A 2014 European Parliament-commissioned study, “Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU,”\(^1\) (“Rebooting Study”) has initiated a much needed review and debate on effective mediation policy. The Rebooting Study, which recommended mandatory mediation for EU litigants with an ability to opt-out and enforcement of the 2008 EU Mediation Directive’s\(^2\) Balanced Relationship Target Number (“BRTN”) concluded, among other findings, that despite increased awareness of mediation and numerous studies and assessments, which have proved its benefits, mediation still remains largely under-utilized as a method of dispute resolution. With legislative enactments in place to realize mediation’s benefits, it seems mediation is a
“Sleeping Beauty” waiting for a “Prince Charming” to wake her up. Mandatory mediation with the ability for litigants to opt-out, as the Rebooting Study suggests, might just be the Prince Charming Sleeping Beauty needs to awaken her benefits.

I. The Directive

The Directive, in force in the twenty-eight Member States of the EU, was the conclusion of a long path towards formal recognition of Alternative Dispute Resolution (“ADR”) by the European Parliament. The path began in 1999 when EU political leaders gathered in Tampere, Finland and formally decided that ADR in civil and commercial disputes was beneficial and should be promoted via legislation. It took the EU some nine years, but in May 2008 the Mediation Directive was formally adopted, with a three-year period for Member States to implement it.

The Directive provides the minimum regulatory standards for mediation legislation to be transposed by the Member States into their national legal systems. Thus, Member States enjoy the freedom to adopt this regulatory framework as they so choose—including a stricter set of standards. If the Member States do not comply with the Directive, the EU can file a legal action, as with other EU Directives, with the ability to levy fines against them based on the actual delay in complying.

The Directive’s objective as stated in Article 1 is “to facilitate access to alternative dispute resolution and to promote amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings”—the BRTN.3 The BRTN4 suggests that there should be a minimum number or percentage of cases, out of the total number of those filed in civil courts annually, to be mediated in each country in order to achieve a balance between mediation and judicial proceedings per the requirements of Article 1.5

That number or percentage, the BRTN, is the only quantifiable way of ascertaining whether or not the balanced relationship called for by the Directive has been effectively reached. Failure to determine that target number or percentage, and of course to reach

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3 Id. at art. 1.
4 For a discussion of this theory, see Giuseppe De Palo & Mary B. Trevor, Introduction to EU MEDIATION LAW & PRACTICE (2012).
5 Directive, supra note 2, at art. 1.
it, renders a Member State vulnerable to legal actions under the Directive.

To reach the goal of the BRTN, the Directive essentially sets forth rules dealing with mediation quality standards such as: allowing judicial referrals; ensuring enforcement of mediated settlements; and protecting confidentiality. Each Member State, however, is allowed to choose the appropriate legal tools to reach its own BRTN based on various macro-economic data such as how effective the public justice system is and other relevant criteria. To help achieve a BRTN, the Directive in Article 5.2 allows Member States, although does not obligate them, to make mediation mandatory provided citizens’ rights to access justice are not infringed.\(^6\)

Accordingly, those States that do not want to implement mandatory mediation could resort to regulatory tools such as mandatory information sessions and financial incentives. However, should those tools prove ineffective, the Directive, under this theory, would require that particular Member State to make the necessary regulatory changes to allow the BRTN, the goal of the Directive, to be reality.

II. THE EUROPEAN MEDIATION PARADOX

The European Parliament first raised concern with the implementation of the Directive in 2011. An assessment conducted by the European Parliament to measure the impact of the Directive, three years after its enactment, showed very disappointing results. In that assessment, the Parliament made note of the countries that were top performers in terms of numbers of mediations and found a majority of these countries experiencing around 2000 or fewer mediations per year.

In that same year, the Parliament commissioned a study, “Quantifying the Cost of Not Using Mediation—a Data Analysis” (“2011 Study”).\(^7\) The 2011 Study was based on the premise that, among many other individual and societal values it promotes, mediation can save both time and money compared to civil litigation yet the exact amount of savings was still uncertain.

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\(^6\) Id. at art. 5.2.

The 2011 Study’s point of reference was the World Bank “Doing Business” Report and especially the index, “Enforcing Contracts.” The Enforcing Contracts index measures the efficiency of the civil justice systems of 189 countries in resolving a specific type of commercial dispute—in particular the time and costs of solving that dispute.

