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Ashley Feasley

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Regulating Mediator Qualifications in the 2008 EU Mediation Directive: The Need for a Supranational Standard

Ashley Feasley*

I. INTRODUCTION

With twenty-six European Union (EU) Member States having formally implemented the 2008 Mediation Directive¹ (Directive) in May 2011, Europe is currently having a mediation “moment.” The EU approved the Directive in 2008 and had a goal implementation date of May 21, 2011 for all participating Member States, which a majority of the Member States did so.² Although the Directive applies only to voluntary mediations in cross-border disputes involving civil and commercial matters, it is broad in its aims. The Directive aims to: (1) improve the awareness of mediation, (2) promote further use of mediation, (3) and ensure a reliable and predictable legal framework for mediation in the EU.³ With the Directive, the EU is promoting mediation as a chosen method of legal dispute resolution in Europe.

Despite the broad aims of the Directive, questions related to the successful implementation of the Directive remain unanswered. In some Member State countries such as Italy, efforts to implement the Directive and corresponding domestic mediation laws have faced opposition and fierce resistance from lawyers who view mediation as a threat to their profession. Italy’s domestic mediation bill, Legislative Decree 28, calls for mandatory mediation in certain domestic civil disputes,⁴ and is currently facing a constitutional attack initiated by lawyers as well as criticism over the level of training and qualifications of mediators.⁵ Moreover, there has been a fragmented application of mediation concepts in Italy as well as in other Member States. A fragmented application of mediation concepts is expected considering that twenty-six separate autonomous nations are attempting to implement a high-level EU directive that does not speak to individual domestic mediation and alternative dispute resolution (ADR) laws.

The application of uniform standards to certain areas of domestic and cross-border mediation would alleviate some of the fragmentation, however. In particular, mediatory qualifications should be addressed and regulated because the Direc-

* Ashley Feasley is a consultant at Africa Now. At the time of the drafting of this article, she was an International Legal Fellow at the ADR Center in Rome. Ms. Feasley thanks Mr. Joseph McLaughlin, Ms. Flavia Orecchini, and her husband, Michael Hyland, for their assistance and support.

1. Directive 2008/52 of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3 [hereinafter Directive].

2. Denmark chose not to participate in this initiative and has reserved the right not to. *See id.* art. 1(3).

3. *See id.* art. 1(1).

4. Sintesi del Decreto legislativo (Legislative Decree) 4 March 2010, n 28 (It.) [hereinafter Decree] 28,

5. *See* discussion *infra* Section IV.

tive does not fully address or enumerate basic uniform levels of training and qualifications of mediators. Regulating basic levels of mediation training and qualifications in all of the participating Member States will likely alleviate some of the perceived threats to lawyers that mediation represents and will increase lawyer participation and support. Implementing this regulatory measure will also make the level of mediation service more uniform throughout the EU. By regulating mediator training and implementing minimum qualification levels, the long-term success and impact of the Directive will be much more likely.

This paper will illustrate how the regulation of mediator training and the implementation of minimum qualification levels will help the Directive have a long-term impact in six parts. Part II will briefly examine mediation in an international law context. Part III will discuss the history of the Directive and pertinent provisions of the Directive. Part IV will address the recent situation in Italy, with a particular focus on the opposition to Legislative Decree 28, mandatory mediation, and the perceived lack of mediator qualifications. Part V will examine the current mediator trainings and qualification standards that are required in other selected Member States in order to demonstrate the need for uniform guidelines for mediator trainings and qualifications in the EU and offer possible suggestions to align mediator qualifications throughout the EU. Part VI provides conclusive remarks.

II. MEDIATION IN THE INTERNATIONAL CONTEXT

Until recently, the international legal system has prioritized the development of adjudication over other forms of dispute resolution, including mediation. This prioritization of judicial adjudication in the international arena is exemplified by the modern judicial tenor of international disputes and the proliferation of courts and tribunals.⁶ Adjudication has been promoted as the best way of resolving both domestic and international law disputes;⁷ however, there are certain characteristics of mediation that make it more appealing and more applicable to modern international and domestic law disputes than adjudication.

Unlike adjudication, mediation is more suitable to solving cross-border disputes. Mediation is more suitable because, absent other arrangements, it is non-binding and provides direct positive contributions such as agenda setting and problem solving while weakening constraints on the primary parties.⁸ Moreover, mediation is inclusive and has a cross-cultural approach to problem solving which is important when resolving international disputes.⁹ Mediation can also be used

6. Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT'L L. 1, 3 (2010); see also LOUIS KRIESBERG, *The Development of the Conflict Resolution Field*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS & TECHNIQUES 51, 51-63 (I. William Zartman & J. Lewis Rasmussen eds., 1997) (providing a comprehensive overview of the development of conflict resolution from 1914-1995).

7. See Spain *supra* note 6, at 12; see generally JACOB BERCOVITCH & RICHARD JACKSON, *CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY: PRINCIPLES, METHODS AND APPROACHES* (2006) (discussing new methods for the resolution or management of international conflicts).

8. See Spain *supra* note 6 at 11.

9. See *id.*; see also NADJA ALEXANDER, *INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES* 48 (2009); Nadja Alexander, *Mediation and the Art of Regulation*, 8 QUEENSLAND U. OF TECH. L. & JUST. J. 1, 22 (2008) (discussing how mediation is a flexible process with potential to accommodate a cross-cultural approach).

proactively and is procedurally open to a variety of stakeholders because the process engages parties in setting an agenda and addressing timing issues.¹⁰ Further, mediation can abate political constraints, which prevent parties from reaching a resolution by lowering political costs through face-saving techniques and promoting flexible bargaining.¹¹ More importantly, mediation provides states with problem-solving opportunities that do not infringe on their respective sovereignty.¹²

As incidents of intra-state conflicts continue to occur with greater frequency while incidents of true inter-state conflicts are on the decline, mediation is better suited to address these changes because mediation is not reliant on legal concepts such as jurisdiction, and can address extra-legal issues that adjudication cannot.¹³ Additionally, adjudication is slow and costly. International and domestic court judgments may take years to be decided and have a possibility of never being enforced, during this time the nature of the dispute will have undoubtedly changed.

While the benefits that can be derived from mediation in the international context are clear, there has long been a deficiency in institutional capacity at the international level for the promotion and implementation of mediation. Traditionally, mediation has not experienced institutional support associated with adjudicatory forums that have a place in the international legal regime.¹⁴ Mediation has lacked formal enforcement mechanisms under international law, so mediation compliance has been voluntary or coerced through political pressure and other means.¹⁵ Furthermore, there are no universally accepted procedural rules governing the use and practice of mediation. Private mediation providers such as the American Arbitration Association and the International Mediation Institute (IMI) have developed protocols for certifying mediators in the practice of international mediation.¹⁶ Yet, there is still no venue for determining standards or qualifying international mediators that is generally accepted by the international community or recognized under international law.¹⁷

10. See Spain *supra* note 6 at 24.

11. *Id.*

12. Most adjudicatory forums lack jurisdiction over non-state actors that are important stakeholders in such disputes. Stakeholders that lack standing or that fall outside of the forum's jurisdiction can be excluded from the process. See Spain, *supra* note 6 at 16; Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L. Q. 1, 12 (2003) (describing both the increasing importance of non-state entities in today's global arena and the lack of legal jurisdiction over these entities).

13. See Spain, *supra* note 6, at 16.

14. *Id.*; see generally Edward N. Luttwak, *Give War a Chance*, 78 FOREIGN AFF. 36 (1999) (arguing that dispute settlement prevents lasting peace by interrupting wars between minor powers, which should be allowed to run their course).

15. Spain, *supra* note 6, at 19.

16. See, e.g., *How to become IMI Certified*, INTERNATIONAL MEDIATION INSTITUTE, <http://www.imimediation.org/how-to-become-imi-certified> (last visited Oct. 25, 2010) (providing general information on International Mediation Institute).

17. See Higgins, *supra* note 12, at 13-14.

The roll out of the Directive, however, has changed the supranational¹⁸ mediation landscape. While the Directive is a supranational effort to promote mediation that applies to the Member States, it is an effort to implement mediation protocols for all cross-border disputes involving an EU Member State. Accordingly, the reach of the Directive is quite extensive as it applies to all disputes arising from cross-border transactions involving an EU citizen or business (with another individual from outside that particular Member State), whether online or in-person.¹⁹

III. THE EU DIRECTIVE

A. History of Mediation in EU

Post World War II Europe has strived to compete economically in the modern global economy. Europe created the European Union in an effort to be more competitive in the global economy and it has had a great level of success because of the EU. However, in Europe, the absence of uniform treatment of rudimentary ADR processes has been regarded by some observers as an inconvenience, and by others as a serious hindrance to commercial growth in the region. The EU's need for a cohesive ADR policy had been debated for at least ten years.²⁰ Following the Vienna Action Plan (1998) and the Tampere European Council (1999), the European Council of Justice and Home Affairs Ministers called on the EU to present a Green Paper²¹ on "alternative dispute resolution in civil and commercial law other than arbitration."²² The Green Paper addressed the current ADR situation in Europe and launched broad consultations on the measures to be taken.²³ In the Green Paper, the EU examined the development of alternative dispute resolution

18. The author uses supranational to describe the need for a standard that is applicable to all European Union Member States at the EU level of governance which is above the respective national governmental level. Supranational literally means "at a level above national governments." Many EU decisions are taken at 'supranational' level in the sense that they involve the EU institutions, to which EU countries have delegated some decision-making powers. Within the EU, there are various forms of cooperation between the Member States. Part of what makes the EU so unique in international politics is what is known as *supranational cooperation*. Supranational cooperation means that rules can be made in the EU which have a direct impact on the Member States and thereby also a direct effect on the citizens of the Member States. EU cooperation relating to the internal market, agriculture, fisheries, etc. are examples of areas in which there is supranational cooperation. See e.g., *What is the Difference Between Intergovernmental and Supranational Cooperation?*, E.U. INFORMATION CENTRE, http://www.eu-oplysningen.dk/euo_en/spsv/all/11/. (last visited Nov. 1, 2011).

19. See Directive, *supra* note 1, art. I.

20. *Alternative Dispute Resolution – Community Law*, EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS, http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm (last visited Nov. 1, 2011) [hereinafter Website of EC European Judicial Network].

21. Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers. *Glossary: Green Paper*, EUROPA: SUMMARIES OF LEGISLATION, http://europa.eu/legislation_summaries/glossary/green_paper_en.htm (last visited Nov. 1, 2011).

22. See Website of the EC European Judicial Network, *supra* note 20.

23. *Id.*

forms which, as consensus-based forms of social peace-keeping were more appropriate than the courts or arbitration for minor dispute resolution.²⁴

The Green Paper attempted to provide information to familiarize them with alternative dispute settlement forms.²⁵ It stated the need for any proposed ADR scheme that was to be adopted by the EU, was to be flexible, guarantee quality and consistency of outcomes, and maintain a harmonious relationship with court procedures.²⁶ The Green Paper proposed that the selected ADR method include clauses providing agreements to go to ADR; statutes of limitation; prescription periods; confidentiality controls; the validity of consent; enforcement and compliance mechanisms; and the training, accreditation, and liability of providers.²⁷ Because mediation had many of these attributes, it was promoted as the ADR method that was most appropriate to further investigate implementing in the EU.

As a result of the consultation process and dissemination of the Green Paper, in October 2004, the EC adopted a draft proposal for a directive on “certain aspects of mediation in civil and commercial matters,” (IP/04/1288) (Draft Directive).²⁸ The Draft Directive did not attempt to address the entire range of issues pertaining to mediation but instead attempted to establish and promote rules on civil procedure to create a strong correlation between mediation and judicial proceedings.²⁹ The EC notably excluded from the Draft Directive provisions concerning the appointment or accreditation of mediators.³⁰

In an effort to further strengthen mediation stakeholder participation, the EC invited a group of experts to develop a self-regulatory instrument known as the European Code of Conduct for Mediators (Code of Conduct). In July 2004, the EC organized the launch of the Code of Conduct, which was approved and created by a large number of mediation experts.³¹ The Code of Conduct was drafted in cooperation with a large number of mediation organizations throughout the EU,³² and was originated as a voluntary instrument to improve the quality of mediation and users’ faith in mediation.³³ To accomplish these goals, the Code of Conduct set out a series of norms that were to be applied to the practice of mediation and standards that could be adhered to by mediation-provider organizations throughout the EU.³⁴ Moreover, it was an informal document that the Member States institutions would not formally adopt, and it was thought to be an industry best-

24. *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, § 1.1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0196:EN:HTML> (last visited April 7, 2011).

25. Website of the EC European Judicial Network, *supra* note 20.

26. *Id.*

27. *Id.*

28. See *Mediation and Civil and Commercial Matters*, EUROPA, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/263&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Nov. 1, 2011).

29. *Id.*

30. *Id.*

31. *Mediation in Civil and Commercial Matters – Guide*, EU BUSINESS, <http://www.eubusiness.com/topics/eulaw/mediation-guide.02/> (last visited Nov. 1, 2011).

32. See *European Code of Conduct for Mediators*, EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm (last visited Nov. 1, 2011).

33. *Id.*

34. *Id.*

practice guide of sorts.³⁵ Adherence to the Code of Conduct was the responsibility of individual mediators and organizations.³⁶ After the successful launch of the Code of Conduct, many in the EU began to engage in discussions about the inevitability of a mediation solution in Europe. In 2005, European Parliament member Arlene McCarthy promulgated a questionnaire on the Draft Directive that had the effect of convincing some skeptics that uniform treatment of ADR was needed at least in the commercial sector throughout the EU.³⁷ The energy driving the mediation movement was on the rise in the EU.

On May 21, 2008, the European Parliament and the EC enacted the Directive in an effort to encourage the use of mediation in civil and commercial matters, and to make certain aspects of cross-border dispute resolution uniform throughout the EU. The enactment of the Directive culminated a ten-year legislative and political process in which each Member State was to consider the role of mediation in commercial affairs, and take a formal position on the minimum requirements of the use of commercial mediation throughout the EU.

Once the Directive was signed into law, the next steps became implementing it into the domestic laws of the Member States. The implementation goal date for the Directive was May 2011.³⁸ However, Member States had an earlier deadline of November 2010 to provide information to the EC about the domestic courts that were competent to make mediation agreements.³⁹ Thus far, the implementation of the Directive has been uneven among the Member States.

Admittedly, some Member States are further along in the Directive implementation process. Some of the Member States already had regulations and existing mediation frameworks in place at the domestic level before the adoption of the Directive. Four countries⁴⁰ informed the European Commission (EC) that they implemented the Directive in national legislation well before May 2011.⁴¹ Other countries notified the EC regarding the names of competent domestic courts for enforcing cross-border mediation settlements.⁴² Additionally, some Member State countries already had pre-existing mediation frameworks for addressing disputes in certain industrial sectors.⁴³

B. The Particulars of the Directive: An Overview

The Directive is a groundbreaking ADR initiative, as it has support at the supranational level with the EU providing a high-level institutional framework and guidance in a manner that has only previously been seen in the promotion of tradi-

35. *Id.*

36. *Id.*

37. *Id.*

38. *See generally* Directive, *supra* note 1, art. 12.

39. *See* Directive, *supra* note 1, art.12(1). This was facilitated in an effort to make it easier for Member State citizens and businesses to begin mediating.

40. The four countries were Estonia, France, Italy and Portugal. *European Commission calls for saving time and money in cross-border legal disputes through mediation*, EUROPA PRESS RELEASES (Aug. 20, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1060&type=HTML>.

41. *Id.*

42. The two countries were Lithuania and Slovakia. *Id.*

43. For example, Ireland and Denmark have existing frameworks in labor relations, Finland has a framework for consumer disputes, and Sweden has a framework for traffic accidents. *Id.*

tional judicial adjudication. With the Directive, the Member States have become laboratories for the development of mediation law because it offers the Member States a flexible regulatory mediation framework which enables them to enact a variety of mediation laws. The Directive does so by merely setting minimum guidelines to be incorporated instead of strict legal regulations.⁴⁴

Another feature of the Directive is that it aims to address the availability of cross-border mediation services, encourage the awareness of mediation, and use of mediation by ensuring a “balanced relationship between mediation and judicial proceedings.”⁴⁵ The provisions of the Directive apply only to voluntary mediations in cross-border disputes involving civil and commercial matters within Member States, however.⁴⁶ In the process of implementing the Directive, Member States have the option under article 8 to decide whether they want to limit their implementing legislation to cross-border cases or whether they also want to apply the provisions of the Directive to domestic cases as well.⁴⁷ It is important to note the exact instances where the Directive applies as it applies in instances where: (1) the parties agree to mediate voluntarily;⁴⁸ (2) a court orders mediation;⁴⁹ (3) the national law prescribes mediation;⁵⁰ (4) or at the invitation of the court.⁵¹ Further, the Directive gives every judge, at any stage of the procedure, the right to invite the parties to have recourse to mediation if he or she considers mediation appropriate in the case in question.

The Directive states that Member States must implement aspects of civil procedure in national mediation schemes such as enforceability, confidentiality, statutes of limitation periods, and mediator training to make mediation more user-friendly and help increase predictability of outcomes.⁵² Moreover, the Directive addresses the enforceability of mediation by giving the Member States responsibility to ensure that parties together (or one party with the written consent of the other(s)) will be able to request that a written mediation agreement be made enforceable.⁵³ These agreements stemming from mediation will accordingly be made enforceable as long as the content is not illegal in Member State where the enforcement was requested or the Member State can provide for its enforceability.⁵⁴ The choice of mediation enforcement mechanism is left to the Member States and

44. Nadja Alexander, *Mediation and the Art of Regulation*, 8 QUEENSLAND U. TECH. L. & JUST. J. 1, 22 (2008).

45. See Directive, *supra* note 1, arts. 1, 2.

46. *Id.* ¶ 10, arts. 1, 2. The 2008 Directive is specifically not to apply to employment and family law situations where parties are not free to decide their own rights and obligations due to pre-existing laws. Additionally, the Directive describes a cross-border dispute as a dispute in which at least one of the parties (to the dispute) is domiciled in a Member State different from the other party. *Id.* ¶ 10, art. 2.

