Giuseppe De Palo

Mediating Mediation: the Easy Opt-Out Model

De Italiaan Giuseppe De Palo is ombudsman van de ontwikkelingsorganisaties van de Verenigde Naties, gerenommeerd hoogleraar op het gebied van alternatieve conflictbeslechting, een van de oprichters van het ADR Centrum in Rome en ervaren mediator. Hij heeft veel geschreven over de Europese Mediationrichtlijn en -wetgeving, en met name het zogenaamde 'opt-out'-systeem. Als het aan De Palo[1] ligt worden potentiële procespartijen in aangewezen zaken verplicht eerst serieus mediation te beproeven voordat zij ontvankelijk zijn in een gerechtelijke procedure. Wij legden hem schriftelijk een aantal vragen voor.

If we understand you correctly, you advocate for a system where parties, as a general rule, must at least sit down with a mediator before starting litigation. After this first session, they are free to 'opt-out' of the mediation process, without negative consequences, and initiate a court procedure. The mandatory character of this first session, in order to gain 'access to justice', does not appear to fit naturally with the idea that mediation is a fundamentally voluntary process. Of course, it all depends on how one understands 'access to justice' and 'voluntariness'. How would you define these notions in the context of the 'opt-out' system? And how are these concepts applied in your work as the Ombudsman for United Nations Funds and Programmes?

I believe we do not need new definitions of the voluntariness of mediation, or of access to justice, to accommodate the mediation model I call 'easy opt-out'. In fact, to me the model fits right in the traditional concept of voluntariness, in that all parties must agree to go through with mediation. The parties are simply required to attend one initial mediation meeting with their mediator.

This meeting should not be a mere 'mediation information-session.' What mediation is and can/cannot do is something the parties should find out about before engaging in the process, especially via their lawyers. The meeting should focus on the viability of mediation in the case at hand. For

interview

Door **Henneke Brink** en **Sanne Schreurs**

that to happen, the parties need to be talking, at least to some extent, about the merit of the case; see their mediator in action; gauge the attitude of the other side; listen to the opponent's side of the story and legal arguments, etc. Therefore, the first meeting has to take place with their chosen mediator rather than a 'mediation counsellor' or a clerk. Also, the mediation process must be formally afoot in order to fully protect the confidentiality of those key initial exchanges. In a restaurant, wouldn't you welcome the opportunity to taste your meal before confirming your order?

At the end of this initial meeting, the parties are entirely free to decide whether to continue with the mediation process already in motion or to withdraw at little cost and without negative consequences (meaning, if you allow me one final use of the restaurant analogy, that you can leave the joint having paid only for the first morsel you ate). I call this model 'easy opt-out' because, of course, anyone can abandon mediation at any time. Doing so where there might be penalties, or after having paid in full for an entire mediation session, might not be that easy.

Differently put, since no one is forced to mediate all the way through, but only to make a serious initial effort by showing up for one meeting, I see the process as being essentially voluntary. That initial effort, in my experience, is key because it provides a structured opportunity for the parties to make a more informed decision as to how to deal with their dispute.

Thus, we can see how this model is also conducive not only to better access to justice, but also to (the narrower concept of) access to courts, as traditionally understood. This first, actual mediation meeting is much more than a mere information meeting, or the formal certification by litigants that ADR options were seriously explored before litigation. It serves as a highly effective 'filter' of cases that might be resolved without judicial intervention, therefore freeing the time and resources of the court systems.

To use a catch phrase, the easy opt-out model is the 'mediation of mediation', because the model is the synthesis of two unquestionable, essentially different and seemingly irreconcilable elements.

Over Giuseppe De Palo

Giuseppe De Palo (Italië) is ombudsman voor de ontwikkelingsorganisaties (Funds and Programmes) van de Verenigde Naties. Zijn team, gevestigd in New York, heeft als taak het helpen voorkomen en oplossen van werkgerelateerde geschillen binnen UNDP, UNICEF, UNFPA, UNOPS en UN-Women. De Palo heeft tijdens zijn carrière bijgedragen aan de oplossing van meer dan 2.500 geschillen, bemiddeling van zaken in meer dan zestig landen, met partijen van meer dan negentig verschillende nationaliteiten. De Palo studeerde rechten aan de University of Bologna en vervolgens aan de University of California in Berkeley. Ook studeerde hij politieke wetenschappen aan de Universiteit van Urbino.

One element is the fundamental legal principle that nobody can be forced to settle. The other element is empirical evidence: no matter how heavily incentivized, voluntary mediation is never used frequently.

Because an opt-out model proves more capable of harnessing the multifaceted potential of mediation, while retaining its voluntary nature, in the Office of the Ombudsman for UN Funds and Programmes we have endeavored to put that model into action when it comes to workplace disputes. In the end, the notion that mediation should be used as a primary dispute resolution method, wherever possible, has been affirmed multiple times by the United Nations General Assembly. In my personal view, we are just practicing what we preach.

Should parties who chose to 'opt-out' of the mediation process be ready, in your opinion, to motivate this decision before a judge in a subsequent court procedure?

