

Mediation

Contributing editor
Renate Dendorfer-Ditges



2017

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Mediation 2017

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Published by
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First published 2012
Fifth edition
ISSN 2051-4697

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Mediation 2017

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Mediation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Tanzania.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Renate Dendorfer-Ditges of Ditges Partnerschaft mbB, for her continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
October 2016

Introduction

Jonathan Lux

St Philips Stone Chambers

History

Mediation is the most popular of a range of dispute resolution methods covered by the acronym 'ADR': alternative dispute resolution.

The terminology here can be somewhat confused. Some say that ADR stands for 'alternative dispute resolution' (ie, an alternative to traditional litigation and arbitration); others say it stands for 'appropriate dispute resolution' (in which case the term becomes almost meaningless as it could embrace all known forms of dispute resolution); and some lawyers say it stands for 'alarming drop in revenue!' (because its effectiveness is such as to resolve in a matter of weeks disputes that might otherwise take years to resolve through the judicial system).

The definition I prefer places litigation and arbitration on one side of the fence and ADR on the other. In other words, the distinguishing feature is that the ADR neutral's role is not to 'decide' the dispute but to facilitate a settlement.

Mediation, while it may have been engaged in privately, was more or less unknown in the common law world until about 35 years ago. The civil law codes, on the other hand, contain provisions dealing with conciliation; in practice, however, these provisions were only rarely brought into play.

Modern ADR had its birthplace in the United States and some say that it is hardly surprising given that in the US the twin evils of cost and delay in the litigation process are at their most acute.

While there is a range of ADR processes, mediation has become by far the most popular.

The process

As mentioned, the mediator's role is not to make any decision but, rather, to facilitate a settlement. There is considerable flexibility in the process but a typical mediation will involve the following stages:

- the mediator is appointed by agreement between the parties or nominated by a third party (eg, the President of the Law Society);
- the mediator asks the parties to sign a mediation agreement, which will contain, *inter alia*, clauses enshrining the confidential and impartial nature of the process;
- the mediator invites the parties to send to him or her a 'mediation position paper' and, if they wish, a 'mediator's eyes only' paper and, if possible, to agree on a set of documents relevant to the purpose of the mediation. The mediation position paper is not supposed to be a replica of court or arbitration pleadings but, rather, to set out relevant background circumstances and what each party hopes to achieve from the process;
- pre-mediation meeting or teleconference: it is good practice for the mediator to contact each party in advance of the hearing to discuss background facts and, importantly, who is to be present on each side at the hearing. It is of critical importance that there is a senior decision-maker present on each side at the mediation hearing if a settlement is to be achieved on the day; and
- the mediation hearing: again, there are no hard and fast rules and the mediator will endeavour to adapt the process to the circumstances of the particular case.

In some countries (eg, Germany) the norm is for the mediator to conduct the mediation with both parties present throughout the day.

In England, on the other hand, it is the general practice for the mediator to hold private caucus sessions with each party. Indeed, in

some mediations the distrust, and sometimes loathing, between the parties can be so great that they refuse to participate in joint sessions throughout the whole process.

Generally, however, the norm in England is for the day to start with a plenary session where the mediator explains his or her role and both parties then have an opportunity to present their issues relating to the dispute.

It is thereafter that the mediation process tends to come into its own, with the parties retiring to separate rooms and the mediator shuttling backwards and forwards between the parties until a settlement is achieved, which is said to happen in approximately 85 per cent of cases.

At that point, the mediator will tend to bring the parties back together to draw up and sign the settlement agreement – a very necessary step to ensure the likelihood of the terms of the agreement being carried out after the mediation process has finished.

A popular process?

The process is private and confidential so it is not easy to provide reliable data. It has been suggested, however, that commercial mediations in the UK are running at approximately 10,000 per annum, although I suspect that the true figure is far higher. With strong support from the government this number is set to rise. Indeed, in these recessionary times the government will be attracted to mediation if for no other reason than that it can serve to shave a considerable amount off the justice budget.

There is strong support also at the European level and an EU Directive on Cross-Border Mediation. In some countries mediation has been made compulsory – Italy and Argentina being two examples.

Other facts that are likely to lead to increased mediation include the following:

- parties are increasingly including multi-tiered dispute resolution clauses in their contracts, for example:
 - step 1: good faith negotiation between the parties;
 - step 2: mediation; and
 - step 3: arbitration or litigation.

There is English High Court authority for the proposition that a mediation clause is enforceable.

Even if a particular litigation lawyer is not a fan of mediation, it may amount to professional negligence to fail to advise a client that he or she has the option to mediate and on whether mediation would be suitable for the particular case.

The courts themselves are increasingly concerned by the high costs of litigation and lawyers are under a duty to ensure that costs are proportionate. During the case management conference the judge is likely to raise the subject of mediation, even if the parties do not, and the judge has the power to direct that the court proceedings be stayed so that mediation can take place. In such circumstances if one party unreasonably refuses to participate in mediation (or fails to engage with a proposal from his or her counterparty to do so), then the court has the power to impose costs sanctions. I have suggested that arbitrators have the self-same powers as the judges in this respect (www.st-philipstone.com/who-we-are/latest-news/item/574-london-leading-a-mediator-s-view-on-mediation-in-arbitration-jonathan-lux).

Perhaps the most important reason for the increasing popularity of mediation is that it works. Unlike the fractured relationship that is the

sequel to a fully contested court or arbitration proceeding, mediation enables the parties to preserve their relationship and it is not uncommon for future business to be a term of the settlement agreement that is concluded at the end of the mediation.

What are the disadvantages?

