurisdictions for cases involving less than a set amount of money? (...) The deficiency of sophisticated data concerning the costs of different dispute resolution processes also extends to the factor of speed.*(op. cit. p. 34)

Há quem advogue que há sim dados estatísticos que provariam a superioridade qualitativa dos meios alternativos. Sandy Heierbacher, em seu *Deliberation by the Numbers: A DDC Fact Sheet,* embora reconhecendo a fragilidade de mensuração qualitativa neste campo, assim sustentava:

"*It is true that quantitative measurement hasn't been a strong suit of the field. It is*

COURT-BASED CASES (2 ed, Justice Institute of British Columbia, Centre for Conflict Resolution, 2008, p. 19): "*A time-limited mediation suggests a more directive style may be necessary on the part of the mediator. This means the mediator takes a more active role in guiding and moving the process and the communication, but still leaving control over the substance and outcome to the parties*".

9 Vide por todos TOMASIC, ROMAN. FEELEY, MALCOLM M. *Neighborhood Justice – Assessment of an Emerging Idea*. New York: Longman Inc., 1982, p. 129.

10 The Upside Of Irrationality, p. 294.

also true that some of the most significant impacts, such as policy changes, are inherently difficult to quantify. But at this point, enough scholarly research and evaluative work has been done that is possible to pull together a concise statistical glimpse of the kinds of things these projects accomplish.Matt Leighninger, executive director of the Deliberative Democracy Consortium (an NCDD organizational member) has done just that! The DDC fact sheet "Deliberation by the Numbers" is available on the DDC website. On this 3-page document, Matt lists quantifiable results from reports of deliberation projects and surveys, with the sources to the right. A few notable examples:94% either strongly agreed or agreed that the process would result in better decisions about the city's budget and goals (Community Forum on Budget Priorities in Bell, CA, Amsler 2012); External political efficacy (the extent to which people feel that government is responsive to their interests) increased by 31% ("United Agenda for Children," Charlotte, NC, Nabatchi 2007); 75% of the communities report that since the project, decisions about what happens in the community involve more people; 77% report that there are now more partnerships among local community organizations ("Horizons" seven-state project in the Northwest, Morehouse 2009)." (www.deliberative-democracy.net/index.php?option=com_docman& Itemid=92, consultado em 27/08/2012)

Vale rememorar o hercúleo esforço envidado pelo renomado *International Restorative Justice Institute* no sentido de coletar dados acerca dos benefícios da adoção da Justiça Restaurativa (vide "*Findings From Schools Implementing Restorative Practices*" *-International Institute for Restorative Practices. Bethlehem, US: 2009*). A despeito desta valorosa iniciativa, fato é que substancialmente ainda se restringe a campos tais como o do "*Safer-Saner Schools"* em apenas 03 países (Estados Unidos, Canadá e Inglaterra), sendo temeroso, sem cautelas e ajustes, extrapolar conclusões daí extraídas para outras áreas sequer tangentes e de natureza díspar.

Ante a ausência de dados empíricos seguros, questiona-se se o elevado "nível de satisfação" dos mediandos entrevistados, superior ao anotado por partes de processos judiciais, atém-se única e simplesmente ao grau de envolvimento emocional e psicológico dos envolvidos nesta alternativa. Vide por todos TOMASIC e FEELEY:

"Our first reaction to mediation is that mediation's capacity to produce positive results is more a function of the level of emotional investment than of the subject of a dispute (...) it does seem to us that mediation is more successful in family than neighbourhood disputes, in landlord-tenant than consumer disputes, in dog bite than assault cases. The difference, rather, is between those cases where problems lie close to the surface, on the one hand, and, on the other, disputes that reflect personal scripts, psychic pre-dispositions or social conditions that have become part of an ingrained response to the dispute

or the other disputant.In the ideology of mediation, courts deal only with presenting complaints while mediation confronts underlying causes. Court dispositions therefore tend towards irrelevance while mediation strikes for permanent solutions (...) our reservation is that "underlying cause" is a complicated concept and mediation's power to identify and affect underlying causes is a function of the kind of underlying causes that are present in a particular case. Disputes submitted to mediation may be influenced by several kinds of attitudes, events and conditions. There may, of course, be nothing more at issue than the presenting complaint. The disputants may just differ about facts or norms or values concerning a naked incident. There may be no history to the neither disagreement norbehaviour patterns related to it.(...) Our point is that mediation is not that mediation does not do enough, nor even that its proponents are not careful enough in distinguishing between what it can or cannot do. It is, rather, the mediation is not psychotherapy and that is what many of the disputes that come to mediation require, if any form of social intervention would be helpful. The problem, then is not mediation as a process, but either its intake or referral when confronted with problems beyond its power to address." (*Neighborhood Justice – Assessment of an Emerging Idea. New York: Longman Inc., 1982, pp. 242-246)*

E não pode ser menosprezada a influência das expectativas sobre tal campo. ARIELY rememora ramificações curiosas deste mecanismo psicológico que tanto afeta nossas decisões. Em um experimento em que um novo sabor de cerveja era oferecido e avaliado por clientes escolhidos ao acaso em bares, avaliações foram amplamente favoráveis quando antecedidas por sugestivas (e irreais) descrições do produto e, ao revés, absolutamente pejorativas quando esclarecido que o novo ingrediente era uma generosa dose de vinagre[11]. A experiência foi reproduzida em restaurantes onde pratos continham ingredientes exóticos[12]com resultados semelhantes. Noutro experimento, mediu-se o grau de satisfação de transeuntes ao ouvirem um músico de rua e os de ouvintes de um espetáculo de gala com um célebre violinista, obtendo o último avaliação imensamente mais favorável do que o primeiro, a despeito de, pasme-se, o músico ser o mesmo nas duas situações[13]. Em todos os casos, com consistência perturbadora, a expectativa prévia influenciava a avaliação final. E assim também há de ser com aquelas pesquisas qualitativas, cuja credibilidade, portanto, deve ser contextualizada.

Fato é que o EFEITO PLACEBO, estudado há décadas por profissionais da medicina, deturpa avaliações de acordo com expectativas, impactando não

11 *op. cit.*, p. 206.

12 *op. cit.*, p. 208.

13 *op. cit.*, p. 219.

apenas o etéreo mundo dos pensamentos, mas também o corpo físico, o metabolismo, a saúde, em uma clara demonstração da importância das expectativas em e para nossas vidas.

ARIELY desenvolveu um experimento em que buscava entender o motivo pelo qual medicamentos genéricos produzem efeitos inferiores aos de marcas tradicionais. Para tanto, divulgou o mesmo medicamento a preços ora irrisórios, ora absurdamente elevados, obtendo, como era de se esperar, avaliações melhores pelos que inadvertidamente pagaram mais pelo mesmo. Assim conclui:

"*... not only that beliefs and expectations affect how we perceive and interpret sights, tastes, and other sensory phenomena, but also that our expectations can affect us by altering our subjective and even objective experiences – sometimes profoundly so. (...) 2 mechanisms: beliefs and conditioning (the body builds up expectancy after repeated experiences and releases various chemicals to prepare us for the future) (...) Almost all our participants experienced pain relief from the pill. But when the price was dropped to 10 cents, only half of them did. (...) Most commonly, the patient expects to walk out with a prescription. It is right for the physician to fill this psychic need?*" (PREDICTABLY IRRATIONAL – The Hidden Forces that Shape our Decisions. 2012. P. 228-241)

Mas não se trata apenas de se entrever limites comuns ou prévios ao uso do instrumento alternativo em si. O amplo território em que a medição reina soberana encontra fronteiras inerentes à sua própria topografia. Voltando-se os olhos à MEDIAÇÃO especificamente, várias pedras já foram contra esta jogadas. Já houve, como dito, quem decretasse a morte da neófita técnica[14],

14 Tenham-se as eloqüentes palavras de ADLER: "*The End is Coming! Brothers and sisters, mediators and facilitators, consensus-builders and collaboration gurus: let us gather down by the river. We have much to discuss, not the least of which is that the end of mediation is upon us. In the words of William Butler Yeats, 'Things fall apart; the centre cannot hold.' And, per the words of T.S. Eliot's famous postscript a few short years later, "This is the way the world ends: Not with a bang but a whimper." Should we grieve or cry in despair? Should we clench our fists and curl our lips in anger? Or should we simply adjourn to the bar? I say no to the first two and yes to the third. Friends, uncork your favorite beverage, drink to the best of our past, and toast to the big things we thought we were going to do when all this started. Then, tomorrow when you wake up and shake the snakes and bugs out of your head, it will be time to go to work with renewed energy. Our new job will be to pass the flame of possibility forward and help light new campfires in territories not yet fully explored! I can already hear the protests and denials. Mediation is just getting started, not ending. After years of experimentation, a thousand flowers have finally bloomed. Look at where we have come from in the last*

enxergando novas linhas de facilitação que haveriam de sucedê-la, superando seus tantos limites. E não faltaram "mitos" acidamente criticados pela Doutrina especializada:

"1- mediation is able to deal with the roots of the problems; 2- mediation improves the communicative capacities of disputants; 3- mediators are not strangers but are friends of the disputants; 4- unlike adjudication, mediation is noncoercive; 5- mediation is voluntaristic as it allows disputants to solve their own problems themselves; 6- mediation centers provide easier access to the legal system (page 229:due to their close association with the justice system, these centers seem to be more points of EXIT rather than of ENTRY); 7- disputants want to get away from the courts and into mediation centers; 8- there is such a thing as a sense of community; 9- unlike judges, mediators represent the community and share its values; 10- the use of mediation is a means of reducing tension in the community; 11- mediators are not professionalized and do not require long periods of training; 12- mediation centers are nonbureaucratic and are flexible and responsive; 13- mediation is able to deal with a wide range of disputes; 14- mediation is speedier than adjudication; 15- mediation is less costly than adjudication; 16- mediation is fairer than adjudication; 17- mediation can reduce court congestion and delay; 18- mediation is more effective than adjudication in dealing with recidivism" (TOMASIC, ROMAN. FEELEY, MALCOLM M. Neighborhood Justice – Assessment of an Emerging Idea. New York: Longman Inc., 1982, p.221, 242 e 244)[15]

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three decades and all the innovative adaptations that are taking place as thousands of mediators help tens, perhaps even hundreds of thousands of disputants bring their conflicts to a close by decisions they themselves made." (*The End of Mediation: An Unhurried Ramble On Why The Field Will Fail And Mediators Will Thrive Over The Next Two Decades!*. ADLER, Peter. Disponível em http://www.mediate.com/articles/adlerTheEnd.cfm. Consultado em 22/04/2013.)

15 Contraponha-se a aridez destas críticas ao entusiasmo de SKINNER em seu artigo *Nine Reasons to Mediate Your Conflict: "1. Mediation keeps you in control. In mediation, parties retain 100% control over their agreement, unlike court which puts matters into the hands of a stranger who may or may not share their values. The mediator does not determine the outcome of the dispute – the parties do.2. Mediation is private. No one needs to know that you have gone to mediation. Though there are a few exceptions (like child abuse or threats of violence), pretty much nothing said during a mediation can be held against a party later in court. 3. Mediation is cost effective. Both parties split the cost of the mediator as well as any experts that are required. But also, because it de-fuses conflict and help parties work together instead of against each other, mediation most likely requires fewer paid hours. 4. Mediation resolves the dispute . The parties to mediation generally agree that their agreement is enforceable in court, and there are fewer enforcement actions because a voluntary agreement is less likely to be challenged. 5. Mediation saves relationships. Gain the satisfaction of knowing that a disagreement has*

Se, por um lado, a tese basilar colaborativa de que há sempre um interesse maior a fundamentar posições menores, a visibilidade destas contrapondo a sutil presença daquele, mostra-se frágil, ante a constatação de que, ainda quando o interesse venha a ser desvendado e atingido, o conflito muitas vezes possui desdobramentos demasiadamente complexos para uma simplória sessão de mediação desvendar verdadeiramente o que move uma pessoa[16].

Acresça-se aí a impropriedade de se buscar mediar "conflito monocêntrico": neste, um bem escasso constitui, de fato, o objeto do conflito, que inadmite solução outra em que não haja um vencedor e um perdedor. Por exemplo, numa disputa eleitoral para uma única cadeira no Legislativo, nada justifica buscar-se mediar tal conflito.

Policentrismos e monocentrismos não são como preto e branco. Há incontáveis tons de cinza. Embora, por vezes, ao disputarem uma laranja, uma parte queira a casca para o bolo e a outra, o sumo para o suco, tantas e tantas vezes as partes desejaram somente e tão somente o sumo, tal como a última bóia lançada ao mar para salvar a vida de apenas um dos dois náufragos.

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been resolved in a peaceable manner. 6. Mediation is at your own pace. Parties might reach agreement in one session, scheduled almost immediately. On the other hand, sometimes people need time to mull things over and adjust to ideas. So long as the parties are moving forward with progress, mediations can be scheduled over several sessions, thus enabling all parties to sort out all options and come to peace with various solutions.7. Mediation enables parties to be creative. Mediation enables parties to address root causes of conflict through every means available, including options or strategies that would not be available by way of court order.8. Mediation allows you to communicate your position. Unlike court, in which testimony is tightly controlled, mediation allows parties to air their dispute fully in a process which is designed to encourage each other to really listen, hear, and understand. 9. Mediation is low risk Mediation has an easy exit. If either party feels mediation isn't working, the parties can return to the old way of doing things".(disponível em http://02e1cd2.netsolhost.com/wordpressDE/2010/07/25/nine-reasons-to-mediate-your-conflict/. Consultado em 25.07.2010)

16 Vide por todos TOMASIC, ROMAN. FEELEY, MALCOLM M. Neighborhood Justice – Assessment of an Emerging Idea. New York: Longman Inc., 1982, pp. 122 e 146): "*Naïve understanding of conflict – if special consideration is given to these causes, the conflict can be resolved by an agreement; if the agreement is followed, the social relations will function well and without conflict (...) We do not mean to imply that the universe of interpersonal disputes is split into practical and deep problems and that any fool can easily tell the difference. On the contrary, practical problems may have complicated strands, deep problems can sometimes be helped with surface adjustments, and at the margins one type of problem shades gradually into the other.*"

Some-se a tal complexidade a dificuldade de se divisarem interesses e justificadores, que se confundem (e confundem) em profusão, não havendo linha nítida que os divida, a desafiar a percepção arguta dos mediadores e negociadores colaborativos. Neste sentido, tenha-se:

"Interests as JUSTIFIERS. Interests can be met in many possible ways. An interest becomes a justification for a position if the other person posits that there is only one way to meet that interest"(Shifting from positions to interests. 3 edition. New Westminster, BC: Justice Institute of British Columbia, Centre for Conflict Resolution, 2012, p. 22)

TOMASIC e FEELEY afirmam que, quando nos extremos de uma situação de conflito, entre o insignificante atrito rotineiro facilmente contornável ou o embate violento ou criminoso, a mediação e afins mostram-se impróprios. Em se tratando de causas gravíssimas, estudos estatísticos demonstram que a mediação mostra-se ineficaz e que eventuais acordos eventualmente obtidos por meio desta são usualmente violados[17]. Noutra banda, conflitos em que uma ou ambas as partes estejam intoxicadas ou incapacitadas por psicopatias graves são absolutamente incompatíveis com tais meios alternativos. Vale a nota:

"But mediation is not, nor should be it expected to be, a panacea for all the problems of people in relationships that have deteriorated to the point of criminal acts of aggression. Our findings (about the BROOKLYN EXPERIMENT) suggest that mediation is no more effective than prosecution in preventing recidivism (...) For example, FELSTINER and WILLIAMS (1979) suggest that mediation (because of the brief time involved) is not an appropriate means of dealing with deep-seated, underlying problems that give rise to hostile acts between individuals. Still they believe it may be useful in cases in which disputants' problems lie close to the surface (...) Cases we found to be least amenable to mediation involved disputes between inmates where there was also a deep-seated pattern of serious hostilities. Here people were likely to continue to maintain regular contact after the precipitating incident, and, hence, the probability of continued friction between the disputants remained high. But where there was greater relational distance between the disputants, complainants were more likely to desire reconciliation(...) Conversely, less complex cases, where disputants have only surface problems may – as FELSTINER AND WILLIAM argue – be the most appropriate for mediation. Yet (...) it should be recognized that these disputants may often choose simply to avoid each other rather than to

17 Vide por todos TOMASIC, ROMAN. FEELEY, MALCOLM M. *Neighborhood Justice – Assessment of an Emerging Idea*. New York: Longman Inc., 1982, p. 112.

avail themselves of the opportunity for mediation. Moreover, avoidance in these cases is usually successful (as judged by the standard of recidivism), because the relationship is often expandable. (1982. Neighborhood Justice – Assessment of an Emerging Idea. New York: Longman Inc., p. 169)

Outra ácida crítica que se tece contra a mediação é a de que esta seria imprópria para conflitos em que as partes não apõem qualquer valor ao elo que as une. Assim, ao passo que a mediação serve para melhorar relações, tal ganho, se desprezado pelos envolvidos, não traduzirá qualquer vantagem ou incentivo para que tal meio alternativo seja adotado[18]. De acordo com a emblemática obra *Getting to Yes,* escrita pelos criadores do método colaborativo WILLIAM URY e ROGER FISHER:

"*In single-issue negotiations among strangers where the transaction costs of exploring interests would be high and where each side is protected by competitive opportunities, simple haggling over positions may work fine. But if the discussion starts to bog down, be prepared to change gears.*" (*op. cit.,* p. 152)

Neste sentido, situações em que se anotam abusos relacionais mostram-se inadequados para meios alternativos. Leia-se:

"Mediation is not a solution in all family cases. Relationship abuse is a key factor to consider and a screening protocol is essential. If you are the mediator you should meet separately with each party and ask specific questions to identify if abuse is present before proceeding to a joint session. It is possible that hostility and aggression can be misused by one party in the mediation to overwhelm, intimidate and exhaust another. Where abuse is present, mediation is not likely to be a viable option for safety reasons". (Introduction to Family Law. New Westminster, BC: Justice Institute of British Columbia, Conflict for Conflict Resolution, 2012, intro).