47. See Directive, *supra* note 1, art. 8.

48. *Id.* art. 2(a).

49. *Id.* art. 2(b).

50. *Id.* art. 2(c).

51. *Id.* art. 2(d). This option must not interfere with the national law of the Member State and must also not prevent parties from exercising their right of access to the judicial system. Additionally, with this option, the court may also invite the parties to attend an information session on the use of mediation if available (when they invite the parties to mediate.) See *id.* arts. 5(1), (2).

52. *Id.* ¶ (23), art. 7.

53. See Directive, *supra* note 1, art. 6(1).

54. *Id.*

mediation can be enforced by court approval by an “other competent authority.”⁵⁵ A “competent authority” makes the mediation agreement enforceable through a judgment, a decision, or an authentic instrument that complies with the law of the Member State where the request is made.⁵⁶ This provision will enable parties to give an agreement that resulted from a mediation legal status similar to that of a court-produced judgment without ever having to commence judicial proceedings.⁵⁷ This possibility, which currently does not exist in all Member States, is an incentive for parties to attempt mediation rather than immediately initiate court action.

The confidentiality of information is also an issue that is touched upon by the Directive. The Directive ensures that mediation takes place in an atmosphere of confidentiality and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if mediation fails.⁵⁸ The confidentiality provision is essential to give parties confidence in, and to encourage them to make use of, mediation. To this end, the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties.⁵⁹ Moreover, the Directive contains provisions on limitation and prescription periods which ensure that, when the parties engage in mediation, any such period will be suspended or interrupted in order to guarantee that they will not be prevented from going to court as a result of the time spent on mediation.⁶⁰ Like the rule on confidentiality, this provision also indirectly promotes the use of mediation by ensuring that parties’ access to justice is preserved should mediation not succeed.⁶¹

The Directive also obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conducts and other quality control mechanisms concerning the provision of mediation services.⁶² These mechanisms may include market-based solutions provided that they aim to preserve the flexibility of the mediation process and the autonomy of the parties and to ensure that mediation is conducted in an effective, impartial and competent way.⁶³

IV. ITALY: LEGISLATIVE DECREE 28, MANDATORY MEDIATION, AND MEDIATOR QUALIFICATIONS

Member States have been informed of the new mediation guidelines and are in the process of adopting them. Even though some Member States had pre-

55. Article 6, paragraph 3 of the Directive states that Member States must inform the Commission of the courts and or other authorities competent to receive enforceability requests. The Commission will make the information about these particular organizations available by any appropriate means. *See Id.* arts. 6(3), 10.

56. *Id.* art. 6(2).

57. *See* Directive, *supra* note 1.

58. *Id.* art. 7.

59. *Id.*

60. *Id.* art. 8(1).

61. *See* Directive, *supra* note 1.

62. *Id.* art. 4(2).

63. *Id.* arts. 4 (1), (2).

existing mediation schemes, the road to adoption and implementation of the Directive has been fraught with opposition and controversy. Consider the current situation in Italy, one of the four countries that notified the EU that it implemented the Directive,⁶⁴ with the Legislative Decree No. 28 (the Decree)⁶⁵ which called for mandatory mediation in certain domestic civil disputes. The Decree lays out Italy's domestic mediation law framework and also represents Italy's efforts to comply with the Directive.⁶⁶ Yet, the Decree goes further than the Directive in its requirements, as it mandates mediation in several types of civil and commercial disputes.⁶⁷ Consequently, Italy's implementation of the Decree was not free from controversy. The controversy surrounding the Decree is instructive as it pertains to the qualifications, training requirements of mediators, and the role of lawyers in mediation in the EU Decree.⁶⁸

A. The Legislative Decree No. 28

The Decree is likely the most extensive mediation implementation effort of the Directive within the EU. Initiated on March 4, 2010, the Decree required that by March 21, 2011 parties to certain types of civil and commercial disputes must engage in mediation prior to initiating court action.⁶⁹ The particular type of civil and commercial law disputes identified by the Decree are: (1) neighbor disputes, (2) property rights, (3) division of goods, (4) trusts and estates, (5) family-owned businesses, (6) landlord/tenant disputes, (7) loans, (8) leasing of companies, (9) disputes arising out of car and boat accidents, (10) medical malpractice, (11) libel, (12) insurance, (13) banking, (14) and financial contracts.⁷⁰ Italy developed the Decree in an attempt to implement the Directive and resolve the nation's extremely over-crowded and inefficient court system.⁷¹ A driving force behind the law's enactment was that it presented a legitimate solution to help reduce the incredible backlog of civil cases currently pending in Italy, which stands at approximately 5.4 million cases.⁷² Due to its overworked court system and looming budget constraints, Italy was primed to accept an ADR method as a means to help streamline the volume of cases facing Italian courts.

64. See Code of Conduct, *supra* note 32.

65. See Decree *supra* note 4.

66. *Id.*

67. *Id.* art. 4 ¶ 3.

68. The controversy also involves the aspects of constitutionality of the law, but this article will discuss the lack of adequate mediator qualifications and lawyer involvement in mediations.

69. See Decree, *supra* note 4 art. 24.

70. *Id.* art. 5 ¶ 1.

71. As in other continental European countries, in Italy the "ADR movement" began in the early nineties. In those years the Parliament began to produce general mediation laws. The results of these first legislative acts, however, were rather disappointing because few parties were mediating their disputes. In subsequent years, the legislature continued to promulgate mediation legislation - from subcontractors to franchisees to the tourism industries. Despite renewed efforts, the results were the same: (i) a small number of disputes actually mediated, (ii) a low average value of lawsuits brought to the attention of mediators and (iii) a high percentage of parties rejecting the invitation to mediate.

