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MEDIATION IN ITALY: A BRIDGE TOO FAR?

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Introduction

Not all litigation backlogs are made the same. In Italy, the backlog in civil litigation has been so extreme that, in 2001, Italy's parliament passed a law entitling litigants to recover compensation from the justice system for excessive delays in civil cases.[1] Named after its sponsor, the so-called Pinto Law is a legislative response to repeated decisions of the European Court of Human Rights to the effect that delays in the Italian civil proceedings exceeded a reasonable length as required by Article 6.1 of the European Convention on Human Rights. In fact, Italian appellate courts routinely award litigants damages for excessive delays in legal proceedings. Those delays have

[1] Law 89/2001

not abated, however, and cases continue to be filed against Italy in the European Court for excessive delay in its civil justice system.[2]

In this context, mediation[3] has been a hot topic in Italy for over a decade and has been the subject of recent, very controversial legislative initiatives at the national level, in particular Decree 28, dated March 4, 2010, designed to require the use of mediation as a means of reducing the backlog in the courts.[4]

Mediation in Italy is not new. Since 1942, Italy's Code of Civil Procedure (c.p.c.) has provided for voluntary mediation in cases pending before justice of peace[5].

Mediation also has been available for some time in contracts related to suppliers, farming, employment and landlord-tenant relations. However, there is no single model of mediation. Sometimes mediation is required to take place in the presence of the judge who will decide the merits of the case; in other cases mediation proceeds before neutrals who are independent of the judicial system. Some mediation procedures result in enforceable decisions; others result in proposed agreements that the parties must accept in order to become effective. Until recently, most forms of mediation in use in Italy have been imposed as a condition precedent to the pursuit of specific categories of legal proceedings, and so have not been based on the voluntary participation of the parties.

This article provides an overview of Italy's mediation initiatives and highlights the aspects of Italy's emerging mediation scheme that make it distinctive and render it controversial.[6]

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[2] For a brief overview of the crisis and repeated attempts at reform of the Italian civil justice system, see Elizabetta Silvestri, The Never-ending reforms of Italian Civil Justice, http://unipv.academia.edu/ElisabettaSilvestri/Papers/825268/The_Never-Ending_Reforms_of_Italian_Civil_Justice.

[3] Although Italian legislation and scholarly articles tend to use the terms mediation and conciliation interchangeably, in proper Italian parlance "mediation" refers to the process, "conciliation" to a positive result in mediation (see definitions provided by Decree 28 dated March 4, 2010). The term mediation is used in this article to refer both to mediation and conciliation.

[4] Italy has not wanted for debate over whether or how to use mediation. Scholarly critics have objected to mediation on grounds of procedural fairness in the neutral selection process, the questionable impartiality of neutrals, and the risk that mediation, especially mandatory mediation, could increase rather than reduce litigation cost and delay.[4] Some scholars have countered that mediation should not be viewed as merely a corrective measure for litigation delay but as a method of resolving claims that is qualitatively better than litigation in court. *See* Buonfrate–Leogrande, *La giustizia alternativa in Italia tra ADR e conciliazione* (Alternative justice in Italy, ADR and conciliation), *Riv. Arbitrato*, 375 *et seq*. (1999). For a thorough review of the related legislative initiatives, see Giovanucci–Orlandi, *La normative italiana in tema di conciliazione "convenzionale"* (The Italian regulatory scheme related to "conventional" conciliation), in *Arbitrato, ADR, conciliazione*, 1218 *et seq.* (M. Rubino-Sammartano ed., 2009).

[5] *Codice di procedura civile* (Italian Code of Civil Procedure), art. 322.

Crisis in the Courts

Claims of human rights violations at the European Court of Human Rights and Pinto Law claims for compensation in Italy's courts of appeal, such as the estate case that dragged on for over 22 years, make for sensational newspaper articles[7]. Combined with these dramatic anecdotes, the somewhat less sensational statistics have put pressure on Italy's parliament to promote mediation as the fix for a civil justice system that is broken.