Mediation will not give parties security for their claim, the publicity that they may want, the binding precedent that comes from a court judgment, or enforcement. On analysis, however, these disadvantages will evaporate.

If a claimant is concerned that the defendant may not be financially secure then there is nothing to stop the claimant from mediating and concurrently starting court or arbitration proceedings and then applying for a freezing injunction or ship arrest to ensure that there are assets to meet whatever entitlement the claimant has.

If it is publicity that a party wants (or more likely a published apology) then this can be made a term of the mediation settlement.

Very few parties are keen to fund the extensive costs involved in seeking a binding court precedent. In most cases it is the gathering and analysis of the facts that consumes the bulk of the costs. It has been said that 20 per cent of the overall costs is spent in presenting 80 per cent of the facts and then 80 per cent of the costs is spent dredging for the remaining 20 per cent of the facts, which only rarely make any substantive difference to the outcome of the case. This is hardly a successful economic model.

That said, if there is an issue of law on which a court decision is wanted (for example, on the construction of a clause in a contract) then the parties should seriously consider mediating everything but the contract issue and referring only the latter to the court.

It is also said that there can be difficulties in enforcing the mediation settlement agreement, which is simply another contract that can be broken. However, this ignores the fact that in many cases court or arbitration proceedings will have been started before the mediation

takes place and, by agreement of the parties, it is perfectly possible to convert the mediation settlement agreement into a consent judgment or consent award with all the possibilities of enforcement that attach to a judgment or award.

Another suggested disadvantage is that mediation can be used (or abused) by a party as a 'fishing expedition' (ie, the party has no serious interest in settlement and simply wants to prise as much information from his or her opponent as possible to increase the chances of winning the subsequent court or arbitration proceedings). Again, this does not really stack up. If a party's evidence (documentary or witnesses, or both) is weak then this will come out before or at the trial. What then is the real disadvantage of this becoming apparent earlier, when only a fraction of the likely ultimate costs have been incurred?

The future of ADR

There is an increasing number of mediation issues coming to court (eg, confidentiality). It will be most important for the court to resist the temptation to pry into the mediation itself.

Another issue is that it may be difficult to mediate early, before each party knows what the other will say and has seen the evidence to back the case (or defence) put forward. I have devised a solution to this which I have called 'Early Resolution', described in greater detail at www.st-philipstone.com/2016-09-22-07-43-05/adr-earlyresolution.

ADR is relatively young – certainly by comparison with the second oldest profession, the law. There is still considerable ignorance even among lawyers as to what it is and how it works. It is crucial that in these early years we take the time and trouble to grow a cadre of professional mediators who can be entrusted to take good care of the process. If this occurs then parties can only be impressed by the singular cost-efficiency, speed and 'relationship' advantages that mediation offers. This may lead to mediation becoming the dispute resolution process of first recourse and this publication is no doubt a helpful step in that direction.



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Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Italy implemented 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 with Legislative Decree No. 28/2010, which was implemented by Ministerial Decree Nos. 180/2010 and 145/2011.

Besides the above-mentioned pieces of legislation, many alternative dispute resolution (ADR) providers (public or private) voluntarily refer – for international mediation (outside the EU) – to the United Nations Commission on International Trade Law Model Law on International Commercial Conciliation.

On 3 September 2015 Legislative Decree No. 130/2015 came into force, implementing Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

ADR methods have generally been known in Italy for a long time, but mediation in particular has only started to receive attention in its development as a serious means of dispute resolution over the past 15 years or so.

As mentioned above, the Italian government has recently implemented Directive 2013/11/EU on ADR for consumer disputes, transposing the Directive and adapting it to the various ADR procedures already present in consumer affairs.

The entry into force of Decree No. 130/2015 also modifies Decree No. 28/2010 and the manner in which the mediation centres that are currently registered with the Italian Ministry of Justice should carry out mediations between professionals/companies and consumers.

Legislative Decree No. 130/2015 has made changes and additions to Decree No. 206/2005, better known as ‘Consumer Code’, with the inclusion of ‘Title II-bis – extrajudicial disputes resolution’ (article 141 to 141-decies), which regulates the procedural methods for ADR procedures.

In practice, ADR helps consumers to resolve disputes with commercial traders when problems arise with a purchased product or service; for instance, if the seller refuses to repair a product or to make a refund to which the consumer is entitled.

It should be noted that under article 141, paragraph 10, the consumer will not be deprived of the right of appeal to the competent court, whatever the outcome of the court settlement before the ADR entity. Before Legislative Decree No. 28 of 4 March 2010 (updated by Decree-Law No. 69 of 21 June 2013, converted by Law No. 98 of 9 August 2013), the most significant innovation over the past few years for the development of mediation in Italy was contained in Legislative Decree No. 5/2003 (now repealed by the above-mentioned Decree No. 28/2010, which has taken its place and has broadened the scope of the attempts of mediation to all civil and commercial disputes). Decree No. 5/2003 provided for both mediation and arbitration in disputes

within a company (and certain other circumstances as, for instance, banking and financial disputes).

Law No. 129 of 2004 entitled ‘Rules for the regulation of the franchising’, in article 7, entitled ‘Mediation’, states that for disputes relating to the franchising agreement the parties may agree that prior to court proceedings or arbitration, an attempt at mediation should be made at the mediation office of the chamber of commerce in whose territory the franchisee has their main office. At the mediation proceedings the provisions of Legislative Decree No. 28/2010 shall apply *mutatis mutandis*.

Legislative Decree No. 206 of 2005 (the Consumer Code) reorders the legislation on consumers and is the fundamental reference text for the protection of the rights of consumers and users.