72. Giuseppe De Palo & Leonardo D'Urso, *Explosion or Bust? Italy's New Mediation Model Aims to Shrink Backlogs, And 'Eliminate' One Million Disputes, Annually*, 28 ALTERNATIVES TO THE HIGH COSTS OF LITIGATION (Apr. 2010), available at http://www.herbertsmith.com/NR/rdonlyres/FEB319A6527E4A6CA9262781A62B326A0/ALT28_04forweb418.pdf.

The Italian legislature focused on mediation, in part, because of the Directive and also because of the pre-existing Italian mediation laws already in place.⁷³ The Italian legislators wanted to increase parties' day-to-day use of mediation in civil cases, in large part, because the voluntary mediation laws already in place were not accomplishing the goal of encouraging parties to use mediation.⁷⁴ With that in mind, the Italian legislature went a step further and mandated mediation for certain types of civil and commercial cases.⁷⁵ In addition to making mediation mandatory for certain types of disputes, the Italian legislature sought to regulate the mediation time frame, and created a provision in the Decree that requires that all mediations occur within a four month period, starting from the date of the request to mediate.⁷⁶

B. Opposition to Mandatory Mediation

While the supporters of the Decree believe that the mandatory mediation provisions within the law are a true improvement of the speed and cost of resolving domestic civil disputes (as compared to traditional adjudication of civil disputes), some members of the Italian legal community are vehemently against the implementation of the Decree and mandatory mediation. Italy's leading national union of lawyers, Organismo Unitario dell'Avvocatura (OUA)⁷⁷ has spearheaded some Italian lawyers'⁷⁸ resistance to the implementation of the Decree. OUA's complaints are not against mediation per se, but against mandatory mediation, or (especially) mandatory mediation without lawyers and what they see as the lack of standards for the training and requirements of mediators.⁷⁹ The perceived threat to Italian lawyers (legal industry) is the main reason for the opposition to mediation and the Legislative Decree. OUA wants the Decree to be changed to allow clients to opt out of court-ordered mediation, and they also want the law to be changed to require "technical" (i.e., counsel's) assistance during mediation.⁸⁰ In short, some Italian lawyers feel that Legislative Decree aims to cut lawyers out of the media-

73. Italy first initiated a mediation law in 1993 and legislative decrees in 2003 and 2004 further defined mediation's role: Decreto Ministero 5 del 2003 (Ministry Decree 5 of 2003) came into force settling regulation for an evaluative mediation process in company disputes, and Decreto Ministero 222 del 2004 (Ministry Decree 222/2004) addressed requirements for mediation requirements for mediation organizations and created a national registry. *See also*, Veronic Alvisi & Giuseppe De Palo, *Mediation in Italy: toward a professional practice*, 11 ADR BULL. No. 2, art. 4.

74. *See* De Palo & D'Urso, *supra* note 72.

75. *Id.*

76. *See* Decree, *supra* note 4, art. 6.

77. The OUA, Organismo Unitario dell'Avvocatura, literally means the Unitary Organism/Organization of Lawyers/Lawying. It represents the national union of lawyers in Italy.

78. It is important to note that not all Italian lawyers are against mandatory mediation and Decree 28. Bar associations in Rome and Venice have participated in implementing mediation. *See e.g.*, Giovanni Negri, *Parte II Lavoro Sui Nuovi Tribunali*, IL SOLE 24 ORE, April 27, 2011, available at <http://www.oua.it/Documenti/11%20sole%2024%20ore.pdf>. (last visited Apr. 28, 2011).

79. Another large issue is the constitutionality of the Decree. For more information regarding this element, see Giuseppe De Palo, *A Mediator for the Lawyers, and Italy's Minister of Justice*, 29 ALTERNATIVES TO THE HIGH COST OF LITIGATION, May 2011, 105-106.

80. Giuseppe De Palo, *Mediating Between the Bar and the Government? Italy's Attorneys Strike Over a New ADR Law*, 29 ALTERNATIVES TO THE HIGH COST OF LITIGATION, May 2011, 84.

tion process in favor of using mediators, who the lawyers perceive to have inadequate training and qualifications.⁸¹

To this end, OUA has mounted an impressive media campaign and has employed several different types of tactics and approaches. OUA brought a claim in the Italian courts contesting the unconstitutionality of the Decree, and litigation is currently pending before the Italian Supreme Court.⁸² In its claim, OUA argues that the legislative process installing mandatory mediation was flawed because it was the duty of Italian Parliament, not the duty of the Cabinet, to introduce pre-trial mandatory mediation.⁸³ OUA's claim has thus far survived the first hurdle, as in early April the Tribunale Administrativo Regionale (TAR) di Lazio (the Italian province Lazio's regional administrative court) court found OUA's claim "not manifestly baseless."⁸⁴ Accordingly, the Italian Supreme Court will issue an opinion on OUA's claim regarding the constitutionality of the Decree possibly within the year.⁸⁵

Additionally, OUA has initiated a lawyers' strike as well as media campaigns. OUA called for a national strike from March 16, 2011 to March 21, 2011 to protest the Decree's enactment (the day of the Decree's enactment was March 21, 2011). Lawyers across the country were asked to abstain from attending hearings in any civil, criminal, tax, or administrative proceeding.⁸⁶ OUA has also mounted an impressive media campaign as well and the controversy has been picked up by numerous blogs and has even been reported in several American media outlets, including the *Wall Street Journal*.⁸⁷

But while OUA is continuing to fight the Decree and mandatory mediation, many members of the Italian legal community are moving forward with the implementation of the Decree, particularly mediation provider organizations which are busy setting up offices throughout Italy.⁸⁸ The powerful Italian Employers Federation (Confindustria) and virtually all of the national associations representing the business community have formally asked the Italian legislature and courts system to go ahead with mediation, and to deny any request for changes, or delays, to the Decree.⁸⁹

81. See Negri, *supra* note 78.

82. See De Palo, *supra* note 79, at.105

83. *Id.*

84. See Negri, *supra* note 78.

85. *Id.*

86. See De Palo, *supra* note 80, at 84.

87. Vanessa O'Connell, *Mandatory Mediation in Italy? Mamma Mia!*, WALL ST. J. L. BLOG (March 14, 2011), <http://blogs.wsj.com/law/2011/03/14/mandatory-mediation-in-italy-not-if-the-lawyers-have-any-say/>.