In the three-year reporting period 2007-09, cases at the tribunal (trial) level ranged, depending on the year and form of decision, from approximately 15.2 to 28.1 months. During the same reporting period, the duration of an appeal at the court of appeals level ranged, depending on the same factors, from approximately 37.9 to 52.5 months. During 2007-09, relatively smaller matters before justices of the peace ranged in duration from 9.7 to 14 months.

During the period July 1, 2008 through June 30, 2010, the total number of pending civil cases fell a slight 0.8 percent, from 5,649,970 to a still-daunting 5,602,616 cases[8].

Legislative Efforts to Jump Start Mediation

Since the passage in 1993 of Law n. 580, Italy's chambers of commerce have possessed a broad mandate to develop mediation in their assigned territories:

(i) to promote the development of commissions for arbitration or conciliation, whether in commercial or consumer cases;

(ii) to develop and promote standard form contracts between or among businesses, their associations, consumers and consumer associations;

(iii) to appear in cases related to economic, industrial or commercial crimes and to promote legal actions to discourage unfair competition.

However, the 1993 statute was roundly criticized for being incomprehensive, poorly

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[6] For a thorough review of the related legislative initiatives, see Giovanucci–Orlandi, *La normative italiana in tema di conciliazione "convenzionale"* (The Italian regulatory scheme related to "conventional" conciliation), in *Arbitrato, ADR, conciliazione*, 1218 *et seq.* (M. Rubino-Sammartano ed., 2009).

[7] See *Legge Pinto: Otto condanne per l'Italia* (Pinto Law: Eight Judgments against Italy), Il Sole 24 Ore, May 3, 2010.

[8] See *Corte Suprema di Cassazione, Relazione sull'Anno Giudiziario 2010* (Italian Supreme Court Report on Judicial Year 2010).

organized and in some respects, internally inconsistent[9].

2001/2003 Legislative Initiatives

The reform of corporate law by Law N. 366, dated October 3, 2001, which entered into force on January 1st, 2004, authorized the Italian Government "to provide forms of conciliation of civil disputes related to company law, including disputes brought before private bodies and entities, that guarantee serious and efficiency and that are written in a special register maintained at the Ministry of Justice." Pursuant to that authority, the government issued Legislative Decree No. 5 of January 17, 2003[10]. Title VI of this decree contained rules governing extra-judicial mediation. The commentary on the decree stated that the intent of the rules was to "regulate alternative methods of resolving disputes administered by public and private entities, under the supervision of the Ministry of Justice…." The 2003 Decree was influential in drawing the distinction between judicial and extra-judicial mediation (e.g. out of court mediation).

Mediation in Practice: Mainly in Consumer Claims

Nearly six million pending civil cases in a nation of 60.7 million people would appear to make a compelling case for mediation. After a period of rapid growth from a small base in the period 2005-08, however, mediation filings at the chambers of commerce declined from a peak of 20,246 in 2008 to 18,642 in 2009. By contrast, in consumer claims brought against telecom providers and administered by the Regional Committee for Conciliation (Corecom) established for that purpose by Law n. 249 of 1997, filings increased without interruption from 8,434 filings in 2005 to 43,403 filings in 2009. In 2009 telecom cases administered by Corecom and by the chambers of commerce accounted for 67 percent of all cases submitted to mediation.

Resort to mediation tends to be limited in Italy to relatively low-stakes consumer claims ranging from a median of Euro 400 in Corecom cases to Euro 14,400 in chamber of commerce cases to Euro 28,042 in other administered mediations. Most administered mediations are provided on a cost-free or nearly cost-free basis by the chambers of commerce or other governmental authorities. In 2009 mediations lasted an average of approximately 67 days for chamber of commerce-administered cases, 50 days for other

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[9] *See* G. Alpa, *Riti alternativi e tecniche di risoluzione stragiudiziale delle controversie* (Alternative procedures and techniques for the extra-judicial resolution of disputes), *Pol. Dir*. 403 *et seq.* (1997); L. Rubino, *I procedimenti* (The Proceedings), in *La riforma del diritto societario* (The reform of company law) (Locascio, ed., 2003).