The Consumer Code provides that the associations of consumers and users and other entities have the option, before judicial proceedings, to attempt mediation before the mediation office of the local chamber of commerce or other mediation providers competent under article 141 of the Consumer Code. The Consumer Code provides that the duration of the procedure is limited to 60 days (the period within which it must always be settled).

The mediation record, signed by the parties and the representative of the mediation provider, is lodged at the court of the place where the mediation was held for the approval of the judge, who makes it enforceable.

The Consumer Code provides for both offline and online mediation to settle disputes between consumers and professionals.

In 2006, Law No. 55, entitled ‘Amendments to the Civil Code on family pacts’, introduced article 768-octies of the Italian Civil Code, which states that disputes arising from provisions related to transfers of family businesses to descendants must be sent to one of the mediation bodies accredited by the Italian Ministry of Justice.

In 2007, by a regulation issued by the Authority for Telecommunications Supervision with Resolution No. 173/07/CONS, new procedures entered into force for settling disputes between users and operators of telecommunication services.

This Resolution states that the attempt of mediation is a ‘condition of admissibility’ of judicial action against suppliers of services, but widens the different procedures available to users.

On the website of the Authority for Telecommunications Supervision (www.agcom.it) it is possible to download the forms by which the user can carry out the following:

- requests for provisional measures to the continuity of telecommunication service (form GU5);
- requests for mediation (form UG); and
- requests for application for settlement of the dispute to the Authority (form GU14).

One change is the recognition of absolute equality – as to the condition of admissibility – between mediation proceedings managed by the mediation chambers established at the public offices for telecommunication (Corecom), those managed by the chambers of commerce and those managed by bodies that have arisen from joint agreements between consumer associations and telecommunications operators, and finally from all mediation providers recognised by the Consumer Code.

Legislative Decree No. 179 of 2007 on the institution of an Arbitration and Mediation Chamber within the Italian National

Commission on Companies and the Stock Exchange (Consob) provides for the establishment of a chamber of mediation and arbitration for resolving disputes between investors and brokers, because of violation by the brokers of requirements concerning information, fairness and transparency in contractual relationships with investors, and a system of compensation for damage suffered by investors and a special guarantee fund.

The legislation provides that the Chamber of Conciliation and Arbitration of Consob can make use of the mediation services of the mediation bodies entered in the Register of the Ministry of Justice.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation proceedings?

Authorisation to mediate

For the purposes of the Legislative Decree No. 28/2010, mediation should be handled only by mediation bodies accredited by the Ministry of Justice.

Mandatory attempt of mediation

In certain disputes Italian law requires a previous mandatory mediation attempt.

Need for mandatory presence of the lawyers of the parties

At the first meeting and subsequent meetings, until the end of the procedure, each party must participate with the assistance of a lawyer.

Preliminary meeting

For every type of mediation it is ordered by law that a mandatory preliminary meeting in which the mediator, together with the parties and their lawyers, explains to the parties the function and how to conduct the mediation. The mediator, in the same first meeting, then invites the parties and their lawyers the chance to speak, to begin the process of mediation and, if positive, proceed with the conduct of the mediation.

Duration

The mediation proceeding can last for up to three months, after which the mediation attempt can be considered to be satisfied; even if the parties – on a voluntary basis – continue to try to negotiate a possible solution.

Confidentiality

The mediation process protects confidentiality and professional secrecy.

Enforceability

The mediation agreement may become enforceable (see below).

Penalties

Those not participating (without reason) in a mediation are required to pay some court costs in subsequent litigation.

Exemptions and benefits

The minutes of mediations with a value under €50,000 shall be exempt from payment of registration fees.

All records and documents relating to the mediation process shall be exempt from stamp duty and any expenses and taxes.

Those unable to meet costs of mediation can benefit from legal aid, and can freely participate in mediation. The parties to mediation can benefit from a tax credit up to a maximum of €500 in the event of a successful mediation. In the case of failure of the mediation, the tax credit is reduced by half.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

In Italian law a prior mediation attempt is only required in certain disputes. From the 1990s the legislature began to require mediation or conciliation and inserted provisions in this respect while passing laws that dealt with reforms in various sectors, as follows:

- Law No. 320 of 1963 provides for the obligatory attempt to mediate the dispute before the agricultural sections of the court;
- Law No. 481 of 1995 prescribes a mandatory attempt of mediation in disputes related to public utility services;
- Law No. 192 of 1998 prescribes an attempt of mediation for disputes between contractors and subcontractors. The mediation attempt must take place at the chamber of commerce where the subcontractor has its headquarters; and
- Law No. 183 of 2010 provides for a mandatory attempt to mediate in certain disputes related to employment contracts.

In civil and commercial matters, the mediation attempt is considered by Legislative Decree No. 28/2010 as 'voluntary' for all disputes, but it is a condition for admissibility of a judicial action, and therefore 'mandatory', for disputes relating to the following:

- co-ownership of land;
- property rights;
- division of assets;
- hereditary succession;
- family agreements;
- leasing;
- loans;
- commercial leases;
- medical and paramedical liability;
- defamation;
- insurance; and
- banking and financial agreements.

The parties, in those cases, must first attempt to resolve their disputes through mediation (with the mandatory assistance of lawyers) before submitting them to the Italian judicial system. If a party initiates proceedings before the court without first resorting to mediation, the judge shall suspend the case and order the parties to mediate. Such mediation has to be conducted by one of the ADR providers accredited by the Italian Ministry of Justice. The legislative decree provides that the unjustified failure of a party to appear at the mediation procedure can be considered by the judge in the subsequent judicial proceeding and trigger negative inferences, on the basis of article 116(2) of the Code of Civil Procedure. Additionally, new legislation (Law No. 148 of 14 September 2011) provides that, in the above-mentioned case, a party who fails to appear will be obliged to pay an amount (equal to the amount that a party must pay to the state when he or she participates in a judicial proceeding) to the state as a form of sanction. If a mediation clause is contained in advance in a contract or in a company's constitution and if a party has commenced a judicial proceeding without trying to mediate, the judge or the arbitrator – upon request of the interested party – must postpone the proceeding and fix a time, within a maximum of 15 days, by which the parties should request mediation by an accredited provider.