88. See e.g., ADR CENTER, www.adrcenter.com (last visited April 24, 2011)(an Italian based organization that has begun setting up mediation centers throughout Italy).

89. Confindustria is formally on the record as supporting the attempt at mandatory mediation. The powerful workers union even holds classes to educate workers about the benefits from mediation. See e.g. La Mediazione Civile Obbligatoria: Una opportunità per evitare contenziosi lunghi e costosi [Mandatory Civil Mediation: An opportunity to avoid costly and time-consuming disputes], a meeting held at Confindustria Siracusa, Apr. 8, 2011, <http://www.confindustria.it/ADM/EvenNew.nsf/tutti-Doc/D0D0AD69734B6258C1257869005100FE?OpenDocument&MenuID=EC566D785A91941AC1256EFB0034879E>; see also the Confindustria Website, <http://www.confindustria.it> (last visited April 28, 2011).

C. Existing Mediator Qualification and Training Requirements

Those in the Italian business and legal community who have accepted the Decree and mandatory mediation do so, mainly because the Decree represents the most viable means to reduce court costs and time expenses. Despite OUA's protestations about the lack of adequate mediator training and qualification provisions, there are some provisions outlined in the available Italian law, particularly in the corresponding Administrative Decree 180.⁹⁰ Administrative Decree 180 is the administrative law that corresponds to the Decree and lays out the implementation policies of the Decree and devotes several provisions to the qualifications of both individual mediators and the mediation provider organizations.⁹¹ While OUA hopes to scrap the Decree and Administrative Decree 180 in their entirety⁹² there are provisions that do address mediator and mediator provider organizations requirements and capabilities. As set forth in Administrative Decree 180, mediations in Italy may only be conducted by mediators who have successfully completed a 50-hour mediation training course.⁹³ Additionally, under the Decree, mediations can only be conducted by mediators who are listed in the Register, and who have attended and passed a special training provided by training institutions that are accredited by the Ministry of Justice.⁹⁴ These measures have been included in Italian mandatory mediation legal framework, partly in an attempt to raise the mediation success rate, but also to show some attention was given by the government to address the importance of training and qualifications of mediators and mediation providing organizations.

The Decree and Administrative Decree 180 also attempt to address the qualifications of the mediation providing organizations themselves. Under the Decree guidelines, the quality of the mediation process is to be controlled by allowing only providers who are accredited and monitored by the Italian Ministry of Justice to administer mediations.⁹⁵ As mandated by the Decree, mediation procedures in Italy can be handled only by public agencies and private organizations registered with the Ministry of Justice in the official Register,⁹⁶ and the requirements and procedures for registration are governed by special ministerial decrees.⁹⁷ Members of Italian bar associations, chambers of commerce, or other professional associations can form organizations that, upon request, can be listed as a mediation-provider organization in the official Register kept by the Ministry of Justice.⁹⁸ Lastly, the Decree also provides that all of the regulations laid forth in the Decree that apply to the selected mediation provider will apply to the mediation procedure itself.⁹⁹ This requirement has the effect of requiring that the selected mediation

90. Decreto 180 Ottobre 2010, n. 180 (It.), available at <http://www.monoadr.it/cms> [hereinafter "Administrative Decree 180]. Administrative Decree 180 Articles 4, 18 lay out mediator training and qualifications regulations.

91. *Id.* arts. 4(3)(a), 18.

92. See De Palo, *supra* note 80.

93. See Administrative Decree 180, *supra* note 90, art. 18.

94. *Id.* art. 4(4); see Decree *supra* note 4 art. 16.

95. *Id.* art. 16.

96. *Id.*

97. See generally Administrative Decree 180, *supra* note 90.

98. Decree, *supra* note 4, arts. 16, 19.

99. *Id.* art. 16.

provider must personally ensure the appointed mediator's impartiality, confidentiality, and fitness to appropriately conduct the mediation.¹⁰⁰

Despite these regulatory floors and procedural safeguards in place in the Italian mediation legal framework, opponents of mandatory mediation (and the Decree) in Italy are still concerned with the level of training and qualifications for mediators and mediation provider organizations. Many opponents, including OUA, feel that lawyers are being cut out of the mandatory mediation process and will be replaced by less-educated mediators.¹⁰¹ OUA's claim does indeed place heightened emphasis on mediator qualifications and training as well as lawyer participation. The situation in Italy, where the government has proactively attempted to implement the Directive as well as implement a corresponding domestic mediation framework, highlights an important debate about the implementation of the Directive: that the level of mediator training and qualifications needs to be further defined by the EC in order to create more uniform mediation standards.

V. STRUCTURAL FRAGMENTATION IN MEDIATION TRAINING AND QUALIFICATIONS

The protest against the Italian government's implementation efforts exemplifies some of the fears that large-scale mediation implementation conjures up for Member States' domestic governments and demonstrates the need for the EC to regulate mediators' qualifications and lawyers' participation in mediation as they apply to cross-border transactions. Regulation or clarification on this matter bodes well for domestic Member State mediation frameworks as well. While the participating Member States do not have responsibilities to enact more exhaustive domestic mediation frameworks than the guidelines listed in the Directive, some Member States, like Italy, are attempting to implement domestic frameworks that are more extensive in their implementation of mediation than provided by the Directive. Examining some of the Member States existing mediator training and qualification regulations demonstrates the varied and diverse mediator qualification requirements and policies regarding lawyer participation in mediation and also reinforces the need for the EC to implement a general set of guidelines regarding mediator qualifications and lawyer participation in mediation. An examination of the Member States various policies on mediator training and qualification requirements also exposes some of the structural fragmentation (as to the idea of what it means to be a mediator and of mediation principles) that is occurring as the Member States attempt to implement (1) the Directive (as it applies to cross-border transactions), and (2) domestic mediation schemes.

The original architecture of the Directive is a flexible framework that allows mediation to be implemented as a collection of single method approaches within each Member State. By allowing individual mediation approaches within each Member State, the EC is fostering the growth of mediation and select mediators from throughout the EU. However, by allowing the varied differences in mediator qualifications and lawyer involvement in mediation to remain, there is danger of

100. *Id.*

101. *See De Palo, supra note 80.*

“structural fragmentation”¹⁰² between Member States mediation methods when it applies to cross-border mediation as well as institutional inconsistency in the implementation and application of the Directive.

