In Practice

The Italian Mediation Explosion: Lessons in Realpolitik

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Between the time that the first modern Italian mediation statutes were issued in 1993 and March 2011, when mandatory mediation procedures under Italian Legislative Decree 28/2010 went into effect, an interesting paradox emerged in Italian mediation: mediation usage was virtually nonexistent despite the high success rates of mediated cases. Clearly, the mere availability of mediation was not sufficient to attract disputants away from the courts, even though the Italian court backlog skyrocketed to 5.4 million cases during this period.

Decree 28/2010 was issued by the Italian government to address this paradox through a mandatory mediation requirement, but the law has faced significant opposition from some members of the Italian bar in the form of public strikes and legal challenges. Legislators have responded to this dissent with reactionary amendments to "cure" problems in the regulatory structure, even though there has also been significant positive attention paid to the Italian mediation model at the European level.

As the opposition to Decree 28/2010 now appears to be diminishing and recent data indicate that mandatory mediation is achieving its objectives (to the tune of tens of thousands of mediated cases since March 2011), two lessons in realpolitik emerge for mediation

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proponents. First, nothing less than compulsion can rapidly increase mediation use. Second, the legislator who compels mediation without openly engaging the opposition is not mediation savvy, for even in compelling a policy choice, one should be respectful and mindful of the opponent's position, if for no other reason than to minimize his or her opposition to the final result.

Key words: mediation, mandatory mediation, Italy, European Mediation Directive, mediation explosion, resistance to mediation, mediation sanctions.

Introduction

The 2008 European directive on mediation and subsequent resolutions issued by the European Parliament have brought this form of alternative dispute resolution (ADR) to the forefront of both supranational and national legislative initiatives.[1] This directive reflects the desire of the European Parliament to encourage mediation in the member states as part of the overall focus on reinforcing the "area of freedom, security, and justice" of the European Union (EU) without impeding the autonomy of the member states to direct their own national dispute resolution practices.[2] The mediation directive is a step forward in the continuing development of ADR practices promoted at the EU level and was motivated by the growing interest across the continent in party-driven resolution over the last several decades. The directive required member states to implement its provisions in their domestic legislation by May 21, 2011.[3]

As in Europe, the Italian legislature demonstrated significant interest in mediation in recent years. Instead of succeeding to create an active mediation community, however, a paradox has emerged in Italy: since the introduction of the first modern legislation regulating mediation in 1993, specific industries have experienced high success rates in mediated cases, but the availability of mediation has on the whole failed to divert cases away from the courts in significant numbers. Therefore, the "light-touch" approach of the new European directive may be just what is needed to help resolve the Italian mediation paradox because it serves as an impetus for change in member states seeking to draft significant domestic legislation that will facilitate a true balance between traditional and alternative domestic dispute resolution.

In Italy, the European directive provided pro-mediation legislators the opportunity to implement a large-scale, mandatory pretrial mediation program for some domestic civil disputes. Given that mediation has thus far failed to become mainstream, this seemed like the only effective way to

promote it in the national legal community that would quickly increase mediation use. Despite being an ideal fit in a theoretical sense, however, mandatory mediation has not taken an immediate hold and has, in fact, been deeply unpopular during the early stages of its implementation because of the exclusion of important stakeholders during the legislative process. Although evidence suggests that the opposition is lessening, this tumultuous process has left its mark on the legal community and begs a careful analysis of the regulatory policy that the Italian government engaged in when it introduced mandatory mediation.

In this article, we will first introduce the Italian mediation paradox and then consider some aspects of the law enacted to fix it: Italian Legislative Decree number 28 of March 4, 2010 (Decree 28/2010). We will then discuss the route chosen by Italian legislators to enact mandatory pretrial mediation and the reactions of opponents. Finally, we offer two lessons in realpolitik drawn from the Italian mediation explosion.

Mediation in Italy: The Italian Paradox

The implementation of the European mediation directive in Italy began with the paradox noted in the introduction above: despite high success rates when used in certain sectors, mediation failed to become a mainstream dispute resolution option (De Palo and Harley 2005). Almost twenty years after the first modern mediation legislation was issued in 1993, statistics indicated that mediation was used in a mere 0.1 percent of Italian cases. These data are even more shocking when taken in conjunction with the additional statistic that, when used, mediated cases enjoyed an 80 percent success rate (De Palo, D'Urso, and Golann 2010; De Palo, D'Urso, and Gabellini 2011, Herbert et al. 2011).

Further, a 2008 survey of 278 ADR providers reported that these few mediated cases were neither civil nor commercial cases, rather they were "hybrid" procedures conducted according to specific industry rules (Bonsignore 2010). Ordinary civil case mediation was used in negligible numbers, and the lack of development of in-court mediation programs reflected that members of the judiciary failed to promote such initiatives (Cominelli 2010).