Generally, judges are not permitted by law to refer cases to mediation. They can only advise the parties, during the trial, to try to mediate their case. Only in some cases, as provided in Legislative Decree No. 274 of 2000 (relating to the criminal competence of the Italian judges) can the judge promote mediation, or refer the parties to a public or private mediation centre.

The new law provides that the court, even in court of appeal, after considering the nature of the case, the state of education of the case and the behaviour of parties, may order the parties to try to mediate. In these cases, the mediation is 'a condition of admissibility' of the proceedings, including during the appeal proceedings, but judges may not specify the mediator or the mediation provider (pursuant to Legislative Decree No. 28 of 4 March 2010).

5 Court-annexed mediation

Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

Generally speaking, Italian legislation does not provide for a real integration of mediation into court proceeding.

That said, a judge may try to mediate among the parties at every stage and degree of the civil and commercial proceeding headed by him or her.

In some cases (minor proceedings, divorce, etc) the judge can try to mediate before going on, but a true system of court-annexed mediation has not yet been provided for by law.

However, a certain degree of integration between mediation and trial was provided by Legislative Decree No. 28/2010, which states that some activities undertaken (or not undertaken) in mediation have an impact (positive or negative) on the possible subsequent judicial proceedings.

6 Mediation-arbitration and other forms of mediation-related ADR

Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

Generally speaking, hybrid ADR methods are not often used in Italy.

However, it is important to consider that some chambers of commerce and private ADR providers offer combined ADR instruments such as med-arb and med-then-arb (alongside mediation and arbitration).

The use of arb-med is restricted to some particular complex cases and some high-profile ADR providers (such as Concilia, some chambers of commerce, etc).

Only if the ADR body in which a mediator is accredited permits it may the mediator also act as arbitrator for the same parties and on the same controversy. In general, the appointment of different professionals is more common: one for the attempt of mediation and the other as arbitrator (or as a member of the arbitral tribunal).

In a civil trial, if a judge attempts to mediate between the parties and mediation fails, however, the same judge may continue the trial.

Even if there is the possibility, it is not very common that an arbitrator have the desire to transfer arbitration cases to mediation, losing the possibility to continue the arbitration procedure.

Some ADR providers (such as Concilia) use other ADR techniques as adjudication, expert determination and peace dialogue tables. These kind of ADRs are used for specific cases and, generally, upon request.

7 Online dispute resolution (ODR)

Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

The practice of using the internet and computers to try to solve disputes in mediation or arbitration has been known for many years in the Italian ADR system.

That said, it is important to know that the use of ODRs is not widespread or used frequently in Italy. In fact, only the major ADR providers have electronic ADR programmes that enable disputes to be solved in a virtual environment. One of the new laws on mediation (specifically Ministerial Decree No. 180/2010, recently updated) regarding the possibility of the use of electronic means in mediation indicates that the mediation rules of every ADR provider accredited by the Ministry of Justice cannot provide that access to mediation takes place exclusively through electronic means.

In any case, to manage online mediations, the mediation provider must have an electronic programme that has been prepared with all the protocols and the security measures established by the competent department of the Ministry of Justice. Therefore, the use of platforms such as Skype or those of a similar type is prohibited.

At present, there are no measures implementing European ODR legislation, although it will soon be necessary to discuss it.

8 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

All mediators must keep any information arising out of (or in connection with) the mediation confidential, including the fact that the mediation exists and has been conducted between the parties.

In addition, Legislative Decree No. 28/2010 provides that mediators may not be called as witnesses and the parties may not rely on any communications made or any information collected during mediation in the subsequent judicial proceedings.

In particular, article 9, entitled 'Duty of confidentiality', states that anyone who works in a mediation provider accredited by the Ministry of Justice is bound by an obligation of confidentiality with respect to statements made and the information acquired during the mediation process. In addition, the same article states that the mediator shall be held to confidentiality in relation to all other parties, with regard to the statements made and to the information acquired during the caucuses (separate sessions), except with the consent of the registrant, or the consent of the party from whom the information originated.

Article 10, entitled 'Usability and professional-secrecy', sets forth that the statements made or the information acquired in the course of a mediation process cannot be used in a trial having the same object, even in part, that has begun, been summarised, or continued after the failure of mediation, except with the consent of the registrant or the party from whom the information originated. Further, the evidence of witnesses is not allowed on the content of those statements and information.

The article further states that the mediator may not be required to testify about the content of the statements made and the information gathered during the mediation process before the court or other authorities.

In addition, in accordance with article 22 of Legislative Decree No. 28/2010, the mediator must report suspected money laundering or terrorist financing to the competent authority. The disclosure of confidential information by the mediator or the parties is permitted or compelled in the cases provided by article 7 of EU Directive 2008/52/EC.

9 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

When the request for mediation is communicated to all the parties convened in the mediation, it interrupts the time line for a court action and, provided that it is the first such request, will prevent a right of action from expiring; but if the mediation fails, the proceedings must be brought within the same period of the limitation that starts from the filing of the report of failure to mediate.

