

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

**LUIGI COMINELLI**

### **1. Adr and the State**

The 1976 Pound Conference is the starting point of what we might call the revival of mediation, as rebranded under the “Alternative Dispute Resolution” label. The modern mediation movement in the western world is said to have begun in the 70s in the US, to have expanded in the 80s to France, UK and Australia, and to have reached all Europe in the 90s (Alexander 2006, 1).

While Cappelletti argues that the mediation revival represents the third wave of a larger “access to justice” movement (legal aid and defence of collective interests are the first two waves), Mistelis contextualizes ADR in the “wave” of privatizations in public services brought by the New Public Management theories (Mistelis 2006). The “ADR” acronym is now under attack by the very mediators, as an outmoded and misleading expression that “survives as a matter of convenience” (Stipanowich 2004, 845): there is nothing “alternative” in mediation and in all non-adjudicative methods of dispute treatment. According to ADR scholars, depending on the nature of the parties or the conflict, mediation may be the most effective (EDR) or appropriate (ADR) way of dealing with disputes.

Social psychologists have tested empirically why and how our cognitive biases impact on our behavior as disputants: in some cases, mediation is a much better instrument to overcome barriers to conflict resolution. Grassroots movements pointed out how much adjudication is overcharged with tasks that are not its own, and how much traditional litigation stifles individual autonomy and satisfaction in dispute treatment. Public and private adjudication in our societies has come to represent the worst example of “legal constructivism” (Resta 1999, 545).

But again, I will come later to conflicting views on the ideologies of mediation.

Despite its great promises, mediation/ADR is still a niche instrument in Europe: 40% of companies surveyed in Italy have never used mediation to resolve business disputes (De Palo and Harley 2005, 473). In the Netherlands, at the forefront of the European mediation movement, only 27% out of the 4.700 registered mediators ever conducted a mediation (de Roo and Jagtenberg 2006, 284).

The effectiveness of mediation is hotly debated. In one famous research conducted by the RAND corporation in 6 US districts (RAND ICJ 1996), still one the most comprehensive to date, “no strong statistical evidence” was found that in-court mediation programs had brought significant reduction in costs in the time of disposition, or significant improvement in attorneys views of fairness in the management of cases. The only significant difference where intra-court ADR had been used, seemed to be an increased likelihood of monetary settlement. In a recent research on intra-court mediation in appellate cases (Heise 2010, 86). The law and economics theory, supported by the social psychology assumptions, that mediation and ADR programs stimulate case settlement and reduce disposition time, is supported only partially by empirical evidence (Heise 2010, 68).

Notwithstanding the fact that the methodology of the RAND study was questioned for having included some flawed programs (Stipanowich 2004, 852), and that a subsequent study on federal district court programs reported that the perception of lawyers was favorable with respect to costs, time disposition and fairness (Federal Judicial Ctr. 1997), evidence of the advantages of ADR is often anecdotal. Figures on ADR proceedings are rarely disclosed due to confidentiality issues, or because the mediators market is mainly private and no public records are required (Stipanowich 2004, 869). Knowledge of mediation among the general public and the legal profession is scant, and the overall impact on litigation is negligible (Genn 1999, 261).

If this is not enough, attempts of modern legal systems to revive mediation as part of a new “access to justice” policy, have been heavily criticized as a new strategy of demise of the public powers (Fiss 1983, Twining 1993). Flawed by the “reductionism in the social psychology analysis of conflict”, the mediation/ADR policy implies the “retreat from the politics of rights”, and “loss of a social justice component” (Harrington 1985). In one of the most passionate and cited defences of adjudication, Fiss (1984, 1085) reminds us that adjudication has an important social function, which is bringing reality into accord with them public values: “judgement aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration”. Settlement is “a capitulation to the conditions of mass society and should be neither encouraged nor praised” (Fiss 1984, 1075).

What is almost undisputed is the high level satisfaction of litigants in mediation: 80% would opt again for mediation in the future (de Roo and Jagtenberg 2006, 287).

## **2. 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”<sup>1</sup>. 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 legislative framework adopted at a supra-national level. 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 (or a “model clause” if you prefer), 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<sup>2</sup>.

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. So slowly, that only in 2001 a Uniform Mediation Law was adopted in the US, where the ADR movement was officially acknowledged by the legal establishment in 1976 during the “Pound Conference”<sup>3</sup>.

Mediation in fact eschews regulation, especially the kind of regulation which modern states adopt. Regulation is feared especially by the facilitative, transformative, community-based soul of the mediation movement.

To describe the EU Directive on Mediation in short, member states will be required to regulate mediation in cross-border disputes, although states are subtly invited to consider if such provisions could be applicable to domestic mediations. 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

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<sup>1</sup> 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.

<sup>2</sup> Albania (2003), Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005), Slovenia (2008).

<sup>3</sup> The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Minneapolis 1976.

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 proceeding. 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 had also to take 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 embryonic phase, and early institutionalization might endanger their efficacy<sup>4</sup>;
- 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<sup>5</sup>. 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 cases because of a restrictive interpretation of Article 65 of the EC Treaty”<sup>6</sup>. The Commission 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

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<sup>4</sup> See footnote 1, Draft Report, p. 3.

<sup>5</sup> Council of the European Union, Brussels, 11 February 2008 (12.02).

<sup>6</sup> 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.

“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 a “legalistic approach”: first regulate, then see if something happens. These states tend to adopt comprehensive general legislation on mediation (Italy, Austria, Slovakia 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. But states tend to adopt “formal legislation” instead.

Be it 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 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 the justice for the poor. Secondly, sanctions should be applied only when the refusal to participate in mediation is unreasonable (Alliance 2004).

### **3. Regulating mediation in Italy**

As in many others “legalistic” countries, mediation in Italy is struggling. Although 278 ADR providers have been censured, only a few thousands mediation procedures have been 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 comes 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 “conciliazioni paritetiche” 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). 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<sup>7</sup>. 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

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<sup>7</sup> 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.

might find a place in such legislative framework, except for some very high-level niche-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. In the worst cases, the judge may even discretionary 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 before going to court. If the parties cannot prove to have done this, the Court must take it into account in determining the costs<sup>8</sup>. However, the decision on the costs is not affected by what the parties did or did not 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

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<sup>8</sup> 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).

might even prohibit it on a general basis, as the Italian Bar Council seems to suggest<sup>9</sup>.

#### **4. 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<sup>10</sup>, these disputes will interest over 1 million out of the 5 million cases entering the court docket every year. 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.

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. More time will be needed in fact by local Bars to prepare for this change, especially for training mediators and establishing mediation providers.

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<sup>9</sup> “When the mediation fails, the local bar and the mediation provider should be 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. 18-C/201, 21 June 2010).

<sup>10</sup> Draft report on the adoption of Legislative Decree n. 28/2010.

The Draft report on the adoption of Legislative Decree n. 28/2010 explains what were 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 bad 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<sup>11</sup>. 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).

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 that cognitively prefer to avoid affirmative steps, while preserving their right to opt out.

## 5. 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 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

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<sup>11</sup> §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).

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, 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 passed laws, such as the Italian Legislative Decree n. 28/2010 on civil and commercial mediation, are a point in case. Incentives to mediate that are too dirigistic and invasive (mandatory mediation, enforceability of the settlement agreement, shifting of the court fees) 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.

Gradual institutionalization might be a better alternative: 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.

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