

BRINGING MEDIATION TO THE MASSES: THE EU REGULATORY APPROACH AND THE ITALIAN CASE ¹

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1. Promoting mediation in Europe

After a debate of 4 years, started with the first draft proposal approved in 2004, the European Union issued in 2008 a directive on mediation in civil and commercial matters, with the aim 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.”³ Mediation has been seen as a way to implement the “area of freedom, security and justice” in the European Union. Member states will have to implement the directive in their legislation within May 2011.

The “EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters” (2008/52/EC) is not the first regulatory framework adopted at a supra-national level to promote mediation. The EU itself issued a Green paper, two directives on ADR in consumer disputes, and supported the drafting of a European Code of Mediators. UNCITRAL approved in 1980 a set of conciliation rules, and in 2002 a model law on international commercial conciliation which has been used as a source of inspiration by a handful of states for their national legislation on mediation.⁴

After the Alternative Dispute Resolution movement revived the concept of consensual and informal justice in the 70s, states have slowly taken on the task to make room for non-adjudicative methods in their legal systems. Mediation in fact eschews regulation, especially the kind of regulation which modern states adopt. Regulation is feared especially by the facilitative, transformative, community-based ethos of the mediation movement.

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³ 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.

⁴ Albania (2003), Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005), Slovenia (2008).

To describe the EU Directive on Mediation in short, member states will be required to regulate mediation in cross-border disputes, although they are also subtly invited to consider if such provisions could be applicable to domestic mediations⁵. Under the directive, states may allow judges to mediate, provided they are not and will not be “responsible for any judicial proceedings concerning the dispute in question”.

The EU directive provides a flexible framework, not focusing on one regulatory approach only, but rather on a variety of mechanisms (Alexander 2008, 22). The selection of mediators and the mediation procedure itself are not regulated by the directive. With regard to confidentiality (Art. 7) states will have to guarantee that what is revealed or produced by the parties in a mediation session will not be disclosed later in a judicial or arbitral proceedings. Member states may establish exceptions to the confidentiality principle only for overriding public fundamental interests, such as the protection of physical or psychological integrity. Member states will have to provide for suspension of the limitation period (Art. 8) and judicial enforceability of the settlement agreement (Art. 6). Member states will need to ensure the quality of mediators by encouraging training and the adoption of code of conducts for mediators, as well as assuring quality control on mediation procedures.

The EU also took a stance on legislation mandating mediation. EU states will not be prevented from mandating the parties participation to a mediation proceeding or to an informative session on mediation, provided that the right to access the justice system as the last resort is preserved.

The EU directive on mediation has been criticized for several reasons:

- *for being premature, since mediation systems in Europe are still in an embryonic phase, and early institutionalization might endanger their efficacy;*⁶
- *for covering insufficiently the issue of confidentiality, which is a crucial aspect in the development of mediation, while pushing disproportionately for quality assurance in mediation services (Phillips 2009, 315-317);*
- *finally, for not being ambitious enough, in that the directive could have been made applicable also to domestic disputes.*⁷ *Negotiations were held in the EU institutions in this respect, but the majority in the Council and in the European Parliament “supported limiting the scope of the Directive to cross-border*

⁵ Eu Directive 2008/52/EC, Recital n. 8: “[...] nothing should prevent Member States from applying such provisions also to internal mediation processes”.

⁶ See footnote 3, Draft Report, p. 3.

⁷ Council of the European Union, Brussels, 11 February 2008 (12.02).

*cases because of a restrictive interpretation of Article 65 of the EC Treaty.*⁸
The Commission thus had to settle for a broad definition of cross-border cases.

Three approaches to the promotion of mediation have been described in continental Europe (De Palo and Harley 2005, 469). Denmark and the Netherlands exemplify the “pragmatic approach”, in that they follow a model of “experiment first, then regulate” (Alexander 2006, 30). In both countries the judiciary has taken an active role, sponsoring pilot projects of intra-court mediation.

Switzerland has several training programs in place for mediation, putting more emphasis on the education of lawyers: this is the “cultural approach”. The high rate of judicial conciliations and the efficiency of the court system have made institutionalization unneeded.

The majority of European states, among them France, Germany, Spain and Italy, have instead a “legalistic approach”: first regulate, then see if something happens. These states tend to adopt comprehensive general legislation on mediation (Austria, Slovakia, Slovenia and Lower Saxony are the most notable examples in this respect).