Thus, with all the legislative pieces in place, why was mediation not more widely used? On the contrary, over the same period that gave rise to the Italian mediation paradox, the case backlog in Italy grew to 5.4 million cases with parties waiting an average of eight years for their day in court (De Palo and D'Urso 2010). These data indicate that a serious problem lies at the heart of the Italian justice system and constitutes an inherent limit on access to justice (Giuggioli 2011).

The need to divert cases from the Italian court system is clearly considerable (Deodato 2010) — instead of efficient resolution, parties find themselves attempting to extract justice from a legal system with no time

to hear their dispute. The glaring inefficiencies of the Italian courts seem even more extensive in light of the fact that, according to one estimate, the disputes subject to mandatory mediation under Decree 28/2010 would constitute more than one million of the cases currently pending before the Italian courts.[4] Diverting such a large number of cases to mediation clearly has huge potential benefits for the civil justice system as a whole.

These potential benefits, while significant, have traditionally been insufficient to overcome the force of the formidable Italian legal culture, in which disputants have proven to be particularly resistant to moving away from the courts regardless of the time and effort required to litigate (De Palo and Cominelli 2003). This legal culture worked against previous legislative mediation reforms and rendered them all but moot, creating the aforementioned mediation paradox. This resistance to change is not political, we argue, but rather reflects cultural attitudes found throughout the Italian political spectrum and is mirrored by attorneys, judges, and other legal professionals. In addition to a mere resistance to change, Italian legal professionals have additional business motivations that reinforce their interest in keeping mediation out of the mainstream (De Palo and Cominelli 2003).

The question raised by theorists is, therefore, how to promote mediation without compelling it (Cominelli 2010)? This, we argue, is the challenge of legislative policy, which can be used to promote the obvious benefits of mediation and, when appropriate, to compel its use. In Italy, the government faced a society that was so pro-litigation that it needed to not only provide mediation services but also to create a shift in the "choice architecture" (Watkins 2010) in which disputants view litigation as the default option and ADR procedures with skepticism. Therefore, shifting the default choice away from litigation became a key factor in implementing Italian mediation legislation in such a way that will lead participants to view mediation — if not as the default option — as at least a viable option.

Accordingly, Italy used the need to implement the European mediation directive as an opportunity to overhaul its mediation legislation and, among other features, compel parties to mediate by creating mandated pretrial mediation for some domestic civil and commercial disputes. Some have argued that this is a dramatic step — in fact, it is. It was, however, a necessary step given that, despite its benefits and availability, Italian litigants have failed to embrace mediation and instead have continually chosen to bring their cases to the overburdened, slow, and inefficient judicial system. The obvious conclusion here is that the average disputant did not consider mediation to be a real option.

To give mediation an opportunity to succeed, thereby allowing Italian courts and citizens to reap its benefits, Italian legislators needed to create a forceful mediation statute. Accordingly, Legislative Decree

number 28/2010 was passed in March 2010 to implement the EU directive on mediation and to enact mandatory mediation for many civil and commercial disputes.[5]

Combating the Paradox

Basic Provisions of Decree 28/2010

The path to Decree 28/2010 has been marked by multistep and multilevel actions in both the Italian Parliament and throughout the government. The Italian mediation model created by the new regulatory scheme has become synonymous with its requirement of pretrial mandatory mediation for certain civil and commercial disputes. This is, of course, not the only aspect of the law, nor even the only noteworthy provision. Some other basic features of the new mediation decree are described below.

- *The mediation procedure*: Under the decree, mediation is administered by mediation provider firms which are registered by the Ministry of Justice. These organizations are responsible for conducting the mediation procedure, supervising mediator training, and ensuring the impartiality and overall quality of the proceedings.
- *Mediation organization registration*: Mediation procedures can be handled only by public organizations and private organizations registered with the Ministry of Justice (Article 16 §1).
- *Regulation of organizations*: Mediation providers must abide by certain regulations set forth by ministerial decree (Article 3 §2).
- *Mediators*: The mediation procedure can be conducted only by mediators who are listed with an organization accredited by the Ministry of Justice. Mediators must also attend and pass special training provided by institutions accredited by the Ministry of Justice (Article 16 §5).
- *Confidentiality*: The mediator, all those working within the mediation organization, and anyone else involved in the mediation process have a duty to protect confidential information and may not be compelled to testify about it in court. Statements made or information acquired during the procedure may not be used in subsequent judicial proceedings (Articles 9 and 10).
- *Tolling the statute of limitations*: Participation in mediation will toll the statute of limitations once for a maximum of four months, at which point the mediation procedure must be concluded (Article 6).
- *Enforcement of mediated agreements*: All mediation settlement agreements can be made enforceable when they are presented to and approved by the court (Article 12 §1).

