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COMMERCIAL MEDIATION 2013

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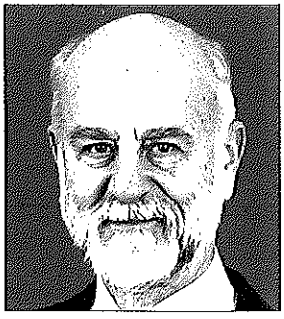
ROUNDTABLE

The International Who's Who of Commercial Mediation has brought together four of the leading practitioners in the world to discuss key issues facing lawyers today.

ALAN LIMBURY
Strategic Resolution
AUSTRALIA

EDNA SUSSMAN
Sussman ADR LLC
UNITED STATES

GORDANA RISTIN
Slovenian Mediators' Association
SLOVENIA



GIOVANNI DE BERTI
De Berti Jacchia Franchini Forlani Studio Legale
ITALY

Who's Who Legal: Which industries have been particularly active sources of disputes over the past year? Do you think this is reflective of your jurisdiction as a whole?

Alan Limbury: The effects of the global financial crisis in Australia have increased the pressure on litigation lawyers to make budget. So we see increased advertising by law firms seeking claimants, ranging from class action plaintiffs against (for example) banks, investment advisers and companies failing to make appropriate stock market disclosures, to family plaintiffs dissatisfied with the provisions of wills. Such disputes appear to have increased lately, while the level of intellectual property, family law, farm debt, retail tenancy, professional negligence and other tort disputes remains relatively stable. The volume of general commercial disputes, in which there is often no insurer and which are more price sensitive, fluctuates depending upon what is at stake and upon the increasing sophistication of corporate counsel.

Edna Sussman: A survey of Fortune 1000 corporations administered in 2011 by the Cornell University Survey Research Institute on perceptions and use of mediation, arbitration and conflict management explored the question of the extent to which mediation was utilised in various areas of conflict. The two areas in which mediation was most frequently pursued were, not surprisingly, commercial contracts and employment matters. These were followed by extensive usage of mediation in personal injury and product liability disputes. However, the survey found considerable and increasing use of mediation not only in these fields, but also in intellectual property, real estate, construction and environmental matters. Even the use of mediation in the financial sector, long resistant to mediation, showed an increase of 10 per cent from a similar survey conducted in 1997. Illustrative of this expansion in the financial sector, the US Bankruptcy Court in the Lehman bankruptcy entered an order requiring mediation for all counterparties who had unresolved disputes concerning interest rate swaps or other derivative transactions with Lehman. Pursuant to this order, Lehman served over 200 ADR notices and eventually settled approximately 200 matters resulting in over US$1 billion for the estate. Similar procedures for mediation were also established by bankruptcy courts in New York for other bankruptcies.

Gordana Ristin: We have seen an increase in commercial disputes and also in civil cases. In Slovenia we have 700,000 new acts (disputes) at all courts (civil, commercial, criminal, small cases, administrative). In Slovenia it is still not very expensive to litigate. For commercial disputes alone, it is already expensive, but the number of actions is still increasing. There are many mediations related to bankruptcy, tort disputes, insurance industry and intellectual property. We still have some cases before the courts concerning privatisation. In civil disputes, there are many inheritance and consumer protection cases. There are big efforts in the courts to overcome the backlog but the number of new cases is even higher.

Giovanni De Berti: Some indication of the trend can be indirectly inferred from statistics relating to mediation. The 2010 Mediation Law that implemented the EU Mediation Directive of 2008 introduced many instances of mandatory mediation. The disputes chosen to require mandatory mediation were largely those considered to be at the basis of the enormous backlog of civil cases – some 5.5 million in June 2011, when the mandatory mediation provisions came into effect. Statistics show that the majority of the applications for mediation relate to medical malpractice (28 per cent), insurance (7 per cent), professional malpractice (7 per cent), real property (6 per cent), tenancy (6 per cent), services supply (6 per cent), traffic accidents (6 per cent), and banking and financial services (5 per cent). Generally speaking, most of the applications were filed by private individuals, while responding parties such as hospitals, doctors, insurers and banks have very often failed to appear.

Who's Who Legal: Have you noticed an increase in the number of parties choosing mediation as a form of dispute resolution in recent years? What are the key reasons behind this trend and what do you predict for the future in terms of mediation's importance?