10 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Legislative Decree No. 28/2010 has introduced a form of multi-step procedure: while mediation is the process in which a professional mediator helps the counterparties to resolve their dispute, conciliation is the positive result of the mediation process, the settlement.

The new law establishes that if an amicable settlement among the parties is reached, the mediator compiles the mediation minutes to which the text of the mediation agreement is attached.

With the novelties introduced in the text of the above-mentioned Legislative Decree No. 28/2010 by Decree-Law No. 69 (converted by Law No. 98 of 9 August 2013), where all the parties that have acceded to the mediation are assisted by a lawyer, the agreement that has been signed by the parties and by the same lawyers, is automatically

enforceable for: compulsory expropriation; execution for delivery and release; performance of the obligations of do's and don'ts; and recognition of judicial mortgage.

Lawyers witness and certify the compliance of the mediation agreement to mandatory rules and public policy.

In all other cases the agreement attached to the minutes is approved, on request of a party, by a decree of the president of the court, subject to verification and approval of compliance with mandatory rules and public order. In cross-border disputes, the mediation minutes are approved by the chief judge of the district in which they are to be performed.

11 Mediation institutions

What are the most prominent mediation institutions in your country?

In Italy public and private mediation providers are accredited by the Ministry of Justice for conducting civil and commercial mediation upon the provisions of Legislative Decree No. 28/2010 (there are more than 900 bodies at the time of writing, and the number will increase every month).

As for the public, the 104 Italian chambers of commerce are the more prominent public ADR bodies: each of them has a mediation and arbitration chamber.

Among them, the more well known are as follows:

- the chamber of mediation of the Milan Chamber of Commerce;
- the chamber of mediation of the Rome Chamber of Commerce; and
- Curia Mercatorum, an association of private law, not for profit, owned by several chambers of commerce, trade associations and professional associations, and led by the chamber of commerce of Treviso.

As for the private ADR providers, the most prominent are as follows:

- Concilia (www.conflictresolution.it), which, since 1999, has provided training and consultancy services in civil and commercial negotiation, mediation, conciliation and arbitration, as the leading Italian ADR provider. Concilia is headquartered in Rome, with accredited secondary offices in Italy and abroad. Concilia is accredited by the Italian Ministry of Justice for conducting civil and commercial mediations and for organising training for professional mediators. Among other things, Concilia houses the headquarters of the Italy Professional Chapter of Mediators Beyond Borders International and has been nominated as the first and unique Italian qualifying assessment programme by the Independent Standard Commission of the International Mediation Institute;
- Conciliatore Bancario e Finanziario (banking and financial mediation provider). This was born from an initiative led by the first 10 Italian banking groups to give customers a fast and efficient alternative to court proceedings (www.conciliatorebancario.it);
- the Chamber of Mediation of Consob, which was created to try to resolve, through mediation, banking and financial disputes (www.camera-consob.it); and
- ADR Notariato, created by the National Council of Notaries with multiple offices in Italy (www.adrnotariato.org).

Mediation procedure

12 Background

Describe the development of mediation in your country.

Even though mediation in its multiple forms (family, civil, commercial, corporate, environmental, social, etc) has been well known in Italy for many years, only recently have a general professionalism and common ethical standards been established for almost all forms of mediation.

In certain cases, however, there are still barriers to the use of mediation, and lawyers specifically are divided between those in favour of mediation and others who are absolutely opposed to it. The role played by the Italian chambers of commerce and by a few private ADR providers in the advancement of mediation procedures is undeniable.

The Ministry of Justice regularly publishes statistics regarding civil and commercial mediations in Italy. The new data for the first quarter of 2016 is derived from 445 responding mediation bodies.

In the study period, there were 76,083 new cases of mediation registered, which is in line with the data from 2015 (82,489 in the first

quarter; 84,210 in the second; 62,581 in the third and 75,656 in the fourth). Among the controversies mostly treated in mediation in the first quarter of 2016 were those related to bank contracts (approximately 22 per cent), real rights (14 per cent), leasing (12 per cent) and condominium (11 per cent).

The adhering party appeared in 46 per cent of cases and, when the parties agreed to sit at the mediation table after the first meeting (the preliminary meeting), a settlement agreement was reached in 43 per cent of cases (all data is in line with previous surveys).

In general, an agreement was reached in 37.6 per cent of voluntary mediation cases, 21.4 per cent of mandatory mediation cases and 13.9 per cent of court-assigned cases.

Among the disputes to which there was a higher percentage of an appearance of the adhering party were those concerning relations between relatives (hereditary succession: 60.1 per cent; inheritance division: 57.1 per cent and family agreements: 56.3 per cent).

The adhering party appeared in between 50 and 55 per cent of disputes relating to property rights, lease, condominium and rental companies, while the percentage dropped to approximately 45 per cent in the event of bank contracts; to between 35 and 40 per cent in terms of damages from defamation by the press, financial contracts and damages from medical liability; and to only 13.4 per cent in terms of insurance contracts.

With regards to lawyers attending mediation: in voluntary mediation, 62 per cent of applicants were assisted by their legal, while this was 83 per cent for the adhering parties.

As for the length of the mediation, compared to 902 days (2015 data relating to a dispute in court), the average ADR procedure, with an appearance by the adherent and agreement, lasted 80 days, which is down compared to 103 days in 2015, but in line with 2013 (82 days) and 2014 (83 days).

13 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Currently, mediation is used for a wide range of disputes from civil to commercial, corporate, financial, banking, insurance, family, environmental, labour, consumer, criminal and social.

Criminal mediation, however, is used only in the case of offences prosecuted upon complaint and in juvenile proceedings.