For our purposes, we refer to four ways of regulating mediation identified by Alexander (2008, 2): 1) market regulation (generally for high-end commercial disputes only); 2) self-regulation (collective regulation, mainly knowledge-inspired and expert-based, adopted by a community or industry); 3) formal framework (legal parameters within which self-regulation can fill in the details); 4) formal legislation. Wisely, the European Union has chosen the “formal framework” model (n. 3). Detailed regulations, incentives and sanctions are left to the member states to decide. Nonetheless, states tend to adopt “formal legislation” instead.

Whether through a bottom-up or through a top-down approach, the Directive forces EU member states to regulate and promote mediation. The main trade-off regulators will face is between consistency and spontaneity. Establishing consistency may stifle growth and innovation in mediation programs, and lead the process down to the same path of judicialization that arbitration has walked (Press 1997, 910). Preserving spontaneity may prevent its widespread use by the legal profession and confuse disputants: we can just mention the 750 ADR schemes counted by the

⁸ Brussels, 7.3.2008 COM(2008), Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.

European Commission in business-to-consumer disputes (Affairs 2009). Two caveats have been highlighted: incentives should not be too high for the destitute, or else mediation would become, in a matter of speaking, the justice for the poor. Secondly, sanctions should be applied only when the refusal to participate in mediation is unreasonable (Alliance 2004).

2. Regulating mediation in Italy

As in many others “legalistic” countries, mediation in Italy is struggling. Although 278 ADR providers were reviewed, only a few thousand mediation procedures were conducted in 2008. The number has risen significantly in the past four years, but what is most striking is that a large majority of these procedures still come from “hybrid” mediations (Bonsignore 2010), that is quasi-mediation services established by banks, postal services or telephone operators (41,4% of the total), which are called *conciliazione paritetica* but in fact are closer to non-binding arbitration, or mediations in the telecom sector (38,5% of the total), where mediation was mandated for every dispute starting in 2008. The *conciliazione paritetica* has the highest settlement rate (95,6%), due to the strong endorsement of the players involved, as they are conducted by a mixed panel of representatives from consumer associations and the industry. Mandated mediation in business-to-consumers telecom disputes enjoys a significant flow of small claims and employs expert mediators. This was not the case for mandated mediation in labor disputes, where the conciliation panel had no real training in mediation, and the engulfment which resulted from the bureaucratization of the procedure was in all counterproductive.

Mediation as purists intend it, that is a non-adjudicative procedure chosen voluntarily by the parties, is still performed in negligible numbers, and so is the number of mediations managed by private ADR providers (the 0,4% of the total in the year 2008, according to a survey that however did not include some of the national players). In-court mediation programs, which usually confirm the maturity of the judiciary on the issue, are still in an embryonic phase (Ventura 2009, 209). Figures released by public ADR providers confirm that the average value of mediated disputes is low, and that in more than 65% of cases the invited party did not accept to come to mediation.

In March 2010, legislative decree n. 28/2010 was passed in Italy to enact the EU directive on mediation.⁹ Decree n. 28/2010 is the most encompassing and ambitious attempt after a long series of legislative measures addressing mediation in specific sectors of litigation. The essential points of the decree are the following: a) mediation in civil and commercial matters, conducted by a trained mediator through an accredited mediation provider, will enjoy substantial benefits; b) lawyers will have to inform their clients that they can resort to mediation in order to resolve their disputes, and if they don't give this informed consent in writing, their retaining agreement is void; c) finally, from March 2011, a large number of disputes will have to go through mediation before going to court, or the judge will order a stay of the proceeding. State-sponsored mediation will be administered therefore by accredited mediation providers, following the arbitration chambers model. Mediation providers will have to supervise the training of the mediators and the impartiality of the proceedings. Even though "solo mediators" are not explicitly barred, it is really difficult to see how they might find a place in such a legislative framework, except for some very high-level, specialized mediations.