[10] "Definition of the proceedings related to company law and financial services as well as banking and credit transactions".

administered mediation, and 90 days for Corecom cases. Reported success rates ranged from 72.4 percent for Corecom cases to 71.4 percent in non-chamber administered cases, but only 55.75 percent in chamber-administered cases. The rate of non-compliance with the results of mediation ranged from 63.2 percent in chamber of commerce cases to 46.7 percent in other administered mediations. Non-compliance in Corecom cases stood at a relatively low rate of 16.3 percent[11].

2008 Financial Services Dispute Resolution Program

Two distinct and overlapping systems of ADR in the financial services sector were put in place in 2007-08, a procedure administered by CONSOB, Italy's equivalent of the Securities and Exchange Commission for retail customer claims against financial services providers, and a procedure administered by the Bank of Italy to ensure transparency in banking services.

Legislative Decree No. 179, dated Oct. 8, 2008, authorized CONSOB to establish a Chamber for Conciliation and Arbitration (CONSOB Chamber) and delegated to CONSOB regulatory authority over the new Chamber. Pursuant to CONSOB Decision No. 16763 dated Dec. 29, 2009, CONSOB established a purely facilitative mediation procedure for claims initiated by retail customers that could result in a self-executing agreement convertible to a judgment by the chief judge of the Tribunal court with jurisdiction over the territory in which the mediation took place.

In the event a mediation does not result in an agreement, the mediator may issue a proposed resolution at the request of the parties. If the parties do not accept the proposal, each party may indicate its final position or the terms on which it would be prepared to settle, and the parties' positions are memorialized in the mediator's report to CONSOB Chamber[12].

Also in 2008, the Inter-ministerial Committee for Credit and Savings (CICR) (based on legislation passed in 2005 with the support of the Bank of Italy) established and published rules and procedures for a new entity called the Arbitrator of Banking and Finance (ABF). On June 18, 2009, the Bank of Italy modified and issued supplemental rules and procedures for ABF proceedings. The apparent overlap of the CONSOB and

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[11] See *Istituto per la diffusione della cultura arbitrale (ISDACI) Quarto Rapporto sulla diffusione delle ADR in Italia nel 2009* (ed. 2011) (Institute for Diffusion of Arbitration Culture (ISDACI) Fourth Report on ADR Diffusion in Italy 2009 (ed.-(Institute for Diffusion of Arbitration Culture (ISDACI) 2011).

[12] For a discussion on the CONSOB Chamber of conciliation and arbitration see, *e.g.*, Nascosi, *La nuova camera di conciliazione ed arbitrato presso la CONSOB* (The new CONSOB chamber of conciliation and arbitration), in Le Nuove Leggi Civili Commentate (2009), at 963 et seq.

ABF procedures is expected to result in an agreement between the two entities to define more clearly their respective areas of jurisdiction.

Italy's approach to banking and financial services disputes appears to have little in common either with mediation or arbitration. The claimant must first exhaust the internal review remedy of the service provider; if the customer does not accept the proposed resolution, then the dispute is submitted to arbitration, but the award is not binding on the service provider. The Bank of Italy has indicated that it intends to maintain on its website a black-list of service providers that do not comply with arbitral awards, but has not indicated when it intends to do so.

Privately sponsored mediation

Nonostante la presenza, da almeno un decennio, di centri privati che offrono servizi di mediazione al di fuori del circuito delle Camere di Commercio (che sono enti pubblici), il ricorso ai primi non risulta particolarmente diffuso.

Nel 2009 sono stati censiti 55 centri privati di mediazione amministrata, che hanno gestito complessivamente 316 procedure in quell'anno su un totale di 93.406[13].

Rispetto al totale delle domande di ADR avanzate nel 2009, quindi, soltanto una minima parte (0,3%) del totale di tali domande è stato presentato ad un centro privato per la mediazione.

La futura tendenza dovrebbe peraltro segnalare un significativo incremento delle mediazioni amministrate da centri privati, che sono incentivati dalla nuova legislazione.

Italy's Response to the 2008 EU Directive: 2009 Civil Justice Reform Legislation

As a founding member of the European Union, Italy strives both to influence and act in line with EU directives. EU Directive 2008/52/CE on mediation in civil and commercial matters adopted on May 21, 2008 was a culmination of an extensive effort that began in May 2000[14]. The directive applies by its terms to trans-border civil and commercial disputes; it expressly does not preclude member states from implementing mediation regimes at the national level.