While it is important to allow for EU Member State flexibility and autonomy, the ability to effectively mediate cross-border issues will likely be hampered by the existing non-uniform levels of mediator training and qualifications. As there is no framework for understanding how to systematically integrate the use of different and multiple mediation training and qualification requirements across Member State forums, it could become difficult to implement mediation and select mediators from throughout the EU. This type of “structural fragmentation” is harmful to the growth and legitimacy of the Directive and mediation efforts within the EU generally.¹⁰³

A. An Overview of Various Member States' Frameworks

A brief survey of some of the Member States' respective mediator training and requirement qualifications and regulations helps to illustrate the extremely varied standards that currently exist throughout the EU. The different categories of Member State policies on mediation qualifications and lawyer involvement in mediation can be categorized into four groups: (1) Member States countries, like Italy, who have adequate existing policies for mediator trainings and qualifications but have vague policies on (or do not address at all) other mediation qualification and participation aspects, such as lawyer involvement in mediation;¹⁰⁴ (2) Member State countries, like Austria, that have very regulated and strict mediator training and qualification requirements; (3) Member States, like the Czech Republic, who have no existing regulation in regards to the training of mediators and no outside controls; (4) and lastly, countries, like the United Kingdom, that do not have codified regulations in their domestic mediation schemes, but possess strong private industry enforcement of mediation training and qualification requirements. In order to grasp the varied levels of mediator qualifications and participation, I will briefly discuss the cases of Austria, Czech Republic, and the United Kingdom.

102. See Spain, *supra* note 6, at 27-29; See generally Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Int'l Law Comm'n, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC Report] (report of the study group detailing the complications arising from the increasing diversity of international law tribunals). Spain discusses the idea of structural fragmentation as it applies to international dispute resolution. I am applying the concept of structural fragmentation to the implementation of the Directive in the various Member States as it pertains to the varied pre-existing standards that exist for mediator qualification requirements and lawyer. In essence, as the Member States continue to encourage diverse mediation schemes with regards to mediator qualifications requirements cross-border mediation those standards as they relate to have a danger of becoming a less viable alternative dispute resolution attempt.

103. *Id.*

104. I will not discuss the test case of Italy in this section, as I already discussed Italy and its mediation frameworks advantages and disadvantages as they relate to mediation qualifications and lawyer participation. See *supra*, Section IV.

1. Austria: Highly Regulated Mediator Requirements

In certain Member States, such as Austria, the mediator training and qualification requirements are very demanding and are codified by law.¹⁰⁵ In Austria, all mediators in civil matters must: (1) be registered with the Federal Ministry of Justice, (2) must be over 28 years of age, (3) hold a professional qualification, (4) be trustworthy, (5) possess the necessary professional indemnity insurance, (5) and have completed a training course (which consists of 200 hours of theoretical learning and additional practical modules) at a Ministry of Justice approved training facility.¹⁰⁶ Persons who have not completed training but who have the requisite level of knowledge and experience may still be entered on the list subject to the opinion of the Advisory Board.¹⁰⁷ Austria's system exemplifies the approach of Member States¹⁰⁸ who have precise mediator requirements that are incorporated by law into the domestic mediation scheme. The approach employed by Austria and other like-minded Member States represents a more detail-oriented end of the spectrum, whereas other Member States' mediator requirements are much more lax.

2. Czech Republic: No Existing Mediator Training and Qualification Regulations¹⁰⁹

There are some Member States, such as Czech Republic, that completely lack any policies and regulations on who is qualified to be a mediator in regards to civil and commercial matters. The Probation and Mediation Service of the Czech Republic, which is overseen by the Ministry of Justice, currently oversees all laws or policies related to civil mediation.¹¹⁰ The most pertinent mediation-related law in Czech Republic is the Probation and Mediation Service Act.¹¹¹ In the Czech Republic, currently there are no legal requirements regarding mediators who work

105. In Austria, the Civil Law on Mediation Training governs training and accreditation. See Austrian Mediation Act (Law on Mediation in Civil Law Matters), available at http://portal.wko.at/wk/format_detail.wk?angid=1&stid=362257&dstid=686&titel=Austrian,Mediation,Act [hereinafter Austrian Mediation Law].

106. *Id.* § III, arts. 9-11.

107. *Id.* Members of certain professions are able to undergo reduced training course as a result of their specific professional experience (e.g. lawyers, notaries, financial trustees, psychotherapists, etc.).

108. Other Member States who follow this model include Greece, through Article 2 of Law n. 3898/2010, and Portugal through Lei n. 78/2001, n.161, available at <http://www.conselhodosjulgadosdepaz.com.pt/Legislacao/Julgados/Lei78-2001.pdf>.

109. As relating to mediation training and regulations for civil and commercial matters.

110. PROBATION AND MEDIATION SERVICE OF CZECH REPUBLIC, available at <https://www.pmscr.cz/en/primary-documents/>; see also *Mediation in Member States, Country Mediation Profiles*, JUSTICE EUROPA, available at https://e-justice.europa.eu/contentPresentation.do?plang=en&idCountry=cz&idTaxonomy=64&member=1&vmac=BJxe00X6ayQIEu20bsG12O1ZgzG1N3d2ww51ibY8RvXTt5CLrBylgy_GsYLuyHU47H5pyxeNF-4kcgfBUoS-QAAfQkAAAFm (last visited April 28, 2011). The Probation and Mediation Service is a government organization that focuses on criminal law.

111. The Probation and Mediation Service Act, Act No. 257 (July 14, 2000) available at https://www.pmscr.cz/download/EN_ABOUT_PROBATION_AND_MEDIATION_ACT.pdf.

in a civil or commercial law capacity.¹¹² Any citizen can claim to be mediators, so long as they are not working as an officer in the Probation and Mediation Service.¹¹³ Because the threshold for becoming a mediator is so low, it is necessary for Czech citizens and other Member State citizens (when engaging in cross-border mediation) to search for the training and reference record of proposed mediators to select a qualified Czech mediator.

