

Mandatory Mediation – the Israeli Pilot

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Introduction

As the President of the Shalom Courts of Tel-Aviv, Israel and as a District Court judge, many briefs cross Judge Edna Bekenstein's desk. Moreover, it is her duty to observe the handling of many files which come before the judges in her jurisdiction. The judges in the Tel-Aviv courts observe numerous pre-trial conferences, where the judges attempt, often successfully, to encourage parties and attorneys to at least try to settle their cases through mediation. If the judges did not take an interest in settling cases out of court, the number of motions on court dockets would grow and cases would linger in the system, making finality for the parties farther off, more expensive, and potentially less satisfying by the time it is achieved.

Judge Bekenstein, along with her colleagues, has an interest in helping move appropriate cases forward to settlement. Taking an active role in encouraging settlement of ongoing cases through various types of alternative dispute resolution processes ("ADR"), judges increasingly accept roles as case managers at the pre-trial stage of litigation. Despite this trend, however, the judge's proper role in using mediation to push the settlement process forward and how far a judge may go in helping to encourage settlement until recently were not so clear.

In this framework, Israeli Justice Minister Daniel Friedman has given the green light for the implementation of an experimental mediation program beginning March 2008. The program will involve making all sides in civil cases involving claims on sums which exceed NIS 50,000 to hold one free mediation session before the trial begins and letting them decide if they wish to solve their dispute through mediation. The scheme will be carried out in the magistrate court of Tel-Aviv under Judge Bekenstein's jurisdiction (as well as in Jerusalem and Rishon-LeZion) as a pilot program. 100 mediators will work with the courts for two years. The program is based on the recommendations of the commission on mediation headed by Judge Michal Rubinstein, who will also chair the pilot program's steering committee.

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The courts will have to be very cautious in carrying out the new pilot. One of the often quoted benefits of mediation is that its increased use can offload pressure on the court system, thereby reducing what are often long delays in case handling and possibly allowing for savings of public resources. This however should not be pursued as an independent objective. The organization of the judicial system is the sole competence of the government, not of the private business enterprises involved.

The legal system should not see mediation just as an alternative to court proceedings. It is rather one of several dispute resolution methods available in a modern society which may be the most suited for some, but certainly not all, disputes. Moreover, it should be stressed that the availability of alternative dispute resolutions in general can not in any way detract from the obligation of the judiciary to maintain an effective and fair legal system that meets the requirements of the rule of law as one of the central pillars of Israel as a democratic society.

Background of Mediation in Israel

Mediation was formally institutionalized in Israel in 1992, with the amendment of the Courts Law of 1984.¹ The amendment granted courts the authority to refer civil disputes to mediation or arbitration with party consent. Soon thereafter, regulations² were enacted that determined the scope of confidentiality, the prerequisites and training requirements for mediators, and mediator duties and responsibilities.

Prior to the formal institutionalization of mediation, there was only limited experience with arbitration and conciliation, all of which was concentrated in the organized labor setting.³ Only in the post-1992 era were alternative dispute resolutions perceived as a real alternative to litigation. In recent years the field of mediation and conflict resolution has begun to gain momentum within the courts. An even more impressive jump has been seen in the number of practitioners offering their services in the field, lawyers and non-lawyers.

Within the courts, case management pilot programs were developed in 1998, spearheaded by Judge Edna Bekenstein with the support of then Chief Administrator of the Courts Judge Dan Arbel, following which Case Management Departments (Manat) were established. The Manat was intended to improve the efficiency of the courts by dealing with cases at an early stage, before they reached the judge, referring some of the cases directly to mediation.⁴ The Tel-Aviv court expanded the proliferation of mediation by sending letters signed by Judge Edna Bekenstein to the litigants and their lawyers, explaining about the essence of the mediation process and suggesting it in the appropriate cases and disputes.

¹ Courts Law (Consolidated Version), 5744- 1984, S.H. 198, §§79B, 79C.

² Courts Regulations (Mediation), 1993, KT 5539, 1042; Courts Regulation (Mediation), 1996, KT 5766, 1325.

³ Mordechai Mironi, Innovations in Negotiation and Dispute Resolution in the Workplace, 3 Law & Bus. 75, 80-84 (2005).

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<http://www.justice.gov.il/MOJEng/The+National+Center+for+Mediation+and+Conflict+Resolution/>

Further, in many of the courts the function of the case management judge was established, whereby the judge held a preliminary session with the parties in which he or she reviewed the possibility of resolving the conflict by means of agreement and considered whether mediation was appropriate.

