

2011

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Recommended Citation

William A. Herbert et al., *International Commercial Mediation*, 45 INT'L L. 111 (2011)
<https://scholar.smu.edu/til/vol45/iss1/9>

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NATALIA TERESHCHENKO, AND MICHAEL JUDIN*

I. China

On August 28, 2010, Chinese legislators passed the People's Mediation Law to institutionalize the people's mediation committee as the legal organization to resolve everyday disputes within local communities.¹ The law states that governments from the county level and above will provide financial support for mediation and reward outstanding mediation committees and individual mediators. The law requires that only people who are "righteous, sociable, and warm-hearted" and who possess certain social and legal knowledge may become mediators. To encourage mediation as a means to resolve disputes without resorting to litigation or arbitration, the law requires courts and law enforcement officials to provide information about mediation to parties involved in disputes. The law further states that agreements reached through mediation are legally binding on the parties and may be enforced by a court should one of the parties so request.²

II. The Mediation Regulation Spectrum in Europe: Developments in Italy and Slovenia

This is a special moment in alternative dispute resolution in Europe. In recent years, the mediation law landscape has undergone substantial changes motivated mainly by the 2008 "European Union Directive on Certain Aspects of Mediation in Civil and Commercial Matters" (the "Mediation Directive"). Reacting to this supranational Mediation Directive, the European Union has become a laboratory of experimentation for the development of mediation law.

* William A. Herbert, Vice-Director of the Legal Affairs Department of Otsuka Pharmaceutical Co., Ltd. in Tokyo, edited this article and drafted the section on China. Giuseppe De Palo and Ava V. Baker co-authored the section on the European Union. Apostolos Anthimos authored the section on Greece. Natalia Tereshchenko authored the section on Russia. Michael Judin authored the section on South Africa.

1. According to the Chinese Ministry of Justice, "China has more than 4.9 million mediators working in more than 800,000 mediation committees." *Chinese Legislature Passes People's Mediation Law*, XINHUANNEWS, Aug. 29, 2010, http://news.xinhuanet.com/english2010/china/2010-08/29/c_13467472.htm.

2. *Chinese legislature passes People's Mediation Law*, XINHUANNEWS (Aug. 8, 2010, 6:00 PM), http://news.xinhuanet.com/english2010/china/2010-08/28/c_13467209.htm.

A. THE E.U. MEDIATION DIRECTIVE

By May 2011, E.U. Member States must implement cross-border mediation laws in line with the Mediation Directive. The Mediation Directive provides Member States with a flexible regulatory framework that enables them to enact a variety of mediation laws, because it sets minimum guidelines for the mediation laws of Member States. These guidelines require that Member States' laws ensure the quality of mediation procedures by encouraging and developing quality control regulations for mediators and the training of mediators,³ that they provide for court referral to mediation,⁴ that they enforce settlement agreements reached at mediation,⁵ that they contain confidentiality procedures,⁶ that they provide access to judicial proceedings if the mediation should fail,⁷ and that they provide a means for informing the public of mediation, mediation organizations, and competent courts.⁸ The Mediation Directive's general requirements give Member States the flexibility to create mediation laws that are best suited to their judicial systems and access to justice needs.⁹ When presented with flexible, supranational regulation, countries can enact such regulations in a variety of ways. Traditionally, the forms of regulation fall along a spectrum of pragmatic, cultural, and legalistic approaches.¹⁰

In light of the Mediation Directive, Member States are reforming or creating new mediation laws in diverse ways. The contrast between recently enacted mediation laws in Italy and Slovenia provides an example of the varied mechanisms of mediation law reform. While the Italian mediation law is highly regulated, requiring compulsory mediation in some cases, Slovenia's mediation law has an opt-in mediation process.

B. ITALY

In Italy, the mediation law is an example of compulsory mediation. Italy's March 4, 2010, Legislative Decree No. 28 (the "Decree"), requires that by March 2011 all civil disputes arising in the following areas proceed to mediation prior to gaining access to the courts: neighbor disputes ("condominio"), property rights, division of goods ("divisione"), trusts and estates, family-owned businesses, landlord/tenant disputes, loans, leasing of

3. *China's Draft Mediation Law Aims to Make Conflict Settlement a Neighborhood Issue*, COMMUNIST PARTY OF CHINA, June 23, 2010, <http://english.cpc.people.com.cn/66102/7036078.html>; *New Law to Make Conflict-Solving Neighborhood Issue*, CHINADAILY, June 22, 2010, http://www.chinadaily.com.cn/china/2010-06/22/content_10005266.htm.