[13] Come nota 11

[14] For a synthesis of the EU Council's final position, adopted on Feb. 28, 2008, see L'Observateur de Bruxelles No. 72 – April 2008, 30 ss. (French text).

Italy interpreted the 2008 Directive as an invitation to adopt a comprehensive civil and commercial mediation statute consistent with the EU approach. The result was Law No. 69, dated June 18, 2009, which authorized the reform of Italy's civil litigation system and the creation of a comprehensive mediation program for civil and commercial cases through legislative decrees.

Law No. 69/2009 expressly incorporates the basic principles of the 2008 Directive. However, this directive does not clearly call for member states to require compulsory mediation (i.e., barring access to the courts until mediation is tried). Instead, the EU Directive provides that it is "without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."

The legislation does not authorize the government to bar access to courts because any absolute bar to pursuing rights in the Italian courts would invite a constitutional challenge based on Article 24 of the Italian constitution. Italy's parliament was less than clear, however, as to whether and, if so, within what limits, the government could provide for compulsory mediation. Italy's government, in enacting its legislative decree, concluded that it had the authority to condition the continued progress of civil cases filed in court on participation in mediation[15].

Law No. 69/2009 is particularly detailed in its provisions regarding the professionalism and independence of the providers of mediation services (i.e., mediators) and the need for those providers to be registered with the Ministry of Justice. It authorizes bar associations, and, in certain categories of cases, other professional organizations, to establish a list of qualified mediators to hear disputes in providers of mediation at the tribunal courts and authorized the registration of those providers with the Ministry of Justice.

Law No. 69/2009 also (i) obliges attorneys to advise their clients, before initiating litigation, of the availability of mediation through registered providers; (ii) limits the duration of mediation to four months; (iii) provides for costs, including fees for mediator-appointed experts whose compensation is to be set at the time of appointment; and (iv) allows for a "success fee" to the mediator if the mediation results in a settlement. It also provides that there must be a sufficient separation of roles to ensure that the mediator is neutral, independent and impartial.

[15] There was no shortage of legal opinions expressed at the time that the 2008 Directive delegated to the Italian legislature the authority to provide for mandatory mediation as a condition to going forward with litigation of certain categories of cases in Italian courts. See, e.g., Caratta, in Mandrioli & Caratta, *Come cambia il processo civile* (How the civil case is changing), Torino, 2009, spec, 217.

Parliament also authorizes the government to provide the courts with discretion: (i) to decide *not* to shift fees and expenses to the prevailing party at the conclusion of litigation if that party turned down a proposal in mediation that would have provided all the relief provided in the judgment or award; (ii) to award the non-prevailing party its fees and expenses; and (iii) to impose an additional payment on the prevailing party for having rejected the offer in mediation.

In addition, the law authorized the courts to enforce a settlement agreement reached in mediation to provide that the record of a successful mediation conclusion be enforceable by the courts and provide the basis for a recorded lien.

Italy's government then drafted by legislative decree to implement a civil and commercial mediation scheme along the general policy lines set forth by Parliament in Law No. 69/2009. Supporters of the decree argue that compulsory mediation will increase use of mediation and more likely help to reduce the courts' backlog, particularly in small, individual consumer rights cases [16]. Critics argue that the legislation is inconsistent with the 2008 Directive's emphasis on a process that (i) is voluntary and facilitative, (ii) is confidential, (iii) offers trained mediators following fair and efficient procedures, (iv) avoids the direct involvement of the judge who will decide the merits, (v) does not provide for automatic issuance of a mediator's proposal, (vi) does not preclude the parties from pursuing conventional remedies in court, (vii) does not discourage legal representation, and (viii) would have the benefit of enforceability of any resulting agreement in EU member states[17].

