

Opinio Juris in Comparatione

Op. J. Vol. 2/2011, Paper n. 7

Studies in Comparative and National Law
Études de droit comparé et national
Estudios de derecho comparado y nacional



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Suggested citation: Maria Angela Zumpano, *The Role of Lawyers in European ADR*, *Op. J.*, Vol. 2/2011, Paper n. 7, pp. 1 - 5, <http://lider-lab.sssup.it/opinio>, online publication December 2011.

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Abstract:

This paper deals with the scarce diffusion of the ADR practice in Europe. Regarding the arbitration, the reason lies in the high costs of this procedure, while respect to the other out-of-Court procedures, like mediation, there is a large mistrust among lawyers, due to lack of training to cooperation and dialogue.

Recently a EU Directive has pushed towards mediation in civil and commercial lawsuits, where cross-border cases are particularly complex due to different national laws and practical matters like costs or language. National legislators have used this occasion to introduce a general discipline of mediation, applicable to domestic disputes as well. So most lawyers are called to abandon their adversarial approach in order to prepare for a cooperative negotiation.

The author examines the numerous aspects on which a lawyer can play his role in every step of a mediation proceeding, and bring the client to an amicable satisfactory settlement.

Keywords: ADR, mediation, lawyers, role.

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1. In Europe and in particular in the continental countries, legal profession receives a highly adversarial training, almost exclusively headed towards the state jurisdiction.

In law schools the trial before the court is widely and extensively studied, while ADRs have little space in traditional university courses. ADRs have been introduced only recently and mainly as optional courses. They arouse interest among students and are always successful, but these subjects are soon put aside by the graduate who approaches the world of work, as they have not found a wide practical response at least so far.

Even the arbitration, which is surely the closest to the civil state justice among the ADRs, is practiced by very few lawyers, both as arbitrators and defense attorneys of parties who choose such alternative method to protect their own rights. The reason lies in the high costs of this procedure: private justice is considered luxury, as only few lucky people can afford the high fees of the professionals who deal with it. Mainly large companies or multinational companies turn to arbitration, in order to avoid waiting for the jurisdiction time delays or not to fall into the specific peculiarities of the different national procedures¹. Individuals rarely turn to private trial because their lawyers do not usually present this alternative or they even advise against it.

So, most lawsuits converge to state jurisdiction. Therefore lawyers dedicate themselves to this kind of procedure, on the strength that the trial before the court requires their exclusive presence, unlike ADRs which do not prescribe a mandatory advocacy in court. The net practical predominance of state justice explains the difficult development of alternative instruments, which seem “unusable” and “unsuited” not for intrinsic reasons but purely for reasons of fact.

For those who choose to be lawyers, the impact with the court shows a definitely aggressive legal class, whose aim is to achieve the best result for their client and humble the opponent. Similar behaviors do not really suit the fair play which usually characterizes – or should characterize – arbitral procedures and are absolutely counterproductive when the alternative procedure is a non-adjudicative one. Converting to a negotiation or conciliatory model is a long and hard process for most lawyers because it implies a real change of custom: abandon the approach of “fight to the death” in order to prepare for cooperation and dialogue.

In the European context, a EU directive² has pushed towards mediation as an appropriate instrument to solve civil and commercial lawsuits of transnational importance. National legislators have used this occasion to introduce a general discipline of mediation, applicable to domestic disputes as

¹ However, the problem exists also in this case: see *Techniques pour maîtriser le temps et les couts dans l'arbitrage*, ICC Bull. 2007, 23.

² 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”, *Official Journal* L 136, 24 May 2008.

About the preliminary work, s. *An Analysis and Evaluation of Alternative Means of Consumer Redress Other than Redress Through Ordinary Judicial Proceedings*, Leuven, 2007.

well. The challenge which lawyers in Europe are required to face is to break through their usual mistrust towards an instrument which they have scarcely practiced so far, and use these opportunities to increase the value of a new professional skill.

2. In alternative procedures, even non-adjudicative ones, the role of lawyers is anything but minor. The aspects on which the party needs to be advised, guided and assisted by the lawyer are numerous.

The lawyer himself is the one who, by examining the controversy, can verify if it is a matter which only a state judge can solve or if it is possible to turn to a conciliatory procedure³. If the mediation is possible, the lawyer sees to explain the client what it is about and which results he can achieve through it.

Some national legislators, inspired by the EU directive in this way, have established that for some determined matters the judicial procedure must be mandatorily preceded by mediation proceedings. Actually in Italy the law provided that the missed experiment of an attempt of mediation causes an adjournment of the trial, waiting for the parties to start the mediation proceeding at the not judicial seat. The trial will restart only after the time required to conclude the mediation has elapsed, even with a negative result (failed conciliation)⁴.

In these cases, as well as in the cases in which the party spontaneously chooses the mediation procedure, the lawyer is able to advise his client about the most appropriate seat where to carry it out. There are several institutions, both public and private, which offer such services. The lawyer can use his own personal experience gained through previous involvements in similar procedures, to advise a reliable institution, possibly specialized in the specific matter. He can help the client to find his way among the cost estimations, he can analyze the fees and relate them to the items which concern his specific situation. In any case he will use his legal competencies to examine the general rules of procedure adopted (and made public) by the different institutions in order to address the client to the seat which best corresponds to his needs.