In addition, on the basis of what is required by the European Directive on mediation, mediation attempts do not extend to revenue, customs or administrative matters or the liability of the state for acts and omissions in the exercise of official authority. On the contrary, only those matters that involve the liability of public authorities for non-authoritative acts fall into the category of disputes governed by Legislative Decree No. 28/2010.

14 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

No, the mediation procedure is very informal and the parties do not necessarily have to prepare summaries or keep records or documents.

The mediation procedure, however, is commenced with the filing – by the claimant – of a written request for mediation. The request must be transmitted by the ADR provider to the defendants by any means that can ensure the receipt of the documents: postal services, fax or certified email.

15 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

The entire proceeding in this case can be described as follows:

- the parties (or one of them) submit a written mediation request to an independent qualified professional ADR provider accredited by the Ministry of Justice;

- the chosen ADR provider designates an independent mediator (chosen from among the mediators accredited by the ADR provider) and arranges the initial meeting between the parties;
- the date, location and name of the chosen mediator are communicated to other parties by the ADR provider and by the party who initiated mediation, if he or she wants to ensure that other parties have received the communication; and the fees payable to the accredited mediation bodies and to the mediator, to be borne by the parties, are provisionally established;
- the new law provides for the obligation of assistance of lawyers for all the parties involved in a mandatory mediation attempt. In these cases, the presence of the lawyers of the parties is mandatory for all the phases of the mediation procedure until the end;
- as previously mentioned, the new addition to Legislative Decree No. 28/2010 introduced the necessity of a 'preliminary meeting' before starting the mediation. For every type of mediation the law orders a mandatory preliminary meeting in which the mediator, together with the parties and their lawyers, explains to the parties the function and how to conduct the mediation. The mediator, in the same first meeting, then invites the parties and their lawyers to discuss the prospects of beginning the mediation process and, if positive, to proceed with the conduct of the mediation; and
- after this point, if the parties reached a positive accord to start the mediation proceeding, two different scenarios are possible, depending on the choices of the parties to the mediation, as follows:
 - if the parties are able to reach a written agreement, the mediator drafts the minutes of the meeting that must be signed by all the parties, by the mediator and by the lawyers of the parties; and
 - if no agreement is reached at the parties' request the mediator must issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse.

If either party refuses the proposal, the mediation is considered to have failed and any party may commence a lawsuit. But if the judicial decision is identical to the previous mediator's proposal, such decision may affect the allocation of judicial expenses because the court will refuse to award all the costs and the expenses to the winning party if that party has previously rejected the mediator's proposal. In such circumstances, the court will order the winning party to pay the losing party's costs and court fees.

16 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both commonly used in mediation?

At any stage of the mediation procedure the parties may mutually ask the mediator to formulate a written proposal and he or she is obliged to issue a non-binding proposal for the resolution of the dispute, which the parties may choose to accept or refuse.

If no agreement is reached by the parties, before writing the mediation minutes, the mediator may voluntarily issue a non-binding proposal to try to help the parties reach an agreement on the basis of his or her proposal.

The primary mediation style for commercial mediation is 'facilitative' and, if the mediator thinks it is opportune, or if the parties require it, the style may change to 'evaluative'. Whatever the style, Italian mediations are managed with the use of joint and private sessions.

17 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Generally speaking, use of a sole mediator is the most common.

Co-mediators are more often used in family cases and for complex business mediations, or for multiparty mediation. Even for environmental mediation, co-mediators are used to resolve both legal-economic and social-relational aspects. Often, in these cases,

lawyers (or accountants) act alongside sociologists or psychologists as mediators.

Further, the new law on mediation (Legislative Decree No. 28/2010) establishes that in disputes that require specific technical skills, the ADR provider may appoint one or more auxiliary mediators.

18 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

Apart from the obligation by law (Legislative Decree No. 28/2010) of the presence of the party's lawyer in mandatory attempts of mediation, Italian legislation does not require the presence of consultants in mediation proceedings, but it is always recommended by the ADR providers that parties are accompanied by professional advisers, especially when the dispute is complex and difficult.

Legislative Decree No. 28/2010 sets out special rules applicable only to lawyers. When a lawyer has been appointed, he or she must inform the client about the possibility to use the mediation process and about the tax benefits that may come from a mediation procedure governed by Legislative Decree No. 28/2010. The lawyer will also inform the client of the cases in which the mediation is a condition of admissibility of the claim. The information must be provided clearly and in writing. In the case of breach of information obligations, the contract between the lawyer and the client is voidable. The document containing the information about the mediation procedure is signed by the customer and must be attached to the application for any court proceeding. The court, which verifies whether that document is attached to the application, informs the party of the right to request mediation, or sets the first hearing after the expiry of the deadline for the obligatory attempt at mediation (within three months of filing the mediation before an accredited provider).

Some mediation providers stipulate in their mediation rules that individuals must personally participate in the mediation process with the mandatory presence of a personal lawyer (in cases of mandatory attempts of mediation), being able to be assisted by other professionals of their choice. Only for serious and exceptional reasons may they participate in the proceedings using one or more representatives with the power to settle the dispute; while legal persons must participate in the process of mediation by a representative with the appropriate authority to resolve the dispute. For non-binding attempts of mediation, some mediation rules require the assistance of an attorney for each party for mediations whose value exceeds a certain amount (usually €50,000), unless the parties expressly waive this in writing.

With respect to experts and witnesses, the new law indicates that in complex cases, in addition to possible co-mediation, the mediator may make use of experts enrolled in the register of consultants in the courts. Parties may make use of their own experts and witnesses.

Lawyers and other assistants of the parties, as well as co-mediators, experts and witnesses, shall apply the rules of confidentiality provided for in the law.

19 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?