Implementation of Italy's Mediation Program

The legislative decree implementing Law No. 69//2009 attracted considerable criticism from legal scholars and magistrates[18]. The Commission on the Study of Mediation and Conciliation of the Consiglio Nazionale Forense (CNF, Italy's national bar association), and the Superior Council of Magistrates (self-governing institution of judges) both expressed practical concerns. Parliamentary oversight committees such as the justice

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[16] See PORRECA, *La mediazione e il processo civile: complementarietà e coordinamento* (Mediation and Civil Justice: Subsidiariness and Coordination), in *Società* 631 et seq (2010).

[17] The 2008 Directive is consistent, in this sense, with the April 4, 2001 Commission Recommendation (2001/310/CE) that the parties to a mediation be informed of their right to decline to participate in an extra-judicial attempt to resolve a dispute, and that the parties be given the right to be represented or assisted in all phases of the alternative procedure.

[18] See, e.g, *Chiarloni, Prime riflessioni sullo schema di decreto legislativo di attuazione della delega in materia di mediazione ex art. 60 L. n. 69/2009* (Initial reflections on the scheme by legislative decree for the implementation of the authorization in the field of mediation based on Article 60 of Law n. 69/2009), ilcaso.it, sez. II, doc. n. 179/2009, November 26, 2009.

commissions of both houses of parliament also raised questions and suggested modifications. The justice ministry adopted only some of the recommendations of the justice commissions. The council of ministers gave final approval to the implementing decree, as modified, on February 19, 2010.

The text of Decree No. 28, dated March 4, 2010 consists of 24 articles and is accompanied by an explanatory memorandum as to some of the more controversial provisions. It incorporates the pre-existing mediation programs for telecom disputes, banking and financial services mediation, and programs in certain specialized fields.

Regulation No. 180 followed on October 18, 2010. It established the registry for mediators and set a standard fee schedule for them.

A comprehensive review of Decree No. 28 and Regulation 180 is beyond the scope of this article[19]. The following discussion is intended only to highlight the more distinctive and controversial aspects of the Italian mediation.

Criticism and Controversy

The decree attracted considerable criticism from Italian legal scholars, the Superior Council of Magistrates, and the Commission on the Study of Mediation and Conciliation of the Consiglio Nazionale Forense[20].

The following discussion highlights some of the distinctive aspects of the Italian mediation scheme that tend to make Decree No. 28 controversial.

The Mediator's Proposal

The original version of Decree No 28 required evaluative mediaiton. Article 1(a) defined mediation to include "the formulation of a proposal for resolution [of the dispute]." Article 11 provided that, if the parties were unable to reach agreement, the mediator would be obliged to formulate a "proposal for conciliation" and inform the parties beforehand of the risk that the costs of litigation could be shifted to a party that rejects the proposal if the ultimate decision in litigation corresponds to the mediator's proposal. Article 13 provided that the court (i) must impose the costs of future litigation on the party that rejected the mediator's proposal if the ultimate decision on the merits

[19] For a comprehensive treatise on the subject, *see* T. Galletto, Il Modello Italiano di Conciliazione Stragiudiziale in Materia Civile (The Italian Model for Extra-Judicial Conciliation in Civil Cases), A. Giuffré Ed., Milan 2010.

[20] *see* T. Galletto, Il Modello Italiano di Conciliazione Stragiudiziale in Materia Civile (The Italian Model for Extra-Judicial Conciliation in Civil Cases), ID, at 44 *et seq.*.

corresponded exactly to the mediator's proposal, and (ii) may do so, in the event of serious and exceptional circumstances to be explained in the award, if the decision on the merits did not correspond exactly to the mediator's proposal.

The requirement of a mediator's proposal and its potential cost-shifting consequences caused concern about the risk of compromising the confidentiality of mediation. Critics argued that the record of a failed agreement was bound to end up in court even if only for the official purpose of providing a potential basis for cost-shifting at the end of the case. Moreover, critics pointed out the risk that (i) in preparing the report, the mediator could hardly avoid making reference to information submitted by the parties in the course of the mediation, and the risk of compromising confidentiality could inhibit parties from using mediation, (ii) the requirement of a mediator's proposal had no basis in the EU Directive or any precedents in Italian mediation practice, and it could result in a penalty on a party for not accepting that proposal, (iii) the requirement was also inconsistent with the 2003 Legislative Decree No. 5. Critics argue that the seeds of failure were planted in this heavy-handed provision[21].