³ See *Whereas* (10) of the EC Directive: “This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law”. Besides, Art. 1/2: “This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties’ disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)”.

⁴ Art. 5 D.lgs. n. 28/2010; from March 2011, this mandatory attempt is required in disputes concerning rights *in rem*, division of common properties, wills and successions, family agreements, lease contracts, free-loan contracts, medical liability, libel, insurance, banking and financial contracts. From March 2012, pre-trial mediation should become mandatory also in relation to condominium disputes and to claims for damages deriving from road or maritime collisions.

The lawyer's contribution is precious when presenting the request of mediation. Filling in the petition, defining the subjects to be involved in the proceedings as counter-parties, explaining the initial claims, choosing the documents to communicate and file are activities which the party could do autonomously but it is obvious that if the party avails himself of his lawyer, he will save time and be sure not to make mistakes.

The same, even if in a different way, is valid as well for the party who does not take the initiative first, but is invited to the proceedings and decides to appear by communicating his adhesion.

When the proceedings have started, the lawyer's role varies depending on whether the party asks him to go with him to the meetings with the mediator. Quite often, in particular in the cases in which the lawsuit involves complicated matters on legal level, the party prefers to appear accompanied by a lawyer acting as a consultant. The lawyer shall prepare himself to play this role and study the controversy not only in the terms strictly provided for by the law, as he does when defending the party in court. He shall examine and clarify the background and every involvement even if they do not have a legal nature but relational and emotional. He shall take into account the real interests of his client and weigh up his expectations about the negotiation he is about to do with his help.

In the preliminary step it is fundamental that the lawyer prepares his client to the mediation meeting. Regardless of the fact that the party wants to avail himself of a consultant or that he intends to operate within the proceedings autonomously, in the mediation the party is the main character of the meeting and of the acts done. Therefore it is really important that the lawyer explains his client the details of the proceedings: times and methods, needs of confidentiality, tasks and powers of mediator, the chance to quit in case he decides not to go on with the meetings, the effects of the potential agreement he might stipulate with the other party in case the mediation is successful.

After making sure that the client has properly understood, the lawyer can evaluate with the client the alternatives he is facing at the moment, helping him to grade them within a scale of options on the basis of the interests at play. For each option the lawyer is able to give his contribution by foreseeing the obstacles which may arise on legal level and indicating proper and feasible solutions.

Preparing himself and preparing the party for the meeting, establishing goals and elaborating a negotiation strategy to achieve them means creating the basis of a good mediation⁵. All this will be useful for the party, regardless of the fact that an agreement is achieved or not achieved at the end of the proceedings.

As already said, the lawyer can take part at the proceedings as a consultant of the party. In this case, his role must more than ever adapt to the not adversarial character of the procedure. The

⁵ About negotiation strategy: BOYLE F., CAPPS D., PLOWDEN P., SANDFORD C., *A Practical Guide to Lawyering Skills*, Oxon, 2005, 265.

mediator does not judge and the lawyer is not there to convince him of the reasons of his client, if anything he needs to convince the other party to find a shared solution.

An aggressive attitude, typical of win-lose procedures, can easily cause the interruption of the mediation and determine its failure. On the contrary, the lawyer must adopt a collaborative approach based on the highest availability and correctness. He must not steal the show from the party, but he must help him to focus on the most constructive aspects. If tones raise up and the litigants come to a collision, the lawyer must be an ally of the mediator and recreate a peaceful atmosphere in order to re-establish communication. It is easy that in this way the lawyer gains the trust of the mediator and his availability to listen to him carefully, both in the joint meeting and in the individual sessions (caucuses). The legal competence of the lawyer is extremely useful when it is time to determine the best and worst alternative to a negotiated agreement (BATNA and WATNA) or in those cases when the mediator formulates a proposal on which the parties have to express themselves.

Finally the act the whole procedure aims for: the conciliatory agreement. The agreements which originate from mediation are acts of will of the parties. However the parties are rarely able to evaluate how far the consent they have given is consistent with the rules of law. In this case, as in defining the times and ways of implementation, lawyers can give the parties important advice and help them to draw up the document which properly defines the details.

3. Last of all, it is evident that the role of lawyers in mediation can be relevant. Likewise it is evident that this category of professionals needs an appropriate training in order to offer a high quality service, adequate to the characteristics of the proceedings. But to reach this aim it is necessary to work on the education of the legal class, so that lawyers are able to put themselves in the negotiator's shoes without being influenced by adversarial dynamics. The lawyer needs to develop a flexibility which allows him to modulate his behaviors according to what the procedure requires. In particular, in the case in which Europe sets forth to loosen the still existing net discrimination between adjudicative and conciliatory methods.

Only under these conditions it is possible to imagine that the alternative comes effectively true among the methods of resolutions of lawsuits.