The new pilot of mandatory mediation, which is scheduled to begin in March 2008, has a very good chance of taking mediation to new heights in Israel. In order to make sure the new initiative progresses well, the Judicial Branch should check itself periodically and correct whatever needs correcting along the way.

Taking into account that mediation is comparatively new, and mandatory mediation in Israel is novel, we could learn from the experience of other legal systems in the world which have implemented similar schemes.

Comparative Law

Studying comparative law in a specific subject area brings about a better comprehension of other legal cultures and thereby a deeper understanding of the subject area itself. The study of comparative law in any subject area offers the usual advantages of learning about other countries' legal cultures and through that developing a deeper understanding of the subject study. It is more so when one deals with mediation since it is newly institutionalized in legal cultures, and, it is relatively new to the canon of legal education.⁵

National legal traditions have responded differently to the implementation of mediation. Thus, the Israeli legislature and the Courts can gain insight from studying the multiple legal traditions in the world. They can also learn more about the possibilities of mediation by how the law and legal institutions in other cultures relate to mediation practices in other countries. For example, mediation is emerging differently in common law jurisdictions than in civil law jurisdictions, which have been much slower at adopting court-connected mediation programs.⁶

We will focus our comparative analysis on four different legal regimes with each one representing a different modal:

1. **The United-States of America** has the longest and widest history of mediation, either court regulated or not.
2. **Argentina's** mandatory mediation is probably the most imposing of any legal system in the world.
3. **The Netherlands** is a small-medium sized country with many similarities to Israel.
4. **The European Union** is the largest economy in the region (if not in the world), with strong business connections to Israel.

⁵ Jacqueline Nolan-Haley, Teaching Comparative Perspectives In Mediation: Some Preliminary Reflections, St. John's Law Review (2007)

⁶ Nadja Alexander, What's Law Got To Do with It: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions, Bond Law Review 335 (2001).

Mediation in the U.S.A.

Mediation in the United States, as a formal legal practice on the federal level, was first implemented by Congress, over a century ago in 1898, to address conflicts between organized labor and management.⁷ During the twentieth century, mediation manifested in many forms and contexts, including conciliation in domestic relations courts, mediation of civil rights disputes, community mediation, and finally in the federal courts starting in the 1970's.⁸

In 1990, the United States Congress passed the Civil Justice Reform Act.⁹ It states that each United States District Court shall consider principles and guidelines of litigation management and cost and delay reduction,¹⁰ and allows the District Courts to refer appropriate cases to alternative dispute resolution programs including mediation.¹¹ Eight years later, the United States Congress passed the Alternative Dispute Resolution Act of 1998,¹² ordering each district court to authorize the use of alternative dispute resolution processes.

The ADR Act does not mandate mediation, but rather requires that District Courts offer ADR: "Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions."¹³ The ADR Act further authorizes each court to exempt "specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate," but requires that they consult a member of the bar including the United States Attorney for their district.¹⁴

Federal Rule of Civil Procedure 16 gives judges discretion to have attorneys and unrepresented parties confer to help settle their cases.¹⁵ The Rule gives judges discretion to encourage settlement and to use ADR processes, but it is not clear how far judges can push that discretion.¹⁶ Judges can force attorneys and parties to appear at these conferences and can facilitate settlements. However, judges should not make parties feel "coerced" into settling in lieu of litigation.¹⁷

American states including Oregon, California, Texas and Florida have started making mediation mandatory, at least for some claims. Only if it fails may the parties go to trial. Half of all civil cases filed in the State of Pennsylvania are randomly

⁷ Sarah R. Cole et al., *Mediation: Law, Policy, Practice* (West 2003).

⁸ Judge Dorothy Wright Nelson, *ADR in the Federal Courts - One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 *Ohio State Law Journal* 1 (2001)

⁹ Civil Justice Reform Act of 1990, Pub. L. No.101-650 § 101, 104 Stat. 5089 (1990).

¹⁰ 23. Civil Justice Reform Act § 473(a).

¹¹ Civil Justice Reform Act § 473(a)(6).

¹² Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315 § 1, 112 Stat. 2993 (1998).

¹³ Alternative Dispute Resolution Act § 3(b).

¹⁴ Alternative Dispute Resolution Act § 4(b).

¹⁵ 43 Federal Rules of Civil Procedure 16(a)(5), (c)(9), (c)(16).

¹⁶ Sylvia S. Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 *Georgetown Journal of Legal Ethics* 51 (2007)

¹⁷ Model Code of Judicial Conduct Canon 3(B)(8) comment 1 (2003)

selected for mediation, with a number of exceptions.¹⁸ In the State of New-York, mandatory referral to mediation is permitted in cases involving civil issues besides liability for damages.