The final version of Decree No. 28 amended these provisions. It provides that, in the absence of a settlement in mediation, the mediator may provide a mediator's proposal if the parties request it and the mediator considers it appropriate to do so.

The explanatory memorandum accompanying Decree No. 28 characterizes this approach as a synthesis of the varying positions taken in response to the original version of the decree and explains that a mediator's proposal tends to serve the interest in finality. In response to the concern that a mediator's proposal will involve disclosure of confidential information, the memorandum allows for the possibility that a mediation could have two separate mediators, one facilitative and one evaluative, who do not compare notes. The explanatory memorandum does not address whether the evaluative mediator will be in a position to make a proposal designed to result in settlement.

Adverse Consequences: Mediate or Else!

Article 8.5 of Decree No. 28/2010 states that a judge may draw adverse evidentiary inferences against a party that fails to participate in a mediation without sufficient

[21] Even the relatively recent legislation on mediation and arbitration of customer disputes in the financial services industry and related regulations precluded evaluative mediation except with the consent of the parties. D,gls, Oct. 8, 2007 n. 179; CONSOB decision 16763, Dec. 29, 2008. See, e.g., Luiso, *La delega in materia di mediazione e conciliazione* (Implementing legislation in the field of mediation and conciliation), in *Le modifiche al codice di procedura civile* (Changes to the Code of Civil Procedure) 233-34 (Alpa, ed., 2010).

justification There appears to be nothing in Law No. 69/2009 authorizing a sanction of this sort. Moreover, no distinction is made between participation in facilitative mediation or the evaluative phase of mediation. To the extent that the sanction applies, it arguably results in a degree of duress hardly consistent with the voluntary nature of facilitative mediation. Moreover, not even in litigation does contempt of the Italian court for failure to appear and defend result in the sanction of adverse inferences[22]. This is true in labor law cases as well[23]. Indeed, the Constitutional Court has held such implied admissions to violate general principles of Italy's procedural law[24]. Thus, Article 8.5 may exceed the authority delegated by the legislature, a fatal constitutional defect. Adverse inferences cannot be drawn from a failure to participate at a trial on the merits in court, and so the propriety of a mediation rule that appears to allow for such inferences from a failure to participate in the facilitative portion of the mediation process is questionable.

Mandatory Mediation in Certain Cases

The Justice Ministry estimates that, under Decree 28/2010, about one million cases have become subject to suspension pending mediation. The categories of affected cases include customer claims in insurance; banking and financial services; disputes related to the leasing of companies; condominium, leasing, landlord/tenant and other real estate-related disputes; estates litigation; medical malpractice claims; libel cases. The estimate does not include cases that were already subject to suspension pending mediation, including claims against telecommunications providers, and vehicular accidents (the latter to be included in the category of affected cases starting on March 20, 2012).

The memorandum accompanying the decree argues that a challenge to the decree based on Article 24 of the Constitution is not likely to be successful in view of the public interest in reducing docket congestion in the courts and precedents rejecting Article 24 challenges in cases involving labor/employment and agrarian disputes. The argument appears even less likely to succeed than an argument that the Justice Ministry exceeded

[22] The jurisprudence interprets Articles 116 c.p.c. to provide that the conduct of the parties can be the "only and sufficient source of proof and persuasion of the Judge" and not just a factor in considering the proof adduced at trial. See Decisions of the Court of Cassation (Cass.) No. 12145 dated Aug. 10, 2002; No. 10568 dated July 19, 2002; No. 10268 dated July 16, 2002, and more recently, No. 1658 dated Jan. 27, 2005. However, the conduct in question must take place during the trial itself. Conduct in pre-trial proceedings can have no bearing on matters of proof. Cass. Decision No. 8596 dated June 22, 2001. Thus, a failure to appear and defend in proceedings preceding the trial cannot by itself have probative value in support of a plaintiff's claims. Cass. No. 10554 dated Dec. 9, 2004.

[23] As a result of legislative amendments introduced by Law. No. 183 dated Nov. 4, 2010, an attempt at mediation pursuant to Article 410 c.p.c. no longer constitutes a precondition to pursuing a labor/employment claim in court.