This is a hell of a question – it hits the nail right on the head. Before I try to answer it, let me say this. It is important to note that mediation is likely to be valuable for all parties, regardless of its outcome. Indeed, a 'failed mediation' may not in fact be an actual failure. Mediation may not have resulted in an agreement on the day, but airing the issues face-to-face may lead to a settlement afterwards, or at least there may be agreement on some points, which leaves fewer points to litigate and potentially less costs to incur. As a matter of fact, there is evidence that a very high percentage of people who were skeptical about mediation before its start, ended up recommending it to others even when their mediation failed. I might have gotten very lucky, but after 25 years of mediation practice I have never heard, from a single participant, that mediation had been 'a waste of time'.

Onto what you asked me, now. I guess at the basis of your question there is another one, which goes like this: 'What's the point of requiring the parties a serious initial effort at mediation if they can abandon the process so easily? Parties may show up, pay lip service to the process (to avoid sanctions) and then leave'. The even bigger question, and certainly too big for me here, is that of 'good faith' in mediation. I will limit myself to the following: I am against opening up the initial mediation session to later judicial scrutiny, as that would affect fundamentally what happens in the mediator's room. To determine a sufficiently serious effort I am in favor of setting objective parameters, such as a minimum time duration of the first session, or completing certain defined tasks in advance, such as preparing a mediation statement and a response.

I would add two things. If the initial session is free or costs the parties only a symbolic amount, the temptation not to engage seriously in mediation will be higher. The mediators, too, might be less keen to do their best to get the parties to continue with mediation. Setting an appropriate fee level is thus important. If 'well begun is half done', the fee for the initial session should be around 20% of the total mediation cost. Mediation users should realize that mediation services come at a cost – like access to courts, which is not free either but financed by filing fees and general taxation.

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At the policy level, one should also not be too concerned if many cases exit the mediation channel because of the easy opt-out mechanism. First, the system is there to filter more effectively cases that are, and are not, suited for mediation. Second, even aside from the foregoing considerations about what failure in mediation means, these 'failed' mediations cases are indeed a cost, from a systemic point of view. Still, the (normally moderate) cost of each of these aborted mediations should be weighed against the (normally much higher) savings of each successful mediation that would not have taken place, without that initial meeting.[1]

Mediation often offers parties an opportunity to achieve an outcome that comprises 'something more' than merely a practical alternative to a judicial decision, since a settlement agreement may also address non-legal concerns and needs. How can it be ensured that this broader 'potency' of mediation does not disappear from view in the highly legalized context of the opt-out system (where the parties are most likely lawyered-up, their understanding of the conflict probably defined in legal terms)?

Litigants will be lawyered-up almost by definition. Also, if they are facing the requirement of an initial mediation meeting, direct negotiations must have failed – if they have taken place at all. In this context, the mediation 'event' made easier by the opt-out mechanism becomes even more desirable, both at the individual and the policy level, because it provides the perfect (or just a better) forum to

explore the possibility of harnessing that 'something more', which to me includes the human and psychological dimensions of mediation (for instance when an apology is offered), or the crafting of a qualitatively superior agreement, such as when deals or relationships end up being restored, or even enhanced.

Why, in your opinion, do parties tend to opt for a legal procedure with an almost certain win-lose outcome over mediation? In your writings, you have referred to the work of Richard Thaler. What lessons can be learned from the behavioural science and economics?

A proper answer to the first part of your question would be long and complex. In an attempt at summary, I believe there is abundant and solid research that humans are 'hard-wired' to make inferior decisions when it comes to disputes, regardless of the economic incentives that, in a given system, might make litigation more palatable than mediation to certain actors in that system.

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In *Nudge*, Richard Thaler and co-author Cass Sunstein explained in an accessible way the irrational biases and cognitive errors leading us to make suboptimal decisions. Before them, Daniel Kahneman and Amos Tversky also gave us deep (and to me somewhat troubling) insights as to how people actually make decisions in the face of uncertainty. As any lawyer worth his or her salt would say: there is always uncertainty in going to trial, even where the facts and the law appear clearly in favor of one of the litigants. Decision-making theories are thus essential to dispute resolution.

The way Thaler and Sunstein indicate to overcome these biases and errors is to modify the context in which decisions are presented, which they refer to as 'choice architecture'. This is because people are inclined to choose a default method rather than an alternative option that requires them to take action and make efforts. When altering the context in which decisions are presented, people are nudged away from suboptimal decisions based on biases and errors, but they still maintain their autonomy to decide and their self-determination.

In this line of thinking, voluntary mediation (no matter how incentivized) represents an opt-in model: parties need to take action to get the process going. If they do nothing, the default course of action is litigation. In the opt-out model, the parties are free not to engage in mediation, but inertia is more likely to make them go with it. In fact, parties must make efforts to bypass mediation if they want to start litigation immediately. They may face possible sanctions, have to file motions to convince the judge that mediation would have likely failed, lose potential benefits, etc.