Some ADR providers are specialised in creating dispute management systems for companies. However, mediation in civil and commercial matters must always follow the directions of Legislative Decree No. 28/2010. Systems are especially used to automate the processes that are the basis of any kind of mediation, such as requests for mediation, submission of documents, responses to individual requests by the ADR provider, etc. The Consumer Code provides that associations of consumers and users may, prior to judicial proceedings, attempt mediation before the local chamber of commerce or other competent

mediation providers. In such cases the duration of the mediation procedure is limited to 60 days, after which it is considered settled.

As a member state of the EU, Italy applies EC Regulation No. 861 of 2007 of the European Parliament and of the Council, which established a European small claims procedure in cross-border cases. The Regulation is applicable to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed €2,000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interests, expenses and disbursements. It does 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.

The legislation also provides that, where possible, the court shall attempt to reach a settlement between the parties.

Mediation clauses and mediation agreement

20 Mediation clauses

Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?

More and more in Italy, especially in the business world, during the drafting of contracts, particular attention is drawn to the inclusion of ADR clauses that may foresee only mediation or only arbitration, or they can be multi-step, providing the classic triad of negotiation, then mediation, then arbitration.

A classic example of a multi-step contract clause is the following mediation-then-arbitration clause:

- *Every dispute arising under or connected to this contract will first be object of an attempt of mediation procedure in accordance with the Mediation Rules of Concilia LLC, a company registered at the Italian Ministry of Justice, at No. 8 of the Register of the institutions delegated to handle civil and commercial mediation attempts. The seat of the mediation will be [...] [city]. Mediation rules, forms and table of fees currently in force at the beginning of the mediation procedure are available on the website www.conflictresolution.it. If the dispute is not resolved within (90) days from the deposit of the request of the mediation procedure, the dispute shall be settled by arbitration - under the Rules of Arbitration of Concilia LLC in force at the moment of activation of the arbitration, available on the website www.conflictresolution.it.*
- *The Arbitral Tribunal will consist of a sole arbitrator [or: three arbitrators] appointed pursuant to those Rules.*
- *The arbitration will be formal (or informal).*
- *The Arbitral Tribunal will decide in accordance with the rules of law of [...] [or: ex aequo et bono].*
- *The seat of the arbitration will be [...]*
- *The language of the arbitration will be [...]*
- *The decision of the arbitrator (arbitrators) will be final and binding on the parties.*

21 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

The parties are free to conclude a mediation agreement at their discretion. Nevertheless, the parties may themselves undertake a mediation attempt in advance through the provision of a specific contractual mediation clause in their mediation agreement.

As mentioned, during mediation the parties may only oblige the mediator to issue a non-binding written proposal.

22 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

For mediation mandated by law, there is an identical tariff for both public and private providers. With regard to voluntary mediations, each provider may set its own rates, which must be approved by the Ministry of Justice.

Parties are jointly and severally obliged to pay the fees and the fees increase in proportion to the value of the dispute. The mediator is paid by the provider, with a percentage of the fee that the parties pay to the same provider.

Public rates range from a minimum of €65 to a maximum of €9,200.

Professional matters for mediators

23 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Mediators must possess at least a bachelor's degree or, alternatively, must be enrolled in a professional association or board.

Moreover, an accredited mediator must meet the following criteria:

- he or she must not have a criminal record;
- he or she must not be permanently or temporarily disqualified from public office;
- he or she must not be the subject of preventive or security measures or safety; and
- he or she must not have been the subject of disciplinary sanctions other than disciplinary warnings.

In addition, no mediator may declare him or herself willing to act as mediator for more than five accredited mediation providers.

Mediators may not assume rights and obligations, directly or indirectly, in the mediations they oversee. In addition, the mediators may not receive monetary compensation directly from the parties. The payment must be made directly to the mediation provider.

Before every mediation, the appointed mediator must: sign a declaration of impartiality; notify the mediation provider and to the parties all the reasons for possible damages to the impartiality; and respond to any organisational request of the mediation body.

The very latest legislation on mediation published, and in force since 24 September 2014 (Decree No. 139 of 4 August 2014), states that the mediator cannot be a party of a mediation or represent, or in any way assist, the parties in mediation procedures before the mediation providers in which he or she is accredited, or in which he or she is a partner, or hold a charge for any reason. The ban extends to professional members, associates or those exercising the profession in the same premises.

Moreover, a mediator who is currently in, or has been in, over the past two years, a professional relationship with one of the parties, or when one of the parties is assisted, or has been assisted in the past two years, by his or her partners, or associated with him or her, or who has practised in the same premises cannot be named.

Finally, the person who has played the role of mediator cannot entertain a professional relationship with one of the parties until at least two years after the definition of the procedure. The ban extends to professional members, associates or those engaged in the same premises.

24 Training

Are there any requirements regarding training for mediators?

The law states that civil and commercial mediators should have specific training (at least 50 hours) acquired from accredited ADR training centres.

The basic content of the training is laid down in the legislation as follows:

- national, EU and international legislation on mediation and conciliation;
- methodology of facilitative and award procedures of negotiation and mediation;
- conflict management and communicative interaction techniques, also with reference to mediation referred by the court; and
- effectiveness and operation of the mediation clauses, form, content and effects of the request for mediation and of the conciliation agreement, duties and responsibilities of the mediator.

The training is divided into theoretical and practical parts, with a maximum of 30 participants per course, including simulated sessions with student participation and a final examination for a minimum of four hours.

25 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

The law prescribes that civil and commercial professional mediators must take refresher courses (at least 18 hours every two years) and establish their participation, during each two-year period, and for the purposes of professional education, in at least 20 mediations managed by mediation organisations accredited to the Ministry of Justice.