Alan Limbury: Yes. In the field of commercial and intellectual property disputes, this began in the late 1980s, so Australia has had almost 30 years of experience. I attribute the increase in recent years to greater appreciation of the benefits of mediation amongst corporate clients and corporate counsel; the beginnings of generational change amongst lawyers, influenced in part by increasing teaching of ADR and "principled negotiation" in university law schools whose students are now becoming partners in their law firms; the increasing exercise of the statutory power of courts in Australia to order parties to participate in mediation; legislative requirements in certain types of dispute, in which there is perceived imbalance of power, such as farm debt and retail tenancy, to mediate before litigating; and recent federal legislation requiring parties to take "genuine steps" in an endeavour to resolve disputes before commencing proceedings, with costs penalties, including against lawyers, for failure to do so. These forms of compulsory mediation often lead disputants to choose to mediate before they are compelled to do so.

Edna Sussman: There is no question that mediation is on the rise. The Cornell study conducted in 2011 showed an increase in the use of mediation from 1997 to 2011 in every area of conflict. The economic downturn of recent years has caused increased price sensitivity on the part of corporations around the world. Spending money on arbitration or litigation is not viewed as a productive way to spend money that could be better expended on the development of a company's core businesses. Mediation is increasingly being viewed as an effective mechanism for reducing the costs of dispute resolution while at the same time achieving a more expeditious resolution and, importantly, maintaining control of the outcome. In my view mediation will continue to increase. Multiple drivers are at work to further mediation as a tool for dispute resolution. There are now literally thousands of court-sponsored mediation programmes. Business lawyers are increasingly inserting step clauses in contracts, which require an attempt at mediation before arbitration or litigation can be commenced. Deal mediation and other innovative uses of expert facilitation are being explored and utilised. State ethical obligations are emerging which require that attorneys advise their clients about the availability of resolution through ADR. The recent EU Mediation Directive should lead to an increase in mediation in those countries. Finally, the long traditions of harmony and conciliation in the Far East will inevitably influence the resolution of disputes in our global economy and advance the use of mediation. The increasingly widespread use of mediation and its continuing expansion is well deserved and is a natural consequence of the many benefits of mediation.

Gordana Ristin: Yes. Every year (since mediations began in 2001) there has been an increase in the number of mediations. From lawyers I have found out that there are more and more cases in the field of commercial disputes and family disputes. But it is still not a very big number compared with jurisdictions where the practice is firmly established.

In Slovenia, court-annexed mediation opened the door for many mediators – many of whom are lawyers, and recently they have started to put mediation clauses into contracts. We have a very good mediation law, based on the UNCITRAL model, and Slovenia harmonised the Law with EU Directive DIR2008/52/ES. Parties do know more about ADR and mediation now. We do not have mandatory mediation and I am not in favour of it, but in Slovenia 400 judges have been trained as mediators and many lawyers have also been educated in the discipline.

The key reason behind this trend is that we (the pioneers of mediation in Slovenia 12 years ago) started with a very serious approach and professional way of mediating, so parties were happy with the process, even when they were unable to settle. Now we have some private mediation firms, which do not have many cases, but it is a good start. In many professional chambers, there are ADR centres. It is also very important that EU law, covering all kind of disputes in EU matters, demands ADR (for cross-border disputes, consumer protection cases, EU administrative labour cases and, intellectual property). EU member states should be obliged to adopt such rules and to raise awareness of ADR.

Giovanni De Berti: Between March 2011 and December 2012, when mandatory mediation was required as a condition precedent to begin or continue a case in court, there was a great upsurge of requests of mediation, totalling more than 215,000 by the end of the period. However, only 27 per cent of such requests evolved into real mediation proceedings; in the other cases the respondent party did not show up. Voluntary mediations showed a decrease as a percentage of the mediation proceedings, from 20 per cent of the total in 2011, to 13 per cent on the whole period from March 2011 to December 2012. However, in absolute numbers, applications for voluntary mediation increased by 35 per cent, from 12,000 in 2011 to 16,000 in 2012. After the Italian Constitutional Court ruled in October 2013 that the mandatory provisions had been enacted illegally, the number of (now voluntary only) mediations dropped considerably.

Who's Who Legal: Has any one model of mediation become particularly dominant or preferred by clients? In your experience, is there an approach to mediating which enables successful dispute resolution more than others?

Alan Limbury: "Success" is perceived differently by lawyers and by clients. The evaluative mediation model, often practised by retired judges, finds favour amongst those litigation lawyers who see success

as settlement, a perception encouraged by some serving judges and politicians, for whom success means no more than reduced court waiting lists with possible consequential cost savings to government. Some clients are led by their lawyers to believe that this is the best or only model. To those for whom success means resolving disputes by ascertaining and finding creative ways to satisfy the underlying interests of the disputants, the proactive facilitative mediation model (in which the mediator makes helpful suggestions without expressing opinions on the merits of the case) remains in favour. Clients who experience this kind of success, even occasionally insurance companies, prefer this model.