- *Referral to mediation*: The judge may refer — not order — parties to mediation with an accredited provider at any phase of the trial (Article 5 §2).
- *Financial incentives*: Parties who mediate are entitled to an exemption from the stamp tax for all documentation associated with mediation, as well as a tax credit of a maximum of five hundred euros if the mediation results in a settlement and a maximum of two hundred fifty euros if the mediation concludes without a settlement (Article 17 and 20).
- *Duty to inform*: Lawyers are required to inform their clients, in writing, about the option or requirement to mediate and the accompanying financial incentives. Failure to notify may void the power of attorney at the option of the client (Article 4 § 3).
- *Starting the process*: The parties first select a mediation provider, unless already designated by contract. The mediation process begins with the submission of a request to a mediation provider. The mediation provider then appoints a mediator and arranges a meeting with the parties within fifteen days of the request (Article 8 §1).
- *Contract clauses*: If a contract between the parties includes a mediation clause, upon request of a party, a judge may set a fifteen-day deadline for the parties to submit a request for mediation to an accredited mediation provider selected by the parties and adjourn the hearing for at least four months (Article 5 §5). The same procedure applies if mediation is required by statute, and an attempt to mediate has not been made before filing a case in court (Article 5 §1).
- *Settlement agreement*: If an amicable agreement is reached, the mediator memorializes the agreement, which is signed by the parties, in an official record called the "verbale" (Article 11 §1) The settlement agreement becomes a writ of execution, placing a judicial lien on the party's assets. It is deemed to be enforceable and is recorded on a special form (Article 12 §2).

Controversial Provisions of Decree 28/2010

Some provisions in the mediation decree have proved particularly controversial in the Italian legal community. Prescriptions like the mandatory mediation feature and the mediator's ability to issue a final proposal absent the request of the parties represent novel approaches to mediation problem solving, but have also made the legislation vulnerable to legal attacks at the Italian and EU level.

In what follows, we analyze several tenets of the new Italian law that have been at the forefront of the national debate and that provide context for our discussion of regulatory policy. Our analysis of the practical implications of certain provisions is based in large part on our experiences as

mediators at Rome's ADR Center SpA, a prominent Italian dispute resolution provider and the largest private firm in continental Europe offering civil and commercial mediation services.[6]

Mandatory Mediation for Some Disputes. Under the decree, parties to the following kinds of disputes must engage in mediation before being allowed access to the courts: neighbor disputes, property rights, division of goods, trusts and estates, family-owned businesses, landlord/tenant disputes, loans, leasing of companies, disputes arising out of car and boat accidents, medical malpractice, libel, insurance, and banking and financial contracts (Article 5 §1). Mandatory mediation for most of these kinds of issues went into effect on March 21, 2011, although an amendment to the decree delayed mandatory procedures for certain high-volume issues until March 2012.[7] The decree stated that if parties fail to participate in the required mediation and proceed directly to court, the judge will order the proceedings suspended while the parties undergo mandatory mediation (Article 5 §5). Additionally, if parties fail to participate in mediation without a valid justification, this failure can be used against the party in the subsequent trial (Article 8 §5). Further, a recent amendment to Decree 28/2010 added that a party who fails to participate in mediation in good faith will be charged twice the filing fees when the dispute is taken to court.[8]

The contentious features of this provision are evident — the most controversial is the compulsory nature of the procedure. On one side, some critics have argued that removing the party's freedom of choice makes mediation no longer a true facilitative procedure, and mediation can only help combat Italy's dire civil litigation situation if it is voluntary (Giuggioli 2011). In fact, parties' freedom to choose or not to choose mediation is an issue of general concern for the American Bar Association, which has generally opposed mandatory mediation or arbitration, even if the result is nonbinding (MacMillion 1998). Further, some theorists and practitioners have argued that not only are mandatory ADR procedures not optimal, but in fact, under the United States Constitution, they are a violation of due process because they limit access to trial (Shaw 1998).

On the other hand, one commentator has argued that the dual availability of voluntary and compulsory mediation — which in itself is not necessarily a negative concept — in the legal system allows disputants to achieve results that are better than those received by judicial resolution alone (Deodato 2011). Indeed, compulsory mediation serves to educate parties in a process that they might not choose otherwise, and mere exposure and information about the mediation procedure may motivate parties to choose mediation voluntarily in future disputes regardless of whether they are required to do so. The two arguments

have continued in different forms, but the core conflict remains this: party-driven resolution cannot function when parties are forced to participate but the clear benefits of ensuring that parties are exposed to mediation are obvious.

Establishment of the Jurisdiction of the ADR Provider. The jurisdiction of an ADR provider to administer mediation services is determined when a party files a request to mediate with a mediation organization of the party's choosing. In the event that parties submit requests for mediation to different ADR providers, the jurisdiction of the ADR provider is determined by "the date of receipt of the communication of the request" — in other words, the first mediation organization to receive a request has a jurisdiction over the procedure (Article 4 §1), which means that the jurisdiction of the ADR provider is left to the discretion and promptness of the parties. This regulation has been debated by practitioners because it is different from how the jurisdiction of a court is determined in the ordinary judicial process, which is generally according to objective criteria depending on the matter of the controversy (e.g., the court where the contract is performed and the court where the employee performs his or her duties).

