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TO THE HIGH COST OF LITIGATION

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Italy's 'Required Initial Mediation Session': Bridging The Gap between Mandatory and Voluntary Mediation

BY LEONARDO D'URSO

Since the mid-1990s, an animated debate has been carried out among practitioners, academics and lawmakers about the most effective approach to increase the embrace of mediation in a given jurisdiction, especially outside the United States.

This debate usually has been polarized between two alternatives: First, develop the culture of mediation by promoting the process's advantages, and training mediators and

lawyers, in order to create a spontaneous demand for mediations.

Alternatively, other moves seek to introduce various legislative reforms to incentivize the reliance on mediation for litigants, and regulate the market in order to decrease the number of cases filed in court.

The debate soon evolved to the pros and cons of voluntary versus mandatory mediation. The vast majority of academics and practitioners objected that mandatory mediation was a contradiction in terms, and above all, a barrier to access to justice and against most nation's constitutions.

Hundreds of conferences and articles have been dedicated to find the "magic formula" to increase the number of mediations.

As a result, most European jurisdictions have introduced new laws in the past two decades based mainly on the voluntary recourse to mediation, with some incentives for litigants, and an accreditation scheme for

mediators to ensure high-quality mediation services standards.

Millions of dollars and Euros have been spent by governments, international donors and private institutions on projects and awareness campaigns to "achieve the balanced relationship between judicial proceedings and mediation" as stated in Article

1 of the 2008 EU Mediation Directive, known formally as the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (available at <http://bit.ly/2ovxA4G>).

With few exceptions, however, this approach failed; all available statistics in Europe report that mediation on average is used in less than one percent of the cases in court. This means out of 100 court cases, on average only one litigation is resolved by a third-party neutral mediator.

AN ITALIAN MODEL

Four years ago, a pilot provision was introduced in Italy within a wider legislative reform of a previous law on mediation for civil and commercial disputes. This provision—limited in time and scope and contained in just one paragraph—was able to generate alone

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more mediations than judicial proceedings in the disputes in which the process was applied. See “European Union Urged to Refocus Its Mediation Efforts on a Different Kind of Mandatory ADR,” 33 *Alternatives* 70 (May 2015) (available at <http://bit.ly/2Cqx5AG>).

Despite the complexity of the entire law (Legislative Decree Nr. 28 of 2010 reformed in 2013), this article aims to explain in simple terms the so-called Italian mediation model, the different results after four years of application, and the lessons learned.

We have noticed most commentators and mediator colleagues wrongfully refer to the Italian model as “mandatory mediation.” It is not. Under the Italian mediation model, there are three main ways for recourse to mediation:

(1) Recourse by Voluntary Agreement of the Parties or by a Contract Clause. For any legal dispute, parties are always able to agree to go to an accredited mediation provider under the rules of the law. Litigants can benefit from fiscal advantages and tax credits for the mediation fees. If lawyers assist the parties and sign the mediation agreement, it will automatically become an enforceable document. When a commercial contract or a statute includes a mediation clause, parties must attempt to mediate before they can arbitrate or file a dispute in court. If no attempt to mediate is made, the judge or arbiter can, by his or her own motion or upon motion by a party, allow the parties a period of 15 days to file a request for mediation. This type of recourse is the so-called voluntary mediation, regulated by the law with accredited mediators, present in most European jurisdictions.

(2) Recourse Ordered by a Judge. For any pending case in any trial court, or in a

court of appeals, judges at their discretion can order the parties to attempt mediation after assessing the nature of the case, the stage of the trial, and the parties’ conduct. If ordered to mediation, the parties must file a request for within 15 days with a mediation provider. A judge is able to refer a case to mediation at any time before the

Regulate It

Under scrutiny: Italy’s long-running attempts to help its court caseloads with mediation.

A possible solution: Data shows one of three alternatives described in this article has been effective in getting cases settled in mediation.

Why is it working? The author says the apparent success is supported by the structure created by strong legislation, not a change in the culture or even emphasis on the quality of the mediators. With the by-definition laissez-faire mediation process, the conclusion is sure to raise eyebrows. In fact, even with regulation, one thing is the same: party control.

closing arguments, or if a hearing is not expected, before oral discussion of the pleadings. In these cases, mediation is a condition for prosecution of the case in court that should be attempted between hearings without any delay in the duration of the judicial proceeding.

(3) Recourse by Voluntary Agreement during a “Required Initial Mediation Session.” In limited civil and commercial

matters—including joint real estate ownership; real estate generally; division of assets; inheritances; family business agreements; real property leases including rental apartments, business, and commercial; bailments; medical malpractice liability; damages from libel, and damages from insurance, banking and financial contracts—which account for only about 10% of all civil and commercial disputes, the Italian mediation model requires the plaintiff to first file a mediation request with a provider and attend an initial mediation session before recourse to the courts may be granted. The initial mediation session must be held within 30 days of the filing and in the presence of an accredited mediator and a lawyer. At this stage, a small administrative filing fee is requested—40 Euros for claims below a value of 250,000 Euros, and 80 Euros above. There is no obligation to pay more, unless the parties decide to voluntarily proceed with the full mediation procedure. In the initial session, the mediator explains to all parties and lawyers the process and its benefits for their case. The duration of this first meeting can vary at the mediator’s discretion and as the parties wish. If one party does not attend this initial session, the judge will sanction that party in subsequent judicial proceedings. If during the initial session, one party decides not to proceed with mediation, then the party has fulfilled the mediation requirement and is able to “opt-out” and file the case in a court. There is no obligation to pay any additional fees. If the parties decide to proceed with mediation, the fees are determined by the case value and the process should last no more than 90 days.