Edna Sussman: The American Bar Association Task Force on Improving Mediation Quality issued a report on commercial mediation in 2008 summarising its findings, which were based on an extensive two-year-long outreach to users and mediators. The findings suggest that more evaluative mediation, with some pressure exerted on the parties, is preferred by many in the context of such disputes. Of those questioned, the following percentages thought the mediator undertaking the listed activities would be helpful in about half or more of their cases:

- 95 per cent – ask pointed questions that raise issues;
- 95 per cent – give analysis of a case, including strengths and weaknesses;
- 60 per cent – make prediction about likely court results;
- 100 per cent – suggest possible ways to resolve issues;
- 84 per cent – recommend a specific settlement; and
- 74 per cent – apply some pressure to accept a specific solution.

Similar surveys conducted in other jurisdictions have come to parallel conclusions. Thus, while some who generally handle family matters or personal community-based disputes continue to advocate a facilitative approach to mediation, the former contention by the mediation "purists" that evaluative mediation is not mediation and impinges on party autonomy has fallen by the wayside. Successful mediation requires that the mediator tailor a process in collaboration with the parties, which is best suited to the particular dispute at issue and most attuned to the personalities, cultures and needs of the parties.

An optimal evaluative approach does not mean just having the mediator give his or her views of how the dispute would be decided by the decision-maker but rather having the mediator explore with the parties the strengths and weaknesses of their case and explore the other interests that are at stake. In a great number of cases the parties have "interests", facts unrelated to the merits of the case, which are highly relevant to why a party might want to settle and how that party values the claim taking those interests into account. Part of the mediator's job is to explore those interests, assist in identifying additional interests and help the parties decide if sharing those interests would advance their settlement objectives. The exploration of these interests – facts extraneous to the merits of the case – can sometimes be the most significant factors in driving settlement and should be part of the process along with an exploration of the merits.

Gordana Ristin: I feel that "success" is achieved when a mediator does their work in a professional and ethical way, and ensures that the clients understand each other. I find that the adaptable (or flexible) approach to mediating works the best for parties and me as a mediator. In cases where there is a mediation clause in a contract I propose the evaluative model of mediation to prepare the parties. But in reality, I am mostly a facilitative mediator at the beginning (the introduction and research stages) and if parties need a longer negotiation phase with objectivism, I will attempt a more evaluative method of mediation. But no dispute or client is the same.

In court-annexed mediations, the state pays for three hours of mediation and after this, the parties pay. In these cases, there is more of the evaluative mediation model, because parties don't want to incur further expenses. In commercial cases, when parties pay for mediation, I am more facilitative and in later phases more evaluative, if it is necessary. I think that a technique of transparency and educating parties works the best.

It is very important that the mediator works closely with lawyers in order to enable quick resolution. Sometimes the lawyers do not want to facilitate a successful mediation, because they could lose income if a dispute is resolved without going to court.

Giovanni De Berti: The mediation model generally taught and practised in Italy has been the facilitative one. However, the 2010 Mediation Law allows the mediator to make a proposal of resolution to the parties even if the parties do not ask for it. The 2010 Mediation Law actually puts pressure on the parties to accept the proposal, penalising the non-accepting party with regard to the allocation of legal costs in the subsequent court case. This introduced evaluative mediation in the Italian legal system.

The provision contained in the Italian Mediation Law is a controversial one, inasmuch as the proposal, if not accepted, may be forwarded to the court, who should be considering it only with regard to costs. However, the disclosure of the proposal flies in the face of confidentiality. The ruling by the Constitutional Court declared the provision null and void, but now the statutory instrument before the Italian parliament would reintroduce it.

Who's Who Legal: Have there been, or are you expecting, any changes to mediation law or practice in your jurisdiction? Are there any reforms you would suggest to make the current system more effective?

Alan Limbury: Federal legislation in Australia overrides the common law exceptions to the "without prejudice" rule by rendering inadmissible, in any circumstances, evidence of mediation communications in court-ordered mediations. The legislation does not affect voluntary mediations. State and

territory legislation goes as far or almost as far as the federal legislation. This is said to be in the interests of encouraging mediation and avoiding "satellite litigation". However, the inflexibility of this regime prevents justice being done in cases where the common law would admit such evidence, for example, to set aside a settlement agreement when appropriate to do so. In 2011 the National ADR Advisory Committee recommended leaving it to the judge to decide whether the interests of justice or the public interest militate in favour of admissibility in any given case, whether the mediation be court-ordered or not. Hong Kong has since adopted this approach. The system would be more effective if Australia were to do likewise, since it would eliminate the difference between voluntary and court-ordered mediation and it would mean that, if something goes wrong, the courts would be able to fix it.