In the 2011 Study, experts from all over the EU were asked to estimate how much it would cost, and how long it would take, to mediate that very same dispute in their country. This would allow for the effective comparison of the time and cost of litigation versus that of mediation. Using progressively lower mediation success rates than those offered from the experts, the 2011 Study then calculated a mediation-effectiveness break-even point representing the minimum success rate for mediation that still generates time and costs savings in each Member State. The 2011 Study found the break-even point for time savings was 19% and the break-even point for cost-savings was 24% when all Member States’ data was averaged.

Thus, even with very low mediation success rates, savings in time and money—cost—could be realized.

These numbers led to the expression “the European Mediation Paradox”—if increasing the use of mediation brings such significant time and cost savings to the parties (as well as the judiciary and taxpayers), why were Member States experiencing such low rates of mediation? Seemingly, the parties and Member States were acting irrationally, all other things being equal. But in actuality, other things are not equal. There are many, perhaps countless, factors impacting how mediation is used—key among them being regulatory environment rules, incentive rules, concerns about quality of service and professionalism, and levels of awareness among parties.

While the 2011 Study was instructive in regard to saving time and money, since Member States could wait to implement the Directive into their national legal systems until May 2011, some, the European Commission in particular, contended that the time was not yet sufficient for a meaningful impact assessment. However, counter to this argument was the fact that some Member States had transposed the Directive and, most importantly, many of the key pro-mediation features enshrined in the Directive (quality,
confidentiality, etc.) had already existed in the national legal systems for many years.

The European Parliament revisited the issue of the Directive’s lack of impact at the end of 2012 when its Legal Affairs Committee, during a formal hearing, asked the European Commission whether legal action should be taken against the Member States for having de facto failed to implement the Directive, to reach its clear goal. Three and a half years after its enactment, and one and a half after the deadline for its implementation, mediation was still being used in far less than one case out of a thousand. The European Commission responded, again, that at the end of 2012, it was still too soon to assess the impact of the Mediation Directive.

While the measurable impact of the Directive was being debated in Europe in 2012, the BRTN concept was being experimented with across the world. For example, New York County’s Commercial Division Advisory Council recommended an eighteen-month experiment with mandatory mediation for commercial cases, whereby every fifth case would go to mediation. The experimental mandatory mediation program in New York’s commercial courts was issued at the behest of a 2012 report issued by the Chief Judge’s Task Force on Commercial Litigation in the 21st Century.

In 2013, the European Parliament became so convinced that mediation and ADR generally were not taking hold in the EU that the preamble to the Consumer ADR Directive provided that, “[i]t is regrettable that . . . ADR has not been correctly established and is not running satisfactorily in all geographical areas or business sectors in the Union.” This new Consumer ADR Directive showed both the EU’s frustration with the limited impact and enactment of ADR in the EU.

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11 The European Commission is the body responsible for controlling the proper implementation of EU legislation in the Member States.


A. 2013 Rebooting Study

Following up on the frustration of the limited impact and enactment of ADR into Member States’ national regulatory frameworks and not convinced by the Commission’s still too soon to assess the impact of the Directive argument, in 2013 the European Parliament commissioned a study examining the implementation of the Directive—the Rebooting Study. Specifically, the European Parliament invited experts to submit proposals focusing on the following issues:

1) The Directive’s rules on confidentiality are, by some Member States, deemed not to be strict enough;
2) Differing opinions on the role of legal professions involved in mediation procedures;
3) Uncertainty as to the precise scope of the exceptions to duty of secrecy and confidentiality;
4) How the provisions of the Mediation Directive allowing the possibility for courts to refer the parties to mediation may have affected national procedural law.

The goal of the Rebooting Study was to examine the status of mediation in Member States and establish the root causes of the low levels of mediation. To do this, the study was broken down into four main parts:

1) Updating the 2011 “Costs of Not Using Mediation” Survey;
2) Analyzing the legislation implementing the Mediation Directive in the Member States;
3) Proposing legislative measures to increase the use of mediation across the EU;
4) Proposing non-legislative measures to increase the use of mediation across the EU.

