

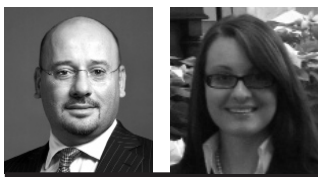
THE RECORDER

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INTERNATIONAL LAW

ADR hits Europe

The Italian mediation model offers an alternative to European litigants and is viewed favorably by EU nations



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International Law

While mediation is a process familiar to most U.S. attorneys, this alternative dispute resolution method is undergoing a significant evolution in the European Union, and specifically Italy. In particular, the concept of mandated mediation — where

parties involved in certain types of disputes must try to mediate before heading to court — is gaining in popularity. Backed by some convincing statistics, the Italian model for mediation is gaining traction throughout Europe as a way of dealing with an overburdened judiciary.

The 2008 European directive on mediation and subsequent resolutions issued by the European Parliament reflect the desire to encourage mediation in the 27 EU member states. Italy's own judicial backlog — estimated at 5.4 million cases and an average duration of eight years to litigate a case — motivated the passing of Legislative Decree No. 28/2010 in March 2010 to implement the EU directive and enact mandatory mediation for many civil and commercial disputes. Under the decree, parties to the following kinds of disputes must engage in mediation: neighbor and landlord/tenant disputes, property rights, division of goods, trusts and estates, family-owned businesses, loans, disputes arising out of car and boat accidents, medical malpractice, libel, insurance, banking and financial contracts.

While Italy's execution of the directive's suggestions is one of the bolder implementations, current mediation trends in other member states illustrate that many are for-

malizing mediation laws and implementing incentives and even requirements for mediation. As of September 2011, 22 of the 26 member states subject to the directive have these rules in place. Some of the states, such as Italy, Bulgaria, Romania and Hungary, chose to go beyond the directive's core requirements by utilizing mediation economic incentives that have reduced the court workload in certain jurisdictions.

To further examine the effects of mediation incentives, the European Parliament considered a European study aimed to provide empirical evidence to assist lawmakers in deciding whether to implement newer mediation policies. This study was prepared in the context of an EU-funded project implemented by ADR Center. It gathered data on mediation collected from more than 40 experts representing all EU countries. The study concluded unequivocally that mediation saves litigants both time and money. It therefore followed that the greater the savings, the stronger the policies incentivizing mediation should be.

The European Parliament issued two resolutions in the fall of 2011 that favorably reference the Italian mediation model. This spurred some member states to consider the model more closely in order to extract

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possible ideas for implementation in their respective countries. For example, a delegation of Dutch policymakers asked Italian mediation experts, including this author, to hold a meeting to discuss the merits of a draft law modeled after Article 5 of the decree, identifying which Italian disputes are subject to mandatory mediation. There has been a similar interest formally expressed by Poland, which is currently considering a modification to legislation that may include mandatory procedures.

Given both the interest in the Italian model and exchanging information on best practices in mediation among the member states, a roundtable of European mediation experts was held and included representatives from Italy, The Netherlands, Belgium, Bulgaria, the Czech Republic, Germany, Greece, Poland, Romania, Spain, Slovenia and the United Kingdom. The group assembled in Milan in early November 2011 to share points of view regarding the way in which mediation is now regulated in various EU states following the directive's implementation and to identify the effect of mediation incentives on the domestic legal culture.

Taking a step back to consider the Italian model more closely, it is clear why it has been recognized, emulated and strongly debated. Under the Italian Legislative Decree, mediation is administered by mediation providers, which can be public agencies or private organizations registered with the Ministry of Justice. The mediation procedure can be conducted only by mediators who are listed with an accredited organization and have completed special training provided by such institutions.

To counter any excessive delay of eventual court proceedings, participation in mediation will toll the statute of limitations only once for a maximum of four months, at which point the mediation procedure must be concluded and parties

may continue the case in court. However, should a mediation yield an agreement during that time, said settlement agreement can be made enforceable when approved by the court. To further entice the parties, participation in mediation results in an exemption from the stamp tax for all documentation, as well as a tax credit of a maximum of 500 euros if the mediation results in a settlement and a maximum of 250 euros if the mediation concludes without a settlement.

Another interesting feature of the decree is that lawyers are required to inform their clients, in writing, about mediation and the accompanying financial incentives. Failure to notify may void the power of attorney at the option of the client.

Another debated element of the Italian mediation decree is the procedure that enables the mediator to issue a formal proposal when parties are unable to reach an agreement absent the parties' consent. If the mediator drafts a formal proposal, the parties are free to accept or reject. However, rejection of the proposal carries a possible fee-shifting penalty at trial. If the mediator's final proposal is ultimately equivalent to the subsequent judicial decision, the judge will exclude the recovery of costs incurred in litigating the case from the award given to the winning party if it previously declined the proposal. However, specialized internal rules of the mediation organization may explicitly prescribe that the mediator not formalize the proposal unless requested to do so by the parties.

It is clear from the Italian experience that, although mandatory mediation is not necessarily a popular concept, statistics show it is an effective tool that can provide great benefits for disputants and the court system. The January 2012 report issued by the Ministry of Justice offered data gathered in Italy between March and December 2011 and showed that 60,810 mediations

were filed in just nine months with 77 percent being mandatory mediations, 20 percent voluntary, 2 percent arising from judicial referral and 1 percent pursuant to a contractual clause. Although only 36 percent of cases filed secured the participation of all parties, 52 percent of mediations where the responding party was present ended with an agreement. This data is hard to ignore and could push the Italian Model further throughout the EU and maybe globally.