[24] See Decision 340, Corte Costituzionale, Oct. 12, 2007, in Le Societá (2008) at 495 (with comment by Elisabetta Senini).

the authority granted in the underlying legislation. However, neither Law No. 69/2009 nor the EU Directive expressly authorizes a mediation scheme in which cases are suspended pending mediation. Law No. 69/2009 appears to point to the 2003 Decree for Conciliation in Italy's company law as the model on which to base the new scheme, but the 2003 Decree does not oblige the parties to proceed to mediation[25].

A potential challenge, raised by the Magistrates' Council lies in the lack of express authorization in Law No. 69/2009 or the EU Directive, or any principled rationale in the jurisprudence for the creation of two different tracks for civil cases: one that leaves mediation to the discretion of the parties, and another that requires an attempt at mediation as a condition for the case to proceed in court (cases subject to obligatory mediation).

The Magistrates' Council also has questioned the likelihood of success of compulsory mediation in the following terms: "Mediation can be successful only if sustained by a real willingness to settle and if it is not based on a need to satisfy an obligation." It suggested that the parties will go through the motions to meet their formal obligations to participate in mediation and then proceed with the litigation. Under this scenario, mediation would only render civil litigation more costly and time-consuming than it is in its current state of gridlock.

In theory, at least, conditioning the advancement of a lawsuit on participating in mediation is likely to pass constitutional muster in Italy if the suspension is limited in time, since it will not bar access to the courts either through delay or prohibitive cost[26]. In a decision dated March 18, 2010, the European Court of Justice (ECJ) considered whether compulsory mediation of a consumer case in the telecommunications sector – provided by Italian law n. 249 of 1997 - violates EU principles. It ruled that the answer is no if the compulsory mediation scheme is intended to be more effective than a purely voluntary system in reducing docket congestion, provided that certain conditions are met, including:

a) the mediation process does not render impossible or excessively difficult the enforcement of any rights conferred pursuant to EU law;

b) the mediation does not result in a third-party decision binding on the parties and does not bar the parties from pursuing their rights in court;

c) the mediation does not result in substantial delay in pursuit of litigation in court;

[25] It should be noted, however, that in 2000 the Constitutional Court rejected a challenge based on exceeding legislative authority in a case involving obligatory mediation of private employment relationships. Corte Costituzionale. Decision No. 276 (2000).

[26] Decision No. 173, Corte Costituzionale, May 13, 2010, in *Foro It.* (2010) at 1980.

d) the statute of limitations is tolled pending mediation;

e) the costs of mediation is not material[27].

Critics of the decree argue that suspending a millions of cases while training thousands of mediators and establishing local provider organizations will result in substantial delay and additional expense and could be a practical bar to litigation in court in certain cases. They call attention to the requirement that "the parties be informed of their right to refuse to participate in the [mediation] procedure" and argue that, at least when the case involves consumer rights, there can be no negative consequence of any sort for refusal to participate in mediation.

Mediator Qualifications

Regulation 180 provides that a mediator must have a three-year university degree or be a member in good standing of a professional organization and have at least 50 hours[28] of mediator training provided by an educational institution. Legal scholars and the Magistrates' Council have expressed concern about the decision not to require any legal training, particularly since mediators are obligated to ascertain that the rights being asserted have some basis in the law and to ensure that the result of the mediation does not violate public policy[29].

Locale of Mediation

Decree 28/2010 does not establish any criteria for selecting the locale of the mediation. Critics argue that, particularly with respect to compulsory mediation, a locale rule is needed to prevent possible abuse (for example, bringing multiple mediation proceedings in different locations) and prevent additional delays in a civil justice system. Both houses of parliament and the Magistrates' Council expressed a preference for including a rule concerning the locale but the Justice Ministry disagreed and defended its decision in the memorandum accompanying the decree.

The Role of Attorneys

[27] European Court of Justice, March 18, 2010, C317/08; in Foro It., 2010, IV, 361 (in Italian, annotated by Armone & Porreca).
[28] Regulation 180, art. 18(f).
[29] Decree 28/2010, art. 12,1.