Incentives to go to mediation will operate in two ways. First of all, mediation proceedings and the resulting settlement agreement will be exempt from stamp duties and court fees. Secondly and more importantly, should the mediation be on the verge of failure, the mediator is entitled to put forward a settlement proposal which the parties need to consider and decide whether to accept or refuse. This strong evaluative twist may have important consequences for the dispute. If later the parties end up in court, and the judicial decision coincides with the settlement proposal, even the winning party who refused to settle will have to pay for the costs of the trial proceeding incurred after the mediator's proposal. This is notable feature in Italian civil procedure, where normally the winning party can recover its legal expenses, including attorney's fees, from the losing party. In the worst cases, the judge may even discretionarily punish the winning party of the dispute who behaved unreasonably in mediation, by awarding punitive court fees.

Some commentators have defined this mechanism as "adjudicative mediation" (Delfini 2010, 25). The system is loosely inspired by the UK Pre-Action Protocols, introduced in 1998 with the new Civil Procedure Rules. The Pre-Action Protocols prescribe that parties should consider alternative means of resolution

⁹ D.Lgs. 4-3-2010 n. 28, "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.

before going to court. If the parties cannot prove to have done this, the Court must take it into account in determining the costs.¹⁰ However, the decision on the costs is not affected by what the parties did or did not do in the mediation, like in the Italian scheme. The drafters of Decree n. 28 seem to believe that the parties know what is the “just” outcome of the dispute, whereas the mediation rationale stays right in the strategic admission that the outcome of the judgment is uncertain, and that the parties’ perception may diverge as to the value of the same legal rights, due to the influence of diverging extra-legal interests.

We can see here how the misconception of mediation may create problems, and how in fact such paternalistic threats might be counterproductive in terms of the appeal of the procedure. Mediators cannot be forced in any case to formulate a settlement proposal, unless both parties demand it, and the by-laws of the mediation provider might even prohibit it on a general basis, as the Italian Bar Council seems to suggest.¹¹

3. The Italian way to mandatory mediation

As anticipated, starting in March 2011 a large number of civil and commercial disputes will need to go through a mediation attempt with an accredited mediation provider, before going to court. This procedural step will be required for every legal dispute in one of the following matters: tenancy, land rights, partition of property, hereditary succession, family business transfer covenants, loan for use, lease of business, insurance contracts, banking and finance contracts, traffic accidents, medical negligence, libel by press.

According to one estimate,¹² these disputes will affect over 1 million out of the 5 million civil cases currently pending before the Italian courts. If the mediation attempt is not performed, the judge will order a stay of the judicial proceeding, until the parties have started the mediation. The same order will be given when mediation is mandated in a contract or in company by-laws and one of the parties sues without

¹⁰ In *Dunnett v. Railtrack Plc* ([2002] 1 WLR 2434), the winning defendant did not accept to mediate before the appeal, in spite of the judge’s recommendation. Although the decision was upheld, the Court of appeal refused to award the defendant the costs of the appellate proceeding (Andrews 2010, 547).

¹¹ The National Bar Council suggests that when the mediation fails, the local bar and the mediation provider should be made able to decide whether to allow the mediator to formulate a settlement proposal to the parties, or to forbid it altogether (Consiglio Nazionale Forense - N. I8-C/201, 21 June 2010).

¹² Draft report on the adoption of Legislative Decree n. 28/2010.

having tried mediation first. For those disputes, mediation is made compulsory on an indiscriminate basis, with no regard to the specific case at hand. While this has already been done in the past with labor disputes and business-to-consumer telecom disputes, no previous attempt had been made on such a large scale.

Mandatory mediation has been met with mixed reactions. All the UK Pre-Action protocols involving ADR explicitly state that “no party can or should be forced to mediate or enter into any form of ADR.” While such measures are feared by some to be detrimental for the defense of rights (Converso 2000, Biavati 2005), and to determine an increase in costs and formality (Ingleby 1993, 443) they also have been praised as beneficial, provided that the mediator has some specific training (Luiso 2010, 129).

The Italian Bar Council has eagerly criticized mandatory mediation. The official position of Italian attorneys is that mandatory mediation should be scrapped, and that in any case a postponement of the whole system of accredited mediation providers entering into force should be granted. Indeed, more time will be needed by local Bars to prepare for this change, especially for training mediators and establishing mediation providers. The Draft report on the adoption of Legislative Decree n. 28/2010 explains the criteria to select matters which will need to go through mediation: a) disputes concerning long-duration contracts or involving members of the same social groups (tenancy, succession, family transfers); b) highly conflictual disputes requiring compensation (professional malpractice, traffic accidents); c) contracts widely diffused (insurance and banking contracts).