4. Nadja Alexander, *Mediation and the Art of Regulation*, 8 QUEENSLAND U. TECH. LAW & JUST. J. 1, 22 (2008). There are only twenty-six EU Member States subject to the Directive because Denmark opted out of the Directive. Press Release, EUROPA, European Commission calls for saving time and money in cross-border legal disputes through mediation. *European Commission Calls for Saving Time and Money in Cross-border Legal Disputes Through Mediation*, EUROPA, Aug. 20, 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1060&format=HTML&aged=0&language=EN&guiLanguage=en>.

5. Council Directive 2008/52/EC, art. 4, 2008 O.J. (L 136) 3.

6. *Id.* art. 5.

7. *Id.* art. 6 ¶ 2.

8. *Id.* art. 7.

9. *Id.* art. 8.

10. *Id.* arts. 9, 10.

companies (“affitto di aziende”), disputes arising out of car and boat accidents, medical malpractice, libel, insurance, banking, and financial contracts.¹¹

At first glance, the Decree appears unnecessarily strict. By forcing parties to mediate, it takes mediation outside of the realm of a consensual, party-controlled process. But the Decree was developed as a solution to extremely overcrowded courts.¹² The average duration of a civil case is three and a half years and ten years to reach a final judgment on a civil appeal.¹³ In addition to overcrowded courts, Italy faced a “mediation paradox” where few parties agreed to mediate disputes, but of the parties that did, an overwhelming percentage reached satisfactory settlements.¹⁴ As a result, the Italian legislature wanted to increase parties’ use of mediation in civil cases. Because voluntary mediation laws did not accomplish the goal of encouraging more parties to use mediation, the legislature went a step beyond and mandated mediation for certain civil cases.¹⁵ Under the Decree, not only will mediation allow an alternative to court access, but it will also offer a guaranteed faster procedure to resolve civil disputes and thereby reduce court backlogs. In fact, the Decree requires that all mediations occur within four months, starting from the date of the request to mediate.¹⁶ This cap is in place to ensure that mandatory mediation is a true improvement, at least in speed and ease of procedure, over adjudication of civil disputes.

C. SLOVENIA: GENERAL INFORMATION

Unlike in Italy, mediation in Slovenia is optional and is never mandatory for civil cases.¹⁷ In 2001, the District Court of Ljubljana instituted a mediation pilot program that allowed parties to mediate their disputes voluntarily.¹⁸ The pilot program was successful in alleviating court backlogs; therefore, ten courts offered similar mediation programs to parties by 2009.¹⁹ In order to comply with the Directive, on November 19, 2009, the Slovenian National Assembly enacted the Alternative Litigation Settlement Act (“ZARRS”), a mediation law that requires all courts to enact mediation programs, works to increase awareness of mediation, and gives parties the opportunity to mediate disputes.²⁰ ZARRS came into effect in May 2010, and as of June 15, 2010, all fifty-nine

11. Although the Directive provides a flexible framework, there are a number of requirements that countries must incorporate into their mediation laws, including these. See Council Directive 2008/52/EC, 2008 O.J. (L 136) 3.

12. Giuseppe De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 NEGOTIATION J. 469, 469 (2005).

13. Decreto Legislativo 4 Marzo 2010, n. 28, art. 5 (It.).

14. As in other continental European countries, in Italy the “ADR movement” began in the early nineties. In those years, the Parliament began to produce general mediation laws.

15. Sergio Ciarloni, *Stato attuale e prospettive della conciliazione stragiudiziale* [Current status and prospects of reconciliation stragiudiziale], 2 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 447-65 (2000) (It.).

16. Professor Giuseppe De Palo, Speech for Mediation Day in Warsaw, Poland (Oct. 21, 2010).

17. *Id.*

18. D.Lgs. n. 28/2010, art. 6 (It.).

19. See generally *Zakon o alternativnem reševanju sodnih sporov* [ZARSS], 97/2009 [Alternative Litigation Settlement Act] (Slovn.).

20. E-mail from Slovenian Ministry of Justice to author (Oct. 21, 2010) (on file with author). The courts of first instance include forty-four county courts, eleven district courts, and four labor courts.

courts of first instance offer mediation.²¹ Although judges can refer parties to mediation, mediation is ultimately at the parties' election.