One should take heed, when comparing the state of mediation in Israel and in the United States, of the fact that mediation developed organically in the United States, culminating in general federal laws after seventy years of experience, whereas in Israel institutionalized mediation crossed the distance between non-existence and significant institutionalization in roughly ten years.

Mediation in Argentina

When military rule ended in 1983, the tides of globalization washed over Argentina and modernization of the legal system entered the political agenda. In the period between 1987 and 1989, only five years after the return of democracy, news of alternative dispute resolution in the United States began to enter via academic journals. Beginning in around 1990, Argentinean lawyers and judges traveled to the United States to receive training in mediation and import it into their country. Numerous training sessions were held and the first pool of local experts, almost all of which were lawyers with a court-connected vision for mediation's future, emerged.¹⁹

The Argentinean federal government expressed a strong interest in mediation. In 1993 a two-year trial period went into effect during which ten courts referred select cases to mediation. The Ministry of Justice recorded a settlement rate of approximately fifty percent and realized that mediation indeed had the potential to decrease the case flow.

In 1995, the Argentine Legislature enacted the "Mediation and Conciliation Law,"²⁰ which requires almost all types of litigants in the Federal Capital of Buenos Aires to attend mediation. The law states in Article 1 that mandatory mediation will "promote direct communication between the parties for the extra-judicial solution of the controversy."²¹ The following year, the Argentine Legislature put into effect the "Obligatory Labor Conciliation Instance Law,"²² in the Federal Capital, this time to mandate mediation for labor and employment disputes.

It should be noted that mandatory mediation in Argentina is far more imposing than its United States counterpart. Argentina's laws mandate mediation in a more categorical fashion than the equivalent laws in the United States.²³

¹⁸ <http://www.fjc.gov/public/home>

¹⁹ Timothy K. Kuhner, Court-Connected Mediation Compared: The Cases of Argentina and the United States, 11 ILSA Journal of International & Comparison. Law 520 (2005)

²⁰ Ley de Mediación y Conciliación [Mediation and Conciliation Law], Law No. 24.573, Oct. 25, 1995, [28258] Boletín Oficial [B.O.] 1 (Arg.).

²¹ Mediation and Conciliation Law, art. 1.

²² Ley de Instancia Obligatoria de Conciliación Laboral [Obligatory Labor Conciliation Law], Law No. 24.635, Apr. 26, 1996, [28387] B.O. 1 (Arg.).

²³ Supra note 19.

Mediation in the Netherlands

The Ministry of Justice in the Netherlands is promoting mediation by proposing mediation at the Legal Counters and the courts, and by offering financial facilities. The mediation referral facility with the Legal Counters was phased in from April 2005. Its implementation ran parallel to the roll-out of the Legal Counter offices set up within the framework of the newly adapted subsidised legal aid scheme. By late 2005 there were 20 offices, and by mid 2006 all 30 offices had been realised.²⁴

Also started in April 2005 was the phased implementation of a mediation referral facility at the courts, enabling parties in legal proceedings to opt for settlement of their dispute by mediation. By the end of 2005 the referral facility had been implemented in 8 courts, by the end of 2006 in 22 courts and by April 2007 in 26 courts. This completed the introduction of this structural referral facility to mediation at the courts, as scheduled²⁵.

To stimulate the use of mediation, each party's contribution was set at half the self contribution for the lowest income group of people who under the Legal Aid Act qualified for a regular legal aid permit. In 2006 the self contribution was set at €45 for the first four hours. If the mediation took longer, another €45 was due (but not by the lowest income group).²⁶ For parties accepting a mediation proposal from the judge, a so-called incentive contribution is available throughout the run-up period. The incentive contribution is a flat-fee sum of €200 (plus VAT) per mediation. The amount covers two and a half hours of free mediation.

The structural referral facility for mediation at the courts was phased in as planned from April 2005. To that end, the courts received support from the Netherlands Court-connected Mediation agency (Landelijk Bureau Mediation, LBM). In April 2005 the referral facility was introduced at 8 courts (phase 1). Up to and including 2006 the referral facility was implemented at another 14 courts (phase 2 to 4). By the end of 2006 the referral facility was operational at 22 courts.

In a fifth phase, a referral facility was implemented in other four courts in early April 2007. This fifth phase completed the implementation of the referral facility with the courts. From April 2007 all courts in the Netherlands offer the option of choosing for mediation during a legal procedure. From the implementation of the referral facility, mediation officers are working within the relevant courts in order to organize, coordinate and report on the work associated with the referrals.