Coercion to mediate is generally embraced by policy makers who are more worried about the court backlog than the well-being of the disputants. The not-so-hidden agenda of mediation as “pure diversion” is particularly strong in Italy (Deodato 2010, 10), where a combination of incentives to drag on litigation and poor court management has rendered the justice system dysfunctional (Marchesi 2003; Pellegrini 2008). The idea of mediation as diversion from courts is also widespread at the EU institutional level.¹³ The underlying assumption is that citizens are not willing anymore to spend in the administration of justice, and that it is easier now to find a substitute (de Roo and Jagtenberg 2006, 304).

¹³ §3.2, European Economic and Social Committee, Mediation in civil and commercial matters Brussels, 9 June 2005, Opinion of the European Economic and Social Committee 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) 718 final – 2004/0251 (COD).

How to promote without compelling? One “paternalistic-libertarian” perspective suggests a shift in the “choice architecture” (Watkins 2010). Since the disputants often litigate in court because this is the default option, no matter what their chances are, framing the disputants choices in order to make mediation the default option would make it preferable to the parties who otherwise cognitively prefer to avoid affirmative steps, while preserving their right to opt out.

4. Additional specifics of the new decree

In aiding the reader, the following summary of some specific features of the new mediation decree may be instructive:

- *Referral to mediation*--The judge may refer parties to mediation with an accredited provider at any phase of the trial.¹⁴
- *Duty to inform*--Lawyers are required to inform their clients, in writing, about the option to mediate and the accompanying financial incentives of doing so. Failing to notify may void the power of attorney.¹⁵
- *Starting the process*--The parties first select a mediation provider, unless already designated by contract. The mediation process is commenced by submitting a request to a mediation provider. The mediation provider then appoints a mediator and arranges a meeting with the parties within 15 days of the request.¹⁶
- *Duration of the mediation and first session*--The mediation proceeding must be completed within four months of the submission of the request.¹⁷
- *No-show at mediation*--If a party, without a valid justification, fails to appear at a mediation session, this failure may be used against the party in the subsequent trial.¹⁸
- *Contract clauses*--If a mediation clause is provided in a contract between the parties, or if mediation is required by statute and an attempt to mediate has not been made before filing a case in court, upon request of a party, a judge may set a 15-day deadline for the parties to submit a request for mediation to

¹⁴ D.Lgs. 4-3-2010 n. 28, Art. 4 § 3.

¹⁵ *Id.*

¹⁶ *Id.*, at Art. 8 § 1.

¹⁷ *Id.*, at Art. 6 § 1.

¹⁸ *Id.*, at Art. 8 § 5.

an accredited mediation provider selected by the parties and adjourn the hearing to at least four months.¹⁹

- *Regulations of organizations*--Mediation providers must abide by certain regulations set forth by ministerial decree. A mediation provider selected by the parties must ensure confidentiality of the procedure, a disinterested mediator and one appropriately equipped to conduct the mediation.²⁰
- *Settlement Agreement*--If an amicable agreement is reached, the mediator memorializes the agreement, which is signed by the parties, in an official record. 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.²¹
- *Recovery of Costs*--If the parties request the mediator to make a proposal that ultimately completely corresponds with a subsequent judicial decision, or the mediator deems it necessary under the circumstances, the judge will exclude the recovery of costs incurred by the winning party that declined the proposal.²² In certain circumstances, the judge also can exclude the recovery of costs incurred by the winning party even if the judicial decision does not completely correspond to the initial proposal.²³
- *Confidentiality*--The mediator and anyone else who works within the mediation provider organization, or anybody who is involved in the mediation process has a duty of confidentiality and may not be called to testify. Statements made or information acquired during the procedure may not be used in subsequent judicial proceedings.²⁴
- *Mediation provider organization registration*--Mediation procedures can be handled only by public agencies and private organizations registered with the Ministry of Justice.²⁵

¹⁹ Id., at Art. 5 § 5.

²⁰ Id., at Art. 3 § 2.

²¹ Id., at Art. 11 § 1.

²² Id., at Art. 13 § 1.

²³ Id., at Art. 13 § 2.

²⁴ Id., at Art. 9 § 1.