Mediation, like arbitration and other forms of alternative dispute resolution, remain largely unknown to practicing lawyers and law students in Italy[30]. The point has been made in scholarly literature that the training and culture of litigation attorneys, their concerns about loss of control and income, and their rules-based, winner-take-all approach to conflict resolution is not particularly conducive to searching for creative, win-win solutions, a goal of mediation[31].

The sudden introduction of a nationwide system of compulsory mediation with an express reference to a role for bar associations as mediation providers presents a challenge for Italy's legal profession. Even though the decree and the regulations do not require mediators to be lawyers or for mediating parties to be represented by counsel, the prospect of evaluative mediation that could result in a mediator's proposal and concerns about preserving confidentiality tend to suggest the need for attorneys to take on these roles even if legislation and regulation do not require it. Not surprisingly, the Consiglio Nazionale Forense (national bar association) has established a commission to promulgate rules for the conduct of mediation under the auspices of the various bar associations, together with standards for the training of bar association mediators.

The pressure to control the cost of resolving cases involving relatively small amounts in controversy (of which there are far too many) point toward the likely development of programs to train recent law graduates to serve as mediators. This training could include disciplines not traditionally taught in law school in Italy, including the art of negotiation. This could not only generate opportunities for professional development early in a practicing lawyer's career, it also could have a long-term impact on the nature of the legal profession.

Lawyers have an obligation under the legislative scheme to inform clients clearly and in writing as to the availability of mediation and its costs. Failure to do so would appear to place the attorney at risk of being unable to enforce the terms of engagement and at risk of disciplinary action. Critics of these sanctions for nondisclosure argue that they go beyond the terms of the decree, which could make the sanctions ineffective. If the sanctions prove effective, a practical solution may be to include a notice of the availability of mediation and its costs in the standard form authorization that a client must execute in order for an attorney to commence a lawsuit.

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[30] Practicing lawyers and law students in Italy have ready access to scholarly articles explaining the varied potential roles of attorneys in the mediation process. See, *e.g.*, Uzqueda, *Il ruolo degli avvocati nella conciliazione* (The role of attorneys in conciliation) in Alpa & Danovi, eds., *La risoluzione stragiudiziale delle controversie e il ruolo dell'avvocatura*, (Extra-judicial dispute resolution and the role of advocacy), (2004), 227 *et seq*..

[31] See, e.g., Uzqueda, *ID.*

Recent Developments

In April 12, 2011, the regional administrative tribunal (T.A.R.) of Lazio (the region including Rome) referred to Italy's constitutional court the question whether parliament had authorized the government, in issuing Decree 28/2010 implementing Law No. 69/2009, to render mediation compulsory[32]. The case is pending. In the interim, further legislation may be enacted to resolve the issue.

With regard to the role of lawyers as advocates in mediation - an issue of great concern to the Italian bar in view of the fact that Decree 28 does not require legal representation in mediation that could be both mandatory and evaluative, a seemingly productive meeting took place on May 10, 2011, between the president of the national bar association (CNF), Professor Guido Alpa, and the then (now former) justice minister Angelino Alfano. In that meeting, the minister indicated that he would consider modifying Decree 28/2010 to require representation by counsel at mediations in which the amount in controversy exceeds a minimum value (in the range of Euro 7,000-10,000), as well as strict limits on the categories of cases in which mediation would be compulsory.

Conclusion

The need for alternative dispute resolution in Italy is real, and the desire on the part of Italy's Parliament and Government to make good use of mediation is genuine. A sense of urgency and an apparent reluctance to trust in voluntary and facilitative approaches has prompted the Government to pressure parties to submit to compulsory mediation.. In issuing Decree 28, the Government also invited legal and constitutional challenges and has disregarded, or at least discounted the evolving international consensus that mediation tends to be more effective when the parties freely choose to participate and less effective when they are forced to do so.

The exact contours of mediation in Italy remain to be set. It seems likely, however, that Italian mediation will feature a unique set of characteristics, and that Italy's experience in the next few years will test prevailing assumptions about the mediation process.

[32] This case originated as an administrative challenge by the Organization of Italian Attorneys (OUA) to regulation 180/2010.