Nesta exata direção, leia-se LINDA K. GIRDNER:

"*Why can't a mediator deal with abuse if and when it is indicated in the course of mediation? Due to denial and fear, in a joint session neither party is likely to assert that spouse abuse has occurred in the marriage. It is difficult for a mediator to ascertain abuse from the dynamics in a mediation session, since the abuser may use subtle cues to inform the abused spouse that she has gone too far. The parties may seem quite agreeable because the abused spouse anticipates the abuser's needs and is willing to comply with them in exchange for her safety. The mediator then becomes an unknowing party to*

18 Vide por todos LON FULLER (p. 30/31).

an agreement based on coercion and submissiveness."(*Mediation Triage: Screening For Spouse Abuse In Mediation Mediator*. MEDIATION QUATERLY, vol. 7, n. 04, 1990. San Francisco, Jossey-Bass Inc., p. 366)

Umbilicalmente ligada a esta crítica, esta a alegação de risco de "*group thinking*", fenômeno psicológico pesquisado originalmente pelo psicólogo IRVING JANIS, da Yale University, na década de 1970. Tal ocorre quando, em um grupo de pessoas, o desejo por vezes inconsciente de harmonia torna turva a análise realista de alternativas, levando à desastrosa escolha coletiva, com custos negativos primários de perda de criatividade individual, originalidade e independência de raciocínio. Como dito por SCOTT PAGE (2007):

"An implication of what we have covered so far is that when people see a problem the same way, they're likely all to get stuck at the same solutions—if we look at a problem with the same perspective, we're all likely to get stuck at the same local peaks. As we saw in the Ben and Jerry's example, someone who represents the problem differently(and not as well) probably has different local optima—a different peak. This person can help the group get unstuck. We might ask, Why, other than lack of imagination, would people rely on the same perspective? People may sharea perspective because it's useful.If someone hasa better perspectiveonaproblem, copyingit would seemtomake sense.As counterintuitive as this advice sounds, copying better perspectives may not be such a good idea. Collectively, we may be better off if some of us continue to use less effective but diverse perspectives(...) Although common perspectives arise because of imitation and the need to communicate, they also arise for less productive reasons. People are social, and insecure, animals. Members of a group sometimes lock into a common perspective because they feel more comfortable thinking about the world the same way that other people do. These common perspectives can be a type of groupthink.(...) The logic of groupthink rests on our desire to conform. If a majority of people thinks of a problem one way, they often compel others to do so. That way could be a good perspective and, if so, the group will do well. Groupthink need not be bad. But it could mean that everyone has adopted an unproductive perspective, and this can lead the group to make bad decisions. Most relevant for our investigation, groupthink— whether good or bad—reduces perspective diversity and stifles the collective ability of the group to find good solutions". (PAGE, Scott E. . The Difference: How The Power Of Diversity Creates Better Groups, Firms, Schools, And Societies. Princeton university press, 2007, p. 49 e 51)

Segundo *Resolving Conflict In Group Levels 1: Effective Team Dynamics:*

"Groupthink is a psychological phenomenon that occurs within groups of people, in which the desire for harmony in a decision-making group overrides a realistic appraisal of alternatives. Group members try to minimize conflict and reach a consensus decision

without critical evaluation of alternative ideas or viewpoints. Antecedent factors such as group cohesiveness, structural faults, and situational context play into the likelihood of whether or not groupthink will impact the decision-making process. The primary socially negative cost of groupthink is the loss of individual creativity, uniqueness, and independent thinking. As a social science model, groupthink has an extensive reach and influences literature in the fields of communication studies, political science, social psychology, management, and organizational theory. The majority of the initial research on groupthink was performed by Irving Jánis, a research psychologist from Yale University.In an influential 1972 book, his original definition of the term was "A mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."(op. cit., p. 14)

Outra força oculta age em desfavor das partes que usam a mediação: a aversão humana a perdas. Em uma simplória definição, seria esta um recorrente estado psicológico pelo qual o ser humano, ao ter como seu algo (como, por exemplo, dinheiro, carro ou o sucesso de uma mediação), buscaria inconscientemente evitar a dolorosa perda. DAN ARIELY escreveu um interessante e surpreendente livro sobre a irracionalidade, quando abordou, dentre outras, a aversãoà perda:

"Loss aversion is a powerful idea that was introduced by Danny Kahneman and Amos Tversky (...) for this work, Danny received the 2002 Nobel Prize in Economics (...) Loss aversion is the simple idea that the misery produced by losing something that we feel is ours- say, money – outweighs the happiness of gaining the same amount of money". (The Upside Of Irrationalionality – The Unexpected benefits of defying Logic. ARIELY, DAN. New York: Harper Perennial, 2012, p. 32)

Em sua obra *How We Decide* (Boston: Mariner Books, 2012, pp. 76/77). LHERRER faz referência a um teste aplicado a inúmeros médicos nos Estados Unidos em que o mesmo quadro médico de um paciente era descortinado ora sob aspectos de perda (morte), ora sob aspecto de ganhos (sobrevivencia), em alternativas de tratamento que se mostravam diametralmente opostas. E, sem estranheza, os respeitáveis profissionais majoritariamente optavam por alternativas diametralmente opostas de acordo com o risco de perda ou a chance de sobrevivência, embora, matematicamente, estas se equivalessem e pudessem ser calculadas em um breve segundo[19].

19 Para maiores detalhes do teste, leia-se DANIEL KAHNEMAN, ganhador do Prêmio Nobel em Economia: "*An experiment that Amos carried out with colleagues at Harvard*

E não se trata, nem de longe, de uma força isolada. De fato, há muitas outras que modelam, em complexa interação, nossas decisões. PETERS e WATERMAN correlacionam às irracionalidades de tais fenômenos psicológicos, tendo por escopo a excelência das melhores empresas americanas:

"The central problem with the rationalist view of organizing people is that people are not very rational (...)all of us are self-centered, suckers for a bit of praise, and generally like to think of ourselves as winners. But the fact of the matter is that our talents are distributed normally – none of us is really as good as he or she would like to think, but rubbing our noses daily in that reality doesn't do us a bit of good (...) as information processors, we are simultaneously flawed and wonderful. On the one hand, we can hold little explicitly in mind, at most a half dozen or so facts at one time. Hence there should be enormous pressure on managements – of complex organizations especially – to keep things very simple indeed. On the other hand, our unconscious mind is powerful, accumulating a vast storehouse of patterns, if we let it. (...) we all think we're tops. We're exuberantly, wildly irrational about ourselves.(...)The most intriguing finding – in another major area of psychological research, called "attribution theory" – is the so-called fundamental attribution error postulated by Stanford's LEE ROSS. Attribution theory attempts to explain the way we assign cause for success or failure. (...) the fundamental attribution error that so intrigues the psychologists is that we typically treat any success as our own and any failure as the system's. (...)The old adage is "NOTHING SUCCEDS LIKE SUCCESS". It turns out to have a sound scientific basis. Researchers studying motivation find that the prime factor is simply the self-perception among motivated subjects that they are in fact doing well. Whether they are or not by any absolute standard doesn't seem to matter much (...)And so it goes through a wealth of experimental data, now thousands of experiments old, showing that people reason intuitively. They reason with simple decision rules, which is a fancy way of saying that, in this complex world, they trust their gut. We need ways of sorting through the infinite minutiae out there, and we start with heuristics – associations, analogues, metaphors, and ways that have worked for us before. (...)Analogously, what's called "foot-in-the door research" demonstrates the importance of incrementally acting our way into major commitment. For instance, in one experiment, in Palo Alto, California, most subjects who initially agreed to put a

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Medical School is the classic example of emotional framing. Physician participants were given statistics about the outcomes of two treatments for lung cancer: surgery and radiation. The five-year survival rates clearly favor surgery, but in the short term surgery is riskier than radiation. Half of the participants read statistics about survival rates, the others receive the same information in terms of mortality rates. The two descriptions of the short-term outcomes of surgery were: "The one-month survival rate is 90%"; "There is 10% mortality in the first month". You already know the results: surgery was much more popular in the former frame (84% of physicians chose it) than in the latter (where 50% favored radiation)" (*Thinking Fast and Slow*. Canada: Doubleday Canada, 2011, p. 367).

tiny sign in their front window supporting a cause (traffic safety) subsequently agreed to display a billboard in their front yard, which required letting outsiders dig sizable holes in the lawn. On the other hand, those not asked to take the first small step turned down the larger one in ninety-five cases out of a hundred. The implications of this line of reasoning are clear: if you get people acting, even in small ways, the way you want them to, will they come to believe in what they're doing (...) The leading mathematician ROGER PENROSE says, "The world is an illusion created by a conspiracy of our senses" (...) We are fairly sure that the culture of almost every excellent company that seems now to be meeting the needs of the "irrational man", as described in this chapter, can be traced by transforming leadership somewhere in its history (...) (In Search Of Excellence – Lessons From America's Best-Run Companies. New York: Warner Books, 1982, p. 56-74).

E uma centena de outras forças psicológicas ocultas poderiam ser e usualmente são elencadas como obstáculos a qualquer modelo de deliberação, afetando o modo pelo qual nós, seres humanos, decidimos[20]. CALAMANDREI como sempre antecipava:

"*Na realidade, no tabuleiro do juiz, as peças são homens vivos, que irradiam invisíveis forças magnéticas que encontram ressonâncias ou repulsões, ilógicas, mas humanas, nos sentimentos do judicante. Como se pode considerar fiel uma fundamentação que não reproduza os meandros subterrâneos dessas correntes sentimentais, a cuja influência mágica nenhum juiz, mesmo severo, consegue escapar?*"(Eles, os juízes, vistos por nós os advogados. São Paulo: Livraria Clássica, 2000, p. 175/176)

Se tudo antes não bastasse, a mediação colaborativa (aí incluída a construção colaborativa de consenso) sofre críticas também por implicitamente adotar, sem ressalvas, a ideia de que qualquer decisão tomada por mais de uma pessoa seria superior à tomada isoladamente por esta.

Uma estória bastante inusitada pode ilustrar a falibilidade desta ideia. "GARRY KASPAROV CONTRA O MUNDO" foi o nome dado a um jogo de xadrez realizado em 1999, via *internet,* em que o mestre enxadrista, com as peças brancas, enfrentou cerca de 50.000 internautas, de mais de 75 países, que decidiam o movimento das peças pretas pela maioria de votos. Após 62 jogadas, KASPAROV venceu.

ELI MINA, igualmente resistente à ideia de que a maioria estaria sempre certa, escreveu "IS THE MAJORITY ALWAYS RIGHT?", abaixo transcrito:

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20 Em uma perfunctória pesquisa no Wikipedia, listam-se mais de uma CENTENA destes gatilhos psicológicos!

"With numbers-based democracies, the end (getting enough votes) justifies the means, which may prompt some people to make pre-meeting deals on how they'll vote. On the other hand, with knowledge-based democracies, members refuse to commit their votes in advance of a meeting. Instead, they arrive at meetings with fully open minds, listen to everyone, and treat "minorities" as partners in decision-making.With numbers-based democracies, assertive and persuasive advocates tend to prevail. With knowledge-based democracies, the people with the most relevant information and the most astute analysis are listened to. The group has a culture that promotes learning, inquiry and excellence in decision-making. Ultimately, democracies that are primarily focused on the number of votes are more likely to produce flawed and risk-prone decisions. On the other hand, knowledge-based democracies are more likely to produce informed decisions that increase opportunities and minimize risks for the affected organizations. (...) So, is the majority always right? Is four the most important number on a Council of seven? Only if the four have knowledge on their side; only if members come to meetings with open minds and are prepared to learn from the discussions; and only if the meeting environment is kept safe. Yes, the numbers are important, but they should be backed by objectivity and knowledge. (consultado em 21.02.2013 em http://www.elimina.com /insights/shared-jun12.html*)*

MARK McCORMACK é visceralmente contra decisões tomadas por grupos:

"Group decisions are rarely good decisions. Something happens to people's skepticism when they're gathered in a room with the stated goal of achieving consensus. They become too agreeable. They're intimidated by the boss and take positions they think the boss wants to hear. They're reluctant to challenge their allies. After a while, with everyone echoing the same opinion, a group euphoria that psychologists call "groupthink" takes over. This surreal euphoria often leads people to conclusions that fly in the face of reality" (What They Still Don't Teach You At Harvard Business School – More Notes From A Street-Smart Executive. Toronto, Canada: Bantam Book, 1989, p. 76-77)[21]

Tudo sem contar a distorção matemática que usualmente vitimizam votações. Noutros termos, pela combinação matemática de inúmeros votos em cenários diversos, nem sempre a maioria obtém o que a maioria deseja. Tal dilema foi percebido no final do século XVIII por MARQUÊS DE CONDOR-

21 SCOTT E. PAGE desafia tal noção, sustentando, ao revés, ser sim cientificamente comprovável que decisões tomadas por grupos superam em qualidade de indivíduos ou grupos com menor diversidade, ainda que com maior Q.I.. Vide *The Difference: How The Power Of Diversity Creates Better Groups, Firms, Schools, And Societies*. Princeton university press, 2007. Em igual sentido,ROB CORCORAN em *Trustbuilding - An Honest Conversation On Race, Conciliation And Responsability* (p. 126).

CET, estudioso de probabilidades, que observou que, por meio de votação estratégica, poderia ser subvertida a vontade majoritária. Esta conclusão contraintuitiva foi objeto de profunda pesquisa pelo Professor KENNETH ARROW, que foi laureado com o prêmio Nobel pelo que chamou de "*teorema da impossibilidade*".

Segundo o Paradoxo de Arrow, quando eleitores possuem 3 ou mais distintas alternativas, uma votação sem ordem de preferência pode converter subpreferências individuais em preferências primárias coletivas, sem que, de fato, o sejam.

Em um exemplo simplório, se perguntarmos a 10 pessoas, qual o sabor preferido de sorvete (morango, chocolate, creme ou abacaxi), dando-lhes a oportunidade de votarem em três sem explicitarem grau de preferência, a votação poderá ser subvertida se, mesmo chocolate sendo o sabor por qual nove sejam loucamente apaixonados (com a exceção de um votante que optasse pelos demais sabores), morango for a escolha majoritária quando posto como (distante) terceiro por todos, ainda quando assim somente lá estivesse circunstancialmente pela indiferença entre os demais sabores ou quaisquer outros (simplesmente para não deixarem uma opção em branco). E o mesmo pode ocorrer, por evidente, em eleições plurinominais para Procurador-Geral de Justiça.

E mesmo a suposta vantagem de tais meios alternativos trazerem à mesa opções para além daquelas que individualmente elucubrassem as partes tem sido alvo de questionamentos à luz do "paradoxo da escolha". Conforme sustentado por ERICH FROMM, em seu "*Escape From Freedom*", em uma democracia moderna, as pessoas são oprimidas não por escassez de escolhas, mas por sua superabundancia. BARRY SCHWARTZ aduz:

"*Autonomy and Freedom of choice are critical to our well-being, and choice is critical to freedom and autonomy. Nonetheless, though modern Americans have more choice than any group of people ever has before, and thus, presumably, more freedom and autonomy, we don't seem to be benefiting from it psychologically.*" (*The Paradox of Choice - Why More Is Less*. 2004. Harper Perennial)

LHERRER (2012) assim reverbera tal tese:

"Herbert Simon said it best: "A wealth of information creates a poverty of attention" (...) This is a counterintuitive idea. When making decisions, people almost always assume that more information is better (...) but it's important to know the limitations of this approach, which are rooted in the limitations of the brain. The prefrontal cortex can

handle only so much information at any one time, so when a person gives too many facts and then asks it to make a decision based on the facts that seem important, that person is asking for trouble.(...) this is the danger of too much information: it can actually interfere with understanding. When the prefrontal cortex is overwhelmed, a person can no longer make sense of the situation. (...) sometimes, more information and analysis can actually constrict thinking, making people understand les about what's really going on". (*How We Decide*. 2012. Boston: Mariner Books, 2012, pp. 159-165).

A mediação colaborativa em larga escala (ou construção colaborativa de consenso) padece de limites que não são poucos, já havendo quem decretasse o colapso ontológico de instrumentos deste naipe. ALVIN TOFLER, *in Future Shock - The Third Wave*, na década de 80, afirmava categoricamente:

"Built to the wrong scale, unable to deal adequately with transnational problems, unable to deal with interrelated problems, unable to keep up with the accelerative drive, unable to cope with the high levels of diversity, the overloaded, obsolete political technology of the industrial age is breaking up under our very eyes" (*op. cit*. NY: BANTAM BOOKS. 1980, p. 411)

SUSSKIND *et alii* aditam que há temas que simplesmente não permitem a construção de consenso e há hipóteses em que obstrucionistas podem concretamente impedir o sucesso da empreitada, além de identificar obstáculos estruturais e externos ao modelo:

"Some issues don't lend themselves to consensus building because thy deal with what we call fundamental beliefs. They are simply too hot and too closely linked to people's sense of their own identity. To cite an extreme example: abortion rights is usually a non-negotiable issue for people on both sides (...) sometimes, though, non-negotiable items are open to discussion once people realize they are not being asked to compromise. Instead, they are being asked to consider different questions, different ways of refraiming the initial issue. At the other end of the spectrum, some issues don't generate enough interest to sustain a consensus building effort (...) Perceptual barriers to consensus building – (...) "difficult, costly, too time-consuming, or of uncertain efficacy" (...) External barriers to consensus building- (...) one is that an individual determined to disrupt the process can, indeed, cause serious trouble. The second is that the media tend to take a neutral-to-negative stand, vis-à-vis CBA. The third is that people worry about liability or otherwise running afoul of the law. (...)"[22]

22 Vide SUSSKIND, LAWRENCE E.. CRUIKSHANK, JEFFREY L. *Breaking Robert's Rules – The New Way To Run Your Meetings, Build Consensus, And Get Results*. New York: Oxford University Press, 2006, p. 44 e 155.

Com base no modelo proposto por BRUCE TUCKMAN[23], há quem enxergue enormes dificuldades praticas de evitar que um grupo com centenas de pessoas alcance o estágio de *performing,* permanecendo, no mais das vezes, em constante *storming,* com saída e entrada constante de novos atores, a impedir o sucesso da empreitada.

Há quem não poupe mesmo a inflexibilidade ideológica dos que sustentam ser sempre a medição ou a construção de consenso a primeira alternativa a se pensar, devendo ser descartada somente quando inepta. Acusam, ao revés, de ser a participação obrigatória uma tirania travestida. COOKE and KOTHARI (2001) assim escreveram em sua provocante obra "*Participation: The New Tyranny", ipsis litteris:*

"A critical challenge to established interpretations - Contributors argue forcefully that the term participation is being mobilized to serve a wide variety of political agendas, many of which are not very radical; that participatory approaches can impose, not overcome, power relations when delivered as a technocratic cargo; that practitioners have erroneously imagined local communities as discrete and socially homogeneous; that local knowledge has been romanticized , intracommunity divisions underemphasized, and the positive contribution of external agents underplayed; the local-scale action has been prioritized while links to wider processes and institutions have been neglected; and finally that participation is no panacea and has its own practical and theoretical tensions. (...) Participation is a form of power and when it really does tyrannize it must be resisted"

Inúmeros autores ponderam a respeito da perda inútil de tempo, recursos humanos e financeiros para se apor o epíteto "*participativo*" a conflitos cujo objeto atém-se a demandas amplamente repetitivas a que são aplicados princípios universalmente adotados em um numero amplíssimo de casos idênticos.

Partindo, aliás, da trilogia escrita[24]sublimemente por ARIELY, inúmeras outras críticas, fundadas em larga e profunda pesquisa científica pelas Universidades de Duke, M.I.T. e Harvard, poderiam ser tecidas quanto ao processo decisório que se pretende adotar alternativamente ao modelo judicial clássico.