²⁵ Id., at Art. 16 § 1.

- *Mediators*--The mediation procedure can be conducted only by mediators who are listed with any organization accredited by the Ministry of Justice. Mediators must attend and pass special training provided by institutions accredited by the Ministry of Justice.²⁶

5. Unpacking the practicalities of Italian mediation

Indeed, the new mediation decree is ground-breaking in both its sweep and scope. Prescriptions like the “evaluative twist” of the mediator’s proposal provided for in Article 11 inform the new legislation with novel approaches to mediation problem-solving. Given these new prescriptions, however, a question remains as to the impact of their practical application. In what follows, we analyze several tenets of the new Italian law as well as explore how they have been addressed by Italy’s mediation providers. Our touchstone for comparison is Rome’s ADR Center, a prominent Italian dispute resolution provider and the largest private firm in continental Europe offering civil and commercial mediation services.²⁷

Choosing the ADR Provider (in the absence of a contract clause): In the event that both parties submit a request for mediation to different ADR providers, the competence of the ADR provider is determined by “the date of receipt of the communication of the request”.²⁸ This criterion has been debated by practitioners as it is different from that applied to determine the competence of a Court. In the ordinary judicial process the competent Court is generally identified according to objective criteria depending on the matter of the controversy (e.g., the court where the contract is mainly performed, the court where the employee performs his or her duties, and so forth). Under the new decree, the competence of the ADR provider is determined under subjective criteria and therefore left to the discretion and promptness of the parties.²⁹

From a practical standpoint, the effect of this provision over the mediation process is that of preventing the “slowest” party from selecting the ADR provider and thus slowing the mediation process down. In order to reduce the possible risks connected with this provision, the practical tips suggested by ADR providers is,

²⁶ *Id.*, at Art. 16 § 5.

²⁷ Using ADR Center as a touchstone allows the authors to speak first-hand 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.

²⁸ D.Lgs. 4-3-2010 n. 28, Art. 4 § 1.

²⁹ *Id.*

where possible, that of including an ADR clause in all contracts. As outlined above, in this case, if an attempt to mediate has not been made before filing a case in court under the ADR clause agreed by the parties, upon request of the interested party a judge may set a 15-day deadline for the parties to submit a request for mediation to the selected mediation provider and adjourn the hearing at least to four months.³⁰

Additionally, there are various interpretations of what is meant by “date of receipt of the communication.” It is not clear who is the intended recipient: the other party or the ADR Provider? In the first interpretation (the date of receipt by the other party) it is also not clear whether it is either the ADR Provider or the party who is entitled to make the communication. And, in any case, regardless of who is entitled to render communication, from a practical perspective it is difficult to determine the consequences of both a lack of communication or delay and when a communication should be considered as properly received by the other party under the circumstances. Accordingly, the ADR providers have been following the second interpretation or the date of receipt by the ADR Provider. This seems to be consistent with the principle that a diligent party, who sends a mediation request to an ADR provider, should not suffer the consequences of that provider being “slow” in communicating to the other party that a mediation request has been filed.

Communication of the Mediation Process to the Other Party by the ADR Provider. When submitting the application for mediation, the selected mediator provider shall appoint a mediator and set a first meeting between the parties within fifteen days from the filing of the application.³¹ Thus, when the mediation procedure is commenced, the respondent party is to be advised by the mediation provider and not by the party initiating the mediation. Historically, when one or more parties intend to mediate a dispute, the initiating party contacts the respondent(s). The prescriptions outlined in Article 8, however, places the burden of notification on the mediation provider. It is thus up to the provider, not the initiating party, to comply with the 15-day timeline.

What if notification within 15 days is impracticable? In practice, the 15-day stipulation has not been strictly construed by providers. , Article 8 provides that the application and the date of the first meeting are to be reported to the other party by any appropriate means to ensure its receipt, whether rendered by the provider or by

³⁰ Id., at Art. 5 § 5.

³¹ Id., at Art. 8 § 1.

the initiating party.³² In short, if the mediation provider has been unable to notify the respondent party, the initiating party may nevertheless do so through any number of communication modes, whether through personal service, notification by mail, etc.