The Italian experience seems like a convincing example of how the implementation of an opt-out system can stimulate the effective use of mediation. What do you believe is the main objection the institutions within the UN context to adopt a similar system? (And furthermore: are there perhaps more recent data that provide an insight into the current workings of the Italian system?)

It is worthy of note that various international legal systems have shown a willingness to promote mediation practices on a larger scale and have thus introduced mediation requirements into their judicial system. EU Directive 2008/52/EC, for instance, provided the minimum regulatory standards for mediation legislation to be transposed by the Member States of the European Union into their national legal systems. The Directive's objective, as stated in Article 1, is to 'facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.' The 'balanced relationship' between mediation and litigation has been interpreted to mean that a minimum number of cases filed in the national courts should be first mediated – if needed by making mediation a pre-litigation requirement (as expressly allowed by art. 5, section 2).
Under the Italian system, which introduced the easy opt-out mechanism in 2013, parties in certain civil cases are required to participate in a first meeting with the mediator, or else they face both financial and procedural sanctions in the ensuing litigation. There are no negative consequences for abandoning mediation at the end of the first meeting.

This model, in place in Italy for seven years now, generates on average some 150,000 mediation cases per year and proves the positive filtering effect I referred to earlier. When the parties decide to go past the initial meeting, the settlement rate is around 50%. This percentage is stunning, if

we think about it. Remember: these are parties who could have negotiated a settlement face-to-face (but did not try or succeed) and ended up in mediation only because that is a pre-litigation requirement. Required to receive a simple, fast and inexpensive 'mediation treatment', these litigants found a mediated settlement in one case out of two. As I put it many years ago, if you lead the horse to the river, the water is good and you know the horse is thirsty, chances are that the horse will drink, and happily so.

It is not a surprise that the so-called Italian mediation model has shaped the Turkish and, as of late, the Greek laws on mediation. A simple look at the Turkish statistics, before and after the new law came into force, illustrates how simple it is to create a decently-sized mediation market. That is: one where the number of mediated disputes is not a miniscule fraction of the litigated ones. Without one such market, all discussions about mediation quality, accreditation etc. are moot, insignificant. Legislation-induced mediation practice, as well as public and private controls over it, generate quality much faster, and more effectively, than endless discussions on quality alone will ever generate a single mediation. This, at least, has been my experience working for some of the largest international donor organizations to promote mediation in several parts of the world, before I joined the United Nations.

In the light of these results, what is a surprise to most commentators is why the mediation requirement in Italy only applies to around 10% of all civil litigation cases. As the readers might surmise, the number of mediations taking place where there is no such requirement (namely, in 90% of the cases) is extremely low. Difficult as it still appears for many mediation enthusiasts to accept, this sharp difference in numbers does away with the contention that mediation is primarily an issue of culture. Culture and promotion of mediation are of course important issues, but certainly not the primary ones. In fact, how can the same country have lots of mediations in certain types of disputes (where mediation is required), and very few or none in other types (where mediation is not required), when litigants and especially the lawyers are often the same? The primary issue is policy, as Nobel Prize winners of the calibre of Kahneman, Tversky and Thaler have explained.

In the UN context, a genuine opt-out system is yet to be implemented, but there is evidence of movement in that direction, at least based on the experience of some of UN agencies. By way of example, our latest Annual Report talks about the development of the internal mediation project at UNICEF, which I am hopeful will soon be embraced by the other four UN agencies my Office serves.

Do you think mediation (with an easy opt-out provision) should also be tried in situations where conflict diagnosis would suggest, or where it is evident, that another intervention – such as a court procedure resulting in a judicial decision – is probably the more appropriate or effective route? We're thinking, for instance, about cases in which the parties are arguing about the interpretation of legislation or a legal clause.

As you may remember, in my view mediation is likely to be helpful even when it fails. Therefore, I would always choose in favor of a failed mediation (including a mediation that from the start one knew was very unlikely to succeed), if the alternative is a mediation that did not take place at all, because of a weak mediation policy. That said, when writing mediation rules requiring serious initial efforts at mediation legislators face choices. By way of example, in certain jurisdictions cases sent to mediation regardless of the parties' request might be chosen randomly (such as every other case, or every third case, filed with the court). The Italian legislator for example chose a different path, by identifying certain types of disputes (such as real estate, inheritance, libel etc.) where mediation was deemed probably more successful and requiring a pre-trial mediation meeting in those cases. Both models have value. In fact, if the random selection model shows positive results, one could say that mediation is effective regardless of the nature of the dispute. In that case one could decide to extend the pre-trial mediation meeting to all areas of litigation, at least on a trial basis. The Italian model and similar ones provide more targeted evidence, allowing both to experiment with additional types of disputes, if mediation proves successful in some, and to remove the mediation requirement in other types, where the requirement appears not to work. ●

Notes

1. The views expressed in this interview are those of De Palo and do not necessarily reflect the position of the United Nations.
2. The importance of this costs/benefits analysis is illustrated by two studies conducted for the European Parliament: *Quantifying the costs of not using mediation – a data analysis* (2011) and *'Rebooting' the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU* (2014), available at www.europarl.europa.eu.

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