The Parliament, in protecting the integrity of the study, insisted any ensuing recommendations of the study, reflect the view of as many stakeholders as possible. In order to achieve this end, a forty-five question questionnaire was developed and tested by senior experts. The questionnaire was then made available online, and the study team invited mediators, lawyers and business associations to complete the survey. In total, 1226 completed responses were received from every country in the EU. Of these, 816 were received in time to be included in the published version of the study.

Using the same methodology as the 2011 Study, respondents in the Rebooting Study were asked to estimate the number of civil
and commercial mediations occurring annually in their country. Using the average duration of litigation in the EU (based off of the World Bank’s Doing Business Report’s Enforcing Contracts index used in the 2011 study) and the average duration of mediations (as reported by respondents in the Rebooting questionnaire), the time savings were estimated to update the 2011 study. For each dispute, if all cases in the EU went to mediation first, and the procedure succeeded in 50% of the cases, the average number of days saved would be 240 days; if mediation succeeded in 70% of the cases, savings would increase up to 354 days.

The same methodology was applied to the cost savings. Money savings per single dispute were multiplied by the number of disputes in the EU annually resulting in savings around thirty to forty billion Euros, at a 50% success rate. Savings would of course be far greater if the settlement rate was higher than 50%.

It is important to note that almost no EU country has an official count of mediations; as a result the estimates provided by the Member State respondents (which were in actuality quite consistent) were averaged for each EU country with the results throughout the EU varying greatly from Member State to Member State. At the end of 2013, only four countries—Italy, United Kingdom, Netherlands and Denmark—reported more than 10,000 cases. The majority of the countries, thirteen, reported less than 500 cases per year. Only one country registered above 200,000 mediation cases per year, Italy. The Italian experience will be discussed in detail below.

In the second part of the study, respondents were asked to rank a number of pro-mediation regulatory features in their national legislations, on a scale from weak to strong. The premise of this inquiry was that where pro-mediation regulatory features existed in national legislation, there would be more mediations. Therefore, countries where mediations were fewer could simply strengthen those regulatory features common among countries with pro-mediation regulatory features resulting in more mediations for they, themselves, to see an increase in mediations. In the end, however, these features did not appear to be significant or decisive factors enhancing the use of mediation, even when implemented at their strongest setting. Even in countries where these features already existed in their strongest form, mediations were still very few. Consequently, increasing mediation quality requirements, for example, or strengthening confidentiality protection, were found not to have significant impact.
The study then asked respondents to indicate what they thought the single most effective legislative measure to increase the number of mediations would be. The majority of study respondents indicated that current legislative measures in place to promote mediation were not working. For example, the study showed that confidentiality protection does not appear to increase the number of mediations. In fact, the majority of respondents from all EU Member States, even those with less than 500 mediations per year, reported strong confidentiality protection in their countries. In addition, countries that implemented incentives for people to mediate also did not realize an increase in the number of mediations. In sum, the Study reveals that the regulatory features currently in place to promote mediation are not decisive factors in favoring mediation use.

However, in this same question, the Study data showed that the introduction of a mandatory system would be desirable and did correspond to a higher frequency of mediations taking place. Two-hundred and seventy respondents ranked mandatory mediation in certain cases as the most effective legislative measure with options such as economic sanctions and judicial referrals receiving around one hundred votes. Indeed, if one combines the score of mandatory mediation information sessions (212 votes) with mandatory mediation with an easy opt-out (85 votes), the total equals 297—almost three times the amount of votes received for the next most popular feature. The reason for combining the scores is that the two measures are very similar, in that they both force mandatory consideration of mediation, in certain cases as opposed to full mandatory mediation and which, together, demonstrates the highly desirable feature of mandatory elements in mediation.

The difference between the two options is that mandatory mediation information sessions are an opt-in type; that is, people need to first sit down with the mediator, or a mediation counselor, and then may decide, possibly, to start a formal mediation process. In the second model, the first meeting is already part of a formal mediation process. Nevertheless, either party can withdraw at the beginning of the procedure at little or no cost (opt-out). Only if all parties agree will mediation continue beyond that first meeting.