Selection of the Mediator by the ADR Provider. Article 8, as cited above, also stipulates that the provider is to appoint the mediator.³³ On its face, this provision can be construed as compromising the element of party-driven resolution in the process for it seems the parties are pre-empted from selecting their mediator. And yet, the particular rules of the various mediation providers can offset this provision by involving the parties in the selection process. For example, at ADR Center it is initially up to its directors to select the appropriate mediator depending on the type of case or issue in controversy. Nevertheless, the parties have direct, advanced knowledge of who their mediator could be because ADR Center maintains a list of its mediators, complete with CV's, contact information, and individualized descriptions of background and experience. Also, at the time of sending a request for mediation the parties can express a non-binding choice for a particular neutral. Moreover, according to mediation rules, at a request of the parties, or at ADR Center's own motion, under certain circumstances the appointed mediator can be substituted, thus giving the parties "back" a bit of their autonomy.

Where the list of neutrals of an ADR provider is not publicly available, which is the norm as of today in Italy, indeed the party's confidence in the entire process might be hampered, at least psychologically. Even though the law does not require ADR Providers to make their list available to the public, but only to the Ministry of Justice, one could expect that market best practices will force neutral organizations to change their approach in this regard.

The Mediator's Proposal and the 'Evaluative Twist': No doubt the most novel element of the new decree is encompassed in Article 11, dealing with the power of the mediator to issue a formal proposal in case the mediation is about to fail. Actually, Article 1, section a), introduces this innovative feature, by defining mediation as "... the activity aimed at both assisting [the parties] in the search of an amicable solution ... and at *making a proposal* to resolve [the dispute] (emphasis added)"

³² Id.

³³ Id.

Under Article 11, when an agreement is not reached the mediator may proffer a settlement proposal and, if the parties so request at any time during the proceedings, s/he is obliged to do so.³⁴ Per section 2, the proposal is communicated to the parties in writing. The parties, in turn, submit their acceptance or rejection of the proposal to the mediator in writing and within seven days of the mediator's communication.³⁵ In the case of there being no answer by the parties, their silence is deemed as a refusal of the mediator's proposal.³⁶ If an amicable agreement is reached, or if all parties subscribe to the proposal of the mediator, pursuant to Section 3 the proposal is memorialized as minutes to be signed by both the parties and the mediator.³⁷ Acceptance of the mediator's proposal is tantamount to an agreement having been reached and thereby the mediation is concluded.

A number of issues emerge in light of the provisions of Article 11. For one, is the "proposal" 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 turn into something closer to an arbitral award. What is more, combined with the possible penalty for not abiding the proposal (pursuant to the provision providing for recovery of costs as outlined above³⁸) the mediator's proposal can carry heavy consequences. In so being, the mediator is acting in a capacity well beyond that of a facilitative intermediary. Moreover, one could question the entire (summary) basis of information on which the proposal is rendered.

If the latter is the case and the mediator is merely acting as a reciter of sorts, how can we reconcile the adverse consequences for refusing the proposal? 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 constrained to accept the proposition in order to avoid the forebodings of sanctions. In this way, the specter of sanctions can represent a kind of coercive force driving the parties toward settlement. There can be little doubt,

³⁴ *Id.*, at Art. 11 § 1.

³⁵ *Id.*, at Art. 11 § 2.

³⁶ *Id.*

³⁷ *Id.*, at Art. 11 § 3.

³⁸ *Id.*, at Art. 13.

therefore, that this “twist” in either case imbues the entire process with a hearty element of evaluative—if not coercive—problem-solving.

As it is, the mediator’s proposal triggers the sanctions of Article 13 only when the mediator communicates it formally at the end of the session.³⁹ It is therefore important for parties to assess beforehand how individual ADR providers approach the issue. The specialized rules of mediation providers may explicitly proscribe that the mediator not formalize the proposal unless requested to do so by the parties. .

Perhaps more fundamentally, and in part regardless of the nature of such proposal (whether it is rights-based, or just what the mediator feels both parties could agree to given the circumstances) one should question how mediation advocacy is going to be affected by these rule. We refer to the fear of both parties to admit and make concessions, albeit in private caucus, knowing that the person they are talking to will inevitably use that knowledge to form its proposal. In this regard, it will be interesting to see whether the ADR providers will be successful in allowing their mediators not to issue such proposal, for example when the neutral deems not to have enough information, or time, or subject matter expertise, to issue one. And in case the proposal is a rights-based one, the extent to which its correspondence to a later judgment could be challenged by arguing that, “based on the evidence” available to one of the litigants at the time of mediation, the proposal was to be refused. Lastly, where the mediator issues a proposal which has objectively less chances of being found “correspondent” to a later judgment, such as where its content is a very “creative” one, it will be interesting to see whether or not a litigant might insist on having from the mediator, and or the provider organization, a proposal which is more likely to trigger negative financial consequences for the party not inclined to accept it. This, clearly, would be the case of a proposal resulting in a straight Euro figure, like the one litigants expect to get in court.

