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Civil Process and Mediation in Italy, 2024

—Ius Dicere et Litem Componere, Italiae Usus

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Abstract

The rule of law is extremely important and the role and activities of the courts are absolutely relevant. But enforcing the law proves one right, another wrong, and does not solve the conflict. And in a society where, due to lifestyles and work, family and social ties have become weaker and social relationships are increasingly conditioned by technological aspects, the judicial process, which is supposed to solve problems, has become a problem itself (too complicated and too long). In Italy, at the end of 2009, there were 5,826,440 pending cases in civil courts, the highest number ever reached. In 2010 the compulsory civil and commercial mediation was implemented in the contemporary legal system; contemporary, because mediation belongs to the Italian legal tradition. Fierce opposition by lawyers, benign neglect by judges. Over a period of about ten years mediation has grown, but not enough. And, above all, usually the parties are not present in the mediation meetings, but they are represented by their lawyers. This greatly undermines the effectiveness of the procedure. In 2021/2023 the Riforma Cartabia has introduced relevant new rules in the civil proceedings and in ADR. Will they be sufficient to reduce the backlog and, more relevant, the length of trials? How will the new civil trial rules and mediation procedures interact with each other? Risk: the lawyerization of mediation. How to avoid it? Through highly qualified training.

Keywords

ADR, Mediation, Mandatory Mediation, Court Civil Procedures, Cartabia Reform, Italy

1. Introduction

December 31, 2009, 5,826,440 pending cases in Italian civil courts, the highest

number ever reached[1]. Compulsory civil and commercial mediation was ruled in 2010 and came in force in 2011. Strong opposition by lawyers and benign neglect from judges. Two main criticisms:

- "*mediation is not justice*"! true, justice is *jus dicere* (enforcing the law, proves one right, another wrong, but does not solve the conflict), mediation is *litem componere* (settles the dispute);
- "*mediation does not belong to the Italian legal tradition*"; wrong, history teaches just the opposite! (Matteucci, 2020; Swanson, 2017; Matteucci, 2023a).

2. A Bit of History

VII century B.C.—Απαγορεύεται η έναρξη δικαστικής διαμάχης μεταξύ δύο προσώπων, εάν δεν έχει προηγηθεί προσπάθεια συμβιβασμού

"*It is forbidden to start a judgment between two if conciliation has not been attempted before*". In other words, mandatory mediation.

This was one of the rules in the first collection of written laws in the Western world, due to Zaleuco from Locri Epizefiri, in the south of Italy, along the Ionian Sea, at that time a colony of Greece.

V century B.C. Republic of Rome (the origin of the later Roman Empire). XII tables rules. There is a hint to conciliation: "*Rem ubi pacunt, orato. Ni pacunt, in comitio aut in foro ante meridiem caussam coiciunto*" "*If the parties agree, the judge shall issue the sentence. If the parties do not agree, they shall set forth the main aspects of the matter in the forum or courtroom before noon*".

Almost in the same period, VI-V century B.C. China, The Analects of Confucius 論語 [12: 13] *The Master said*: "*In hearing lawsuits, I am no better than anyone else. What we need is to have no lawsuits*"[2].

In the Roman Empire for some centuries there were the "*Defensores civiatum*", local, paternal magistracy, with limited civil and penal jurisdiction, the forerunners of the modern conciliators.

A not insignificant role in the settlement of disputes, outside the trial, was payed by the "*jus mercatorum*", (merchants' law), which took shape in territories of the Italian independent municipalities of the late Middle Age (XII/XIII century A.C.) and then, following the merchants, spread to many European countries. This legislation provided, in the case of non-compliance with covenants and insolvency, the "*bancum ruptum*" (bankruptcy), and very heavy economic, as well personal, penalties. Then, in several cities, more and more began to be granted the "*fida*", self-conduct: the failed fugitive or banished people

[1]The problem of the low efficiency of justice in Italy goes back many decades. According to Giovanni Giolitti, one of the most important figures in Italian political history, who was elected prime minister many times in the first decade of the twentieth century: "*In Italy…justice…is slow, very expensive, and does not provide sufficient guarantees*"—**1899**.

[2]The Analects of Confucius 論語, translated by A. Charles Muller. http://www.acmuller.net/con-dao/analects.html.

could re-renter the city, without being thrown into prison, for a limited period, in order to reach an agreement with his creditors.

In the XIV/XV centuries A.C. the Republic of Venice was one of the main mercantile and financial centers of the Mediterranean sea. It paid close attention to the settlement of commercial trades. If the merchants, in disagreement among them, did not reach an agreement, the *Sopraconsoli* (judges) were to ensure that "*toto suo posse de ponendo ipsum -debtor- in concordio cum suis creditoribus*"—the judges must do every effort that an agreement could be reached (judicial mediation?).

The basis of western law was laid in ancient Rome**.** Anyway, already in the XVI century A.C., in Italy, Francesco Guicciardini, a relevant philosopher and politician in Florence, complained about the administration of justice by the courts (Guicciardini, 2015: pp. 1528-1530)[3].

The dislike of lawsuits by the Chinese population was alive in the XVI/XVII centuries A.C. Emperor Kangxi (1662/1722) is credited with the following statement: "*Judicial disputes would incur in ordinate multiplication if the people were not afraid of the courts and trusted into find swift and perfect justice in them*"[4].

A Chinese proverb well summarizes the concept: "*Better to starve that to become a thief; better to be tortured to death than to sue*".

Also in England "*Suffer any wrong that can be done you rather than come*

[3]Guicciardini, *Ricordi*, 1528-1530: 209

"*Io credo che siano un male minore le sentenze dei turchi i quali decidono presto e quasi a caso, rispetto al modo di giudicare usato comunemente fra i cristiani; infatti la lunghezza di queste cause comporta tante di quelle spese e tante di quelle noie per il litiganti, che avrebbero minor danno da una sentenza data rapidamente il primo giorno. Si consideri che se noi supponiamo le sentenze dei turchi date tirando a sorte, ciò vuol dire che la metà sono azzeccate; io invece penso che da noi, o per ignoranza o per malafede dei giudici, la maggioranza delle sentenze sia sbagliata*".

(Version in modern language by Edoardo Mori, 2015)

http://www.mori.bz.it/Guicciardini%20-%20Ricordi.pdf.

"*I believe that the judgments of the Turks, which are disposed of quickly and almost at random, are not as bad as the manner of the judgments that are commonly used among Christians, because the length of these judgements matters so much, both for the expenses and for the disturbances that are given to the litigants, that it does not harm, perhaps, that the judgment should be issued in the first day of the trial. If we assume that the judgments of the Turks are given in the dark, it follows that half of them are fair, but they are unfair not less than those given among us, either through the ignorance or the malice of the judges*"—translation is mine.

[4]Emperor Kangxi—"*Judicial disputes would incur a tendency to multiply immeasurably if the people were not afraid of the courts and trusted to find in them swift and perfect justice. Man would be led to have illusions about what is good for him, and in this way the contentions would have no end, to the point that half of the men in our empire would not be enough to settle the disputes of the other half*".

"*Therefore I desire that those who go to the courts be treated without compassion and in such a way that they feel dislike for the law and tremble at the thought of appearing before e judge. In this way evil will be cut off at the roots*".

"*Good citizens, who have disputes among themselves, will settle them as brothers, resorting to arbitration by an old man or the village chief. As for turbulent, obstinate and quarrelsome, let them ruin themselves in the courts; this is the justice they deserve*".

here, to the Court of Chancery!", This was the Charles Dickens' conclusion in the novel Bleak House, published in 1852-1853 (Dickens, 1852-1853)[5].

USA—1906, Roscoe Pound's (dean of the University of Nebraska College of Law) report entitled "*The causes of popular Dissatisfaction with the Administration of Justice*", read at an American Bar Association conference.

Dispute resolution outside the courts was quite widespread in Europe. In the XVIII century in Netherlands it was mandatory for citizens to go before conciliators, without the assistance of lawyers, before going to ordinary courts. This had been pointed out by Voltaire in a 1745 letter (Scamuzzi, 1886)[6].

That seems to have been well known to the members of the Constituent Assembly, born out of the French revolution. These, wishing to affect a radical change in the judicial system, adopted the idea of a "paternal" judiciary, which could adjudicate small claims disputes without formality. And also seek to maintain peace and concord by preventing litigation. Thus in 1790, justices of peace were established, the figure of which was brough to Italy by the Napoleonic army and, over the years, proved itself especially in the Kingdom of the Two Sicilies (in the south of Italy).

All of this does not mean that the rule of law and the role of courts are not relevant.

Absolutely the contrary: the rule of law and tribunal activity are extremely

[5]The "Jarndyce v Jarndyce" dispute involves a large inheritance with multiple wills and trusts and multiple beneficiaries. The case drags for many generations, so in the end, when it appears that the true hairs have been identified, legal fees have eaten up the entire estate.
https://en.wikipedia.org/wiki/Bleak_House.

[6]Voltaire—"*La meilleure loi, le plus excellent usage, le plus utile que j'aie jamais vu, c'est en Hollande*".

"*Quand deu hommes veulent plaider l'un contre l'autre, il sont obligés d'aller d'abord au tribuna de juges conciliateurs, appelés faiseur de paix*".

"*Si le parties arrivent avec un avocat et un procureur, on fait d'abord retirer ces derniers, comme on ete le bois d'un feu qu'on veut eteindre*".

"*Les faiseur de paix disent aux parties: vous etes des grand foux de voulir manger votre argent à vous render mutuellement malheurux; nous allons vous accomoder sans qu'il vous en coute rien. Si la rage de la chicane est trop forte dans ces plideurs, on les remet à un autre jour, afin que le temps adoucisse les symptomes de leur maladie; ensuite les juges les envoient chercher une seconde, une troisième fois: si leur folie est incurable, on leur permet de plider, comme on abandonne à l'amputaton des chirugrgiens des membres gangrenés; laor la justice fait sa main*"; in Scamuzzi, "*Conciliatore—Conciliazione giudiziaria*", Digesto Italiano, 1886, page 50.

"*The best law, the most excellence practice, the most useful I have ever seen is in Holland. When two men want to plead against each other, they are obliged to first go to the court of conciliation judges, called peacemakers*".

"*If the parties arrive with a lawyer and a prosecutor, the latter are first removed, just as wood is removed form a fire that has to be extinguished*".

"*The peacemakers say to the parties: 'You are mad to want to eat your money and make each another unhappy; we're going to accomodate you without costing you anything. If the rage of quarreling is too strong in these pliders, they are postponed t another day, so that time can soften the symptoms of their illness; then the judges send for them a second or third time: if their madness is uncurable, they are allowed to plide, just as gangerous limbs are left to be amputated by surgeons; the justice does its work*"—Translation is mine.

important ("*There are still judges in Berlin*"!)[7].

However, it is appropriate for there to be an integrated system of controversy solution (Sander, 1976)[8], and this is what was decided to be done in Italy in 1865.

The newly established kingdom of Italy (1861) credited conciliation with no small relevance. In the first code of civil procedure, enacted in 1865, the preliminary title was called "*Della concliliazione e del compromesso*" ("*Conciliation and consent*") and its seven articles provided an absolutely up-to-date regulations (the enforceability of the conciliation minutes was also provided for). Royal Decree n. 2626 of 1865 established the conciliation judges, with two functions, Jurisdictional and conciliatory, the one, however, prevailing over the other. In 1880, 70% of the judgements issued in Italy came from conciliatory judges.

In the 1922/1945 period, fascism in power had centralized in the state as much as possible of the public functions, from the fire brigades to the Red Cross, as well as the management of the disputes. This was to be carried out only by the state judges, not by private mediators.

As a consequence, the ultra-decade-long-training of new recruits of legal practitioners. Since the '30s of the last century mediation has not been taught in the Italian universities. Therefore, mediation belongs to the Italian legal tradition, but we forgot it.

December 31, 2009, 5,826,440 pending cases in Italian civil courts, the highest number ever reached. Compulsory civil and commercial mediation was ruled in 2010 (in force from 2011)[9] for disputes related to: condominiums, rights in rem,

[7]As recorded by historian Franz Theodor Kugler in 1856, the legend goes that Frederick the Great was being disturbed by the clatter of the mill sails and offered to buy the mill from its miller, Johann William Grävenitz.

When he refused, the king is supposed to have threatened: "*Does he not know that I can take the mill away from him by virtue of my royal power without paying one groschen for it*?"

Whereupon the miller is supposed to have replied: "*Of course, your majesty, your majesty could easily do that, if—begging your pardon—it were not for the Supreme Court in Berlin.*"

https://en.wikipedia.org/wiki/Historic_Mill_of_Sanssouci.

[8]The multidoor courthouse by Sander, "*Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*", 1976.

Levin & Wheeler (1979) (eds.), West Publishing Co., St Paul Minnesota.

Cartabia, former Italian Minister of justice: —ADR, "*far from alternatives, these forms of legal dispute resolution play a role that is rather one of complementarity to jurisdiction, of coexistence, …*"—Report to Parlamentary justice committees, 2021.

[9]Law 69/2009—Legge 18 giugno 2009, n. 69—Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in materia di processo civile. (09G0069)

Note: Entrata in vigore del provvedimento: 4/7/2009 (GU n.140 del 19-06-2009—Suppl. Ordinario n. 95)

Legislative Decree—Legislative Decree 28/2010—Decreto Legislativo 4 marzo 2010, n. 28—Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali. (10G0050)

Note: Entrata in vigore del provvedimento: 20/03/2010 (GU n.53 del 05-03-2010)

Ministerial Decree 180/2020—Decreto 18 ottobre 2010, n. 180—Regolamento recante la determinazione dei criteri e delle modalità di iscrizione e tenuta del registro degli organismi di mediazione e dell'elenco dei formatori per la mediazione, nonché l'approvazione delle indennità spettanti agli organismi, ai sensi dell'articolo 16 del decreto legislativo 4 marzo 2010, n. 28. (10G0203) (GU Serie Generale n.258 del 04-11-2010).

division, hereditary succession, family pacts, leases, comodato, business leases, compensation for damages from medical and healthcare liability, compensation for damages from defamation in the press or other advertising media, insurance, banking and financial contracts. Such disputes amounted to approximate the 8.5% of the Italian civil judicial disputes.

The judge could order mediation in disputes concerning ALL available rights.

The mediation agreement, omologated by the president of the court, was enforceable.

To become a mediator, the law prescribed an initial course of 50 hours (too few).

Strong opposition by lawyers (a matter of culture and ADR regarded as Alarming Drops in Revenues) and benign neglect from judges (a matter of culture: mediation as a child of a lesser God!).

2012, according to the Constitutional Court the D.L. 28/2010 was affected by over delegation. No more compulsory mediation, only *iussu iudicis* mandatory mediation remained in force. There was an increase in the use of the voluntary one.

D.L. 69/2023[10]: mandatory mediation back again, compulsory legal assistance to the parties in the mediation proceeding and lawyers mediators *ope legis* (15 hours training required)!!! At the beginning of the mediation procedure, an initial information meeting was scheduled, after which the parties, assisted by lawyers, could decide whether to abandon or start (**OPT-OUT)** the procedure, no longer compulsory but voluntary. The mediation agreement, signed by the parties and the lawyers, was in itself enforceable. According to the new Article 185-bis, of the Civil Procedure Code, the judge could make a conciliatory proposal, if not accepted he could order a referral to a mediation proceeding (arb-then-med).

Step by step mediation continued on its way, with a major change: gradually judges realized the importance of mediation and lawyers, very slowly, began to follow.

In the 2011/2022 period there had been:

- a decrease (−5% per annum) in the number of procedures activated in civil courts, due to the economic crisis and the Covid pandemic;
- a strong increase (+14% per year) in civil and commercial mediation procedures;
- a sharp increase (+12% per year) of agreements reached in mediation.

And, according to the European Union, in 2016 Italy used mediation at a rate

[10]Law Decree—Decreto Legge 21 giugno 2013, n. 69, Disposizioni urgenti per il rilancio dell'economia. (13G00116)

(GU Serie Generale n.144 del 21-06-2013—Suppl. Ordinario n. 50)

Note: Entrata in vigore del provvedimento: 22/6/2013.

(GU Serie Generale n.144 del 21-06-2013—Suppl. Ordinario n. 50)

Law—Legge 9 agosto 2013, n. 98, Conversione in legge, con modificazioni, del decreto-legge 21 giugno 2013, n. 69, recante disposizioni urgenti per il rilancio dell'economia. (13G00140)

Note: Entrata in vigore del provvedimento: 21/08/2013.

(GU Serie Generale n.194 del 20-08-2013—Suppl. Ordinario n. 63)

six times higher than the rest of Europe (Parliament, 2017).

BUT in 2022:

- the success rate (agreements/mediations activated) was 15%;
- the ratio agreements/new court proceedings 0.9%.

Too little. However the matters subject to compulsory mediation in the period 2011/2022 amounted to only 8.5 per cent of the disputes subject to civil court proceedings. With the Cartabia Reform (2021/2023) this percentage will rise to 20/25%.

- Nevertheless. In mediation procedures, where all parties were present up and decided to go beyond the first meeting, the success rate was 47% (Matteucci, 2023b).
- Why is it so difficult in Italy to get parties to join a mediation procedure?

3. Court Civil Proceeding and ADR Reform in Italy

Why is it so difficult in Italy to get parties to be present in a mediation proceeding?

Two main reasons:

- the lack of training at university level (as mentioned above) and an initial training of mediators of only 50 hours.
- a cultural background: in Italy there was no the bourgeois nor the industrial revolution, but only the self-named "fascist revolution", which was nothing else but the maintenance of the *status quo ante*. Therefore, Italians are not particularly fond of novelty.

Moreover, according to Giuseppe Prezzolini, a journalist, in his book *Codice della Vita Italiana* (Code of the Italian Life) "*It is not true…that there is no justice in Italy. Instead, it is true that one should not ask the judge for justice, but rather the influential deputy, minister, journalist, lawyer, etc. You can find it: the address is wrong*", edited in **1921**, one century ago!

In the same year, Piero Calamandrei, one of Italy's leading jurists of the twentieth century, wrote in a book titled *Troppi avvocati* (*Too many lawyers*), published by *La Voce*: "*In Italy today the number of legal professionals surpasses by far the existing social needs; this pathological elephantiasis affecting the Bar entails, as its natural consequence, unemployment and economic hardship for the vast majority of professionals, followed by the gradual intellectual and moral degradation of the profession. Public opinion, even without exactly understanding the causes of this degradation, is aware of it and judges it severely*" (page 38).

"*It is important to keep in mind that the liberalization of the legal profession… presents a serious danger*, i.e. *the possibility that the regime of beneficial competition among freelance professionals morphs into a desperate struggle for existence when, as the number of legal counsels becomes increasingly disproportionate to the number of lawsuits, normal professional work starts running short*" (page 35)—**1921.** And the number of lawyers has increased a lot after War World II, with implications on the number of cases filed in courts

(Carmignani and Giacomelli, 2010).

And Italy, "*The country, where everything ends in court*".—"*From neighbour disputes to civil rights and schools. Controversies, sluggish politicians, quibbles. Why we delegate our daily lives to judges, while we continually contest that justice does not work. … Barking dogs, hanging laundry, snacks, school failures. Inefficacies, however, that draw a picture in which, having disappeared the organs of 'mediation', the parties, associations, trade unions, committees, cultural centers, leave the individual citizen with the only 'mediation' called upon to decide today: justice*" (Pierluigi Battista, "*Il Paese dove tutto finisce in tribunale*", Il Corriere della Sera, 29.03.2017)[11].

From 2009 to 2021 the backlog of civil cases in the courts had decreased, but not by a sufficient amount, while the duration of cases in courts was still too long. Therefore between 2021 and 2023 a sweeping reform of the civil process and ADR (mediation, arbitration and assisted negotiation) was implemented, rubricated under the name of the Cartabia Reform (named after the minister of justice in charge).

As far as civil process is concerned, according to the Italian Government, 2022, "*the reform focuses mainly on reducing the time of civil proceedings, identifying a wide range of interventions aimed at reducing the number of cases in judicial offices, simplifying existing procedures, reducing the backlog and increasing the productivity of the offices themselves. To contain the explosion of litigation in the judicial offices, the use of alternative instruments for the resolution of disputes, primarily arbitration and mediation, is accentuated, and the current system for quantifying and recovering judicial costs is under review*"[12].

The relevant changes of proceedings of first instance are among the most important one and, may be, the most relevant in connection with mediation (D'Elia & Spinelli Ressi, 2024).

Freshfields Bruckaus Deringer LLP: "*The first hearing and the activities preceding it will become more important during first instance proceedings. The goal is to encourage an immediate discussion between the parties and to avoid that at the hearing the judge merely sets the time limits for written pleadings, as it frequently happens at present. To this end, according to the new bill*:

- *the plaintiff will be entitled—before the first hearing—to put forward new claims and objections and to summon third parties if this is a consequence of the defendant's counterclaims or objections. Analogous powers will be granted to the defendant*;
- *the parties will appear in person at the hearing with a view to try and settle the dispute before the judge and the failure to appear in person might be taken into account by the judge against the absent party*;

[11]Matteucci (2022), *Italy, "The country, where everything ends in court". New rules on mediation, October* 2022. https://www.linkedin.com/pulse/italy-country-where-everything-ends-court-new-rules-2022-matteucci/?trackingId=mr7l7Rt4Suqm5jlOfcnrsw%3D%3D.

[12]https://italiadomani.gov.it/en/Interventi/riforme/riforme-orizzontali/riforma-della-giustizia.html, 2022.

"*the judge will decide on the requests for evidence at the first hearing, and then schedule the hearing for the taking of evidence within the following* 90 *days*" (Freshfields Bruckaus Deringer LLP, 2022; Gilardi, 2023).

Tight timeframes and many procedural tasks to be completed before and during the first hearing.

Also, according to the government, another essential element for growing the use of mediation is the attention to the relationship between magistrates and ADR. "*It is time to rethink the relationship between trial before the judge, and mediation tools, including giving the judge the opportunity to encourage the parties towards conciliatory solutions, especially through the provision of reward measures*"[13]. And this is a focal point, which I will return to a bit later.

Between 2021 and 2022, the rules, called "Cartabia Reform", named after the minister in charge, were enacted. With regards to civil and commercial mediation.

- Legge—Law 26.11.2021, n. 206 (delega—delegating law)[14],
- D.Lgs.—Legislative Dcree 10.10.2022, n. 149 (attuazione—implementing decree)[15],
- D.M.—Ministerial Decree 09.06.2023 (giustizia riparativa—criminal mediation)[16]
- D.M. 01.08.2023 (23A04556) (gratuito patrocinio—free legal aid)[17],

[13]Cartabia, former Italian Minister of justice—Report to Parlamientary justice committees, March 15 and 18, 2021—translation is mine.
https://www.mondoadr.it/cartabia-forme-alternative-di-risoluzione-dei-conflitti-producono-effetti-virtuosi-di-alleggerimento-dellamministrazione-della-giustizia/

[14]Law—Legge 26.11.2021, n. 206 (delega)—Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata—G.U. 09.12.2021, n.292.
https://www.gazzettaufficiale.it/showNewsDetail?id=4329&backTo=archivio&anno=2021&provenienza=archivio

[15]Legislative Decree—Decreto legislativo 10.10.2022, n. 149—Attuazione della legge 26 novembre 2021, n. 206, recante delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata. (22G00158)

Entrata in vigore del provvedimento: 18/10/2022—G.U. 17.10.2022, n. 243, S.O. n.38.
https://www.gazzettaufficiale.it/eli/id/2022/10/17/22G00158/sg.

[16]Ministerial Decree—D.M. 9 giugno 2023—giustizia riparativa.

Istituzione presso il Ministero della giustizia dell'elenco dei mediatori esperti in giustizia riparativa. Disciplina dei requisiti per l'iscrizione e la cancellazione dall'elenco, del contributo per l'iscrizione allo stesso, delle cause di incompatibilità, dell'attribuzione della qualificazione di formatore, delle modalità di revisione e vigilanza sull'elenco, ed infine della data a decorrere dalla quale la partecipazione all'attività di formazione costituisce requisito obbligatorio per l'esercizio dell'attività. (23A03848)—G.U. 15.07.2023, S.G. n. 155.
https://www.gazzettaufficiale.it/eli/id/2023/07/05/23A03848/sg.

[17]Ministerial Decree—D.M. 01.08.2023 (23A04556)—Gratuito patrocinio.

Determinazione, liquidazione e pagamento, anche mediante riconoscimento di credito di imposta, dell'onorario spettante all'avvocato della parte ammessa al patrocinio a spese dello Stato nei casi previsti dagli articoli 5, comma 1, e 5-quater, del decreto legislativo 4 marzo 2010, n. 28 e dall'articolo 3 del decreto-legge 12 settembre 2014, n. 132, convertito, con modificazioni, dalla legge 10 novembre 2014, n. 162. (23A04556)—(GU Serie Generale n.183 del 07-08-2023).
https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2023-08-07&atto.codiceRedazionale=23A04556&elenco30giorni=false.

- D.M. 01.08.2023 (23A04557) (incentivi fiscali—tax incentives)[18].

D.M.04.10.2023, n.150—(Regulations on the mediation providers and training institutions register, compensation for mediation providers, international dispute and consumer code providers. Abolition of Ministerial Decree 180/2020)[19].

- D.M. 07.10.2023, 151 (disciplina del Mediatore familiare—family mediator rules)[20].

30.06.2023, mediation 4.0 took off.

The main novelties brought about by the above-mentioned measures.

A—increase in the number of matters subject to mediation

B—greater effectiveness of the procedure, through procedural consequences and tax incentives

C—increased fees to be paid to mediation bodies

D—greater involvement of the judiciary

E—involvement of the public administration

F—increase of the quality requirements of mediation bodies, trainers and mediators; sanctions;

G—regulation of the use of the technical consultant's report in mediation

H—telematic mediation

I—opposition to injunction

L—increased training period

Another relevant reform, the digitizion of the civil process and increased focus on ODR (Tedoldi, 2023; Matteucci & Stoppa, 2023).

On my opinion, particularly relevant to the proper development of mediation are the issues under B-D and L.

B'—greater effectiveness of the procedure, through procedural consequences and tax incentives**.** D.L. 28/2010 (amended by D.L. 149/2022)

Too many times one or both parties do not present themselves at the mediation, usually to be represented by a lawyer and all too often only to say "*we are not interested in getting on*" and receive an anodyne mediation report of negative outcome. Such behaviour deeply undermines the effectiveness of the proceeding. To challenge them:

[18]Ministerial Decree—D.M. 01.08.2023 (23A04557)—ncentivi fiscali.

Incentivi fiscali nella forma del credito di imposta nei procedimenti di mediazione civile e commerciale e negoziazione assistita. (23A04557)—(GU Serie Generale n.183 del 07-08-2023).
https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2023-08-07&atto.codiceRedazionale=23A04557&elenco30giorni=false.

[19]Ministerial Decree—D.M.04.10.2023, n.150, Regolamento registro organismi mediazione ed enti **f**ormazione, indennità spettanti agli organismi, organismi ADR controversie nazionali e transfrontaliere e Codice consumo. Abolizione del D.M. 180/2020.

Note: Entrata in vigore del provvedimento: 15/11/2023—(GU Serie Generale n.255 del 31-10-2023).
https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2023-10-31&atto.codiceRedazionale=23G00163&elenco30giorni=true.

[20]Ministerial Decree—D.M. 07.10.2023, 151—Disciplina del Mediatore familiare—Gazzetta Ufficiale, 31.10.2023, n. 255.
https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2023-10-31&atto.codiceRedazionale=23G00162&elenco30giorni=false.

Art. 8—Procedure

4. The parties shall participate personally in the mediation procedure. If there are justified reasons, they may delegate a representative with knowledge of the facts and with the necessary powers to settle the dispute. Parties other than natural persons participate in the mediation procedure through representatives or proxies with knowledge of the facts and with the necessary powers to settle the dispute. If necessary, the mediator shall request the parties to declare their powers of representation and record them in the minute.

Art. 12-*bis—Procedural consequences of non-participation in the mediation procedure.*

1) The failure to participate without a justified reason in the first meeting of the mediation proceedings shall entitle the judge to infer evidence, in the subsequent court proceeding, pursuant to Article 116, second paragraph, of the code of civil procedure.

2) If mediation is a pre-action condition, the judge shall order the party, that did not attend the first mediation meeting without a justified reason, to pay to the State budget an amount corresponding to twice the fees (contributo unificato) due for the proceedings.

3) In the cases referred to in paragraph 2, the judge may also order, in the decree closing the proceeding, the unsuccessful party, who did not participate in mediation, to pay to the other party a sum equitably determined, not exceeding the costs of the proceedings accrued after the conclusion of the mediation.

Article 20*— Tax credit in favour of the parties and the mediation providers.*

1) The parties shall be granted, when a conciliation agreement is reached, a tax credit proportional to the mediation fees paid, pursuant to Article 17 (3) and (4), up to an amount of €**600.00**[21]. In the cases referred to in Article 5, paragraph 1, and when mediation is ordered by the court, the parties shall also be granted a tax credit proportional with the fees paid to their lawyer for assistance in the mediation procedure, within the limits provided for by the forensic parameters and up to a maximum of €**600.00**.

2) The tax credits provided for in paragraph 1 may be used by the party within the overall limit of €**600.00** per procedure and up to a maximum annual amount of €**2400.00** for natural persons and €**24,000.00** for legal persons. If mediation fails, the tax credits shall be reduced by half.

3) An additional tax credit shall be accorded proportional with the fees (contributo unificato) paid by the party to the court proceeding ended following the conciliation agreement, within the limit of the amount paid and up to a maximum amount of €**518.00**.

4) The mediation bodies shall be granted a tax credit proportional with the compensation not payable by the party admitted to legal aid, pursuant to Article 15-septies, paragraph 2, up to a maximum of €**24,000.00**.

5) The cost arising from the implementation of the provisions set forth in this

[21]€ = euro.

Article, estimated at €51,821,400.00 per year starting from the year 2023, shall be covered by a corresponding reduction of the Fund for the implementation of the mandate for the efficiency of the civil process referred to in Article 1 (39) of Law No. 206, 26.11.2021.

D'—greater involvement of the judiciary

Law Decree 28/2010 (amended by Legislative Decree 149/2022),

Art. 5 quinquies

1). The magistrate shall ensure his/her own training and updating in mediation matters by attending seminars and courses, organised by the Superior School of the Judiciary (SSM), also through the decentralised training structures.

2). For the purposes of the evaluation referred to in Article 11 of D.L. No. 160 of 05.04.2006, the attendance of seminars and courses referred to in paragraph 1 and the number and quality of cases settled by mediation order or by conciliatory agreements shall respectively constitute indicators of the magistrate's commitment, ability and industriousness.

3). The ordinances, by which the judge refers the parties to mediation and the disputes settled as a result of their adoption, shall be the subject of a specific statistical survey.

4). The head of the judicial office may promote, at no new or greater expense to the public finance, cooperation projects with universities, bar associations, mediation bodies, training bodies and other professional and trade associations and bodies, while respecting their mutual autonomy, to encourage the use of mediation on request and training in mediation.

And, overall

L'—increased training period D.M. 14.10.2023 n. 150

Art. 23—*Initial mediators training*

1) For each mediator who has obtained a master's or single-cycle degree in law, for the purposes of inclusion in one of the lists referred to in article 3, paragraphs 3, letters a), b) and c), 6 and 7, the applicant certifies the completion and passing of the final test of a training course reserved for a maximum number of forty participants lasting no less than eighty hours, in addition to the completion of an internship through participation, supported by the mediator, in no less than ten mediations with participation of the invited party.

2) The course referred to in paragraph 1 is made up of theoretical and practical modules and includes a final evaluation test lasting no less than four hours, to be carried out in person, including checks on both modules, and a practical test including the simulation of a mediator's proposal.

3) The theoretical modules of the course referred to in paragraph 1 have a duration of no less than forty hours, are carried out in person or via audiovisual connection in synchronous mode for three-quarters of the aforementioned amount of time, and have as their object:

a) the storical, philosophical, anthropological and sociological introduction of the conflict and of the different theoretical and methodological models of con-

flict management;

b) the theory of communication and cognitive and decision-making profiles;

c) the evolution of the national and international culture of extrajudicial conflict resolution;

d) the national, European and international legislation on mediation and mediation delegated by the judge;

e) the validity and effectiveness of the mediation contractual clauses;

f) the form, content and effects of the request for mediation and of the conciliation agreement and its transcribing;

g) the tasks and responsibilities of the mediator also for the drafting of the minutes and for the formulation of the conciliation proposal.

4). The practical modules of the course referred to in paragraph 1 last no less than forty hours, take place in person, through laboratories and simulated sessions, and have as their object:

a) the phases of the mediation procedure, including electronic mediation;

b) the relationship between mediator and mediation body;

c) the methodologies of the procedures for consensual management of disputes and communicative interaction;

d) activities aimed at acquiring information and any technical evaluations in the mediation process and relations with the legal consultant;

e) the techniques for the drafting of the conciliation proposals.

5). in addition to what is established in paragraph 4, the practical modules may include participation in mediation meetings. To this end, the training body stipulates a specific agreement with one or more mediation bodies in compliance with article 9 of the legislative decree.

6). For each mediator who has obtained a master's or single-cycle degree in a subject other than that indicated in paragraph 1, and for each mediator registered with a professional association or college who has obtained a three-year degree, in addition to the completion of the training course indicated in paragraphs 1 to 5, the completion of the in-depth legal course. envisaged by paragraph 7, is required.

Art. 24—*Continuous mediators training*

1) for each mediator, the attendance of the courses referred to in paragraph 1, for no less than eighteen hours in the two-year period.

Art. 25—*Initial and ongoing training of expert mediators*

2) The theoretical modules intended for the training of mediators expert in international matters, cross-border disputes and in the field of consumer relations have as their object:

a) national and supranational consumer protection regulations;

b) judicial, extrajudicial, consensual and joint protection of the consumer;

c) rights and protections regarding cross-border disputes.

Art. 26—Initial training for trainer

1) For the purposes of inclusion in section A) of the list provided for by article

10, paragraphs 3 and 4, the applicant certifies, for each trainer:

a) a master's degree or single-cycle degree;

b) the qualification of mediator in civil and commercial matters;

c) carrying out, in the five years preceding the request for registration, teaching activities in courses or seminars in the field of mediation, conciliation or alternative dispute resolution at public or private, Italian or foreign recognized universities, professional associations or public bodies;

d) as an alternative to the provisions of letter c) having carried out, in the five years preceding the request for registration, activities as a trainer in the subjects referred to in letter c).

2) For the theoretical trainer, in addition to the requirements set out in paragraph 1, the applicant certifies the publication, in the five years preceding the request for registration, of at least three scientific contributions in the subjects indicated in paragraph 1, letter c).

3) For the practical trainer, in addition to the requirements set out in paragraph 1, the applicant certifies the experience gained in the three years preceding the request for registration, as a mediator with one or more bodies registered in at least ten mediation procedures with participation of the invited party.

Art. 27—*Continuous training of trainers*

1) For the purposes of confirmation of inclusion in the list referred to in Article 10, paragraphs 3 and 4, the training body, certifies for each trainer the participation in training courses training in the subjects chosen from those indicated in article 26, reserved for a maximum number of forty trainers, divided into modules to be carried out in person or via audiovisual connection in synchronous mode including laboratory activities, the latter to be carried out in person.

2) The body certifies, for each trainer, attendance of the courses referred to in paragraph 1, for no less than eighteen hours in the two-year period.

4. Likely Interactions between the Civil Process and ADR New Rules

When compulsory mediation was ruled judges looked at mediation with a "benign neglect", but since 2015 it is thanks to the judiciary that the use of mediation has been increasing in Italy: mediation proceedings delegated by judges were 3% (of all incoming mediation procedures) in 2012, 8% in 2014, 11% in 2016, 14% in 2018, 12% in 2020, 16% in 2022.

The Italian judges con order the litigants to undergo a mediation (delegated mediation) (ex art. 5, c.2, D.Lgs. 28/2010) or/and make a solution proposal based on equity (ex art. 185-*bis* civil procedure code), which the parties are free to accept or refuse (not binding arbitration), in all subjects related to alienable civil rights (Matteucci, 2019). If the proposal is not accepted, the judge can order a referral to a mediation procedure, managed by an external mediation provider (arb-then-med).

A very effective summary of the likely interactions (or, de-interactions!) be-

tween new civil trial rules and new ADR norms are in a paper by former judge Massimo Moriconi, one of the leading pioneer in the use and analysis of mediation in his work in court in Italy:

"*The Cartabia Reform set questions about the ADR/ASR tools and, mainly, about mediation.*

"*Will it benefit them? And if so, which mediation in particular? All of them without distinction, from voluntary to compulsory mediation, to court mandated to statutory mediation? Or instead to varying degrees? And if so, why?*

"*Will it be appropriate or necessary for mediation providers to refocus, based on the regulations and opportunities?*

"*And if so, how should providers and mediators do so? Is the reform likely to transform the generally unfriendly attitude toward mediation among judges for the better?*

"*Negative indicators in this regard could be the exponential development and success of the judge's proposal under Article* 185 *bis, civil procedure code; the tight civil judgements timelines introduced by the Reform and the possible conflict with the mandatory calendar; and, perhaps among the most serious, the continued lack of understanding by the judiciary of the usefulness of mediation.*

"*Given the tight timelines of the procedural tasks involved in the first instance of the trial, and in particular the significance that the trial calendar is taking on, and the atmosphere of disvalue against any act that dilutes the trial time, one has also to wonder where and when the judge can enter conciliatory paths without facing violations that should even susceptible him or her negative measures in terms of discipline and career?*" (Moriconi, 2022).

Tight timeframes and many procedural tasks are to be completed before and during the first hearing.

And, as far as ADR are concerned. In order to avoid mistakes, the lawyer could suggest the client to carefully consider reaching an agreement in mediation.

The new rules, both of court proceeding and mediation, are in force for not too many months, and it is not possible—so far—to tell whether this option has been thoroughly evaluated.

"*While settlement has long taken center stage in common law cultures, giving rise to the 'settlement judge', it is also gaining ground in continental civil law cultures, creating unique judicial roles that broaden the repertoire of judicial function. The study uncovers an informative new judicial role arising from reforms in Italy, one that combines mediation awareness, adversarial settlement-seeking and inquisitorial truth-seeking, and which we named: 'fitting the forum to the fuss while seeking the truth'. We focus on the Florence first-instance court in Italy, whose model for implementing recent reforms encouraging settlement, mediation and judicial conciliation, is being replicated by other courts in the country*" (Lucarelli et al., 2020).

An example of the difficulties in reconciling the new procedural rules with the

new ADR rules can be taken from the following decrees.

Court of Modena—second civil section—Decree 11.05.2023

"… *the defendant, in entering an appearance, preliminary objected to the inadmissibility of thee application, due to the lack of the mandatory precondition of the assisted negotiation* (*ADR*) *procedure*; …

"*Preliminary findings should be made here*; …"

"… *the judge is endowed with additional powers in preliminary verifications ad has traditional powers of* "*direction of the process*", *which harmoniously join with the delegated law* (*L.* no.206/22), … *that is, through the procedural form, to ensure* '*objectives of simplification, expeditiousness and rationalization of the civil process* (*art.*1, *paragraph* 1, *delegated law*); …*therefore*, …*with a view to speeding up the same, as well as concentration of requirements always with aim of ensuring speed and reasonable duration of the same* (*as a result of the reduction in the number of hearings and simplification of procedural requirements, as provided by the procedural novel*), *can be evaluated positively the possibility in the head of the judge, already at this preliminary hearing, to order the parties, who have not proceeded, to establish the assisted negotiation* (*ADR*) *procedure* (*art.* 3 *d.l.* 132/2014); *rather than ordering it at the first hearing of appearance of the parties, following the filing of as many as three supplementary pleading per party* (*which would hardly foster any compositional settlement, and indeed rather crystallizing litigious matter*), *with postponement of the first hearing at least* 45 *days* (*see Art.* 3 *d.l.*132 *of* 2014); …

"*All this with a view to reducing the duration of the trial*; … *that, however, in the present case, taking into account of the sum of* 9978.50. '*as well as compensation for all damages caused*'. *The case gets an indeterminable value …and, such, is not subject to the condition of procedural feasibility, pursuant to Article* 3 *of Decree Law* No. 132/2014; …"

Court of Verona—first civil section—24.11.2023

… *The dispute should be instead be considered subject to mediation, in light of the provisions of Artricle* 5, *paragraph* 2, *of Legislative Decree* No. 28/2010, *as replaced by Article* 7, *letter e*) *of Legislative Decree* No. 149 *of October* 10, 2022, *which increased, as of June* 30, 2023, *the number of disputes that must be preceded by this type of ADR, including those concerning work contracts, and therefore also those, such the present one, concerning intellectual work contracts.*

…

On closer consideration, however, it should be reiterated (*see on this point this court's order od* 9/28/2017) *how the rule on mediation mentioned above is contrary to the fundamental principles of the EU, a fortiori following the entry into force on November* 15 *of Ministerial Decree* no. 150, *which, among other things, raised the amounts of mediation fees, leading to an* "*increase in the overall cost*" *that the parties have to bear for compulsory mediation and which, not to be forgotten, are inclusive of those for compulsory assistance.*