3. The United Kingdom: No Mediation Requirements in Law But Strong Industry Regulation

The last category comprises a small number of Member States,¹¹⁴ such as the United Kingdom, who do not have formal training or accreditation requirements codified in law but have industry standards in place to enforce national mediator training and requirement standards. In Great Britain, no training or accreditation is formally required to practice as a mediator. However, in practice, the vast majority of mediators are trained and accredited through a recognized ADR provider. For civil mediation in Great Britain, the Ministry of Justice encourages mediators and mediator providers to be accredited by the Civil Mediation Council (CMC), which is an independent body that promotes civil and commercial mediations as alternatives to litigation.¹¹⁵ Similarly, in the other parts of the United Kingdom, such as Scotland and Northern Ireland, there is a strong self-regulating industry with limited governmental oversight.

In Great Britain, the National Mediation Helpline (a government-sponsored service) only accepts mediation providers who are accredited by the CMC.¹¹⁶ Access to court referrals is only possible via the National Mediation Helpline.¹¹⁷ For mediation providers in Great Britain and Wales to have access to those referrals, they must have the CMC accreditation.¹¹⁸ The accreditation process establishes a basic process that mediation providers can use to address issues related to training, insurance, codes of conduct, and continuing professional development.¹¹⁹

In Scotland and in Northern Ireland generally, the mediator profession is self-regulating, with the existence of several membership or accreditation organizations and limited government endorsement.¹²⁰ In Scotland, “the government carries out activities to encourage the development of quality control mechanisms

112. Under the Probation and Mediation Service Act, Section 6(2), there are some requirements for “officers” of the Probation and Mediation Service, but no explicit enumeration of mediator qualifications or requirements. See *id.* § 6(3).

113. *Id.*

114. Germany is also included in this group, as mediators do not face specific requirements but must be registered on a national list which is generally monitored by industry. See Germany: Librex Mediation Questionnaire with Replies, REBECCA KELLY MEDIATION SERVICES (last visited Nov. 1, 2011).

115. Explanatory Memorandum to the Cross Border Mediation (EU Directive) Regulations 2011 from the Ministry of Justice for Parliament, 2011 No. 1133, Annex A, 11, http://www.legislation.gov.uk/ukxi/2011/1133/pdfs/ukxiem_20111133_en.pdf (last visited April 28, 2011).

116. *Id.* at 11.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 12-3.

and training for mediators,¹²¹ which include funding and assisting in the creation of the Scottish Mediation Register (SMR).¹²² The SMR was created with the aim encouraging effective quality control assurance regarding mediators and mediation services.¹²³ In Northern Ireland, the Northern Ireland Executive (the Executive) has recently funded training for mediators in order to increase the number of accredited mediation service providers in Northern Ireland.¹²⁴ The Executive continues to encourage the application of quality control mechanisms and ongoing training for mediators.¹²⁵

B. Ways to Improve Mediator Qualification Issues

After examining the various Member State mediation frameworks, it is clear that there are a wide variety of mediation attempts that are being implemented in multi-varied ways. While these varied approaches represent the flexibility envisioned by the Directive mediator training and qualifications requirements, the Directive should eliminate or minimize such flexibility to maintain continuity. The EC could find a possible solution by looking to some pre-existing mediator qualification frameworks from NGOs or from private industry. For example, examining sources such as the IMI Mediator Competency Certification,¹²⁶ or the ADR Center's Capacity Building programs would provide some help to provide mediator training and qualification minimum requirements.¹²⁷ The IMI Standards Commission comprise a broad range of suggestions and strategies drawn from international mediation users, disputants, professional advisers, mediators, mediation provider institutions, adjudicators, and they, or other organizations, could provide training and qualification floors—or at the minimum a useful foundation for the EU to begin creating mediator training and qualification standards.

VI. CONCLUSION

While some would argue that the variety of approaches to mediator training qualification requirements is indicative of the character of mediation, this dismisses the fact that widely-varying mediator training and qualification standards

121. Explanatory Memorandum, *supra* note 115, at 12.

122. *Id.*

123. *Id.*

124. *Id.* at 13.

125. *Id.*

126. The role of the Standards Commission is to prepare the detailed standards, criteria, guidelines and rules that will enable the successful implementation of IMI Mediator Competency Certification. The standards on which IMI competency certification is based will:

- Provide users with reliable data to facilitate their choice of competent mediators
- Address the professional interests of mediators and mediation provider institutions
- Reflect outstanding training, actual experience and independent assessments
- Inspire and encourage the achievement of higher standards throughout the profession
- Prioritize self-regulation, transparency, simplicity, adaptability to differing conditions, and the minimization of administrative burden and cost.

See *IMI Mediator Competency Certification*, INTERNATIONAL MEDIATION INSTITUTE, http://www.imimmediation.org/standards_main (last visited on April 28, 2011).

127. See *Capacity Building Programs and Training of the Trainers*, ADR CENTER, http://www.adrcenter.com/international/cms/?page_id=2 (last visited Nov. 2, 2011).

continue to hinder the implementation of the Directive in the EU. By allowing Member States to simply choose their own mediator training and qualifications regulations, outcomes continue to vary from private industry regulation (in the United Kingdom), to controversy and antipathy towards mediation (in Italy), or possibly no existing civil law mediator framework at all, (as in the Czech Republic).

As to the claim that enforcing regulation upon mediators and their qualifications will destroy the unique and flexible appeal of mediation, this claim is false as it belies the essence of mediation. In mediation, when parties are looking for a solution to their dispute they are looking to an individual, a neutral, who implicitly has the requisite skill and knowledge base to mediate. As the Directive addresses cross-border disputes only, the choice of mediators for these types of disputes becomes an increasingly important and trust-oriented selection process. EU citizens will choose mediators that they trust to be competent. Mediators who come from Member States that have undefined or lax mediator training and qualification requirements are at as much of a disadvantage as mediators who do not have readily available language skills. It is important for the EC to provide some type of uniform regulation for mediator certification and qualifications throughout the EU, for the future applicability of the Directive and for the lasting success of EU mediation generally.