A um, o chamado "IDENTIFIABLE VICTIM EFFECT":

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23 Vide por todos *Resolving Conflict In Group Levels 1: Effective Team Dynamics*. Tenha-se a dinâmica de grupo vislumbrada por BRUCE TUCKMAN, fragmentado em etapas de *forming*, *storming*, *norming* e *performing* (e ainda, *adjourning*).

24 Vide dados bibliográficos ao final da pesquisa.

"*Though we possess incredible sensitivity to the suffering of one individual, we are generally (and disturbingly) apathetic to the suffering of many (...) First, there's your proximity to the victim – a factor psychologists refer to as closeness (...) The second factor is what we call vividness (...) the opposite of vividness is vagueness (...) The third factor is what psychologists call the drop-in-the-bucket effect, and it has to do with your faith in your ability to single-handedly and completely help the victims of a tragedy*" (The Upside Of Irrationalionality – The Unexpected benefits of defying Logic, p. 239-244)

A dois, o processo decisório encampado pela mediação, pela construção de consenso, pretende ser RACIONAL, quando, muitas vezes, bem ao revés, a IRRACIONALIDADE é quem previsível e verdadeiramente define como satisfatória ou não a decisão final a ser tomada. Como bem ensina ARIELY:

"When I mention the RATIONAL economic model, I refer to the basic assumption that most economists and many of us hold about human nature – the simple and compelling idea that we are capable of making the right decisions for ourselves (...)we are not only irrational, but predictably irrational – that our irrationality happens the same way, again and again (...) we are all far less rational in our decision making than standard economic theory assumes. Our irrational behaviors are neither random nor senseless – they are systematic and predictable. We all make the same types of mistakes over and over, because of the basic wiring of our brains. (...)we are pawns in a game whose forces we largely fail to comprehend (...) just as we can't help being fooled by visual illusions, we fall for the decision illusions our minds shows us (...) in essence we are limited to the tools nature has given us, and the natural way in which we make decisions is limited by the quality and accuracy of these tools (...) it does not necessarily mean that we are helpless. Once we understand when and where we may make erroneous decisions, we can try to be more vigilant, force ourselves to think differently about these decisions, or use technology to overcome our inherent shortcomings"(PREDICTABLY IRRATIONAL – The Hidden Forces that Shape our Decisions, p. xix-xx, 317, 321-322)

E disse ainda:

"Many studies in behavioral economics have shown that people make decisions based on a sense of fairness and justice. People get angry over unfairness, and, as a consequence, they prefer to punish the person making the unfair offer. Following these findings, brain-imaging research has shown that receiving unfair offers in the ultimatum game is associated with activation in the anterior insula – a part of the brain associated with negative emotional experience. Not only that, but the individuals who had stronger anterior insula activity (stronger emotional action) were also more likely to reject the unfair offers. (...) Emotions can easily affect decisions and that this can happen even when the emotions have nothing to do with the decisions themselves. We've also learned

that the effects of emotions can outlast the feelings themselves and influence our long-term decisions down the line" (The Upside Of Irrationalionality – The Unexpected benefits of defying Logic, pp. 266-276)

Nesta esteira de ideias, já se pronunciaram igualmente SUSSKIND *et alii* (1987), compreendendo o papel fundamental e o impacto irracional de emoções de partes em conflito, *in verbis*:

"It is important for disputants to recognize that emotions can overwhelm logic: (...) the dollar bill auction. In this experiment, the researcher announces to the test group that he intends to auction off a dollar bill to the highest bidder. He also establishes 4 seemingly innocuous ground rules. First, bidding must be proceed in ten-second increments. Second, the highest bidder will win the dollar, but the second-highest bidder must pay the auctioneer the amount of his or her losing bid. Third, bidders are not allowed to communicate with each other during the course of the auction. Fourth, the auction is over when a minute passes without a new bid being made.(...) now, there are bidders not only with an investment in winning, but also with a stake in not losing. (...) how is this relevant to public dispute resolution? The participants in the auction were "trapped by choice"". (op. cit. p 89-91).

LHERRER, embora conferindo imensa racionalidade a emoções, atesta a sua influencia involuntária e muitas vezes inconsciente em atos diários, simples ou complexos:

"Plato, as usual, was there first. He liked to imagine the mind as a chariot pulled by horses. The rational brain, he said, is the charioteer; it holds the reins and decides where the horses run. If the horses get out of control, the charioteer just needs to take out his whip and reassert authority. One of the horses is well bred and well behaved, but even the best charioteer has difficulty controlling the other horse. "He is of an ignoble breed," Plato wrote. "He has a short bull-neck, a pug nose, black skin, and bloodshed white eyes; companion to wild boasts and indecency, he is shaggy around his ears – deaf as a post – and just barely yields to horsewhip and goad combined". According to Plato, this horse represents negative, destructive emotions. (...) Unlike his teacher Plato, Aristotle realized that rationality wasn't always in conflict with emotions.(...) one of the critical functions of the rational soul was to make sure that emotions were intelligently applied to the real world. (...) Patient ELLIOT-neurologist Antonio Damasio- a few months earlier, a small tumor had been cut out of Elliot's cortex, near the frontal lobe of his brain. (...) Elliot felt nothing. How grotesque or aggressive the picture, his palms never got sweaty. He had the emotional life of a mannequin. This was a completely unexpected discovery. At the time, neuroscience assumed the human emotions were irrational. A person without any emotions – in other words, someone like Elliot – should therefore make better emotions.

His cognition should be uncorrupted. The charioteer should have complete control. What, then, had happened to Elliot? Why couldn't he lead a normal life? To Damasio, Elliot's pathology suggested that emotions are a crucial part of the decision-making process. When we are cut off from our feelings, the most banal decisions became impossible. A brain that can't feel can't make up its mind. (...) While Plato and Freud would have guessed that the job of the OFC (orbitofrontal cortex) was to protect us from our emotions, to fortify reason against feeling, its actual function is precisely the opposite. From the perspective of the human brain, Homo sapiens is the most emotional animal of all. (...) The result is that the uniquely brain areas of the mind depend on the primitive mind underneath. The process of thinking requires feeling, for feelings are what let us understand all the information that we can't directly comprehend. Reason without emotion is impotent (...) So far, we've been exploring the surprising intelligence of our emotions. (...) but emotions aren't perfect. They are a crucial cognitive tool, but even the most useful tools can't solve every problem. In fact, there are certain conditions that consistently short-circuit the emotional brain, causing people to make bad decisions. The best decision-makers know which situations require less intuitive responses (...) While the emotional brain is capable of astonishing wisdom, it's also vulnerable to certain innate flaws."(HOW WE DECIDE. LHERRER, JOHN. 2012. Boston: Mariner Books, p. 9,10, 14, 18, 23, 26 56, 61 e 105-107)

E não basta lembrar que já se concedeu um premio Nobel ao criador do SMORC (*Simple Model of Rational Crime),* segundo o qual crimes, decisões e desvios de conduta ocorreriam de acordo com uma análise de custo/benefício. Em termos psicológicos corriqueiros, o custo (dano à nossa autoimagem) haveria de ser menor que o ganho com um "deslize" em nosso próprio favor. Ocorre que, em pesquisas recentes conduzidas para justamente desafiar tal festejado modelo, tem comprovado sua falibilidade. ARIELY assim arremata:

"If we all lived in a purely SMORC-based world, we would run a cost-benefit analysis on all our decisions and do what seems to be the most rational thing (...) Essentially, we cheat up to the level that allows us to retain our self-image as reasonably honest individuals (...) For starters, the finding that the level of dishonesty is not influenced to a large degree (to any degree in our experiments) by the amount of money we stand to gain from being dishonest suggests that dishonesty is not an outcome of simply considering the costs and benefits of dishonesty. Moreover, the results showing that the level of dishonesty is unaltered in the probability of being caught makes it even less likely that the dishonesty is rooted in a cost-benefit analysis. Finally, the fact that many people cheat just a little when given the opportunity to do so suggests that the forces that govern dishonesty are much more complex (and more interesting) than predicted by the SMORC. (...) In a nutshell, the central thesis is that our behavior is driven by 2 opposing forces. On the one hand, we want to view ourselves as honest, honorable people (...) on the other hand, we want to benefit from cheating and get as much money as possible (this is the

standard financial motivation). Clearly these two motivations are in conflict (...) this is where our amazing cognitive flexibility comes into play. Thanks to our human skill, as long as we cheat by only a little bit, we can benefit from cheating and still see ourselves as marvellous human beings" (THE HONEST TRUTH ABOUT DISHONESTY – How we lie to everyone – especially ourselves. 2012, pp. 4/5, 23, 26/27)

Por sua vez, MATTHEW LEIGHNINGER (2006), em sua obra THE NEXT FORM OF DEMOCRACY: how expert rule is giving way to shared governance", assim acrescenta:

"*Your plight is shared by local leaders all over the country: most would-be democracy-builders have narrow citizen involvement needs, they have few democratic structures to lean on, and they have trouble finding people with skills to mobilize citizens effectively" page (...) If you don't allow participants to explore all the ways they can be citizens, you cut short the larger potential of well-rounded, active citizenship, and you may just leave people frustrated*" (Nashville, TN: Vanderbilt University Press, 2006, pp. 47-56)

LEIGHNINGER sustenta que a maioria dos esforços cívicos para construção de diálogo e consenso usualmente falham em atrair participantes, por terem agendas pré-definidas e baseadas em estereótipos cívicos. Quase todas as iniciativas enfrentam carencia de recrutamento de pessoal e diversidade sócio-étnica, sobrecarregando e ciclicamente perdendo seu próprio grupo de colaboradores mais próximos. Tudo sem falar em falta de estrutura física ou financeira para longos termos[25].

E também há limites dos novos meios tecnológicos para engajamento VIRTUAL em massa. Nem mesmo a mais inovadora tecnologia criada na mídia social está livre de limites ou problemas. Anonimato, assimetria temporal ou espacial, falta de estrutura dialógica (seja da plataforma, seja de quem abre o diálogo e não dispõe de pessoal ou recursos suficientes) são apenas alguns dos muitos percalços enfrentados.Em *The Promise and Problems of Online Deliberation,* LAURA W. BLACK lista os inúmeros problemas relacionados com a deliberação online[26].

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25 DAVE MESLIN, em sua palestra "*O Antídoto para a Apatia*", discorre brilhantemente sobre os obstáculos práticos e conjunturais para que a colaboração se concretize. Em um discurso de poucos minutos, cobre, com notável extensão, os percalços para um efetivo engajamento cívico. (Disponível em http://www.ted.com/talks/lang/pt-br/dave_meslin_the_antidote_to_apathy. html?source=email#.UXneazHz5KF.email. Consultado em 29/04/2013).

26 A autora apresenta quadro em que analisa uma a uma as tecnologias virtuais em

KADLEC *et alii* vislumbram também aqui fenômenos psicológicos que alteram substancialmente o conteúdo da discussão virtual:

"*By having users submit ideas and vote at the same time, the team experienced a phenomenon introduced earlier as the early submission bias. Ideas that were submitted on the first day and received a high number of votes were more visible and therefore more likely to receive more votes and stay on top. Additionally, ideas that are similar in nature, but submitted separately, detracted from each other's total score. Since the process was based on an idea-generation model, these two effects led to a significant bias. Separating phases for submitting ideas, followed by combining and refining them through collaborative editing, and prioritizing and rating the ideas afterwards might be a concept to prevent this issue.*"

Comum a todos, aliás, está o fato de que a dinâmica de poder em que estão inseridas e que deve ser enfrentada é tudo menos pueril ou simplória. De acordo com BERNIE MAYER:

"Altering power imbalance and addressing power dynamics in a mediation process require that the mediator be able to detect and understand how power manifests itself. This is not a simple task" (apud BALMER, Joan. DYNAMICS OF POWER)

Reconheça-se, pois, uma obviedade: há sim limites aos meios alternativos de resolução de conflito. Mais: tais limites, longe de ser simplórios, são absolutamente complexos. Mais ainda: nem mesmos as bases filosóficas de tais alternativas são imunes a críticas ácidas e incisivas.

Nada disto, porém, afasta a constatação igualmente óbvia de que a adoção e a utilidade de tais meios não podem ser descartadas enquanto PARTE INTEGRANTE E COMPLEMENTAR de um todo, de um sistema de resolução de conflito, que não detém, aliás, solução única infalível para todo e qualquer conflito[27]. A simplória exclusão de meios alternativos por conta de sua falibilidade[28] significaria o mesmo que excluir os meios judiciais clássicos por igual

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voga, destacando seus limites. Disponível seu artigo em http://kettering.org/publications/the-promise-and-problems-of-online-deliberation/, consultado em 17/04/2013.

27 Neste mesmo sentido, vide *Reaching Resolution - A Guide to Designing Public Sector Dispute Resolution Systems* (British Columbia, Canada: Ministry of Attorney General, 2003, p. 1-9)

28 Nãoé por outra que:*"Both approaches have qualities as well (...) Each conflict style has its appropriate uses, but the appropriateness of a particular style may differ between cultures (...) a collaborative style is neither a panacea nor appropriate in all*

motivo. De acordo com ILAN GEWURZ[29], criador do conceito de "*multi-door Court House",* a variedade de meios de processamento de conflito, ainda quando nenhum destes seja infalível, reduz o grau de falibilidade do sistema de resolução de conflito[30]. O todo (falível) fica mais rico e menos falível por contar com cada uma de suas variadas partes.

Viva, pois, a mediação!

BIBLIOGRAFIA

ADLER, Peter. *The End of Mediation: An Unhurried Ramble On Why The Field Will Fail And Mediators Will Thrive Over The Next Two Decades*!. *In* http://www.mediate.com/articles/adlerTheEnd.cfm. Consultado em 22/04/2013.

ARIELY, Dan. *The Upside Of Irrationalionality*: The Unexpected Benefits of Defying Logic. New York: Harper Perennial, 2012.

Predictably Irrational – The Hidden Forces that Shape our Decisions. New York: Harper Perennial, 2012.

The Honest Truth About Dishonesty – How we lie to everyone – especially ourselves. New York: Harper Collins Publishers, 2012.

BALMER, Joan. *Dynamics Of Power*. New Westminster, BC: Justice Institute of British Columbia, Centre for Conflict Resolution, 2012.

BITTLE, Scott. HALLER, Chris. KADLEC, Alison. *Promising Practices in Online Engagement*. Center for Advances in Public Engagement, Occasional paper no.3, 2009

BLACK, LAURA W.. *The Promise And Problems Of Online Deliberation*. Ohio: Kettering Foundation, 2011.

BUSH, ROBERT A. BARUCH. FOLGER, J.P. *The Promise of Mediation*. Jonh Wiley and Sons Inc, 2004.

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cases..."(Conflict Resolution. 14 ed. New Westminster, BC:Justice Institute of British Columbia, Centre for Conflict Resolution, 2007, p. 29 e 26)

29 Vide "*Re-Designing Mediation To Address The Nuances Of Power Imbalance*".

30 Adrede, LAURA W. BLACK conclui igualmente pela complementaridade de meios e tecnologias pessoais e virtuais (*The Promise and Problems of Online Deliberation,* disponível em http://kettering.org/publications/the-promise-and-problems-of-online-deliberation/, consultado em 17/04/2013). Em idêntico sentido, SUSANNA HAAS LYONS em *Social Media and Civic Engagement* (Vancouver, Canada: Simon Fraser University, 2012, p. 13).

CALAMANDREI, Piero. (tradução de Eduardo Brandão)*Eles, Os Juízes, Vistos Por Um Advogado*. São Paulo: Martins Fontes, 1995, 397p.

CAPPELLETTI, Mauro. GARTH, Bryant. *Access to Justice: The Worldwide Movement to Make Rights Effective—a General Report*. *Access to Justice: A World Survey*. Milan: Dott. A. Giuffrè Editore, 1978.

CLOKE, Kenneth. *The CrossRoads of Conflict – A Journey Into the Heart of Dispute Resolution*. San Francisco, CA: Jossey-Bass, 2006.

COOKE, Bill. KOTHARI, Uma. *Participation: The New Tyranny*. New York, US: Palgrave Mcmillan Press, 2001.

CORCORAN, Rob. *Trustbuilding - An Honest Conversation On Race, Conciliation And Responsibility*. Virginia, US: University of Virginia Press, 2011.

DANESH, Hossain B.. DANESH, Roshan. *Has conflict resolution grown up? Toward a developmental model of decision making and conflict resolution*. The International Journal of Peace Studies. Volume 7. 2012.

FREDERICK, Shane. *Cognitive Reflection And Decision Making*. Journal of Economic Perspectives, 2005, 19(4), 25-42).

FROMM, ERICH.*Escape From Freedom*. United Kingdom: Farrar and Rinehart, 1941.

GEWURZ, Ilan. *Re-Designing Mediation To Address The Nuances Of Power Imbalance*. Michigan, US: Ross School of Business, 2012.

GIRDNER, Linda K.. *Mediation Triage: Screening For Spouse Abuse In Mediation Mediator*. Mediation Quaterly, vol. 7, n. 04, 1990. San Francisco, Jossey-Bass Inc.

HAAS LYONS, SUSANNA. *Social Media and Civic Engagement*. Vancouver, Canada: Simon Fraser University, 2012, p. 13.

HARVARD LAW SCHOOL. *Strategies for Negotiating More Rationally*. Negotiation Skills, Program on Negotiation, Harvard Law School. *In* http://www.pon.harvard.edu/?p=34724/?mqsc=E3503954& utm_source=WhatCountsEmail&utm_medium=PON%20Harvard+Negotiation%20Insider%20Tuesday&utm_campaign=Negotiation_Insider_04152013. Consultado em 29/04/2013.

HEIERBACHER, Sandy. *Deliberation by the Numbers: A DDC Fact Sheet.In* www.deliberative-democracy.net/index.php?option=com_ docman&Itemid=92. consultado em 27/08/2012)

JUSTICE INSTITUTE OF BRITISH COLUMBIA. *Handling Conflict In Virtual Environments*. 1 ed. New Westminster, BC: Justice Institute of British Columbia, Centre for Conflict Resolution, 2012.

Resolving Conflict In Group Levels 1: Effective Team Dynamics. 2 ed. New Westminster, BC: Justice Institute of British Columbia, Centre for Conflict Resolution, 2007.

Mediation Level I. 13 ed. New Westminster, BC: Justice Institute of British Columbia, Centre for Conflict Resolution, 2009.

KAHANE, Adam. *Changing The World By Changing How We Talk And Listen*. Oxford: Generon, 2002.

KAHNEMAN, Daniel. *Thinking Fast and Slow*. Canada: Doubleday Canada, 2011.

KANER, Sam. *A Facilitator's Guide to Participatory Decision-Making*. 2nd edition. San Francisco, Ca: Jossey-Bass, 2007.