26 Accreditation of mediators

Outline the system for certification of mediators.

Formal registration with the Ministry of Justice is required for those (ADR providers and mediators) wanting to conduct mediations in compliance with the new law. This means that, at present, only those ADR bodies listed on the Ministry register (www.giustizia.it) can act as an accredited ADR provider (with their accredited mediators) in civil and commercial mediations and other disputes covered by the current legislation.

The same is required for mediators: to work, a professional mediator who has passed an accredited training course (organised and managed by an accredited ADR training centre) needs to be accredited into the mediators' panel of an accredited ADR provider, otherwise he or she cannot operate.

Parties who entrust their civil and commercial dispute to an unregistered ADR provider and before an unregistered mediator risk not being able to enforce any resulting agreement. It seems that the legislature believes this interventionist regulatory approach is best for Italy, and that this is the most appropriate way to implement EU Directive 2008/52/EC in the Italian judicial system.

Apart from the special ministerial authorisation of ADR providers and mediators dealing with civil and commercial mediations under Legislative Decree No. 28/2010, there is a two-tier system in Italy, whereby ordinary mediators (not accredited by the Ministry of Justice) may deal with mediations in family, environmental, social, criminal

and consumer disputes. Obviously, except for some provisions, a mediation managed by ordinary mediators may not have all the positive outcomes of a mediation under an accredited ADR provider and managed by an accredited mediator.

27 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The mediator must keep information acquired in joint and separate meetings confidential. In addition, the mediator must remain impartial, neutral and independent from all the parties of the mediation. The mediator must also inform the parties and the ADR provider that appointed him or her of every circumstance that may affect his or her impartiality and independence during the mediation. The mediator must monitor that the parties do not perpetrate crimes or fraud during the mediation procedure.

The mediator may be liable for wilful misconduct or gross negligence, for improper behaviour adopted during the mediation procedure he or she runs. The mediator may only be liable for the management of the mediation and for the preparation of the written minutes of mediation. The subsequent written agreement of the parties, which will be attached to the minutes of mediation, does not place any liability on the mediator.

Accredited ADR providers must possess an insurance policy for an amount not less than €500,000, for liability arising – for any reason – from the management of the mediations.

To date, Italian law does not oblige accredited mediators to have professional liability insurance if they are covered by the insurance of their ADR body, but if a liability arises and the ADR provider uses its insurance, the mediator can be obliged to reimburse the ADR body if he or she is found to be at fault.

The mediator may be dismissed at any time by the ADR mediation body; the mediator is not an employee of the ADR body, but acts as external adviser. The ADR body, therefore, may decide to remove the mediator from its list, especially in the event of misconduct or poor performance. Each ADR body has its own rules for evaluating the performance of its mediators. For example, some ADR bodies have accredited mediators who have a system of monitoring their performance certified by other external entities.

At the end of every mediation process, each party receives a form for the evaluation of the service and of the mediator: such an assessment of the parties may affect the subsequent assessment of a mediator by the ADR provider.

The law provides for cases in which the mediator may be expelled from the ADR providers that accredited him or her. An example is



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when the mediator has not taken a refresher course every two years, or no longer fulfils all the criteria to practise as a mediator.

28 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

The rules of the ADR bodies must provide – by law – the possibility that the parties voluntarily and mutually indicate the same mediator, for the purpose of his or her possible nomination by the ADR body.

Moreover, the law provides that if the mediator is not jointly chosen by the parties, the ADR bodies shall appoint the right mediator among those accredited, taking into account professional competences, also derived from the type of university degree held, besides other factors of competence and professionalism.

As mentioned above, at the time of his or her appointment the mediator must sign a declaration of impartiality. The mediator must not have any previous relationship with the parties, nor have relations of kinship, affinity, marriage with any of them. In addition, the mediator must not have been the adviser or the lawyer of one of the parties before the mediation.

Cases

29 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.

Recent judgments are as follows:

- Court of Florence judgment of 2 July 2015: the minutes of mediation cannot be approved in the absence of indication of the legal title;
- Court of Ascoli Piceno judgment of 15 June 2015: conviction, for the person who fails to appear in mediation, to pay the costs of the subsequent judgment;
- Court of Vasto judgment of 23 June 2015: the court requires the mediator to make a conciliation proposal even in the absence of a joint request of the parties;
- Court of Rome judgment of 10 July 2014: the failure of the defendant to attend a mediation procedure constitutes, in the subsequent judgment, an additional element for the assessment of the facts and the evidence in favour of the plaintiff;
- Court of Rimini judgment of 2014: the opposition to an injunction is not prosecutable if the mediation mandated by the court was not performed;
- Court of Florence judgment of 19 March 2014: in mediation mandated by the court the parties must appear in person, and mediation must commence regardless of whether the parties decide not to start;
- Court of Siena judgment of 25 June 2012: the failure to participate in mediation by the party who brought the request for mediation is considered an evasion of the law, because such conduct is committed intentionally in violation of a mandatory provision, which protects due process;
- Court of Varese, sez I civ, order of 6 July 2012: once the parties have been invited by the court to establish the mediation process, and mediation is successful, the parties need not state in the trial the success of the mediation, but can cause the court action to cease simply by not participating in the subsequent hearing; and
- Court of Ostia judgment of 5 July 2012: the non-appearance of the party duly summoned to attend a mediation is generally an integral element in favour of the requesting party for the investigation and the proof of the liability of the party that did not appear in mediation.

Getting the Deal Through

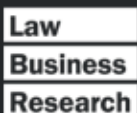
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Mediation
ISSN 2051-4697



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