The Slovenian mediation law gives courts the ability to refer any case that they believe would benefit from mediation, although the parties are not obligated to attend.²² Judicial referral is the means by which parties begin to engage with the mediation process, not through a mandatory law.²³ According to Article 15, Section 1, the courts shall give the parties the *option* to use ADR, unless the judge believes that ADR is not suitable for the case.²⁴ The one instance where the law requires parties to engage in the mediation process is if the judge orders the parties to attend a mediation information session. If a party refuses to attend this session without justification, then the absent party "shall be obliged to reimburse the other party's expenses that arose from this hearing."²⁵ Though mediation is not mandatory, if the judge wants parties to learn about mediation, then the parties are obligated to attend the information session.

D. DIFFERENCES BETWEEN ITALY AND SLOVENIA: MANDATORY VERSUS VOLUNTARY

The most striking difference between Italy's and Slovenia's mediation laws is that Italy's law mandates mediation of most civil disputes, while mediation is voluntary under Slovenia's law. In Italy, laws that merely encouraged voluntary mediation did not alleviate court backlogs because too few parties chose to mediate their disputes, even though the majority of parties that did mediate their dispute reached settlement. Therefore, the Italian legislature decided to mandate mediation to make more parties seek mediation to relieve astonishing court backlogs. The Decree is highly innovative because it makes Italy the only country in the E.U. that mandates mediation in civil disputes.

Unlike in Italy, however, enough parties in Slovenia were choosing mediation to alleviate court backlogs that mediation could remain voluntary and therefore the law only generally promotes the awareness, use, and availability of mediation. Voluntary mediation schemes, like the one in Slovenia, are nothing new. Across the E.U., mediation is overwhelmingly voluntary.²⁶ Slovenia's law, enacted around the same time as the Decree, serves as an example of the spectrum of mediation laws that Member States can implement—from the mandatory system in Italy to the voluntary system seen in Slovenia.

21. *Id.*

22. *Id.*

23. *Id.*

24. See *Zakon o alternativnem reševanju sodnih sporov [ZARSS], 97/2009 [Alternative Litigation Settlement Act]* art. 4 ¶2 (Slovn.).

25. *Id.* art. 2. No Slovenian court is prohibited from referring parties to mediation. In fact, the county, district, regional, labor, and high courts (including high labor and high social courts) are all responsible for setting up independent programs for court referral to mediation. The only civil case in which a court cannot refer mediation is in social disputes. See *generally* *Zakon o delovnih in socialnih sodiščih [ZDSS-1] [Labour and Social Courts Act]* (Slovn.).

26. *Zakon o alternativnem reševanju sodnih sporov [ZARSS]*, art. 15, ¶1 (The court shall provide the option of alternative dispute settlement to the parties in each case, unless the judge for the particular case deems this to be inappropriate.).

E. DIFFERENCES BETWEEN ITALY AND SLOVENIA: JUDGES

The difference between mandatory and non-mandatory mediation influences the role of judges in both mediation systems. In Italy, the judge's primary role is to enforce settlements made during mediation and to ensure that parties have mediated their dispute prior to accessing the courts. In Slovenia, however, the judge's primary responsibility is to inform parties of the option to mediate and to raise the parties' awareness of mediation—the judge acts as the gatekeeper by determining which disputes require mediation.²⁷

F. DIFFERENCES BETWEEN ITALY AND SLOVENIA: QUALITY CONTROL

Italy and Slovenia also represent the ways E.U. countries can institute quality control measures while still ensuring that parties across the E.U. receive mediation services of similar quality. In Italy, the registration of mediators is controlled solely by statute—there is no judicial intermediary and the Ministry of Justice, not the courts, maintains the register of mediators.²⁸ The mediation bodies that are qualified to register with the Ministry of Justice maintain their own quality control measures that are adequate to enable them to register with the Ministry.

In Slovenia, however, the mediation registers are controlled directly by the courts in accordance with the law.²⁹ According to the law, all mediators listed by every court's program must meet the limited requirements set out in Article 8.³⁰ Under Article 8, section 1, the mediator must have the capacity to enter a contract, must not have been convicted by final judgment for a deliberate criminal offense for which they were prosecuted *ex officio*, must have completed at least the first level of post-secondary education, and must have undergone mediation training according to the program determined by the Minister of Justice.³¹ Furthermore, the criteria for removal are explicitly set out in Slovenia's law.³²

This difference in quality control regulation highlights how countries across the E.U. can regulate mediators and mediation service providers in different ways and still ensure that quality control measures are implemented and enforced.

G. CONCLUSION

Italy and Slovenia³³ show how two E.U. Member States can respond differently to the pressures of supranational legislation while, at the same time, seeking to improve access to

27. *Id.* art. 18, ¶¶ 1, 5. The law does not address the consequences to the parties if both parties refuse to attend the mediation information session.