KOPAN, Tal. *Open data shifts from apps to big issues*. *In* http://www.politico.com/story/2013/04/open-data-shifts-from-apps-to-big-issues-89718.html#ixzz2REmDuAlY. Consultado em 22/04/2013.

LEIGHNINGER, Matthew. *The Next Form of Democracy*. Nashville, TN: Vanderbilt University Press,2006.

LHERRER, John. *How We Decide*. Boston: Mariner Books, 2012.

MAYER, B.S.. *A Dinâmica da Resolução de Conflitos: Guia prático*. San Francisco, Califórnia: Jossey-Bass Publishers, 2000.

McCORMACK, Mark. *What They Still Don't Teach You At Harvard Business School – More Notes From A Street-Smart Executive*. Toronto, Canadá: Bantam Book, 1989.

MINA, Eli. *Is The Majority Always Right*?. *In*http://www.elimina.com/insights/shared-jun12.html. Consultado em 21.02.2013

MONTY, Scott. *Foreword*. Qualman, Erik. Socialnomics- How Social Media transforms the way we live and do business. 2nd ed.. New Jersey, USA: John Wiley & Sons Inc.. Foreword, 2013.

PAGE, Scott E.. *The Difference: How The Power Of Diversity Creates Better Groups, Firms, Schools, And Societies*. Princeton University press, 2007.

PAULO JUNIOR, José Marinho. *O Poder Jurisdicional de Administrar*. Rio de Janeiro: Lumen Iuris, 2005.

PETERS, Tom. WATERMAN Jr., Robert H.. *In Search Of Excellence – Lessons From America's Best-Run Companies*. New York: Warner Books, 1982

PINHO, Humberto Dalla Bernardina de. *A Mediação No Direito Brasileiro: Evolução, Atualidades E Possibilidades No Projeto Do Novo Código De Processo Civil*, Rio de Janeiro*:* http://www.ambito-juridico.com.br/site/

index.php?n_link=revista_artigos_leitura &artigo_id=9685, consultado em 22/04/2013)

QUALMAN, Erik. *Socialnomics- How Social Media transforms the way we live and do business*. 2nd ed.. New Jersey, USA: John Wiley & Sons Inc.., 2013.

SCHWARTZ, Barry. *The Paradox of Choice - Why More Is Less*. Harper Perennial, 2004.

SKINNER, Alexandria. *Nine Reasons to Mediate Your Conflict*. *In* http://02e1cd2.netsolhost.com/wordpressDE/2010/07/25/nine-reasons-to-mediate-your-conflict/. Consultado em 25.07.2010.

SUSSKIND, Lawrence E.. CRUIKSHANK, Jeffrey L.*Breaking Robert's Rules – The New Way To Run Your Meetings, Build Consensus, And Get Results*. New York: Oxford University Press, 2006

TOFLER, Alvin. *Future Shock - The Third Wave*. New York: Bantam Books, 1980.

TOMASIC, Roman. FEELEY, Malcolm M. *Neighborhood Justice – Assessment of an Emerging Idea*. New York: Longman Inc., 1982.

URY, William. FISHER, Roger. *Getting to Yes: Negotiating Agreement without Giving In*. 2 ed. Penguin Books, 1992.Top of Form

NEW PERSPECTIVES OF CIVIL AND COMMERCIAL MEDIATION IN BRAZIL

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1. Evolution of Brazilian Law on Mediation

In Brazil, starting from the 1990's, interest began to grow concerning the institute of mediation, especially under the influence of the Argentinean legislation enacted in 1995[2].

Over here, the first lawmaking initiative took shape with Bill No. 4,827/98, arising from a proposal by Congresswoman Zulaiê Cobra, and the initial draft submitted to the House contained a concise text, setting out the definition of mediation and listing some pertinent provisions.

In the House of Representatives, as far back as 2002, the bill was approved by the Commission for the Constitution and Justice and sent to the Federal Senate, where it was given the number PLC 94, of 2002.

However, the Federal Government, as part of the "Republican Package" that followed Constitutional Amendment No. 45, dated December 08, 2004 (known as the "Judiciary Reform"), presented various Bills modifying the Code of Civil Procedure, which led to a new report for PLC 94.

The Substitute (Amendment No. 1-CCJ) was approved, which impaired the initial bill. The substitute was sent to the House of Representatives on July 11, 2006. On August 01 the bill was forwarded to the CCJC, which received it on August 07. After that, there were no further news of it until mid-2013, when it was once again addressed, probably inspired by the bills already under discussion before the Senate.

In 2010 the National Council of Justice published Resolution No. 125, based on the premise of the right of access to Justice, laid down in art. 5, XXXV, of the Federal Constitution.

Art. 1 of the Resolution institutes the National Judiciary Policy for handling conflicts of interests, seeking to ensure everyone with the right to resolve

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2 PINHO, Humberto Dalla Bernardina de [organizer]. *Teoria Geral da Mediação à luz do Projeto de Lei e do Direito Comparado*, Rio de Janeiro: Lumen Juris, 2008.

disputes by suitable means, making it quite clear that it falls to the Judiciary Branch – not only via a resolution awarded by judicial decision - to afford other mechanisms for the resolution of conflicts, in particular the so-called consensual means, such as mediation and conciliation, while also providing the citizens with attention and guidance.

To achieve these targets, the Courts were to set up Permanent Centers for Consensual Methods of Resolution of Disputes, and install Judiciary Centers for Reolution of Disputes and Citizenship.

The Resolution also addresses qualification of the conciliators and mediators, the registry and statistical monitoring of their activities and management of the Centers[3].

2. Legal Initiatives

2.1. The Project of the Civil Procedure Code

In 2009 a Commission of Jurists was set up, chaired by Justice Luiz Fux, with the aim of presenting a new Code of Civil Procedure.

In record time a Preliminary Bill was presented, converted into a Legislative Bill (No. 166/10), submitted to discussion and examination by a Commission especially constituted by Senators, within the realm of the Federal Senate Commission for the Constitution and Justice.

In December 2010 a Substitute was presented by Senator Valter Pereira, which was approved by the Plenary Session of the Senate with two minor changes. The text was then sent on to the House of Representatives, where it was identified as Bill No. 8046/10[4].

Early 2011 saw the first initiatives of reflection on the text of the new CPC, broadening the debate with civil society and the juridical milieu, with activities held jointly by the Commission, the House of Representatives and the Ministry of Justice.

In August, a special commission was created to examine the text, chaired by Congressman Fabio Trad.

In the year 2013, under the chairmanship of Congressman Paulo Teixeira,

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3 PELUSO, Antonio Cezar. RICHA, Morgana de Almeida [coordinators]. *Conciliação e Mediação: estruturação da política judiciaria nacional*, Rio de Janeiro: Forense, 2011.

4 All the steps of handling the Project for the New CPC can be followed on our blog: http://humbertodalla.blogspot.com and at http://www.facebook.com/humberto.dalla.

a Substitute was presented in the month of July and an Overall Cumulative Amendment in October. At the moment that this text is being concluded, the activities of revising the text have still to be completed.

In the wording at present available of the Project for a new CPC, we can identify the Commission's concerns with the institution of conciliation and mediation, specifically in articles 166 to 176.

The Project shows special concern with the activity of mediation done within the structure of the Judiciary Branch, although it does not rule out prior mediation or even the possibility of using other means of dispute resolution (art. 176).

The fundamental principles of conciliation and mediation were safeguarded, to wit: (i) independence; (ii) neutrality; (iii) autonomy of will; (iv) confidentiality; (v) oral expression; and (vi) informality.

It is important to stress the relevance of the activity to be conducted by a professional mediator. In other words, the function of mediating should not, as a rule, be accumulated with other professions, such as judges, public defenders and prosecutors.

In art. 166, 3rd and 4th paragraphs, the Commission of Jurists, after noting that conciliation and mediation must be stimulated by all the players in the process, established an objective distinction between these two mechanisms. The differentiation comes about through the posture of the third party and the type of dispute..

Thus, the conciliator may suggest resolutions for the dispute, whereas the mediator assists the persons in conflict to identify, by themselves, alternatives of mutual benefit. Conciliation is the best suited tool for disputes involving material interests, whereas mediation is recommended in cases where it is sought to preserve or restore ties.

It is important to note that the original version of PLS 166/10 required the mediator to be registered as a member of the OAB (Brazilian Bar Association). The Report and Substitute presented on November 24, 2010 prioritized the understanding that any professional can exercise the functions of mediator.

There will be a judicial record with information on the mediator's performance, indicating, for example, the number of cases in which he/she took part, the success or failure of the activity and the issue involved in the dispute. This data will be published periodically and systematized for statistical purposes (art. 168 of the Project).

The Commission, using some of the provisions already present in the Bill

of the Mediation Law, was also concerned with the ethical aspects of the mediators and conciliators, and in this regard made provision for the hypotheses of exclusion of names from the Court's record and providing for the opening of an administrative procedure to investigate the conduct (art. 174).

As to remuneration, art. 170 of the Bill states that a table of fees will be published by the National Council of Justice (CNJ).

As we see, the concern of the Commission is with judicial mediation. The Bill does not forbid prior or out-of-court mediation, but merely opts not to regulate it, making it clear that interested parties may make use of this modality, resorting to the professionals available on the market.

2.2. The Project of the Mediation Bill

With the advent of the Project for the Code of Civil Procedure, in the year 2011 Senator Ricardo Ferraço presented to the Senate Legislative Bill 517/11, proposing the regulation of judicial and out-of-court mediation, so as to create a system aligned with both the future CPC and with CNJ Resolution No. 125.

In 2013 two more legislative initiatives were attached to PLS 517: PLS 405/13, the outcome of the work performed by the Commission instituted by the Senate, and chaired by Justice Luis Felipe Salomão, of the Superior Court of Justice (STJ), and PLS 434/13, result of the works of the Commission instituted by the CNJ and the Ministry of Justice, chaired by Justices Nancy Andrighi and Marco Buzzi, both of the STJ, and by the Secretary of Judiciary Reform at the Ministry of Justice, Flavio Croce Caetano.

We shall first address the text of PLS 517.

With CNJ Resolution 125 already in effect, faced with the prospects of regulation of judicial mediation by the new CPC, and given the need to deal with issues concerning the integration between adjudication and self-composing forms, in August 2011 we had the opportunity to submit suggestions to Senator Ricardo Ferraço, then involved with the works of the third edition of the Republican Pact.

We made up a working group alongside Professors Tricia Navarro and Gabriela Asmar and devoted ourselves to the task of drafting a new Preliminary Bill for a Law of Civil Mediation. After examination by the Senate Consultancy, the Senate Bill was presented, taking the number 517[5], and which is now following the legislative procedure in the Federal Senate.

5 The text can be consulted on the Federal Senate site, at: http://www.senado.gov.br.

The Bill works with concepts more updated and adapted to Brazilian reality. For example, in art. 2 it states that *"mediation is a decision-making process conducted by an impartial third party, with the aim of assisting the parties to identify or develop consensual resolutions"*.

With regard to modalities, art. 5 admits prior and judicial mediation, which in both cases may, chronologically, be prior, incidental or even subsequent to the procedural relationship.

Also according to the text of the Bill, the judge must *"recommend judicial mediation, preferably, in disputes in which it is necessary to preserve or make good an interpersonal or social relationship, or when the decisions of the parties entail material consequences for third parties"* (art. 8).

On the other hand, if mediation should prove unsuitable for resolving that dispute, the occasion may be transformed into a hearing for conciliation, provided that all of the involved parties agree to it (art. 13).

In closing, without going into the specific questions of the Bill, it is important to stress the intent of making the provisions of the new CPC and CNJ Resolution No. 125 uniform and compatible, regulating the points that still lacked legal treatment.

Early 2013 also saw the constitution of a commission chaired by Justice Luis Felipe Salomão, a member of the Higher Court of Justice, with the aim of presenting the preliminary bill for the New Law of Arbitration and Mediation[6].

This Bill was given number 405/13 and addresses only out-of-court face-to-face and electronic mediation (on-line mediation).

In the text, mediation is defined in art. 1, sole paragraph, as *"the technical activity performed by an impartial third party, with no decision-making power, who, chosen or accepted by the interested parties, hears them and encourages them, without imposing resolutions, seeking to allow them to prevent or resolve disputes by consensual means"*.

Art. 2 states that any issue that admits a settlement may be the subject to mediation. However, agreements that involve inalienable rights must be addressed in judicial ratification, and if interests of incapable parties are involved, the Public Prosecutor's Office must be consulted before judicial ratification.

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6 http://www12.senado.gov.br/noticias/materias/2013/04/03/comissao-de-juristas-apresentara-proposta-de-modernizacao-da-lei-de-arbitragem-em-seis-meses. Consulted on April 202013.

Art. 15 determines that mediation is deemed to be instituted on the date in which the initial terms of mediation are signed, while art. 5 states that *"the parties interested in submitting the solution of their dispute to mediation shall sign terms of mediation document, in writing, once the conflict has arisen, even if mediation was provided for in a contractual clause."*

The final terms of mediation - signed by the parties, their attorneys and the mediator - constitutes an out-of-court title to execution, irrespective of the signature of witnesses (arts. 22 and 23); the parties may request judicial ratification of the final terms of mediation, so as to constitute an out-of-court title to execution.

Lastly, art. 21 authorizes holding mediation via the internet or other form of remote communication.

In May 2013, the Ministry of Justice, through the Secretariat of Judiciary Reform, in partnership with the National Council of Justice, set up a commission of specialists to submit a preliminary bill on judicial, out-of-court, public and on-line mediation[7].

In its art. 3, the text determines that any issue that addresses available rights or inalienable rights that are subject to a settlement may be the subject to mediation. If the agreements address inalienable rights, they will only be valid after consulting with the Public Prosecutors and going through judicial ratification.

On the other hand, there will be no judicial mediation in cases of: a) filiation, adoption, paternal power, and annulment of matrimony; b) restraint; c) judicial recovery and bankruptcy; and d) injunctive relief. This is, somehow, a consequence of the system adopted by art. 26, *"the initial petition will be distributed simultaneously to the court and the mediator, stopping the counting of the statute of limitations and lapse"*.

As to out-of-court mediation, art. 19 determines that the parties interested in submitting their disputes to mediation are to sign initial terms of mediation, in writing, once the dispute has arisen, even if mediation was provided for in a contractual clause. Also, art 25 states that the final terms of mediation enjoy the nature of an out-of-court title to execution and, once ratified in court, they become a judicial title to enforcement, similar to a final judgment in a court case.

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7 http://www2.camara.leg.br/camaranoticias/radio/materias/ULTIMAS-NOTICIAS/441916-GRUPO-DE-JURISTAS-VAI-PROPOR-MARCO-LEGAL-DA-MEDIACAO-E-CONCILIACAO-NO-BRASIL.html

With regard to public mediation, art. 33 authorizes the agencies of the direct and indirect Public Administration of the Federal Union, the States, Federal District and Municipalities, and also the Public Prosecutor's Office and Public Defender's Department, to submit disputes to which they are parties to public mediation.

Thus, public mediation may take place in disputes involving: a) public entities ; b) public entities and a private party; c) homogeneous individual, collective or diffused rights.

Lastly, on-line mediation, as set forth in art. 36, may be used as a means for resolution of conflicts in cases of sales of goods or provision of services via the internet, with the aim of resolving any domestic consumer disputes .

In November 2013, public hearings were scheduled to discuss the three bills and go into the controversial issues that still surround the theme. The Reporter for the subject in the Senate, Senator Vital do Rego, presented a substitute for PLS 517/11, seeking to bring together what is best in the three initiatives. Then, two amendments were presented by Senator Pedro Taques and three by Senator Gim Agnello. The first amendment from Senator Taques was accepted in full, and the second, partially. The three amendments presented by Senator Agnello were rejected[8].

Thus, the final text that was approved and sent to the House of Representatives, where it was identified as Project of Law 7.169/14. In June 2014, Congressman Sergio Zveiter presented a substitute for this Project with some adjustments, but maintaining the general idea idealized at the Senate`s version.

3. New Perspectives for Brazilian law

Even though this paper has concentrated on the procedural issues pertaining to mediation, we hold the opinion that the best model is the one which urges the parties to seek a consensual resolution, making every effort before filing a lawsuit. A resolution extolling only a system of very well-equipped incidental mediation mechanisms after a lawsuit has already been initiated does not appear to be ideal, as the judicial machinery will already be in motion, when, in many cases, this could have been avoided[9].

8 http://www12.senado.gov.br/noticias/materias/2013/12/11/projeto-que-disciplina-a-mediacao-judicial-e-extrajudicial-e-aprovado-pela-ccj.

9 PINHO, Humberto Dalla Bernardina de. PAUMGARTTEN, Michele Pedrosa. *A ex-*

On the other hand, we do not agree with the idea of obligatory mediation or conciliation. The voluntary nature is the essence of such procedures. This feature can never be compromised, even with the argument that it is a form of educating the people and implementing a new form of public policy.

However, we are forced to acknowledge that, in certain cases, mediation and conciliation must be regulatory stages of the procedure, to the extent that such tools prove to be the best suited to the outcome of that particular dispute.

Thinking of a prior and obligatory instance of conciliation, in cases in which only property issues are being discussed, or imposing sanctions for not accepting a reasonable settlement (such as payment of the costs of the proceeding or the attorneys' fees, even if the party is successful, when that amount is exactly what was decided by the judge in the decision), may be valid solutions. They are examples from English law[10] and U.S. law[11], which deserve to be studied.

But should never be applied in a mediation where there are profound emotional issues - quite often unconscious - that require time, maturity and mutual trust to be exposed and resolved[12].

However, we are obliged to acknowledge that it is necessary to seek a resolution for cases in which mediation is the most suitable solution, yet rejected by the parties for no plausible reason.

The Judiciary cannot be allowed to be used, abused or manipulated at the whim of litigants who quite simply want to fight or push the dispute to new frontiers.

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perîencia ítalo-brasileira no uso da mediação em resposta à crise do monopólio estatal de solução de conflitos e a garantia do acesso à justiça, in Revista Eletrônica de Direito Processual, volume 8, available at http://www.redp.com.br.

10 ANDREWS, Neil. The Three Paths of Justice. Cambridge: Springer, 2012, p. 197

11 As an example, we may mention Rule 68 of the F.R.C.P.: *"Federal Rules of Civil Procedure. Rule 68. OFFER OF JUDGMENT. (a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. (...)".* Text available at http://www.uscourts.gov, access on Sep. 12 2013.

12 PINHO, Humberto Dalla Bernardina de. PAUMGARTTEN, Michele Pedrosa. Os efeitos colaterais da crescente tendência à judicialização da mediação, *in* Revista Eletrônica de Direito Processual, volume 10, Jan-Jun. 2013.

We reassert here our opinion that the parties should have the obligation to demonstrate to the Court that they have tried, in some way, to seek a consensual resolution for the dispute.