A classic example of the difference between opt-in and opt-out models in policy-making is the 2003 Study by Johnson and
Goldstein\textsuperscript{14} regarding organ donation programs (the “2003 Study”). The two researchers looked at the percentage of people willing to donate their organs in case of death, in various EU countries. The study examined the difference among eleven EU Member States, which at the time had opt-in or opt-out registration for participation in the Member State’s organ donation program as part of the driver permit registration process. The 2003 Study found the key difference was the way the choice for organ donation participation was presented. The 2003 Study found that where the application process included the requirement to mark a box to “opt-in” to donate, participation rates varied from 4.25% to 27.5%. In contrast, in Member States where the application process included the requirement to mark a box to “opt-out” of donating, donation participation rates were very near 100%, with the exception of one country for which the participation rate was 85%. The policy implication of the Johnson and Goldstein study is pretty compelling, opt-out saves many more lives than opt-in; the difference shows the power, and very disparate outcomes, that can result between opt-in systems and opt-out systems.

Of these different mandatory elements, a system of mandatory mediation mitigated by the opt-out provision appears most desirable from the Rebooting Study. In addition to the Johnson and Goldstein findings that demonstrate a high participation rate in opt-out participant models, countries that have implemented opt-in systems still report very low numbers of mediation. For example, Romania until recently had required parties to attend a mandatory information session where they could then opt-in to mediation, yet Romanian respondents reported less than 2000 mediations per year.

Finally, in the fourth part of the Rebooting Study, on a scale from 1 to 5, respondents were asked to rank the likely impact, in terms of increasing the number of mediations, of a certain number of non-legislative measures. These included measures such as increasing or improving mediation advocacy education, implementing pilot projects, and an EU wide system of mediator certification. The majority of the 1226 study respondents indicated that the impact of non-legislative measures would be far less than that of legislative ones.

Due to the documented failure of other regulatory models in the EU, and the far better performance of the Italian one, the

study concluded that the European Union should do two things to increase the use of mediation. First, mandatory mediation with a readily available ability to opt-out should be introduced in the Mediation Directive (which is scheduled for revision in 2016) and in other EU legal instruments on ADR (in force and being proposed), albeit on a temporary basis, as a trial.

Alternatively, the Study proposes that the EU affirm the existing theory of the BRTN. The advantage of this approach is that it does not require changing any legislation. Based on the very low number of mediations taking place in Europe, it can be concluded that almost all Member States have a statutory obligation under existing EU law to increase that number. Each Member State, using any pro-mediation policy of its choice, will have to determine a clear target number representing a minimum percentage of mediations to take place each year in order to reach the BRTN called for in Article 1 of the Mediation Directive.

B. The Italian Experience—An On/Off Switch

In Italy, before 2011, and despite pro-mediation legislation that had started in 1993, there were virtually no commercial mediations (either mandatory or voluntary). Things changed drastically in 2011, when a government decree made mediation a condition precedent to trial in certain cases such as banking and insurance contracts, real estate, medical malpractice and a few others. With the decree, several hundred thousand mediations were started on an annual basis, 20% of which were voluntary cases.

In late 2012, the rate of mediations declined drastically from 200,000 to maybe 2000 per year when the Constitutional Court ruled that a parliamentary statute was needed—not a governmental decree—to require litigants to try mediation before going to court. The constitutionality per se of mandatory mediation was thus not addressed by the decision which left the matter in the hands of the legislator.

As the number of mediations dropped drastically, including almost all of the voluntary mediations, in September 2013, Italy reintroduced the mandatory requirement. This time by an Act of

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15 Legge 29 dicembre 1993, n. 580 (It.).
16 Corte Cost., 24 ottobre 2012, n. 272 (It.).
17 Decreto Legislativo 4 marzo 2010, n. 28 (It.).
Parliament, with another notable change, Italy removed the obligation to go through, and pay, for a full mediation process in the abovementioned categories of cases.\(^\text{18}\) Under the new law, parties must participate at the first meeting with the mediator, if not they can both face certain sanctions.\(^\text{19}\) However, at the first meeting, anybody can decide to stop mediation immediately, by paying only a nominal fee (approximately from 50 to 100 US dollars).\(^\text{20}\) Under this system, as noted above, Italy is experiencing upwards of 150,000 mediations a year.\(^\text{21}\)

In effect, the Italian experience provides a concrete example for the proposition that introducing mandatory elements, more specifically mandatory mediation with the ability for parties to opt-out will likely increase the number of mediations in a Member State. Experience has also shown that the incidence of voluntary mediation is benefitted by the introduction of mandatory mediation when provided in one regulatory framework. In Italy for example, when mandatory mediation was introduced, the number of mediations including voluntary mediations increased, providing evidence that mandatory mediation elements can also have positive effects on the incidence of voluntary mediations. The experience in Italy is direct evidence of a correlation between elements of mandatory mediation being introduced and a rise in the incidence of all mediations.