28. See, e.g., Alexander J. Oddy, Anita Phillips & Mike McClure, *Mediation Country Report: England and Wales*, JAMS INT'L ADR CENTER (2010), http://www.adrcenter.com/. . . /Mediation_Country_Report_England_and_Wales.pdf.

29. In Italy, the lawyer is the person responsible for informing the parties that they have to mediate their dispute. If the lawyer fails to do so, then the lawyer's contract with the party is voidable according to Article 4 of the Decree.

30. Decreto Legislativo 4 marzo 2010 n. 28 (It.).

31. *Zakon o alternativnem reševanju sodnih sporov [ZARSS]*, Alternative Litigation Settlement Act, c. 16/2009 (Slov.).

32. *Id.* c. 8/2009.

33. *Id.*

justice and providing beneficial mediation services. Furthermore, these two different laws addressing mediation show the diversity of challenges that individual Member States face despite their common E.U. bond.

III. Greece

Mediation in Greece is still a new domain. The first law on mediation has been published at the end of 2010.³⁴ Unlike arbitration, mediation and negotiation courses are not part of the law school syllabus in Greece. Still, mediation schemes are dispersed throughout Greek legislation, namely articles 99–106 of Law 3588/2007 [Bankruptcy Code]; Law 1876/1990 on collective bargaining; Law 2251/1994 on Consumer Protection, which institutionalized out-of-court resolution panels; and quite recently, Article 2 of Law 3869/2010, on the settlement of debts of over-indebted persons.

Until recently, the prevalent term was “conciliation,” which, pursuant to the domestic interpretation of the term, is a process where parties—acting either alone or assisted by lawyers or third persons—try to find an out-of-court dispute settlement. The third person is not a mediator; hence, he or she is not trained or assessed as mediator but has a more active role in the process: he or she not only facilitates the parties, but also intervenes by openly giving advice to the parties and suggesting concessions or solutions. Legislation also provides for court-annexed conciliation procedures, conducted according to the relevant provisions of the Greek Code of Civil Procedure. In particular, it is possible for any party to solve a civil or commercial dispute by means of a conciliation agreement with the assistance of a third party.³⁵

The definition given in the law on Mediation (Art. 4) considers mediation as a structured process, regardless of its name, whereby two or more parties to a dispute voluntarily attempt to agree on the settlement of their dispute with the assistance of a mediator. It excludes attempts made by the court or the judge entrusted with the dispute in question in the course of judicial proceedings.

The above-mentioned law concerns civil and commercial disputes, following almost literally the E.U. Mediation Directive (2008/52/EC) wording. It applies to any civil and commercial mediation taking place in Greece, irrespective of the claim’s nature (cross-border or purely domestic). The law defines a mediator as any third person asked to conduct mediation in an appropriate, effective, and impartial way, regardless of the way in which the third person has been appointed or requested to conduct the mediation. Following a vivid controversy, Article 4(c) of the draft stipulates that a mediator must be a lawyer accredited as a mediator by the competent Accreditation Body. Pursuant to Article 6, Para. 1, the Accreditation Body will be the Mediation Accreditation Commission, under the auspices of the Ministry of Justice. By means of a decision from the Ministry, a number of important issues will be regulated, such as:

1. A quality control mechanism, which will apply for the assessment of mediators;

34. Law Nr. 3898/2010, on mediation in civil and commercial matters, Official Gazette Nr. 211/16.12.2010.

35. Astikos Kodikas [A.K.] [Civil Code]:871 (Greece); Kodikas Politikes Dikonomias [KPOL.D.] [Code of Civil Procedure]:208, 209-12, 214(A), 233(2), 293, 667, 681(A),(B),(D) (Greece); see PELAYIA YESSIOU-FALTSI, CIV. PROC. IN HELLAS (Kluwer Law International 1996); KONSTANTINOS D. KERAMEUS, INTRODUCTION TO GREEK LAW, 249-50 (K.D. Kerameus & P.J. Kozyris eds., Kluwer Law & Taxation 1988).

2. The requirements for the accreditation of foreign mediators;
3. A Code of Deontology, which accredited mediators must respect; and
4. Any other issue related to accreditation.