We support, as already stated[13], expanding the procedural concept of interest to act, welcoming the idea of adaptation, within the binomial need-usefulness, as a way to rationalize the measure of jurisdiction and avoid unnecessary resort to the Judiciary Branch, or even abuse of the right of action.

This view may lead to a difficulty of harmony with the principle that jurisdiction may not be delegated; that the judge may not evade his function of judging, that is to say, if a citizen knocks at the door of the Judiciary, his access shall not be denied or hindered, pursuant to article 5, sub-item XXXV of the 1988 Constitution.

What must be clarified is the fact that a party under jurisdiction requesting measures from the state does not mean that the Judiciary must, always and necessarily, offer a response of imposition, doing no more than applying the law to the case in point[14].It may be that the judge understands that those parties must be submitted to a conciliatory, pacifying stage, before any technical decision should be issued[15].

This is made very clear in the legislative bill for the new CPC, to the extent that art. 139 grants the judge a whole series of powers, especially with regard to steering the proceeding, expressly mentioning adaptation and mitigated flexibility as tools for attaining effectiveness.

On this point, obviously the judge's paramount concern will be with the actual pacification of that dispute, rather than with merely rendering a judgment, as a form of technical-juridical answer at the urging of the party under jurisdiction.

If the new CPC requires from the judge absolute fidelity to the Constitutional Principles, converting him/her, beyond question, into an agent of preservation of the constitutional guarantees, on the other hand, it also grants him/her with instruments to acquire profound knowledge of the con-

13 PINHO, Humberto Dalla Bernardina de Pinho. *A Mediação e a necessidade de sua sistematização no processo civil brasileiro,* in REDP – YEAR 4 – 5th volume – January - June 2010, available at http://www.redp.com.br, p. 147.

14 MANCUSO, Rodolfo de Camargo. *A resolução dos conflitos e a função judicial no Contemporâneo Estado de Direito*. São Paulo: Revista dos Tribunais, 2009.

15 PINHO, Humberto Dalla Bernardina de. Mediação: a redescoberta de um velho aliado na solução de conflitos, in: Acesso à Justiça: efetividade do processo (org. Geraldo Prado). Rio de Janeiro: Lumen Juris, 2005, pp. 105/124.

flict, encompassing its reasons, albeit-meta-legal, so to as to effect its pacification.

In this regard, it is necessary to establish a system balanced between judicial and out-of-court mediation, so as to firmly guarantee access to justice and maintain a Judiciary that is agile, speedy and effective. Once a lawsuit has been filed, just as we have developed a system of filters for repetitive cases, we also have to think of a multi-door system that adapts to each type of dispute.

Another point that strikes me as vital is the construction of a collaborative network[16], involving the entities of the Judiciary Branch and sectors of organized civil society possessing the structure necessary to offer this service under a regime of cooperation. I am referring to out-of-court registry offices, the public and private universities, professional associations, the Public Defenders and Prosecutors, and Public Advocacy.

Thinking of judicial mediation alone will not resolve the problem of the overload of work that currently presses down on the judges' shoulders. On the contrary, it will most likely cause a new "boom" of cases, just as happened with enactment of the CDC (Consumer Defense Code) in 1990 and institution of the Civil Special Courts, in 1995.

Faced with this, we are obliged to recognize that, before enacting our future law of mediation, we have to build this network and prepare it for the volume of cases to come, in order to avoid the risk of compromising this institution before it even comes into effect.

4. References

ANDREWS, Neil. *La « doppia elica » della giustizia civile: i legami tra metodi privati e pubblici di risoluzione delle controversie*, *Rivista Trimestrale di Diritto e Procedura Civil,* Giuffrè Editore, Milano, 2010, fascicolo secondo, p. 529.

BESSO, Chiara. *L'attuazione della direttiva europea n. 52 del 2008: uno sguardo comparativo*, *Rivista Trimestrale di Diritto e Procedura Civil,* Giuffrè Editore, Milano, 2012, fascicolo terzo, p. 863.

16 SPENGLER, Fabiana Marion; SPENGLER NETO, Theobaldo. *Mediação enquanto política pública: a teoria, a prática e o projeto de lei.* Santa Cruz do Sul, Edunisc, 2010. http://www.unisc.br/portal/pt/editora/e-books/95/mediacao-enquanto-politica-publica-a-teoria-a-pratica-e-o-projeto-de-lei-.html.

CADIET, Loic. *I modi alternativi di regolamento dei conflitti in Francia tra tradizione e modernità, in* Rivista Trimestrale di Diritto e Procedura Civile, v. 60, n. 4, Giuffrè: Milano, 2006, p. 1181.

CAPPELLETTI, Mauro [s/ indicação de tradutor], *Os Métodos Alternativos de Solução de Conflitos no Quadro do Movimento Universal de Acesso à Justiça, in* Revista de Processo, vol. 74, São Paulo: Revista dos Tribunais, 1994, pp. 82/97.

CHASE, Oscar. *I Metodi Alternativi di Soluzione delle controversie e la cultura del processo: il caso degli stati uniti d´america*, in VARANO, Vicenzo. *L´altra giustizia. I Metodi Alternativi di Soluzione delle Controversie nel Diritto Comparato*, Giuffré, Milano, 2007, pp. 131/156

CLARKE, A. *The future of civil mediation*. Civil Mediation Council, at http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf, acesso em janeiro de 2012.

COMOGLIO, Luigi Paolo. Mezzi Alternativi de Tutela e Garanzie Costituzionali, in Revista de Processo, vol 99, p. 249/293.

COSTA E SILVA, Paula. *A nova face da justiça*: Os meios extrajudiciais de resolução de controvérsias. Lisboa: Coimbra Editora, 2009.

DE PALO, Giuseppe. TREVOR, Mary B. *E U Mediation. Law and Practice*. Oxford, University Press, 2012.

FISS, O.M. *Against Settlement*, 93 Yale Law Journal 1073-90, may 1984.

FONSECA, Elena Zucconi Galli. *La nuova mediazione nella prospettiva europea: note a prima lettura, Rivista Trimestrale di Diritto e Procedura Civil,* Giuffrè Editore, Milano, 2010, fascicolo secondo, p. 653.

GABBAY, Daniela Monteiro. *Mediação & Judiciário no Brasil e nos Estados Unidos: condições, desafios e limites para a institucionalização da mediação no Judiciário*, Brasília: Gazeta Jurídica, 2013.

MIRIMANOFF Jean A., La Mediation: de la mythologie a la realite. Une parabole, Genève, novembre 2012, www.gemme.ch

NOLAN-HALEY, Jacqueline. Is Europe Headed Down the Primrose Path with Mandatory Mediation? *North Carolina Journal of Interna-tional Law and Commercial Regulation,* Carolina do Norte, v. 37, p. 01-31, fev. 2012.

PAUMGARTTEN, Michele. O Futuro da Mediação na Itália após a Decisão da Corte Constitucional da República, in Revista Eletrônica de Direito Processual, vol. XI, disponível em http://www.redp.com.br.

PAUMGARTTEN, Michele Pedrosa. PINHO, Humberto Dalla Bernardina de. *Mediación Obligatoria: una versión moderna del autoritarismo pro-*

cesal. Revista Eletrônica de Direito Processual. *texto disponível em http:// www.redp.com.br*, vol.10, p.210 - 225, 2012.

PINHO, Humberto Dalla Bernardina de [organizador]. *Teoria Geral da Mediação à luz do Projeto de Lei e do Direito Comparado*, Rio de Janeiro: Lumen Juris, 2008.

PINHO, Humberto Dalla Bernardina de. A mediação e o Código de Processo Civil projetado, in *Revista de Processo*, ano 37, vol. 207, São Paulo: Revista dos Tribunais, 2012, pp. 213/238.

PINHO, Humberto Dalla Bernardina de. *Disposições Gerais do P.L. 7.169/14, in* Revista Eletrônica de Direito Processual, ano 8, volume especial: *A Nova Lei de Mediação Brasileira: comentários ao P.L. 7.169/14*, pp. 35/61, outubro / 2014, disponível em http:www.redp.com.br.

VIGORITI, Vincenzo. *Europa e mediazione. Problemi e soluzioni*. Revista de Processo. n. 197, p. 339-355. 2011.

PRACTICAL IMPACTS OF THEORETICAL LENSES

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Introduction

In the field of dispute resolution, mediators and scholars have invested a lot of time, efforts and ink in the discussion about the neutrality of mediators and arbitrators.

While neutrality may be an ideal to be pursued, it is an unattainable goal. There is no such a thing as a neutral human being. Neutrality would require mediators with no previous history, experience, ideas, and assumptions.

On the other hand, impartiality may be a more reasonable and attainable goal. Impartiality, however, can only be achieved by mediators through the self-knowledge and awareness of the assumptions that inform their decisions and behavior.

In order to achieve such impartiality, mediators must relentlessly pursue knowledge and awareness of lenses he/she uses when intervener in a dispute.

The lenses through which each mediator or arbitrator see the dispute will determine his/her vantage points, and, therefore, will have significant impact on how the dispute and its resolution is managed.

Different lenses will necessarily determine different approaches and perspectives. Consequently, understanding how different lenses will dictate different conflict management approaches and outcomes is critical for successful mediations.

The objectives of this paper are to:

1. Compare the underlining assumptions and principles that inform two different theoretical lenses: Game Theory and Conflict Transformation Theory; and

2. Analyze how the use of different theoretical lenses impacts the mediators' choices in the conduction of mediation.

Game Theory vs. Conflict Transformation Theory

In mediation, depending on which theoretical lenses is adopted by the mediator, the approach, choices, and likely results of the process will be significantly different.

In order to preserve its impartiality and apply the right lenses to the right practical cases, a mediator must understand the assumptions that are conditioning her/his actions.

Comparing two different theoretical lenses is, in this scenario, a useful exercise to exemplify the practical impact of the adoption of different theoretical lenses to the same dispute. To this end, this paper focuses on the comparison between Game Theory and Conflict Transformation Theory.

It could be argued that Game Theory and Conflict Transformation Theory represent two opposite and competing theoretical lenses in the field of dispute resolution. As demonstrated in this paper, these different lenses imply in conflicting assumptions and value that impact and inform the way a dispute is seen, approached and managed.

Game Theory and Conflict Transformation Theory differ in the assumptions related to the conflict vision; the perceived reality; the perception of time; the notion of human nature; the human nature; the motivations and actions; the social interactions; the conflict outcomes; and the effective strategy to manage disputes.

Conflict Visions

Game Theory adopts a problem-solving orientation. In Game theory, a conflict is a fixed problem that calls for a solution that can be found though the application of a one-size-fits-all dispute resolution process. Conflict resolution is, therefore, content centered (Lederach, 2003).

Conflict Transformation Theory, on the other hand, takes the view that conflicts are normal and recurrent in human relations and an opportunity for change and improvement (Lederach, 2003). Conflicts are not a problem to be solved, by rather an elastic, changeable process (Tidwell, 2001).

A natural consequence of this world view is that, since conflicts are a natural consequence of social interactions, conflict resolution process is viewed as relationship centered (Lederach, 2003).

Perceived Reality

Game Theory perceives reality as fixed, objective and measurable. Reality is equally perceived by all the stakeholders involved in the conflict.

Conflict Transformation Theory, on the other hand, assumes that reality is socially constructed; always changing and subjective. Therefore, each of the stakeholders involved in the conflict will perceive it differently.

Time Frame

In Game Theory, a conflict is linear and defined. According to these lenses, it is possible to determine with precision the beginning and the endpoint of a given conflict or dispute (Mitchel, 2002).

A natural consequence of this worldview is that, in Game Theory, conflicts must be resolved within a measurable and defined timeframe in the shortest period of time (Lederach, 2003).

Conflict Transformation, however, adopts a non-linear vision of conflict. The conflict's beginning and endpoint are not determined, precise or objective (Mitchel, 2002). Consequently, conflict transformation is a process with mid to long range time frame (Lederach, 2003), which often is open ended.

Human Nature

Game Theory follows the Hobbesian paradigm according to which the human being is naturally individualistic, rational and self-serving. Human beings will analyze and decide on their course of actions exclusively based upon their individual and quantifiable interests.

In Game Theory, human beings will use language to precisely communicate truth. Game Theory assumes that language is an efficient media to express truth about a fixed reality (Gergen, 2001).

Conflict Transformation assumes that relationships are important and, since reality is socially constructed, rationality will vary with cultural context in which the conflict is inserted.

Human beings, according to Conflict Transformation Theory, have the capacity for both consciousness of the human experience; and for relating to the experience of others (Folger, 1994). Language, in this world view, creates context and shapes reality (Gergen, 2001).

Motivation/Actions

Since, as demonstrated above, human beings are rational, the parties in a conflict, according to Game Theory, will naturally calculate the payoffs of they every move and decide rationally on the basis of the expected payoff (Rigney, 2001).

Furthermore, since, according to Game Theory, human beings are individualistic, the parties in a conflict will, according to its theoretical lenses, aim at the maximization of their individual respective payoffs without any concern for the well-being of others. In other words, the decision making process is based on individualistic rational choices (Rigney, 2001).

Conflict Theory uses different paradigms to assess the actions in motivations in a conflict. Its approach is based on two principles (Lederach, 2003): a positive orientation toward conflicts, according to which conflicts are not a problem, but rather may represent opportunities for growth and innovation; and the belief, that the parties may be willing to use the conflict to engage in an effort to produce constructive change and growth.

Consequently, in Conflict Transformation Theory, the focus must always be on transforming relationships at the personal, relational; structural and cultural levels (Lederach, 2003).

Social Interactions

In Game Theory, parties will choose their own moves according to their expectations of the other party's movies in the future. In this scenario, cooperation would only be possible when the payoffs for cooperating are larger than those of not cooperating (Rigney, 2001).

In Conflict Transformation Theory, the parties are naturally social beings whose identity, behavior and culture are shaped by society. Social cooperation, therefore, is part of human nature. Consequently, the key to a satisfactory outcome for a conflict is the relationship between the parties.

Outcomes

In Game Theory, conflict resolution and settlement are synonymous. Conflicts are resolved through settlement with two possible outcomes (Rigney, 2001): (i) win-win, in which the total payoff expands and parties enjoy part of the prosperity; and (ii) Zero-Sum, in which the gain of one party comes at the expense of the other party.

Conflict Transformation Theory could not be more different. According to this paradigm, the conflict resolution objective is the transformation of the relationships, interests, discourses and structures in order to establish a constructive conflict dynamics (Miall, 2003).

Effective Strategy

According to Game Theory, Tit-to -tat, is it the most effective strategy for dispute resolution. In the Tit-to –tat strategy, the party/player (i) cooperates in the first round and imitates the other players/behavior in the next rounds; will cooperate when the other party/player cooperates and punish the other party/player when there is no cooperation (Rigney, 2001).

In Conflict Transformation Theory, on the other hand, a successful strategy contains other requirements (Mitchel, 2002): multi-level participation; empowerment of the disenfranchised; outcomes controlled by those involved in the conflict (self-determination); focus on traumas, hurts and sense of past injustices; interveners must understand cultural and social structures; co-creation of a new understanding of the conflict; creation of structures that maintain, deepen and continue positive changes; and mutual, inter-active education of the adversaries about the nature of the conflict.

The Differences between the models and their assumptions are summarized in the table below:

	Game Theory	Conflict Transformation
Conflict Vision	-Conflict is a fixed problem that must be solved (Problem solving orientation). -Same conflict resolution processes apply in all cases and social settings. -Conflict resolution is content centered (Lederach, 2003)	-Conflicts are normal in human relations and an opportunity for change and improvement (Lederach, 2003). -Conflicts are an elastic, changeable process (Tidwell, 2001). -Conflict resolution process is relationship centered (Lederach, 2003).
Perceived Reality	-Reality is fixed, objective and measurable.	-Reality is socially constructed; always changing and subjective-
Time Frame	-Linear vision of the conflict with clearly defined beginning and endpoint (Mitchel, 2002). -Conflicts must be resolved within a short term time frame (Lederach, 2003).	-Non-linear vision of conflict where beginning and endpoint are not determined (Mitchel, 2002). -Conflict transformation is a process with mid to long range time frame (Lederach, 2003).

Human Nature	-Individualistic; -Rational; -Selfish; -Amoral; -Self-serving; -Language as a truth bearer (Gergen, 2001).	-Relationships are important. -Rationality varies with cultural context. -Human beings have both the capacity for consciousness of the human experience; and for relating to the experience of others (Folger, 1994). -Language creates context and shapes reality (Gergen, 2001).
Motivation/Actions	-Parties/Players accurately calculate their payoffs and rationally decide based on them (Rigney, 2001). -Maximize payoffs through strategy and deception without concern for the well-being of others (Rigney, 2001). -Decision based on individualistic rational choices (Rigney, 2001).	-Approach based on two principles (Lederach, 2003): Positive orientations toward the conflict; Willingness to engage in an effort to produce constructive change and growth. -Focus on transforming relationships at the personal, relational; structural and cultural levels (Lederach, 2003).
Social Interactions	-Social interaction involving strategic play: parties/players will continuously choose their own moves according to their expectation of the other parties/players´ moves in the future (Rigney, 2001). -Cooperation increases only when payoffs for cooperating are larger than those of not cooperating (Rigney, 2001).	-Humans are naturally social beings and their identity, behavior and culture are shaped by society. -Social cooperation is part of human nature.

Outcomes	-Conflict is resolved by achieving a settlement: Win-win: the total payoff expands and all parties/players enjoy part of the prosperity; Zero-sum: the gains of one party/player come at the expense of the other players (Rigney, 2001).	-Objective is the transformation of the relationships, interests, discourses and structures in order to establish a constructive conflict dynamics (Miall, 2003).
Effective Strategy	-Tit-to -tat, where (Rigney, 2001): The party/player cooperates in the first round and imitates the other players/behavior in the next rounds; The party/player will always cooperate when the other party/player cooperates and punish the other party/player when there is no cooperation.	-Successful strategy must contain (Mitchel, 2002): Multi-level participation; Empowerment of the disenfranchised; Outcomes controlled by those involved in the conflict (self-determination); Focus on traumas, hurts and sense of past injustices; Interveners must understand cultural and social structures; Co-creation of a new understanding of the conflict; Creation of structures that maintain, deepen and continue positive changes; Mutual, inter-active education of the adversaries about the nature of the conflict.

Practical Consequences of Theoretical Lenses

Ultimately, the success in mediation is defined by the mediator's ability to work with the parties in order to resolve the dispute that brought them to the mediation table. In order to do so, the mediator will apply his/her expertise to each case.

Although the dispute resolution techniques and theoretical orientation typically claim to be effective in all disputes, it seems to be a fact of life that, in dispute resolution, once size does not fit all. The choice of the right approach is, therefore, critical to mediation's success.

Definition of Conflict: Problem Solving vs. Relationship Building

A mediator adopting Game Theory approach will necessarily believe that the dispute before him/her is a finite problem, objective problem with de-

fined beginning and ending points. According to this worldview, the best path to resolve a conflict is to focus on the content and substance of the dispute.