From a practical standpoint, this provision effectively prevents the "slowest" party from selecting the ADR provider and thus disincentivizes a delay in the mediation procedure. However, the departure from the traditional determination of judicial jurisdiction is novel. To reduce the possible risks connected with this provision, ADR providers suggest that, when possible, ADR clauses should be included in all contracts. A contract clause allows parties to address this issue by preselecting the mediation organization, which necessarily entails the joint determination of the location of the eventual mediation session and the internal rules of the organization by which the mediation will be conducted.

Selection of the Mediator by the ADR Provider. Under the decree, the mediation provider will appoint the mediator (Article 8). On its face, this provision seems to compromise the element of party-driven resolution in the process because the parties are preempted from selecting their mediator. But the ADR provider has the option of offsetting this provision by involving the parties in the selection process by providing information about the mediators (e.g., their resumés) and by allowing parties to express a nonbinding choice of a particular neutral. Additionally, according to mediation rules, upon the request of the parties or the ADR provider's own initiative, under certain circumstances, the appointed mediator can be substituted, thus restoring a bit of their autonomy.

The Mediator's Proposal. If mandatory mediation is the most controversial element of the new mediation decree, the procedure outlined in Articles 11 and 13 runs a close second. These provisions enable the mediator to issue a formal proposal when parties are unable to reach an agreement absent the parties' consent as well as to provide possible sanctions at trial for parties who reject the proposal.

Under Article 11, when the parties are unable to reach an agreement, the mediator *may* proffer a settlement proposal, and, if the parties unanimously request at any time during the proceedings, he or she *must* do so (Article 11 §1). If the mediator drafts a formal proposal, the parties are free to accept or reject. Acceptance of the mediator's proposal by both parties is tantamount to an agreement having been reached, and thereby the mediation is concluded.

Under Article 13, however, rejection of the proposal carries a possible fee-shifting penalty at trial. If the mediator's final proposal is ultimately equivalent to the subsequent judicial decision, the judge will exclude the recovery of costs incurred in litigating the case from the award given to the winning party if it previously declined the proposal (Article 13 §1).[9]

A number of issues have emerged in light of these provisions. One question posed by practitioners and academics alike is whether the Article 11 proposal is an evaluation (like a judgment) or is it merely a solution crafted by the mediator and framed according to the proposals and offers articulated by the parties during the initial mediation session. If the former interpretation is correct, the execution of the mediator's proposal, as a unilateral action, may take on the characteristics of an arbitral award, especially considering the possible penalty associated with rejection. In this case, the mediator is clearly acting in a capacity well beyond that of a facilitative intermediary.

If the latter is the case and the mediator, as a facilitator, is merely reflecting the parties' positions, how can we reconcile the existence of possible adverse consequences for refusing the proposal under Article 13? That is, assuming *arguendo* that the mediator's proposal *is* party generated — approximating a kind of middle ground spanning the parties' own initial proposals for settlement — the parties are still motivated to accept the proposition to avoid the penalty. In this way, the specter of sanctions can represent a coercive force driving the parties toward settlement. But one should note that the sanctions only come into play if the judge, who has already seen the mediator's proposal in the parties' submission of the case to the court, ultimately reaches the same conclusion as the mediator, in which case the penalty only serves to force obstinate parties to consider what may be a fair resolution of the dispute. In either case, there can be little doubt that this procedure imbues the

entire process with a hearty element of evaluative — if not coercive — problem solving.

Although Article 11 has created this power, however, the mediator is not required to use it unless the parties unanimously so request, at which point the parties have consented to this evaluative role. Further, when the parties do not make a request, the mediator *may* create a proposal, but the mediation organizations may create rules that further limit this autonomy.[10] It is therefore important that parties consider how individual ADR providers approach the issue, as the specialized internal rules of the mediation organization may explicitly prescribe that the mediator not formalize the proposal unless requested to do so by the parties.

The Italian Model: Mandatory Mediation and Its Critics

We now turn to a discussion of how Italian legislators chose to create this mediation revolution — which, like any other revolution, has been far from painless.[11] To properly explore these issues, we must consider the legislative processes that led to the enactment of Decree 28/2010 and the implementation of mandatory mediation. As a note on the Italian legislative structure, the role of implementing the European directive initially vests with the parliament, which power it may delegate to the government. The parliament has the power to make the laws, while the government has the power to enforce the laws and, in some situations, issue secondary legislation in the form of a decree. Accordingly, Decree 28/2010 was enacted by the Italian government under the delegated power from the Italian Parliament issued in Law 69/2009, Article 60. Decree 28/2010 was then supplemented by Decree 180/2010 of the Ministry of Justice (a branch of the government), which added specific provisions regulating the registration of mediation organizations, mediation fees, and training and certification of mediators, among others.

Opposition to Decree 28/2010

Beginning at the parliamentary level, an early draft of Law 69/2009, Article 60 put forth by a sector of the parliament specifically granted the Italian government the power to enact a decree on mediation that included a mandatory mediation procedure. This feature, however, faced significant opposition and was removed. Instead, the published text of Article 60 officially recognized mediation as an *option* in civil and commercial cases and delegated an open-ended power to the government to enact a decree on mediation with provisions that would implement the European mediation directive, so long as these provisions did not limit access to justice.