Additionally, the law provides for the establishment of a commission, entrusted with the preparation of the necessary rules and regulations related to the certification criteria. A decision of the Ministry of Justice will set up the commission members.³⁶

With respect to mediation training institutions, the law opted for a rather unfamiliar condition: the above institution has to be founded by at least one Greek Bar Association and one Greek Professional Chamber. Any other issues related to training in mediation will be regulated by presidential decree, following a proposal by the Ministry of Justice, the Ministry of Education and some other line ministries.³⁷

The draft law provides that mediation shall be conducted in a way that does not infringe on confidentiality, unless parties agree otherwise, and that before initiating the mediation procedure, all persons participating in it shall oblige themselves in writing to respect the confidentiality of the procedure. Further, it provides that mediators, parties, their attorneys or representatives, and any other persons involved in the mediation process are not to be summoned as witnesses. In the event the latter occurs, parties are not obliged to make any depositions on what occurred during the mediation process.³⁸

If mediation leads to a settlement agreement, the agreement is to be recorded in the minutes drafted by the mediator. The minutes can be submitted to the Court of first instance (one member section) in the place where mediation took place at the initiative of the mediator, following a request from any of the parties concerned. The minutes become enforceable once submitted as stated above.³⁹ Thus, the agreement's enforceability is secured even in case of a party's reluctance, unlike the wording of the E.U. Directive, pursuant to which the common action of the parties is required in principle. In the latter case, one party may act solely only upon the explicit consent of the others.

The law does not explicitly provide whether a mediation clause stipulated in a contract may be considered as the basis of a relevant plea, as is the case regarding an arbitration clause.

At present, there are only two mediation providers in Greece: one is the Hellenic Center of Mediation, located in Athens, which has a significant number of mediators, trained and assessed (in their majority) by the CIArb of London. A mediation center exists also in the city of Thessaloniki, in Northern Greece's Macedonia district, under the auspices of the Thessaloniki Bar.

The Law on Mediation provides the minimum hourly rate of the mediator's fee, which is to be defined and amended by decision of the Ministry of Justice. The maximum duration allowed is twenty-four hours, including preliminary preparation of the process. The parties and the mediator are free to agree on a higher amount for the mediator's fees.⁴⁰

Meanwhile, a special commission to the Ministry of Justice has submitted a draft law on the acceleration and rationalization of the civil procedure. The draft deals also with ADR

36. A.K. Art. 5.

37. A.K. Art. 5.6 Law 3898/2010.

38. A.K. Art. 5 ¶ 2 Law 3898/2010.

39. A.K. Art. 10 Law 3898/2010.

40. A.K. Art. 9 ¶ 2 Law 3898/2010.

issues, including the introduction of court-annexed mediation. The draft has been presented by the Minister of Justice to the public on March 2nd, and will be submitted to the Cabinet for approval, before reaching the Parliament. The overall conclusion is that Greece is experiencing an era of significant motion in the field of ADR, particularly in the area of mediation.

IV. Russia

A. A NEW LEGISLATION, A NEW ERA?

With the adoption of a new federal law from July 7, 2010, No. 193-FZ "On Alternative Procedure of Dispute Settlement with Participation of Mediator ("Mediation Procedure")" (the "Law") and a further law amending existing acts, Russia has entered a new stage in the domain of ADR methods.⁴¹ The two laws entered into force on January 1, 2011.⁴²

Mediation is not new to Russia's legal practice. The Law is based on the UNCITRAL 2002 Model Law, and was initiated by the Chamber of Commerce and Industry of the Russian Federation several years ago, but only in July 2010 did President Medvedev amend and sign it. In its final version, the Law is much more scrupulous than its UNCITRAL predecessor in terms of qualification standards for mediators and in the establishment and functioning of the self-governing organizations of mediators.

According to Article 1(2) of the Law, mediation can be used to resolve disputes arising out of civil, family, and employment law disputes. Article 1(5) outlines the exceptions: collective employment, public interest, or third-party interest disputes. Article 5 is crucial in that it establishes the procedure as completely confidential. Articles 15 and 16 enumerate requirements for mediators. A non-professional mediator can be any person over eighteen, with full legal capacity and no criminal record. A professional mediator must be at least twenty-five years of age, with a higher education and mediator training. Public officials cannot be mediators.

The most important provisions of the Law include the possibility of using mediation at any time, be it before or along with litigation or arbitration or even after the judgment has been rendered. The principal limit is 180 days for the process.

Although cases taken to a mediator are still rare, the ratification of the Law will definitely have a positive impact on the workload of the courts, which numbered an astonishing twenty-five million cases in 2009. In addition, there are plans to implement mediation in dispute resolutions in small, medium, and large businesses.

41. *Signed Into Law on Mediation that Creates a New Corporation Lawyers*, PRAVO NEWS, July 26, 2010, <http://www.pravo.ru/news/view/34701>.

42. Elena Makarova, *Russia: New Regulation of Mediation*, CDR NEWS, Sept. 3, 2010, <http://www.cdr-news.com/expert-views/831-russia-new-regulation-of-mediation>.

V. South Africa

A. INTRODUCTION

In South Africa, it can safely be said that the importance of mediation as a means of resolving disputes is slowly but surely gaining recognition, increasingly in the sphere of commercial disputes. But it is equally clear that in practical terms, South Africa has a long way to go before mediation is likely to enjoy the status it deserves. Overall, the practice and mindset of South African lawyers is still firmly married to the resolution of disputes in a litigious or adversarial fashion.

Internationally, mediation emerged prominently upon the legal stage in the course of the 1970s. Since then it has become a preferred means of resolving a wide variety of disputes: political, environmental, commercial, marital, and employment. Yet in South Africa, this shift from the adversarial model of resolving disputes to one embracing alternative modes of dispute resolution (“ADR”), including mediation, has been markedly slower. In this article, we consider aspects of the South African mediation landscape, and in the process, we consider the reasons for the above-noted reluctance to embrace ADR, including mediation. Primarily, we look at the role mediation has played in South Africa in the past year before venturing some thoughts about the road ahead.

A useful point of departure in attempting to understand recent South African attitudes to mediation is the King Report on Corporate Governance of 2009 (“King III”), in which emphasis is pertinently placed upon the merits of non-litigious solutions to disputes.⁴³ King III states that, in fulfilling their duty of care to a company, directors and executive officers are duty-bound to ensure that disputes are resolved effectively, expeditiously, and efficiently. It has commonly been accepted that this serves as an *imprimatur* for directors and executives to ensure that disputes are resolved in a cost-effective way which has as limited an impact as possible upon a company’s financial and other resources, and which avoids disrupting its business relations. According to King III, mediation affords the parties a dispute option generally unavailable to those who resort to a court or an arbitral forum.⁴⁴

Thus, because of King III, it has been argued that South African company directors have a fiduciary duty seriously to consider mediation as a preferred option in seeking to resolve a dispute before turning to a court or seeking out an arbitrator. The contention has even been advanced that, in appropriate circumstances, a failure to pursue mediation might provide the grounds for an action in damages against the directors of a company. By parity of reasoning, it has been argued that legal counsel acting for a corporation who fail either to include ADR clauses in their contracts or fail to draw their clients’ attention to the suitability of mediation as a solution might open themselves up to lawsuits for professional negligence.

Thus, while King III and the Companies Act 71 of 2008 (which will come into effect only in April 2011 and to which we refer below) place emphasis upon the efficacy and

43. PRICE WATERHOUSE COOPERS, STEERING POINT (Sept. 2009), available at <http://www.saica.co.za/Portals/0/documents/PWC%20SteeringPoint%20KingIII.pdf>.

44. INSTITUTE OF DIRECTORS IN SOUTHERN AFRICA, KING REPORT ON CORPORATE GOVERNANCE FOR SOUTH AFRICA, (“KING III”) 118 (2009) available at <http://african.ipapercms.dk/IOD/KINGIII/kingiiiireport/>

importance of mediation in appropriate circumstances in the corporate sphere, it is yet to be seen how they will play out in practice. In one sense, this statement encapsulates what might be termed the South African malaise: although statutes and other texts show that mediation is a necessary aid to resolving disputes, how this ideal will be put into practice is unclear. Ideals are only as good as the machinery by which they are put into effect.

B. LABOR LAW AND THE CCMA

1. *Mediation of Employment Disputes*

While it is unclear whether the direction envisaged by King III is likely in practice to be followed effectively, there is an area of South African law in which mediation has not only been successful, but in which it has been institutionalized to such an extent that it has become the preferred means of dispute resolution.

The Commission for Conciliation, Mediation and Arbitration (“CCMA”),⁴⁵ which was set up in terms of the Labor Relations Act 66 of 1995 and which replaced the erstwhile Industrial Court, holds sway over the majority of employment disputes: under the aegis of the CCMA, the State provides free mediation, conciliation, and arbitration in the majority of disputes which relate to the employment relationship.

The CCMA comprises a panel of full-time and part-time trained mediators, conciliators, and arbitrators. Unlike private mediation and arbitration, in which the process itself is voluntary, at the CCMA the employer has to attend, if not the conciliation, then at least the arbitration. Whatever criticisms have been leveled at the CCMA, the measure of success it has attained since its inception is notable.