Edna Sussman: While there are many courts in the United States, including the US district court in the Western District of New York, which have for some time mandated that parties engage in mediation in good faith absent a dispensation from the judge, the courts in New York City are now beginning to explore mandatory mediation. The positive experience with mandatory mediation around the country has motivated the courts in New York City to focus on the issue. As part of that initiative the US district court that sits in New York County began last year to require all employment cases and all civil rights cases to go to mediation. A review of whether and how to further increase mediation is underway both in that court and in the state court in New York City.

A special state court task force on commercial litigation recently recommended a pilot mandatory mediation programme for the Commercial Division, the court which hears commercial cases above a certain monetary threshold. That programme, when implemented, would require, in addition to permissive referrals to mediation by the judges, that every fifth newly filed case be mediated unless the parties stipulate otherwise or a party makes a good cause showing why mediation would be unjust or ineffective. These initiatives build on a long tradition of permissive mediation in those courts serviced by established panels of experienced mediators. These mediators are working closely with the court administrators to work out procedures to maximise the likelihood of successful mediations and reduce litigation costs by formulating optimal procedures for the selection of mediators and for encouraging judges to refer more cases to mediation. Thus we see the continuing expansion of mediation in the courts in the United States and continuing improvement in the delivery of court annexed mediation services.

Gordana Ristin: In Slovenia we have a good mediation law. Since 2009 there has been an Alternative Litigation Settlement Act. A positive consequence is that there is the option of mediation in all courts in Slovenia (first and second instance courts). The Act offers free mediation in family cases, and three hours for free in civil cases, but no free mediation in commercial cases. The court refers parties to mediation in each case, unless the judge deems it inappropriate for a particular case. Natural persons as parties are obliged to participate in mediation. Legal persons as parties have to ensure the presence of a person with the power to reach a court or out-of-court settlement. If the party fails to participate in the informative hearing, the judge may impose on the absent party the reimbursement of the other party's expenses that arose from attending the hearing. Article 19 regulates mandatory referral to mediation. If a party submits an objection to this decision, the judge repeals his or her decision and the mediation proceeding will not take place. However, regardless of the result of the proceeding, the court may order to reimburse the other party for the expenses for the proceeding.

I am not expecting any changes to mediation law. But with the economic crisis, it could be difficult for the state to pay for mediation in a court-annexed system. The idea of ADR is still new in Slovenia and it needs some time to grow to be able to subsist without of the support of the state. In Europe, ADR is strong, where the state helps and promotes ADR (particularly Nordic countries). In all EU directives which demand ADR, there is currently no provision for financial support of mediation from states, which would be important for the continuing growth of the area.

Giovanni De Berti: The Italian parliament recently enacted a law coming into effect in September 2013. It reintroduced mandatory mediation in a limited way. Parties intending to begin or continue legal proceedings in a number of disputes (in practical terms, these are the same as those previously earmarked for mandatory mediation, but for traffic accidents) must attend a preliminary meeting with a mediator in order to obtain information about mediation and decide whether or not to pursue it. If this does not happen then the case cannot be heard; in such cases, the clients must be assisted by lawyers. In any event, a lawyer entrusted with a dispute must inform clients in writing of the availability of mediation; failing this, his or her appointment shall be null and void.

An even more interesting provision is the power given to the court, if it considers it appropriate, to order mediation at any stage of the case, even in appeal. (As the law stood before, the court could only suggest mediation and the parties were free to accept or reject the suggestion.)

Similar provisions apply, both in court and in arbitration proceedings, if the contract or corporate by-laws contain a mediation clause, provided one of the parties raises the objection.

The agreement reached in mediation, if countersigned by the respective lawyers, shall be immediately executory; if not, it can be made executory subject to a formal control by the court. These provisions should herald a significant change in the diffusion of mediation in Italy. Until now, mandatory mediation by order of law, irrespective of considerations of practicality or opportunity, has been strongly resented, mainly (but not exclusively) by lawyers, while judges have had a general attitude of scepticism. In the future, much will depend – as experience in other jurisdictions has shown – on the attitude of the courts.