Taking this power, the government then enacted Decree 28/2010 with mandatory mediation provisions using a more expedient and less democratic process, made all the more so because it arguably excluded certain stakeholders, such as attorneys, possibly because of their early opposition

to mandatory mediation. As one might expect, these efforts to circumvent the dissent only fueled the fire, and, accordingly, the decree has faced significant opposition since its introduction. The dissent largely originates from the efforts of the Organismo Unitario dell'Avvocatura (Italy's leading association of attorneys, "OUA") and has manifested in two forms: opposition in the public arena and formal court challenges.

The OUA publicly opposed Decree 28/2010 from the outset; however, the dissent heightened around the time mandatory provisions took effect on March 21, 2011. The OUA organized three nationwide strikes, calling on all attorneys to boycott any court proceedings as an act of public dissent against mandatory mediation and mediation that does not require the presence of an attorney (De Palo 2011a). These events did not succeed in killing the mediation regulation, but they did bring the debate about its appropriateness to the forefront of the national media.

Meanwhile, the OUA and other opponents of the decree turned to the courts. In two notable cases, the judge in the court of first instance referred the case to a higher court to hear challenges against the viability of the mediation regulation under the Italian Constitution and the European mediation directive, respectively. Each case is discussed below in turn.

In the Regional Administrative Tribunal (TAR) of Lazio, the OUA backed a case in which the parties argued that the mediation regulation was against the Italian Constitution for three reasons. First, Decree 28/2010 exceeded the delegation of power from Law 69/2009, Article 60 because mandatory mediation per se limits access to justice. Second, the plaintiffs argued that the schedule of fees for mandatory mediation cases set forth by Ministry of Justice Decree 180/2010 created a procedure that was too expensive. Finally, Decree 180/2010 failed to provide adequate guidelines to ensure the quality and professionalism of mediators.

The judge of the TAR found these claims to be "not manifestly baseless" (the threshold requirement for standing in the Constitutional Court) and referred them to the court for review.[12] We note, however, that because this standing requirement is low and the Italian Constitutional Court has no authority to reject a case, the fact that this dispute will be heard by the court is no indication of the final result. A decision is expected in 2012, and meanwhile, the regulatory scheme remains in effect.

At the same time, opponents of the regulation also challenged Decree 28/2010 in the Tribunal of Bagheria, a subsection of the Tribunal of Palermo.[13] There, after hearing the parties' arguments that Decree 28/2010 was an improper implementation of the European directive, the judge determined that the claims had merit and referred the case to the European Court of Justice. With reference to the requirements set forth in the directive, the case specifically questioned whether the decree provides appropriate guidelines for mediator certification and selection for a particular dispute, whether its grant of territorial jurisdiction to the first mediation

organization contacted is valid, and whether the balance between mediation and judicial resolution called for in the directive can be interpreted in such a way as to allow the mediator, when the parties have not reached an agreement, to issue a final settlement proposal absent the request of the parties. This case again holds a potential blow for the Italian mediation regulatory scheme, as it could invalidate key aspects of the new decree. A decision is expected in 2012, although as of the publication date of this article, the case is ongoing.

Legislative Reactions to Opposition

The Ministry of Justice reacted to the OUA's fierce dissent to the mediation regulation by proposing an amendment to the regulatory scheme. The challenges to Ministry of Justice Decree 180/2010 raised in the TAR threaten to bring the entire mandatory regulatory framework crumbling down. Therefore, to "cure" the two provisions in which the Italian Constitutional Court may find a defect, the Ministry of Justice issued Decree 145/2011 (published on August 26, 2011), which amended Decree 180/2010 to make the mandatory mediation procedure less expensive while increasing mediator training and recertification requirements.

The response to the Italian mediation model and the public nature of the dissent have implications outside Italy's borders as well. In fact, when looking abroad, we see that in the creation of mediation policy, the EU is looking to Italy as a model. Regardless of whether one believes that the Italian government employed good policy in enacting the mediation statutes, the fact remains that Italian legislators pushed the envelope by taking such bold steps and are responsible for initiating a debate about domestic mediation legislation not only within Italy but also throughout Europe. A keystone of the debate (discussed further below) is that, opposition aside, mandatory mediation is working: it is reducing the court backlog and lessening court processing time and costs for Italian litigants.