Once a dispute is lodged with the CCMA, a commissioner is appointed and is enjoined to seek to resolve the dispute within thirty days. The commissioner is responsible for devising a conciliation strategy setting out ways to end the dispute. In the ordinary course, this strategy should include mediation, the collecting of evidence, and the putting forward of a recommended solution. Within thirty days (or within the longer period agreed upon by the parties), the commissioner has to provide a certificate stating the outcome of the dispute.

Over the past year, the CCMA further solidified its predominantly positive reputation in South Africa by its successful mediation of a significant number of potentially protracted and destructive labor disputes. In its annual report, presented to the South African Parliament on September 14, 2010, executive director Nerine Kahn states: “We are proud of being the largest dispute resolution body in the world.”⁴⁶

With the FIFA Football World Cup held in South Africa in mid-2010, the CCMA had its work cut out during 2009 and the first part of 2010 to ensure that industrial action was kept to a manageable minimum. For this reason, the CCMA set up so-called “2010 units” at each of its regional offices. The function of those units was to identify, to monitor, and to deal with instances of labor conflict. The approach adopted was two-fold, comprising both a proactive component of actively engaging stakeholders, and a reactive component of rapidly deploying commissioners to address cases in which conflict escalated.

45. Commission for Conciliation, Mediation, & Arbitration, <http://www.ccm.org.za/> (last visited Jan. 14, 2011).

46. *Id.*

Amidst widespread criticism from economists and political commentators that certain unions intended to exploit the situation and to hold the government and various state enterprises to ransom by planning and staging strikes in the run-up to the World Cup, in an attempt to extract pay set above inflation, the task of the CCMA in defusing situations of conflict which arose was performed in a politically and emotionally charged context.⁴⁷

2. *Important Disputes Resolved by the CCMA in 2010*

In May 2010, a dispute over pay arose between Transnet and the South African Transport Workers' Union ("SATAWU"), which on the eve of the World Cup resulted in a strike that threatened to hobble national rail and port operations across the country. The crisis sharpened when the United Transport and Allied Trade Union ("UTATU") joined forces with SATAWU. Together they represented eighty-five percent of Transnet's workforce of 54,000 people. Eventually, both unions agreed to meet Transnet and a mediator from the CCMA, and the dispute was resolved on the eve of the World Cup, preventing potentially dire consequences for South Africa's hosting of this global event.⁴⁸

Yet even more perilously threatening was the dispute between the state power company Eskom and the trade unions Solidarity, the National Union of Mineworkers, and the National Union of Metalworkers of SA, which unfolded in July during the World Cup itself, and which placed the staging of the semi-final and final match in jeopardy. This dispute was resolved when Eskom and the trade unions signed a one-year wage deal after protracted negotiations and, eventually, the intercession of the CCMA.⁴⁹

Moreover, the effective intervention by the CCMA in a dispute between SACCAWU and Pick n Pay (concerning wages, terms, and conditions of employment for full-time and variable-time employees of Pick n Pay stores across the country) ended a national strike. During the strike, the management of shopping centers against SACCAWU obtained several injunctions concerning picketing by strikers. The CCMA was approached to assist in the establishing of picketing rules for the strike that commenced on October 28, 2010. On November 5, 2010, CCMA commissioners assisted the parties in concluding interim picketing rules, which came into effect on November 7, 2010.

At the meeting of November 5, 2010, the CCMA commissioners involved also explored the prospect of achieving a settlement of the main dispute. The parties agreed to reconvene on November 8, 2010, and to participate in CCMA mediation in terms of Section 150 of the Labor Relations Act. On November 9, 2010, a CCMA commissioner succeeded in helping the parties to end the dispute.

In sum, besides such graphic if anecdotal evidence, an overview of the success of the CCMA in the past year can best be gleaned from its annual report for the financial year 2009-2010.⁵⁰

47. See Manie Van Dyke, *Transnet Unions Trying to Hold World Cup To Ransom*, POLITICS WEB, May 12, 2010, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=175604&sn=Detail&pid=71619>.

48. See *CCMA Urged to Intervene in Transnet Strike*, MAIL & GUARDIAN ONLINE, May 13, 2010, <http://www.mg.co.za/article/2010-05-13-ccma-urged-to-intervene-in-transnet-strike>.

49. Dewald van Rensburg, *CCMA Steps in to Stop Eskom Strike*, FIN24, June 20, 2010, <http://www.fin24.com/Business/CCMA-steps-in-to-stop-Eskom-strike-20100620>.