It is also important to note that the Italian mechanism has been lauded as a model to follow. Following the presentation of the Rebooting Study before the European Parliament, the former Vice-President of the European Parliament and Rapporteur for the Mediation Directive, Arlene McCarthy, wrote a public letter to the then Minister of Justice of Italy, indicating that the opt-out Italian mediation model was “an example the entire EU should learn from.”\(^\text{22}\)

\(^{18}\) Id. at art. 5

\(^{19}\) Id.

\(^{20}\) Id.


\(^{22}\) Letter from Arlene McCarthy, Member of the European Parliament, to Anna Maria Cancellieri, Minister of Justice of the Republic of Italy (Jan. 13, 2014), available at http://www.giustizia.it/giustizia/protected/980005/0/def/ref/NOL979449.
III. CHALLENGES TO THE 2013 REBOOTING STUDY

Since the Rebooting Study was presented to the Legal Affairs Committee of the EU in January 2014 it has been widely circulated and widely read. Generally, the Study and its findings have been well received; however, there have also been several critiques of the findings and conclusions of the Study. Key critiques included the assertions that mandatory mediation improperly “forces” a voluntary process to take place and that litigants who have paid for court services should have unrestricted access to those services. Still another critique questioned whether mandatory mediation would generate improved satisfaction for the parties who wanted to litigate. A final critique raised the question of whether the results were biased, suggesting that survey respondents may have been mediators providing self-serving responses to require mandatory mediation. These critiques will be briefly addressed in the following pages.

A. Challenge 1—Survey Bias

This challenge suggests that the study methodology is flawed and that the study was biased alleging that the majority of study respondents were mediators whose responses were obvious and self-interested. This critique is difficult to analyze because the questionnaire underlying the Rebooting Study did not include a request to identify whether the respondents were mediators or derived their principal income from mediation.

However, this challenge misconstrues not only the methodology used but also the conclusions drawn from the results. An entire chapter is devoted to the study methodology and it thoroughly explains the methodology and the reasoning behind the chosen methodology. In a nutshell, critics say that if you ask the community of cows about whether humans should eat more chicken, the answer would be a unanimous yes. Asking an audience presumably composed of mostly mediation supporters would of course make mandatory mediation appear as the number one solution.

First of all, it would be nice to think that human beings are a little more nuanced than cows. However, even if they were not, the questionnaire was designed to also take into account the downside of different legislative and non-legislative measures. In fact, respondents were asked to assess the drawback of whatever mea-
sures they would recommend, and especially any degree of compulsion in mediation. Second, the Rebooting Study does not recommend mandatory mediation, but only mandatory consideration of mediation, and even then to actually introduce it only as an experiment for the first few years. Thus, it is not necessarily self-serving the mediation community.

Third, as it is a mistake to think that the recommendation of mandatory elements of mediation are based only on 300 or so favorable responses, it would be equally wrong to base this recommendation on responses if the number received were doubled or tripled. Rather, the number that is important is the number of mediations taking place, and also not taking place, depending on the regulatory framework—that is where the recommendation comes from. As discussed above, countries with mandatory elements in place have more mediations taking place, thus in order to increase the incidence of mediations this was recommended as the solution.

B. Challenge 2—Failure to Examine Litigant Satisfaction Levels After Mandatory Mediation

This critique states that the number of settlements alone does not count and raises the question of user satisfaction. However, this issue is superfluous, as user satisfaction is not the aim of the Mediation Directive nor does there seem to be an impact into the rate of user satisfaction. A well-known Australian study compares mandatory and voluntary mediation programs, showing not only similar settlement rates, but also satisfaction rates:

The most consistent finding of research into mediation is high client satisfaction. Research on mediation, regardless of the type of mediation or the program, has found that most disputes which are referred will go to mediation and will settle before, during or shortly after mediation. Outcomes, including rate of settlement and degree of satisfaction, do not appear to vary much, whether participation is voluntary or compelled.23

C. Challenge 3—Mandatory Mediation is an Oxymoron

This challenge argues that mandatory mediation is in fact an oxymoron. By its own nature, mediation is a voluntary process.