In fact, six months after the execution deadline of the directive, the European Parliament addressed how the member states have implemented its provisions.[14] In its resolution of September 13, 2011, the European Parliament focused specifically on those member states that had gone beyond the directive's basic requirements by enacting mandatory mediation and mediation incentives and sanctions. In addition to other findings,[15] it noted that the Italian mandatory mediation requirement has made dispute resolution more effective and reduced the court's workload (point 5), although such provisions have faced significant domestic opposition (point 8).[16]

The September 13, 2011 resolution was only the beginning of the attention paid to Italian ADR policy and procedures at the EU level in recent months. The European Parliament issued a second resolution on

October 25, 2011 on ADR in civil, commercial, and family disputes that named the Italian Joint Conciliation model as a "best practice" that could be incorporated at the EU level.[17] On November 7, 2011, at the request of representatives from the Dutch legislature, a meeting on best mediation policies was held in Milan in which experts from ten European countries shared best mediation practices from their home countries and discussed the Italian mandatory mediation model and the general role of incentives in mediation legislation.[18]

Further, representatives from both Poland and the Netherlands have indicated that they are following the Italian mediation story, and many EU countries are watching the case before the European Court of Justice. It may well be that the legal claims filed against the law, if they are struck down by the courts, will strengthen the Italian mediation model and will allow it to serve as an example for other states wishing to enact similar legislation. And conversely, the generally positive attention paid by the European community to Italy may serve to promote more widespread acceptance of the law domestically.

Meanwhile, despite the dissent, the data show that Decree 28/2010 and mandatory mediation are, in fact, achieving some success. Despite a drop in mediation filings over the summer, recent mediation statistics released by the Ministry of Justice indicate positive results as a whole for mandatory mediation and Decree 28/2010 as more than thirty thousand cases have been mediated since the mandatory provisions took effect in March 2011.[19] This success, naturally, inevitably creates its own positive publicity in the legal community. As further evidence that mediation is gaining popular support in the mainstream dispute resolution community, October 2011 saw a major increase in the number of registered mediation organizations, many of which are bar associations and other professional groups.[20]

On the whole, as Italian mediation proponents weather the storm created by the issuance of Decree 28/2010, it seems that despite the initial backlash, the situation may be improving. With Decree 145/2011 in effect and the court challenges pending, the tide of opposition, although ever present, seems to be abating. One might argue here that, when the decree was first issued, the old adage "you can take a horse to water, but you cannot make it drink" was appropriate; however, evidence now indicates that, in taking the horse to water, it seems that, sooner or later, the horse will drink.

Two Lessons in Realpolitik for Mediation Proponents

These indications of success should not overshadow the significant rift caused in the Italian legal community by the introduction of mandatory mediation. After observing the process, one must ask: Could this have been done better from a regulatory perspective? As a starting

point, the possibility that the implementation of Decree 28/2010 may have faced less resistance had all stakeholders been involved in developing Italian mediation policy must not be discounted. This initial statement gives rise to two lessons in realpolitik for pro-mediation legislators.

Lesson One: The Role of Compulsion

Given what we now know — that the courts were hopelessly clogged and Italian disputants were resistant to mediation despite its success (the "mediation paradox") but did use it when it became mandatory — Italian legislators in effect had no choice but to enact mandatory mediation at any cost, as anything less than compelling disputants to mediate would not produce the results that Italy required. Thus, the first lesson: in certain situations, legislators must accept that drastic steps are necessary regardless of whether they are popular. In this case, the legislators needed to compel mediation in one mode or another.

The Italian mediation law may very well fail because of the reality that mediation needed to be compelled, and it might have failed even if legislators had initially engaged all stakeholders in the debate (see lesson two below). A positive outcome of the pending court cases — that is, the courts find that all claims are baseless — as well as the continued success of the mandatory mediation procedure will indicate that forcing Decree 28/2010 through the political ranks over the heads of the opposition accomplished the ultimate goal of compelling mediation and rapidly increasing its use. But compelling mediation without the support, or at least acquiescence, of all stakeholders has come at a cost, notably through the unfortunate lack of cooperation with the attorney groups and the resulting need to amend the regulatory scheme.

Another possible outcome here, of course, is that Decree 28/2010 and the other regulations will be reduced or struck down by the courts, and then the Italian mandatory mediation story will become a cautionary tale against excluding important stakeholders from the debate. If this is the case, legislators can at least take comfort in knowing that they ensured that tens of thousands of disputants had an opportunity to experience mediation and that they brought the debate on mandatory mediation to a meaningful level in the EU. Unfortunately, this outcome would bring an end to a procedure that may have offered Italian disputants significant benefits over the long term.

Lesson Two: Openly Engaging the Opposition

Regardless of the ultimate result, the foregoing process instructs legislators, as mediators in fact are instructed, to be cautious in attempting to circumvent opposition. Looking at the big picture, we find evidence that compelling disputants to mediate through a mandatory procedure is an effective tool for the Italian government to use in revolutionizing its civil justice

system. As demonstrated in the mediation paradox above, in the absence of such a propulsive regulatory framework, Italian civil and commercial mediation seemed doomed to fail, as it has over the last two decades (De Palo and D'Urso 2010), which is clearly a risk that the Italian judicial system cannot afford to take.

As in many areas of policy, this is a subject in which reasonable minds may disagree, and valid arguments exist on all sides regarding the appropriateness of the law. This article takes the position that the biggest policy issue is therefore ultimately not *what* was enacted but rather *how* it was enacted.