50. Annual Report, http://www.ccmaza.org.za/UploadedMedia/CCMA_2009-2010_Annual_Report.pdf (last visited Feb. 2, 2011).

According to this source, the total number of disputes referred to the CCMA in the past year was 153,657. This amounted to 617 new referrals for every working day. Over 116,000 of these cases were dealt with by way of conciliation (or mediation), an average of 466 on each working day. This statistic indicates an increase of fourteen percent over the previous year. Some 99.8 percent of the total conciliations were heard within the statutory thirty-day period, and the average number of days from referral to finalization was twenty-seven.

Whatever criticisms might be leveled at it, the CCMA has become an effective body that manages to resolve disputes within its jurisdiction. To the extent that mediation has not set root deeply in the South African legal landscape, the CCMA serves as a model that might fruitfully be adopted and adapted in cognate areas. As will appear from the discussion below, one of the crucial features that distinguish the CCMA from mediation in other pockets of South African law is its significantly obligatory nature: it represents a form of mandatory mediation.

C. LACK OF MEDIATION SUCCESS IN OTHER SPHERES

But, by way of contrast, it is generally accepted that the success of mediation in the employment and other arenas has not been replicated elsewhere in South African law. This lack of success would appear to be the case notwithstanding the fact that the legislature (and the judiciary) has been emitting an increasingly strong message that mediation is a necessary tool to be applied in a wide variety of contexts. Notably, the legislature has identified *inter alia* the following divergent fields as being susceptible to dispute resolution through mediation: family law (the Children's Act 38 of 2005 contains many mediation provisions), company law (the Companies Act has been mentioned above), consumer protection (the National Credit Act 34 of 2005 ("NCA") and the Consumer Protection Act 68 of 2008 ("CPA") have mediation provisions), and land reform. While the relevant provisions of the CPA and the Companies Act are yet to come into effect, in the recent past scholars have, on the basis of mediation provisions already in force in a number of areas, considered the reasons why they have failed to transform the South African legal landscape. For instance, it has been argued cogently that the primary root of this lack of success is the machinery of the civil courts itself.⁵¹

D. EMERGENT MEDIATION PRINCIPLES

In light of recent developments in South African law, perhaps most notably the *Brownlee* decision, a 2009 case holding that the legal representatives of divorcing parties bore a positive duty to advise the parties of the benefits of mediation,⁵² it has been argued that a number of principles pertaining to mediation should now be accepted as forming part of South African law.⁵³

51. Alan Rycroft, *Why Mediation is not Taking Root in South Africa*, in *Africa Centre for Dispute Settlement*, QUARTERLY NEWSLETTER, (University of Stellenbosch Business School) Oct. 2009, at 2, 3 available at http://www.usb.ac.za/disputesettlement/pdfs/October_Newsletter_2009.pdf.

52. B, M v. B, Ng, 2008, (Unreported 25274) at 21 para. 49 (S. Afr.).

53. Hendrik Kotze, *Rule 37 and Mediation in Africa Centre for Dispute Settlement*, QUARTERLY NEWSLETTER, (University of Stellenbosch Business School) Oct. 2009, at 6–8, available at http://www.usb.ac.za/dispute-settlement/pdfs/October_Newsletter_2009.pdf.

The first of these principles is that the parties to a dispute are obliged seriously to consider the appropriateness of mediation. This obligation is contained in Uniform Rule 37(6)(d), which, in terms of the *Brownlee* judgment, is plainly of general application, spanning the gamut of different types of disputes. The second is that parties should refer a matter to mediation where a reasonable chance exists that it might contribute to the dispute being settled *in toto* or to a settlement of certain of the issues in dispute. Moreover, the principle emerges that attorneys are duty-bound to advise their clients of the benefits of mediation, and to provide them with advice concerning the submission of a dispute to mediation. The fourth principle is that a party or legal representative neglecting such duty makes him vulnerable to be punished by means of an adverse costs order.

E. THE ROAD AHEAD

In South Africa, the emphasis placed upon the importance of mediation by King III is sharply articulated in the new Companies Act, the NCA, and the CPA. The NCA is already in force, but the other two statutes will come into effect in the course of 2011.⁵⁴ It therefore remains to be seen how effective the broader scheme of provisions regarding commercial mediation will prove to be.⁵⁵

54. See A. Mattiuzzo, *Drowning in Debt? Mediation May Just Save Your Property*, TAXTALK 16:16-17, May/June (2009) (S. Afr.).

55. P. Arthur, *The Many Merits of Mediation*, WITHOUT PREJUDICE (S. Afr.) Feb. 2010.