A mediator adopting Conflict Transformation Theory would, in contrast, see the conflict as a natural result of human interactions. Conflicts are not a problem to be resolved, but rather an elastic process that has no clear beginning or ending point. Therefore, according to this worldview, the best path to resolve a conflict is to focus the mediation on relationships and context.

Two practical consequences follow from these differences. The first consequence is that the use of Game Theory will be more effective when applied to cases that are low in conflict and objective in nature. Conflict Transformation Theory, on the other hand, will be more effective when values, identity, culture and emotions are important factors in the dispute.

The second consequence is that mediators using Game Theory will most likely believe that all aspects of the dispute can be resolved during the mediation sessions, whereas mediators using Conflict Transformation will have a more open ended approach to the dispute. Such differences will significantly impact the mediation dynamics and time management.

Dispute Resolution Process: Rationalize Emotions vs. Include Emotions

A Game Theory paradigm will prompt the mediator to attempt to rationalize every step of the process. His/her actions will be underlined by the belief that the parties are rational and, therefore, resolving a dispute is just a matter of finding a solution that maximizes each party's objective payoff. Consequently, emotions are obstacle to reaching resolution and, therefore, should be rationalized in order to make settlements possible.

Conflict Transformation Theory paradigm, on the other hand, will prompt the mediator to believe that emotions not only are an integral and natural part of the process, but also that they should be incorporated in every step of the dispute resolution. Rather than being an obstacle, emotions may be an important tool in mediation.

Consequently, given these differences, mediators using Game Theory will adopt processes that define the dispute in narrow terms and will address it using rational and objective approaches; whereas mediators using Conflict Transformation will address dispute in broader terms and assume that a conflict will be transformed into a more productive form of human interaction that can improve the parties' relationships.

Outcome: Settlement vs. Transformation

Different theoretical orientations necessarily lead to different ideas on the successful outcome of mediation. Consequently, Game Theory and Conflict Transformation Theory have different standards for mediation success.

A mediator adopting a Game Theory paradigm will equate success with the achievement of a settlement. It is a natural consequence of Game Theory's problem solving orientation. If conflict is a problem to be resolved with a clear beginning and ending points, the settlement is the evidence that the conflict has been resolved.

The use of Conflict Transformation Theory lenses, on the other hand, will define success using different standards. According to this worldview, conflict is not a problem and, therefore, does not call for resolution. The relationships, interests and structures should not be transformed in order to eliminate conflict, but rather to make conflict a more productive form of constructive interaction that creates opportunities for the parties' growth.

Conclusions

As demonstrated above, different theoretical orientations have a decisive impact on the way the conflict is approached, defined and addressed by the mediator. Overall, it is the features of each dispute that will determine the best and/or most effective theoretical approach.

It is incumbent upon the mediator to choose the right approach for each conflict and conduct the mediation with impartiality. In order to do so, a mediator must both know his/her theoretical assumptions when addressing a conflict and, at the same time; and be able to identify the best theoretical lenses to be used in each case.

References

CBS News. (2009 йил 14-October). *After Health Care Win, Debate Continues - Home Politics WASHINGTON, Oct. 14, 2009* . Retrieved 2009 йил 19-October from CBSNews.com: http://www.cbsnews.com/stories/2009/10/14/politics/main5383342.shtml?tag=contentMain;contentBody

CBS News. (2009 йил 14-October). *Health Insurers Are Now Obama's Enemy*. Retrieved 2009 йил 19-October from CBSNews.com: http://www.cbsnews.com/stories/2009/10/14/politics/washingtonpost/main5383845.shtml

CBS News. (2009 йил 9-September). *Transcript: Obama's Health Care Speech*. Retrieved 2009 йил 21-September from CBSews.com: http://www.cbsnews.com/stories/2009/09/09/politics/main5299229.shtml?tag=contentMain;contentBody

Folger, J. (1994). *New Directions in Mediation - Communication Research and Perspectives*. Sage Publications.

Gergen, K. J. (2001). *Psychological science in a postmodern context*. American Psychologist.

Lederach, J. P. (2003). *Conflict transformation*. From http://www.beyondintractability.org/essay/transformation/: http://www.beyondintractability.org/essay/transformation/

Miall, H. (2003). *Conflict transformation: A multi-dimensional task*. From http://www.berghofhandbook.net/articles/miall_handbook.pdf

Mitchel, C. (2002 йил May). Beyond Resolution: What does conflict resolution actually transforms? *The Network of Peace and Conflict Studies* .

Rigney, D. (2001). *The metaphorical society: An invitation to social theory*. Rowman & Littlefield Publishers.

The Economist. (2009 йил 12th-September). Fired up and readyto go. *The Economist* , 33-34.

Tidwell, A. C. (2001). A critical assessment of conflict resolution. In A. C. Tidwell, *Conflict resolved:*. Continuum.

DEVELOPMENT AND RESISTANCE IN SOUTH EUROPE JUSTICE SYSTEMS TO RESTORATIVE JUSTICE

Helena Soleto[1]

It is not clear where to situate the start of Restorative Justice; Restorative Justice is said to have been born through social and legal trends in Northern European countries, and, above all, in Canada and the United States: initiatives in Ontario in the seventies, academic constructions or social developments with roots in ancient legal cultures or native justice produced this way of delivering Justice.

Mediation and Restorative Justice currents have had limited efficacy in Southern European countries, and namely in Spain; over the last years, the European contribution has been crucial to their development.

This paper focuses on the origins and models of Restorative Justice (hereinafter: RJ), the European contributions in developing RJ, the factors that hinder assimilation of RJ in civil law systems, as well as the principles which I view as fundamental in a RJ framework.

1. Genesis and models of Restorative Justice

1.1. Factors of change in traditional Criminal Justice triggering the genesis of Restorative Justice

We can summarize five factors which have been calling for change, throughout the 20th century, in different levels of the traditional occidental Criminal Justice systems; these factors have allowed for the bloom of RJ elements in various countries:

a) Retributive currents
b) Social empowerment currents
c) Inefficiency and quest for satisfaction with the Administration of Justice
d) Reinsertion aims
e) Importance of the victim

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a) Retributive currents

The beginnings of RJ amount to currents initiated in the 60's in the United States; on one hand, the traditional judicial system was proving insufficient to economically repair the harm done to the victims, and, on the other hand, society claimed participation in matters such as criminal justice, traditionally delegated to the State.

It is important to mention that participation of victims in the anglosaxon system is less intense in procedural terms (as it is known, participation of the private accuser is an exceptional characteristic of the Spanish system in terms of comparative law); however, in practice there is a higher interest for the victim, probably so because of the vindicative aim this is imbued with.

In the US system, the initially dominant interest for the victim with a retributive aim wound down in mid-nineteenth century; from the 70's on, in the twentieth century, the concept of restitution[2] was recovered, and it was made absolutely relevant after the presidential report on this matter, *President's Task Force Final Report, 1982*. Before this report, the necessary restitution to the victim as part of the conviction was regulated in no more than 8 States. From this initiative on, multiple policy changes took place in federal and national level, gathering together rights of the victim.

b) Social empowerment currents

During the 60's, as well, new ways to understand coexistence and living in a society were developed in the United States. They resulted in initiatives that promoted empowerment of the society and the development of programs allowing citizens to participate in the Administration of Justice.

These programs are based on the belief that the parties in conflict must actively participate in its resolution and mitigate its negative consequences. They are also based, in some cases, on the will to return to local decision-making and community development. Such approaches are also seen as a means to encourage the peaceful expression of conflicts, to promote tolerance and integration, to encourage respect for diversity and to promote responsible community practices.

Thus, different forms of RJ have been developed, ones that offer communities new means of conflict resolution[3]. In many countries, the idea of par-

2 TOBOLOWSKY *et allii*, *Crime victim rights and remedies*, North Carolina, USA, 2010, pp. 153 *et seq*.

3 *Vid*. paragraph 1.3.

ticipation of the community is a commonly accepted idea; it seems that RJ practices can help strengthen the capacity of the existing system of justice, especially so when society includes components which are culturally conditioned in very different ways, affecting their vision of justice and their participation therein. This may be the case in New Zealand, where the use of circles has constituted a significant progress.

Finding a way to effectively mobilize participation in the civil society, while at the same time assuring protection for the rights and interests of victims and criminals is a fundamental challenge for participatory justice.

c) Inefficiency and quest for satisfaction with the Administration of Justice

In many countries, insatisfaction and frustration with the official system of justice have led to a demand for alternative responses to delinquency and social unrest.

The main reason for the insatisfaction is that societies have viewed the courts as the only way of resolving every conflict, and not all conflicts are identical. Every conflict has its own characteristics, specialties, context, reasons, parties, emotions and background. For this reason, when it comes to resolving a conflict, perhaps one should start with studying these factors, in order to decide on the best way for resolution, and not send it directly to the court to be resolved by the Judge.

In the so-called – famous indeed – Pound conference, "*1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*", Professor Sander indicated that the use of the most adequate resolution means for each conflict should be enabled; the concept of "multi-door courthouse" emerged thereof, each door of which would be a means of resolution, such as litigation, mediation, arbitration, expert evaluation, etc[4].

Thus, there emerged, on one hand initiatives promoting reparation and, on the other hand, initiatives promoting conflict resolution from within the community. Reparation panels would be an example of reparation initiatives.

In relation to community activity, the work of community justice centers supported by the follow-up workgroup of the Pound conference is still and al-

4 *Vid*. SANDER, "Varieties of dispute processing" (address before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice – Pound Conference, Apr. 7-9, 1976), in 70 F.R,D. 79, 1976, pp. 111 *et seq*.

ways relevant[5]. These centres, which would treat conflicts between neighbors, family members or even civil law conflicts, or minor criminal law conflicts, would be community centres created by social initiative, called "community centers" or "community boards". Currently, a big part of the mediatory activity originates in referral of cases by the courts.

d) Reinsertion aims

Many mediation and RJ programs are largely justified on the basis of the idea that the mediation process has to favor reeducation of the offender, especially when it comes to a juvenile one, and for this reason recidivism therein should be smaller compared to cases in which there is no mediation.

On the basis of several research studies from the United States[6] and the United Kingdom it has been observed that juvenile offenders who have participated in a mediation program are less likely to recidivate, and that the mediatory formulas with joint participation of victim and offender lead to a better result[7].

Studies on recidivism should probably be broadened and elaborated more in depth, since there may exist other factors which influence varying recidivism rates – such as selection of cases to be mediated, considering that, in general, mediation is only carried out when the offender seems capable of emotionally taking on the damage done, among other things.

According to the *UN Handbook on Restorative Justice*, RJ programs may offer to offenders the opportunity to:

- Assume responsibility for the offense and understand its impact on the victim;
- Express emotions, and even regret, with respect to the offense;
- Receive support in order to repair the damage caused to the victim or to oneself and to the family;
- Correct attitudes, provide restitution or reparation;
- Showing repentance to victims ("apologize" as indicated in the original text, which in Spanish could be translated as "pedir perdón", although this does not mean actually expecting an apology from the victim);

5 IZUMI, The use of ADR in criminal and juvenile delinquency cases, in *ADR for judges*, Washington, USA, 2004, pp. 202 *et seq*.

6 SCHNEIDER, "Restitution and recidivism rates of juvenile offenders: results from four experimental studies", *Criminology*, vol. 24, nº 3, 1986, pp. 553 *et seq*.

7 UMBREIT, COATES and VOS; Victim offender mediation, in *Handbook of dispute resolution*, BORDONE (coord.), pp. 455 *et seq*.

- Restoring relationship with the victim, when deemed appropriate;
- Reaching closure.

e) Importance of the victim

General criminal theory and the subsequent structures of Justice are focused on the breach of law, paying little or no attention to issues concerning the victims further than and beyond their procedural situation, such as their emotional or economic needs.

In his work Conflicts as property, in 1977, Nil Christie was defending the need to include the victim in the delivery of Justice: "criminology to some extent has amplified a process where conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property"[8].

In most criminal law systems, the victim is entitled to claim financial reparation, and is often allowed to participate in the process, without, however, being offered precisely the key role that would be necessary, emotionally speaking.

In countries such as the United States, the victim has various rights[9], such as to be notified on processes and their results, to be present in the process, to be heard in relation to presentation or withdrawal of an accusation, as well as in relation to plea bargaining, the judgment and suspension of the proceedings. In addition to these procedural rights, systems pointing to an economic restitution of the victim have been spreading since the presidential report in the 80s.

In western systems, rights of information, participation and protection of the victim have been spreading. In the European Union, the *2001 Framework Decision*, which we will be mentioning below, established the standing of the victim in criminal proceedings, and the *Directive* of October 2012 has come to consolidate and strengthen such standing.

The 21st century implies, in terms of Criminal Justice, an effort to approach administration of justice through a new lens: the victim's one. As we said, 20th century justice achieves the highly needed guarantee for the rights of the accused, whose fundamental freedoms may be found diminished through due

8 CHRISTIE, Conflicts as property, The British Journal of Criminology, vol. 17, n.1, 1977, p. 1 *et seq*.

9 *Vid*. TOBOLOWSKY *et allii*, *Crime victim rights and remedies*, North Carolina, USA, 2010,

process. In the 20th century, in the more developped countries the situation is evolving towards obtaining justice of a higher quality, which shall also take into account the situation of the victim.

The increasing appearance of texts on the status of the victim internationally – either in general or for certain unlawful acts that are especially significant to society nowadays, such as terrorism, violence again women or children or vulnerable groups – constitutes an expression of this new approach.

Thus, the United Nations has developed rules and basic texts concerning the victim in general, as well as concerning victims of terrorist attacks, women as victims, children as victims and, more generally, vulnerable groups as victims.

The Council of Europe has developed rules such as the *European Convention on the Compensation of Victims of violent crimes*, the Council of Europe *Conventions on prevention of terrorism, on action against human trafficking, on the protection of children against sexual exploitation and sexual abuse*, and the 2006 *Recommendation on assistance to crime victims*, the 2002 *Recommendation on the protection of women against violence*, the *Guidelines on human rights and the fight against terrorism*, adopted by the Committee of Ministers in March 2005; through the European Committee on legal co-operation, it works on the assimilation of rules by Member states.

The European Union has also shifted its focus on victims in the last decade, developing the *Green paper on compensation of crime victims* and the corresponding *2004 Directive*, and, in terms of participation in the process, the *2001 framework Decision*, replaced by a wider Directive treating the same matter, in October 2012.

Restorative justice offers benefits to the victims, such as, according to the *UN Handbook on Restorative Justice*, the possibility to:

- Directly participate in resolving the situation and establishing the consequences of the offense;
- Receive answers to their questions on the crime and the offender;
- Express oneself with respect to the impact caused to them by the offense;
- Receive restitution or reparation;
- Receive an apology;
- Restore, when deemed appropriate, a relationship with the offender;
- Reach closure.

1.2. Restorative justice models depending on the relationship with the Courts

Regarding the conceptualisations of RJ, it is interesting the Johnstone and Van Ness approach,who argue that RJ is mainly used in three different ways[10]:

- Encounter conception, where the parties met to discuss the crime, its consequences and the restoration
- Reparative conception, where the main issue is the restoration of the crime with RJ
- Transformative conception, wich focuses on the structural injustice

More specifically, and depending on the relationship between the Criminal justice system and the RJ instruments developed in a State, we may distinguish three kinds of systems[11]:

a) Systems complementary to Courts
b) Systems alternative to prosecution
c) Initiatives outside the sphere of the Justice system

a) Systems complementary to Courts

Systems hereby classified as "complementary" to Courts correspond to the more traditional criminal justice systems, which choose to bind RJ systems to the Courts. They are marked as Court-connected programs, and they may or may not belong to the system of administration of justice.

In these systems, development of a RJ process concluding with a reparation agreement may bring procedural benefits to the accused or defendant; these will usually consist in a different classification of the crime or a reduction of the proposed penalty taking into account an extenuating circumstance, or, after the judgement, the suspension or replacement[12] of the penalty, and even prison-related benefits.

The time of referral to mediation by the judicial authority may greatly vary

10 JOHNSTONE, G. and VAN NESS, D. (2007). The meaning of restorative justice. In G. Johnstone and D. Van Ness (Eds.), *The Handbook of Restorative Justice* (pp. 5-23). Cullompton: Willan Publishing, cit. By ZINSSTAG, TEUKENS and PALI, *Conferencing: a way forward for Restorative Justice in Europe*, European Forum of Restorative Justice, 2011, p. 32

11 *Vid*. Author, Sobre la mediación penal, Aranzadi, 2012.

12 See the contribution of PERULERO, "Hacia un modelo de Justicia restaurativa: la mediación penal", in *Sobre la mediación penal*, Garciandía y Soleto (dirs.), 2012.

for each program, the general idea being that the earlier the cases are referred, the better.

In anglosaxon countries where RJ is highly developed, referral may take place at different moments, depending on programs: before the accusation, after the accusation but before conviction, subsequently to conviction but before a judgment containing the penalty, subsequently to the judgment and before reintegration into society, and after incarceration and before reintegration into society. Depending on the time of referral, the body conducting it will vary: the police, the Prosecution, the Court, the prison authorities...[13]

b) Systems alternative to prosecution

There exist programs which, in terms of Criminal Justice, represent a real alternative to prosecution, thus being structured as a true alternative dispute resolution form.

In such a structure, certain crimes or crimes committed by people of certain characteristics (age, ethnicity...) may be treated through RJ processes, without entering the Criminal justice system.

In these cases, an authentic referral of cases takes place even before they could be judicially processed; they are mostly organized in countries with an anglosaxon culture. Continental States view this RJ pattern reluctantly because of their strong and traditional criminal justice systems, which belong to the State.

In the United States and Northern European countries this kind of programs are developed in some judicial districts with minors, or in cases of shoplifting. Most of them are run by the police or by public entities, and exclude recidivism.

In the case of Spain, mediation carried out in programs for minors could be said to be an alternative system when it takes place at an early moment and the case is closed, although we understand this system to be mainly complementary rather than alternative.

c) Initiatives outside the sphere of the Justice system

There is an increasing appearance of RJ initiatives with no relevance to the proceedings and to enforcement, the uppermost purpose of which is emotional restoration.

I am referring to RJ activities that can be carried out subsequently to con-

13 *Vid.* Handbook of Restorative Justice, UN.

viction, and that may or may not be relevant to the administrative status of the prisoner, such as, for example, the restorative process between an offender and a victim's family member in order to apologize for the damage caused.

Restorative processes between people who do not wish criminal proceedings to be initiated by the system of justice could also be included here; this may be the case of conflict between parents and children, the latter being the offenders.

Lastly, restorative processes with no procedural relevance, but which bring about an emotional restoration, would also be included here.

1.3. Restorative justice processes

We gather here a description of different restorative processes, the use of which is spreading in recent years[14].