The issuance of Decree 28/2010 with mandatory mediation provisions came as a surprise and an insult to the stakeholders, namely, but not exclusively, the attorney groups such as the OUA that the government excluded from the process. Not only had their interests — which are significant — not been taken into account, but this group felt particularly targeted because, in their eyes, the decree sought to take away their livelihood by allowing parties a way to resolve their disputes without the assistance of legal representation (De Palo 2011b). A further slight to the highly professionalized Italian legal community (including not only attorneys but also judges, notaries, accountants, and others) was the suggestion that mediators, with their minimum qualifications, could effectively do the work of the entire litigation process. What is more, because of the lack of communication and consultation with policy makers about the true motives behind the decree, the excluded stakeholders were free to assume that they were intentionally excluded from the debate, and their interests were not important.

This conclusion would only have been enforced by the suspicion that these excluded stakeholders may have been tricked — that Law 69/2009, Article 60 may not have been the result of reasoned compromise between the early proponents and the opponents of mandatory mediation. In the face of dissent in the Parliament, pro-mandatory mediation policy makers may have realized that losing a lengthy parliamentary debate would not only delay the law but also possibly result in an official prohibition on mandatory mediation procedures. To an individual who was excluded from the process, it appears that these legislators made the strategic decision to lobby instead for a delegation of power that would allow the government to formulate a decree that would not impede access to justice, which was then used to create the mandatory mediation requirement.

While the legislators may have expected that publication of Decree 28/2010 would cause mayhem, they clearly underestimated the opposition's reaction. As discussed above, the dissent led by the OUA was significant in both its force and its breadth. The opposition was felt throughout Italy, in protests calling for all Italian attorneys to not attend any court procedures as well as the formal challenges in court. Italian newspapers

continually published updates on the situation, carefully following the actions and statements made on all sides of the debate, as well as the content of discussions made between representatives of the OUA and the Italian Attorney General.[21]

As stated above, the ultimate result of this opposition was a reactionary amendment to the regulatory scheme (Decree 145/2011) in which the legislators sought to provide a "quick fix." This band aid amendment, published a mere five months after mandatory provisions went into effect, showed how desperate the legislative proponents of mandatory mediation were in their belated efforts to take the interests of the opposition into account while preserving Decree 28/2010 as a whole. It is, in fact, too early to see if this decree will satisfy the opposition or whether it will eventually have any unforeseen negative consequences.

It is also too early to determine whether any side of this debate — the pro-mediation legislators or the opposition — has "won." As the dust settles, it becomes ever more evident that the policy makers themselves are realizing that compelling such a procedure without engaging the opposition has held significant consequences for mandatory mediation. We note that the legislators are now starting to work to actively include all stakeholders in future decisions. This late effort may indicate that policy makers have realized their mistake, and it may be sufficient to conclude the situation positively for all involved.

The question now asked by those on all sides of the debate is whether, moving forward, the ends will prove to justify the means — whether failure to engage openly with the opponents of mandatory mediation was worth ultimately creating the dissent that, pending the result of the court decisions, may bring an end to the mandatory mediation procedure and the considerable infrastructure of mediation organizations and mediators who depend on it. Even if the regulatory scheme does survive the legal challenges, it will be forever changed by the provisions of Decree 145/2011.

Lastly, we must resist the temptation to allow the ends to *define* the means because even the eventual success of the law is no indication that the legislature employed good policy. Drawing from a theory in mediation teaching, placing stakeholders so solidly on different sides of the issue creates a combative relationship making concessions more difficult. One is left to imagine whether an initial joint effort could have created better provisions in the regulatory scheme. As suggested by Giuseppe Grechi, President Emeritus of the Court of Appeals of Milan, this policy approach created a "lose–lose" situation (De Palo 2011a). With the attorneys so solidly entrenched against the regulation, they lost their chance to offer meaningful input. Meanwhile, on the other side, the mediation community lost the valuable assistance of the attorneys — who as a group could have been a natural partner in

promoting mediation — in developing mediation practices, quality standards, and procedures. Further, even if the mandatory mediation provision prevails, recent legislation has slowed, and the attorneys have been left behind.

Conclusion

With the European Parliament supporting ADR and mediation legislation, it is clear that the ADR movement in Europe is here to stay for some time. Whether the Italian mediation decree will ultimately be a successful measure for Italian dispute resolution is uncertain, and the practical and scholarly debates on the more controversial aspects of the law will continue. While this debate is ongoing, those who work to implement the directive are optimistic about the future of mediation and its effect on the judicial community. They are working to manage the mediation explosion — not only to make the option available but also to create a community in which high-quality, effective mediation procedures resolve citizens' everyday disputes. The paradox that called for such a strong mediation law in the first place still exists, and time will reveal whether mediation — if successful on a larger scale — will ultimately make it a popular dispute resolution option for Italians.

NOTES

1. Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters. Published in the *Official Journal of the European Union* May 24, 2008, Volume L 136/3. In its approach to regulating mediation in cross-border civil and commercial disputes, the EU directive provides a loose framework (Alexander 2008), which promotes the goal of the directive as stated in Article 1.1, "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 text of the directive is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.