DIFFERENT RESULTS

Four years after this law was introduced, in 2017 the combination of the three types of recourses produced about 200,000 total mediations. To better understand the approaches that worked, we need to break down that number of mediations and closely analyze it with the three types of recourses described, which shows three different sets of results—and three different levels of success.

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(1) Recourse by Voluntary Agreement of the Parties or by a Contract Clause. Out of 200,000 mediations, only about 20,000 were initiated in 2017 by the parties' agreement to attempt to mediate when the dispute arose, or due to a contract clause. When initiated, these types of mediation reached a success rate of 60%. If we divide the number of "voluntary mediations" by the two million yearly filings of civil and commercial cases in the Italian courts where the recourse of mediation is completely voluntary, the average ratio is less than 1%. In these matters, which account for more than 90% of all disputes in Italy (e.g., breach of contract, extra contractual damages, partnership dissolutions, etc.), there has not been a recorded substantial decrease of incoming cases in court from 2013.

(2) Recourse Ordered by a Judge. Out of 200,000 mediations, only 1,900 mediations were initiated by a judge's order. Compared to about three million civil cases pending in the Italian courts, the ratio is less than 0.1%. So out of each 1,000 pending cases in court, only one judge ordered the litigants to attempt a mediation process. It is evident that there has not been a substantial decrease in pending cases due to mediation from judge referrals. It's clear that Italian judges should be trained more to use their power to refer parties to mediation.

(3) Recourse by Voluntary Agreement during a Required Initial Mediation Session. An incredible 90% of mediations—about 180,000—were initiated due to the first required mediation attempt in the total matters mentioned above. The average success rate was almost 50% when the parties voluntarily agreed to initiate the full process during the initial meeting. If the number of these Type 3 mediations is divided by the 140,000 yearly incoming civil and commercial cases in dispute matters where the first

Without having all parties in front of the mediator, present at the same time, and around the same table, it would be impossible to reach so many agreements to initiate a mediation process, as the statistics prove.

meeting is mandatory, the ratio is more than 100%. This information verifies for the first time in Europe that Italy has more mediations than cases in court—at least in this category. Additionally, since 2013, with Type 3 dispute matters, a substantial decrease was recorded in court-filed cases. (There were 30% decreases in disputes over joint ownership of real estate; a 40% drop in disputes over rental apartments, and a 60% plunge in adverse possession disputes.) And it is worth noting that the European Court of Justice ruled that this Italian provision on the mandatory first meeting is fully compatible with the law.

LESSONS LEARNED

With all due respect to the opinions and theories on the right approach to substantially increasing the number of mediations in a jurisdiction after many years of trial and errors, it is time to analyze objectively the verified results of different approaches in order to evaluate what worked and what failed.

The Italian statistics from the past four years give a clear illustration of drastically different results from the three different types of recourse to mediation currently in place. The contrasting results occur within the same jurisdiction—with the same citizens, lawyers, judges—and prove the number of mediations is not dependent on the "culture" or quality of mediators, but the most effective legislative mediation in place.

Statistics show that currently, the Type 3 model, "Recourse by Voluntary Agreement during a Required Initial Mediation Session" is the only effective model that can generate enough mediations in a period of two or three years for an entire jurisdiction.

This first meeting works well with five important conditions:

(1) The relevant parties of the dispute should be present in person; if the lawyer is without the client there is little chance to pro-

ceed to the full mediation process;

(2) The session should be administered by an experienced and well-trained mediator;

(3) The session should be held in a short period of time since the filing of the request and the fee should be minimal in order to not be considered a barrier to the access to justice;

(4) The parties when present can decide to easily "opt-out" without sanctions, or voluntarily continue the process; and

(5) Substantial sanctions should be given in the case of an absent party during the subsequent judicial proceeding.

After witnessing thousands of first mandatory mediations, this author can attest to the effectiveness of having all decision makers in the dispute together in order to decide if they want to opt-out and go to court or continue with the full mediation process.

After talking with the parties and their lawyers about the advantages of mediation for their case, in a joint or separate meetings, in more than 50% of the cases I am able to convince the parties to give mediation a chance.

Without having all parties in front of the mediator, present at the same time, and around the same table, it would be impossible to reach so many agreements to initiate a mediation process, as the statistics prove.

In conclusion, the Required Initial Mediation Session, with an easy opt-out, has been proven to generate a substantial number of mediations in a given jurisdiction in two or three years, providing the best advantages of mandatory and voluntary mediation without their disadvantages.

The Required Initial Mediation Session can be introduced step-by-step, within a legislative reform or in court-connected mediation program, with the relevant adaptations to local needs, in different jurisdictions as Greece and Turkey have recently done with a great success. See Leonardo D'Urso, "How Turkey Went from Virtually Zero to 30,828 Mediations in Just One Month," *Mediate.com* (Feb. 22)(available at <http://bit.ly/2GRW2DB>). 