The most usual mediatory style RJ processes in the field of criminal law – meaning that a neutral interacts with the offender and other people, who may be the direct victim of the offense or other people from within the community, using facilitation techniques – vary, depending on the participants, the action plan and the aim.

a. VOM: victim-offender mediation

Victim-offender mediation is the most widespread RJ instrument. Obviously, participants include the offender, the victim and the mediator, and, unlike civil mediation, dialogue here is more important than agreement; the aim is to empower the victim, allowing for accountability of the offender and reparation of the damage caused[15].

The rationale for these programs is based on the restitution of the victim and rehabilitation of the offender. Furthermore, as IZUMI notes, most victims support restitution as an alternative to incarceration in property crimes, where rates of satisfaction for victims and offenders are very high[16]. This is the most widespread restorative process in Spain and the European Union countries, as well.

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14 *Ibidem*.

15 IZUMI, "The use of ADR in criminal and juvenile delinquency cases", in *ADR for Judges*, pp. 195 *et seq*.

16 *Ibidem*, p. 197.

b. Family group conference

Family group conference or community conference is a mediatory style form of facilitation which includes participation of people from the family, school and social background, in addition to the offender and the victim. The process consists in a facilitation in which people engage in conversations about the damage and about ways for achieving reparation.

These conferences can take place in community centers, schools, and even in police or child protection centres, or referral from the Court, and they can have no procedural relevance, *i.e.* the matter does not enter the justice system and the courts are not involved[17]. This model comes from New Zealand and is used in the United States, especially in cases involving minors in foster care and in general as a way of preparing hearings with the judge in the non-criminal field, but also in minor criminal matters such as shoplifting. ZINSSTAG, TEUKENS and PALI, refere to the use of Conferencing in USA and Western Europe for dealing with almost all offences, with the exception of murder[18].

c. Circle sentencing

Circle sentencing is similar to a group conference, but it involves participation of the judicial authority; the court forwards cases, and it monitors cases and compliance with the rules.

Participants may belong, as in the case of group conferences, to the social background of the victim and the offender; consensus is sought in order to understand what happened and how to achieve reparation.

It is even possible that the judge participates in the circle, but this participation does not, in principle, confer a key role or a facilitator one. The judge's activity focuses on embodying the agreed plan in the judgment, although participation may be more active when consensus is not achieved.

This model is used in some programs in the United States for unlawful acts committed by minors, but also adults, and is used for all types of crime, even against life and sexual integrity in Canada[19], and ZINSSTAG, TEUKENS y PALI describe a similar situation in other countries[20].

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17 *Ibidem*.

18 ZINSSTAG, TEUKENS and PALI, *Conferencing: a way forward for Restorative Justice in Europe*, European Forum of Restorative Justice, 2011, p. 49.

19 *Vid*. IZUMI, "The use of ADR…", *cit*., p. 200,

20 *Vid*. ZINSSTAG, TEUKENS and PALI, "Conferencing…", *cit.,* pp. 82 *et seq*.

d. Restorative justice panels

These panels are the community response to the failure of the public system to bring about reparation in the framework of the proceedings.

In the United States, these panels or groups are structured differently, although in general the victim is not included in their meetings with the offender, and the offender plays a minor role. This is considered the least restorative of processes.

Generally, once the offender admits guilt in criminal proceedings, the judge offers them access to the restorative panel, which, after meeting with them, discusses reparation with the victim. The panel is set up with participation of citizens.

This form of complementing the justice system has been rated as the least restorative, as it is focused on reparation, and the participation of victim and offender is limited, although depending on how it is carried out several restorative purposes may be reached. It is a form of organization similar to conditional release panels.

The panel has broad discretion in establishing reparation, which may be economic, but which usually combines restitution with measures such as community work, letters to the victim or apologizing.

Typically, follow-up meetings are held after about 3 months in order to monitor compliance with the measures. Have they been met, the panel congratulates the offender; otherwise, the case is forwarded to the judge to determine the sentence, which may include imprisonment[21].

e. Community mediation

We have already referred to the emergence of alternative dispute resolution and RJ forms since the 70s, and the convergence of reparative requirements and social empowerment of the 60s.

Thus, community centers working in neighborhoods and schools were created, providing training in conflict resolution to students, teachers and volunteers. The San Francisco Community boards stand out among community centers.

The follow-up workgroup of the Pound conference recommended that community centers be developed to allow a variety of methods for processing conflict and interacting with the courts of justice[22].

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21 *Vid.* IZUMI, "The use of ADR...", *cit.*, pp. 200 *et seq.*

22 TAMM and REARDON, "Warren E. Burger and the Administration of Justice", *Brigham Young University Law Review*, 1981, p. 513.

There is an estimated 500 community mediation centers in the United States, which are funded by Federal Government grants, contracts with the government (for example, in order to facilitate matters concerning foster children, such as the Concord Center in Nebraska), with the courts, or directly with mediation users, as well as by donations.

Community centers conduct mediations and facilitations in non court-connected school and neighborhood areas, but also civil and criminal law mediations and facilitations forwarded by the court[23].

2. European contributions to the development of Restorative Justice

I believe that we can find three major types of "contributions" of Europe to Restorative Justice:

- Firstly, a *legal and practical impetus from the EU and the Council of Europe*;
- Secondly, the *comparative experiences drawn from other countries*;
- Thirdly, and lastly, the *influence of strong activist NGOs*, the European Forum for Restorative Justice and the European Association of Judges for Mediation (GEMME).

2.1. Legal and practical impetus by the Council of Europe and the EU

Among regional regulation, Recommendation 99 (19) of the Council of Europe on mediation in penal matters and a subsequent study and support work on behalf of the CEPEJ have produced one of the pillars which actively sustain RJ through mediation, and which is explained and detailed in the EU regulation.

Restorative Justice is also a funding aim of the European Commission in the field of the Directorate Justice, which has, for this reason, funded numerous actions linked to mediation or RJ, as a policy in the last 10 years.

Initiatives in a European Union level are especially relevant, in addition to texts promoted by the United Nations, which are probably a result of broader international experiences, such as those of the United States and New Zealand and Australia, all of which offer a wider and more flexible approach.

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23 *The State of Community Mediation-2011* reports an association of more than 400 US Based programs. National Association for Community Mediation. Nafcm.org. *Vid*. also IZUMI, "The use of ADR…", *cit*., p. 203.

Among the UN texts, Resolution 2002/12 of 24 July 2002, 37th plenary meeting, entitled "Basic principles on the use of Restorative Justice programmes in criminal matters", is a result of previous resolutions and the Vienna Declaration. In this Resolution, the basic concepts of RJ are described in a very accurate and flexible way, and principles of use are listed in the same way, establishing guidelines which allow for deviation from the general criteria when deemed appropriate, safeguarding, in any case, the rights established by national regulation relating to the victim and the offender.

2.1.1. Recommendations of the Council of Europe and the work of CEPEJ

As Perulero indicates, various Recommendations of the Council of Europe urge States to introduce specific reparation measures and even to develop victim-offender mediation systems.[24]

Since the 80s, the Council of Europe has been issuing Recommendations insisting on the relevance of the victim in criminal proceedings, such as nº R (85) 11, R (87) 18 , R (87) 21, R (87) 20, R (889 6, R (929 16, R (95) 12, R (98) 1, and, more recently, R (2006) 8, which replaces R (87) 21, but it is in Recommendation nº R (99) 19 of 15 September 1999 of the Committee of Ministers of the Council of Europe, on mediation in penal matters, where an effort has been made to give impetus to mediation in this field among Member states.

The Recommendation promotes development of penal mediation by Member states on the basis of the principles listed in the Annex to the Recommendation, which includes 34 guides or principles that could serve as a guide to the States with various aims; general principles of mediation, ethical duties of mediators, safeguards for protection of the victim, quality of the mediation…

The Council of Europe, through CEPEJ, the European Commission on the Efficiency of Justice, has carried out a significant follow-up of the level of implementation of the Recommendation (99) 19, and as a result of this several documents have been published; among these, it is worth mentioning the *Analysis on assessment of the impact of Council of Europe recommendations concerning mediation* and the *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*.

The content of the report on the impact of the Recommendations on mediation, CEPEJ (2007) 12, is very negative: most States do not fill in questionnaires,

24 PERULERO, "Hacia un modelo de Justicia restaurativa: Mediación penal", and also ROMERA, "Principios y modelo de mediación en el ámbito penal" in *Sobre la mediación penal*, Garciandía y Soleto (dirs.), 2012.

and information is very limited. The limited impact of the Recommendation, as well as the general situation of mistrust and lack of information of citizens, users of justice and, above all, of the judges, are highlighted as a basic conclusion in regard with the Recommendation concerning mediation on penal matters.

The Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, CEPEJ (2007) 13, establish criteria concerning three concepts: availability, accessibility and awareness.

Relating to availability, support of States for mediation projects is addressed, as well as the role of judges and prosecutors, and also of other authorities and NGOs, of lawyers, whose codes of conduct must include a duty or recommendation to suggest mediation to their clients, the quality of mediation systems, and mediator qualification, among other issues.

Concerning accessibility, it is noted that mediation should not be used if there is a risk that a disadvantage is caused for either party, among other things, such as the cost of mediation which should be for free.

Lastly, concerning mediation awareness, CEPEJ indicates that there is a need to extend awareness of mediation for the general public, for victims and offenders, the police, the judges and prosecutors, lawyers and social workers.

In the year 2012, a *Report on the Quality of Justice* (with data from 2010) was published, including a chapter on mediation, and where one can see the inadequacy of data (for example, there is no data on Spain and Germany), and small impact of penal mediation in terms of numbers. Only Belgium, the Netherlands and Poland offer figures, but obviously the reality is very different, as other countries have also developed a state of mediation.

2.1.2. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012

Concerning the European Union, since 2001 we have relevant rules which mention victim-offender mediation, in the *Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JAI)*, namely in article 10:

> *"Penal mediation in the course of criminal proceedings*
>
> *1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.*
>
> *2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account."*

These rules, very brief, have recently been replaced by 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*, and replacing Council Framework Decision 2001/220/JAI.

Article 12 of the 2012 Directive[25]:

"Right to safeguards in the context of restorative justice services

1. Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:

(a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

(b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

(c) the offender has acknowledged the basic facts of the case;

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25 Draft Directive. Art. 11. *1. Member States shall establish standards to safeguard the victim from intimidation or further victimization, to be applied when providing mediation or other restorative justice services. Such standards should as a minimum include the following:*

a) mediation or restorative justice services are used only if they are in the interest of the victim, and based on free and informed consent; this consent may be withdrawn at any time;

b) before agreeing to participate in the process, the victim is provided with full and unbiased information about the process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

c) the suspected or accused person or offender must have accepted responsibility for their act;

d) any agreement should be arrived at voluntarily and should be taken into account in any further criminal proceedings;

e) discussions in mediation or other restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

2. Member States shall facilitate the referral of cases to mediation or other restorative justice services, including through the establishment of protocols on the conditions for referral."

(d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

(e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest.

2. Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral."

The phrasing of the draft Directive was not favorably received by RJ practitioners and scholars[26], precisely because of obstructing the development of Restorative Justice, because of introducing some distorting elements and because of figuring an underlying mistrust of the institution.

After arduous preparation, the final phrasing of the Directive has improved but there is still some criticism to be made, since it seems Restorative Justice is excluded in cases where the victim is not willing to participate.

Restorative justice versus penal mediation

In much the same way as the 2001 Framework decision, the 2011 draft Directive expressly referred to mediation in the title of its article 11 *"Right to safeguards in the context of mediation and other restorative justice services"*; in the final phrasing, this reference was removed, replaced by a more general reference to Restorative Justice, whereby article 12 provides for "*Right to safeguards in the context of restorative justice services*".

Several changes have been made in the same regard, in order to refer to RJ in general, such as in paragraph 2 of the abovementioned article, which affirms the idea that working on RJ implies a broader and better established field compared to mediation.

Measures versus standards

The wording of the Directive improves the phrasing of the draft, since it no longer provides, in paragraph 1, for *standards*, as previously indicated by the draft, but rather for *measures*, safeguarding the situation of the victim, on one hand, and highlighting the importance of the quality of reparative justice services, on the other hand.

Possibly, the new approach – probably a more advanced one – brought

26 *Vid.* in this regard the views expressed by the European Forum for Restorative Justice in www.euroforumrj.org

about by the 2012 Directive in relation to the 2001 one, could be due to that the 2001 decision can be said to be outdated, and that States do not need mediation to be promoted by European rules, and also that legislation in the second decade of the century should aim to specify procedural aspects of mediation.

However, the reality does not currently support such an argument, since, on one hand, penal mediation has only been consolidated in some countries, and, on the other hand, a detailed regulation of mediation could be an obstacle for its development.

Going into too much detail in a framework text such as a Directive in relation to something as flexible as mediation or RJ ought to be is not the most adequate thing to do, since each State, and even, each Court or judicial district shall specifically develop the legal, ethical and practical environment of the mediation. The details relating to the mediation process are to adapt to all structural needs and to offer flexibility for a possible readjustment to the circumstances.

Replacing the terms "establish standards" by "take measures" during processing of the Directive is not a trivial issue. The previous wording meant a necessary regulating activity on behalf of States, and this is contrary to the spirit and aim of RJ, which does not have to be limited by rules, since it needs to be able to adapt to the needs of each field, each case and each moment. In general, in countries which have more and better experience in RJ, regulation through rules is very rare, while in least advanced countries if regulation exists it is wider; for this reason, the final wording of the Directive is a huge success for the good development of RJ.

This same idea has led to changing paragraph 2 of article 12 of the draft, finally referring to the establishment of "procedures or guidelines" to make referral easier.

Participation of the victim in the Restorative Justice process

One of the problems during the passing procedure of the Directive was that it could be understood by readers that paragraph 1.a) establishes participation of the victim in the RJ process as a necessary element. This could exclude RJ process with surrogates or without victim.

This requirement is based on the need for the victim's consensus, which may be withdrawn at any time during the process.

Such a limitation, although it could initially make some sense, is not justi-

fied: at times the attitude of the victim does not allow constructive participation in the mediation process; and, in other cases, for example, when there is no specific victim, the offender would be deprived of the possibility to obtain the personal and procedural benefits which come with the mediation agreement.

In practice, in many mediation programs a mediation will continue when this is observed to be beneficial to the offender and non participation of the victim responds to elements which are not significant to the mediation process; for example, the victim is afraid and does not want to maintain any relation with the offender, or wants no contact with the issue at hand, etc. We also referred to the absence of a specific victim, for example, in crimes related to drug trafficking, or other crimes in which the victim does not exist or is not available (because of living in another district or State, etc.). In these cases, it is quite usual that the mediation or RJ process continues with the participation of a "surrogate", that is, a person replacing the position of the victim in the restorative process. Also, in case mediation has begun and the victim no longer wishes to participate, the process can be continued with the participants deemed appropriate by the mediator, and the victim being informed about the issues that shall be agreed on with the mediator.

It seems that the Directive goes beyond its original purpose, and that it tackles matters which will have to be decided upon and regulated by other operators, such as the States themselves, or even the courts, mediator organizations, etc. Excluding issues related to mediation is negative for its development, since in practice a given case will be evaluated at different times by different operators and the issue of appropriateness of the conflict resolution method for the specific conflict needs to persist during the entire process.

The Directive regulates the standing of the victim in Restorative Justice, but RJ can also be developed and regulated when the victim does not participate, such as in cases similar to the ones we mentioned. However, the wording of the Directive can be received by States as an absolute regulation of RJ, above all in those States with less know-how and experience in this field.

Acknowledgment of the facts

In paragraph c of article 12 of the Directive it is noted that "*the offender has acknowledged the basic facts of the case*". This matter has fuelled a big debate throughout processing of the Directive, since a strong requirement of acknowledgment covering the facts and intention, or even the penalty that could be imposed, could prevent the development of many restorative processes.

The word of the draft Directive was too litigation oriented in this regard, indicating that *"the suspected or accused person or offender must have accepted responsibility for their act"*.

In general, most RJ programs require some grade of acknowledgment of the facts in order to begin the process, and a process ended successfully will normally mean that the offender acknowledges their responsibility during the process or in the reparation agreement; in this regard, the wording of the Directive is much more accurate than the draft was, and broadens the spectrum of cases that are possibly susceptible of starting a RJ process.

Voluntary and confidential character versus res judicata

According to paragraphs d and e, agreements are arrived at voluntarily and may be taken into account in any further proceedings, while discussions shall be confidential, except in cases of public interest that are included in the national regulation or ethical limitations.

It seems that the mediation agreement is not protected by the confidentiality prevailing in mediation sessions, a reasonable issue if we take into account the tinge of public interest in this matter taking us away from the available area which in the private field allows for confidentiality to extend to the agreement or even to the fact of having reached an agreement.

The possibility of linking the agreement to other proceedings is not to be understood as an *ex legem* consequence of the *res judicata*[27].

Paragraph d simply establishes non confidentiality on its existence and content in other possible proceedings, obtaining in each case the importance awarded to specific circumstances in each States, being this co-defendant testimony, witness testimony, confession... depending on the requirements of the different legal orders and jurisprudence.

Appropriateness of the case versus generalization

In paragraph 2 of article 12, the final phrasing includes a reference to case referral "as appropriate". This contains the idea of appropriateness of the case to the RJ process, moving away from the traditional automatism that criminal proceedings are imbued with; we shall refer to this matter below.

27 *Res judicata* can produce a material effect on future procedures: a fact declared so by the resolution of the first procedure can be assessed as a fact on a second procedure without the need to develop further evidence over that fact.

2.2. Comparative experience drawn from other countries

In Europe, we have great variability in relation to the development of RJ; among Northern European countries, such as Norway, we can find experiences in the 70s that are pioneers on a global level; others, such as the United Kingdom, have many ongoing programs; the Central European countries have worked, in recent times, on RJ, with positive results [28]; and, lastly, it is in Southern European countries where a greater resistance can be observed with regard to introduction of mediation or RJ programs, and where, in general, basic elements are not adequately regulated, sometimes underregulated but –and more harmful- sometimes tending to overregulation.

Concerning the pioneer, Norway, mediation between victim and offender has been developed since the 70s, first with juvenile offenders and then incorporating cases of adults in the programs. As in most countries, the system is monitored by the Prosecutor, and in order to start a restorative process there has to be a strong evidence of guilt.

Since 1991, RJ has been regulated, first in the National Mediation Service Act, then in the code of procedure (1998), the Execution of Sentences Act (2001) and the Penal Code (2003), and in other, more flexible rules, such as notices of the State Prosecutor's Office, and orientation guides explaining to legal operators which crimes are more adequate for mediation to be attempted, such as theft or vandalism[29].

The United Kingdom is also among the countries which have started with pilot programs early, dating back to 1979. In the UK there are various RJ programs and tools, a great diversity of RJ projects, a lot broader than in the other countries. There are even programs developed by the Ministry of Internal Affairs, and this includes criminal conflict diversion programs, although referral and reintegration ones, too[30]. One can notice the commitment to flex-

28 *Vid*. Information concerning Restorative Justice in Northern and Central European countries in the document *European Best Practices of Restorative Justice in the Criminal Procedure*, 2010.