The three "core requirements" of the directive are not optional and require each state to enact provisions that protect the confidentiality of information exchanged during the mediation process (Article 7), ensure the enforceability of mediated settlement agreements (Article 6), and require that the statute of limitations for an action is tolled while parties undergo mediation procedures (Article 8). However, so long as these protections are provided for, member states may chose the best approach in domestic law to promote the quality of mediators and the mediation procedure (Article 4), manage recourse to mediation (Article 5), and to make mediation information available to the general public (Article 9).

2. One of the stated objectives of the directive on mediation is to "create a workable, light-touch directive which reflects existing guidelines and best practice and can serve to encourage the wider use of mediation across the EU" (draft report on the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters [COM(2004)0718 – C6-0154/2004 – 2004/0251(COD)), Committee on Legal Affairs, 21.9.2006]).

3. The European Parliament resolution of September 13, 2011 on the implementation of the directive on mediation in the member states, its impact on mediation, and its take-up by the courts (2011/2026(INI)), statement F, acknowledges that as of that date only four member states had not reported that they have implemented Directive 2008/52/EC.

4. Draft report on the adoption of Legislative Decree n. 28/2010.

5. Legislative Decree n. 28 of 4 March 2010, "Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali," published in the *Italian Official Journal*, March 5, 2010, n. 53.

6. Using ADR Center as a touchstone allows the authors to speak firsthand about the practical experiences working with and implementing the new mediation decree. The practical observations, in addition, take into account and incorporate the assessments of other Italian providers and practitioners.

7. Decreto Milleproroghe 2011, DL 225/2010, 16-decies.

8. Maxiemendamento alla Manovra Finanziaria, 2011, p. 11, 35-sexies.

9. Additionally, in certain circumstances, the judge can also exclude the recovery of costs incurred by the winning party even if the judicial and final proposals are not equivalent.

10. The Italian Bar Council leaves this discretion to the mediation organizations and the local bar. N. I8-C/201, 21 June 2010.

11. The factual basis of the following is drawn from Giuseppe De Palo's experience as a central figure at the heart of the Italian mediation debate and from his role as president of the ADR Center, SpA. Given his unique expertise and perspective on the development of mediation policy, De Palo has been called to testify during each of the last four Italian legislative terms and is routinely interviewed by the national media. Additionally, he and ADR Center are frequently consulted on both Italian and European ADR policy issues by the World Bank, the European Parliament, and other international organizations. ADR Center chronicles these developments on the website, http://www.mondoadr.it/cms/.

12. Regional Administrative Tribunal of Lazio, decision n. 03202/2011 REG.PROV.COLL., referring recourse nn. 10937/2010 and 11235/2010 to the Italian Constitutional Court.

13. Ordinance of the Tribunal of Palermo, section of Bagheria, of 16 August 2011. http://www.leggioggi.it/2011/09/14/la-mediazione-va-in-corte-di-giustizia/.

14. The European Parliament resolution of September 13, 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)).

15. Specifically, point 9 holds that states providing financial incentives for parties who mediate, such as Italy, Bulgaria, and Hungary, "prove that mediation can bring about a cost-effective and quick extrajudicial resolution of disputes through processes tailored to the needs of the parties."

16. The European Parliament goes on to state that, despite this success, moving forward, mediation should be publicized as "a viable, low-cost and quicker alternative form of justice rather than a compulsory aspect of the judicial procedure" (point 10).

17. European Parliament resolution of October 25, 2011 on ADR in civil, commercial, and family matters (2011/2117(INI)), at point 11, "[n]otes the example of Italian 'joint conciliation' as a possible best practice model based on a protocol agreed and signed by the company and the consumer associations requiring the company to agree in advance to ADR in order to resolve any disputes which arise in the area covered by the protocol."

18. Event entitled, "Expert Meeting: Best Practices in Mediation Legislation in Europe," hosted by ADR Center SpA in Milan, November 7, 2011. Representatives in attendance came from Italy, the Netherlands, Belgium, Bulgaria, Greece, Germany, Slovenia, Spain, and the United Kingdom.

19. Since the issuance of Decree 28/2010, 33,808 mediations have been performed, and, discounting the months of August and half of September when the courts were closed, the number of mediations conducted per month seems to be continually increasing. Ministry of Justice, Director of Statistics, *National Statistics Projection, 21 March 2011 to 30 September 2011.* Available online at: http://www.giustizia.it/resources/cms/documents/mediazione_DATI_CUMULATI_settembre2011.pdf.

20. After an average of fifty-four new organizations/month registered from March 2011 to October 2011, 126 new organizations were registered between October 1 and November 1, 2011. The full list of registered mediation organizations, along with their date of registration, is available at: http://www.giustizia.it/giustizia/it/mg_1_10_4.wp?frame10_item=1.

21. For a selection of articles chronicling the coverage by the Italian press, please see the Mondo ADR, a website maintained by the ADR Center Spa, http://www.mondoadr.it/cms/.

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