Fees and Costs of Mediation: Pursuant to Article 17, each party involved in the mediation must share the costs of the ADR provider.⁴⁰ From a practical perspective, it often happens that the respondent party (i.e., the party called upon by the provider or by the initiating party to mediate) will refuse to bear his or her portion of the costs. As a way of alleviating this circumstance, ADR providers advocate a multi-tier payment system. First, the parties are advised that if the case is settled each party is granted a tax credit, per the decree, depending on the value of the

³⁹ Id., at Art. 11 § 1.

⁴⁰ Id., at Art. 17 § 4 §§ a.

dispute in controversy.⁴¹ Normally, parties will pay a fixed fee for the mediation commensurate with the amount in controversy and the expected time allocation for the session(s).

Second, in particularly complex cases or cases requiring a number of sessions, however, it is possible for the parties to devise a contingency fee option. In so doing, the parties pay a minimum or fixed fee (e.g., to cover the administrative costs) upfront to ADR Center and, only if a resolution is reached will they pay an additional amount based on agreed upon cost tables. While still bound to share the costs of the mediation, this second option is meant to empower the parties to collaborate with the provider and develop their own payment scheme. It should be however noted that pricing flexibility is more limited for public ADR providers, such as the Chambers of Commerce and the mediation organizations established by the Bar Associations. This is because their schedule of (minimum and maximum) fees is set by a Government decree, which also determines the maximum increase allowed when the mediation is successful, and the minimum decrease when mediation is a condition precedent by law. To the contrary, the Ministry of Justice is only to set the “criteria” for the approval of the schedule of fees of the private organizations, therefore allowing more latitude in their pricing schemes.

6. Conclusion

The ADR movement is here to stay for some time. The mediation revival is a sign of that continual movement “back and forth between justice without law, as it were, and justice according to law” (Pound 1922, 54). The European Union and the member states are pushing for institutionalization, and it is only with some kind of institutionalization that attention will be increased around the issue of mediation (Press 1997, 917). ADR and mediation policies need to revolve around the double track of quality and incentives. These policies will require some degree of judicial activism, the establishment of a market in ADR services, and high-level mediation training for lawyers and mediators (De Palo 2009, 204). Where all these different strategies have not been combined in a balanced way, the results have been poor. In France, where all the energies have been invested in assuring mediation quality alone, the number of proceedings has not risen significantly.

Since this process of institutionalization requires some degree of formality, there is a clear danger of excesses in proceduralization, and eventually unintended judicialization, as it has been the case with arbitration (Clift 2009, 516). Newly

⁴¹ Id., at Art. 20 § 1.

passed laws, such as the Italian Legislative Decree n. 28/2010 on civil and commercial mediation, are a point in case. According to some, incentives to mediate that are too drastic and invasive (mandatory mediation, enforceability of the settlement agreement, shifting of the court fees and so on) tell us a story of “judgment nostalgia” (Biavati 2005), and mistrust in the ability of the parties to deal with their own dispute (Cutolo 2006). The Italian legislator seems to ignore that the benefits of mediation are in the mediation process itself, and not in diversion from the courts, which is rather a positive side-effect.

According to others, and speaking especially “from the trenches”, in the absence of such propulsive regulatory framework, civil and commercial mediation in Italy would be doomed to produce virtually no results, such as those resulting from the last two decades of the Italian ADR movement (De Palo and D’Urso, 2010.)

As it happens, gradual institutionalization might have been desirable: the cultural and social changes represented and requested by mediation need patience (Clift 2009, 513). For the time being, the risk of judicialization must be dealt with by mediation providers and finely trained mediators, fighting to keep the process as informal and genuine as possible. ADR education and integrity on the service provision side, as a result, become necessary more than anywhere else.

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