23 Kathy Mack, Court Referral to ADR: Criteria and Research 2 (2003).
The challenge implies that it is not conceptually possible to force a voluntary process to take place. However, this distinction is much more subtle; as discussed above, compulsion to come to mediation is very different from compulsion in mediation. While critics are correct in pointing out that nobody can force people to mediate (something the Study does not advocate for), they fail to consider that people can be forced to at least consider mediation. The concept of mandatory elements in mediation refers only to educating litigants about the benefits and possibilities of mediation either through holding an information meeting or by placing the parties before an actual mediator. That is, the mandatory elements are either “opt-in” or “opt-out.”

On closer inspection, from a policy point of view the true oxymoron, based on empirical evidence from all over the world is voluntary mediation. There is simply no country where there is a significant number of mediations, where there are no mandatory elements in getting parties to experience mediation. This is important in light of the fact that the Rebooting Study has identified this as the single most effective method of increasing mediations in Member States.

D. Challenge 4—Litigants Have Paid for their Day in Court

This next challenge suggesting that it is not fair to deprive parties who have paid for their day in court is misleading. Indeed, according to the data provided annually by the Council of Europe, a public international organization based in Strasbourg, France, the average contribution by EU litigants to the overall costs of the civil justice systems is about 30%.24 That is, the difference between what a State spends to offer the civil justice system, using the general taxation, and what litigants contribute by paying court fees. In certain countries this number is as low as 10%.25 Would those who are unsatisfied with current administration of civil justice, increase their court fees so as to pay in full for the civil justice service, or try something different first. Moreover, regardless of what the litigants think, the non-litigants who pay 70% of the litigation tab, have the right to ask those litigants who only pay 30% to at least

25 Id.
try mediation first. Even assuming a shared overhead for cases that cannot be mediated, these figures actually provide a strong argument for increasing the use of mediation.

E. Challenge 5—Mandatory Mediation is Not the Solution to Waking Up Sleeping Beauty

This critique suggests that the many attributes of mediation should be marketed in the proper manner to the general public, which will then spontaneously embrace it thus waking Sleeping Beauty. This challenge, in effect, blames the lack of mediation culture for the low numbers of mediations in the EU. As elaborated above, it is naïve to keep on blaming the lack of an established mediation culture for the limited use of mediation. To use the seat belt or helmet law example again, a “culture of safe driving” alone won’t do it. This same analogy applies directly to introducing mandatory elements to mediation. An established mediation culture alone will not compel parties to resort to mediation, more is necessary and the results of the Study definitively show that people want more.

IV. Mediation as a Sleeping Beauty

Over the past few decades many people in the field of ADR, particularly mediation, have become jaded by their version of mediation—a version that is increasingly being referred to as a Sleeping Beauty. Actually, in light of many decades of stagnation, and despite the generous injection of enthusiasm and repeated efforts to revive her, the consensus seems to be that mediation in its current state is, unfortunately, more than just asleep. The Rebooting Study concluded that a certain degree of mandatoriness is the necessary ingredient in the magic remedy for Sleeping Beauty.

The counter argument to mandatory mediation is summarized nicely in the following saying, you can lead a horse to water, but you cannot make it drink. In other words, you can force people to sit down at the mediation table, but not force them reach an agreement. Many people find this old adage very compelling and it is—however it should be qualified when talking about mediation policy in general, instead of an individual mediation. First, compulsion to come to mediation is not compulsion in mediation; it is merely an
obligation to try. Second, mediation policy is not, and should not be, about the single litigant, but about all litigants, or at least the majority of them. Hence, when discussing policy, the saying should go as follows: “lead millions of horses (i.e. all of your civil and commercial disputes or categories of them) to the river, calculate the benefits resulting from those that drink and the losses from those that did not.” This should at least be tried for a period of time, even on an experimental basis.

Certainly, it is also necessary to make sure that the water the horses are drinking is good water, and not something else, but that is about mediation quality, and mediation quality, especially in mass-markets is another story altogether.