There is no mandatory mediation in the Netherlands as of today. However, the Ministry of Justice of the Netherlands is contemplating to experiment mandatory mediation in family cases and maybe later on in labor disputes.²⁷

²⁴ Directorate-General Administration of Justice and Law Enforcement Department of Justice, The Netherlands, Mediation Monitor 2007 Interim report (April 2007).

²⁵ See *id.*, p. 15.

²⁶ See *id.*, p. 8.

²⁷ Information received from Ms. Manon Schonewille - Executive Director, ACB Group (The Hague, The Netherlands)

Mediation in the European Union

In 2002, the European Commission issued a Green Paper that identified ADR as a "political priority" for all "European Union institutions, whose task it is to promote these alternative techniques, to ensure an environment propitious to their development and to do what it can to guarantee quality."²⁸ The purpose of the paper was to encourage use of ADR as a means of increasing access to justice in cross-border disputes. The paper initiated wide-spread consultation with Member States and interested parties on possible measures to promote the use of mediation.

Following positive responses to the Green Paper, the Commission of the European Communities issued a proposal for a Directive on mediation in civil and commercial matters in October 2004 ("EC Proposal").²⁹ The proposed EU Directive focuses on cross-border disputes and was intended to further the EU goal of increasing access to justice by providing private parties and businesses with an additional mechanism for resolving disputes.³⁰ It was intended to promote the use of mediation in the EU without making it mandatory.³¹

The European Commission has made it clear that the role of the European Community in directly promoting mediation is limited due to the nature of the European Union. The only concrete measure to promote mediation contained in the EC Proposal is the obligation for Member States to allow courts to suggest mediation to the parties. This is a very low key intervention, compared to the law in many States in the United-States and Argentina, and even to the new approach in Israel.

At this time, the European Commission proclaims that the pursuit of the objectives of mediation can not take place in isolation without regard to the very provision of mediation services. Therefore, at this time, the question of quality of mediation services must be addressed together with, and as a function of, the other provisions of the proposed directive which must operate with a sufficient level of mutual trust between the Member States in cross-border situations.

In this legal framework, a Mediator Code of Conduct was developed by the European Commission and finalized in July 2004.³² The Code sets out a number of principles such as informed consent and impartiality,³³ and covers important mediator practice areas such as fees and advertising.³⁴ It demonstrates not only a commitment to using mediation but to practicing it with high standards of professional integrity.

²⁸ Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, at 5, COM (2002) 196 final (Apr. 19, 2002)

²⁹ Commission Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, at 2, COM (2004) 718 final (Oct. 22, 2004).

³⁰ See id. at 2-3.

³¹ See id. at 2

³² European Code of Conduct for Mediators (European Commission Justice Directorate 2004), available at:

http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

³³ See Mediator Code, at 2-3.

³⁴ See id, at 2, 4.

Conclusion

When it comes to the search for effective methods of making mediation work, comparative study is essential. We are all students in a global village where mediation has gained in significance and stature as an effective process for managing and resolving international commercial disputes.

Mediation is developing in multiple countries and contexts, from private commercial practice to court-connected programs, and in the public as well as in the political sphere. Much more study is needed on the subject.

Israel has embarked on a new mandatory mediation program that might put it in line with the most advanced countries in the world, as far as mediation goes. Israel is a vibrant society where people tend to argue a lot, but, desire to mend things just as much. The new program can be a real-life laboratory for this conflict resolving method.

However, the fact that the new experiment mandates the conflicting parties to try mediation might meet with resentment from litigants and lawyers. This might prove to be a real obstacle, and therefore should be carefully dealt with. Mandatory per se is problematic. The new pilot of mandatory mediation would be successful only if it will be an "eye-opener" and introduce mediation to the wide public of litigants, thereby making it in the future a voluntary choice of venue for many participants involved in a dispute.

Moreover, the mediators and mediation centers should be of a very high caliber. Israel has seen in the past decade mediation centers and schools sprout all over the country. Teaching mediation is a positive thing for itself. Nevertheless, students of mediation should understand that being a good mediator takes great knowledge in the Law and requires skills which develop after years of handling legal cases. Another option for good mediators is professionals who are chosen to mediate on cases involving specific knowledge or skills they have acquired during many years (e.g. engineers and accountants).

If the experiment succeeds, Israel could be truly fulfilling its biblical role as a Light upon the Nations (Isaiah 42:6).