29 *Vid*. ERVO, "La conciliación en materia penal en los países escandinavos", in *La mediación penal para adultos*, Barona Vilar (dir.), pp. 148 *et seq*.

30 *Vid*. the interesting work of MONTESINOS in *La mediación penal para adultos*, Barona Vilar (dir.), concerning mediation in the United Kingdom, as well as *Sobre la mediación penal*, Garciandía y Soleto (dirs.), and CEPEJ document CEPEJ-GT-MED(2007)6 Restorative Justice: the Government's strategy: Contribution by the United Kingdom.

ibility and the reluctance to regulate mediation in this country, which is probably the one that has understood and developed RJ in the best way in Europe.

France began mediation practices in the 80s, with a law of 1993 regulating mediation and another one of 2004 boosting the institution.

In Belgium, programs with juvenile offenders were initiated in the 70s, although there was no express regulation. Victim-offender mediation was first regulated in 1994, and at present the prosecutor and court may refer cases with regard to all unlawful acts. In the Belgian case, mediation is possible even during police inquiry, controlled by the prosecutor, thus established as a real alternative to the process. For court-connected mediation, the system is controlled by a liaison prosecutor, a special advisor and a case manager. The development of RJ in Belgium is a model for the rest of continental countries.

In Germany, victim-offender mediation began in 1984 with juvenile offenders and in minor cases, and is currently well-developed, but operators indicate prosecutors show little trust in the institution[31].

In Austria, the beginning of pilot programs dates back to 1980 with juvenile offenders, extending in the 90s to cover adults, officially regulated in 1999 for crimes entailing less than 5 years of imprisonment[32].

2.3. Activity of non-governmental organizations

In the European field there are two NGOs whose activity has contributed in the development of mediation and RJ, favoring sharing of know-how, support for new projects and influence on national regulation and practice.

GEMME is the *European Association of Judges for Mediation*[33] its aims include studying mediation systems, sharing experiences among judges and promoting research and dissemination initiatives.

Most European countries have a section in GEMME, which has in many cases been the principal driving force behind development of mediation in these countries. This has been the case of the Spanish section of GEMME, which in turn has been established as a national association. Judges have car-

31 BARONA, "Situación de la justicia restaurativa y la mediación penal en Alemania", in Mediación penal para adultos (Barona dir.), p. 235 *et seq*.

32 *Vid.* MIERS, *An International review of Restorative Justice*, Crime Reduction Research Series, Home Office, UK, 2001, pp. 7 *et seq*.

33 http://www.gemme.eu/, GEMME, principally consisting of judges, prosecutors and clerks, also includes some mediation practicioners and scholars.

ried out a dissemination work and have provided support to different mediation initiatives conducted in Spain, participating actively therein.

The *European Forum for Restorative Justice*[34] consists of researchers, practitioners, judges, prosecutors, and in general, operators who are in contact with RJ. This organization, unlike GEMME, specializes in criminal matters, develops a high level in literature and experimenting and promotes the dissemination of knowledge, the sharing of experiences and of research, training and dissemination initiatives.

According to the European Forum of RJ, Restorative Justice needs are currently educating society to accept RJ, generalizing the training for judges and legal practitioners for acceptance and proper use, allocating of resources to development of programs, assuring quality in the development of programs and expanding the use of RJ instruments beyond mediation.

3. Resistance of South continental systems to Restorative Justice and criteria in Restorative Justice

The formalistic legal culture that affects Sourthern European countries is widely known, and, facing Restorative Justice, we can find a number of objections from the operators[35].

The first objection that RJ is faced with comes from those defending that it is not a right method to treat issues that are of interest to Criminal Law. Their main argument is based on the idea that the State holds the right to punish, and is therefore the only entity with a right to enforce criminal law. The reason lies in that the State has the duty to safeguard security, and the victim's attitude is but an insignificant issue; the State has to punish each time it is informed that a crime has been committed.

Within this approach, leaving decision in the hands of the victim is impossible, since the imposition and enforcement of punishment are actions belonging to the State on the basis of the need to safeguard security, and in order to assure that no crime is left unpunished, or that there is no "privati-

34 http://www.euforumrj.org/

35 In the Report "The Restorative Justice: an agenda for Europe. Supporting the implementation of restorative justice in the South of Europe", p. 81 and following, the principal challenges for RJ development in South Europe, concerning the legal system, are described: formalistic legal culture, positivism and mandatory prosecution. CASADO CORONAS *et allii* and European Forum for Restorative Justice, 2008.

zation of justice" which would give rise to impunity of the people with more economic resources, that is, to sum up, safeguarding equality of citizens before the law.

However, we consider that these opinions disregard basic elements of RJ.

The importance attributed to the victim in the 21st century is obvious, and in any case, RJ allows for an improvement in relation to criminal proceedings, above all with regard to the victim. If RJ programs are well designed, privatization of justice – meaning that those with a greater purchasing power could avoid criminal penalties in exchange for higher compensations – will in no way be allowed; on the contrary, only participation based on the willingness to repair the damage caused to the victim, mostly in emotional terms, is allowed.

3.1. Resistance of South Europe systems to Restorative Justice

Furthermore, moving beyond this initial exclusionary vision, we can gather objections of operators of traditional justice to restorative justice in two big groups:

- The tendency of continental systems to apply principles of the criminal justice process and the criminal justice proceedings to RJ
- The tendency to exhaustively or broadly regulate mediation and RJ

3.1.1. Tendency to apply procedural principles to Restorative Justice

We believe there is a tendency to apply procedural principles to RJ, such as the principle of legality, the principle of equality, the bilateral structure principle and the right to a defense, and that this tendency is erroneous.

Thus, for example, some people consider that, on the basis of applying the principle of legality, punishment of unlawful acts belongs to the State, through the Courts of Justice, and that it is not possible to modify the elements of the proceedings as a consequence of RJ activities, since this would violate the principle of legality.

This argument means ignoring the practice of both Criminal Justice and Restorative Justice: on one hand, in practice, a large part of unlawful acts are not persecuted, both because of lack of economic means and because of rationality.

On the other hand, in almost all legal orders there exist mechanisms for making criminal proceedings more flexible, allowing for the use of restorative instruments which can have an impact on the proceedings even when no RJ form is expressly regulated. Specifically in the Spanish case, plea bargaining – of increasing importance in recent times – embraces anglosaxon tendencies to deemphasize the principle of legality and to replace it by the principle of discretionary prosecution with legal limitations.

Some also believe that mediation or RJ demand a bilateral structure, meaning that if the victim does not agree to participate, or in case there is no victim, it is not possible to carry out the activity. This idea could be reinforced with a narrow understanding of paragraph (a) of art. 12 of the 2012 Directive.

This position goes against logic and the practice of many programs: in many cases there is no victim, or the victim does not want to participate in the mediation process, for whatever reasons, however there is regret and the willingness to repair on behalf of the offender, and many programs allow for mediation or the restorative method deemed adequate, sometimes with participation of a person who will act as a substitute of the victim. Other times, the restorative process is developed with a facilitator and the result is notified to the victim. On other occasions, the offender of a certain victim is unknown or is not available and other offenders of similar crimes act as surrogate offenders in the mediation, with the objective of carrying out reparative activities towards strangers, people who have not been their victims but who have also suffered an offense. It would be a pity to exclude numerous cases for which RJ is still a positive instrument, on the basis of this erroneous interpretation.

Moreover, interpreting the principle of equality, it is believed that RJ has to be regulated as a right, as part of the criminal proceedings, and that everyone should have a right of access to RJ, in all cases and in the entire national territory.

RJ instruments have to be considered as elements which are to be used only when certain conditions are met, and not in all cases: for example, the existence of a strong evidence of guilt, such as an *in flagrante delicto* or acknowledgment of the facts, the willingness to restore, the lack of recidivism etc. will favor that a restorative process begin, and this is something that has to be assessed in each case.

Moreover, legislation on RJ as a right for everyone in all judicial districts would be absurd, for the aforementioned reasons, but also a matter hard to put in practice.

One of the major advantages of RJ is adaptability of its processes to the necessities of each local, judicial, and cultural *milieu*, and generalizing the right of access to RJ could be at odds with this.

We believe that it is more appropriate to regulate the possibility of developing RJ instruments, as well as their efficacy in the proceedings, and, on the other hand, to make sure there are policies aimed at promoting RJ across the entire national territory, offering to all citizens the possibility of access to such instruments, should the circumstances be adequate.

We are referring to a vision similar to that of the right to an effective remedy: if, according to the Spanish Constitutional Court, citizens are entitled to a judgment on the merits as long as the procedural prerequisites are met, citizens will be entitled to participate in a RJ process if the adequate circumstances occur.

Lastly, as a point of resistance to RJ, some people believe that the applicable right of defense, particularly the right not to incriminate oneself, is violated by participation of the defendant or the accused in a restorative process.

Obviously, if RJ processes are conducted with no respect for the fundamental rights of the parties, and, above all, of the defendant or accused, they would result in nothing more but failure. On the contrary, RJ programs require, in practice, the concurrence of a strong evidence of guilt, such as an *in flagrante delicto*, acknowledgment of facts, a defense which is not based on denial of the acts, mutual aggression, etc. Furthermore, all operators of the restorative process and the criminal proceedings in general will monitor respect for fundamental rights.

In any case, it is obvious that development of RJ programs has to pay special attention to what may have an impact on the rights of the accused, assuring confidentiality in all levels, even when the RJ process is unsuccessful. The initiation and development of a RJ process is a circumstance which should be preferably not communicated to the Court rendering the judgment if the RJ process is unsuccessful and the defense of the offender is not going to admit the facts[36]

3.1.2. Tendency to regulate comprehensively

In the assimilation of a new institution such as mediation by legal systems, a tendency can be observed, consisting in regulating RJ circumstances in a way that is analogous to a legal rule. See, for example, the tendency to establish definitions, processes, rights, exclusion of crimes or circumstances for dealing with RJ. This kind of regulation produces a lack of flexibility in RJ instruments, which may entail their inefficacy.

This tendency can probably be explained on the basis of a lack of awareness of RJ in general, as well as a legal view awarding a key role to the principle of legality and the principle of equality in the field of Criminal justice.

Often, we can find systems that exclude RJ or mediation for serious matters such as crimes, or serious crimes, or in cases where the victim withdraws their participation, or at enforcement stage. Such exclusion may be reasonable for some cases, but there will still be others where mediation or another RJ instrument may be the most appropriate way to have an impact on the conflict.

On the contrary, instead of regulation it is much more appropriate to establish referral and working methods by means of other flexible instruments, such as protocols or internal Court rules or rules specific to the RJ services, allowing for appropriateness to the background circumstances and to the specific case, and which enabling modifications – should there be any – in a flexible way.

This is a common tension in continental systems, especially in Southern countries, a lot more prone to overregulating institutions of legal relevance.

36 It is the same idea that balances the right to negotiate and the right to plead innocent, and the unawareness of the Court with regard to the dealings between defense and prosecutor in case the agreement is not reached. If the Court is aware that the defense tried to negotiate, its neutrality could be affected if the negotations fail and the Court has to resolve the case.

On the contrary, anglosaxon systems accept variability and flexibility of regulation of RJ systems in the various programs[37].

It is a great error to apply traditional justice criteria, procedural principles of proceedings, to an activity of an eminently diverging nature, and doing so may lead to an inefficacy or withdrawal of restorative instruments, and even to obtaining negative results.

On the contrary, we consider that *a different series of principles should be applied in RJ in terms of its relation to the proceedings*, given it is shaped in a way dramatically different to traditional Justice.

3.2. Criteria for use in Restorative Justice

We understand that criteria for use of RJ could be encompassed in two categories:

- Adequacy of the RJ procedure to the specific conflict
- Protection of participants, especially the victim

3.2.1. Adequacy of the RJ procedure to the specific conflict

The principle of appropriateness or adequacy of the RJ procedure to the specific conflict, which would be opposed to this of a right to mediation, is a basic principle which in turn includes the principle of protection of the parties.

Protection of parties, especially the victim, is a fundamental principle entailing interruption and termination of the restorative process in case there is a risk of secondary victimization or severe damage to the parties.

In contrast to the right that the citizen may have to a resolution by the Courts, which may entail the right to a judgment on the merits, should the procedural conditions be met, it is not possible to establish an absolute right to mediation or to RJ: in the same way that the right to a resolution is assured when the procedural conditions are met, the parties will have a right to mediation or to participation in a RJ process when the necessary prerequisites are fulfilled; those will consist in that the legal requirements and the prerequisites of the program are met, in case there is a service able to take on the subject.

37 Even if the procedures are flexible, SHAPLAND *et allii* "Situating restorative justice within criminal justice", in *Theoretical criminology*, Sage, 2006, p. 510, explain that RJ within the criminal system cannot be characterized as completely informal as opposed to other restorative justice settings.

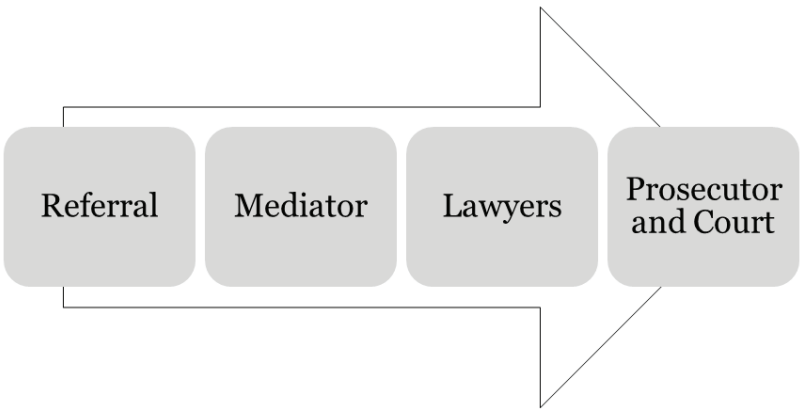
Even if there is not a right to mediation or RJ, governements should assure access to RJ services in the whole territory, understanding that the adequacy of the RJ procedure to every possible case has to be controlled in different stages by different operators.

As appropriateness or adequacy circumstances taken into account by many programs, we could indicate the following:

- Offender's capacity and attitude
  - Good faith and ability to admit responsibility, to be evaluated by different operators, such as members of the referring court, the mediator, the psychosocial teams.
- Victim's capacity and attitude
- Adequacy *stricto sensu*
  - Lack of recidivism
  - Appropriate participation of the parties
  - Participation of third parties
  - Instrument efficacy in the conflict

3.2.2. Protection of participants, especially the victim

In practice, operators look at adequacy of the RJ process for the conflict in several moments. Here I describe, for example, the control system of many mediation programs in Spain, in the majority of which mediation is designed as a tool that is complementary to the Courts.



Time in which legal operators control adequacy or appropriateness in Victim-Offender Mediation in programs in Spain.

Firstly, forwarding or referring a case to mediation is generally not automatic when it comes to criminal matters; normally, court operators – that is, the Judge, the Clerk, staff of the judiciary – control, jointly or individually, compliance with a series of factors, such as the apparent guilt, like the existence of an *in flagrante delicto* or defense which is not based on denial of the criminal acts, lack of recidivism and the offender's attitude.

The matter of apparent guilt is tricky in terms of defense of the accused, for which reason most programs take over mediation or RJ cases when there is an *in flagrante delicto,* or when defense of the accused is based on a criterion other than non participation in the punishable facts.

In most programs, participation in RJ processes is not allowed when the offender is a habitual offender or a repeat one. This is justified on the fact that RJ is not established as an automatic benefit for the offender, but rather as a form of restoration and re-education, which is normally not achievable for habitual offenders. Another important reason is the existence of limited resources for RJ procedures; establishing priorities, for cases in which mediation would have more impact and success, would provide the program with a higher efficiency rate. However, as I was indicating earlier, excluding such circumstances by policy could in practice exclude the use of mediation or other restorative methods for cases in which operators will estimate them to be highly useful and positive; for this reason, it is more adequate to establish such criteria in guidance documents or protocols for developing RJ, and they may be general or, even better, specific for each judicial district or Court.

Secondly, in the field of criminal law, the mediator controls victim protection and appropriateness of the process, taking into account the circumstances to which we referred earlier, and primarily the defendant's ability to assume the responsibility and the defendant's lack of intent to harm the victim.

The mediator performs a continuous monitoring of the viability of the mediation or other restorative process and the appropriateness of the process to the circumstances. Thus, if, for example, they believe that the offender does not intend to empathize with the victim or to take responsibility, they may terminate the procedure with no result; the mediator can also do so if they consider that there is a danger of victimizing the victim, or even if they consider that the victim's attitude is not adequate.

For legal operators it is hard to accept ceding power to the mediator, who practices a profession or performs a function which is new and strange to most jurists.

Thirdly, the lawyer of the parties has the corresponding duties of protecting the interests of their clients, ensuring that mediation and its results fall within the law and respect the rights of the participants.

Lastly, when the prosecutor, lawyer, judge or other legal operator incorporate the reparation agreement or other specific agreement into the proceedings, they further check the appropriateness of the mediation for the matter, and, above all, the legal consequences of the reparation agreement.

4. Conclusions

The origin and major development of RJ corresponds to the anglosaxon countries, mainly the United States and Canada, with an increasing role of New Zealand and the United Kingdom over the last years.

The international, namely European, contributions are being decisive for the development of RJ in the European countries that are more resistant to change, such as the Southern European countries.

The Council of Europe is the pioneer international organization in promoting mediation in various fields, including the criminal one; however, its efforts have not had a great impact on national practices. The European Union, with its victim-related rules, is directly influencing States, above all by means of instruments such as the recent Directive of October 2012, but also by means of policies supporting research and national actions relating to RJ.

NGOs such as GEMME or the European Forum for Restorative Justice are organizations which have participated and do participate actively in the dissemination of mediation and RJ, bringing together experiences and knowledge necessary to their development.

Concerning situation of RJ in the various countries, we can observe that in most cases programs began with regard to crimes committed by juvenile offenders, and have been evolving to develop programs for adults.

In most programs, cases are referred previously to trial, and one can observe an increasing tendency to refer cases at the stage of trial or enforcement, as well.

In conclusion, it can also be said that in countries where victim-offender mediation (VOM) is consolidated other RJ tools are being introduced, and a better understanding is gained by scholars, legal practitioners and even citizens. These countries include the United Kingdom, Norway, the Netherlands and Belgium.

Resistance of the most conservative countries – legally speaking – such as Spain, before the relative novelty of mediation or RJ, is based on the lack of awareness of the basics of this subject.

Taking into account the need to regulate the traditional proceedings, and the application of the traditional principles, the applicable principles in the field of RJ are those of adequacy, flexibility, minimum regulation and protection of participants in the process, especially the victim.