

Mediation in Romania, Italy and the European Union

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Abstract:

This article is a part of the writers-series³ that is being run by Mediators Beyond Borders International (MBBI) and explores the following question “*What would your company/industry/field, and region, look like if adversarial decision-making systems were replaced by collaborative ones ?*”. The term „company/industry/field” refer to the field of mediation and the term “region” is set for the European Union, with specific interest in Romania and Italy.

In response to **what the field of mediation in Romania, Italy and the European Union (EU), would look like if adversarial decision-making systems were replaced by collaborative ones**, one might begin by saying the question appears ironic. This is given the fact that the field of mediation is collaborative *par excellence* – and that mediators walk their talk and are experts on collaboration. Yet, upon closer inspection, at least in Romania and Italy, if not in other EU countries as well, adversarial decision-making systems exist and the question is worthwhile and realistic.

The European Parliament’s Committee on Legal Affairs, on 5 July 2011, adopted a Motion⁴ for a European Parliament Resolution on the implementation of the directive on mediation⁵ in Member States—its impact on mediation, and its use by the courts (2011/2026(INI)). According to point nine of the Motion, “[...] *Member States whose national legislation goes beyond the core requirements of the Mediation Directive seem to have achieved important results in promoting the non-judicial treatment of disputes in civil*

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³ Mediators Beyond Borders, Writers Series Part IV: Dr. Constantin-Adi Gavrilă and Mr. Leonardo D’Urso on Mediation in the European Union, <https://mediatorsbeyondborders.org/writers-series-part-iv/>

⁴ European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)) (2013/C 51 E/03), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IP0361&from=EN>

⁵ THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, DIRECTIVE 2008/52/EC on certain aspects of mediation in civil and commercial matters, 21 May 2008 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN>

and commercial matters; [the Commission] observes that the results achieved in particular in Italy, Bulgaria and Romania prove that mediation can bring about a cost-effective and quick extrajudicial resolution of disputes through processes tailored to the needs of the parties”.

Romania’s mediation field launched with the support of donor-funded programs and the Romanian Ministry of Justice—to develop ADR in the judiciary. Then, mediation legislation⁶ was introduced in 2006—and the field grew at a fantastic pace. The system was developed with quality assurance mechanisms, including training standards, a national accreditation scheme and incentives aiming to pull parties into mediation (i.e. a full refund of court fees if parties would reach agreement). Almost 30,000 individuals accessed formal training in the field of mediation and more than 10,000 were registered on the national panel of mediators – a public list of mediators who graduated from authorized training programs.

Increasingly, pressure points were created at multiple levels in the society—mediation legislation was modified by numerous legal experiments aimed at convincing individuals and companies to choose mediation to resolve their disputes. Unfortunately, the solutions could have benefited from more collaboration both within the field and with other stakeholders i.e. those in the legal profession and the academic community. More collaboration would have determined a real consultation processes, engaged stakeholders and allowed for buy-in, improved solutions and sustainable results. Sadly, the lack of outcomes⁷ from collaboration paralysed the entire mediation field in the country.

Had there been collaboration within the mediation field in Romania, the field would still be vibrant today. A handful of networked mediators had been able to implement mediation in the short-term, but without discussions with stakeholders, the experiment was not turned into a sustainable process.

However, mediation is alive and kicking in Italy. The determination of a small group of mediators in Italy saw their advocacy engage the Government and Parliament in instating an exemplary legal framework⁸ on mediation.

Italy is adopting two models of mediation at the same time in commercial and civil cases: the usual voluntary mediation model with incentives and sanctions, in 90% of the civil disputes; and the required initial mediation meeting before going to court, in 10% of the disputes (relating to real estate, inheritance, medical malpractice, banking contracts, etc..).

⁶ Law no. 192 of 16 May 2006 on mediation and organisation of the profession of mediator 20.08.2013, <http://www.cmediere.ro/legislatie/7/>

⁷ Christian-Radu Chereji, Constantin-Adi Gavrilă - Don't rush - Kluwer Mediation Blog <http://mediationblog.kluwerarbitration.com/2015/03/02/dont-rush/>

⁸ ADR Center - The Italian Mediation Law on Civil and Commercial Disputes, <https://mediatorsbeyondborders.org/wp-content/uploads/2017/09/The-Italian-Mediation-Law.pdf>

While the first model is quite well known where both parties need to agree before starting the mediation (also known as “Opt-In”), the second model (known as “Opt-Out”) is innovative and becoming a best-practice across Europe.

The main characteristics of the Opt-Out model are that:

1. The initial meeting is held within 30 days of the filing of the mediation request with an accredited mediation provider by the Ministry of Justice. Each party must pay a filing fee of only 40 Euros (or 80 Euros for claims above a value of EUR 250,000.00).
2. If one party does not attend the initial session, the judge will sanction that party in subsequent judicial proceedings.
3. When all parties are present, during the initial session, the mediator explains the mediation procedure and its benefits to all the parties and lawyers.
4. If, during the initial session, one party decides not to proceed with mediation, they have fulfilled the mediation requirement and are able to file their case in a court. There is no obligation to pay any additional fees.
5. If all parties agree to proceed with the full mediation then they are able to start right away and pay the agreed upon fees. The duration of the procedure is 90 days.
6. The presence of lawyers is mandatory under the law, with the exception of consumer disputes due to the 2013 EU Directive on consumer ADR.
7. Mediation agreements, signed by lawyers, are automatically enforceable.

With about 200,000 mediations per year, Italy took the leading role in mediation in Europe and surpassing the Member States with a longer tradition of mediation (like the UK, Germany and The Netherlands). Italian statistics show that currently, the Required Initial Mediation Session model is the only effective model that can generate mediations in an entire jurisdiction in relatively short period of time.

The 2008 EU Directive on Mediation is a milestone for all EU Member States in introducing national legislation on mediation in civil and commercial matters. However, after almost ten years since its adoption, and more than twenty years since the start of the ADR movement in Europe, it has become evident that the goal stated in Article 1 of the Directive – towards encouraging the use of mediation and especially achieving a, “*balanced relationship between mediation and judicial proceedings*–” has not been realized. Despite the lack of homogeneous statistics, except Italy, in almost all of the Member States, mediation is used in less than 1% of the cases in court: for 1 mediation, 100 cases go to court.

As the results of a recent study⁹, commissioned by the European Parliament, suggests, EU legislators should consider revising the Article 5.2 of the Directive, requiring parties, in certain disputes, to participate at least in an initial mediation session with a trained mediator. This mediation attempt should be fast and inexpensive.

The outcomes of the Opt-Out model are possible because of good collaboration among stakeholders who stopped positioning themselves as adversaries. This managed to develop and implement a sustainable legislation framework in the field of mediation.

⁹ European Parliament, Committee on Legal Affairs - The Implementation of the Mediation Directive 29 November 2016 Compilation of In-Depth Analyses
http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf