

## MANDATORY MEDIATION, THE ITALIAN EXPERIENCE<sup>1,2</sup>

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### 1. A bit of history – Mediation is part of the Italian legal tradition

The Italian State was founded in 1861. In the first Civil Procedure Code (1865) the heading of the introductory seven articles was “Conciliation”. According to a law issued in the same year, police officers must first of all reconcile conflicts among private citizens. In 1880 Justices of Peace issued the 70% of all sentences delivered in Italy. According to Law 261/1892 the judge “*in order to reach a conciliation, could call for the single party in a private hearing*” (an *ante litteram* caucus). Therefore conciliation / mediation belong to the Italian juridical and judicial culture.

But the totalitarian regime carried out during the Fascist period (1922 – 1943) disliked conflict resolutions reached by private citizens; they must be settled by judges, through sentences. 1941 Civil Procedure Code, art. 183, provided the possibility of conciliation managed by the judge in the pre-trial hearings; nevertheless it is always been a pure formality.

The bankruptcy rules have their roots in the “*jus mercatorum*”, developed in Central and Northern Italy around the thirteenth century. These laws included the “*affida*”, i.e. the *trust* given to the insolvent debtor and fugitive allowing him to return to his city in order to negotiate with his creditors; this practice became very popular in the highly business-oriented Republic of Venice from the fifteenth century onwards. The debtor-creditor negotiation was later opposed by the Napoleonic Code, shyly resumed by the Italian legislation of the late nineteenth century,

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<sup>1</sup> Artigo recebido em 06/08/2015 e aprovado em 27/11/2015.

<sup>2</sup> A video on the same subject in [https://www.youtube.com/watch?v=rUt\\_XSHAohM](https://www.youtube.com/watch?v=rUt_XSHAohM)

supported by the Italian doctrine of the early twentieth century, and rejected by the bankruptcy law passed by fascism in 1942<sup>3</sup>.

Since the thirties of the twentieth century, in Italy, mediation gradually lost its importance and it was no longer taught in universities for over seventy years; it was (and still is) part of the Italian legal tradition, but it was forgotten.

In 1993 the Law 580 ruled: each Italian Chamber of Commerce had to set up a conciliation (and arbitration) chamber; the Harvard mediation procedure was the reference. At a very slow pace ADRs started their way in contemporary Italy.

The Legislative Decree no. 5/2003 (in force since 2005) ruled voluntary mediation in corporate, financial and banking controversies. Nobody (*rectius*, no lawyer) used it, and when I asked why, lawyers replied: “*Because it was not compulsory*”.

There was a tremendous number of pending civil litigation cases in the overall judicial system: 5,826,440 in 2009. In 2010 the compulsory mediation took off, was revoked in October 2012 and reintroduced in September 2013. It had to face a furious opposition by lawyers (a matter of culture and revenues) and a benign neglect by judges (a matter of culture).

In Italy the conflicts subjected to mandatory mediation are only the 8% of all the conflicts filed in the Italian courts; their filing had a 9% increase, when mandatory mediation was revoked, and a 15% decrease later on, when it was back. These few data are sufficient to sum up the situation

## 2 . The framework

According to Cepej<sup>4</sup> figures for **2010** and **2012**, compared to 46 and 44 other European countries respectively, Italy had:

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<sup>3</sup> Matteucci Giovanni, “*Insolvenza e negoziazione in Italia: uno sguardo al passato per comprendere il presente e, forse, prevedere un po' del futuro – Insolvency and negotiation in Italy; a look to the past to understand the present and, perhaps, forecast a bit of the future*” <http://www.adrmaremma.it/matteucci25.pdf> or [http://www.ilfallimentarista.it/insolvenza\\_negoziazione\\_sguardo\\_storico](http://www.ilfallimentarista.it/insolvenza_negoziazione_sguardo_storico) 21.2.2013

<sup>4</sup> Cepej, European Commission for the Efficiency of Justice, set up by the Committee of Ministers of the Council of Europe [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf) and [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport\\_2014\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf)

- a lower than average proportion of the total public spending allocated to the whole justice system (value in %) <sup>5</sup>

Table 1

|                |            |            |
|----------------|------------|------------|
| Croatia        | 1.9        | 1.9        |
| France         | 1.1        | 1.9        |
| Germany        | 1.6        | 1.5        |
| Italy          | 1.5        | 1.5        |
| Norway         | 3.3        | 3.2        |
| Romania        | 2.3        | 2.2        |
| <b>Average</b> | <b>1.9</b> | <b>2.2</b> |

- a high number of litigation cases <sup>6</sup>

Table 2 *No. of 1<sup>st</sup> instance **incoming** and **resolved** cases; civil cases per 100,000 inhabitants*

|                |              |              |              |              |
|----------------|--------------|--------------|--------------|--------------|
| Croatia        | 3,323        | 3,384        | 4,286        | 4,074        |
| France         | 2,758        | 2,713        | 2,575        | 2,555        |
| Germany        | 1,935        | 1,941        | 1,961        | 1,968        |
| Italy          | 3,958        | 4,676        | 2,613        | 3,430        |
| Norway         | 367          | 369          | 359          | 357          |
| Romania        | 5,010        | 4,407        | 5,195        | 5,123        |
| <b>Average</b> | <b>2,738</b> | <b>2,663</b> | <b>2,492</b> | <b>2,466</b> |

- long-lasting litigation cases <sup>7</sup>

Table 3 *Disposition time of litigious civil cases in 1<sup>st</sup> instance courts, in days*

|         |     |     |
|---------|-----|-----|
| Croatia | 462 | 457 |
| France  | 279 | 311 |
| Germany | 184 | 183 |
| Italy   | 493 | 590 |

<sup>5</sup> Cepej, figure 2.4 / 2.2.

<sup>6</sup> Cepej, figure 9.5 / 9.4.

<sup>7</sup> Cepej, figure 9.12 / 9.9.

|                |            |            |
|----------------|------------|------------|
| Norway         | 158        | 160        |
| Romania        | 217        | 193        |
| <b>Average</b> | <b>287</b> | <b>246</b> |

- a huge number of lawyers <sup>8</sup>

**Table 4**                      *Number of practicing lawyers (excluding legal advisors)*

|                | <i>absolute number</i> |         | <i>per 100,000 inhabitants</i> |            | <i>per professional judge</i> |           |
|----------------|------------------------|---------|--------------------------------|------------|-------------------------------|-----------|
| Croatia        | 4,133                  | 4,392   | 94                             | 103        | 2                             | 2         |
| France         | 51,758                 | 56,176  | 80                             | 86         | 7                             | 8         |
| Germany        | 155,679                | 160,880 | 190                            | 200        | 8                             | 8         |
| Italy          | 211,962                | 226,202 | 350                            | 379        | 32                            | 36        |
| Norway         | 5,162                  | 6,969   | 105                            | 138        | 9                             | 12        |
| Romania        | 20,620                 | 20,919  | 96                             | 98         | 5                             | 5         |
| <b>Average</b> | ///                    |         | <b>128</b>                     | <b>139</b> | <b>10</b>                     | <b>11</b> |

In Italy, there has also been:

- a “shrinking” in the litigation market (the number of new civil proceedings has decreased due to the economic crisis which started in 2008, the length of proceedings and the increase in court fees) <sup>9</sup>:

**Table 5**                                      **Civil proceedings per legal year (numbers x 1,000) <sup>10</sup>**

|               | Justice of the peace | Trial courts | Total * |
|---------------|----------------------|--------------|---------|
| 2009          |                      |              |         |
| Registered    | 1,948                | 2,835        | 5,012   |
| Defined       | 1,706                | 2,800        | 4,717   |
| Pending 31.12 | 1,744                | 3,540        | 5,826   |

<sup>8</sup> Cepej, table 12.1 / 12.1 .

<sup>9</sup> According to the Italian Bar Council (Consiglio Nazionale Forense) + 180% from 2005 to 2012; CNF January 24<sup>th</sup>, 2014 <http://www.consiglionazionaleforense.it/site/home/naviga-per-temi/in-evidenza/articolo8457.html> .

<sup>10</sup> Source: “Relazione del Ministero su amministrazione della giustizia” (Italian Ministry of Justice) .

| 2013          |       |       |  |       |       |  |       |       |  |
|---------------|-------|-------|--|-------|-------|--|-------|-------|--|
| Registered    | 1,372 |       |  | 2,813 |       |  | 4,389 |       |  |
| Defined       | 1,415 |       |  | 2,899 |       |  | 4,569 |       |  |
| Pending 31.12 |       | 1,296 |  |       | 3,265 |  |       | 5,155 |  |
| 2014          |       |       |  |       |       |  |       |       |  |
| Registered    | 632   |       |  | 1,454 |       |  | 2,186 |       |  |
| Defined       | 648   |       |  | 1,455 |       |  | 2,230 |       |  |
| Pending 30.06 |       | 1,249 |  |       | 3,086 |  |       | 4.899 |  |

Variations %

2013 / 2009      - 30   - 17   - 26      - 1   + 3   - 8      - 12   - 4   - 12

\* Justice of the peace (Giudice di pace), Trial courts (Tribunale ordinario), Juvenile court (Tribunale dei minori), Court of Appeal (Corte d'Appello), Supreme Court of Cassation (Corte Suprema di Cassazione)

- a sharp increase in the number of lawyers (per 100,000 inhabitants)

Table 6

|         |                   |
|---------|-------------------|
| 1989    | 94                |
| 2000    | 207               |
| 2010    | 350               |
| 2012/08 | 406 <sup>11</sup> |

- a decrease of lawyers' revenues: average taxable income for social security purposes amounting to EUR 40,333 in 2012; 13% decrease in the period between 2008 and 2012<sup>12</sup> (a problem concerning almost all professionals, because of the economic downturn); as a consequence, most Italian lawyers read the acronym ADR not as Alternative Dispute Resolution but as "*Alarming Drop in Revenues*";

<sup>11</sup> 2012/08 : lawyers 247,040, population 60,779,708 <http://www.albonazionaleavvocati.it/html/statistiche.html>

<sup>12</sup> Micardi Federica, "*Dai notai agli ingeneri redditi in forte calo*", Il Sole 24 Ore, 11.3.2014, pag. 22 <http://www.banchedati.ilssole24ore.com/EstrazioneDoc.do?product=BIG&doctype=HTML&iddoc=SS20140311022BAA>

- a tremendous number of pending civil litigious cases in the overall judicial system, with the highest level in 2009, 5,826,440, and a low but steady decrease after that.

Table 7

(end of the period; numbers x 1,000)

|                                |              |
|--------------------------------|--------------|
| 2003                           | 4,650        |
| 2005                           | 4,933        |
| 2007                           | 5,550        |
| <u>2009</u>                    | <u>5,826</u> |
| 2011                           | 5,409        |
| 2013                           | 5,155        |
| 2014 (June, 30 <sup>th</sup> ) | 4,899        |

### **3 . 2010 : Mandatory mediation approved**

As I have already stated, mediation had been introduced in 2003, related to corporate, financial and banking conflicts. It was voluntary mediation, though, and it was totally ignored.

To cope with the problem of the pending litigious cases, the compulsory mediation was made law in 2010, in force since March 2011, ruled by the Legislative Decree no. 28/2010 and the Ministry Decree no. 180/2010.

Mediation is the procedure, conciliation the result (the agreement). It can only be used for disputes over alienable rights (“*diritti disponibili*”). Proceedings were to be concluded within four months time. Tax relief was to be provided to the parties involved in the mediation procedure, and doubled when the agreement was reached.

Legal advisers to the parties were to inform their clients about the mediation process.

Mediators (trained according to the law) operate within organizations (“*Organismi di mediazione*”, mediation bodies) under the control of the Ministry of Justice; they manage the proceeding, without the power to make binding decisions or judgments for the recipients of the service itself. Nevertheless, the neutral can make a written proposal, when asked by the parties.

on his own initiative and also if one of the parties is missing (!!!). Within the following seven days, the parties are free to accept or decline the proposal, but in the subsequent trial, should the judgment be the same as the refused proposal, the claimant must pay all judicial costs, including those paid by the losing party (link with the judicial proceeding).

The mediation proceedings must remain secret.

The final agreement is enforceable if it does not violate mandatory regulations or if it is not contrary to public policy, and when it is approved upon examination by the president of the court.

The parties may participate in mediation alone or assisted by a professional (lawyer, engineer, etc.). These are the regulations for *VOLUNTARY* administered mediation.

Legislative Decree no. 28/2010 also introduced *MANDATORY* mediation in many civil matters:

- “*diritti reali*” rights *in rem*;
- “*divisione*” division of assets
- “*successioni ereditarie*” inheritance
- “*patti di famiglia*” family estates
- “*locazione*” lease
- “*comodato*” gratuitous loans
- “*affitto di aziende*” business lease
- “*risarcimento del danno derivante da responsabilità medica e diffamazione a mezzo stampa o con altro mezzo di pubblicità*” civil liability for medical malpractice and defamation in the press or other media
- “*contratti assicurativi, bancari e finanziari*” insurance, banking, and financial contracts since March 20<sup>th</sup>, 2012
- “*condominio*” condominium
- “*risarcimento del danno derivante da circolazione di veicoli e natanti*” civil liability for damage caused by vehicles or ships.

Interim and preventive procedures were exempted from the mandatory attempt at mediation.

Mediation can also be requested by the judge (*DELEGATED* mediation) in disputes over all alienable rights (“*diritti disponibili*”) but the judiciary has shown a “benign neglect” for it.

Legislative Decree no. 28/2010 also recognized the existence of *VOLUNTARY NEGOTIATION* and *PEER MEDIATION* in civil and commercial disputes, complaint procedures for service users (as set out in complaints policies), and *two other kinds of ADR in the banking and financial sector*: the “*Arbitro Bancario e Finanziario*” and the “*Camera Arbitrale e di Conciliazione*”, two independent bodies, the former of the Bank of Italy, the latter of the Italian Securities and Exchange Commission (Consob) <sup>13</sup>.

More than 200,000 disputes were expected to be transferred from the courts to mediation (one million in five years). There was a “*mediation explosion*”, or, to be precise, the *expectation* of a “*mediation explosion*”: due to the economic crisis, many professionals, mainly lawyers, rushed to attend courses on mediation (which only lasted 50 hours, while at least 200 hours would have been necessary). As a consequence in 2011 there were about 1,000 “*Organismi di mediazione*” (mediation bodies) and – while no one knows the exact number – approximately 40,000 mediators (mainly lawyers). There were more mediators than mediations.

#### 4. Training

Training can be seen as the Achilles' heel of Italian mediation proceedings <sup>14</sup>.

In Italy, certified mediators are required to:

- hold a BA degree in any subject, or membership in a professional association (in this second case, mediators are only allowed to manage proceedings related to their professional competences);

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<sup>13</sup> In the Italian banking and financial sector there are at least five different types of ADR.

<sup>14</sup> Matteucci Giovanni, “*Mediazione avanti tutta ma ... la formazione?*”, January 30<sup>th</sup>, 2012 <http://www.altalex.com/index.php?idnot=16703>  
Riccardi Carlo, “*Formare alla mediazione*”, July 21<sup>st</sup>, 2014 <http://blogconciliazione.com/2014/06/formare-alla-mediazione/>

- complete a 50 hour training course on theory and practice, designed for a maximum of 30 trainees, consisting of:

- Italian, European and international laws on mediation;
  - facilitative and adjudicative mediation procedures, and mediation ordered by a judge;
  - conflict management techniques;
  - communication techniques;
  - mandatory mediation contract clauses;
  - form, content and effects of mediation demand and agreement;
  - mediator's duties and responsibilities;
  - simulated mediation sessions;
  - final 4 hour test;
- update their training every two years with an 18 hour advanced training course on the above mentioned subjects, including simulated mediations, and attend 20 mediation procedures.

Certified ADR trainers in Italy are required to:

- publish works on ADR theory: 3 articles or books on ADR, issued by a national based publisher, with ISBN code for books and ISSN for serial issues; alternatively, ADR scientific issues published by public bodies; online publications are not admitted;
- practice ADR: management of 3 mediation procedures;
- give lectures on ADR to professional associations, public bodies, Italian or foreign public universities;
- update their training every two years with a 16 hour training course run by professional associations, public bodies, Italian or foreign public universities.

Mediation is a multidisciplinary science; a 50 hour course is enough *to inform*, but not *to form* professionals. Moreover, most teachers and participants were lawyers; therefore, lectures mainly focused on civil procedure laws as applied to mediation. And approximately 99,99999 ... % of candidates were successful in the exams !!!

On March 21<sup>st</sup>, 2011, mandatory mediation took off. The initial results were encouraging: only 26 – 30% of proceedings saw all parties present (understandably so, not only

because of the lawyers' hostility, but also due to the novelty of the procedure), but, when all parties were present, the success rate was 59 – 51%. A final agreement was achieved in only 15% of mediations (Table 8, columns C and D). Not too bad. And, overall, three to four months were required to reach the deal.

Over time, the number of proceedings increased as well as the percentage of proceedings where all parties were present. But the success rate of the latter started to decline, continuously, constantly, and stubbornly, until the end of 2012 (Table 8, column C).

Why?

The mediator's fee doubles when an agreement is reached. This acts as an incentive to the professional, who will try to ensure that the proceeding results in a positive solution; however, in some (if not many) cases, the parties left the mediation just before its final session, where the deal was to be signed.

Moreover, it is my opinion that, at the beginning of 2011, mediators were professionals with expertise in the subject, with many years of training behind them, and able to understand the causes of conflict and how to manage them. Later on (also because of the economic crisis), people who jumped on the bandwagon were arriving on the scene; the consequences were deterioration in the quality of the mediation process management and worse results.

## **5 . Lawyers' strike, Constitutional Court decision, mandatory mediation revoked**

Legislative Decree no. 28 /2010 introduced mandatory mediation, as a pre-condition to assessing courts, facing a furious opposition by most lawyers (who were too many and with decreasing revenues).

Even if most mediators were lawyers, Italy's national lawyers union (*Organismo Unitario dell'Avvocatura Italiana*) called for a national strike <sup>15</sup>. Many of them rightly pointed

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<sup>15</sup> “ *Italian Lawyers Strike Because of Mandatory Mediation - Believe it or not, the Italian Bar Association is calling on its members to strike in opposition to a mandatory mediation law. According to the website for the Organismo Unitario dell'Avvocatura Italiana (the Italian bar association- [www.oua.it](http://www.oua.it)), lawyers are being asked to participate in a strike from March 16<sup>th</sup>-22<sup>nd</sup>, and a public protest demonstration on March 16th. The strike is aimed at a new law commencing March 21<sup>st</sup>, requiring mandatory mediation in certain cases. Lawyers are being asked to attend the protest and to cease work on all cases during that period.*

out the low quality of the service offered by many mediation bodies; some invoked the constitutional right to defense in a trial (but they were locked in their ivory tower: can a *res judicata*, after 10 – 15 years, still be called “justice?”). Numerous appeals against the Legislative Decree no. 28/2010 were made, needless to say, by lawyers themselves. On December 12<sup>th</sup>, 2012, the Constitutional Court declared the unconstitutionality of compulsory mediation, due to over-delegation (the Government went beyond its powers in creating the delegated legislation) and not because of the breach of a citizen’s right to defense <sup>16</sup>.

The number of mediation proceedings dropped, even as there were almost 1,000 mediation bodies, almost 40,000 mediators, and still an enormous number of legal disputes. Why? In Italy, where there has never been a liberal or an industrial revolution, but only a *bourgeois* revolution managed by Benito Mussolini, almost everything is expected to come from the State, from the public sector (Italian public debt is one of the highest in Europe). Therefore, no mandatory mediation by law, no mediations!

Nevertheless, voluntary mediation survived, with a much higher success rate than that of compulsory mediation.

## 6 . 2013 - Mandatory mediation reloaded

Under pressure from the European Union, the so called “To Do” Law, Legislative Decree no. 69/2013, reintroduced mediation as a mandatory first step before going to court, starting on September 20<sup>th</sup>, 2013. The most efficient mediation bodies have always been those

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“ Interestingly, the timing of the strike blankets a national holiday (March 17<sup>th</sup>-18<sup>th</sup>) and a weekend (March 19<sup>th</sup>-20<sup>th</sup>), effectively extending what is already a four day weekend.

“ Now that mediation is an accepted part of the civil litigation process, we forget that in other parts of the world, lawyers are still fighting against measures that may settle cases and reduce legal fees. Even though there is a significant backlog of cases in Italy, lawyers are obviously not taking this new law lying down.

“ That said, it is interesting that the Government passed the law notwithstanding such strong opposition from the Bar” - Paul Godin, ADRChambers (Canada), April 19<sup>th</sup>, 2011

<http://www.adrchambers.com/blog/2011/04/19/italian-lawyers-strike-because-of-mandatory-mediation/>

<sup>16</sup> Italian Constitution, art. 24 : “*Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi*” “*Everyone can take judicial action to protect his own individual rights and legitimate interests*”.

run by private entrepreneurs and the Chambers of Commerce; the less efficient, those run by lawyers.

But the heavy pressure exerted by lawyers on the members of Parliament (many of whom are lawyers themselves) led to significant changes from the previous law:

- “*risarcimento del danno derivante da circolazione di veicoli e natanti*” - civil liability for damage caused by vehicles or ships was exempted from mandatory mediation; civil liability for medical malpractice was extended to include all forms of health care malpractice;

- accredited mediation bodies must be chosen within the territorial jurisdiction of the court over which the judge presides;

- the settlement agreement reached before an accredited mediation body can be enforced either when undersigned by the lawyers representing the parties or when approved by the court; mediation proceedings are to be concluded within a three months period;

and, more importantly,

- compulsory lawyers’ assistance to the parties;

- the first “informative” meeting free of charge (except for a 48,00 euro fee – the mediator works for free, the lawyer hired by the party is paid); the invited party, according to lawyers’ misinterpretation, can abstain from the proceeding by not attending the mediation meeting (with the plaintiff and the mediator) or, present at the first informative meeting, can “opt out” from the process <sup>17</sup>.

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<sup>17</sup> “*These elements, which were not part of the June 21<sup>st</sup>, 2013 decree, were vigorously advocated for by members of the Italian bar during the process of converting the decree into law. Parliament eventually accepted them*” Giuseppe De Palo, “*Mandatory mediation back in Italy with new Parliamentary rules*”, Mondoadr, October 22<sup>nd</sup>, 2013, <http://www.mondoadr.it/cms/articoli/mandatory-mediation-italy-parliamentary-rules.html>

As far as mediation is concerned, Italy has experienced five different time periods :

A) 1993 - 2003 :

- “pure” voluntary mediation;
- not enforceable;
- no links with the judicial proceeding;
- no compulsory assistance by a lawyer to the parties;
- fees to be paid at the beginning of the proceeding;

B) 2003 – March 2011

- voluntary mediation;
- enforceable;
- no links with the judicial proceeding;
- no compulsory assistance by a lawyer to the parties;
- fees to be paid at the beginning of the proceeding;

The behaviour of most lawyers has been (and still is) almost a form of boycott: when invited to take part in a mediation proceeding, they refuse to do so. Oftentimes, lawyers attend the first informative meeting (without the party they represent) only to declare: “*We are not interested in proceeding*”. The same behaviour is adopted by many banks and insurance companies.

The result consists in 3,064 agreements where all parties were present in the fourth quarter of 2013, and 6,598 in the first quarter of 2014; in percentage terms: 12% and 11% of the registered proceedings. A huge hustle and bustle of paper work and –up to now- poor results, especially when compared to the almost 5 million pending civil litigations. But at the end of 2015 there has been a strong increase in mediation registered proceedings.

Furthermore, the Legislative Decree has conferred upon all lawyers the qualification of mediators “*ope legis*” and entrusted their representative bodies with decisions about training. The following training requirements were established:

- a 15 hour training course, with a maximum of 30 trainees (5 hours on Italian legislation; 10 hours on conflict management techniques and mediation skills);
- 2 attendances to mediation procedures.

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C) March 2011 – October 2012

- mandatory mediation;
- enforceable;
- links with the judicial proceeding;
- no compulsory assistance by a lawyer to the parties;
- fees to be paid at the beginning of the proceeding;

D) October 2012 – September 2013

- voluntary mediation;
- enforceable;
- links with the judicial proceeding;
- no compulsory assistance by a lawyer to the parties;
- fees to be paid at the beginning of the proceeding;

E) from September 2013

- mandatory mediation;
- enforceable;
- links with the judicial proceeding;
- compulsory assistance by a lawyer to the parties;
- pre-mediation first meeting, free of charge, with an “opt out” mechanism.

The conflicts subjected to mandatory mediation are only the 8% of all the conflict filed in Italian courts; their filing had a 9% increase in period D (voluntary mediation) and a 15% decrease in period E (mandatory mediation).

This perfectly exemplifies the coherence of those who had criticized the inadequacy of the 50 hour courses, and shows a very poor knowledge of mediation and its techniques.

## 7 . The judiciary

When compulsory mediation came into force in 2011, judges did not take a stand against it, but in practice they did not use the opportunity provided by the law.

The main concerns on the part of the judiciary were (and are) likely to be the following:

- introduction into Italian law, whose roots date back to Roman law, of a procedure typical of other legal cultures (*a concern based on false assumptions*);
- metamorphosis of the system, whereby disputes are initially managed by psychology-based techniques and not on the basis of constitutional guarantees; preference for a lawyer as mediator (*concerns which show a very modest knowledge of mediation*);
- interference between mediation and jurisdiction (*a reasonable concern*);
- career advancement within the judiciary is largely based on the number of judgments delivered by each judge; if the criteria for career advancement were to include the number of disputes resolved through mediation (which is a shorter proceeding), judges may neglect their judicial function (*a questionable, unreasonable concern*).

To induce judges to use mediation, Legislative Decree December 22, 2011, no. 212, art. 12 stated: “*The head of the court . . . shall take . . . all necessary measures to facilitate the completion of the mediation at the invitation of the court . . . and shall file an annual report to the Superior Council of the Judiciary and the Ministry of Justice*”<sup>18</sup>. This rule disappeared as the decree was converted into law.

Notwithstanding the situation outlined above, some years ago a small portion of the Italian judiciary began to look carefully at mediation and its possible use. I mainly refer to:

- “Progetto Conciliamo”, started in 2005 at the Court of Milan ;

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<sup>18</sup> Legislative Decree 22.12.2011. no. 212, art. 12: “*il capo dell'ufficio giudiziario .. adotta .. ogni iniziativa necessaria a favorire l'espletamento della mediazione su invito del giudice .. e ne riferisce con frequenza annuale al Consiglio Superiore della Magistratura ed al Ministero della Giustizia*”.

- “Progetto Nausicaa”, started in 2010 at the Court of Florence ;

both projects focused on the analysis of mediation and aimed at improving the knowledge of mediation among legal professionals ;

- the experience of the Court of Ostia, a separate division of the Court of Rome, whose leader, Judge Massimo Moriconi, acted as a pioneer in the field of mediation. Thanks to an extensive use of delegated mediation in the 2012 – 2013 period, Judge Moriconi achieved a reduction of at least 10% of the disputes entrusted to him <sup>19</sup>.

Which method did he use? The magistrate analyzed all incoming cases and, whenever he believed that the parties could reach a settlement, he invited them to undergo a mediation proceeding. Moral suasion was effective.

As already mentioned, according to Legislative Decree no. 28/2010 mediation could also start at the invitation of the judge (delegated mediation).

Moreover, Legislative Decree no. 69/2013 established:

- the possibility for judges (since June 2013) to make a solution proposal based on equity (ex art. 185-*bis* civil procedure code) in all subjects related to alienable civil rights, which the parties were free to accept or refuse (not binding arbitration);

- the possibility for judges (since September 2013) to order litigants to undergo mediation in all subjects related to alienable civil rights (delegated mediation). In many cases, the judges blended these two options: they made a solution proposal, and if the proposal was rejected, they ordered mandatory mediation (arbitration – then – mediation).

From June 2013 to June 2014, only about ten judges have used these opportunities in about fifty cases <sup>20</sup> ; but later an increasing number of them started, and with very interesting results: in most cases lawyers, though reluctant to do so, joined the mediation procedure and litigants reached an agreement. Last but not least, judges have opposed the practice of those lawyers who do not attend the first informative meeting, or attend it (without the party) only to declare that they are not interested in proceeding with the mediation. Judges are condemning this behavior, remarking that: *“lawyers are mediators ‘ope legis’, therefore ‘ope legis’ they know mediation, the necessity of the parties’ presence and of a real interaction among them”*.

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<sup>19</sup> <http://www.mondoadr.it/cms/articoli/resoconto-del-convegno-il-ruolo-del-giudice-nella-mediazione.html>

<sup>20</sup> For further information see [www.adrmaremma.it](http://www.adrmaremma.it), Italian section, News.

From September 23<sup>rd</sup>, 2013 to October 10<sup>th</sup>, 2014, the above-mentioned Judge Moriconi presided over about 725 cases; according to him, ADR methods could be used in almost 500 cases of them; in 121 cases he turned to 40 non-binding arbitrations, 35 delegated mediations and 46 non-binding arbitrations and delegated mediations (*arb-then-med*); in 58% of the cases the parties reached an agreement <sup>21</sup>.

The tools work, they are very efficient but they are underutilized. It is easier and quicker to issue a law than to change a habit; the issue here is “culture”!

## 8 . New rules approved

In August 2014, pending civil litigations in Italy were a bit less than 5 millions. The Prime Minister on June 30<sup>th</sup>, 2014 announced 12 goals to be reached in the reform of Justice <sup>22</sup>.

As far as ADRs are concerned:

- transfer before the arbitrator the cases pending before the court, upon the parties’ agreement;
- assisted negotiation by lawyers , a new ADR proceeding in Italy: for an application for payment in any case up to € 50,000; in a lot of disputes on disposable civil rights (in matters not subject to mandatory mediation); for the separation between husband and wife (provided there are no underage children, or anyway dependent from their parents), the litigants, assisted by their lawyers, will be able to reach an agreement, that is enforceable; as mediation, this procedure will be a pre-condition to assessment in court <sup>23</sup>;
- who loses in court will refund the expenses of the process, limiting the possibility of compensation;
- those who do not voluntarily pay their debts will have to pay more; a high statutory rate of interest for late payment will be provided, to an extent at least equal to the market price;

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<sup>21</sup> <http://www.adrmaremma.it/news199.pdf>

<sup>22</sup>

[http://www.giustizia.it/giustizia/it/mg\\_2\\_7.wp?sessionId=8E68C407DD8FC1E142FA9EB4A5E6D754.aipAL03](http://www.giustizia.it/giustizia/it/mg_2_7.wp?sessionId=8E68C407DD8FC1E142FA9EB4A5E6D754.aipAL03)

[https://www.giustizia.it/giustizia/prot/it/mg\\_2\\_7\\_1.wp?previousPage=mg\\_2\\_7](https://www.giustizia.it/giustizia/prot/it/mg_2_7_1.wp?previousPage=mg_2_7)

[https://www.giustizia.it/giustizia/prot/it/mg\\_2\\_7\\_2.wp?previousPage=mg\\_2\\_7](https://www.giustizia.it/giustizia/prot/it/mg_2_7_2.wp?previousPage=mg_2_7)

<sup>23</sup> Legislative Decree 132, September 12<sup>nd</sup>, 2014 art. 1 and art. 2.

therefore the debtor, who forces the creditor by applying to the court to get the amount back, will not make money out of the lengthy procedures;

- compulsory judicial proposal in all pending court cases lasting for more than three years;
- equating judicial proposal to the judgment, for the purpose of assessing the productivity of the judge .

The first four reforms have been adopted. No news about the last one, which would give a strong boost to the use of the ADRs.

## 9 . Summing up

ADR's are necessary to save time and money (and to have a better life).

ADR's are first of all a matter of culture, therefore of knowledge and skills.

In Italy mediation was ruled in 2003 for corporate, financial and banking conflicts; it was voluntary. Nobody (*rectius*, no lawyer) used it, and when I asked why, lawyers replied: "Because it was not compulsory".

Mediation became compulsory in 2010, facing a furious opposition by lawyers (a matter of culture and a matter of revenues; ADR = Alarming Drops in Revenues), and a benign neglect by judges (a matter of culture).

50 hours courses have proved insufficient, at least 200 hours would have been necessary, and they should have been taught not only by law experts but also by communication experts, psychologists, bankers, etc. ADR's are a mixture of very different skills, they need "contamination", "fusion". On the contrary, in Italy, there is usually no "blending" of experiences: lawyers teach lawyers, and judges teach judges. The most effective experiences, in Italy, are those made by universities together with the courts; theory and practice, not only for students but also for judges, for whom the mediation is a new technique.

It is also necessary that lawyers understand that they can also earn with mediation, especially in times of economic downturn, during which companies need to solve their problems in order to get money. And it is also necessary for the evaluation of judges for career

advancement to be based not only on the number of orders issued, but also on the total number of disputes resolved.

Compulsory mediation would be useful in conflicts related to **ALL** disposable rights, separated from the judicial proceedings and with strong tax incentives. In Italy the conflicts subjected to mandatory mediation are only the 8% of all the conflicts filed in the Italian courts; their filing had a 9% increase, between October 2012 and September 2013 (when mandatory mediation was revoked) and a 15% decrease later on (when mandatory mediation was reintroduced).

Italian judges at the beginning looked at mediation with a "benign neglect", because they considered (and still consider) mediation as the "Child of a Lesser God". The few who have used the ADRs so far have achieved interesting results; they have understood that ADRs are not the solution for all conflicts, but an additional instrument to achieve a more equitable justice.

Since 2010 Italy has become a very interesting laboratory to analyze the consequences of different types of ADRs. And I think we are just at the very beginning.

Table 8            **Civil (not family) and commercial mediation in Italy**

|                       | <b>Registered proceedings</b> | <b>All parties present</b> | <b>Success rate all parties present</b> | <b>Agreement all parties present</b> |               |
|-----------------------|-------------------------------|----------------------------|---|--------------------------------------|---------------|
|                       | A                             | B                          | C                                       | BxC=D                                | AxD=E         |
| <b>2011</b> 2nd quar. | 18.138                        | 26%                        | 59%                                     | 15%                                  | 2.811         |
| 3rd “                 | 15.670                        | 30%                        | 51%                                     | 15%                                  | 2.397         |
| 4th “                 | 27.002                        | 36%                        | 49%                                     | 18%                                  | 4.860         |
| <b>21.3 / 31.12</b>   | <b>60.810</b>                 | <b>31%</b>                 | <b>54%</b>                              | <b>17%</b>                           | <b>9.912</b>  |
| <b>2012</b> 1st quar. | 30.880                        | 36%                        | 44%                                     | 16%                                  | 4.860         |
| 2nd “                 | 51.634                        | 26%                        | 43%                                     | 11%                                  | 5.783         |
| 3rd “                 | 45.040                        | 22%                        | 40%                                     | 9%                                   | 3.963         |
| 4th “                 | 27.325                        | 21%                        | 38%                                     | 8%                                   | 2.213         |
| <b>Year</b>           | <b>154.879</b>                | <b>26%</b>                 | <b>42%</b>                              | <b>11%</b>                           | <b>16.727</b> |

|                       |                |            |            |            |               |
|-----------------------|----------------|------------|------------|------------|---------------|
| <b>2013</b> 1st quar. | 4.785          | 31%        | 43%        | 13%        | 646           |
| 2nd “                 | 4.485          | 34%        | 62%        | 21%        | 946           |
| 3rd “                 | 6.369          | 23%        | 58%        | 14%        | 866           |
| 4th “                 | 25.965         | 36%        | 32%        | 12%        | 3.064         |
| <b>Year</b>           | <b>41.604</b>  | <b>31%</b> | <b>49%</b> | <b>15%</b> | <b>6.365</b>  |
| <b>2014</b> 1st quar. | 46.910         | 40%        | 27%        | 11%        | 6.598         |
| 2nd “                 | 41.857         | 41%        | 23%        | 9%         | 3.767         |
| 3rd “                 | 33.871         | 42%        | 22%        | 9%         | 3.048         |
| 4th “                 | 56.949         | 43%        | 21%        | 9%         | 5.125         |
| <b>Year</b>           | <b>179.587</b> | <b>42%</b> | <b>23%</b> | <b>10%</b> | <b>17.958</b> |

Table 9 **Matters subject to civil mediation**

Civil mediation has been

- compulsory since March 21, 2011 until December 12, 2012
- voluntary since December 13, 2012 until September 19, 2013
- compulsory since September 20, 2013

|             | Proceedings<br>filed in the courts | Mediation<br>proceedings |
|-------------|------------------------------------|--------------------------|
| <b>2011</b> | 209.572                            | 60.810                   |
| <b>2012</b> | 209.024 - <b>0,2%</b>              | 154.879 + <b>155 %</b>   |
| <b>2013</b> | 228.870 + <b>10 %</b>              | 41.604 - <b>73 %</b>     |
| <b>2014</b> | 195.273 - <b>15 %</b>              | 179.587 + <b>332 %</b>   |

Table 10

| <b>Legal assistance</b>            |                              |
|------------------------------------|------------------------------|
| <b>Inviting party to mediation</b> | <b>Present invited party</b> |

|                                     | legally<br>assisted<br>A | NOT legally<br>assisted<br>B | legally<br>assisted<br>C | NOT legally<br>assisted<br>D |
|-------------------------------------|--------------------------|------------------------------|--------------------------|------------------------------|
| <b>21.3.2011 / 31.12.2012</b>       | 81%                      | 19%                          | 81%                      | 19%                          |
| <b>2011 Year</b>                    | 84%                      | 16%                          | 79%                      | 21%                          |
| <b>1.1 / 30.9.2013</b>              | 72%                      | 28%                          | 65%                      | 34%                          |
| <i>in the voluntary mediation *</i> |                          |                              |                          |                              |
| <b>2014 Year</b>                    | 63%                      | 37%                          | 73%                      | 27%                          |

\* Until September 19<sup>th</sup>, 2013 legal assistance in mediation was not compulsory.

Table 11

|             |             | <b>Types of proceedings</b> |                  |                               |                                   |
|-------------|-------------|-----------------------------|------------------|-------------------------------|-----------------------------------|
|             |             | <b>Mandatory<br/>by law</b> | <b>Voluntary</b> | <b>Delegated<br/>by judge</b> | <b>Compulsory<br/>by contract</b> |
|             |             | A                           | B                | C                             | D                                 |
| <b>2012</b> | <b>Year</b> | <b>86%</b>                  | <b>11%</b>       | <b>3%</b>                     | <b>0,03%</b>                      |
| <b>2013</b> | <b>Year</b> | <b>55%</b>                  | <b>42%</b>       | <b>2%</b>                     | <b>1,4%</b>                       |
| <b>2014</b> | <b>Year</b> | <b>84%</b>                  | <b>10%</b>       | <b>6%</b>                     | <b>0,6%</b>                       |

Table 13

|                              |                  | <b>Outcome according to type of proceeding</b>                |   |                       |
|------------------------------|------------------|---|---|-----------------------|
|                              |                  | <b>Settled proceedings<br/>according to type of mediation</b> | <b>Success rate<br/>all parties present</b> | <b>Agreement rate</b> |
|                              |                  | A   | B   | AxB = C               |
| <b>21.3.2011 / 31.3.2012</b> |                  |   |   |                       |
|                              | Mandatory by law | 78%   | 45%   | 35%                   |
|                              | Voluntary        | 18%   | 65%   | 12%                   |
|                              | Ordered by judge | 3%  | 33%   | 1%                    |
| <b>2013 Year</b>             |                  |   |   |                       |

|                  |     |     |      |
|------------------|-----|-----|------|
| Mandatory by law | 56% | 30% | 17%  |
| Voluntary        | 42% | 64% | 27%  |
| Ordered by judge | 2%  | 22% | 0,5% |
| <b>2014 Year</b> |     |     |      |
| Mandatory by law | 84% | 21% | 18%  |
| Voluntary        | 10% | 44% | 4%   |
| Ordered by judge | 6%  | 15% | 1%   |

**Table 14 Mediation proceedings according to type of mediation bodies**

|                              | <b>Mediation<br/>Bodies <sup>24</sup></b> | <b>Settled<br/>proceedings</b> | <b>All parties<br/>present</b> | <b>Agreement<br/>all parties present</b> |
|------------------------------|---|--------------------------------|--------------------------------|--|
|                              | A   | B                              | C                              | D  |
| <b>21.3.2011 / 31.3.2012</b> |   |                                |                                |  |
| Chamber of Commerce          | 82  | 15.916                         | 38%                            | 50%                                      |
| Private                      | 569                                       | 28.768                         | 35%                            | 51%                                      |
| Professional not lawyers     | 59  | 214                            | 34%                            | 29%                                      |
| Bar association              | 103                                       | 14 394                         | 30%                            | 34%                                      |
|                              | <b>813</b>                                | <b>59.292</b>                  | <b>35%</b>                     | <b>48%</b>                               |
| <b>2013 Year</b>             |   |                                |                                |  |
| Chamber of Commerce          | 87  | 3.902                          | 30%                            | 40%                                      |
| Private                      | 699                                       | 12.882                         | 32%                            | 49%                                      |
| Professional not lawyers     | 85  | 336                            | 43%                            | 47%                                      |
| Bar association              | 115                                       | 6.900                          | 35%                            | 30%                                      |
|                              | <b>986</b>                                | <b>24.019</b>                  | <b>32%</b>                     | <b>42%</b>                               |
| <b>2014 Year</b>             |   |                                |                                |  |
| Chamber of Commerce          | 87 **                                     | 18.185                         | n.a.                           | 23%                                      |
| Private                      | 644 **                                    | 84.723                         | n.a.                           | 27%                                      |
| Professional not lawyers     | 92 **                                     | 1.198                          | n.a.                           | 38%                                      |

<sup>24</sup> Mediation bodies at the end of the period. \*\* At September 30, 2014.

|                 |            |                |      |            |
|-----------------|------------|----------------|------|------------|
| Bar association | 115 **     | 52.211         | n.a. | 21%        |
|                 | <b>938</b> | <b>156.317</b> |      | <b>24%</b> |

Table 15

**Length of proceedings**

|                     |                              |
|---------------------|------------------------------|
| Trial Courts (2013) | Mediation proceedings (2014) |
|                     | all parties present          |
| 844 days            | NO agreement 63 days         |
|                     | agreement 83 “               |

Tabel 16

**Average value of disputes subject to mediation**

2014 euros 110.556

*Statistics based on data by Italian Ministry of Justice*

[https://webstat.giustizia.it/\\_layouts/15/start.aspx#/SitePages/Studi%20analisi%20e%20ricerche.aspx](https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Studi%20analisi%20e%20ricerche.aspx)