Just like any other good policy, good dispute resolution policy is about encouraging and rewarding good behaviors. Sometimes it is necessary for this to happen by law, at least in the initial phases; history shows us that human beings often resist change, even when they know it is good for them. People did not simply stop smoking in public places when they knew smoking would not only damage their health, but also that of others. And what about using seat belts in the car, or helmets on a motorcycle? What would happen to the majority of human beings if those rules were cancelled? Since they reflect behaviors that are individually and societally beneficial, will these behaviors be followed spontaneously? The answer is probably not.

When faced with a lawsuit, people demonstrate similar resistance to beneficial change: in particular, the notorious two “F’s”—fight or flight—come into play. When suing, or being sued, the immediate, natural instinct is not to mediate, despite repeated demonstrations that overall mediation remains the most effective way of dealing with lawsuits. People know that wearing a seat belt or helmet is good for them and for society, still there are laws compelling that behavior. In this case mediation culture alone will not be sufficient either.

Jay Folberg and Joshua Rosenberg, in an article published over twenty years ago further elaborate on this and apply it directly to ADR. They suggested that inertia is indeed a key factor in determining the choice of dispute resolution options.26 The article found that in an experimental US federal court program, over 80% of the attorneys whose cases were required to use ADR said they would select a form of ADR for use in other cases if it were availa-

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SLEEPING? COMATOSE?

ble, but no attorney whose case was not assigned to ADR requested to participate on their own.27 Although attorneys could request to have their cases removed from the ADR track, very few opted out. The authors concluded that:

[This indicates that litigants and their attorneys often followed the path of least resistance, simply staying on the [ADR] track into which they were initially slotted regardless of their judgments about the suitability of that track for their case. What may appear to be complete freedom of choice to participate in alternative dispute resolution may actually result in no real choices being made at all.28

Most importantly, if people really did not want to resort to mediation, why is mediation then so successful? Why would one out of two cases settle, as is the situation in Italy? Or why, in the US, would otherwise similar foreclosure mediations programs register a 25% mediation rate, when the system is “opt-in”, and over 70% when it is opt-out? Part of the success of mandatory mediation elements can be attributed to the fact that people often take the path of least resistance. Reaffirming what Folberg and Rosenberg stated, is easier to stay on the mediation/ADR path and settle instead of opting-out.29

It is also interesting to note several recent trends in mediation all advocating similar models to the one advocated in the Rebooting Study. These trends all involve different mandatory elements, thus further emphasizing that voluntariness and a mediation culture alone is not enough.

In the United Kingdom, as of April 2014, parties in almost all family disputes are required to attend a Mediation Information Assessment Meeting (“MIAMs”) before they can file an application to the court.30 The Minister of State for Justice, Lord Faulks has also recently said that “The Ministry of Justice is also willing to reconsider compulsory mediation information and assessment meetings—or MIAMs—in civil claims.”31 In Greece, a bill has recently been introduced requiring litigants to attend mediation before trial—a full mandatory system, and at the EU level, a revisi-

27 Id.
28 Id.
29 See id.
V. PRINCE CHARMING

It is now commonly agreed by mediators that something is necessary to “wake” mediation up from its dormant state. The Rebooting Study ultimately concluded that unless the law introduces “elements of mandatory mediation”, mediation would not ever be revitalized, at least in the EU. Voluntariness, therefore, is the false Prince Charming as far as dispute resolution policy is concerned, as litigants are not enchanted by the vision of mediation, and mediation must be woken up by other, real-world means.

First, nothing short of mandatory elements has worked, at least in the EU, in terms of increasing mediations. Second, where mandatory elements are there, people hardly think of going back. Third, the trend, as discussed above, seems clearly to be headed in that direction, legislation-wise, in Europe and elsewhere.

In short, mediation is a beauty (at least, as compared to its alternative), and she is in a coma. There is presumably more than one wicked witch. People, who are often, blinded by the philosophically and scientifically mistaken view of voluntariness, are waiting for the wrong Prince to come and wake her up. Smart forms of mandatory mediation—a more flexible approach than most recognize—increase the number of mediations. Rejecting that reality, and wishing that a more idealistic approach would work, is the fairy-tale, idealistic vision that has kept us in the situation we confront today for too long. It has been shown time and again that the only real Prince Charming capable of waking Sleeping Beauty is mandatory consideration of mediation.

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