In order to understand how this conclusion is reached, it should be recalled that the Court of Justice in its ruling N. 457 *of June* 14, 2017, *reiterated, in line with Alassini ruling of March* 18, 2010, *what are the prerequisites for being able to consider form of mandatory ADR, regardless of the subjective quality of the parties, as compatible with the EU principle of effective judicial protection, enshrined in Articles and* 13 *of the ECHR and Article* 47 *of the Charter of Fundamental Rights of the European Union, regardless of the subjective quality of the parties.*

Indeed, the Court of Justice has stated that such a judgment of compatibility can be made if the procedure jointly meets all of the following conditions:

1) *it does not lead to a decision binding on the parties;*

2) *it does not result in a substantial delay for the filing of a judicial appeal;*

3) *suspends the prescription or forfeiture of the rights in question;*

4) *does not generate costs,* i.e., *does not generate substantial costs … for the parties, provided, however, that the electronic route is not the only means of access to said conciliation procedure and that interim measures are available in those exceptional cases, where the urgency of the situation so requires.*

That said, in the opinion of this court, the national discipline of compulsory mediation, as supplemented by the regulation, does not comply with the penultimate of the aforementioned conditions since, by also providing for compulsory defensive assistance (*Article* 8, *paragraph* 5, *Legislative Decree* 28/2010) *it entails costs that are not moderate for the parties, taking into account the criteria for determining the lawyer's fee currently in force.*

5. Conclusion

Mediation belongs to the Italian legal culture, but it has not been taught in the universities for almost one century. Therefore the contemporary jurists, judges and lawyers, have been trained in adversarial techniques, which have been used for decades. It is obvious that, at the introduction (2010) of mandatory civil mediation, very few professionals understood its essence and usefulness. The 1° CIM, Italian mediation competition (2013), wanted and organized by Dr. Nicola Giudice, Milan Chamber of Commerce, repeated every year so far and also replicated in other cities, raised the enthusiastic interest of many university students. Some university teachers have also activated ADR courses. But the Ministry of the University still has not decided to set up a curricular course on ADR!!!

The length of the initial courses to become mediator, 50 hours so far, has been too limited and they were generally focused on the procedural consequences of mediation into the civil process, and not on the mediation nature and techniques.

The Riforma Cartabia (2021/2023) has deeply innovated the civil process and ADR rules, focusing, among others, on the judiciary involvement in mediation and in the quality and duration (80 hours, still too little) (Bond, 2019; Matteucci,

2024a, 2024b)[22] of initial training. Forecasts are difficult to be made. Anyway, the usefulness of mediation in Italy, indeed, has been underlined by Dr. Margherita Cassano, first president of the Corte di Cassazione, at the opening ceremony of the 2024 judicial year[23].

Habit is very hard to die. The most relevant problem I see on the horizon is the lawyerization of mediation in Italy, as happened in other countries (Monteleone, 2023; Nolan-Haley, 2010; Salisbury, 2020; Weiler, 2018; Tvaronaviciene et al., 2023). How to avoid it? Through qualified training, even at the international level.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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[22]Bond: … "*I have always been sceptical about one-week forty-hour mediation courses leading to accreditation and people being able to say they are qualified mediators. … I was proud to have to do two hundred hours of mediation training, then several mediations, and coaching on those mediations before I could become accredited by the German Mediation Association* (*Bundesverband Mediation*). *I was and am convinced that this is a sign of quality*"—"*On the benefit of mediation training, and on getting things wrong. An interview with Ewa Chye*", 2019.
http://mediationblog.kluwerarbitration.com/2019/03/24/on-the-benefits-of-mediation-training-and-on-getting-things-wrong-an-interview-with-eva-chye/.

A university mater degree on extrajudicial dispute resolution procedure was organized, in Italy, by the University of Siena and the Chamber of Commerce of Grosseto in 2004 and replicated in 2005 and 2006, director Prof. Giovanni Cosi. Duration 164 hours in presence, 40 of which devoted only to communication techniques. Three weeks internship.

Matteucci, 2024 *Civil and commercial mediation* 4.0 *in Italy after the Riforma Cartabia*, 2024—*A summary*.
https://mediate.com/civil-and-commercial-mediation-4-0-in-italy-after-the-riforma-cartabia/.
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Matteucci (2024), Mediazione civile e commerciale in Italia dopo la Riforma Cartabia. Da Zaleuco di Locri Epizefiri (VII century B.C.) to artificial intelligence (2024), Aracne publisher
https://www.aracneeditrice.eu/it/pubblicazioni/mediazione-civile-e-commerciale-in-italia-dopo-la-riforma-cartabia-giovanni-matteucci-9791221814514.html

[23]Cassano—"*Con specifico riferimento alla mediazione meritano segnalazione gli interessanti risultati desumibili dai dati ministeriali. … soprattutto nelle cause in tema di successione, divisione ereditaria, diritti reali, condominio, assicurazione, responsabilità extra-contrattuale. Come osservato dalla dottrina, il valore della mediazione non risiede soltanto nella sua capacità deflattiva, quanto piuttosto nella sua idoneità a realizzare la coesione sociale, a porre al centro la persona, prima ancora che la 'parte', a restituire agli individui l'opportunità di comprendere le ragioni del conflitto e di acquisirne la consapevolezza, a promuovere l'ascolto empatico dell'altro, a gestire relazioni efficaci attraverso il confronto*".

Relazione sull'amministrazione della giustizia nell'anno 2023, 25.01.2024, pag. 236.
https://www.cortedicassazione.it/resources/cms/documents/Relazione_Cassazione_2024.pdf.

With specific reference to mediation, it is worth noting the interesting results that can be deduced from Ministerial data … especially in cases concerning succession, inheritance division, real rights, condominium, insurance, non-contractual liability. As doctrine has underlined, the value of mediation lies not only in its deflative capacity, but rather on its ability to achieve social cohesion, to put the people at the centr, even before the "party", to give individuals back the opportunity to understand the reason for conflict and to achieve awareness of it, to promote empathic listening to others, to manage effective relationships through controntation.—Translation is mine.

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